THE DOMINANCE AND MONOPOLIES REVIEW

Tenth Edition

Editors
Maurits Dolmans, Henry Mostyn and Patrick Todd

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

It seems apt that in the preface to *The Dominance and Monopolies Review*'s 10th edition we confront the existential question facing the law governing unilateral conduct. That is: is *ex post* antitrust enforcement dying out?

Antitrust enthusiasts have three main reasons to be nervous. First, a decade of debate about under-enforcement has resulted in a wave of multi-jurisdictional regulatory initiatives to constrain the behaviour of large digital platforms and open up digital markets to more competition. These proposals vary, but tend to govern conduct that would traditionally have been subject to *ex post* antitrust enforcement. Second, authorities are turning to alternative tools to tackle unilateral conduct, such as market studies. Third, some perceive that authorities face a high evidentiary burden of successfully bringing abuse cases. Put together, these trends could leave a diehard abuse of dominance practitioner in low spirits about antitrust's future, at least in digital markets.

But other developments give cause for hope. Authorities remain adamant that digital regulations will complement rather than replace their existing abuse toolboxes, and that they will continue to investigate conduct that falls outside the scope of new regulation. Agencies, in particular the UK Competition and Markets Authority (CMA), have used their existing enforcement powers nimbly to open investigations and secure commitments from defendant companies quickly. And recent cases affirm that the abuse toolbox is not inflexible, putting into practice the classic mantra that the categories of abuse are not closed. There is space for abuse of dominance rules to be applied flexibly to conduct not previously explored, for example in relation to sustainability, although this raises separate issues regarding certainty for businesses.

As these trends and developments show, the law governing abuses of dominance, and the role it plays in competition policy, are constantly evolving and becoming more complex, bringing new challenges for businesses and practitioners to navigate. To provide some respite, this 10th edition of *The Dominance and Monopolies Review* seeks to provide an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year and sets out a prediction for future developments. From those thoughtful contributions, we identify three main trends, as previewed above.

i Antitrust v. regulation

Over the past year, regulators and legislators have moved from consultation to action, as they have set out competing proposals for regulation to address perceived competition problems caused by concentration in digital markets. Mostly, these proposed regulations cover similar themes, such as prohibiting leveraging and self-preferencing, mandating interoperability and maximising user control over choices online.

Perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), has formulated *ex ante* 'dos and don'ts' for large gatekeeper platforms. The UK has set up a digital markets unit (DMU) to create enforceable conduct requirements for companies with 'strategic market status'. While the legislation giving the DMU necessary enforcement powers has not yet been introduced, the DMU is operating in 'shadow' form to operationalise enforcement of the new regime. The CMA has also conducted two market studies into digital advertising and online platforms and mobile ecosystems to identify activities that should be subject to the regime. In Germany, the German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'paramount cross-market significance' (PCMS). In essence, the law enables the Bundeskartellamt to designate firms as holding PCMS, and then to impose *ex ante* prohibitions on certain defined practices. The Bundeskartellamt adopted its first PCMS decision against Google in 2021, and a second PCMS decision against Meta in 2022. In the US, the American Innovation and Choice Online Act, which would regulate similar conduct as its foreign counterparts, is currently before the US Senate.

It is perhaps understandable that regulators and legislators seek to regulate rather than pursue individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex and require proof that harm has or is likely to occur. As Commissioner Vestager has explained as the motivation for the DMA: 'We need regulation to come in before we have illegal behaviour and to be able to say these are the rules of the game and this is what you must do.'

The DMA will prohibit conduct directly covered by past and current abuse of dominance cases. For example, the DMA's prohibition on self-preferencing targets conduct that was the subject of the Commission's 2017 *Google Shopping* decision, currently on appeal to the CJEU. The DMA's prohibition on gatekeepers using non-publicly available data generated or provided by their business users to compete with those business users would address the conduct challenged in the Commission's ongoing investigations into Amazon and Meta. And the prohibition on gatekeepers requiring business users to use the gatekeeper's own payment service would address conduct alleged in the Commission's ongoing investigation into Apple.

Rules that are set to be enacted in the UK and US are similarly expected to displace antitrust enforcement against digital platforms like Amazon, Meta, Apple and Google. Unlike in the EU, though, these regimes appear to allow companies the opportunity to justify their behaviour, on the grounds of consumer benefits or that alternatives would lead to harm. For example, the CMA recognises that 'conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits', and it has advised that conduct should be exempted under its new regime if it 'is necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings'. Likewise, the new German rules allow a company to justify its practices. That seems a better approach – for competition and consumers – and it is troubling that the DMA does not contain any analogous provision.

How will these new rules affect antitrust enforcement in digital markets? Will abuse of dominance give way completely to *ex ante* regulation?

We think not. As Commissioner Vestager said recently, antitrust and regulation 'are complementary – both will remain necessary. No one should expect the new [DMA] to replace Article 101 and 102 enforcement actions.' There are at least three reasons why there is space for antitrust enforcement to carry on – and expand – when regulation provides additional recourse.

