The European Antitrust Review

2013

Published by Global Competition Review
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Finland

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Merger control

A new Competition Act[1] entered into force in Finland on 1 November 2011. It introduced a number of changes to Finnish merger control rules, which further harmonises the rules with those of the European Union.

Notification thresholds and the concept of a concentration

Notification thresholds remain identical to previous ones. A concentration must be notified to the Finnish Competition Authority (FCA) where the parties' combined worldwide turnover exceeds €350 million and the individual turnovers of at least two of the parties accrued in Finland are in excess of €20 million each.

The concepts of a concentration and a party to a concentration correspond to the respective EU concepts.

Enforcement activities

Following amendments to the obligation to notify in 2004, the number of concentration notifications has decreased dramatically. As of 2 July 2012, the FCA has reviewed 11 concentrations, all of which have been cleared unconditionally. In 2011, the FCA reviewed a total of 28 concentrations, 26 of which were cleared unconditionally. One concentration in the health-care sector was cleared conditionally, and the other, centred on the asphalt market, ended up in prohibition proceedings brought by the FCA to the Market Court, which ultimately cleared the concentration on strict commitments.

The SIEC test

The new Competition Act replaced the traditional dominance test with the significant impediment to effective competition (SIEC) test, originally established at the EU level. As a result, the Finnish test is harmonised with that of the European Commission,[2] and the Commission's guidelines, as well as EU case law, can be applied for interpretative purposes.[3] According to the FCA's guidelines on merger control, the SIEC test is a well-suited means of measuring the potential anti-competitive effects of a concentration on a specific market.[4] In practice, however, the creation or strengthening of a dominant market position continues to be recognised as a typical impediment to competition in the context of merger control.[5]

Mandatory notification

A concentration must be notified prior to its implementation. The new Competition Act disposes of the previous one-week deadline for notifying a threshold-exceeding concentration following the signing. In case of a failure to notify a concentration before its implementation, the FCA may propose that the Market Court impose a fine of up to 10 per cent of the parties' preceding annual turnover. To date, the FCA has not made such a proposal.

As an improvement from the perspective of companies intending to merge, the new Act – in harmony with the Merger Regulation – provides for a possibility of pre-notification when the probability of the signing is considered high. Thus, the investigation process may, in such circumstances, prove more expeditious than previously. In case of an essentially inadequate notification, however, the official investigation process is not considered to begin at the time of the notification.

Procedural deadlines

The investigation process consists of Phase I, with a maximum length of one month, and further proceedings in Phase II, amounting to no more than three months. The Market Court may extend Phase II by no more than two months. If the FCA fails to act within the deadlines, the concentration is considered to be cleared. The FCA may, according to the new Competition Act, freeze the aforementioned procedural deadlines if the parties fail to provide correct or sufficient information as required by the FCA. In such a case, the processing time is extended by an amount of days equal to that which the FCA had to wait in order for the completed information to be delivered.

Appealability of merger decisions and commitments

The FCA may either clear a concentration conditionally or unconditionally, or make a proposal to prohibit it to the Market Court, whose rulings are appealable to the Supreme Administrative Court. The Market Court may prohibit a concentration only upon a proposal by the FCA. Thus, an appellant may not have a concentration prohibited.

In practice, the right to appeal a concentration decision is relatively narrow. Parties to a concentration cannot appeal the FCA's conditional clearance decision due to the fact that the FCA may only impose commitments approved by the notifying party. As a result, if the FCA and a party to the concentration do not reach an agreement on the commitments, the only available course of action is to let the FCA take the case to the Market Court for prohibition proceedings. The Market Court has three months to rule on the case, starting from the proposal by the FCA.

The Finnish Administrative Judicial Procedure Act provides for a third-party right to appeal the decisions made by the FCA and the Market Court. However, the appeal may, in practice, only concern commitments and their substance within a conditional clearance decision. Given the strict requirements for a third party to be directly affected as to their rights, obligations or interests,[6] however, the right to appeal remains highly theoretical. To date, a third party has never been considered to be in an appellant position as described above. Consequently, in order for a third party to have a say in the outcome of a concentration, active collaboration with the FCA during the investigation period is recommended.

