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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Finland --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm.

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FINLAND

1. “Competitive neutrality” and the role of the State in the market

1. In Finland, the provisions regarding competitive neutrality were provided for as an amendment to the Competition Act (948/2011) in 2013.¹ Competitive neutrality is related to the role of public entities on the market and the objective of provisions is to ensure equal operating conditions, i.e. competitive neutrality between public and private sector business activities.

2. The Finnish Competition and Consumer Authority (FCCA) has the authority to intervene – with legally mandated requirements and restrictions – in the provisions of goods and services in public sector business activities, if a business practice or organisational structure is applied in the economic operations of a municipality, association of municipalities, state or an entity under their control which distorts or prevents competition on the market. The FCCA primarily carries out this task through negotiations. The main objective of the Competition Act, including its competitive neutrality provisions, is to protect sound and effective economic competition from harmful restrictive practices.

3. The Competition Act does not prohibit public organisations from practicing business or competing with private enterprises on the same market. The objective of the competitive neutrality provisions is to establish neutral competitive conditions between public and private sector business activities. By ensuring competitive neutrality on the market, the provisions are also essential in maintaining the private sector business activities and in allocating the society’s production assets in an appropriate way.

4. In Finland, government has traditionally involved in productive activities on a broad scale. In addition to the state, productive entities are owned by municipalities or association of municipalities. The economic importance of state-owned productive activities and municipal activities is very substantial. Due to societal development, public and private businesses meet on the same market more often. Differences in the conditions and baselines for engaging in business activity inevitably result in problems in terms of competition neutrality and the functionality of the markets.²

5. The FCCA has identified a number of sources of neutrality problems. For example, in the contribution to the OECD roundtable on State Owned Enterprises and the Principle of Competitive Neutrality³ the FCCA stated that the neutrality problems primarily relate to state aid in its various forms, such as taxation and bankruptcy protection, and in-house procedure in public procurements as

¹ Competitive neutrality provisions entered into force at the beginning of September 2013. See the FCCA Press Release, ‘New supervisory task for Finnish Competition and Consumer Authority - Goal: equitable competitive conditions for public and private players’, 2 September 2013, available at <http://www.kkv.fi/en/current-issues/press-releases/2013/new-supervisory-task-for-finnish-competition-and-consumer-authority---goal-equitable-competitive-conditions-for-public-and-private-players/>.

² See an English summary of the report by the Working Group Examining Competition Neutrality in Public Sector Business Activity, Ministry of Employment and the Economy, MEE Publications, Competitiveness 23/2009, April 2009, p. 88, available at http://www.tem.fi/files/22721/TEM_23_2009_kilpailukyky.pdf.

³ OECD Roundtable on State Owned Enterprises and the Principle of Competitive Neutrality, DAF/COMP(2009)37, pp. 125-128, available at <http://www.oecd.org/daf/competition/46734249.pdf>.

well as the pricing of public utilities. Regulations may also impede private sector entry. In addition, competitive neutrality problems may derive from financing obtained through extraordinary means.

2. Rules and tools to address competitive neutrality distortions available to competition authorities

2.1 Rules/Tools

6. Competitive neutrality provisions are provided for in Chapter 4a of the Competition Act⁴. According to Section 30a of the Competition Act, the FCCA has the authority to intervene if a business practice or organisational structure is applied in the economic operations of a municipality, association of municipalities, state or an entity under their control, which in the supply of goods or services i) distorts or is capable of distorting the conditions of sound and effective competition; ii) prevents or is capable of preventing the creation or development of sound and effective economic competition; or iii) contradicts the requirement of market-based pricing as stipulated by Section 66a of the Local Government Act (365/1995), currently Section 128 of the Local Government Act (410/2015)⁵.

7. The above-mentioned business practice consists of all activities that result in a public sector undertaking gaining an unfair competitive advantage over its private competitors. This may refer, for example, to extraordinary aid received by a public sector undertaking or predatory pricing by said undertaking. An organisational structure refers, for example, to business activities conducted as a municipal enterprise or authority, as these may entail tax benefits or bankruptcy protection. In addition to the ability to intervene if competition is distorted or prevented, the FCCA is also responsible for ensuring that municipal pricing is market-based in exceptional situations where the Local Government Act does not require business activities to be corporatised. The FCCA can therefore intervene, for example, in the activities of affiliated entities specified in the Act on Public Contracts (348/2007)⁶ if the affiliated entity takes advantage of the opportunity to sell a portion of its assets on the market and if the sale of assets produced by the affiliated entity to an outside party is not market-based.

