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**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by Finland --

**17-18 December 2014**

*This document reproduces a written contribution from Finland submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

*More documents related to this discussion can be found at <http://www.oecd.org/daf/competition>.*

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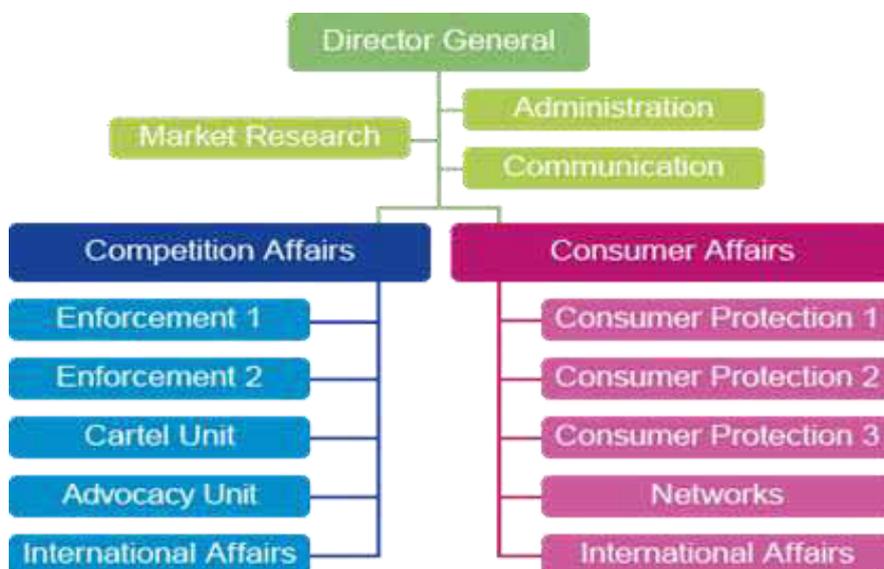
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## FINLAND<sup>1</sup>

### 1. The Merger of Finnish Competition and Consumer Authorities

1. The Finnish Competition Authority and the Finnish Consumer Agency merged on 1 January 2013 to form the new Finnish Competition and Consumer Authority (FCCA). The Authority's budget is about EUR 11 million and it has a staff of 140 persons. Some 60 officials work on competition affairs and about 40 on consumer affairs. The organisational chart is presented below.

Figure 1. FCCA Organisational Chart



2. The merger process was implemented in a rather short time. In March 2012, the Ministry of Employment and the Economy published a press release on the launch of a study into the merger of the agencies and established a steering group to prepare for the actual merger. The steering group included representatives from the Ministry of Employment and the Economy, the Ministry of Justice as well as from the management and staff of both agencies.

3. In September 2012, the Government submitted a legislative proposal to Parliament for the creation of the new Competition and Consumer Authority as well as proposals to amend the Competition Act and the Consumer Protection Act. No significant changes were made to the substantive provisions on consumer protection and competition enforcement, nor to the provisions concerning the powers of the Authority. The sanctions available to the Consumer Agency remained the same and are weak compared to the means available to the Competition Authority. In January 2014, the FCCA moved to new premises, where all personnel were under the same roof.

1. This note was written by Helena Tuorila, Senior research officer, Market Research Department

## 2. Objectives Set During the Preparatory Phase of the Merger

4. During the preliminary study that preceded the submission of the legislative proposal regarding the merger, several grounds for the merger were put forward in addition to the explicit savings targets in respect of support functions and the costs of premises.

5. Both agencies were deemed to be working in a policy area whose common denominator was the functioning of the markets, and there were also similarities in the agencies' objectives. The objective of competition policy is functioning competition and markets so that functioning competition allows the consumer to choose from a wider selection of products at competitive prices. The corresponding objective of consumer policy is to strengthen consumers' confidence in markets by eliminating disruptive behaviour.

6. Another fact in favour of merging was related to the need to increase and use cross-sector specific expertise, which to an increasing extent is required to support official intervention. A third perspective was related to the need to concentrate, and thus improve, expertise in litigation with respect to cases that go to court.