Definition of geographic markets

In spite of the regulatory similarities with EU merger control rules, the FCA has, in a number of individual cases, applied the Finnish rules slightly differently in substance. For example, the FCA seems to apply a more restrictive approach to defining relevant markets than the European Commission. This is particularly the case as regards the definition of the relevant geographic market, which is mainly due to Finland's somewhat isolated location in relation to central Europe. As a result, the typical starting point for defining the rel-

evant geographic market is the national market, and parties wishing for the FCA to apply a broader market must be prepared to provide extensive economic and statistical evidence.

Case study: The Market Court clears a concentration under stricter commitments than originally proposed by parties in *Destia*

The Market Court approved NCC Roads Ltd's (NCC) acquisition of Destia Ltd's and Destia Kalusto Ltd's asphalt paving business in November 2011, subject to stricter commitments than originally proposed. The decision came after the FCA made a proposal to the Market Court in August 2011 to prohibit the concentration as it was considered to create a joint dominant position between NCC and Lemminkäinen Infra Ltd.[7] The Market Court agreed with the FCA and concluded that the commitments proposed by NCC to the FCA were not sufficient to prevent impediments to effective competition in the market for asphalt mixture. However, the Market Court approved the concentration on the condition that NCC be obliged to sublet a site for the production of asphalt mixture to a competitor or a potential competitor, and sell asphalt mixture to all of its competitors who do not have their own production capacity.[8]

Case study: The FCA clears a health-care concentration conditionally in *Terveystalo Healthcare Oy*

In a merger case between two health-care-sector companies, Terveystalo Healthcare Ltd (Terveystalo) and ODL Terveys Ltd, the FCA investigation was closed in May 2011 with a conditional clearance decision. The acquisition led to an outcome in which all of the private hospitals and the majority of private medical services in Northern Finland were owned by a single market operator. The FCA approved the merger upon commitments including, inter alia, the acquirer's obligation to ensure that doctors working for a competing private health-care service provider could continue performing operations on similar prices and terms as before in a hospital affected by the concentration. Another notable condition for the concentration was that private customers in Northern Finland would be offered medical services for fees not exceeding those applied by Terveystalo elsewhere in the country.[9]

Antitrust

The new Competition Act of November 2011 did not introduce significant amendments to the substance of the rules on anti-competitive practices, which correspond to those of articles 101 and 102 of the Treaty on the Functioning of the European Union. Antitrust rules in Finland are therefore in line with those of the EU.

As a recent development, the monitoring of cartels is becoming more intensive. The FCA's latest tool in these tasks is its special cartel investigations unit, which started operating in June 2012.

The FCA's investigative powers

Upon a request by the FCA, undertakings are obliged to provide all information necessary for the FCA's investigation of potential restrictions to competition or the existence of a dominant position.

In case there is a reason to believe that a representative of an entity has contributed to the implementation of a competition restriction, the FCA may, where necessary for the pursuit of investigation, invite them to appear before the FCA.

In addition, the FCA is empowered to conduct inspections in the business premises of an undertaking and, since the adoption of the new Competition Act, in other premises as well, such as at a private home belonging to a representative of the undertaking. Inspections in the latter premises require advance permission from the Market Court.

In order to enforce compliance with the measures taken, the FCA may impose a periodic penalty payment on the undertakings concerned. The decision to impose an undertaking to actually pay the penalty sum may be made only by the Market Court.

Imposition and calculation of fines

The size of fines imposed on infringers has increased significantly, bringing the Finnish system of sanctions closer to the European standard. For instance, in the 2009 cases concerning cartels in the markets for asphalt and raw wood, the fines imposed were of a level previously unseen in Finland, totalling over €82 million for the asphalt cartel and €51 million for the raw wood cartel.

The calculation of fines is based on an overall assessment of the infringement with a particular reference to its nature, extent, the degree of gravity and duration.[10] In any event, the amount of fines may not exceed 10 per cent of the undertaking's turnover during the year it was last involved in the infringement.

Fines may be imposed on an undertaking for competition infringements only if the FCA has filed a proposal to the Market Court within five years of the date on which the infringement occurred or, in case of a continuous infringement, within five years of the date on which the infringement ended. The FCA's measures to investigate the infringement, however, reset the limitation period. In any case, fines may not be imposed where the proposal has not been filed within 10 years of the infringement or its ending.

The rules on the imposition of fines in the context of corporate succession are similar to those of the EU.

Leniency

The Finnish leniency system follows the leniency policy of the European Commission and the model programme of the European Competition Network. The FCA has also published a set of guidelines on the application of leniency rules.[11]

The right of access to documents is relatively extensive in Finland.[12] For the time being, however, the authorities have applied a more restricted approach to that right in leniency cases in order to protect leniency applications.

