



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**DAF/COMP/WP3/WD(2010)33
For Official Use**

Working Party No. 3 on Co-operation and Enforcement

**PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT
PROCEEDINGS**

-- Finland --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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JT03284496

1. In the enforcement proceedings of Finnish competition rules, the principles of procedural fairness are implemented in the FCA's administrative proceedings on the one hand, and in the legal proceedings of the Market Court and Supreme Administrative Court on the other. In what follows, a brief introduction to the decision-making and jurisdictional issues in the Finnish competition law system:

1. Prohibitions of restrictive practices (101 and 102 TFEU and their counterparts in the national competition Act)

2. The provisions of the national Competition Act shall be applied when a competition restriction does not have an effect on the trade between the EU member States. The national prohibitions of restrictive practices correspond to the prohibitions in the TFEU.

3. The FCA shall investigate competition restrictions and take action when it detects a violation thereof. The measures within the FCA's powers include making an infringement fine proposal to the Market Court; ordering the termination of restrictive conduct; imposing an obligation to deliver a product or a service on an undertaking (to enforce the latter two, the FCA may impose a conditional fine); ordering that the commitments provided by an undertaking shall be binding if they are such that they may eliminate the restrictive nature of a conduct (cf. the implementing provision of EU competition rules 1/2003 Art. 5); imposing an interim injunction. In addition, the FCA has decision-making powers relating to the leniency system.

4. An administrative sanction by nature, a competition infringement fine for a breach of the prohibitions of restrictive practices shall be imposed by the Market Court on the proposal of the FCA. It should be noted that a competition infringement fine cannot be imposed in response to a claim by a third party.

2. Merger control

5. The mergers fulfilling the criteria specified in the Competition Act shall be notified to the FCA prior to the closing of a deal. For the present, mergers are assessed according to a so-called dominance test. The FCA shall approve the merger if the threshold for intervention is not exceeded. If the threshold is exceeded, the FCA shall negotiate with the parties, whether the competition problem may be removed by imposing conditions on its implementation. The FCA is empowered to order that the parties adhere to their commitments.

6. If the commitments by the undertakings are not sufficient to solve the competition problem, the FCA shall make a proposal to the Market Court to prohibit the deal. The deal may only be prohibited on the FCA's proposal, not for example based on a competitor's appeal.

7. The sanctions for implementing a merger without the FCA's approval or against set conditions shall be imposed by the Market Court on the FCA's proposal.

3. Appeal

8. The FCA's decisions can be appealed to the Market Court. Under the general rule of Article 6 of the Administrative Judicial Procedure Act, any person to whom a decision is addressed or whose right, obligation or interest is directly affected may appeal against the decision. Under the general rule of Article 5 of the Administrative Judicial Procedure Act, any measure by which a case has been resolved or dismissed may be challenged by an appeal. For example, the FCA's decision whereby a case is closed (e.g. no evidence of a competition restraint, a matter of minor importance) or a restriction ordered to be dissolved may be appealed. The decision to propose a competition infringement fine cannot be separately appealed, because the proposal will bring the matter before the Court in any case.

9. A decision by the Market Court may be appealed to the Supreme Administrative Court.

10. In merger cases, the appealability of the decision and the right of appeal are determined on the basis of the above-mentioned principles of administrative law. It should be mentioned that in merger cases, the issues which have brought about litigation include the question of whether those who have provided commitments may appeal the decision whereby the FCA has ordered the commitments to be followed, and whether a competitor can appeal a decision whereby the FCA has approved a case.

4. Decision-making process at the FCA

11. In a competition restraints case, whether it be own-initiative or based on a complaint, the unit under whose branch of industry the matter falls, as specified in the rules of procedure, shall be responsible for the handling of the case. The head of unit shall assign a team to the case, and the team shall be led by a head of research. S/he shall assign the responsible case-handler(s). In bigger cases, such a straightforward approach does not work, and the case-handlers and the head of research will be assigned irrespective of units so as that to secure the best possible expertise for the investigation, analysis and trial of the case.

12. Within six months, after a preliminary investigation of the case, matters of major importance shall be brought before the management board. In addition to the management board, experts in economic analysis and experts of the specific market and competition restraint shall participate in the discussion – the aim is thus to have the best possible expertise available to assess the need for further measures and the related strategy and tactics. During the investigations, the matter may again be brought before the management board, but prior to final decision-making the management board review shall be carried out at any rate in cases in which fines, an injunction or an obligation is imposed as well as in merger cases which are either approved conditionally or prohibited.

13. In major cases (incl. merger decisions, leniency decisions, infringement fine proposals), the decisions shall be made by the FCA's Director General on the presentation of the responsible case-handler. The management board review described above preceding final decision-making acts as vehicle for the Director General to ensure that the different viewpoints will be taken into consideration in the decision-making.

14. Prior to decision-making, the parties affected by the competition restraints shall be heard (usually in the form of a draft decision) and given the opportunity to get acquainted with the case materials (usually copies of the materials). In the final decision, the main arguments of the parties and the possible counter-arguments of the FCA shall be presented. The FCA's management can observe all the case-materials in FCA's the electronic case management system.

