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RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT

-- Finland --

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More documents related to this discussion can be found at: <http://www.oecd.org/daf/competition/antitrust-enforcement-in-competition.htm>

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-- Finland --

1. Overview of private enforcement in your jurisdiction

a) *What is the status of private enforcement in your jurisdiction? Are there recent developments in this area?*

1. In Finland, 'private enforcement' refers to a process whereby parties who have incurred losses as a result of infringements of competition law can seek and receive damages from the offenders. It seems that private enforcement activity is gradually increasing in Finland due that some big cartels have come to light in recent years. Especially public institutions (municipalities, public undertakings and other public entities) have been quite active in bringing damage claims. The current trend appears to be that, at least in the case of cartels, injured parties generally seek damages through a civil procedure.

2. Another important line of development in Finland is the implementation process of the EU Damages Directive. Finland, as a Member State of the EU, has an obligation to implement the Directive into its national legislation by 2016. Changes to national damage claims proceedings are not radical but still relevant. The changes that the implementation of the Directive will bring are helpful to claimants in several ways. Finland believes that the Directive provides a good balance between public and private enforcement.

3. The most notable series of rulings relating to antitrust damages is a judgment delivered by the Helsinki District Court in 2013 concerning an asphalt cartel. The judgment consists of 41 separate rulings and the total amount of damages awarded came to EUR 37 million (not including interest). In the case in question, damages were awarded on the assumption that the prices charged by the cartel were 15–20% above the market rate on average. The judgment is not yet legally binding, as an appeal has been filed with the Court of Appeal.

4. Helsinki District Court is currently processing a series of damages claims concerning a raw wood purchasing cartel. The total amount of damages sought by the claimants is approximately EUR 200 million.

b) *What are the overall objectives of public and private enforcement in your jurisdiction?*

5. The objectives of the two processes differ to a degree, but each process is dependent on the other in order to be optimally effective. To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, the two processes need to interact to ensure the maximum effectiveness of competition rules.

6. The primary aim of public enforcement is to detect infringements of competition law, punish offenders of competition law and thereby to increase deterrent effects. The effectiveness of the process relies heavily on the actions and activeness of competition authorities in investigating suspected antitrust offences.

7. Private enforcement is aimed at ensuring the right of injured parties to be compensated, i.e. to recoup financial losses incurred as a result of infringements of competition law. The effectiveness of the process hinges on the activeness of the injured parties in filing claims with civil courts. In Finland, the primary role of the competition authority in these civil processes is to assist the courts, for example, by giving expert opinions by request of a court.

8. Although the objectives of these two policy areas – public and private enforcement – are somewhat different, the processes are mutually complementary. Without efficient and successful public enforcement, antitrust violations could go undetected, leaving the injured parties without compensation. On the other hand, private enforcement ensures that, in addition to fines, antitrust offenders are also made to pay for the damage caused to injured parties. This makes the deterrent effect of the system greater compared to deterrence based on fines alone.

9. It is necessary to regulate the coordination of the two forms of enforcement in a coherent manner, for instance by arranging access to documents held by the competition authorities.

2. Instruments for fostering private enforcement

a) Is there a right for private litigants to claim damages in your jurisdiction? Is there a right to full compensation? Is this a general right or is it specific to antitrust claims?

10. Private litigants can claim damages in Finland. The principle behind this is that claimants should receive full compensation for any damages incurred and proven. Full compensation should not lead to overcompensation, whether by means of punitive, multiple or other damages. The right to full compensation is a general right and not specific to antitrust claims.

11. Although the right to antitrust damages is derived directly from competition law, antitrust claims are heard by civil courts similarly to other damage claims. The proceedings are governed by national procedural rules and principles. Finland has not assigned a single court or specific district courts to hear antitrust claims. However, aggregation of claims into one single court proceeding is a possibility.

12. The right to damages is a general right in the Finnish judicial system. However, the Finnish Competition Act also has separate provisions on the right to seek compensation for losses incurred as a result of infringements of competition law.

b) Who has standing to file an action for damages and in what circumstances?

13. Any natural or legal person who has suffered losses as a result of an infringement of competition law can claim damages. This means that actions can be filed not just by businesses, but also by private individuals and public bodies.

14. According to the case law of the Court of Justice of the European Union (Court of Justice), “any individual” can claim compensation for harm suffered where there is a causal relationship between the harm in question and an infringement of competition law. This means that anyone, be they an individual, including consumers and undertakings, or a public authority, has the right to claim compensation. As an EU Member State, Finland is obliged to follow this ruling.

- c) *What are the main features of your private enforcement system? For example: are there special discovery rules for antitrust cases? Or rules of the burden and standard of proof on causation and the quantification of damages? Does your jurisdiction provide for punitive damages? Does your jurisdiction permit the aggregation of claims and collective redress?*

15. Discovery rules: The basic premise is that the parties to court proceedings supply the court with all of the necessary evidence. The parties can also place demands on each other concerning the presentation of relevant evidence in court (i.e. there are general discovery rules available).¹ Once the EU Directive has been implemented in Finland, claimants will also be able to make use of special discovery rules in antitrust cases.

16. Burden of proof: The burden of proof lies with the claimant, who must demonstrate causation and quantify the level of damages. However, in practice burden of proof often shifts back and forth between the parties: once a claimant has presented evidence in support of a claim, the defendant has an opportunity to present counter-evidence. For example, the claimant could be seeking damages due to having been overcharged by the defendant (as a result of a cartel in which the defendant was involved). In such a case, the defendant could present counter-evidence indicating that the claimant incurred no losses, as the overcharge was passed on to the claimant's clients.

