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Finland

Katri Joenpolvi and Leena Lindberg
Krogerus Attorneys Ltd

Legislative developments

This section examines the most important legislative developments in the field of Finnish competition law, namely, the establishment of a new authority and proposals to adopt new legislation concerning competitive neutrality and the daily consumer goods retail market.

Establishment of the new Finnish Competition and Consumer Authority

The Finnish Competition and Consumer Authority (FCCA) was founded on 1 January 2013 by merging the Finnish Competition Authority and the Finnish Consumer Agency. Apart from improving administrative efficiency, the new authority aims to increase the social significance of competition and consumer issues. Despite the reform, the responsibilities of the joined authorities, as defined in law, were not subject to change. These responsibilities consist of implementing competition and consumer policy as well as competition legislation and EU competition rules, ensuring the proper functioning of competition and protecting consumers.

An amendment to the Competition Act will grant the FCCA powers connected to competitive neutrality

A Competition Act amendment that passed the Finnish parliament at the end of June 2013 strengthens the competitive neutrality aspects of the Act. Under the new rules, the FCCA will be given broader powers to investigate the economic activities of public entities. The FCCA could intervene when a structure or practice connected to economic activity actually or potentially distorts or prevents competition in supply markets. Public entities may enjoy taxation and other benefits related to their financing and the terms for it. They may also enjoy other types of advantages, such as exclusive rights, a capability not to apply commercial principles to their pricing or protection against business risks and bankruptcy. These benefits may put private undertakings in a disadvantageous position and distort competition.

The amendment to the Competition Act will be inapplicable if the activity or structure of the activity resulted directly from legislation or if the intervention by the FCCA prevented an undertaking from carrying out an important task related to the welfare of citizens, public safety or public interest. According to the amendment, the FCCA will not have competence as such in relation to EU state aid rules. However, the FCCA will have the right to scrutinise an activity if it distorted competition in the relevant market even if the activity could be classified as a state aid. The legal basis for the intervention in this situation would be the legislation concerning competitive neutrality, not state aid legislation. The FCCA will also have limited powers in relation to the so-called 'services of general economic interest' (SGEI). For instance, the compliance with SGEI rules, as such, will not be controlled by the FCCA. The FCCA will also lack competence to assess whether the imposition of public service obligations on the entity providing those services creates a competitive neutrality problem. Nevertheless, if the entity adopted practices unnecessary for carrying out the public service obligation, the FCCA could identify competitive neutrality concerns and would have competence to take action in the matter.

To solve the problems related to competitive neutrality, the FCCA should first negotiate with the entity in question. If this was not sufficient to eliminate the problem, the second option would be to prohibit the behaviour or impose conditions on the entity that require it to alter the way in which the practice is conducted.

An upcoming change to the Competition Act establishes a market share threshold of 30 per cent for a dominant position in the daily consumer goods retail market

In June 2013, the Finnish parliament approved an amendment to the Competition Act in order to take measures against the high level of concentration in the Finnish daily consumer goods trade market.

The Finnish daily consumer goods trade is the most concentrated in Europe. Eighty per cent of the market is controlled by the two biggest retailer chains: the S Group and the K Group, which have market shares of 45 per cent and 35 per cent, respectively. The amendment will especially affect the responsibilities of the S Group and the K Group. According to the amendment, an undertaking or a group of undertakings will hold a dominant position in the daily consumer goods retail sector if their market share in Finland exceeded 30 per cent. The new rule will be applied to the daily consumer goods retail market, but also to the exercise of buyer power in the procurement market for daily consumer goods. The assessment of abusing the dominant position will be as in any other industry. The new rules will not apply to individual stores, unless their behaviour was based on the actions of the group or central organisation. The aim of the amendment is to improve the functioning of competition and prevent large operators' use of discriminatory practices against smaller operators and consumers. The amendment will enter into force in January 2014.

Merger control

This section briefly describes the relevant legislation on merger control, recent activities by the FCCA and case law.