Focus on specific industries

The FCA has identified certain industries that require more detailed scrutiny due to specific regulatory issues inherent in the industries concerned. Such industries include, inter alia, postal services and telecommunications, retail trade and the financial sector.[13]

Damages for infringements of competition rules

In recent years, Finnish courts have handled two major cartel cases: one concerning extensive long-term market sharing and bid rigging in the asphalt market,[14] and the other dealing with national price cooperation between forestry companies in the purchase of raw wood.[15] Actions for damages are pending in relation to both cases. The amounts claimed rise to hundreds of millions of euros.

Compensation for damages can also be claimed based on EU rulings, such as decisions given by the European Commission. Proceedings in a damages case resulting from participation in the European hydrogen peroxide cartel[16] are currently pending in Finland against Kemira, a national company operating in the chemicals business.

According to the new Competition Act, the right to claim damages based on a competition infringement becomes void if no action is filed within 10 years of the date of the infringement, or, in cases of continuous infringements, in 10 years counting from the day when the infringement stopped. However, if a damage claim is based on an

infringement found by the FCA to violate the Finnish and EU antitrust rules, or if the FCA has made a proposal to the Market Court to impose infringement fines in the matter, the claim can always be made until one year has passed from the moment when the decision by the FCA, the Market Court or the Supreme Administrative Court in the matter becomes non-appealable.[17]

Case study: The FCA finds a joint dominant position on the Finnish cash dispenser market in *Automatia*

The FCA gave a decision in June 2009 regarding the abuse of a joint dominant position in a case concerning automated teller machine (ATM) service fees. Nordea Bank Finland Plc, OP-Pohjola Group and Sampo Bank Plc co-own Automatia, a company running the main ATM network in Finland. The costs incurred by the banks from their customers' debit card cash withdrawals from the main ATM network were lower than those from smaller, competing ATM networks. With respect to the main network, the banks provided free-of-charge cash withdrawals for their customers. However, regarding similar cash withdrawals from competing ATM networks, the banks applied service fees higher than the actual costs incurred by them from such withdrawals. The FCA found that the application of these service fees was likely to create obstacles to market entry for new competitors and, thus, lead to an abuse of the banks' joint dominant position on the relevant market. In order to ensure equal conditions for competition on the Finnish ATM market, the FCA obliged the banks to apply non-discriminatory service fees to cash withdrawals from all ATM networks.[18]

It can be argued that joint dominance figures in Finland often due to its small markets with few players, and that the existence of such dominance is often assumed relatively lightly.

Case study: The Supreme Administrative Court orders the FCA to cover the opposing party's legal costs in *Finda*

The Supreme Administrative Court gave a ruling in April 2011 rejecting the FCA's appeal regarding the abuse of a dominant position in the market for broadband services. The FCA was held liable for some of the legal costs of Finda Ltd (Finda), the party concerned in the case. The Supreme Administrative Court upheld the Market Court's ruling and rejected the claim of an abuse of a dominant position and the proposed €1 million fine. It held that Finda had a dominant position on the market for wholesale household broadband products. However, it found that the wholesale product was not an essential facility as there were also other means to enter the market. Therefore, Finda did not have an obligation to supply the wholesale product to its rivals and was not abusing its dominant position.[19]

This was a historical judgment, as the FCA was, for the first time, held liable for an opposing party's legal costs in an infringement procedure in Finland.

Case study: The Market Court adopts a broad definition of resale price maintenance in *Iittala*

The Market Court found in its decision issued in December 2011 that certain practices developed by the design products company Iittala Group Ltd (Iittala) between 2005 and 2007 constituted prohibited resale price maintenance. In its proposal to the Market Court, the FCA stated that Iittala had set the minimum price level for some of its household products. Although the Market Court mainly agreed with the FCA's proposal and found that Iittala's resale price recommendations had amounted to resale price maintenance, it reduced the fine originally proposed by the FCA by 25 per cent to a total of €3 million, as it did not find any evidence that Iittala had benefited from its practices. However, the Market Court did not see Iittala's recommendations as non-binding and found that there was an agreement, or a concerted practice, between Iittala and some of its distributors. While the Market Court recognised that resale price maintenance, in principle, might lead to efficiencies and could thus be permitted, it noted that the burden of proof lies with the party claiming these efficiencies, and was not fulfilled in this case. In light of the Market Court's decision, companies in Finland should be extremely careful in issuing resale price recommendations. Companies should also be very cautious both in their internal and external communications, as the decision demonstrates the low threshold in the presentation of evidence required to establish an infringement.[20]