17. Aggregation of claims: Different claims, but relating to same case, can be merged into one court proceeding (joinder of claims). Even so, each claimant is responsible for their own claim. For example, in the aforementioned private enforcement proceedings concerning the asphalt market, all claims were heard by Helsinki District Court, but still 41 separate judgments were given in the case. Punitive damages: Finland's jurisdiction does not permit punitive damages. The sole aim of private enforcement is to award injured parties full compensation (the amount of damages that the claimant can demonstrate). Collective redress: No collective redress is available in the context of antitrust damages in Finland.

3. Balancing public and private enforcement

- a) *Have evidentiary issues arisen in your jurisdiction involving concurrent private and public enforcement cases, and how have agencies and courts resolved them? For example, what can the agency do if a private plaintiff is jeopardizing its case by seeking discovery from the parties under investigation or from essential witnesses?*

18. No such evidentiary issues have arisen in Finland, as all claims are, in practice, follow-on claims. This means that injured parties normally wait until antitrust judgments become legally binding before filing damage claims (unless there is a risk that limitation period expires).

19. So-called stand-alone claims are rare in Finland. Stand-alone claims are generally only filed in order to prevent the statute of limitations from running out on the damage claim. For example, in the autumn of 2014, a claim was filed with Helsinki District Court seeking compensation for damages incurred as a result of abuse of market dominance. The claimant nevertheless asked the District Court (civil court) to postpone the proceedings of the damage claim until a legally binding antitrust decision confirming the abuse had been given (by administrative courts).

¹ Code of Judicial Civil Procedure (17:12): "The obligation to present a document: When it can be assumed that a document is of significance as evidence in a case, the person in possession of the document shall present it in court."

20. Even where claimants do not request postponement themselves, civil courts are likely to defer the proceedings of damage claims until a ruling on the legality or illegality of the underlying business practice has become legally binding from administrative courts. Only then will civil courts entertain damage claims.

21. Genuine stand-alone claims are typically filed in cases involving contractual disputes in which claimants seek damages at the same time. In such cases, allegations of a practice infringing competition law are often presented purely as alternative or supplementary grounds for challenging the contract in dispute.

b) *Can plaintiffs access evidence in the competition authority's file, including leniency information? How is disclosure of evidence in the agency's file regulated in your national courts? How is appropriate protection of confidential information ensured? Do the rules change once the public investigation is completed?*

22. It is important, for both public and private enforcement, to ensure that leniency programmes are attractive.

23. The premise at the moment is that any information or evidence submitted by leniency claimants cannot be used for purposes other than enforcing competition law. The Finnish Competition Act states that any information or evidence submitted to the Finnish Competition and Consumer Authority in order to obtain immunity or a reduction in the amount of fines cannot be used for any other purpose than to settle antitrust cases. This means that information or evidence submitted by leniency claimants cannot be used, for example, in the course of damage claims proceedings. In this, Finnish law will need to be amended to some extent in connection with the implementation of the EU Directive.

c) *What is the relationship between private enforcement and public enforcement remedies such as disgorgement and restitution?*

24. There is no direct link between such remedies in the Finnish system. This is largely due to the fact that the objective of public enforcement is to establish whether or not a business practice infringes competition law, and to impose punishments. Only private enforcement is aimed at restoring the claimant's financial position to what it was before the infringement (cf. restitution).

d) *Do you think that the development of private enforcement might affect the development of substantive standards applicable in public enforcement? Do you find this problematic?*

25. In terms of substantive standards, this scenario is unlikely. However, in procedural standards some convergence may take place between public and private enforcement.

26. The Finnish Supreme Court has not yet ruled on any antitrust cases, and there is consequently no precedent that could be used to evaluate and predict the development of private enforcement in Finland.

4. How can public enforcement help to promote private enforcement?

a) Does your competition authority play any role in private enforcement cases? Can it/does it act as an amicus curiae before a court in private cases?

27. The competition authorities play a relatively small role in private enforcement proceedings (civil proceedings). The civil courts can request the opinion of the competition authorities on the nature of antitrust violations brought before them. Representatives of the competition authorities may also be called upon as witnesses or experts. However, it is up to the courts to decide whether or not to invite such testimony.

b) To what extent should administrative/judicial decisions or settlements be detailed (e.g. on the facts involved in the violation, or the quantification of the harm from the anti-competitive conduct) in order to help potential plaintiffs?

28. The Finnish competition authorities have an obligation to give grounds for their decisions, including how and on what basis competition law has been infringed. Among others, the competition authorities' decisions display the nature and duration of the infringement, which plaintiffs can make use of in the course of private enforcement proceedings.

29. Usually, competition authorities do not directly quantify the level of damage caused by antitrust violations. They do, however, do so indirectly, as any antitrust fines imposed must cover the benefits gained by engaging in illegal practices. The objective is to ensure that the amount of fines to be imposed on parties in a cartel, for example, is high enough to make participation in cartels unprofitable.

c) Are the findings (of the authority or courts) in a public enforcement case binding in private cases? What about decisions of authorities/courts in foreign jurisdictions? Has the timing of publication of public decisions been a problem for private litigants?

30. At the moment, the findings (of the authorities or courts) in public enforcement cases are not binding de jure. However, although the findings (of the authorities or courts) in public enforcement cases are not binding de jure, they often are de facto. For example, in the private enforcement proceedings concerning the asphalt market, as its starting point the Helsinki District Court used a legally binding ruling of the Supreme Administrative Court establishing the existence of an asphalt cartel in Finland. This meant that, in practice, proceedings at the Helsinki District Court could focus on establishing the amount of damages rather than the existence of the cartel.

31. Decisions by the authorities/courts of foreign jurisdictions are not binding in Finland (except when cases fall under bilateral agreements between Finland and the foreign jurisdiction concerned). The implementation of the new EU directive will change this and the rulings from other EU countries will be considered as be prima facie evidence.