General remarks

Pursuant to the Competition Act, a concentration must be notified to the FCCA if:

- the combined worldwide turnover of the parties exceeds €350 million; and
- the turnover of each of at least two of the parties accrued from Finland exceeds €20 million per party.

The concepts of a concentration and a party to a concentration correspond to the respective EU concepts, which are defined in the EU Merger Regulation (No 139/2004).

Enforcement activities

During 2012, the FCCA issued 24 decisions in merger control cases. Nineteen concentrations were approved in Phase I proceedings and two in Phase II proceedings. This figure is roughly in line with the typical yearly number of notifications. In 2012, the FCCA made no decisions of inapplicability nor carried out any proceedings for a failure to notify a concentration. No new applications to amend or repeal commitments given in earlier cases were made.

When to notify?

A concentration must be notified prior to its implementation. In case the parties fail to notify a concentration or implement the concentration prior to the FCCA's clearance, a fine up to 10 per cent of the infringing party's turnover may be imposed. To date, the FCCA has not made such a proposal. In line with the EU Merger Regulation, the Competition Act provides for a possibility of pre-notification when the probability of signing is considered high. This allows for a speedier assessment in comparison to a post-signing notification. In case of essentially inadequate notifications, the official investigation procedure only begins once an adequate notification has been made.

Procedural deadlines

The investigation procedure consists of two phases. Phase I of the procedure takes one month at the most, during which time the FCCA has to clear the concentration unconditionally or under conditions, or to decide upon initiating Phase II investigations. The Phase II investigations take three months at the most, although the Market Court may extend the period by two months. The FCCA will only apply for such an extension in exceptional situations. In case the FCCA fails to act within the deadlines, the concentration is regarded as cleared. If the parties fail to provide correct or sufficient information, the FCCA has the power to freeze its own procedural deadlines ('stopping the clock').

Case study: the Market Court makes the approval of a transaction subject to stricter commitments than originally proposed by the parties

In September 2012, Uponor Oyj and KWH-Yhtymä Oy notified a concentration in which they intended to transfer their infrastructure technology businesses to a joint venture company. The parties are the largest suppliers of plastic piping solutions in Finland. The FCCA held that the deal would have significantly impeded effective competition through a likely increase in prices in the relevant market. It therefore proposed that the Market Court prohibit the transaction, since the commitments offered by the parties were insufficient.

However, the Market Court rejected the proposal and conditionally approved the merger. Uponor and KWH submitted new commitments to the Market Court in spring 2013 during the Market Court proceedings. According to these commitments, Uponor Infra Oy, the joint venture that is established through the concentration, has to provide contract manufacturing services to other pipe manufacturers in the Finnish market. Uponor and KWH also committed to divesting seven production lines. The commitments accepted by the Market Court were stricter than those initially submitted to the FCCA. The FCCA stated that it was satisfied with the ruling, as the FCCA cannot make binding any commitments that the parties have not proposed to it.

The ruling may have implications for how commitments are negotiated in merger control proceedings. The ruling may strengthen the notifying parties' position in relation to the FCCA in cases where a quick approval is not the first priority for the notifying parties. It may, on the one hand, enable negotiating parties to maintain a longer negotiation phase and, on the other, create more challenges for the FCCA, as the parties may be seen to have the opportunity of first testing the FCCA's willingness to accept certain commitments and then continuing negotiations with the Market Court.

Antitrust

This section examines Finnish legislation and recent case law on anti-competitive practices.

General remarks

The new Competition Act of November 2011 did not introduce significant changes to the material rules on anti-competitive practices. The Finnish rules correspond to 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.

The FCCA's investigative powers

Upon a request by the FCCA, undertakings are obliged to provide all information necessary for the FCCA's investigations concerning potential restrictions to competition. In case there is a reason to believe that a person has contributed to the implementation of a competition restriction, the FCCA may, where necessary for the pursuit of investigation, invite them to appear before the FCCA. However, if the individual chooses not to appear, no sanctions may be imposed.

