The Dominance and Monopolies Review

Third Edition

Editor
Maurits Dolmans

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As this new edition of *The Dominance and Monopolies Review* will show, several of the trends that were apparent in the previous few years have continued – except that commitment decisions in Europe seem to be falling out of favour and the Commission is returning to more old-fashioned punitive enforcement. Most obvious perhaps is the ongoing disruption of traditional sectors of the economy by the emergence of digital services and online distribution. This has led to a series of cases and pending investigations in various jurisdictions involving online and IT firms, including companies as diverse as Amazon (Germany, India); HRS (Germany); Booking.com (Germany, France); Expedia (Germany); Intel (EU); Motorola (EU); Samsung (EU); Google (EU, Brazil, Canada, India); PMU (France); Vente-privee.com (France); OnlinePizza Norden (Sweden); Snapdeal and Flipkart (India); Qualcomm (China, EU, Korea, Taiwan, US); IDC (China); and Tencent (China).¹

Two trends in this context deserve special attention. The first is the threatened re-emergence of form-based analysis, at the expense of the economic analysis of dominance and foreclosure effect in abuse cases; the second is the ongoing politicisation of the competition process.

The first trend is perhaps the most surprising and disappointing. When the Commission adopted its decision in *Intel* in 2009, it followed in part its own guidance as set out in the notice on the application of Article 102 of the TFEU² by including a

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¹ The editor and his firm are involved in various cases discussed in this preface and chapters, but none of the comments are made on behalf, or at the request, of any client, and none bind any client or the firm.

detailed analysis of the restrictive effects of Intel’s discounts. ³ Although there is debate about the finding of facts in the case, the Commission at least tried to demonstrate actual foreclosure of equally efficient competitors. On appeal, however, the General Court of the European Union held that this was unnecessary, because the rebates in question were ‘by their very nature’ abusive. ⁴ There was no need to review the exclusionary effects, the Court held, or to apply an ‘equally efficient competitor’ test.

The court thus threw cold water on the hopes of the antitrust community that the court would apply a ‘more economic approach’. It can be argued that the judgment was no surprise since exclusivity discounts had always been considered an abuse, or that it was not as bad as it sounded since the judgment was still based on economic theories. It is true, for instance, that where it can be shown that a customer’s full demand is contestable, the judgment can be distinguished on the facts because the dominant firm does not leverage market power. ⁵ Moreover, as pointed out in the EU chapter of this book, the court stated that the ‘as-efficient competitor’ test is still relevant for non-conditional pricing practices. Finally, we still have the Post Danmark case, where the court held that Article 102 does not ‘seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market […]. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient.’ ⁶

Even that scant comfort, however, is now under threat. The recent opinion of the Advocate-General in Post Danmark II, which came out in May 2015, includes unhelpful statements.⁷ Advocate-General Kokotte rejects arguments that the ‘as-efficient competitor’ test should be applied, fulminating not only against the test, but against ‘expensive economic analyses’ more generally and the ‘disproportionate use of the resources of the competition authorities and the courts’.⁸ The Advocate-General also opines that there is no need for foreclosure to exceed any de minimis threshold,⁹ leaving open the question of why competition law should be applied to conduct that cannot be shown to have had much of an effect at all on competition. Perhaps she was impressed by the thought that the case involved retroactive discounts, leveraging a non-contestable share of 70 per cent protected by a statutory monopoly. It is to be hoped that this kind of thinking is applied only where ‘the abusive nature is immediately shown’ (i.e., in the

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³ Case COMP/C-3/37.990 Intel, Commission decision of 13 May 2009, paragraphs 1,002 to 1,577.
⁵ See various articles in the first issue of the Competition Law & Policy Debate, 2015/1 CLPD.
⁸ Ibid., paragraphs 66–73.
⁹ Ibid., paragraph 85-94.
case of clear per se abuses) but recent developments in pending EU cases are worrying – with the Commission issuing a statement of objections in the Google case for supposed foreclosure in product comparison services in spite of the dynamic nature of that sector and the great success of competitors such as Amazon, eBay and others in the shopping sector, which dwarf Google’s shopping service.

The chapter on US developments contains a similarly troubling case. In a judgment concerning an exclusive dealing policy of a pipe-fitting manufacturer – admittedly, under Section 5 of the Federal Trade Commission (FTC) Act – the US Court of Appeals for the Eleventh Circuit in April 2015 affirmed the FTC’s decision that the conduct was illegal because: ‘[t]he governing Supreme Court precedent speaks not of “clear evidence” or definitive proof of anticompetitive harm, but of “probable effect”.

