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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN FINLAND

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1. Background

1. The Finnish Competition Authority (hereinafter the FCA) is responsible for competition law enforcement in Finland. In its decision-making, it is an independent agency but administratively subordinate to the Ministry of Employment and the Economy for budgetary reasons only. The FCA's objective is to protect sound and effective economic competition and to increase economic efficiency by promoting competition and abolishing competition restraints violating the Competition Act and/or the EU competition rules. The Finnish national legislation has been largely harmonised with the EU competition rules.

2. The FCA investigates competition restraints both on its own initiative and on the basis of complaints. Additionally, the FCA controls mergers and attends to the international tasks falling under its jurisdiction. The other main bodies responsible for competition law enforcement are the two courts, the Market Court and the Supreme Administrative Court.

3. The FCA is the first-instance decision-making body in competition issues. There are two exceptions to this, however. The FCA is not empowered to impose sanctions for breaches of the Competition Act but is obligated to make a proposal to the Market Court if it deems it appropriate to impose fines. The FCA is not empowered to forbid the implementation of a concentration notified to it either, and shall make a proposal to that effect to the Market Court.

4. The FCA and its activities are covered in English on the FCA's web pages at www.kilpailuvirasto.fi/english. The FCA's web pages contain e.g. the English press releases of all the major cases of international interest. The FCA will also publish an (electronic) English version of its Yearbook in the summer of 2011.

2. New Competition Act

5. The Finnish Parliament approved the new Finnish Competition Act in March 2011. The new law is expected to come into force in Autumn 2011.

6. One of the major changes relates to the current dominance test in merger enforcement. In the future, the assessment of mergers will be based on the SIEC-test. Certain procedural rules were also clarified in merger enforcement. These relate to the right of appeal and to the implementation of the notified merger.

7. As for antitrust matters, the national competition law was harmonised with Articles 101 and 102 TFEU in 2004 already. The new law does not change this situation. In that regard, all the substantial prohibition provisions remain the same with the exception of the definition of an undertaking. It was found that the definition of an undertaking in the national law was not in line with the case law of EU competition rules. Due to this, the corresponding national provision was amended in order to harmonise the definition with the EU system.

8. Other changes in the new law are mostly procedural. The new law clarifies the rights of defence in competition enforcement proceedings. Also, the prioritisation rules will become more transparent and operative than they currently are. This is an important clarification in the law given that the FCA is expected focus on the most important competition restraints. In the new law, the FCA will be provided with powers to prioritise its enforcement actions more forcefully.

9. As for cartels, the national leniency provisions were amended so that the national leniency programme would correspond the European Competition Network's Model leniency programme. The penalty system remains similar in the sense that it is based on administrative fines. However, the relevant factors for the calculation of the level of fines are now specified more in detail. Regarding the addressees of fines (single economic entity, succession), the principles of the EU jurisprudence are applied. The provisions on calculating the limitation period are proposed to be similar to those in Council Regulation 1/2003. The FCA's investigative powers will be fortified to provide for inspections of private premises. However, an authorization of the Market Court is required.

10. The provisions on the compensation for damages are proposed to be altered so that any individual should be able seek compensation for damages. In the current Competition Act, only business undertaking are mentioned as having this right.

3. Competition law enforcement

3.1 Courts

3.1.1 Supreme Administrative Court: Merger

11. In August 2010, the Supreme Administrative Court rejected the FCA's appeal on the Market Court decision of 2008 in which the Court had found that the E.ON Finland acquisition made by Fortum in 2006 had not resulted in a dominant position or the strengthening thereof in a manner proposed by the FCA in its merger decision. According to the Supreme Administrative Court, Fortum cannot be considered to have occupied a dominant position in the power production and wholesale market because the relevant market spanned at least Finland and Sweden.

3.1.2 Supreme Administrative Court: Abuse of Dominance

12. In April 2011, the Supreme Administrative Court rejected FCA's appeal concerning a price squeeze case. In 2004, the FCA argued that a local telecom company Lännen Puhelin prevented the entry of competitors to its traditional operating area (abuse of dominant position). The FCA proposed fines worth 1 million euros. Later the Market Court rejected FCA's claims after which the FCA appealed the case to the Supreme Administrative Court. In its April 2001 decision, although rejecting FCA's complaint, the Supreme Administrative Court noted that the FCA did not err, as such, in bringing the case before the court given the obligations of the FCA in competition enforcement.