First, though the DMA is broad, it applies to a discrete set of firms (those designated as gatekeepers), products/services (designated as 'core platform services') and practices (set out in the text of the DMA). Forms of conduct that fall between the cracks will therefore have to be addressed by traditional antitrust enforcement. For example, the DMA focuses on consumer-facing digital products and services, and practices involving business-to-business services could potentially slip through the net. The Commission is currently investigating various practices by Microsoft in relation to its collaboration software, Teams, and infrastructure-as-a-service software, Azure, following allegations of unlawful tying, bundling, and denial or degradation of interoperability. The Commission and the CMA also recently announced concurrent investigations into an agreement between Meta and Google (Jedi Blue), alleging that it could distort competition in the online display advertising market. And that's just digital markets. Antitrust enforcement has played, and will continue to play, a role in traditional markets. Recent cases in the EU and UK cover non-digital industries such as pharmaceuticals, electricity trading services and electric vehicle charge points.

Second, at least in the near term, antitrust enforcement remains the only recourse even for conduct that may be covered by forthcoming regulation. The DMA does not come into force until 2024, and UK and US equivalent laws are likely to be further away still. In February 2022, the chair of the House of Lords Communications and Digital Committee wrote to the CMA, urging it to take a 'more robust approach to using [its] existing enforcement powers' given that the 'new legislation could take a significant amount of time to come into force'. By way of reply, in March 2022, the CMA stated that it had 'identified options for taking further action in digital markets under [its] market investigation and competition enforcement tools, ahead of the DMU receiving its powers'.

Third, recent cases showcase the potential for abuse of dominance cases to be opened, investigated and closed quickly, parrying the oft-cited concern that abuse of dominance cases close the stable door after the horse has bolted. In the UK, the CMA opened an investigation into Google's proposal to remove third-party cookies from its Chrome browser, tested two rounds of commitments and closed its case in just over one year. It quickly opened an investigation into exclusivity contracts for electric vehicle charge points on motorways and secured commitments from the parties following a market study.

We therefore expect antitrust cases to continue to play an important role in maintaining competitive markets, even in the digital sector.

ii The evidentiary burden for authorities in abuse of dominance cases

Antitrust law has long suffered from the criticism that the existing abuse toolbox is too unwieldy – and the standard of proof for authorities too high – for necessary antitrust cases to be sustainable, in particular in the US. In its 2020 report on digital markets, for example, the US House of Representative antitrust subcommittee said, 'In the decades since Congress

enacted [the Sherman, Clayton, and FTC Acts], the courts have significantly weakened these laws and made it increasingly difficult for federal antitrust enforcers and private plaintiffs to successfully challenge anticompetitive conduct and mergers'.

In recent years, the perception that antitrust cases are prohibitively hard to bring appears to have subsided as authorities have opened more cases. In 2021 and early 2022, the CMA opened seven new abuse of dominance cases, having not opened any in 2020. The European Commission, for its part, opened six new abuse of dominance investigations, and US authorities have also been relatively active recently, following years of inaction compared with their European counterparts.

The European Commission has been the pioneer of big ticket antitrust cases in the past decade, issuing record-breaking fines to Intel, Google and Qualcomm. In 2022, though, the General Court partially annulled the Commission's 2009 decision imposing a €1.06 billion fine on Intel for abusing its dominant position through the granting of exclusivity-conditioned rebates. The judgment followed an initial General Court judgment in 2014 concluding that exclusivity rebates by dominant undertakings are per se abusive, regardless of the circumstances of the case, and that the Commission did not therefore have to establish that Intel's conduct was capable of restricting competition and there was no need for the General Court to review the Commission's as-efficient competitor (AEC) test. In 2017, the CJEU overturned the General Court's judgment, explaining that, although exclusivity rebates are presumptively unlawful, the presumption is rebuttable if the defendant shows that the conduct is not capable of restricting competition and foreclosing AECs.

In 2022, the General Court rendered a *renvoi* judgment annulling in part the Commission's decision and the fine in full. Applying the CJEU's judgment, the General Court found that the Commission had not established to the requisite legal standard that the rebates were capable of having, or were likely to have, anticompetitive effects. In particular, the Court identified errors in the AEC tests carried out by the Commission and found that the decision failed to properly consider two of the five criteria identified by the Court of Justice to assess rebates' ability to restrict competition, namely their market coverage and duration. Because it was not possible to identify the amount of the fine that related solely to the 'naked restrictions', which in the General Court's view the Commission correctly qualified as per se unlawful, the General Court annulled the entire fine.

The case establishes – at least in respect of exclusionary discounts – that if authorities choose to assess the anticompetitive effects of presumptively unlawful conduct, they must get that assessment right. Officials have claimed that the judgment raises the bar of enforcement to an unacceptably high level. Andreas Mundt, head of the German competition authority, said that the judgment 'might lead to a situation where the law becomes unenforceable because it takes even more time, it gets even more complex'. We disagree. The case establishes a roadmap for authorities to follow and guardrails to operate within when assessing exclusionary discounts. For example, the General Court criticised the Commission for running its AEC analysis in respect of a short time period, then extrapolating its analysis to cover a longer period. That approach is insufficient, which authorities will recognise going forward. Cases like *Microsoft (Windows Media Player)* show that, where the Commission appreciates that an effects-based analysis is required, it can undertake such an analysis and survive judicial review.

iii Expanding the abuse toolbox

Finally, recent EU and UK cases have shown that the abuse toolbox can be applied flexibly to new forms of conduct not previously examined by the courts.

