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Legislative Amendments Provide the Finnish Competition and Consumer Authority with New Powers

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Some substantial changes have recently been made to Finnish competition law, attracting significant attention. The Finnish parliament approved two major legislative amendments to the Competition Act in the first half of 2013. Firstly, a market share threshold of 30 per cent for finding a dominant position is introduced in the daily consumer goods sector. This amendment will take effect in January 2014. Secondly, the Finnish Competition and Consumer Authority (FCCA) is set to receive additional powers to scrutinise the economic activities of public undertakings. The amendment is expected to take effect in late 2013 or early 2014.

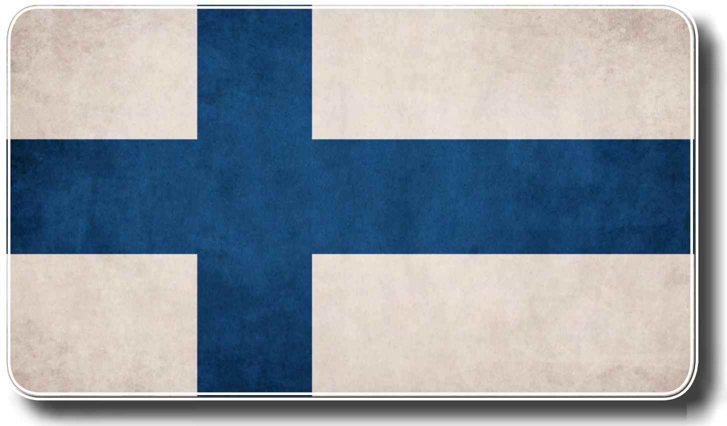
The Largest Operators in the Finnish Daily Consumer Goods Retail Sector Put Under the Microscope

A Highly Concentrated Market

Assessing the functioning of competition in consumer goods retail markets has been an EU-wide trend. The Commission has paid attention to the possible adverse effects of increased concentration in the retail trade as well as subjects such as private label products, and has commissioned a study to assess the impact of recent developments in the sector. The French and German competition authorities, among others, have also recently conducted sector inquiries or otherwise shown activity on the field of consumer goods trade.

The Finnish daily consumer goods market has undergone a considerable structural change during the last 15 years. This development has created one of the most concentrated daily consumer goods retail markets in the European Union. At the moment, the aggregate market share held by the two largest chains active in the market, the S and K groups, is roughly 80 per cent.

A study published by the FCCA in 2012 recommended further investigations on whether the combined effect of several practices in the market has led to competition problems. The Europe 2020 strategy of the Council of the EU also recognised the importance of enhancing competition in the Finnish daily consumer goods trade.



Dominant Position in Daily Consumer Goods Trade

The new amendment will introduce a new 30 per cent market share threshold for "automatic" dominance in the daily consumer goods market. Consequently, the S and K groups will both have a dominant position individually.

The amendment is applied to the daily consumer goods retail market and the procurement market for daily consumer goods. The legislation is targeted at the group or central organisation level. Local or regional stores will fall within the scope of application only if their behaviour results from the actions of the central organisation or group which they are part of. The assessment of the abuse of dominant market position will be as in any other situation.

The amendment aims to address unreasonable and discriminatory practices but also necessitates closer assessment of the effects of, e.g., private label products, risk allocation, marketing allowances and shelf space payments as well as loyalty programmes operated by retail stores. In its review of the planned amendment, the Commerce Committee of the Finnish parliament stated that the competitive effects of these practices must be assessed carefully.

The Effects of the Amendment Remain Uncertain

Several interested parties, including the FCCA, originally questioned the need and effectiveness of the amendment. For example, the FCCA noted that it remains unclear how the amendment would correct the identi¬fied deficiencies in daily consumer goods competition and that there were exaggerated expectations as to the functionality of the amendment. The amendment was modified based on these criticisms, but it remains to be seen how well the concerns were addressed and how useful this amendment was.

Similar sector-specific legislation has also been enacted in, for example, Latvia. The key difference is that in the Latvian rules, the types of abuse have been listed exhaustively and the legislation only applies to relationship between retailers and suppliers. In Lithuania, the competition law approach was deemed ineffective and a special act banning unfair practices in the retail trade was enacted. The Lithuanian act also contains a list of prohibited practices.

The new legislation is most likely to have effects in the market if the two largest operators spontaneously identify a need to amend their market behaviour.

The FCCA Obtains Further Powers to Scrutinise the Economic Activities of Public Entities

Securing Competitive Neutrality

The FCCA will be granted powers to investigate problems related to competitive neutrality. These problems may be caused by the various benefits enjoyed by public entities. For instance, public entities may have taxation benefits, favourable terms for their financing as well as protection against bankruptcy. Similar issues have previously led to state aid complaints to the European Commission.

The FCCA will have right to investigate the economic activities of the State of Finland, municipalities, joint municipal authorities and entities controlled by the state or municipalities. The interpretation of economic activity will be the same as in EU competition law in general. The FCCA can intervene when a structure or practice connected to economic activity distorts competition in supply markets. The FCCA will be able to investigate practices that render competition on the market unfair and may lead to the exclusion of an efficient competitor. Furthermore, the FCCA is allowed to investigate the matter when a practice prevents or is liable to prevent the emergence or development of healthy and functioning economic competition. Intervention is also possible if the conduct of the public entity breaches certain pricing obligations set out in the Local Government Act.

Relationship with Other Legislation

There are limitations for the application of the new powers. The FCCA may not take action if the structure or practice results directly from legislation or if the intervention by the FCCA would prevent an entity from carrying out an important task related to the welfare of citizens, public safety or other public interest.

The FCCA will naturally have no power to directly apply EU state aid rules or intervene with state aids notified to and accepted by the European Commission. In addition, the FCCA will have competence to investigate competitive neutrality problems related to the so-called services of general economic interest (SGEI) only where the entity adopts practices that are not necessary for fulfilling the requirements of the public service obligation.

The FCCA's primary means for solving issues related to competitive neutrality will be negotiations with the entities in question. If the negotiations are unsuccessful, the second option will be to prohibit the behaviour or impose conditions on the entity that require it to alter the way in which the practice is conducted.

Conclusions

It remains to be seen how well the new legislation will function and how it will be applied in practice. In any case, the amendments mean busy times for the FCCA due to the likely significant increase in its workload and frequent lack of resources. In addition, the FCCA is facing high expectations, as the daily consumer goods amendment in particular has attracted massive media coverage and triggered intense discussion. The FCCA's task to meet these expectations will not be an easy one, since there is a certain degree of uncertainty on how the assessment of the abuse will be conducted in the consumer goods sector and what the exact limits of the competitive neutrality powers will turn out to be in practice.

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