Regulatory Reform in Finland

The Role of Competition Policy in Regulatory Reform

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LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Finland. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Finland* published in 2003. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Finland. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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SUMMARY OF THE CHAPTER

Competition policy should be integrated into the general policy framework for regulation. Competition policy is central to regulatory reform, because its principles and analysis provide a benchmark for assessing the quality of economic and social regulations, as well as motivate the application of the laws that protect competition. This chapter addresses two basic questions: First, is Finland's conception of competition policy, which depends on its own history and culture, adequate to support pro-competitive reform? Second, are the competition laws and enforcement structures sufficient to prevent or correct collusion, monopoly, and unfair practices?

A cohesive political-economic culture supported strikingly broad market-based reforms in the 1980s and 1990s. Finland was among the first countries to open its telecoms and electric power sectors to competitive entry and pricing, while liberalising much of transport and even typically difficult sectors such as professional services. Market competition, along with the challenge to succeed in integration with EU was the theme of a long-term reform programme. Attention is now turning to how market principles could improve the efficiency of delivering public services.

Competition policy and institutions have evolved with the national experience over the last 50 years. The enforcement agency, which has been under the same leadership for 14 years, is stable and respected, with a long record of policy advocacy. Enforcement action requires decisions by an independent tribunal, now the recently reconstituted Market Court. The courts' role in shaping enforcement policy is important. Effective action against horizontal restraints may be undermined by the courts' unwillingness, so far, to impose serious sanctions against them.

Competition policy foundations

Finland debated the shape of its competition policy for more than 30 years, before making it a centrepiece of wide-ranging economic reforms in the late 1980s. Price controls, which had been the principal means of dealing with marketplace abuses, remained in place until 1988. High concentration in some sectors was to be expected, because of Finland's small size and isolation from other markets. Cartels were tolerated, in part because of uncertainty about what it would mean to eliminate them. From 1958 to 1998, Finland's competition statute was revised 6 times, with most of the changes intended to make it stronger. These changes in the law often lagged behind changes in the policy that was actually being applied. Since the late 1980s, Finland has followed an economics-based competition policy, as part of a general shift from collective corporatism to a more individualist market order.

Finland's recent economic success is rooted in its traditions of independence, adaptability, and community. These traits were no doubt fostered and necessitated by the country's geographic isolation and linguistic distinctiveness. By contrast to its strong tradition of social solidarity—and perhaps made possible by that solidarity—Finland has no tradition of a strong central state. For centuries, the structure of the central state was in Sweden and then in Russia. During that time, Finland was becoming skilful in adaptation and differentiation within its own system of governance. These skills were evident in the 19th century, when Finland maintained a relatively liberal political structure and economy while still within the Russian sphere of influence. Some of those 19th century adaptations foreshadowed distinctive modern reforms. Finland was one of the first to liberalise its national infrastructure monopolies at the end of the 20th century, but that step was facilitated by a hundred-year history of competition in those industries. In telecoms, Finland had deliberately encouraged development of a non-integrated industry from the outset, in part to make it a less attractive target for a Russian takeover, so that by the 1930s Finland had 800 local phone companies. Finland's resource industries built their own high-voltage power transmission system, and thus the country enjoyed the unique position of having potentially competitive physical facilities performing this function that is usually considered to be a natural monopoly.

Competition policy has a long history in Finland, as restraints on competition appeared from the outset of its industrial development. The earliest reported Finnish decision about industrial competition dates from 1837, when a court refused to enforce an agreement among mill owners because it put undue limitations on the economic freedom of the parties to the agreement and of their input suppliers, who were its victims. Around the turn of the 20th century, Finnish firms in some export-oriented businesses, especially forest products, combined to achieve economies of scale, In some cases, particularly involving the Russian market, they also entered agreements to maintain prices and limit production. Some of these combinations and agreements also had domestic effects, as Finnish firms discriminated against the home market, selling products more cheaply in St. Petersburg than in Helsinki. Government policy evidently supported these private arrangements, especially where they appeared to promote exports to new markets after the Russian revolution had made Finland's traditional markets to the east less attractive. Seventy years later, when trade with Russia collapsed again, Finland responded with a set of policies to intensify domestic competition, rather than dampen it.