Perhaps surprisingly, the chapter on China shows a spark of hope for economists. It discusses the case of Qihoo 360 v. Tencent, following Qihoo 360’s accusing Tencent of abusive practices in instant messaging. The Supreme Court of China conducted a careful analysis, including a review of economic factors. It held that while the usage share of Tencent’s instant messaging services was above 80 per cent, it nonetheless could not be found dominant in the market for instant messaging services. It took into account that in a two-sided market for free services, Tencent had no power over price, and had to keep innovating in order to counter dynamic competition, in a market where users engaged in multi-homing and could switch if the quality of Tencent’s service deteriorated relative to that of its rivals. Qihoo 360 v. Tencent is rightly branded a landmark case and an example for other authorities and courts to consider.

As to the second trend, politicians’ attempts to influence competition cases are not new, of course. But 2014 saw a worrying intensification, at least at the European level. The French and German governments, for instance, at the instigation of national publishers and others, have put private and public pressure on the European Commission to pursue new and unprecedented theories of harm in the IT sector. They are targeting in particular what is called the ‘GAFA’, an acronym for some of the main non-EU online service companies, demanding extraordinary remedies including trade secret disclosures and structural measures. They solicited support from the

10 Ibid., paragraph 75.
11 Other such examples can be found in Germany and Brazil: Verband Deutscher Wetterdienstleister eV v. Google, Reference No. 408 HKO 36/13, Rechtbank Hamburg, 11 April 2013; Buscape v. Google, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).
13 ‘Projet de loi pour la croissance, l’activité et l’égalité des chances économiques (EINX1426821L)’; see: www.legifrance.gouv.fr/affichLoiPreparation.do;jsessionid=E1BDCC
European Parliament, which went as far as adopting a resolution requesting the break-up of an internet company based outside the EEA for alleged abuse of dominance, without any investigation (let alone proper review) of facts, law, or economics. The notion of ‘punishment before trial’ may be amusing as literary entertainment, but is profoundly troubling when coming from a European institution. Nor is the European Parliament alone in Brussels in raising questions. A commissioner was reported making statements in a pending case suggesting that complaints are ‘well-founded’ before a statement of objections was even sent. He is said to have stated: ‘We [Europe] need two to three global players. This applies to software, and hardware and all of these [online sectors].’ ‘If you look at America, which is comparable in size, or Korea, Japan, China, they have very strong powers and we need that too.’ On another occasion, he is quoted saying that ‘The European Union should regulate internet platforms in a way that allows a new generation of European operators to overtake the dominant US players’ and the goal was to ‘replace today’s web search engines, operating systems and social networks’. Such statements could be understood not only to prejudge the outcome, but also to suggest protectionist objectives.

Competition Commissioner Vestager wisely tried to calm the waters, and the President of the European Commission appears to be aware of the risks. Nonetheless, every Commissioner has a vote in competition cases. Article 41 of the Charter of
Fundamental Rights of the European Union therefore requires every Commissioner, and the College as a whole, to handle proceedings impartially. Thus, before a Commissioner reaches a conclusion, she or he should examine every element and each piece of evidence with an open mind, and reserve judgment until all rights of defence have been exhausted. Even the appearance of pre-judgment should be avoided. And ‘it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence’.

Statements that appear to prejudge the outcome of the case, or even prejudge elements of a decision such as whether a defendant has a ‘de facto monopoly’ before the firm has been fully heard, undermine the credibility of the law, the process and the European Commission itself. A legitimate question arises whether a Commissioner in such a situation should not be recused from the decision-making, to avoid the appearance of bias. The Hon Justice Barling (now a chairman of the UK Competition Appeals Tribunal) recently set an example of integrity when he recused himself in Sky v. Ofcom merely on the ground that he had given a thoughtful speech on a relevant topic after the case had been decided by the CAT, and before it was remitted back to the CAT by the Court of Appeal. He stated, appropriately, that ‘my own view of whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context’.

Questions about appearance of pre-judgment are even more sensitive when, as in the European Commission, the team that investigates the defendant is also the one conducting the hearing, briefing the College of Commissioners, and writing the decision. The requirement of impartiality encompasses not only ‘subjective

21 Article 41(1)(a) of the CFR guarantees ‘the right of every person to be heard, before any individual measure which would affect him or her adversely is taken’. Under Article 6(1) of the TFEU, the CFR ‘shall have the same legal value as the Treaties’.

22 See, e.g., ECtHR, Appl. No. 22330/05, Olujić v. Croatia, 5 February 2009, paragraph 63 (‘in respect of the question of objective impartiality even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done”).