In November 2021, the General Court upheld the Commission's decision finding that Google had committed an abuse by favouring its own comparison shopping service (CSS). The Commission previously found that Google positioned and displayed, in its general search results pages, its own CSS more prominently than competing CSSs. The Commission imposed on Google a fine of €2.42 billion. In the judgment, the General Court largely dismissed Google's appeal against the Commission's decision and confirmed the amount of the fine.

The General Court rejected Google's argument that the Commission should have established the legal conditions for a duty to supply (indispensability and risk of eliminating competition), because the case related to the issue of access to prominent placement on Google's results pages. The General Court accepted that the case is not 'unrelated to the issue of access', but it found the conduct 'can be distinguished in their constituent elements from the refusal to supply'. On that basis, the General Court held that the conduct constituted an 'independent' abuse, separate from a refusal to supply. Accordingly, the Commission was not required to show that the duty to supply conditions were met.It remains to be seen whether this legal test will survive on appeal, but it shows the Commission can apply the existing tools flexibly.

Another case showcasing the elasticity of the abuse toolbox comes from the UK. In October 2021, the Competition Appeal Tribunal (CAT) certified opt-out collective proceedings and rejected a claim for summary dismissal in *Justin Gutmann v. First MTR South Western Trains and Stagecoach South Western Trains*. The proceedings arose out of allegations that certain rail companies failed to use their best endeavours to ensure awareness among their customers of boundary fares (i.e., fares for travel to and from outer boundaries of Transport for London's rail zones) so that customers who took journeys beyond the outer zone covered by their Travelcard would not purchase a fare covering the totality of their journey (thereby paying for parts of their journeys twice). This, the proposed class representative claimed, constituted an exploitative abuse of dominance.

In response to the defendants' claim for strike out, the CAT held that the case on abuse was reasonably arguable. If the charging of unfair and excessive prices, or the use of unfair trading terms, by a dominant company can constitute an abuse, the CAT did not regard it as 'an extraordinary or fanciful proposition to say that for a dominant company to operate an unfair selling system, where the availability of cheaper alternative prices for the same service is not transparent or effectively communicated to customers, may also constitute an abuse'. In doing so, it held that the 'law on what constitutes unfair trading conditions, in particular, is in a state of development'.'

It also referred to the 2019 decision of the German Federal Cartel Office that Facebook had abused its alleged dominance by not giving its users a genuine choice over whether it could engage in unlimited collection of their personal data from non-Facebook accounts as one that was 'challenged as an extension of the boundaries of the law on abuse of dominance'. That case is making its way through the German appellate courts, and is pending the outcome of a preliminary ruling by the CJEU.

These cases remind us that, at least in the EU and UK, the existing abuse of dominance toolbox can be adapted to confront novel abuses (albeit with a high risk of judicial scrutiny). There is, for example, no inherent reason why sustainability could not be incorporated into an abuse of dominance assessment. Analyses of pricing practices could take environmental costs into account: the concept of 'competition on the merits' could include competition on sustainability (and reject competition based on overexploitation of public goods), and there

could be *sui generis* abuses that involve unsustainable business practices that also restrict competition. In addition, conduct that might otherwise be abusive could be excused because of sustainability-based objective justification.

With extensions of the case law, however, come increased uncertainty for businesses planning their practices. *Google Shopping*, for example, extends the law governing the circumstances in which dominant firms will be forced to provide access to a facility to their rivals, without that asset necessarily being indispensable for those rivals to compete.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this 10th edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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June 2022

Chapter 8

FINLAND

Jussi Nieminen and Kiti Karvinen[1]

I INTRODUCTION

The abuse of a dominant position is prohibited under Section 7 of the Competition Act.[2] Furthermore, the concept of dominance is defined in Sections 4(2) and 4a of the Competition Act. The Finnish Competition and Consumer Authority (FCCA)[3] has the authority to investigate competition matters.[4] The FCCA may order a dominant undertaking to terminate an unlawful conduct or resolve a restriction through commitments. The decisions of the FCCA may be appealed to the Market Court and further to the Supreme Administrative Court. The Market Court has the authority to impose fines that have been proposed by the FCCA.

The enforcement procedure in abuse of dominance cases is set out in the Competition Act. The concepts of dominance and abuse thereof are, with minor exceptions, similar to those found in the EU competition rules. When an abuse of dominance may affect trade between EU Member States, the Finnish authorities must also apply the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the interpretation thereof. The FCCA may issue legally non-binding guidelines that are consistent with the guidelines and Block Exemption Regulations of the European Commission.[5] To date, no specific guidelines on abuses of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine[6] and guidelines on prioritisation[7] are relevant to abuse of dominance cases.[8] In addition, the FCCA's brochure on the inspection of business premises is relevant also to abuse of dominance cases.[9]

1 Jussi Nieminen is a partner and Kiti Karvinen is a counsel at Castrén & Snellman Attorneys Ltd.

2 948/2011 as amended. The Competition Act replaced the old Act on Competition Restrictions (480/1992, as amended). The provisions of the Act on Competition Restrictions apply to a large extent to violations that occurred prior to the entry into force of the Competition Act on 1 November 2011.

3 The FCCA has been formed by combining the Finnish Competition Authority and the Finnish Consumer Agency. In this chapter, all references to the FCCA before 2013 shall mean the previous Finnish Competition Authority.

4 Regional state agencies also have limited powers to investigate competition matters and, by mandate of the FCCA, to take measures to promote competition in their region.