In the meantime, though, Finland maintained a policy of economic nationalism, limiting the activities of foreign investors and supporting the creation of a state enterprise sector concentrated on basic industries and natural resources. This profile from the interwar period, reinforced by the experiences of wartime mobilisation and post-war rationing and regulation, endured until the late 1980s. Import licences, often imposed at the instance of the domestic industry, had persisted until 1958. The elimination of such constraints parallels, step by step, the development of Finland's competition policy.

Thirty years of debate preceded the first national competition law. The problem of industrial combinations appeared in policy debate in 1928, when the Progressive Cooperative platform called for investigation and public control of "rings and trusts." This call was renewed in 1948, along with a proposal to ban unfair methods of competition. The government responded by appointing a committee representing industry, agriculture, and trade interests to study the matter. The committee's report in 1952 endorsed in principle the protection of economic freedom to compete, but it suggested basing a competition law on information and publicity, rather than control or prohibition. Two prohibitions were nonetheless included in the government's proposed bill, which was based on experiences elsewhere in Scandinavia. One, a blanket prohibition against resale price maintenance, was refined in parliamentary committee, to make it dependent on showing actual harmful effect in the particular case. Legislators evidently thought that agreements would help make prices uniform across the country, and they thought that uniformity would be desirable. The other, against bid rigging, was intended to encourage competition in the construction industry; however, joint bidding could be permitted if it would lead to cost savings. The bid-rigging prohibition was included because such conspiracies were secret. By contrast, ordinary cartels were not prohibited; rather, such unconcealed agreements would be registered with the cartel office. Cartels involving imports and exports were exempted, even from registration, in order to maintain the system of licence-base control over international trade. These were the basic provisions of the first, limited Finnish law about competition, which was adopted in 1958.[1] The touchstone of the 1958 law was consumer interest or injury, acknowledging the historical importance of the co-operative movement in pushing for it. But after the law was passed, labour and consumer groups shifted their attention and priorities to incomes policies and price regulation, and away from eliminating restraints on market competition. The business community had been dubious about the need for a law from the outset, arguing that any restraints that they agreed upon among themselves should not be considered inconsistent with free competition. Hundreds of restraints were registered over the next few years, and there were thousands of requests for notification, but the two prohibitions were never applied (Virtanen, 1998, p. 238-45).

A more comprehensive competition law, based on notification and control of abuse, was adopted in 1964.[2] Finland's 1961 association agreement with the EFTA required Finland to prevent practices that would nullify the pro-competitive effect of tariff reductions. The 1958 law was inadequate for this purpose; moreover, the 1958 law had failed its own intended purposes of gathering information and shaming cartels through publicity. The new law provided for controlling cartels and dominant firms if they were abusive. It created a new competition authority, the Council of Freedom of Trade, to negotiate resolutions and grant exemptions. This was not an enforcement body, though; enforcing legal obligations would be the duty of the Government. The membership of the new council represented industry, trade, consumer, and labour interests. Representatives of small enterprises had been vocal in the debate over the law. They asserted claims both for lenient treatment, because their restraints would be unlikely to have harmful effects, and also for special treatment, so they could bargain effectively with more powerful parties. The law required associations to notify agreements, and more than 80 price agreements had been registered by 1967. Dominant positions (defined as a market share over 50%) were also to be notified, but there were only 10 notifications over 10 years. The light controls that were actually applied tended to support a pattern of loose horizontal and vertical combinations. Nonetheless, the 1964 law did mark the introduction of the principle of national competition policy (Virtanen, 1998, 246-253).

