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

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Topics

- Recent cases
- Antitrust Damages
- Amendments to the Finnish Competition Act
- Deregulation and competition law

Recent cases

EPS insulation cartel case

- The Finnish Competition and Consumer Authority (FCCA) proposed (18.12.2018) that the Market Court impose a total of over four million euros in penalty payments on ThermiSol Oy and UK-Muovi Oy for prohibited cooperation between competitors in the EPS insulation market in Finland. The cartel raised the price level of EPS insulation and restricted competition between the companies. Styroplast Oy, which participated in the cartel, was granted immunity from the penalty payments because it was the first to contact the Authority and provide information on the cartel.

Collecting Societies /Teosto

- On December 18, 2018 FCCA reached a commitment decision concerning the Finnish Composers' Copyright Society Teosto regarding the terms and conditions of the organisation's membership agreement..
- Teosto manages copyrights of music authors and publishers. A key part of Teosto's operations is to grant music users licenses to publicly perform, distribute and record music, and to pay royalties from those licenses to the authors and publishers. Teosto's right to sign these contracts on behalf of individual authors and publishers is based on authorisation agreements.

Collecting Societies /Teosto (2)

- Since the establishment of the organisation, the membership agreement signed by Teosto's author and publisher clients has included a condition according to which the economic rights to all of the client's works are assigned exclusively to Teosto. Due to this condition, Teosto's clients have only been able to grant licenses to the use of their own music in specific situations. Teosto's clients have also not been able to transfer the copyrights to a single piece of music to parties such as their employers or clients.
- In June 2017, the membership agreement was amended to correspond to the requirements of the Finnish Act on Collective Management of Copyright which entered into force the same year. In the new membership agreement, the rights exclusively assigned to Teosto were categorised into five categories of rights, which are performing, radio and television, internet, copying and synchronizing. Music authors and publishers were offered the opportunity to withdraw categories of rights from Teosto's management and the right to directly grant licenses for non-commercial of their music.

Collecting Societies / Teosto (3)

- In November 2017, the FCCA presented to Teosto its preliminary assessment on the competition effects of the new membership agreement's terms and conditions. According to the FCCA's preliminary assessment, the exclusivity clause could not be considered to be "absolutely necessary" to safeguard the rights and interests of individual authors and publishers. Even though termination of the membership agreement by right category is currently possible, the right categories have been defined so that they include licensing areas that apply not only to collective management but also to direct licensing. Partial termination also applies to the entire repertoire of the right holder in question.
- Teosto committed to amend its membership agreement so that in the future clients will be able to withdraw individual works from Teosto's management and grant licenses to individual pieces of music on a case-by-case basis by notifying Teosto in writing – subject to certain conditions mentioned in the commitment decision publicly available on the FCCA's webpage. This means that Teosto's clients no longer have to withdraw entire categories of rights or terminate the entire membership agreement in order to grant their customers or partners direct licenses to their own works. However, Teosto's clients and users of music will be able to continue to utilise Teosto's management services and licensing products when they find it appropriate. As such availability of broad categories lowers transaction costs.

Merger Terveystalo/Attendo (1)

- On 14 December 2018, the FCCA approved Terveystalo Healthcare Oy's acquisition of Attendo Terveyspalvelut Oy. The FCCA has concluded that the acquisition will not significantly impede effective competition in the Finnish market.
- Terveystalo is a nationwide healthcare service group that provides services to individuals, businesses, insurance companies and the public sector. Terveystalo Healthcare Oy is a wholly owned subsidiary of Terveystalo Oyj, the parent company of the Terveystalo Group. Attendo Terveyspalvelut Oy is part of the social and healthcare services group Attendo, the parent company of which has its domicile in Sweden. The healthcare services of Attendo Suomi consist mostly of human resources services, basic healthcare, occupational healthcare, oral healthcare and comprehensive outsourcing services provided to the public sector.