5 Government Proposal 88/2010, p. 6.

6 Guidelines on the Application of the Competition Act 3/2011.

7 Guidelines on the Application of the Competition Act 4/2011.

8 In addition, the FCCA has issued guidelines on leniency and guidelines on merger control.

9 Brochure on the inspection of business premises under Section 35 of the Competition Act (2017).

II YEAR IN REVIEW

Based on published data, the FCCA decided not to investigate or not to take an action in all the abuse of dominance cases decided in 2021. All of the investigations were concluded with a decision not to take an action. The prioritisation decisions indicate that the FCCA effectively uses its authority to prioritise matters and directs its resources to investigating the most harmful competition restrictions from a competition policy point of view.

The Market Court or the Supreme Administrative Court did not adjudicate any cases related to abuse of dominance in 2021.

III MARKET DEFINITION AND MARKET POWER

The definitions of relevant product and geographical market correspond to the approach of the European Commission and the European court praxis. It is explicitly stated in legislative materials that the definition of markets is an economic-based factual matter that may be determined by, for example, conducting a market survey.[10] Substitutability of demand is the most decisive factor in the determination of a relevant product market, but supply-side substitutability is also taken into consideration by the FCCA.

Dominant position is defined in Section 4(2) of the Competition Act as follows:

> *A dominant position shall be deemed to be held by one or more undertakings or association of undertakings who, either within the entire country or a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.*

In spite of the specific definition included in the Competition Act, the concept of dominance is interpreted consistently with EU competition law.[11]

However, there is an exception to the determination of dominance concerning the Finnish daily consumer goods market. According to Section 4a of the Act, grocery chains with a market share exceeding 30 per cent in the retailing of daily goods in Finland are considered to hold a dominant market position. The aim of the provision was to improve the functionality of competition on the highly concentrated Finnish retail trade market and to ensure that competitors are not excluded from the market. It is, however, explicitly stated that the objective is not to prevent competition on the merits, but to ensure that companies deal with suppliers and other market actors in a non-discriminatory manner.[12] The FCCA has publicly stated that the provision does not influence the application of the constituent elements of the abuse of dominance. Furthermore, the FCCA has emphasised that the prohibition of the abuse is only targeted at actions that can be distinguished from the competition on merits.[13]

Two or more undertakings may hold a joint dominant position. In the *Automatia* case, the FCCA took the preliminary view that joint venture Automatia and its owner banks had

10 Government Proposal 148/1987, p. 18.
11 Government Proposal 148/1987, p. 18.
12 Government Proposal 197/2012, p. 20.
13 FCCA Newsletter 26 March 2014.

joint dominance in the cash-dispensing market in Finland.[14] The FCCA stated that to hold joint dominance, the companies must, in an economic sense, act as one economic entity on the market. The FCCA did not require the companies to act identically in every situation, but it was fundamental that they were able to act in a similar manner and to a reasonable extent independently from their competitors, customers and consumers. The FCCA's view was also that the joint venture Automatia formed a structural and economic link between the owner banks, since they offered cash withdrawal services to their customers via Automatia. Despite the fact that they made the pricing decisions independently, as a result of this link, they had an incentive to price withdrawals made using auto-teller machines (ATMs) outside the Automatia network in a way that would encourage their customers to use Automatia's ATMs. The case was closed with a commitment decision. In another more recent *Automatia* case, which concerned the real-time payment markets in Finland, the FCCA took a similar preliminary view. In its preliminary assessment, the FCCA stated that Automatia and its owner banks had a structural, economic and ownership-based link and a market position where they could influence the market in a harmful manner and abuse the market power of their joint venture without significantly or immediately losing market shares to competitors. However, this case was also closed with a commitment decision.[15]

IV ABUSE

i Overview

The definition of abuse of dominance included in Section 7 of the Competition Act corresponds almost word for word to the wording of Article 102 of the TFEU. The interpretation of the abuse of dominance is also similar to the application of Article 102.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing refers to a pricing policy in which the dominant company prices its products below costs in the short term to foreclose existing or potential competitors from the market. In its assessment of predatory pricing, the FCCA has referred to the criteria set out in the European Court of Justice *Akzo* judgment.[16]

In *Valio*,[17] the Supreme Administrative Court found that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the fresh milk market. The Supreme Administrative Court upheld the Market Court's decision to impose a €70 million fine on the company and found that Valio had abused its dominant position in the Finnish fresh milk market. A central issue in the case was the calculation of costs and, in particular, the treatment of the price of raw milk paid to the farmers. Valio is a cooperative owned by farmers, and it has undertaken to buy all the raw milk produced by its owners, and,

14 FCCA Decision No. 964/61/2007, *Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj*.

15 FCCA Decision No. 1469/14.00.00/2015, *Automatia Pankkiautomaatit Oy*. On 1 November 2021, the FCCA made a decision following Automatia's application to remove the commitments. The FCCA concluded that the previously identified competition concerns have been resolved as Automatia is no longer owned by the previous owner banks and the commitments are thus no longer required.

16 Decision of the Supreme Administrative Court, KHO:2016:221, *Valio Oy* and Market Court Decision No. 458/12/KR and 36/13/KR, *Valio Oy*.

17 ibid.

therefore, the company disagreed with the view to consider the cost of raw milk as a variable cost. The Court, however, held that the relevant average fresh milk prices of Valio were below the company's average variable costs between 1 March 2010 and 20 December 2012, and that application of such prices generally indicates predatory pricing.

