



Aalto University
School of Business

What has happened in Finnish competition law since our last meeting in Stockholm?

Petri Kuoppamäki, LL.D, Professor of Business Law

Nordic Competition Researcher Network Meeting in Oslo,
17 November, 2017

Topics

- Recent case law
- New Legislation
- Legislative proposals

Abuse of Dominance – Valio case

- By a decision issued of 26 December 2016, the Supreme Administrative Court upheld the earlier decision of the Market Court from 2014 that had imposed to Valio a €70 million fine for abuse of dominant position in the production and wholesale market of fresh milk.
- Valio engaged in *predatory pricing* in order to remove effective competition from Arla in the fresh milk market in Finland.

Decision of the Supreme Administrative Court

- Violation of Section 7 and Article 102
- Product market: fresh milk
- Geographic market: Finland
- Proof of predatory pricing
 - Prices below average variable cost/average incremental cost and
 - Proof of predatory intent (internal emails etc.)
 - Compare e.g. AKZO Chemie

Asphalt case - Helsinki Court of Appeals Damage Award, 20 October 2016

- The capital sum of the damages awarded was EUR 24 million. The interest based on rate of return and penal interest added considerably (ca. 40 %) to the amount of damages awarded, with the total sum around EUR 40 million.
- The court found that the local authorities mostly had been overcharged by ca. 13%
- Direct evidence vs. econometrics
- The case was for many parts settled after the Court of Appeals decision

Asphalt case – limited leave of Appeal by the Supreme Court

- The leave to appeal granted to Vantaa concerns the application of the principle of economic continuity in the context of antitrust damages and the question whether Skanska Asfaltti Oy, NCC Industry Oy and Asfalttimix Oy are liable for the alleged overcharge caused to Vantaa on the basis of **economic succession** (by way of business acquisitions) the companies originally involved in the asphalt cartel. Compare EU case law on fines.
- The leave to appeal granted to Lemminkäinen concerns the actions for damages brought by the Cities of Mikkeli and Rovaniemi and deals with the question whether joint and several liability should cease to apply in a situation where the claimant's claim has become time-barred against several of the other cartelists. If the Supreme Court's answer to the question would be positive, Lemminkäinen would not be **jointly and severally liable for the overcharge** caused to the Cities of Mikkeli and Rovaniemi, but its liability would be limited to its own share of the overcharge caused to these claimants.

Other follow on damage cases

- The *car spare parts case* concerned a boycott. The case was dismissed by the district court for a lack of proof regarding the damage and causality. It is now pending in district court. The case was dismissed by both the Helsinki District Court and Helsinki Court of Appeals due to lack of causality.
- The *timber cartel case* has several hundred plaintiffs. The claims have been dismissed by the Helsinki District Court partly due to lack of proof as to the damage and partly due to the limitation periods (Supreme Court 2016). The case is pending in Helsinki Court of Appeals.

New law on antitrust damages

- New act on compensation of damages related to infringement of competition law came into force on December 26, 2016
 - Implementation of the EU damages directive
 - Minimum implementation
 - Transition periods will keep the old damage provisions “alive” for years to come...
 - Other civil law ground remain unaffected
 - Contractual damages, unjust enrichment, nullity
-

Public procurement and Taxi services

- Law package on new EU public procurement directives
 - Affiliated purchases: a 5 % threshold (the directive allows 20 %)
 - Special sector rules (etc. disabled people, healthcare sector)
 - FCCA became the enforcement authority for public cases with a specific focus on avoidance of public tendering
- Liberalisation of taxi services has been adopted by the Parliament
 - Lifting the limitations on the number of taxi licenses available and price regulation
 - Part of wider liberalisation on transport services

FCCAs new role in Public Procurement

- Finnish Competition and Consumer Authority (FCCA) will supervise adherence to the public procurement act, with a particular focus on **illegal direct procurement**
- The FCCA may issue reminders to procurement units if it observes unlawful conduct, and, in the case of illegal direct procurement, may prohibit the implementation of a procurement decision. The agency may also propose that the Market Court impose sanctions, such as penalty payments, shortening of the contract, or the annulment of a procurement decision.
- In its first decision of of April 21, 2017 FCCA draw the attention of Central Ostrobothnia's joint municipal authority dealing with social welfare and health care matters (Soite) with regard to the objectives and implementation of principles referred to in the Act on Public Contracts. FCCA's view is that owing to the weighting of the **comparison criteria**, probably only one provider has a realistic chance of winning. This is why there probably will be no competition, and one supplier can in practice set the price for its services as it wishes. The comparison criteria in the call for bids may lead to a situation in which competition enabled by the market situation is not in fact utilised in the tender process between the actors in the market.