7. A fourth reason in support of merging was the need to develop the research function and at the same time increase the Authority's research capacity. A significant factor in the merger of the Agencies was the Government's decision to transfer 5 posts from the National Consumer Research Centre to the Competition and Consumer Authority. The transfer took effect from the beginning of 2014. Development of research activity was seen as an absolute requirement to support the public debate regarding competition issues and consumer protection and also for developing reasoning in the Authority's decision making.

8. The justification for the legislative proposal on the merger of the agencies did not really contain anything other than the abovementioned points raised in the preliminary study. In brief, the Government's proposal states that the objective is to increase the social weight and influence of competition and consumer affairs and to make their administration more efficient.

## 3. The Separation of Competition and Consumer Affairs

9. During the exceptionally lively discussion that took place during the planning phase of the merger, there was a suspicion that the merger would lead to competition policy taking the lead within the new Authority and to the gradual erosion of the results achieved in the field of consumer protection. Presumably because of this, the organisational structure of the Competition and Consumer Authority was affirmed in legislation so that the Council of State appoints the Director General of the Authority as well as the two senior Directors, one of whom leads Consumer Affairs and the other Competition Affairs. The Director of Consumer Affairs also acts as the Consumer Ombudsman. The institution of the Consumer Ombudsman includes the possibility of helping consumers with court proceedings as well as the possibility of starting class actions in the courts. The status of issues relating to consumer protection was also further strengthened in the legislation so that the Director General of the FCCA may not decide to rule on issues that come under the powers of the Consumer Ombudsman.

10. The core of FCCA's organisational structure has been affirmed in legislation in a manner which emphasises the separation of the two policy sectors. In addition, the legislation relating to the FCCA requires the independence of the monitoring and control functions of both policy sectors: *"The monitoring and control functions of the Competition and Consumer Authority are to be organised, in respect of both competition and consumer affairs, so that the independence and impartiality of the Authority and the Consumer Ombudsman in exercising their monitoring and control functions is guaranteed."*

11. One of the justifications given in the Government's proposal for the above stipulation is that "in dealing with competition affairs it is important that information and evidence gathered during

investigations and the leniency procedure under the Competition Act is used only in dealing with competition affairs". This means that there is a "Chinese Wall" between competition affairs and consumer affairs to ensure the administrative requirement for commitment to purpose, in other words that the powers given to the Authority to enable it to carry out a specified task are not used for carrying out some other task.

12. In practice the rules mean, for example, that the Consumer Ombudsman may not be given information about any leniency documents submitted to the Authority by a participant in a cartel, which is critically important if the Consumer Ombudsman simultaneously starts a class action against the participants in a cartel. On the other hand the regulation does not always promote the achievement of the common goals of competition and consumer policy.

13. The preliminary study regarding the merger also identified clear differences in the roles of the Competition Authority and the Consumer Agency. Competition enforcement was dependent on expertise in EU and national competition legislation and in particular, on economics based impact analyses in each individual case. Tasks related to consumer protection on the other hand were regarded as involving more the application of detailed legal provisions.

14. Another significant difference between the agencies was (and still is) the difference in the range of instruments for intervention. Whereas substantial sanctions can be used in competition enforcement, the practice in the field of consumer protection is to apply for an injunction before the court which the court can reinforce with a conditional fine. To put it pointedly, in the field of consumer protection, anything is allowed until it is specifically prohibited by a decision of the court.

15. It should be pointed out that the FCCA has made a proposal to improve the powers of the Consumer Ombudsman and the appropriate Ministry has started the relevant preparatory work. An increase in the powers of the Consumer Ombudsman may help create one of the synergies to be gained from the merging of the agencies, if the result of the development of the powers of the Consumer Ombudsman is that he or she can benefit from the experience accrued in the use of sanctions in competition matters.

16. In the preliminary study, the differences between the agencies in prioritising issues are also mentioned. In the field of competition law, the legislation practically obligates the authority to prioritise between investigated cases and also gives the right not to investigate insignificant issues, whereas there are no actual provisions regarding prioritisation in consumer affairs. However "*The Consumer Ombudsman must be active especially in areas which are particularly significant for consumers or where it can be assumed that problems for consumers would most commonly occur*", but in practice as there is a lack of appropriate provisions regarding prioritising, enforcement has to be targeted at all the areas that are defined as being under the aegis of the Consumer Ombudsman.