3.1.3 Market Court: Abuse of Dominance

13. In decisions issued on 6 July 2010, the Market Court fined Oulun Puhelin Holding Oyj, Aina Group Oyj, Kymen Puhelin Oy and TeliaSonera Finland Oyj a total of EUR 220,000 for abusing their dominant position in setting prices for subscriber connections. In the case of TeliaSonera Finland Oyj, this involved the practices of Auria Oy which was merged into TeliaSonera Finland Oyj at the beginning of 2007. These decisions were based on proposals for fines submitted to the Market Court by the FCA.

14. The cases referred to involved telecom companies in a dominant position in their respective areas abusing that position in the early 2000s by illegally favouring their own service providers with regard to the rents they charged for the subscriber connections. This price bias made it difficult for competitors to gain access to the market in consumer services provided over subscriber connections, such as broadband and B-to-B services.

15. These decisions of the Market Court are highly important for healthy competition in the telecom market, because subscriber connections remain a significant bottleneck for nearly all services provided

over the fixed network. The decisions are also a more general reminder to companies in dominant market positions not to compromise access to the market by their competitors through biased or otherwise excessive pricing or other terms. Complicating market access is particularly reprehensible in situations such as described above, where a vertically integrated company operates in the same ‘sub-market’ as its competitors.

16. Each company was fined as follows:

- Oulun Puhelin Holding Oyj EUR 90,000
- Aina Group Oyj EUR 60,000
- Kymen Puhelin Oy EUR 40,000
- TeliaSonera Finland Oyj EUR 30,000

3.1.4 Market Court: Resale Price Maintenance

17. By its decision of 29 January 2010, the Market Court imposed a fine of 80,000 euros on A-Tec Service Oy (prev. Tecalemit Oy) importing machinery and equipment for a violation on RPM forbidden by the Competition Act. The RPM which had been directed at one contract partner (Pohjolan Laitehuolto Oy) had spanned several regions in Finland and lasted roughly seven months. The conduct which led to the imposition of an infringement fine took place in 2004. The FCA made a competition infringement fine proposal in the matter to the Market Court in March 2006.

18. In the case, Tecalemit, which had itself installed and serviced the machinery and equipment which it imported, had included in the service authorization agreement with Pohjolan Laitehuolto a condition according to which this could not compete with Tecalemit on the prices of the maintenance work done and spare parts sold but it should adhere to the prices set by the importer. This also restricted the possibility of those who had bought machinery and equipment from the importer to tender with each other the services of the importer and Pohjolan Laitehuolto.

3.2 FCA

3.2.1 Cartels and horizontal agreements

19. The FCA has used its resources on cartel trials which are still pending at the courts. The other cases include one on the relation of collective agreement and the competition law. The FCA closed its investigations on the alleged competition restraint involved in the collective agreement between Paperiliitto and Metsäteollisuus ry, as the FCA came to the conclusion that the Competition Act could not be applied to the conditions limiting the use of outside labour in the collective agreement, due to the exception on the labour market in Article 2 of the Competition Act. Metsäteollisuus ry appealed the FCA’s decision to the Market Court.

3.2.2 Abuse of Dominance

- Elisa - Telecom

The FCA has ordered Elisa Oyj to comply with the remedy whereby it undertakes to change its pricing practice regarding the installation charges collected from single-family and detached houses. The decision made by the FCA on 21 October 2010 is connected to the pricing change

introduced by Elisa more than a year ago, which caused a manifold increase in the price of the Talokaapeli product.

Due to the price increase, a single-family / detached house connected to the telecom network was obligated to pay in the installation charges a bigger proportion of the expenses caused by the construction of a fixed telecom network than previously. In so far as the price increase concerned the traditional telecom network, through which the basic broadband service is offered, the price increase could include features which were problematic for the Competition Act. The FCA found that, incorporated into the switching costs, Elisa also collected other, unrelated costs. Elisa has now provided the agency with an undertaking to change its pricing structure so as to eliminate the detected problems.

Other telecom operators have since increased the installation charges collected from properties. The investigations of three other operators are still pending at the agency.