In addition, the FCCA is empowered to conduct inspections in the business premises of an undertaking and also in certain other premises, 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 FCCA may impose a periodic penalty payment on an undertaking for failure to cooperate. The decision to order an undertaking to actually pay the penalty sum may only be made by the Market Court and the Supreme Administrative Court.

Imposition and calculation of fines

The calculation of fines is based on an overall assessment of the infringement, with particular attention paid to its nature, extent, duration and the degree of gravity. The total amount of a fine 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 only if the FCCA 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. Measures taken by the FCCA 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. As regards the concept of succession, the Finnish rules on the imposition of fines 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 FCCA has published a set of guidelines on the application of leniency rules. According to publicly available information, only two leniency applications out of a dozen submitted since 2004 have led to the uncovering of a cartel.

The right of access to documents is relatively extensive in Finland. However, the authorities have applied a more restricted approach to

that right in leniency cases in order to protect leniency applicants and the functioning of the system. According to section 17 of the Competition Act, the information submitted to the FCCA when applying for leniency cannot be used for other purposes than requiring an undertaking to bring an infringement to an end, imposing an obligation to supply, issuing a commitment decision, withdrawing a block exemption or for review of infringement fine proposal at the FCCA, the Market Court or the Supreme Administrative Court. The documents submitted as part of the leniency application are also protected by sections in the Act on the Openness of Government Activities concerning authorities' investigations. According to the Openness Act, access to the documents may not be provided when it would compromise an investigation or the purpose of an investigation. Access must be also refused when it would cause damage to the concerned party unless there is an important reason to grant access. If a leniency applicant was placed in a disadvantageous position in subsequent proceedings, the incentives to file a leniency application would be seriously undermined. To secure the effective implementation of competition legislation and to protect a leniency applicant where necessary, leniency documents are generally defined as confidential. It remains to be seen how these rules are applied together with the constantly evolving EU case law on the subject.

A new FCCA cartel unit and more frequent dawn raids signal increased attention on infringements

In 2012, the FCCA reformed its organisation by introducing a new unit focusing on hard-core cartels. The unit is part of a larger government programme to ensure healthy competition. In addition to thwarting cartels, the new cartel unit processes leniency applications and focuses on improving the investigatory activities of the FCCA. The FCCA has recently used dawn raids several times as an investigation method to detect cartels.

Case study: the Supreme Administrative Court fines individual companies for activities carried out through a trade association

In December 2009, the Market Court imposed a fine on the trade association of companies operating in the market for maintenance work of domestic appliances. The board of directors as well as other bodies of the association were found to have agreed on the prices for certain maintenance services. The Market Court only found the trade association responsible for the infringement. It did not hold the companies that were represented in the board of directors responsible for the infringement, stating that the conducts of the companies could not be severed from the infringing actions taken by the trade association. The FCCA disagreed on this issue and appealed to the Supreme Administrative Court. In January 2013, the Supreme Administrative Court found the competing companies represented in the board and other organs to be individually responsible for the infringement. It was not necessary to prove that members' infringing activities were separate from the actions of the trade association. However, the Supreme Administrative Court also paid attention to the excessive duration of the proceedings, which had taken seven years to complete. Therefore, the Supreme Administrative Court reduced the proposed fines for two undertakings and withdrew the fines imposed on the rest of the defendants.

Abuse of dominant position

Infringements related to the abuse of dominant position have received increasing attention from the FCCA, as recent cases and the aforementioned amendment proposing a fixed 30 per cent threshold in daily consumer goods retail market suggest.