Margin squeeze means that a vertically integrated company weakens the position of a competitor in the end-product market by overpricing an intermediary product. The Market Court has dealt with alleged margin squeeze in several cases concerning subscriber connections in the telecommunications market. In the *Oulun Puhelin*, *Aina Group*, *Kymen Puhelin* and *TeliaSonera Finland* cases, the Market Court imposed fines totalling €220,000 on the companies for the abuse of a dominant position. According to the Market Court and the FCCA, the companies held dominant positions in their respective geographical areas and abused their market positions by favouring their own service providers with regard to the rents they charged for subscriber connections. The price bias made it difficult for competitors to gain access to the market in consumer services provided over subscriber connections, such as broadband and business-to-business services.[18]

The *Lännen Puhelin* case concerned margin squeeze and refusal to supply in the broadband services market. As regards the margin squeeze, the company offered end customers a broadband product based on a different network technology from that of its wholesale product available to competitors. The Supreme Administrative Court upheld the Market Court's decision and considered that, because of the different cost structure of the two technologies, it was not possible to assess whether the company had engaged in margin squeeze.[19] According to the FCCA's report to the Market Court, the prices for the wholesale product had even exceeded the retail prices.[20]

The FCCA has published a memorandum on its evaluation criteria concerning the abuse of dominance in the broadband market. In its memorandum, the FCCA takes the preliminary view that local telecoms operators have dominant positions in their traditional business areas in the markets of subscriber lines as well as the wholesale of broadband services. When assessing the margin between wholesale and retail pricing, the FCCA calculates a weighted average of the monthly gross margin of the asymmetric digital subscriber line (ADSL) connections. If this is negative, the FCCA takes the preliminary view that the pricing fulfils the criteria for an illegal margin squeeze.[21]

Exclusive dealing

In the *Abloy* case, the FCCA assessed, inter alia, whether the marketing support paid by the company to accredited dealers constituted an illegal retroactive target rebate. The FCCA took into consideration that, for about half of the dealers, the support amounted to approximately one-third of their operating income, and was thus highly important and loyalty enhancing. The FCCA considered that the marketing support was non-transparent and its grounds

18 FCCA Proposals to the Market Court No. 950/61/2002, *Oulun Puhelin Oyj*, *Aina Group Oyj*, *Kymen Puhelin Oy*, *TeliaSonera Finland Oyj*, and Market Court Decisions No. 189/07/KR, *Oulun Puhelin Oyj*, No. 356/07/KR, *TeliaSonera Finland Oyj*, No. 355/07/KR, *Kymen Puhelin Oy* and No. 354/KR/07, *Aina Group Oyj*.

19 Supreme Administrative Court Decision No. 2474/2/08 and Market Court Decision 260/04/KR, *Lännen Puhelin Oy*.

20 FCCA Proposal to the Market Court No. 949/61/2002, *Lännen Puhelin Oy*.

21 FCCA Memorandum 3 September 2009.

were unclear. According to the FCCA, this could have had exclusionary effects at least on some individual product groups. Following negotiations, the FCCA decided not to proceed with the case after the company voluntarily amended its discounting system on the basis of FCCA guidance.[22]

Refusal to deal

In *Lännen Puhelin*, the Supreme Administrative Court rejected the FCCA's claim that the company had abused its dominant position by refusing to supply its wholesale ADSL broadband product to its competitors. The Court quoted the *Oscar Bronner*[23] criteria and stated that it was necessary to assess whether the refusal to supply in fact removed all competition from the market. According to the decision, the fact that two competitors had managed to construct their own networks covering a significant area of Lännen Puhelin's network coverage area proved that the refusal had not effectively removed competition.[24]

In the *SNOY* case, the Supreme Administrative Court generally upheld the Market Court's decision and fined Suomen Numeropalvelu (the Finnish number service) €90,000 for refusal to supply in the wholesale market for telephone subscriber information. The company maintained the only nationwide database of telephone subscriber information in Finland and refused to deliver the information to its customer, which offered its services on the internet for free and without registration. Suomen Numeropalvelu justified its refusal by invoking data protection legislation, but this argument was not accepted by the Market Court.[25]

iii Discrimination

In the *Automatia* case, the FCCA considered that the three banks holding joint dominance in the cash distribution market engaged in discriminatory pricing. According to the FCCA, the price difference of withdrawals made from their joint venture's ATMs and withdrawals made from other ATMs was higher than the difference in costs. The FCCA accepted the commitments offered by the banks, through which the companies undertook to price the cash withdrawals in a non-discriminatory manner.[26]

iv Exploitative abuses

There is quite a lot of old Finnish case law concerning excessive pricing, but the assessment in these cases has been somewhat formal, and it is expected that the FCCA will concentrate more on economic effects in its future assessments. This shift to a more economic approach can be seen in the district heating survey. The FCCA assessed the reasonableness of the pricing of district heating companies in a large survey from 2009 to 2011. The FCCA closed its investigations by stating that the average price level of the district heating companies was high compared with the profitability and risk level of their business operations, but it considered that the threshold for intervention required by the Competition Act was not exceeded.[27]