The next major reform of the competition statute, in 1973, introduced an executive official, the Competition Ombudsman, who was empowered to represent the public interest in negotiations involving the (renamed) Competition Council. The Ombudsman could refer matters to the Competition Council for action, as could consumer associations or union organisations. By 1982, the Ombudsman had handled 183 cases, of which only 9 were referred to the Council. Most were about refusals to deal, and much of the Ombudsman's work was in aid of small business interests. But in the 1970s, the principal policy concern was inflation, and the main objective of the institutional changes was controlling price increases. A Board of Trade and Consumer Interests was to administer both price regulation and competition policy. Price control proved unworkable, though. The system was progressively suppressed in the early 1980s, without repealing the law, by eliminating commodities from coverage. But as late as 1984, 40% of the CPI weight was still liable to price regulation, and 11% was in the stricter "price confirmation" category. Meanwhile the Ombudsman was making a record about the harm caused by restrictive agreements.

Dissatisfaction with direct control, and a change in the government, led to a fundamental redirection of policy in the 1980s. A 1979 study by the Business Research Institute had proposed a prohibition against horizontal restraints, and labour groups supported strengthening the law. In 1985, the Council was given greater powers. But the government was already moving toward more radical change. A committee reviewing the failures of price regulation called attention to the deregulatory function of competition policy. Marking a shift in attitude, the committee's report implied that the nation's economic problems were not the inevitable result of a market economy, but of the obstruction of the market economy. It proposed that horizontal cartels should be treated as void *ab initio*. When a new law was adopted in 1988, it did not take that step, to prohibition. Rather, the most visible change was institutional. The Board of Trade and Consumer Interests was eliminated, and a new administrative agency was established. It was the attitude of the new agency that demonstrated the shift in policy.

This new institution aggressively attacked the system of cartels. The powers of what was then called the Office of Free Competition (OFC) were broadly similar to those of the Competition Ombudsman. The OFC—which is now called the Finnish Competition Authority (FCA)—was authorised to register and investigate restraints, negotiate about removing them, and refer matters that could not be resolved to the Competition Council (Virtanen, 1998, pp. 260-65). The new agency enjoyed some advantages over its predecessor, though, notably more resources and government support for more vigorous policy. The OFC immediately undertook a program of eliminating the effects of price regulation, by systematically challenging the horizontal price agreements and recommendations that had been registered under the previous laws. It succeeded in dissolving about 100 of them over the next 5 years. Interest in registering agreements evaporated as this program made clear that registered agreements were the OFC's principal enforcement targets. The OFC also took part in the overall project of deregulation. The government's 1989 Program on the Enhancement of Competition called on ministries to survey existing regulations that restrict entry or inhibit competition. OFC participated in the working parties that implemented this program. Media attention evidenced the large-scale redirection of economic policy, with competition policy at the centre (Virtanen, pp. 266-69). This redirection in the 1980s demonstrates how legal form is less important than policy purpose, for it took place while the general competition law was still based on reporting and control of abuse, rather than outright prohibition.

Updates in the 1990s adopted the EU "toolkit" and merger control. The EFTA countries committed to accepting the EU competition policy structure and thus to prohibiting restraints while providing for the possibility of exemptions. At the same time, Finland was enduring a severe recession, which was magnified by the disruption of its traditional markets in what had been the USSR. The government proposed to prohibit restrictive agreements and to reform the Competition Council by ending the practice of interest group representation in its membership. The Parliament appeared to agree generally that restraints on competition were an important reason for the country's poor economic performance. Indeed, the lawmakers wanted an even tougher competition law than the government proposed. Heeding the concerns of small businesses, who feared that the prohibition against agreements would hurt them if they banded together and who thus demanded that large firms share the pain, the legislature added a prohibition against abuse of dominance. The new Act on Competition Restrictions[3] became effective in 1992. The final pieces were added to the Competition Act in 1998. The principal addition was merger control. Experience with the 1992 law showed that mergers were circumventing the ban against horizontal agreements. A notorious example was the merger of Finland's major dairies after the OFC rejected a proposed agreement among them. And the 1998 amendments provided further reassurance to small businesses by making the *bagatelle* exemption somewhat more explicit. The most recent changes, in early 2002, have been institutional. The Competition Council was replaced by a judicial body, the newly reconstituted Market Court.