15. In addition to the above-mentioned factors, one aspect of procedural fairness is the content of the envisaged decision. According to the Finnish Administrative Judicial Procedure Act, the decision shall clearly indicate the parties whom the decision immediately concerns, the contents of the decision (the matter that has been decided and means thereof), the reasons for the decision and the provisions applied. A failure to supply these elements may lead to an annulment of the decision or the matter may be decided anew.

16. To summarize, the guarantee for the legal protection of the FCA's administrative enforcement proceedings is provided by the provisions concerning the administrative proceedings on the one hand, the right to appeal the FCA's decisions, and the position of the court as a first-instance decision-maker in the imposition of a penalty payment and the prohibition of a merger, on the other hand.

5. Decision-making process before the Market Court

17. The Market Court is a special court subordinate to the Ministry of Justice hearing competition, consumer and public procurement cases, cases relating to the energy market legislation and some market law cases.

18. The Market Court contains both legally qualified members and part-time expert members appointed by the State Council. In regular competition issues, the court has a quorum in a composition containing three legally qualified members and one to three expert members. The expert members are appointed by the Chief Judge for each case according to the Decree of the Ministry of Justice and the rules of procedures of the Market Court.

19. The hearing of cases at the Market Court is public; however, the business and professional secrets of the undertakings are protected under the Act on the Publicity of Court Proceedings.

20. Prior to the hearing of a case, a Market Court judge shall prepare the matter. When a case is being prepared, the interested parties are e.g. provided with an opportunity to respond orally or in writing, and the undertaking affected by the competition restriction may also be heard. Otherwise the proceedings at the Market Court are governed by the Administrative Judicial Procedure Act, which contains provisions e.g. on the conduct of proceedings in the case, the hearing of witnesses, the indemnification of witness costs and the casting of vote if the members of the court are divided.

21. A ruling by the Market Court may be further appealed to the Supreme Administrative Court.

6. Confidentiality

22. The party whose right, interest or obligation in a matter is concerned shall have the right of access to a document obtained, received or made by the relevant authority. Provisions to this effect are contained in the Act on the Openness of Government Activities pertaining to all branches of government. According to the provisions, the authority who has received a request for access to a document shall be obliged to grant it within two weeks from the receipt of the request. Refusal to grant access shall be made by a written decision which is appealable to a general court hearing administrative issues. Wide access to documents, in particular with reference to interested parties, naturally leads to situations in which the promotion of transparency, rights of defence, protection of privacy and the interests involved in investigating a competition restriction are in conflict:

6.1 Timing of right of access

23. In the decision on the access to file by interested parties relating to the documents of the timber cartel (12.4.2006), the Supreme Administrative Court approved the concept of "privacy of the investigation", according to which the agency was not obligated to submit the leniency documents to another suspect before the agency's investigations had come to an end. The access to a file by the interested party is hence possible only after it may be granted without jeopardising the investigation.

6.2 Protecting confidentiality

24. The FCA will not turn over any documents to an interested party if its disclosure would be contrary to a very important public interest (e.g. jeopardising the investigation, identification data of persons or undertakings who have given statements if they wish to keep them secret) or if they contain business or professional secrets or are otherwise confidential under the Act on the Openness of Government Activities. However, the interested party may have the right of access to information considered a business secret if it forms part of the grounds of the case or may affect it. Information

obtained on the basis of the status of an interested party shall not be used for any other purpose than to defend oneself in the pending matter and it cannot be disclosed. A punishment for a violation of this prohibition is prescribed in the Criminal Code of Finland.

25. The Finnish law does not provide on a procedure whereby confidential information could be surrendered e.g. to attorneys so as to prevent them from disclosing the information to a client.

26. The principles relating to the protection of confidentiality change to some extent when the matter is brought before the court. The absolute principle is that the defendant shall be granted access to the trial documents which the FCA has delivered to the court and refers to in support of its claims, and the defendant shall have the right to express any comments on it. For example, during its own proceedings, the FCA may protect the identity of those giving statements or of other third parties, but when it uses these statements as evidence in court, the judicial custom has been that the FCA shall also disclose the identity of those giving statements.

6.3 *Defining a business secret*

27. The complainant and the defendant are asked to indicate any business secrets in the documents submitted by them and, where necessary, to deliver such a version of the document which can be accessed by the general public (where necessary, they shall also deliver such a version which can be accessed by interested parties). The procedure often leads to oversized claims of secrecy, which may harm the possibility of the opponents to acquaint themselves with the matter. The FCA shall then request that the claim for confidentiality be justified and make the final decision as to the business secrets in the documents at its own liability. The decision may be appealed to the administrative court, and the FCA will not disclose the document prior to a final judgement. The important point is that the authority (or a court) shall ultimately decide what is a business secret and in doing so is subject to public liability. It should be noted that making a complaint will not provide the complainant with the status of an interested party who would gain access to documents only available to interested parties. The complaint cannot hence be used successfully as a vehicle to pry into the business secrets of an undertaking.

