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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN FINLAND**

-- 2011 --

*This report is submitted by Finland to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 13-14 June 2012.*

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**TABLE OF CONTENTS**

1.	New Competition Act .....	3
1.1	Plans to Merge Competition and Consumer Authorities .....	3
1.2	New Director General .....	4
2.	Competition law enforcement .....	4
2.1	Courts.....	4
2.2	Enforcement Actions of Finnish Competition Authority.....	5
3.	New Reports and Studies.....	9
3.1	FCA study on daily consumer goods .....	9
4.	Resources of the FCA – key figures .....	10

## **1. New Competition Act**

1. On 12 August 2011, the new Finnish Competition Act was approved in the Presidential session of the Government. Consequently, the new Act entered into force on 1 November 2011.

2. One of the major changes brought about by the new law relates to the existing dominance test in merger control enforcement. In future, the assessment of mergers will be based on the SIEC-test. Also certain procedural rules for merger enforcement relating to the right of appeal and the implementation of the notified merger have been clarified.

3. As for antitrust matters, the national competition law was harmonised with Articles 101 and 102 TFEU in 2004 already, and the new law does not change this. All the existing substantial prohibition provisions remain the same with the exception of the definition of an undertaking. It was found that the current definition of an undertaking in the national law was not in line with the EU case law. The corresponding national provision has consequently been amended in order to harmonise the definition with the EU system.

4. The other changes relating to antitrust matters are mostly procedural. The new law clarifies the rights of defence in competition enforcement proceedings, as it explicitly refers to the relevant European case law e.g. in terms of self-incrimination and legal professional privilege. Also, the prioritisation rules become more transparent and operational in the sense that circumstances for prioritisation actions have been clarified, which should diminish ambiguity in that regard. These changes are important given that the FCA is expected to focus on the most important competition restraints. Due to this, the FCA is also given powers to prioritise its enforcement actions more effectively. For instance, it may use its prioritisation powers if a complaint is ‘manifestly groundless’.

5. As for cartels, the national leniency provisions have been amended to align them with the European Competition Network’s Model Leniency Programme. For example, the law includes a new provision, according to which an undertaking which took steps to coerce other undertakings to participate in the cartel is not eligible for immunity from fines. In addition, the new law introduces concrete provisions concerning the amount of reduction of fines, as well as further requirements to qualify for immunity or for reduction of fines. According to the new law, immunity may also be granted after the authority has carried out an inspection.

6. The penalty system remains similar to the current law in the sense that it is based on administrative fines. The provisions for calculating the limitation period are now similar to those in Regulation 1/2003. The FCA’s investigative powers have been strengthened to provide for inspections of non-business premises. However, an authorization of the Market Court is required in order to do so.

7. Finally, the provisions on the compensation for damages are modified so that any individual will be able seek compensation for damages. In the current Competition Act, only business undertaking are mentioned as having this right.

8. The FCA arranged a national road-show, in which it explained to the different stakeholders the contents of the new Competition Act.

### ***1.1 Plans to Merge Competition and Consumer Authorities***

9. The Finnish Ministry of Employment and the Economy announced in March 2012 that it will set up a steering group to investigate the possibility of merging the FCA and the Finnish Consumer Agency. At the same time, it will be assessed whether the National Consumer Research Centre could also be

combined to the potential new entity. According to the Ministry of Employment and the Economy, all the three bodies have a task to promote the functioning of the markets: a fact which might favour the merger. It is the starting point in the Government's policy to guarantee equal competitive conditions for undertakings of different sizes and to secure that the markets operate to the benefit of the consumers. The combination could also make it possible to strengthen the research and analysis concerning these issues. The overall aim is to increase the impact of competition and consumer issues in Finland. The reform might also bring about efficiency benefits in the administration (personnel and financial administration, communication, IT). However, the Ministry is of the opinion that when assessing the possible merger, the differences in the nature of competition and consumer issues resulting from legislation should be taken into consideration. It is not the intention to change the law-based tasks of the offices.

10. Currently, the FCA has 79 employees (budget 6,16 million euros), the Finnish Consumer Authority 72 employees (budget 4,83 million euros) and the National Consumer Research Centre 27 employees (budget 2,12 million euros).

11. The merging investigation will be conducted by a steering group which has representation from the Ministry of Employment and the Economy, the Ministry of Justice, the FCA, the Finnish Consumer Authority and the National Consumer Research Centre. The investigation will be completed during the spring. The possible decision to merge will be made later based on the investigation. If the decision to merge is made, the new authority could start operations in the beginning of 2013.