17. What about conflict situations that can inevitably arise between competition enforcement and consumer protection? They do arise, but it has always been possible to resolve them, at least up to now, in a fairly satisfactory manner, and the Authority has been able to adopt a common position (which was commonly doubted when the merger was being prepared). Conflict situations between competition and consumer policies arise, as the examples below show, but they should not be overemphasised. The vast majority of the issues dealt with by the combined authority are those where the effect of the Competition Act is clearly to the consumer's benefit and consumer protection measures clearly support competition.

18. Without going into details, we will give some examples of conflict situations: The FCCA's initiative to reduce regulatory burdens in the taxi business gave rise to the question as to whether the abandonment of maximum prices set by the authorities would weaken the position of consumers, particularly with regard to the street hail market. Another example relates to a situation where the condition

for a company acquisition was the sale of certain gym businesses. The question with regard to consumer protection was what position would the consumer be in with regard to the operations that had been divested, and to what extent the Authority's consumer protection function should give instructions in changing the service provider when at the same time, from the perspective of merger control, the Authority required that the viability of the divested operations be preserved so that it could be deemed as a counterweight to concentration. A third possible conflict situation arose regarding such terms and conditions drawn up by an industry association that create a degree of confidence and make comparing offers easier in consumer sales but at the same time limit or harmonise offers in a manner which weakens competition. A fourth example concerns predatory pricing where the consumer values cheap prices in the short term, but the competition authority sees a risk of monopoly pricing in the longer term. A fifth example concerns advertising (for example: "if you can find a cheaper product we will refund the difference") which could be contrary to consumer protection law, but from the perspective of the competition authority it may have the effect of allowing an entrant into the market and thus increasing competition.

19. With all functional differences between competition and consumer policies, both sectors aim to maintain the market order that consumers trust, and that creates prerequisites for economic growth. Two examples related to eliminating structural barriers to competition can be emphasised by performance agreement 2015-2018 between the Ministry of Employment and the Economy and the FCCA. First, the FCCA will emphasise the measures that improve the competitive nature of domestic markets. Second, the Authority will secure the operational preconditions of electronic commerce, and consumers' trust to it. These objectives are achieved through creating operational models and structures which will put the diverse expertise at the disposal of the whole organisation and allow that expertise to be utilised across competition and consumer affairs. In addition, the Authority will promote the functioning of the markets using both of these policy areas.

#### **4. Defining and Implementing the Strategy of FCCA**

20. Apart from the structural changes, the FCCA needed a new strategy. The strategy formation was assigned to the Market Research Department that is the common link between competition and consumer affairs. The strategy formation begun in spring 2013, and it involved several phases where personnel played an active role.

21. During the Authority's strategy process the development areas were identified in co-operation with the personnel. These six development areas are prioritisation, goal-based operations, benefitting from the merger of the agencies and co-operation between the Divisions, competences at an international level, being a good place to work and infrastructure.

22. The development areas were identified in co-operation with the personnel, because the ultimate success of the merger of the agencies and gaining the benefits of it, will finally depend on the degree to which the Authority's staff are motivated to achieve common goals, how such goals are defined together with the staff and how we can succeed in creating a common operating culture. For example, defining the principles of prioritisation helps to determine what is important to the FCCA and why, goal-based operations have a direct effect on job satisfaction and the principles of prioritisation again indicate what kinds of objectives the Authority has. Developing forms of co-operation between the Divisions and benefitting from synergies also depend on how we see our objectives. The objectives for their part help to define what kinds of expertise the Authority needs.

23. Developing a strategy is only effective if it is put into place. Besides strategy paper, the FCCA has a paper concerning the strategy's implementation. Explicit practical measurements and their follow-ups enable to build a foundation for implementation. The Authority is able to identify which of the

development areas are more successful than others and will uncover new methods of implementation, if necessary.