6.4 *Information on pending matters*

28. At least for now the FCA does not actively inform the public e.g. on its web pages of pending matters, although this is likely to be the case in the future. Whereas in matters involving major undertakings and major competition restrictions the FCA may provide information at an early stage (social interest to provide information). In such a case, the FCA will only submit a minimum amount of information and will not take issue with the alleged guilt of an undertaking; instead, it stresses that investigations are underway. Additionally, an early press release usually describes the FCA's suspicions and the general provisions which have possibly been breached. Indicative information will be given on further proceedings in the case. Particularly if inspections have been made into major corporations (which usually becomes public at any rate) providing such preliminary information will be important to avoid speculations and to provide correct and uniform information to the markets.

6.5 *Sanctions for disclosing confidential information*

29. The breach of official secrecy is provided for in Chapter 40, section 5 of the Criminal Code of Finland. The penal scale for a negligent breach of official secrecy is fine or imprisonment for at most six months. The sanction for an intentional breach of official secrecy is fine or imprisonment for at most two years, in addition to which a public official may also be sentenced to dismissal.

7. Requests for information to targets of investigations

30. Under the Competition Act, a business undertaking shall provide the FCA with all the information and documents needed for the investigation of the content, purpose and impact of a competition restriction (or a merger) and clarifying the competitive conditions. The undertaking shall respond to such a request and a conditional fine may be attached to the request to enforce the fulfilment thereof.

31. The content of the request for information varies considerably depending on the nature of the matter, its investigatory phase and the FCA's needs for information. In addition, the content of the request for information is affected by the FCA's assumption as to which information the undertaking may possess and what it can produce without unreasonable complications (this will be assessed from the viewpoint of the undertaking's resources and the investigatory interest).

32. It should be pointed out that addressing requests for information to undertakings is official activity and civil servants do it subject to public liability, in which the principles of legality, specific purpose for the activities and proportionality shall be adhered to. Therefore there is no separate procedure known by the Finnish law with which to investigate whether the agency's activity has been appropriate but an order given by an authority within its powers shall be followed. However, compliance with the above-mentioned principles shall be supervised by the FCA's superiors and failure to comply with them may lead to a complaint to the authority overseeing the legality of the decisions and actions of the Government (the Parliamentary Ombudsman or the relevant Ministry) and disciplinary measures under the legislation concerning state officials. On the other hand, if these principles have been violated in the request for action, the FCA cannot effectively force the undertaking to submit information, because the Market Court would be unlikely to order that the conditional fine imposed by the FCA be paid.

33. In the administrative procedure, however, information will be sought to be provided on the competition problem which has led to the request for information and (depending on the case) an attempt will be made to act more or less flexibly in cooperation with the undertaking:

- Often prior to sending a request for information, the customs of the trade, the activities of the undertaking and the facts needed for the investigation of the restriction will be discussed with the undertaking in order to formulate the request for information in such a way that the undertaking understands which information is requested from it and may deliver the information within reason.
- As a rule, extra time may be granted to the undertakings for issuing a clarification.
- As a rule, attached to the request for information will be a clarification of the reasons for the request and the suspected competition restriction under investigation, and a reference to the provisions of the law on which the obligation to provide information is based.
- The request for information will contain the contact information of the civil servant who handles the case and supplies additional information.
- The FCA may arrange (and does arrange in practice) meetings with the undertakings that are the object of a request for information, if problems arise in fulfilling the request for action.

34. The provisions of the Competition Act do not make a distinction between whether the target of the request for information is an interested party or a third party. However, the above-mentioned proportionality principle changes the situation to some extent. Firstly, the complainant shall provide an

account of the grounds for the request for action, i.e. the FCA will request that the undertaking provide an account of all the facts available and known to it which attest to a breach of the prohibition of restrictive practice, before a clarification in the matter is requested of the suspected undertaking (in major restrictions, this may differ). A minimum amount of administrative obligations will be imposed on third parties, and the requests for information will be sought to be directed to interested parties as a rule. However, in addressing the requests for information attention will be sought to be paid to the undertakings from which the retrieval of information will cause the least amount of trouble.

8. Agreed resolution of enforcement proceedings

35. There is no such settlement procedure used in Finland which has e.g. been adopted by the EU by Commission Regulation No 622/2008. The need for such an instrument was explored in 2009 by the working group considering the need to reform the Competition Act, but the procedure was not found necessary and the implementation thereof was found to contain problems of principle relating to procedural law.

36. The FCA may accept commitments provided by the undertakings and order that they are binding on the undertakings if the commitments are sufficient to remove the restrictive nature of a practice. The procedure corresponds to the one prescribed in Articles 5 and 9 of the EU implementing regulation 1/2003. The FCA does not actively seek such commitments from the undertakings but the initiative lies with the undertakings themselves.

9. Judicial Review

37. The FCA's decisions may be appealed to the Supreme Administrative Court. On the other hand, as has been described above, the FCA cannot impose a fine itself or prohibit a merger, but the first instance decision-maker in these matters is the court (Market Court), which shall consider the validity of the FCA's claim.