22 FCCA Decision No. 428/V1.6.61/2006, *Abloy Oy*.

23 Case C-7/97, *Oscar Bronner*.

24 Supreme Administrative Court Decision No. 2474/2/08, *Lännen Puhelin Oy*.

25 Market Court Decision No. 1097/61/2003.

26 FCCA Decision 964/61/2007, *Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj*.

27 FCCA press release, 16 January 2012.

V REMEDIES AND SANCTIONS

Following the national implementation of the European ECN+ directive, the powers of the FCCA were expanded as of 24 June 2021. The key amendments in Finland from dominance perspective related to calculation of fines and structural remedies. According to the Competition Act, the FCCA is entitled to impose behavioural remedies, propose structural remedies, determine commitments offered by the undertakings as binding, withdraw the benefit of a block exemption, issue interlocutory injunctions and impose periodic penalty payments. The Market Court has the authority to impose fines and structural remedies proposed by the FCCA for competition restrictions.

i Sanctions

The Market Court may impose a maximum fine of 10 per cent of the concerned undertaking's turnover during the year in which the undertaking was last involved in the infringement. The fine will be imposed unless the conduct is deemed minor or the imposition of the fine is otherwise unjustified in respect of safeguarding competition. It is explicitly stated in the Competition Act that the fine may also be imposed on a company to which the business activity has been transferred. The Market Court shall impose the fine proposed by the FCCA.

In its Fining Guidelines, the FCCA states that the fine needs to generate a sufficient deterrent and general preventive effect.[28]

As of 24 June 2021, the Competition Act has new calculation rules for fines. The amount of the fine is still based on an overall assessment, and attention will be paid to the nature and extent, the degree of gravity and the duration of the infringement. In addition, the Competition Act includes more detailed calculation rules. First, the FCCA calculates the basic amount of the fine, which shall not exceed 30 per cent of the turnover in the sale of the goods related to the infringement during the last calendar year when the infringement took place. The proportion of turnover to be considered in determining the basic amount is based on an overall assessment. The overall assessment may take into account, for example, the nature of the infringement, the geographic scope of the infringement, whether the infringement has taken place in practice and other relevant factors. Secondly, the basic amount is multiplied by the number of years the undertaking has been involved in the infringement. Thirdly, irrespective of the duration of the undertaking's participation in the infringement, in the event of severe infringement, 15 to 25 per cent of the relevant turnover shall be added to the fine. Fourthly, the fine may be decreased or increased to take account of any mitigating or aggravating circumstances. An aggravating factor may be. for example, the repetition of an infringement. A mitigating factor could, for example, be the termination of the infringement immediately after the intervention of the FCCA. Finally, the fine may be increased by a maximum of 100 per cent in the event of a repetition or continuation of the infringement after the FCCA's intervention. The rules for calculating the fines apply only to the FCCA's fine proposal and the courts hold discretion in assessing the amount of the fine.

In *Valio*,[29] the Supreme Administrative Court upheld the Market Court's decision to impose a fine of €70 million on the company for its abuse of dominance. This is the highest fine imposed in dominance cases – and in all competition restriction cases in general – in Finland to date. In the assessment of the fine, the Supreme Administrative Court and Market

28 FCCA Fining Guidelines, p. 6.

29 Decision of the Supreme Administrative Court, KHO:2016:221, *Valio Oy*.

Court took into account, inter alia, the object of Valio's conduct, the notion that Valio's conduct was not in line with the fundamental principles of the internal market and the fact that Valio has previously been the subject of an abuse of dominance decision that included the imposition of a fine on the company.

Furthermore, the FCCA and the Market Court may impose periodic penalty payments to enforce an order, condition, prohibition or obligation issued on the basis of the Competition Act. The Market Court has the authority to order a periodic penalty payment to be paid.

The FCCA may also propose to the Market Court a fine for non-compliance of the procedural rules during the investigation (e.g., breaking the seal, providing misleading information) or non-compliance with interim measures. The maximum amount of the fine is 1 per cent of the concerned undertaking's turnover during the preceding year.

ii Behavioural remedies

If the FCCA considers conduct to amount to an abuse of dominance prohibited in the Competition Act or Article 102 of the TFEU, it may impose behavioural remedies. First, the FCCA can order the undertaking to terminate the prohibited conduct. This was done in the *Valio* case, where the FCCA ordered Valio to cease the alleged predatory pricing of fresh milk and thus, in practice, raise its prices. The Market Court further obliged Valio in its interim decision to comply with the FCCA's order.[30] The FCCA may also oblige an undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. In addition, the FCCA is also entitled to give these orders as interim measures. Furthermore, the FCCA may issue an interlocutory injunction if the application of a competition restraint is deemed to require immediate cessation. After the interlocutory injunction, the FCCA must take a final decision or make a proposal to the Market Court within 60 days. Prior to issuing an interlocutory injunction, the FCCA must hear the undertaking.

iii Structural remedies

As of 24 June 2021, the FCCA may propose also structural remedies to put an end to the prohibited conduct if behavioural remedies are not sufficient to remedy the infringement or in cases where a behavioural remedy is more burdensome than a structural remedy. In a situation where an behavioural remedy and a structural remedy are equally effective in remedying the infringement, a lighter measure shall be chosen from the alternatives. Structural remedies may include, for example, the divestment of a business unit or a stake in a competitor's share capital, or another structural remedy that is proportional to the prohibited conduct and necessary to terminate the prohibited conduct. The Market Court shall impose the structural remedy upon a proposal by the FCCA. The Market Court may impose also behavioural remedy instead of a structural remedy, if that is considered a more appropriate alternative.