## **1.2 *New Director General***

12. The Finnish Ministry of Employment and the Economy appointed Timo Mattila as Director General of the FCA for the period of 1 May 2012-30 April 2013. Mattila takes over the duties from the position of an Assistant Director of the agency. Mattila has been employed by the FCA for 13 years, and has worked as a Senior Research Officer, Head of Research and Head of Unit. The present Director General of the FCA Juhani Jokinen transfers to the Ministry of Employment and the Economy for a year to head the programme for sound and effective economic competition (see section Advocacy below).

## **2. *Competition law enforcement***

### **2.1 *Courts***

#### **2.1.1 *Glassware Resale Price Maintenance***

13. In December 2011, the Market Court imposed on Iittala Group Oy Ab a fine of three million euros for RPM that took place during 2005-2007. By its decision, the Market Court came to the same conclusion regarding the infringement as the FCA in its proposal of 2010.

14. The Market Court found that Iittala's conduct amounted to price fixing, which is a serious competition infringement. Iittala's object was to raise the price level and to prohibit any price competition between retailers. Consumers are likely to have paid a higher price for the most well-known Iittala products because of the RPM (for example the Kivi candle holder, the Maribowl, the Moomin products, the Teema series, the Aalto glassware and the KoKo products).

15. The conduct amounted to a common practice used by the entire Iittala organisation, not just by individual persons. RPM was an established and systematic method, which appeared in all Iittala's activities for a minimum of two and a half years.

### 2.1.2 *Dismissal of Appeal Regarding Suspected Restriction on Parallel Imports*

16. In June 2001, the Supreme Administrative Court rendered its verdict in a case concerning potential infringement by? Nikon Nordic AB for the conduct violating the EU competition rules in the digital camera market. In May 2006, the FCA proposed that the Market Court impose an infringement fine of € 300,000 to Nikon Nordic AB for its conduct violating the EU competition rules. The case dealt with the refusal of the undertaking concerned to provide warranty maintenance for Nikon cameras, which were imported to Finland by Verkkokauppa.com that was not an authorized distributor in Nikon Nordic AB's distribution channel. The FCA argued, based on its evidence, that Nikon Nordic AB had refused to provide warranty maintenance to Nikon cameras, which were imported by parallel importers like Verkkokauppa.com.

17. The Finnish Market Court dismissed the FCA's proposal due to lack of evidence in December 2008. The case was appealed by the FCA to the Supreme Administrative Court. As opposed to the findings of the Market Court, the Supreme Administrative Court concluded that it had been established that Nikon Nordic AB had refused to provide warranty maintenance to Nikon cameras, which were imported by parallel importers. However, the Supreme Administrative Court concluded that this refusal lasted only around 10 weeks. The Court stated that due to the short duration of the conduct and its minor overall impact on competition, it was not necessary to assess whether the refusal constituted an infringement under the Finnish Competition Act or Article 101 TFEU, and therefore FCA's appeal was rejected.

## 2.2 *Enforcement Actions of Finnish Competition Authority*

### 2.2.1 *Abuse of Dominance*

- District Heating Sector

On 16 January 2012, the FCA finished its investigations concerning the district heating sector. The aim was to form an opinion of whether there are signs of excessive pricing in the sector.

The investigations which spanned the years 2004–2008 involved two-thirds of the entire district heating industry in Finland (in terms of sales). District heat is transmitted from the production plant to customers as hot water in a closed network consisting of two pipes (flow and return pipes). The water circulating in the flow pipes entering the house releases its heat to customers via heat exchangers. The return pipe conveys the water back to the production plant for reheating.

In the sectoral study, investigations indicated that none of the ten biggest district heating companies in Finland priced district heating during 2004–2008 in a manner which would suggest excessive pricing prohibited by the Competition Act. The average price level of the district heating companies which were subject to investigations turned out to be high considering the profitability of business operations (measured by return on capital) and the risk level of activities but the threshold of intervention required by the Competition Act was not exceeded, however. To improve the reliability of the calculations, the conclusions on abuse were drawn by jointly interpreting the results obtained by two methods of assessment. In one of them, assessing the assets was based on book values and in the other, on the reassessment of assets.