8. The competitive neutrality provisions protect the possibilities for healthy and functioning competition on the market. This means that the FCCA would not intervene in a situation in which the only aim is to seek protection against competition deriving from a player in the public sphere. A requirement for intervention is that the public entity actually distorts the prerequisites for competition, or prevents the emergence or development of competition on the market.

9. According to Section 30b of the Competition Act, competitive neutrality provisions shall not be applied if the business practice or organisational structure immediately follows from legislation, or if the application thereof would prevent the performance of a major obligation related to citizens' welfare, security or other such common interest. The Government Bill (40/2013) elaborates this provision by stating, among others, that a prerequisite for the first exemption is that negative effects on competition immediately follow from legislation without any margin of discretion for the entity responsible for the economic activity. According to the Government Bill, the second exemption provides, among others, that the common interest is de facto impossible to be attained without consequences which adversely affect competitive neutrality and that the common interest cannot be attained by other less restrictive means.

⁴ The Competition Act is available in English at <http://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/competition-act/>.

⁵ The new Local Government Act adopted on 10 April 2015 is not available in English.

⁶ The Act on Public Contracts is available in English at <http://www.finlex.fi/fi/laki/kaannokset/2007/en20070348.pdf>

10. The Competition Act also provides the discretion for the FCCA to prioritise its tasks. According to Section 32 of the Competition Act, the FCCA shall not investigate a case if, among others, it is unlikely that the business practice or organisational structure shall have major impacts on the conditions of sound and effective economic competition. This refers to the requirement that the matter can be seen to be significant as intended by the law.

11. If a competitive neutrality distortion is identified, the FCCA seeks, primarily through negotiations, to eliminate such a business practice or organisational structure. If the negotiations do not yield results, the FCCA shall, according to Section 30c of the Competition Act, prohibit the municipality, association of municipalities or the state from using the business practice or organisational structure immediately, or to impose such conditions on the continuance of the practice or operations which ensure neutral competitive conditions on the market. Operations cannot be ordered to be ceased completely, if the performance of an obligation is prescribed by law. It should be noted that the above-mentioned prohibition, order or condition is issued to a municipality, association of municipalities or state, not a business entity, even if this entity has the status of an autonomous legal person. This does not, however, prevent the FCCA from engaging in negotiation with the actual undertaking in question, if this proves to be appropriate. The above-mentioned decision, prohibition or order shall be followed, notwithstanding an appeal, unless the Market Court rules otherwise. According to the Competition Act, a penalty payment could be imposed to enforce the prohibition, order or condition.

12. In supervision pursuant to the competitive neutrality provisions, a municipality, association of municipalities, state or an entity under their control has an obligation - similar to that of a business undertaking - at the request of the FCCA to provide it with the information and documents needed.

13. The FCCA does not act in an official oversight capacity in public procurements (such as the illegal direct awarding of contracts) and cases involving state aid even though problems which relate to competition neutrality may stem from practices that violate procurement. However, as regards state aid cases the FCCA has the authority to intervene if the case falls within the scope of national law and if such a business practice or organisational structure is not yet notified to the European Commission and if it is not authorised by the European Commission. These conditions are cumulative.

14. The first case in which the new competitive neutrality provisions were applied concerned the wage management industry. In 15 December 2014, the FCCA stated that Pirkanmaan Jätehuolto Oy, a cooperative waste management company owned by its stakeholder municipalities, has changed its pricing for the processing of municipal waste after an intervention by the FCCA. In the future, the processing fees for similar waste deliveries will not depend on whether the waste was delivered by municipal or private service providers. The FCCA decreed that the company's practice could have endangered competitive neutrality, in this case by impeding the ability of private service providers to compete for corporate customers on the waste management market. In addition to municipal responsibilities, the company also serves corporate customers, whose waste is collected by the same collection vehicles that pick up municipal waste. Before the company changed its pricing policy, it was charging a lower processing fee from the company's own contractors than from private service providers with equivalent waste deliveries.

15. The company's pricing policy was initially investigated as a potential case of dominant market position abuse launched as a result of a request for action. The September 2013 amendment to the Competition Act has since enabled the FCCA to investigate the matter on its own initiative, from the perspective of the new regulations on competitive neutrality.