30 Market Court Decision No. 36/13/KR, *Valio Oy*.

VI PROCEDURE

The FCCA is responsible for the investigation of competition restraints and the effects thereof as well as for initiating the necessary proceedings to eliminate the harmful market effects of the restraints. The FCCA can begin investigations as a result of complaints by third parties and on its own initiative, as well as at the request of another EU Member State. The FCCA can also conduct sector inquiries, and these may result in the initiation of further proceedings.

In addition to the FCCA, the regional state administrative agencies have the authority to investigate competitive conditions and competition restrictions. Upon the mandate of the FCCA, the agencies are also entitled to take other measures to promote competition within their respective regions.

The FCCA has the right to prioritise its tasks. According to Section 32 of the Competition Act, it shall not investigate a case in the following situations:

a it cannot be deemed likely that an infringement prohibited in Sections 5 or 7 (Articles 101 and 102 of the TFEU, respectively) of the Competition Act exists;

b competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement;

c the complaint in the matter is manifestly unjustified;

d it is unlikely that an operating model or operating structure specified in Section 30a of the Competition Act will have a major impact on the conditions for healthy and functional competition; and

e it cannot be deemed likely that the suspected infringement would significantly impact on conditions for healthy and functional competition.

The prioritisation of cases can also mean that the handling of a case with potential significance and likely anticompetitive objects or effects may be postponed if there are other ongoing investigations with even greater significance.[31]

The FCCA must take the decision to not to investigate a matter without delay. In its Guidelines, the FCCA has set the following non-binding deadlines: one month for closing cases to which Article 32 is clearly applicable; four months for completing a preliminary survey according to which further actions can be determined; and six months for closing non-significant cases, and drafting of investigation plans and determining objective internal deadlines for cases that require further actions.[32] Overall, the FCCA seeks to handle all competition cases within three years.[33] To date, however, more extensive investigations have, in practice, required a longer process.

The undertaking subject to the FCCA's investigation is obliged to submit information to the FCCA or the relevant regional state administrative agency upon request. This obligation covers all documents and other information needed for the investigation of the content, purpose and impact of a restraint on competition and for clarifying the competitive conditions, as well as information necessary to enable the authority to determine whether the undertaking holds a dominant position. In practice, the FCCA usually sends an undertaking a request for information or arranges a meeting with the representatives of the undertaking to gather the information. Furthermore, the FCCA has the right to hear representatives of

31 FCCA's Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 9.

32 FCCA's Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 14.

33 The FCCA's operational and financial plan for 2017 to 2019.

the undertaking in person if it is considered necessary for the investigation and the person may, for a justified reason, be suspected of having acted in the implementation of the restraint on competition.

The FCCA also gathers information by conducting inspections. These inspections may be announced, or they may be dawn raid inspections. In addition to business premises, the FCCA has the right to inspect other premises (e.g., the homes of the management of the undertaking) if reasonable suspicion exists that bookkeeping or other documents relating to the business and the object of the investigation may be held there and if these documents may have relevance in proving a reasonable suspicion of Section 7 of the Competition Act or Article 102 of the TFEU. However, the FCCA must seek advance permission from the Market Court to conduct an inspection outside the business premises, and the Market Court may prohibit the inspection if it considers it arbitrary or excessive. The Competition Act allows the FCCA to make working copies of the investigated material and continue the investigation later in its own premises. The investigative powers of the FCCA will apply irrespective of the storage medium, which means that mobile phones and tablets used for private purposes may also be subject to inspection. Although unannounced inspections are usually conducted in cartel investigations, the FCCA has conducted several dawn raids in abuse of dominance investigations during recent years. The rights of the FCCA to carry out inspections of companies that have outsourced their information management to a third party were added to the Competition Act in 2015. After this amendment, the FCCA has had the right to request information directly from the third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information. In 2017, the FCCA published a brochure on the inspection of business premises under Section 35 of the Competition Act.

The rights of defence of an undertaking subject to proceedings, including the right to be informed about an ongoing investigation, the right to receive information and the right to be heard, are set out in the Competition Act.

Prior to making a final decision or a proposal to the Market Court, the FCCA will issue a confidential draft decision to the undertaking under investigation. The undertaking has the right to respond to the draft decision, and it may request an informal meeting with the FCCA to present its opinion on the draft decision. A decision[34] may be appealed to the Market Court and further to the Supreme Administrative Court. A decision of the Market Court concerning the imposition of fines may be appealed to the Supreme Administrative Court.

A case can also be resolved through a commitment decision. The FCCA may accept the commitments offered by an undertaking as binding if the commitments are such that the restrictive nature of the conduct can be eliminated. Before making the decision, the FCCA may consult the market participants. If an underlying fact significantly changes, the undertaking infringes the commitments, or the decision has been based on insufficient, false or misleading information, the FCCA may reinitiate proceedings.

34 A proposal to the Market Court to impose a fine is not considered an administrative decision of the FCCA.

VII PRIVATE ENFORCEMENT

The Finnish competition law regime is twofold: in addition to administrative enforcement, it contains rules for private enforcement according to which a private litigant can have an unlawful agreement declared null and void, and damage that occurred from the violation compensated.

Section 8 of the Competition Act provides that an unlawful agreement cannot be applied or implemented (i.e., the agreement or part thereof is null and void by law). The provision applies only *inter partes* and cannot be invoked by third parties.