Depending on the method, the mean value of the price level for the field in years 2004–2008 was estimated to be either a little over 5 (< 10) per cent or more than 15 (< 20) per cent higher than the comparison value. Comparison values for the two methods were determined by using the methods of price regulation.

The need to intervene with the price level of district heating depends in the future fundamentally on how the regulation affecting its market position and concerning the other forms of heating

(such as geothermal heating ) will develop. The pricing pressure resulting from alternative forms of heating to district heating is an important factor in the market.

- Freight Transport Services

On 3 October 2011, the FCA closed proceedings regarding a complaint submitted by Russian shipping company St. Peter Line Ltd (St. Peter Line) against an alleged abuse of dominant position by Port of Helsinki, a company owned by the City of Helsinki. The FCA found no evidence of such an alleged abuse. The case was assessed under the national Act on Competition Restrictions and Article 102 TFEU.

On 29 November 2010, St. Peter Line requested the FCA to investigate the conduct of Port of Helsinki on the market of freight transport services (roll-on/roll-off traffic). According to St. Peter Line, Port of Helsinki did not allow St. Peter Line to transfer goods from Silja Line's vessels on the route Stockholm-Helsinki to St. Peter Line's vessels on the route Helsinki-St. Petersburg at the South Harbour of Helsinki. Therefore, St. Peter Line argued that the conduct of Port of Helsinki was discriminatory and hence, constituted an abuse of dominant position.

The FCA found no evidence showing discriminatory conduct. The alleged refusals of Port of Helsinki to provide access to freight transport services were found to be consistent and non-discriminatory for all shipping companies. Allowing new freight transport services at the South Harbour of Helsinki would have required for Port of Helsinki to make large investments in the port infrastructure. In addition, Port of Helsinki had offered to provide access to the freight transport services at another harbour under its control.

### 2.2.2 *Cartels*

- Proposed Fines for Bid-Rigging in the Real Estate and Property Management Sector

On 19 June 2011, the FCA made a proposal to the Market Court to impose fines amounting to € 95,000 on three local undertakings for bid rigging. The nature of the case was locally restricted, covering one city in Finland and only the national competition rules were applied.

The case concerned real estate and property sales contracts in the city of Rovaniemi. The Lapland Hospital District and the City of Rovaniemi organised competitive tendering for the sale of their real estate properties and apartments in 2006 and 2009. According to the investigations conducted by the FCA, three undertakings active in the real estate and property sales business in Rovaniemi had cooperated unlawfully in drafting the tenders for the said projects. Among others, as a part of the cooperation, two undertakings which had submitted the highest tenders for the projects in question withdrew their bids shortly after they were offered the contracts. According to the FCA, these withdrawals were part of the plan between competing undertakings to restrict competition.

### 2.2.3 *Mergers*

- FCA proposed prohibition of merger between NCC and Destia

On 5 August 2011, the FCA made a proposal to the Market Court to prohibit the envisaged merger, whereby NCC Roads Oy would acquire the asphalt coating business of Destia Oy and Destia Kalusto Oy. The FCA found that as a result of the transaction, a joint dominant position significantly impeding competition was created or strengthened between NCC and Lemminkäinen in the manufacture and sales of asphalt mix in the capital city region.

In addition to NCC Roads and Lemminkäinen, Destia is the only actor in the capital city region with a fixed asphalt station. The other contractors depend on bought asphalt mix and therefore on

the sellers of the mix. Following the deal, asphalt mix would only have been sold by NCC Roads and Lemminkäinen in the capital city area, which both compete with their asphalt mix customers for the paving contracts of the municipalities and private actors. As a result of the deal, the sellers of asphalt mix could have either refused to sell the mix at all, or to have retained the prices above the competed level and thus to have harmed the activities of their competitors in the asphalt paving market. This would in turn have led to increased contract prices and hence been detrimental to the interest of the municipalities, housing organizations and other private actors contracting asphalt paving work.

The FCA proposed that the Market Court ban the deal, as the commitments proposed by NCC to the FCA did not eliminate the harmful effects for competition resulting from the transaction.

On November 2011, The Market Court approved the acquisition, subject to strict conditions. The Court found that the market structure created through the deal provides incentives for concerted activities between NCC and Lemminkäinen, which has serious and long-lasting ill-effects in the markets of asphalt mix and asphalt paving contracts. The Court also held that the foreseeable reactions by competitors and customers did not jeopardize the results expected of the coordination.