The FCA finds that the service in the fixed broadband network is still significant to the supply of broadband services. For the single-family and detached houses built in established neighbourhoods, it is currently often the only way to obtain broadband services sufficient to meet the users' data transmission needs. According to the agency, the mobile network service is supplementary, rather than substitutive, to the fixed network service. Optical fibre connections for single family dwellings are primarily built on new residential areas.

The FCA examined the local operators' pricing of the Talokaapeli and corresponding products as a potential abuse of dominant position. The Competition Act prohibits excessive pricing by companies in a dominant position. The commitment decision on Elisa is based on 13(3) of the Competition Act, on the basis of which the FCA may order that the commitments shall be binding on the business undertakings or associations of business undertakings involved in an alleged competition restraint, if these commitments are such that they may eliminate the restrictive nature of the conduct.

- District Heating

The FCA has finished the first stage of its investigations concerning the district heating sector. The objective was to form an opinion of whether the pricing of the companies should be investigated in more detail as a potential abuse of dominance. The investigations which spanned the years 2004–2008 involved the ten biggest district heating companies in Finland, i.e. two-thirds of the entire industry. The profitability of the industry was assessed by comparing the return on net assets (case-adapted) of the companies to the average cost of capital (i.e. the return requirements of the financiers), in the determination of which e.g. the business risk is considered. Profitability compared to the risk proved to be high in these observations, although the FCA applied a clear margin favouring the companies. The situation may thus not be considered wholly unproblematic as far as the price level is concerned. The price increase (during 2004–2008, roughly 40 per cent on average) corresponded to the rise in the cost level of companies during that period. The profitability of the companies did hence not improve during the period of inspection. The investigations have so far marked a specific screening stage, the results of which are not sufficient theoretically to show an abuse under the competition law. Demonstrating a violation would entail a more in-depth company-specific analysis and probably a longer inspection period. The FCA does not plan to bring the cases before the Market Court at this stage. In the future, however, this option remains open. The FCA will first discuss the results of the investigations with the actors of the field, and then assess the need for any further measures.

Where necessary, the FCA may intervene with the pricing later and also extend the inspection to cover the period following 2008.

- Forcit

Oy Forcit Ab manufacturing explosives has undertaken to cancel its discount system in which the purchases made by the customer during a specific period determine the size of the volume discount granted to the customer from the purchases of the next period. In addition, Forcit has undertaken to observe consistency and transparency in all its discount systems. In its decision of 15 February 2010, the FCA ordered Forcit's above-mentioned commitments binding. The commitments were related to a request for action which the FCA had received from a retailer of explosives. Since Forcit has a strong position as a provider of civil explosives in Finland, the matter was investigated at the agency as a potential abuse of dominance. The discount system applied by Forcit served to tie Forcit's customers to artificial repeat purchase, i.e. to continue the business relationship with Forcit. At the same time, the system complicated the entry into the market of explosives competing with Forcit's products.

3.2.3 *Vertical Restraints*

- Iittala - Resale Price Maintenance

The FCA proposed that the Market Court impose an infringement fine of €4m on the Iittala Group Oy Ab for resale price maintenance (RPM) in tableware goods. In 2005-2007, Iittala imposed minimum resale prices on several well-known products such as the Kivi candle holders, the Maribowl, the Moomin products, the Teema series, the Aalto glassware and the KoKo products. Iittala hence prevented any price competition between retailers. The RPM concerned almost all Iittala retailers in Finland. The investigations of the case commenced when the retailers contacted the FCA.

- Veho Group - motor vehicles

The Veho Group Oy Ab provided the FCA with a commitment by which it undertook to improve the independent repairers' access to the technical training it regularly arranges for the Mercedes-Benz motor vehicles. The commitment decision issued by the FCA in May 2010 was aimed to increase the independent repairers' possibilities to provide consumers with expert services and thereby create competition between the authorised and independent repairers and garages. Effective competition between repair shops has a major impact on car owners, as the service and repair costs of motor vehicles amount to estimated 40 per cent of the total costs of ownership of a car. In order to allow the independent repairers to offer expert services to consumers, particular attention has long been paid to the accessibility of technical information and training in the competition rules concerning the motor vehicle sector (= the EU Commission block exemption and the related guidelines). Issuing a commitment decision is based on Article 13 (3) of the Competition Act, under which the FCA may order that the commitments shall be binding on the business undertakings involved in an alleged competition restraint. The use of warranties also has considerable impacts on competition in the service and repair market. In the new competition rules effective from June, particular attention is paid to the abuse of warranties. Warranties shall not for example prevent consumers from using the services of independent repairers by stipulating that the service be conducted by authorised repairers to maintain the warranties. Car manufacturers may still request, however, that customers use the services of authorised garages in repair work covered by the manufacturer's warranty. The complaint suggested that the warranty practices applied by Veho would restrict the independent repairers' possibility to