Case study: The Supreme Administrative Court's car parts cartel judgment confirms Finland's first cartel found through the leniency system

The Market Court found in February 2009 that five companies operating on the automobile spare parts wholesale level – HL Group Ltd, Arwidson Ltd, Koivunen Ltd, Kaha Ltd and Örum Ltd – had practised prohibited price-fixing between 2004 and 2005. The companies had concerted their discount practices in relation to Osaset dealers, which constituted forbidden price cooperation between competitors covering the entire relevant market in Finland. The decision issued by the Market Court and later confirmed by the Supreme Administrative Court in May 2012 was based on a proposal made by the FCA to impose infringement fines on the five companies. The Market Court imposed total fines in the amount of €1.03 million, exempting Arwidson Ltd on the grounds that it had originally informed the FCA about the infringement and provided further information regarding the price-fixing cartel at issue. This was the first case where the Finnish Market Court imposed infringement fines based on a cartel revealed through the leniency system. The decision of the Market Court was appealed to the Supreme Administrative Court, which, in its ruling, left the fines unchanged and dismissed the FCA's claim to raise the fines.[21]

Notes

1 Competition Act (No 948/2011).
2 Finnish Competition Authority (FCA) Guidelines on merger control, Guidelines on the application of the Competition Act, 1/2011, p59.
3 Government bill HE 88/2010 vp, p70.
4 FCA Guidelines on merger control, supra note 1, p61.
5 Ibid, p60.
6 Administrative Judicial Procedure Act (No 586/1996), Section 6.
7 FCA prohibition proposal to the Market Court in case 249/14.00.10/2011 (5 August 2011).
8 Market Court decision in case MAO:499/11 (2 November 2011).
9 FCA decision in case 1116/14.00.10/2010 (11 May 2011).
10 FCA Guidelines on the assessment of the amount of fines (Kilpailuviraston suuntaviivat seuraamusmaksun määrän arvioinnista, available only in Finnish), Guidelines on the application of the Competition Act, 3/2011, pp6–11.
11 FCA Guidelines on the immunity from and reduction of fines in cartel cases, Guidelines on the application of the Competition Act, 2/2011.
12 Act on the Openness of Government Activities (No 621/1999).
13 Summary of the FCA report, Smart regulation – well-functioning markets, 2011, pp5–6. Available at www.kilpailuvirasto.fi/tiedostot/Kilpailukatsaus-2-summary.pdf.
14 Supreme Administrative Court decision in case KHO:2009:83 (29 September 2009).
15 Market Court decision in case MAO:614/09 (3 December 2009).
16 European Commission decision in the Hydrogen Peroxide cartel case COMP/F/39.620 (3 May 2006).
17 Since the new Competition Act amended the rules on procedural time limits, issues involving limitation periods require particular attention in case the infringement occurred before the new Competition Act entered into force.
18 FCA decision in case 964/61/2007 (18 June 2009).
19 Supreme Administrative Court decision in case 2011:40 (14 April 2011).
20 Market Court decision in case MAO:594/11 (20 December 2011).
21 Supreme Administrative Court decision in case 1429 (31 May 2012).

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Katri Joenpolvi has extensive experience in demanding competition law assignments. Katri also assists clients in competition and European law litigation and complex merger cases involving detailed remedy negotiations. Additionally, she is responsible for creating antitrust compliance programmes, assists clients in regulatory matters and advises on EU law and exemption regulations. Prior to joining Krogerus, Katri worked for the Finnish Competition Authority, where she acted as a deputy director for the last two years of her tenure. She has led the firm's competition and regulatory practice since 2003.

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Leena Lindberg advises clients on competition law assignments. Prior to joining Krogerus, Leena worked with the Finnish Competition Authority (FCA) for 14 years, where she served also as a member of the board of directors. Among her responsibilities was managing the asphalt cartel investigation that led, in September 2009, to the largest infringement fines ever imposed in Finland. Additionally, Leena was in charge of the FCA's merger control team and handled many merger and antitrust cases in the Market Court and the Supreme Administrative Court. Her other international experience includes working for the European Commission's Directorate General for Competition, in addition to which she has represented Finland in a number of EU competition policy reform projects, including merger review and commission case proceedings.

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