New Legislation – Finnish Health care reform (SOTE)

- Third draft of the Finnish Health care reform (SOTE) is currently under preparation
 - Freedom of choice
 - Transfer of health care duties from municipalities to 18 Regions with regional elections
 - Two previous versions failed due to constitutional concerns
- Competition neutrality (State Aid, *La Poste*)
- Specific "abuse" provision"
- Low-threshold healthcare merger rules

New Legislation – Finnish Health care reform (SOTE)

- On 15 June 2017, the Finnish Government issued a bill to amend the current Finnish Competition Act. The government bill contains a legislative proposal that would affect the Finnish Competition Act in the field of social welfare and health care. A merger control is proposed to apply temporarily to practically all social welfare and health care related corporate transactions in Finland. The amendment to the Competition Act is intended to enter into force without delay and would remain valid until 31 December 2018.
- The government bill proposes that a new section be added to the Finnish Competition Act, under which the Finnish merger control will apply to all social welfare and health care related corporate transactions where at least one of the parties provides social welfare and health care services or imaging or laboratory services in Finland. However, the new section will not be applied to corporate transactions where
 - all of the parties are self-employed persons;
 - all of the parties operate under the same private clinic or under the same company or group of companies operating in the field of social welfare and health care;
 - there are two parties to the transaction, and one of the parties is a company that sells the services of at most five doctors or other professionals in the field of social welfare and health care;
 - the target of the acquisition, the merging company or foundation, or the established joint venture is not operating in the field of social welfare and health care or does not provide imaging or laboratory services in Finland.
- The Finnish Competition and Consumer Authority's time limit for processing the notifications is proposed to be extended from one month to 45 business days in social welfare and health care transactions only.
- What will be the practical effect under SIEC test?

New Legislation – Finnish Health care reform (SOTE)

- In addition to the fixed-term notification obligation, the working group also proposed a permanent change to the turnover thresholds regarding undertakings active in the field of social and healthcare services. According to the proposal, a merger is notifiable to the FCCA when at least two of the parties to the transaction produce social or healthcare services, or medical laboratory or medical imaging services on the Finnish markets, and their combined turnover exceeds €20 million or the turnover in Finland for each of at least two of the parties exceeds €2 million.
- The FCCA could also for special reasons demand a notification to be submitted in situations where the turnover thresholds are not exceeded, but the turnover of each of at least two parties exceeds €1 million and fewer than six months have passed from the completion of the transaction. Under these conditions, the parties would also have an option to voluntarily notify the transaction. These provisions are proposed to enter into force in early 2019, but the timing depends on the timing of the larger social and healthcare reform that is presently unclear and has been postponed several times.
- Further, the special provision which empowered the FCCA to intervene in a concentration in the electricity distribution industry if the parties' combined distributed 400 volt electricity exceeds 25% based on national levels was removed from the Competition Act on May 1 2017.

Competition law under preparation

- A legislative working group was set up in summer 2015 to discuss and resolve
 - the "agriculture problem" – no changes proposed
 - procedural issues – e.g. fines, electronic discovery
 - Break up of companies
- The new law proposals are awaited by the end of March, 2018

Summary

- Overall modest public enforcement levels, more active private enforcement
- One big abuse of dominance case, Valio decided with a 70 million fine from Supreme Administrative Court
- The private enforcement has been a big theme
 - Court of Appeals decisions in Asphalt cases with ca. 40 million awarded to cartel victims
- A new law on competition damages enacted
- Liberalisation of Taxi services
- Health care reform

Thank you! Tack!

Petri Kuoppamäki

Professor of Business Law, LL.D

Aalto University, Business School

Runeberginkatu 22-24, Helsinki

PO Box 21220, FI-00076 AALTO

+358-40-7540003

petri.kuoppamaki@aalto.fi