compete. However, the FCA found no reason to intervene with Veho's activities. According to Veho, consumers are able to use the services of independent repairers for scheduled maintenance during the manufacturer's warranty period.

3.2.4 Mergers

20. The major mergers in 2010 included AlmaMedia and HKScan.

- AlmaMedia

In July 2010, the FCA approved a corporate transaction in which Alma Media Oyj, Keski-suomalainen Oyj, Ilkka-Yhtymä Oyj, Pohjois-Karjalan Kirjapaino Oyj, Keski-Pohjanmaan Kirjapaino Oyj and Länsi-Savo Oy jointly acquired a controlling interest in Alma Markkinapaikat Oy, to which the electronic housing, car and consumer marketplaces currently held by the Alma Group were first transferred. The aforementioned companies also jointly acquired a controlling interest in Arena Interactive Oy, which is engaged in mobile business. The parties of the transaction publish newspapers and magazines in Finland and sell advertising space in their print media and on their related websites. The transaction involves housing ads (Etuovi.com and the printed Etuovi.com magazine), car ads (Autotalli.com) and consumer ads (Mikko.fi). The FCA investigated the competition impact of the proposed transaction with particular reference to housing and car ads online and in print. The transaction was approved unconditionally, because the investigation demonstrated that the intervention threshold required by the law was not exceeded.

- HKScan

In August 2010, the FCA approved a merger whereby HKScan Finland Oy acquired the meat processing business of Järvi-Suomen Portti Osuuskunta as well as the foodstuff production, sales and marketing business of Portti in Mikkeli. Both parties produce and sell meat, meat products and other foodstuffs to the retail trade, industrial kitchens and the industry. HKScan's subsidiary LSO Foods Oy is also active at the start of the production chain in the purchase of live animals and their subsequent slaughtering. The FCA examined the competition impacts of the merger with respect to the industrial sales of meat and processed meats, and particularly sausages. The transaction was approved unconditionally, as investigations proved that the intervention threshold required by the law was not exceeded.

4. Advocacy

21. The FCA contributed to the removal of the structural impediments of competition and the opening up of the markets in 27 working groups, which all had specific impact goals. The working groups in the service sector included railway traffic, ports, pilotage, taxi traffic, employee pension institutions, service vouchers and assisted living.

22. In February 2011, the FCA published its second competition survey. According to the survey, legislation which is of a weak quality may limit competition even more than competition restraints by undertakings. Whereas smart regulation is necessary and its benefits clearly exceed its drawbacks. The width and quality of regulation have a major impact on the functioning of the markets and hence the competitiveness and efficiency of the national economy. Special attention is paid to the market impacts of regulation, and impact analysis and its obvious defects in Finland. The survey lists the basic elements of smart regulation and demonstrates them with sectoral examples. The FCA has chosen 11 sectors for closer inspection; in them, regulation is a major part of the economic environment and they also contain topical

issues from the point of view of social decision-making. The sectors have been loosely grouped into four: 1) post, 2) broadband market, 3) banks, 4) employee insurance system, 5) construction, 6) trade, 7) waste management, 8) municipal enterprises, 9) national broadcasting business, 10) taxi traffic and 11) district heating. In addition to monitoring adherence to the competition rules, the FCA also has the task of general advocacy and regulatory impact analysis. The published survey is part of this work. The FCA believes that the survey will offer useful viewpoints to those who decide about regulation and those who prepare it.