The Market Court held like the FCA that the impediment of competition could not have been avoided by the commitments earlier proposed by NCC to the FCA. It was also the view of the Court that making the proposal to ban the deal remained the only option for the FCA. The Court approved the transaction on the conditions it has imposed, which e.g. require that NCC rent to the competitor the site in Nikkilä, Sipoo, for the production of asphalt mix.

NCC Roads and Destia withdrew from the deal after the Market Court's decision was issued. The companies concluded a new agreement, which did not include Destia's fixed asphalt station in Tuusula. The FCA was able to approve the arrangement in its new form.

- FCA approves merger between Terveystalo and Oulun Diakonissalaitos, subject to conditions

The FCA approved a merger, subject to conditions, whereby Terveystalo Healthcare Oy acquired the total share capital of ODL Terveys Oy from the Oulun Diakonissalaitos Foundation. For instance, all the private hospitals in Northern Finland and the majority of the private general and specialist medical services in Kemi-Tornio and Kajaani will be owned by Terveystalo hereinafter.

The approval was conditional upon Terveystalo's commitments to the FCA concerning the hospital services of Oulu and the medical services in Kajaani and Kemi-Tornio. Doctors receiving patients in the Mehiläinen Medical Centre were provided with the opportunity to operate in Hospital Botnia in Oulu on similar prices and terms as prior to the merger. Additionally, Terveystalo undertook to follow the same national prices as elsewhere in Finland as regards the medical services offered to private customers in the region of Kajaani and Kemi-Tornio. Barring commitments, price increases pertaining to the services would have been imminent.

Thus, even after the transaction, customers will have the opportunity to purchase operations conducted in private hospitals also from doctors outside the concentration. The condition concerning Kajaani and Kemi-Tornio was intended to ensure the same national prices for imaging and laboratory services for the private customers in the region as elsewhere in the more competitive regions of Finland.

Both Terveystalo and ODL Terveys have also offered their services to the public sector, firms and insurance companies in the provinces of Oulu and Lapland. The FCA also investigated the impacts of the merger in the occupational health care markets, the outsourcing market and the

insurance company service market but the investigations showed that the threshold for intervention in these markets as defined by the Competition Act was not exceeded.

In the occupational health care services, public actors are also able to compete with the concentration in the provinces of Oulu and Lapland. For example in the region of Oulu, the share of public service provision of the regional occupational health contract market was roughly one third in 2009, and two-thirds in the region of Kajaani and Kemi-Tornio.

Whereas in the outsourcing services of public entities and insurance company services the buyers hold a strong bargaining position, and particularly so in the insurance company services, the pricing of the health care services is agreed on a national basis as a rule. The firm position of the concentration in the insurance company markets in Northern Finland is hence not decisive for the total market, since Northern Finland's share of it is relatively small.

#### 2.2.4 *Advocacy*

18. The FCA was represented in a working group which investigated the funding of the general service of the post. The working group proposes that where necessary the general service be guaranteed by a fee collected from the postal companies, based on the sales price of the service. The working group does not find it appropriate that the postal operations would be funded by public aid or as a public procurement. However, the working group finds that according to information in its possession there is currently no need to compensate the costs caused by the public service. The task of the group appointed by the Ministry of Transport and Communications was to investigate how the funding mechanism documented in the Postal Act would be realised in practice. According to the Act, a company which has a general service obligation has the right to receive compensation when the net costs of the general service cause an unreasonable burden to it. Additionally, the working group was set to assess the development of postal operations and the impact thereof on the need for possible compensation. The working group proposes that the fee which would be directed to the compensation would be collected from such licenced activities which are not part of the general service. This means that a fee would also be collected from Itella based on its other letter delivery operations. The working group finds that the funding mechanisms would also entail that Itella would open up its postal distribution network to competition. This is justified to gain more competition in the market and more payers for the costs of the general service, the report says. The Directive, according to which the provision of the general service should be efficient and its pricing transparent, also spurs to the opening of the network. The working group finds it to be efficient that there is no need to build and maintain an overlapping postal service network. The regulation of the funding mechanisms both by Directive and the Postal Act is new phenomenon. The implementation of the Postal Directive is still underway in some of the EU Member States.

- New programme for sound and effective competition

In March 2012, the Government decided to commence a programme for so-called sound and effective competition. The Ministry of Employment and the Economy is responsible for its preparation. The Director General of the FCA was appointed as the programme leader in the Ministry during the period of 1 May 2012 – 30 April 2013.