The policy standards in Finland's competition law are efficient markets and consumer interest. A comprehensive conception of competition policy based on efficiency supported the stronger enforcement in the 1990s. The statute's own statement of purpose calls for protecting "sound and effective economic competition from harmful restrictive practices" (Art. 1(1)). In applying the law, special attention is to be paid to interests of consumers and to the freedom of business to operate without "unjustified barriers and restrictions" (Art. 1(2)). Such an expression of unimpeachable good intentions assigns the hard work to the interpretation of "unjustified." The government's statement describing the motivations for the proposed amendment discusses these terms in more detail. (Its description, as translated, uses the terms "sound and efficient," rather than "sound and effective.") Economic competition is to be "sound" in order to ensure dynamic and static efficiency in the economy. On the one hand, the law supports and protects competition "in performance," that is, efforts to achieve competitive advantage with higher quality, lower price, or better terms. This is contrasted to competition "over dominance" that seeks to destroy another enterprise's capacity and to "suggestive competition" that relies on artificial marketing actions. The law does not protect the latter types of "competition." "Efficient economic competition" is the standard to which market performance is compared when the law is applied. In efficient conditions, prices are set by independent action and there are no barriers to entry into the market. Thus, the objectives are to ensure free access and to eliminate restrictions that can distort or harm competitive conditions. In describing how the law will be administered, the statement distinguishes between legal sanctions, which will apply to the conduct that the law prohibits, and regulatory action, which will control conduct that is not prohibited but that may nonetheless impair efficient competition. Significantly, the statement emphasises that the phrase calling for attention to the consumer interest should govern the application of all the parts of the act, because sound and efficient economic competition are in the interests of both entrepreneurs and consumers.[4] In this process, the term "efficiency" is not applied solely in a technical sense of welfare economics. The term would also call for consideration of improvements in production, distribution, and promotion of technical and economic development (FCA, 2002).

Efficiency-based competition policy was a central element in a general reconsideration of regulatory policy. As the effort to protect consumers by regulating prices gave way to a more general approach of protecting competitive markets, policy-makers appreciated that remaining regulations could limit competition unnecessarily. Moreover, they appreciated that competition policy institutions should have a role in removing those limits. A committee report in 1987 proposed that all parts of the administration review critically their licensing policies and other regulatory arrangements. Moreover, it advocated that the competition authorities be heard more frequently in the legislative process and that their opinions should receive greater publicity (FCA, 2002). In 1989, the Office of the State Council, headed by the Prime Minister, urged ministries to consider competition effects in their proposed legislation. The Ministry of Trade and Industry issued a similar guideline to other ministries in 1992, reminding them of the 1989 instruction. In response to these calls for greater policy involvement, the competition law was amended to give the competition agency an explicit, active role in regulatory reform.[5]

From infrastructure, the FCA has turned to an initiative about "government and markets." Policy advocacy concentrated at first on overt restraints and on restructuring traditional infrastructure monopolies. With the large-scale restructuring substantially completed by the mid 1990s, notably through the introduction of competitive markets in telecoms and energy, attention shifted in the late 1990s to competition issues that arise when government entities are market participants. An important topic of debate now is the increasing use of market institutions to provide social and medical services that have traditionally been provided directly by local governments. Finland is testing how to introduce market incentives and competition while maintaining high quality and wide availability.

BOX 3.1: COMPETITION POLICY'S ROLES IN REGULATORY REFORM

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.
- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise that had supported regulation, namely that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that policies which had appeared similar may have led to different outcomes.
- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

Substantive issues: content of the competition law

The substantive rules combine national traditions with the EU toolkit. Finland's competition law contains several specific prohibitions, some of which date from the original 1958 law. These prohibitions, which can be enforced by imposing fines, do not copy the EU model exactly, although there are broad similarities. The most interesting difference between Finland's law and the EU model is a provision that speaks in the same terms as Finland's competition policy goals: a restriction that is deemed to have harmful effects through decreasing efficiency or preventing or hindering the conduct of business in a manner "inappropriate for sound and effective competition" may be enjoined even if it is not otherwise specifically prohibited in the statute (Art. 9; Art. 16). This had been the principal substantive provision of the old competition law. It was retained in the 1992 revisions, despite the EU's request that Finland conform its national law to the Treaty of Rome rules *in haec verba* before accession. It could provide a basis for flexible application of competition policy to complex or novel issues, such as non-price vertical agreements, joint dominance and oligopolistic co-ordination, or to unfair competition supported by state aids.