24. The implementation of strategy can be illustrated by example concerning the co-operation between the Divisions. Besides strategy formation the role of the Market Research Department is to provide research services to the other two Divisions. However, the department is new in the FCCA's hierarchy and other departments find its role and responsibilities somewhat confusing. In order to clarify its role for other departments, the Market Research Department organised a roadshow to other departments. The aim was to introduce department's operations and research projects so that other departments would be able to make use of the professional resources. At the same time the Market Research Department was able to deepen the understanding of other departments' professional needs. Several preliminary ideas and concrete forms of co-operation were mentioned during the roadshow sessions. Based on this information, four research projects (impact assessment, prioritisation, monitoring and market choices) were started in autumn 2014. First results of these research projects will be available in early 2015, and more comprehensive results by the end of year 2015.

## **5. Benefits of the Combined Authority**

25. The FCCA has been operating for almost two years and there is still a lot of work to be done to achieve all the objectives. In fact that is exactly the question; what are the longer term objectives for the merger of the competition and consumer administrations? If and when the FCCA wants to compare the value added generated by the merger to the previous separate agencies, the question of what kind of theoretical framework is used to create common goals and synergies should be investigated. It was with this intention that the FCCA published a study<sup>2</sup> of the interfaces between competition policy and consumer policy. The following juxtapositions are based on this study.

26. It is not always unambiguous what is meant by the term 'consumer' and what is being referred to by the expression 'welfare'. Should consumer welfare be examined from the perspective of a natural person, or should the examination also include companies that are in the position of end users, or the buyers of goods and services in general? Secondly, should total welfare also be considered in addition to consumer welfare, and how should the benefits of static and dynamic efficiency be emphasised in prioritising and decision making?

27. Academic research also emphasises the significance of consumer choice and opportunities for choice as a common denominator of competition and consumer policy. Competition policy measures should ensure that there are as many alternatives as possible for the consumer to choose from and this will give the best possible consumer surplus. On the other hand, the consumer must be capable of making rational choices. Ensuring rational solutions is naturally included in consumer protection in the form of the provision of information and also eliminating inappropriate activity from the markets. A critical role for consumer policy is also to balance the asymmetry in information between the company and the consumer. However, this involves problems with rationality of consumer choice, cognitive biases and heuristics. If the consumer acts irrationally, not even intense competition can produce the best possible welfare.

28. An essential question is also whether or not intervention is necessary in every instance of market failure. For example, is the consumer's learning curve such that the problem solves itself, is the detriment resulting from official intervention greater than the benefits obtained, or does the removal of one problem give rise to a second, greater problem? This point of view emphasises the importance of impact analysis before intervention.

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<sup>2</sup> The study was carried out by Professor Kalle Määttä, head of the Authority's advocacy unit.

29. An essential question regarding the choice of areas for intervention and of the concrete measures taken is also to what extent measures taken under competition legislation can affect the realisation of consumer benefits in the markets in general. The nature of some markets seems to be such that increasing competition does not seem to improve the position of the consumer, and even if it did have an effect, consumers are perhaps not willing to change their service supplier. This consideration emphasises the significance of the Authority's market knowledge.

## **6. Conclusion**

30. It may be concluded that political implications, policy coherence and the authority's capability to perform its duties are essential factors when predicting the long-term success of the merger. There are, however, unofficial factors that impact on all levels of the authority. In our experience an important milestone was reached when the FCCA moved to new office premises in January 2014, a year after the merger was officially concluded. This made the unification a concrete and visible reality for the entire personnel.

31. Besides the above-mentioned measure of performance, the Ministry of Employment and the Economy assesses the operative performance and its development as well as achieving the performance targets. Successes in implementing the goals are reported twice a year to the result information system maintained by the State Treasury. The trend in steering is to gradually move to steering covering several years according to the shared course taken by state administration, keeping in mind the authority's legally mandated role, strategic strategy lines and the Government programme.

32. Altogether, it might be too early to draw conclusions on the final success of the merger, as the process is still ongoing. At the same time state government's financial situation has an impact on the FCCA's operation so that the assessment in the long-run must be flexible to the changes that will inevitably occur in the operational environment.