Case study: Suomen Numeropalvelu Oy fails to invoke the provisions of the Personal Data Act as an objective justification for its refusal to supply

In its decision of 30 January 2013, the Supreme Administrative Court upheld the Market Court's ruling and found that Suomen Numeropalvelu Oy (SNOY) had abused its dominant position in the wholesale market of telephone directory information. SNOY was the sole national provider of telephone directory information in Finland. In October 2003, SNOY had refused to provide information to Oy Eniro Finland Ab, claiming that due to data protection legislation, SNOY's customers providing directory services were not allowed to grant their end customers free access to the directory information online without registration. SNOY's conduct left Eniro with no option but to close down its online directory service and adversely affected Eniro's incentives to compete in the retail market of telephone directory information. In assessing the amount of the fine, the Supreme Administrative Court took into account the delays in the proceedings, which had lasted almost eight years. The court held that the matter had suffered from delays for nearly four years and that the total duration of eight years could not be considered reasonable. Due to the duration of the proceedings, the fine was reduced from €100,000 to €90,000.

Case study: the FCCA demands a €70 million fine on Valio for predatory pricing

In December 2012, the FCCA proposed that the Market Court impose a €70 million fine on the Finnish dairy company Valio Oy. The FCCA claimed that Valio had abused its dominant position in the production and wholesale market of fresh milk. The FCCA claimed that Valio had priced its fresh milk below average variable costs. Furthermore, the FCCA also found documentary evidence on Valio's intention to force its competitors out of the market.

The FCCA applied the 'as efficient competitor' test in its assessment. According to the FCCA, Valio was capable of excluding an equally efficient competitor from the market because it priced below costs. The FCCA's assessment concerning below-cost pricing was based on the costs accrued by Valio when operating in the relevant market. The FCCA adopted Valio's internal calculations as a starting point and followed Valio's division between fixed and variable costs. The FCCA found that the raw milk costs in Valio's internal calculations were strongly influenced by the cooperative-based business form employed by Valio as well as its significant market power, not by the efficiency of the production. The FCCA stated that the requirements for assessing the costs of the raw milk based on the sums paid by Valio's competitors instead of those paid by Valio had been met. However, the FCCA chose to apply the 'as efficient competitor' test by using the net prices paid by Valio to its producers as the price of the raw material, arguing that these prices were more favourable to Valio from a legal certainty perspective and that the net prices were essentially the lowest possible price a competitor could pay to producers. The Market Court decision on the matter can be expected in late 2013 at the earliest.

Case study: the FCCA adopts a stricter approach to selective distribution systems

From the summer of 2006 to March 2013, Abloy Oy was subject to an unusually long and complex investigation that began with surprise inspections on the company's premises by the FCCA. Abloy is one of the world's leading manufacturers of locks, locking systems and architectural hardware. Abloy was investigated for alleged abuse of dominant market position in several markets. The FCCA

had various concerns about the authorisation system that Abloy uses for locksmith stores to distribute its products, as well as the marketing subsidies, discounts and project-specific prices granted to these stores in particular situations. After a series of negotiations, the FCCA finally chose not to take action against Abloy in any of these matters. The decision shows that the FCCA's position towards selective distribution systems has become stricter than before and indicates that several companies in a strong market position may have reason to reassess and modify their conditional discount arrangements as well as their grounds for granting marketing subsidies.

Katri Joenpolvi
Krogerus Attorneys Ltd

Katri Joenpolvi has extensive experience in demanding competition law assignments, including complex merger cases. Katri also assists clients in competition law matters and EU law litigation. Additionally, she develops antitrust compliance programmes and assists clients in regulatory matters. Prior to joining Krogerus, Katri worked for the Finnish Competition Authority (FCA), 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.

Leena Lindberg
Krogerus Attorneys Ltd

Leena Lindberg is the co-head of Krogerus' competition and regulatory practice. Prior to joining Krogerus, Leena worked with the 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 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 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.

Krogerus

Unioninkatu 22
FI-00130 Helsinki
Finland
Tel: +358 29 000 6200
Fax: +358 29 000 6201

Katri Joenpolvi
katri.joenpolvi@krogerus.com

Leena Lindberg
leena.lindberg@krogerus.com

www.krogerus.com

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