16. As regards waste management industry, the FCCA and Regional State Administrative Agencies conducted an extensive survey of market conditions in the waste management industry in 2013–2014. The survey brought to light some potentially problematic structures and procedures, which may in the future have to be evaluated from the perspective of competitive neutrality

regulations. The state of competition in the waste management market is also being examined within the scope of a joint project of the Nordic competition authorities. The final report of the project is slated for completion in the autumn of 2015.

17. As regards non-enforcement powers, the task of the FCCA - as part of the main objective to protect sound and effective economic competition - is also to follow the preparation of rules and regulation concerning the economy and to make initiatives to promote competition or to dismantle restrictive regulation.

18. The above-mentioned advocacy measures focus on public organisations responsible for regulation, and manifest themselves above all in written and oral communications and interaction. Practical advocacy measures include initiative, opinions, stakeholder cooperation and participation in competition-related working groups. The purpose is to prevent the creation of potential problems in advance. The objective is not the dismantling of regulation as such but smart regulation, which refers to regulation that is genuinely necessary, correctly dimensioned and measurable and which has benefits that genuinely exceeds the drawbacks.

19. The FCCA's advocacy task has been provided for in the Act on the Finnish Competition and Consumer Authority (661/2012)⁷ and the Decree on the Finnish Competition and Consumer Authority (728/2012). The Act states that the FCCA shall, among others, to take initiative to promote competition and to dismantle any restrictive regulations or orders, and tend to any other tasks prescribed or ordained to it. The Decree specifies that the FCCA shall monitor and investigate competitive conditions, follow the preparation of economic legislation and give statements about questions related to its field, and take initiatives to promote competition and to dismantle restrictive rules and regulations.

20. As regards the process for conducting competition assessment, the FCCA has published a checklist for the analysis of competition and market impacts (Appendix 1 to the report "Smart regulation - well-functioning markets" published in 2011).⁸ The checklist is in line with the 2009 Guidelines on Impact Assessment by the European Commission, the Competition Checklist by the OECD and the Recommended Practices on Competition Assessment by the ICN Advocacy Working Group. The scope of competition assessment covers both sector-wide and individual policies.

2.2 Challenges

21. The Competition Act applies both to private and public business entities. Also the substantive competitive analysis carried out by the FCCA is similar to both private and public sector business activities. However, as elaborated by the Government Bill, competitive neutrality distortions cannot be adequately addressed by provisions which relate to competitive restrictions. The Government Bill also casts light to other problems identified. The reason for the adoption of the competitive neutrality provisions lies on these problems as well as on the decision practice of the European Commission.⁹

⁷ The Act on the Finnish Competition and Consumer Authority is available in English at <http://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/act-on-the-finnish-competition-and-consumer-authority/>.

⁸ The Finnish Competition Authority Press Release, 'Smart regulation – well-functioning markets', 29 April 2011, available at <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2011-04-29>. An English summary of the report is available at <http://www.kilpailuvirasto.fi/tiedostot/Kilpailukatsaus-2-summary.pdf>.

⁹ See e.g. Case C7/2006 *Finnish Road Enterprise (Tieliikelaitos/Destia)*, 11 December 2007, OJ 2008 L 270/1. The Commission stated in its decision that the existing aid measures for the benefit of Tieliikelaitos (currently Destia) consisting, among others, of inapplicability of bankruptcy legislation and inapplicability of normal corporate income tax, were not compatible with the common market. The Commission stated that these aid measures have to be repealed by 1 March 2008 at the latest in

22. Prior to the adoption of the competitive neutrality provisions, competitive neutrality distortions were mainly addressed by Section 7 of the Competition Act which, equivalent to Article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibits the abuse of a dominant position. The problem with applying Section 7 to competitive neutrality distortions is that a dominant position – which is a prerequisite for the application of Section 7 – can seldom be established for the public business entity. For this reason the abuse of a dominant position will not be assessed. In addition, Section 5 of the Competition Act which, equivalent to Article 101 TFEU, prohibits, among others, agreements between undertakings which fix prices. The problem with applying Section 5 to competitive neutrality distortions is that these distortions mainly constitute unilateral acts that cannot fall within Section 5.

23. It should be noted that even business practices that violate competitive neutrality provisions are conceptually similar to those of competition restrictions pursuant to, for example, Section 7 of the Competition Act, the legal praxis concerning competition restrictions does not necessarily serve as an interpretation guide in the investigation of cases involving competitive neutrality. For example, delivery bans or underpricing cannot be evaluated as a matter of competitive neutrality in the same way as the abuse of a dominant position is evaluated. A procedure for basically examining a case as a matter of competitive neutrality can, however, be evaluated in terms of Competition Act provisions on banning, such as prohibiting the abuse of a dominant position. Competition Act provisions on banning and competitive neutrality could then be applied in the same procedure.