23 See, e.g., ECtHR Appl. No. 58442/00, Lavents v. Latvia, 28 November 2002, paragraphs 118–121; and ECtHR Appl. No. 22330/05, Olujić v. Croatia, 5 February 2009, paragraphs 61–68.


26 Ibid., paragraph 83.

27 See, e.g., R v. Gough [1993] UKHL 1 (Lord Goff) (‘But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was
impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice’ but also ‘objective impartiality, insofar as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned’.\textsuperscript{28} Even with the best of intentions, and recognising the excellence and intellectual integrity of many Commission officials, is it humanly possible for a team that has spent one or two years intensely investigating and prosecuting a case, to avoid the risk of unconsciously interpreting and screening information in a way that confirms their beliefs or hypotheses? Where investigation, hearing and decision are prepared by the same team, there is a serious risk of confirmation bias.\textsuperscript{29} Reinforcing this concern is the longstanding, but still surprising, fact that the College of Commissioners does not read the parties’ briefs and does not attend oral hearings. Not even the Commissioner for Competition participates. In other words, the decision is prepared by a Commissioner (and is adopted by a College) without direct personal knowledge of the facts and the proceedings, based on hearsay, set out in internal documents and summaries to which the parties have no access, and that are prepared by a team that has acted as detective and prosecutor. As the OECD warned, ‘[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique’.\textsuperscript{30} Incidental internal procedures, such as devil’s advocate teams and peer review panels, are useful, but are only stopgaps. In light of the quasi-criminal nature of EU infringements proceedings, under Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms,\textsuperscript{31} the proper solution would be to separate the investigative team from the team that prepares the Commission decision, which should include the Commissioner, and for the latter team to review the statement of objections and the response, as well as to attend the oral hearing. There is no chance that this will happen in the coming year, but it is hoped that the discussion on this topic will finally be taken seriously.

I would like to thank my colleagues Nicholas Levy and Andris Rimsa for their thoughts, as well as all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this third edition of The Dominance and Monopolies Review. I look forward to seeing what evolutions 2015

\textsuperscript{29} See, e.g., RS Nickerson, ‘Confirmation bias: A Ubiquitous Phenomenon in Many Guises’ (1998) 2 Review of General Psychology 175–220 (‘the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand’).
holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in Intel and Post Danmark II (conditional pricing) and the European Commission decision in Gazprom and Google, the Qualcomm investigations in various countries, and the US authorities' reviews of practices of patent assertion entities and privateers, which are also directly relevant for the EEA and other jurisdictions.

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London
June 2015
I INTRODUCTION

The abuse of a dominant position is prohibited in Section 7 of the Competition Act. Furthermore, the concept of dominance is defined in Sections 4(2) and 4a of the Competition Act. The Finnish Competition and Consumer Authority (FCCA) has the authority to investigate competition matters. The FCCA may order the dominant undertaking to terminate the unlawful conduct or resolve the 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 concept of dominance and abuse thereof are, with minor exceptions, similar to EU competition rules. When the 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 Union.

1 Anna Kuusniemi-Laine is a partner, Salla Mäntykangas-Saarinen is a counsel and Kiti Karvinen is an associate 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 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.
Commission. To date, no specific guidelines on the abuse of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine and guidelines on prioritisation are relevant to abuse of dominance cases.

II YEAR IN REVIEW

Based on the published decisions, the FCCA made a decision not to investigate or not to take an action in every abuse of dominance case in 2014. The 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. Furthermore, the FCCA is prepared to resolve matters through discussion and voluntary actions of undertakings, as shown in Abloy, where the FCCA decided not to proceed after the company had voluntarily amended its discount system on the basis of guidance given by the FCCA. In 2014, it similarly took into account in Itella the company’s notice to voluntarily amend its pricing practices.

The administrative courts adjudicated only one case related to abuse of dominance in 2014. In Valio, the Market Court found that Valio had abused its dominant position by engaging in predatory pricing in the production and wholesale market of fresh milk and imposed on Valio a fine of €70 million proposed by the FCCA. Valio appealed the Market Court decision to the Supreme Administrative Court in summer 2014.

In 2014, a government proposal was made on an amendment to Section 37 of the Competition Act concerning the inspection procedures of the FCCA. The amendment, which entered into force on 1 March 2015, gives the FCCA the right to request necessary information directly from third-party service providers to which companies subject to inspection have outsourced information management.