23. The FCA participated in the *Municipalities and competition neutrality* project, which made proposals to amend the municipal legislation and where necessary other legislation e.g. to accommodate the changes resulting from the Destia decision by the European Union. The working group proposed that the municipal legislation be amended so that, as a rule, when the municipality is managing a task in competed markets, it should surrender the task to a company, other society or foundation to manage (incorporation obligation). The law would exclude certain tasks which would not be suitable for competitive markets. The major exclusions would concern the statutory tasks of the municipality, cooperation and monopoly duties. Additionally, it was proposed that the law would contain exceptions from the incorporation obligation. The main exceptions would concern minor operations, the support services of the Group, services to stakeholders and management of premises. In addition to the incorporation obligation, the working group proposed that the pricing of the municipal activities should take place on commercial grounds. The regulation on municipal enterprises was proposed to be amended only to the extent that the enterprise form would not be suitable for competitive markets.

5. Resources of the FCA

Key Figures

| Year | No. of FCA officials | Budget expenditure, € |
|------|----------------------|-----------------------|
| 2011 | 70 | 5,273,000 |
| 2010 | 69 | 5,236,740 |
| 2009 | 67 | 5,769,400 |
| 2008 | 69 | 5,360,000 |
| 2007 | 70 | 5,153,000 |
| 2006 | 68 | 5,057,000 |

6. New Reports and Studies

6.1 Stakeholder Survey

24. A recent stakeholder survey on the FCA reveals that the agency is generally considered competent, reliable and professional. At the same time, the stakeholders estimate that interactivity, creativeness and briskness could be increased. A similar study has been conducted twice before, and the same positive qualities came up on those occasions as well. The stakeholders find that the FCA has achieved the performance targets set upon it relatively well. The FCA's activities on all areas are not known, however. The best estimates were provided on the targets of which clear proof has appeared in public (cartel surveillance, in particular). The estimates on the performance targets on which there are no impressive public results are weaker, however.

25. The stakeholders also estimate that the FCA has been able to make high-quality decisions with the right content. But the reasoning of the decisions should be highlighted even more. The FCA is also urged to raise citizens' debate and clearly state in public discussion why the promotion of competition is so important. The most useful methods of interaction are considered to be meetings with the FCA's directors and experts. The FCA's web pages are also considered useful. The stakeholders included decision-makers;

representatives of the economy and public administration; competition lawyers; representatives of research institutes, and reporters. The number of respondents was 191.

6.2 *Nordic Green Growth Report*

26. The Nordic competition authorities published a joint report emphasising the importance of effective competition and competition policy in generating economic growth based on sustainable development. The report is entitled *Competition Policy and Green Growth - Interactions and challenges*, and underlying it is concern about the environmental degradation and the threat imposed thereby on the development of the economy, and the view that so-called green growth is still possible provided that right kind of incentives are created for it.

6.3 *IPR Report*

27. An investigation on the practical applicability of the competition rules concerning the IPR sector in the EU competition law (so-called IPR investigation) and the related interpretation instructions and possible problems and development needs thereof was conducted as a survey by special funding from the Ministry of Employment and the Economy. The report was published in the publication series of the Ministry.

6.4 *Economic Growth Report*

28. The report of the Growth Initiative working group seeking to strengthen long-term economic growth was published in August 2010 by the State Council. Regarding competition policy, the report suggested that the role of competition policy in legislative drafting and societal decision-making should be reinforced. Furthermore, legislative drafting affecting efficiency should be supplemented by an impact analysis. The FCA's resources should also be substantially increased, and its independence guaranteed. An independent competition council consisting of Finnish and foreign experts should be established, and it should be given the tasks of monitoring developments in the competitive environment, introducing initiatives aimed at better legislation and evaluating the effectiveness of supervision. The Council should also support research activities in its sector while promoting better understanding of the importance of competition in society. The FCA would be responsible for the secretarial duties of the Council. Regulation resulting in exclusive rights and privileges, limitations on the means of competition available to business enterprises, and barriers to market entry should be reduced. Legal monopolies and means-testing should be evaluated critically. Public authorities should implement the structural changes required to increase competition. This should be carried out through legislative measures and by reorganising state-owned production. The EU competition law should be amended to allow the dissolving of companies on competition law grounds if the structure of the market does not allow effective competition and there are no other means available to promote competition. According to the report, effective competition is a precondition for increasing productivity and lowering costs e.g. in the welfare services financed by public authorities. Legislation on public production activities, which is already under preparation, should be enacted to safeguard the competition neutrality of public and private production. This will enable intervention in structures and market behaviour that distort competition.