24. As regards other rules that refer to competitive neutrality, the Local Government Act states, for example, that a municipality has the obligation to corporatise business operations, if the said business is practiced competitively on the market. The Government Bill states, however, that the obligation to corporatise is not sufficient to ensure competitive neutrality as a whole. It only removes distortions derived from tax benefits or bankruptcy protection. It should be noted that the FCCA has recently sent a request for information for municipalities on the obligation to corporatise business operations. Replies to the request of information will be sent to Regional State Administrative Agencies which will analyse the replies. Preliminary results of the request are expected to be available in autumn 2015. According to the Government Bill there were 176 unincorporated municipal enterprises in 71 municipalities in 2010.

25. The Government Bill further states that other provisions which support the objectives of competitive neutrality, such as state aid rules, are not sufficient as they do not entail any mechanism for intervention.

26. For the above reasons, among others, it was considered necessary to adopt competitive neutrality provisions as an amendment to the Competition Act.

27. As regards the requirement to maintain separate accounts, it should be noted that if public business entities fall beyond the scope of the Act on Financial Transparency with Certain Undertakings and the Disclosure Obligation (19/2003, as amended by Act 1371/2009)¹⁰ and specific provisions regarding certain sectors of economic activity it is possible that the accounts are not maintained separately. This may pose some major challenges for control, for example, with regard to the identification of cross-subsidisation.

28. As regards cooperation with other authorities, the FCCA and Regional State Administrative Agencies, as stated above, conducted an extensive survey of market conditions in the waste

accordance with the commitment provided by the Finnish Authorities. An amended Act on Unincorporated State Enterprises (1062/2010) entered into force on 1 January 2011. The Act is available in English at <http://www.finlex.fi/fi/laki/kaannokset/2010/en20101062.pdf>.

¹⁰ Unofficial translation of the name of Act 19/2003, as amended by Act 1371/2009. The Act implements Commission Directive 2005/81/EC and Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings.

management industry in 2013–2014. The Nordic competition authorities also examine the state of competition in the waste management market within the scope of a joint Nordic project.

3. Specific issues related to public and private competition enforcement

29. As regards the enforcement of the Competition Act, the FCCA has not encountered any major obstacles in applying legal standards, such as turnover-based rules or control-based rules, to the public entities. It should be noted, however, that competitive neutrality provisions entered into force in September 2013 and that, therefore, there is only limited experience with the application of these provisions. It is possible that challenges which are not yet known may come up later.

30. Section 4a of the Competition Act which contains competitive neutrality provisions does not provide any turnover-based thresholds. Turnover-based rules are provided, for example, in the context of calculating the amount of the fine to be proposed to the Market Court and in the context of calculating the turnover of the parties to a concentration under the merger control provisions.

31. As regards calculating the amount of the fine, Section 13 of the Competition Act states that the amount of the fine is based on an overall assessment, and that in determining the amount, regard shall be given to the nature and extent, the degree of gravity, and the duration of the infringement. The criteria are further explained in the Guidelines on the Assessment of the Amount of the Fine. The starting point for assessing the amount of the fine is the volume (turnover) of the business that is related to the infringement. The amount of the fine shall not exceed 10 per cent of the turnover of an undertaking or association of undertakings concerned during the year in which the undertaking or association of undertakings were last involved in the infringement. The maximum level refers to the worldwide turnover of the legal entity which has committed the infringement. It should be noted that fines are proposed only if the provisions of Sections 5 or 7 of the Competition Act, or Articles 101 or 102 TFEU are infringed. Competitive neutrality distortions are sought to be eliminated through negotiations and if the negotiations do not yield results, the FCCA may issue a prohibition, order or condition to a municipality, association of municipalities or state. However, a penalty payment could be imposed to enforce the prohibition, order or condition.

32. As regards control-based rules, Section 30a of the Competition Act refers to the concept of control by stating that the provision also applies to an entity under the control of a municipality, association of municipalities or state but does not define the concept itself. The Government Bill states that control referred in Section 30a is equivalent to the concept provided in Section 21 of the Competition Act. Section 21 defines the concept by referring to control defined in Chapter 1, Section 5, of the Accounting Act (1336/1997). Section 5 defines control as the majority of voting rights or the power to appoint the majority of the members of the undertaking's governing body or the majority of the individuals who appoint the members of the governing bodies.