Competition law enforcement in Finland in 2014 was characterised by three major cases, all of which were pending at the time of writing. In public enforcement, the Market Court imposed a fine of €70 million on Valio, which is so far the highest imposed for abuse of a dominant position in Finland. In private enforcement, the Helsinki District Court and the Helsinki Court of Appeal proceeded with two extensive damages cases, the Asphalt Cartel case and the Raw Wood case. Although the facts of the damages cases involve cartel behaviour, the decisions are expected to clarify many legal uncertainties concerning, for example, the grounds of action, standard of proof, the

7 In addition, the FCCA has issued guidelines on leniency and guidelines on merger control.
8 FCCA Decision No. 428/V1.6.61/2006, Abloy Oy.
10 Market Court Decision No. 458/12/KR and 36/13/KR, Valio Oy. The appeal is pending before the Supreme Administrative Court.
calculation of damages and causality issues that also arise in damages claims based on abuse of dominance.

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 the legislative materials that the definition of markets is an economic-based factual matter that may be determined by, for example, conducting a market survey.\(^\text{13}\) 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:

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

Despite of the specific definition included in the Competition Act, the concept of dominance is interpreted consistently with the EU competition law.\(^\text{14}\)

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.\(^\text{15}\) 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.\(^\text{16}\)

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 member banks had joint dominance in the cash-dispensing market in Finland.\(^\text{17}\) The FCCA stated that to hold joint dominance, the companies must, in an economic sense, act


\(^{15}\) Government Proposal 197/2012, p. 20.

\(^{16}\) FCCA Newsletter 26 March 2014.


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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 member 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.

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

Predatory 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 (ECJ) Akzo judgment. 18 In Valio,19 the Market Court considered that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the production and wholesale market of fresh milk. The Market Court upheld the FCCA’s order for Valio to cease the violation and imposed a €70 million fine on the company. The Market Court found that Valio held a dominant position in the Finnish fresh milk market and that the company had made a strategic decision to foreclose competition by trying to force its competitor Arla Ingman, part of Arla Foods, from the market by dropping its wholesale prices for fresh milk below costs. A central issue in the case is 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, therefore, the company disagrees with the Market Court’s and FCCA’s decision to consider the cost of raw milk as a variable cost. Valio appealed the decision to the Supreme Administrative Court in summer 2014.

Margin squeeze

Margin squeeze means that a vertically integrated company weakens the position of a competitor in the end-product market by overpricing an intermediary product.

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19 Ibid.
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. 20

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. 21 According to the FCCA’s report to the Market Court, the prices for the wholesale product had even exceeded the retail prices. 22

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 ADSL connections. If this is negative, the FCCA takes the preliminary view that the pricing fulfils the criteria for an illegal margin squeeze. 23

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 were unclear. According to the FCCA, this could have had exclusionary effects at least on some individual product groups. Following

21 Supreme Administrative Court Decision No. 2474/2/08 and Market Court Decision 260/04/KR, Lännen Puhelin Oy.
23 FCCA Memorandum 3 September 2009.
negotiations, the FCCA decided not to proceed with the case after the company voluntarily amended its discounting system on the basis of FCCA guidance.24

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 Bronner25 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.26

In the SNOY case, the Supreme Administrative Court generally upheld the Market Court’s decision and fined Suomen Numeropalvelu (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.27

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.28

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 to be 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 in 2009–2011. The FCCA closed its investigations by stating that the average price level of the district heating companies were high compared with the profitability and risk level.

25 Case C-7/97, Oscar Bronner.
26 Supreme Administrative Court Decision No. 2474/2/08 Lännen Puhelin Oy.
of the business operations, but it considered that the threshold for intervention required by the Competition Act was not exceeded.  

V REMEDIES AND SANCTIONS

According to the Competition Act, the FCCA is entitled to impose behavioural 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 proposed by the FCCA for competition restrictions.

i Sanctions

The Market Court may impose a maximum fine of 10 per cent of the undertaking concerned’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. The amount of the fine is 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 *Valio*, the Market Court imposed 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 Market Court took into account, *inter alia*, the alleged exclusionary 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.

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

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30 FCCA Fining Guidelines, p. 6.
31 Market Court Decision No. 458/12/KR and 36/13/KR, *Valio Oy*. 
of fresh milk and thus, in practice, raise its prices. The Market Court further obliged Valio in its interim decision 32 to comply with the FCCA’s order. Second, the FCCA may oblige the undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. 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 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
Unlike the Commission, the Finnish competition authorities do not have the authority to impose structural remedies.