According to the Government, insufficient competition in the home market sectors, e.g. in the retail trade and construction, raises the price level of products, decreases incentives for innovation and hence reduces productivity and growth. The programme for sound and effective competition meets these challenges. A working economy requires fair competition based on common rules. The aim is that the consumers can choose products from a bigger selection on competitive prices.

### 3. New Reports and Studies

#### 3.1 *FCA study on daily consumer goods*

19. The FCA published a report on competition of daily consumer goods. According to this study, retailers use their firm position with respect to suppliers in several ways that may be considered questionable for sound and effective economic competition. The FCA hence finds that there is a clear need for further investigations into the practices of the trade.

20. Examples of the strong position of the grocery retailers include in particular the use of gratuitous marketing allowances and the transfer of risks to suppliers. Effects that are harmful for competition may also be related to the increasing number of the retailers' own brands (so-called private label products), combined with the strong position of retailers in category management.

21. The FCA investigated the phenomena related to the use of buying power with questionnaires directed retailers and the food industry. The industries included were the meat processing, bakery, mill and pet food industries. In addition to the responses to the questionnaires, the FCA also used other signals obtained from the market and the studies of the European Commission and the European Central Bank on the structure and practices of the markets considered. The financial situation of the actors and the role of foreign trade were also examined.

##### 3.1.1 *Gratuitous marketing allowance remarkably common*

22. The majority of the suppliers who responded to the FCA's questionnaire do not feel that they obtain any value for the marketing allowance they have paid other than the opportunity to be included in the retailer's product categories. It is the view of the industry representatives that, frequently, the value offered in return for the marketing allowance is not agreed upon.

23. Gratuitous marketing allowances may induce price increases because suppliers seek to pass on all their cost increases to purchase prices. The practice is particularly harmful for the entry of new businesses and hence the competitive situation in the entire field. In addition, gratuitous allowances may have a wider impact on the weakening of price competition in the field.

##### 3.1.2 *Own risk transferred to suppliers*

24. The study explored several ways in which retailers transfer their own risk to suppliers. Repurchase requirements for unsold products are the most common way. For example, of the respondents in the bakery and pet food industries, three-thirds announced that they had met with repurchase requirements from the retailers. With such a transfer of risk, the increased uncertainty typically results in production cuts and pressure to increase prices. The suppliers' willingness to innovate may also decrease.

25. In addition to suppliers, the transfer of risk may also have an impact on those competing actors at the retail level who are in a weaker position: if one retailer succeeds in transferring risks to the supplier, this may result in the supplier seeking to obtain better conditions when negotiating with relatively weaker retailers. This may have impacts which further undermine the position of the weaker actors (so-called waterbed effect).

##### 3.1.3 *Private label products reinforce strong position of retailers*

26. The increase in the number of private label products benefits consumers because it increases product variety and lowers prices. However, problems may occur in the long run, as the retailers have such a strong position in category management and pricing. Moreover, as a manufacturer of private label

products, a retailer is able to obtain better information about new brand products, in addition to which they have better information than before about the cost structure of products. All this further reinforces the strong position of retail in relation to suppliers.

27. According to the suppliers' responses, retailers often price brand products above private label products. According to the study, this phenomenon and the possible competition distortions created by it could possibly be prevented by the suppliers' maximum resale price maintenance. However, it is difficult to present tenable estimates about the possibilities and incentives of the supplier level to include conditions on maximum resale price maintenance into the agreements.

#### *3.1.4 A complex problem not easily solved*

28. To summarise, it may be stated that the highlighted practices between retail and the suppliers lie in a so-called grey area when it comes to the application of competition law. No clearly prohibited, hard core restraints on competition were found.

29. The buying power of retail does not in itself automatically mean the lack or distortion of competition. However, the nature of the detected phenomena and their apparent prevalence clearly motivate further measures to be taken.

30. In addition to practices related to buying power, it is also important to estimate other factors influencing the consumers' choice of retail outlet, such as the practices related to the placement of the retail outlets and the supply of supplementary services located in connection to them. The regulations concerning the location of retail outlets, the authorities responsible for zoning and for example the alcohol retail monopoly have a major effect on the creation of equal competition conditions in the Finnish retail trade.

#### **4. Resources of the FCA – key figures**

<b>Year</b>	<b>No. of FCA officials</b>	<b>Budget expenditure, €</b>
2012	79	6,160,000
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