Actions for damages based on an infringement of competition law are covered by the Act on Actions for Antitrust Damages,[35] which entered into force on 26 December 2016.[36]

Section 2 of the Act provides the right for damages to anyone who has suffered damage from an infringement regardless of whether the relationship is contractual or non-contractual. The liability to compensate the damage is joint and several. Joint and several liability of immunity recipients and small and medium-sized enterprises is, however, limited.

Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions.[37] A class action can only be brought by the Consumer Ombudsman and, to date, the Consumer Ombudsman has not brought any class actions for competition law damages. In the *Asphalt cartel* and *Raw wood* cases, however, which involved numerous plaintiffs, practices that resemble those of collective actions were adopted. In these cases, the court joined the separate actions of each of the claimants to proceed together, thus entailing procedural and cost benefits.

An action for damages can be brought either as a stand-alone or a follow-on case in arbitration or in a general court. In general, a claimant's burden of proof is easier to meet in a follow-on case than in a stand-alone case. As of 26 December 2016, a final administrative decision concerning an infringement of competition law has a binding effect on the civil court.

On 18 June 2019, the District Court of Helsinki ordered competition damages of approximately €8 million in total with penalty interest to be paid by the Finnish dairy company Valio Oy to two small local dairies.[38] The case concerned follow-on competition damages relating to the decision of the Supreme Administrative Court of Finland in December 2016 regarding abuse of dominance in the Finnish fresh milk market during 2010–2012. According to the District Court of Helsinki, Valio's predatory intent could be directly based on the decision of the Supreme Administrative Court as the principle of efficiency could be breached if the claimants would have to give evidence on Valio's predatory intent in a follow-on competition damages case. However, the District Court of Helsinki found the claimants' damages claims too extensive and rejected the claimants' claim from the part that regarded the lost opportunity interest. The District Court was also of the view that the penalty interest is usually sufficient for covering additional financing costs, if any, of the damaged party. The parties did not appeal against the decision and, thus, the judgment is final.

35 1077/2016. The Act implements the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

36 If the infringement occurred prior to 26 December 2016, the repealed Section 20 of the Competition Act or other applicable laws apply to the right for damages and liability thereof.

37 444/2007.

38 Decision of the District Court of Helsinki, L14/54043 and L14/54056, 19 June 2019.

In Finland, only single damages can be awarded, and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation covers both direct and indirect economic damage, inter alia, compensation of costs, price difference or lost profits.[39] Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

The burden of proof is reversed with respect to cartels; a cartel is expected to have caused damage unless proven otherwise by the defendant. Unlike in cartel damages cases, there is no legal assumption of damage in Finland in cases concerning the abuse of dominance, and the claimant bears the burden of proof of damage.[40] There is no single way of calculating the damage, but in recent case law related to cartel damages, competition economics and extensive economic evidence on the financial effects of the infringement have been utilised. The court has the power to assess the quantum of damage if the claimant has proven the damage suffered, but evidence of the amount cannot be presented or can be presented only with difficulty.

Furthermore, there must be a causal link between the harm suffered and the violation of the competition law. The claimant must prove that the damage has resulted from the competition law infringement, and not from the market conditions or general market structure. In addition, liability for damage also requires that the occurrence of the damage as a consequence of the violating act was foreseeable by the undertaking at the time the act was made. This means that there is no liability for indirect damage or consequential loss.[41] Contributory negligence on the part of the injured party may also have a significant effect on the liability.

According to Chapter 21 of the Code of Judicial Procedure, the party that loses the case is liable for all reasonable costs incurred by the necessary measures of the opposing party.

According to Section 10 of the Act on Actions for Antitrust Damages, the right to claim compensation expires if the action has not been instituted within five years of the date when a claimant has become aware, or should have become aware, of the infringement, the damage and the party responsible. The five-year limitation period is, however, suspended for the duration of an investigation by the competition authorities, until one year has elapsed from the issuance of a binding decision, as well as for the duration of settlement negotiations. The right to damages is not, however, time-barred if proceedings are brought within one year of the issuance of a binding decision, or within 10 years of the day of infringement of the competition law or the end of a continued infringement.

VIII FUTURE DEVELOPMENTS

According to the operational and financial agreement between the Ministry of Employment and Economy and the FCCA, the FCCA's focus for the next four years will be, inter alia, strengthening the competitiveness of the domestic market. The current EU competition policy and its national implementation has already strengthened the powers of the FCCA, as

39 See Government Proposal 83/2016.

40 See the judgment in *Qvist v. John Crane Safematic*, where the district court found the abuse of dominance but dismissed the claim because the claimant failed to prove the damage. The Appeal Court later overruled the judgment of the district court.

41 Government Proposal 88/2010, p. 66.

well as the national competition policy. It is also noted that, for example, the ever-growing market powers of tech giants underline the need for an integrated competition and consumer policy within EU.[42]

The review of abuse of dominance cases is likely to give more weight to economic-based assessments in the future, which can already be seen in the *OP Financial Group* case resolved in February 2019.[43]

The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the *Asphalt cartel* case and the *Raw wood* case, as well as through the Act on Actions for Antitrust Damages.

42 The operational and financial agreement for 2022 to 2025 between the Ministry of Employment and Economy and the FCCA, pp. 1–2.

43 FCCA Decision No. 015/KKV14.00.00/2015, *OP Financial Group*.

Appendix 1

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