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. 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:

\[\begin{align*}
  a & \text{ it cannot be deemed likely that an infringement prohibited in Sections 5 or 7 (Articles 101 and 102 of the TFEU, respectively) of the Competition Act exists;} \\
  b & \text{ competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; and} \\
  c & \text{ the complaint in the matter is manifestly unjustified.}
\end{align*}\]

The prioritisation of cases can also mean that the handling of a case with potential significance and likely anti-competitive objects or effects may be postponed if there are other ongoing investigations with even greater significance. 33

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 (1) closing non-significant cases and (2) drafting of investigation plans and

32 Market Court Decision No. 36/13/KR, Valio Oy.
33 FCCA’s Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 9.
determining objective internal deadlines for cases that require further actions. Overall, the FCCA seeks to handle all competition cases within three years. 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 the 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 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 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 related to the business and the object of the investigation may be held there and if these documents may have relevance in proving a serious violation 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. 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 have been added to the Competition Act in 2015. After this amendment, the FCCA also has the right to request information directly from such third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information.

The rights of defence of the undertaking subject to proceedings, including the right to be informed about the on-going 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 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.

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35 The FCCA’s operational and financial plan for 2015–2018.
The 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. 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 re-initiate proceedings.

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 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.

Section 20 of the Act provides a specific damages provision, according to which an undertaking or association of undertakings that, intentionally or negligently, violates competition law is obliged to compensate the damage caused by the competition restriction. The damages can be adjusted if considered unreasonable taking into account the financial and other circumstances. The right of action is available to anyone who has suffered damage from the infringement regardless of whether the relationship is contractual or non-contractual. However, if the competition law violation was carried out before 1 November 2011, an action for damages is available only to undertakings and non-undertakings must bring an action on the basis of the Act on Damages or on contractual liability. Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions. 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 pending Asphalt Cartel and Raw Wood cases, however, which involve numerous plaintiffs, practices that resemble those of collective actions have been adopted. In these cases the court has 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. Except for the follow-on cases related to abuse of dominance that are currently pending before the general courts, there have not been many follow-on cases related to the abuse of dominance in Finland and, so far, all cases have been withdrawn; instead, abuse of dominance is more often invoked as grounds for action in contractual disputes. In general, the claimant’s burden of proof is easier to meet in a follow-on case than in a stand-alone case. Although not bound by the decision of the

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36 See Section 12a of the old Act on Competition Restrictions (480/1992, as amended).
FCCA or the administrative court, the general court is likely to accept the final decision as adequate proof of an infringement or lack thereof. 39

In Finland, only single damages can be awarded and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation under Section 20 of the Competition Act covers both direct and indirect economic damage, *inter alia*, compensation of costs, price difference or lost profits. 40 Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

There is no legal assumption of damage in Finland, and the claimant bears the burden of proof of damage. 41 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 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. 42 Also, contributory negligence on the part of the injured party may 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 20 of the Competition Act, the right to claim compensation expires if the action has not been instituted within 10 years of the date the infringement occurred, or when the continuous infringement ended. The limitation period does not, however, expire until one year has passed from the date of the final decision of the FCCA or the administrative court. Different limitation periods apply, however, to actions for damages resulting from competition law violations carried out before 1 November 2011.

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39 See, for example, judgment of the District Court of Imatra, *Vuoksen Paperituote Oy/Stora Enso Oyj*, L04/597, 19 January 2007, where the court gave significant weight to the FCA's decision concluding non-existence of dominance and abuse thereof, and dismissed the claim, as sufficient evidence had not been presented to reverse the FCA's conclusion.


41 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.

VIII FUTURE DEVELOPMENTS

The FCCA has indicated that it will focus on removing structural restraints of competition and on discriminating and binding practices aimed at foreclosing competitors from the market.\(^{43}\) The FCCA foresees that the number of cases with exclusionary effects may increase because of the current fragile economic situation resulting in under-utilisation of capacity and low demand.\(^{44}\) The shift of focus on exclusionary practices has already been seen in the recent case law of the FCCA where the authority has been most concerned with conduct involving margin squeeze, predatory pricing, refusals to deal and restrictive rebates. The FCCA has also stated that it will promote competition on the highly concentrated grocery sector with special attention to be paid to issues such as access to sales data by the suppliers and customer loyalty programmes.\(^{45}\) The review of abuse of dominance cases is likely to give more weight to economic-based assessment in the future.

It is likely that the Supreme Administrative Court will give its judgment in the Valio case by the end of 2015, since the appeal was submitted in summer 2014. Once final, the decision will clarify the evaluation of costs underlying predatory pricing. The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the Asphalt Cartel case and Raw Wood case, as well as through legislative amendments to be made in line with the EU Directive on competition law damages, adopted in 2014.

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43 The operational agreement for 2014 between the Ministry of Employment and Economy and the FCCA, p. 1.
44 The operational and financial plan of the FCCA for 2016–2019, p. 1.
45 The operational agreement for 2014 between Ministry of Employment and Economy and the FCCA, p. 2.
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