33. There are also certain specific issues regarding mergers involving state-owned undertakings. These issues mainly relate to the concept of concentration, the concept of control and the calculation of turnover of the parties to a concentration.¹¹

34. As regards the concept of concentration, the Finnish Merger Guidelines¹² state that in situations where the party acquiring control and the undertaking over which control is acquired are both owned by the same state-owned undertaking, the transaction is usually regarded as internal restructuring if both the acquirer and the undertaking being acquired belong to the same economic unit. However, if the undertakings belong to different economic units which each have independent

¹¹ These issues are in line with the general principles provided in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ 2008 C 95/1.

¹² The Finnish Competition Authority (FCA) Guidelines on Merger Control (the Finnish Merger Guidelines) are available in English at <http://www.kkv.fi/globalassets/kkv-suomi/julkaisut/suuntaviivat/en/guidelines-1-2011-mergers.pdf>.

power of decision, the transaction will be deemed to constitute a concentration under the Competition Act. If both the acquirer and the undertaking being acquired retain independent power of decision after the transaction, the transaction is only regarded as an internal restructuring even if both parties become subject to the control of a single entity, such as a holding company, as a result of the transaction.¹³

35. As regards the concept of control, the Finnish Merger Guidelines state that where a state-owned undertaking exercises its rights as a public authority to provide services of general interest instead of pursuing to influence the business decisions of the undertaking, these rights do not constitute control under the Competition Act except in cases where they are aimed at or can result in the state-owned undertaking acquiring a position where it has decisive influence over the operation of the undertaking.¹⁴

36. As regards the calculation of turnover, the Decree by the State Council on the calculation of turnover of parties to concentration (1011/2011)¹⁵ elaborates the calculation with regard to entities or foundations controlled by public bodies. According to Section 5 of the Decree, any turnover derived from the economic activities of state-owned undertakings and the turnover of undertakings controlled by state-owned undertakings include turnover derived from any other economic activities of the same state-owned undertaking and the turnover of other undertakings controlled by the state-owned undertaking, if the state-owned undertaking in question coordinates economic decision-making between these undertakings.¹⁶

37. According to the Finnish Merger Guidelines, the first essential prerequisite for the turnover derived from the other economic activities of a state-owned undertaking and the turnover of other undertakings controlled by the state-owned undertaking to count towards turnover calculations is that the state-owned undertaking in question actually coordinates the business and competitive behavior of the economic activity or undertaking involved in the merger and its other economic activities or other undertakings under its control. Another factor to be taken into consideration is the question of independent power of decision. For the purposes of calculating the turnovers of undertakings concerned, all of the undertakings and economic activities that form an economic entity that has independent power of decision therefore need to be taken into account, regardless of the way the assets of these undertakings are managed or the applicable rules on administrative oversight.¹⁷

38. As regards other issues related to the enforcement, it could be mentioned that the burden of proof in competitive neutrality distortions lies with the FCCA if it intervenes in the situation. However, the undertaking interfering with neutrality must, pursuant to Section 31 of the Administrative Procedure Act (434/2003)¹⁸, "provide information as to the grounds for his/her demands ... [and] also otherwise contribute to the clarification of a matter filed by him/her." As regards private enforcement, it could be mentioned that if the case is more a matter of a conflict between undertakings than the safeguarding of competition it can be resolved as a civil dispute, such as under the Unfair Business Practices Act (1061/1978).¹⁹

¹³ The Finnish Merger Guidelines, p. 40.

¹⁴ The Finnish Merger Guidelines, p. 41.

¹⁵ The Decree by the State Council on the calculation of turnover of parties to concentration (1011/2011) is available in English at <http://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/decrees-by-the-state-council-on-the-calculation-of-turnover-of-parties-to-concentration-10112011/>.

¹⁶ The Finnish Merger Guidelines, p. 41.

¹⁷ The Finnish Merger Guidelines, p. 41.

¹⁸ The Administrative Procedure Act is available in English at <http://www.finlex.fi/fi/laki/kaannokset/2003/en20030434.pdf>

¹⁹ The Unfair Business Practices Act (amendments up to 461/2002 included) is available in English at <http://www.finlex.fi/fi/laki/kaannokset/1978/en19781061.pdf>.