Merger Terveystalo/Attendo (2)

- The FCCA initiated an in-depth investigation to assess the acquisition on 16 July 2018. Based on the FCCA's preliminary investigation, the acquisition may have adverse effects on competition in the Finnish healthcare service market. In October 2018, the Market Court extended the time limit for the FCCA's Phase II investigation until 14 December 2018. The extension was required due to the health and social services reform in Finland and the uncertainties related to the reform. As the health and social services reform will, upon its implementation, greatly change the Finnish health and social services market, the FCCA has assessed the effects of the acquisition both in the market situation preceding the reform and the freedom of choice market following the reform.
- According to the FCCA's investigation, although both parties to the acquisition operate in the healthcare service market, Attendo and Terveystalo provide different services for different customer groups in the market situation preceding the health and social services reform. Terveystalo is focused on providing occupational healthcare services for corporate customers through its extensive network of clinics. Terveystalo also has a strong position as a provider of specialist medical care services for the public sector. Attendo, in contrast, is specialised in providing primary healthcare services for the public sector.

Merger Terveystalo/Attendo (3)

- The companies had overlapping operations mainly in the market for the outsourcing of public sector health services. According to the FCCA's investigation, however, Terveystalo's operations have been minor, especially in extensive outsourcing cases, and it has only put limited competitive pressure on Attendo. Attendo's main competitors in this market are market leader Pihlajalinna and Mehiläinen. According to the FCCA's investigation, the acquisition will therefore not significantly impede effective competition in the outsourcing of public sector healthcare services.
- In its assessment of the competition effects of the acquisition in the market after the health and social services reform, the FCCA could not base its investigation on the methods normally used for acquisitions and mergers between competitors, such as the examination of market shares and the proximity of competition between the parties, as the market does not yet exist. Instead, the FCCA's assessment was based on a view of how competition will function in the freedom of choice market as well as the available information on where the different operators' clinics may in future be located across Finland. The FCCA's investigations did not indicate that the acquisition would significantly impede effective competition even in the freedom of choice market.

Antitrust Damages

Antitrust damages – Referral to the CJEU by the Supreme Court

- In the **Asphalt case** damages of ca. 40 million were ordered (13 % overcharge) we granted
- The leave to appeal granted to concerning the application of the principle of economic continuity in the context of antitrust damages and the question whether certain asphalt companies are liable for the alleged overcharge caused to Vantaa on the basis of **economic succession of damage liability** by way of business acquisitions) the companies originally involved in the asphalt cartel.
- Compare EU case law on economic succession of fines.
- An oral hearing by the ECJ was held by the CJEU in Luxembourg in January 2019.
- In the **Timber case** all claims have been rejected by the Court of Appeals due to lack of sufficient proof (appeal pending)
- Direct and econometric evidence; future effect of the new law?

Amendments to the Finnish Competition Act

Pending changes to the Finnish Competition Act (1)

- **Section 35:** FCCA has the right to continue its inspection of gathered data at its own premises. Such continued inspections can be conducted by making a data copy while leaving the original data at the hands of the undertaking under investigation in order to minimise disturbance to the undertaking. In addition, while continuing the inspection at the FCCA's premises, the representative of the undertaking under investigation has the right to be present during the inspection. The right to make copies for continued inspection covers both inspections made at the premises of the undertaking as well as inspections made at other premises pursuant to Section 36.
- **Section 37:** amendment to the wording “irrespective of the medium” in order to clarify that the FCCA has the right to access any books and other records related to the undertaking under investigation, irrespective of the medium in which they are stored. This means that the FCCA can search, for example, employees' mobile phones, which the Authority has previously been unable to do.

Pending changes to the Finnish Competition Act (2)

- **Competition neutrality**: new Section 30 d stating that public undertakings and other undertakings under control of public authorities must maintain separate accounts for economic activities they pursue in competition with other undertakings. Public undertakings have this obligation only when engaging in economic activities. The purpose of this provision is to prevent the emergence of competition neutrality problems by requiring more prudence by public undertakings when acting in a competitive environment.
- **Merger control**: processing times have been modified in such a way that during phase I, the FCCA will have 23 working days to investigate the effect of the merger on competition. During phase II, the FCCA would have 69 working days and the Market Court can extend it with 46 working days by application.

Deregulation and competition law

Deregulation of Taxi Services

- Liberalisation of taxi services came into force on July 1, 2018
 - Lifting the limitations on the number of taxi licenses available and price regulation
 - Part of wider liberalisation on transport services
 - FCCA's guidance regarding application of competition law in the new situation
 - According to public information, cases relating calling centers are pending before the FCCA

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
 - Capitation
- Competition neutrality (State Aid, *La Poste*): To notify or not to notify, that is the question...
- Specific "abuse" provision" ? Competition neutrality?
- Low-threshold healthcare merger rules?

Thank you! Tack!

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