BOX 3.2: THE COMPETITION POLICY TOOLKIT

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

Horizontal agreements

The most serious types of cartels are prohibited. Three types of horizontal agreement are prohibited explicitly. Listed first, reflecting its position in the original competition law, is collusion in tendering (Art. 5). Next, the statute specifically forbids horizontal agreements to fix prices (including binding price "recommendations") (Art. 6(1)) or to limit output or divide markets (Art. 6(2)). The prohibition of Art. 6(2) is subject to a proviso, that the agreement is not forbidden if it is essential for an arrangement that will increase production or distribution or promote technical or economic development, and as a result the benefit will primarily accrue to customers or consumers. This language tracks the EU's criteria for exemption. But the process for applying these criteria in Finland differs slightly from current EU practice, although it is similar to the EU's pending proposal to reform enforcement. Parties to an arrangement covered by Art. 6(2) need not notify the FCA in advance and obtain an exemption, as long they can carry the burden of showing those efficiencies if challenged to do so (FCA, 2002). Their burden is heavy, though. Because the agreement must be "essential" to achieving the benefits, it would be necessary to show that there is no other way to achieve them that does not involve the otherwise prohibited agreement.

Efficient co-ordination can be exempted from the prohibition. Horizontal agreements other than price fixing, output limitations, tendering cartels, and market division are subject to the general rule of Art. 9. That is, they are not prohibited nor even disapproved, but they might be enjoined if they actually impair competition. Even an otherwise prohibited agreement might be permitted if it is found to be efficient. The parties to an agreement covered by Art. 5 or Art. 6 may apply to the FCA for an exemption, which may be granted if the agreement promotes production, distribution, or technical or economic development and if those benefits are enjoyed principally by customers and consumers (Art. 19). These general standards for exemption are the same as the EU's.[6] There is one generally applicable exemption, for joint sales and advertising campaigns by members of a co-operative group in retail and service industries. The requirements for this "block" exemption are that the group markets itself identifiably, its market share is under 30%, its members can undercut the advertised prices, and the campaign lasts no more than 2 months for consumer products. This exemption was made more generous in 1998, by extending the allowed term (from 1 month) and removing requirements of franchisee status and joint purchasing (FCA, 1998).

Anti-competitive self-regulation is clearly covered. Associations of businesses are singled out explicitly in the statutory text, which treats their decisions and actions as agreements among the members. Thus, the law clearly prohibits typical trade association efforts to control or prevent competition among members or with non-member firms. Eliminating the price agreements and recommendations adopted by associations of professionals was an early priority. The Finnish Medical Association resisted, claiming that it had only set maximum fees to protect patients; however, the association also admitted that its fee schedule gave new doctors an idea about what they should charge. The association abandoned its price recommendations after an adverse decision from the Council in 1992. Lawyers claimed that their schedules protected clients, and architects claimed that price competition would undermine quality. Most of the associations dropped their fee recommendations after negotiations under the pre-1992 competition law. The dentists asked for an exemption under the 1992 law, but the FCA and the Council dismissed the application (OECD CLP 2000). The issue persists despite the now-clear prohibition. Helsinki pharmacists and their trade association arranged to submit a uniform price list when the government first requested bids for pharmacy services. One reason for uniformity was a belief that the government wanted identical prices. The Ministry of Social Affairs and Health responded with a statement that the list approved by the Government showed maximum prices, and that competition below those prices would be invited (FCA, 2001, p. 17). (Since then, though, new legislation has been adopted, to become effective in 2003, under which retail price competition for some pharmaceutical products will be formally eliminated and the prices will be set by decree of the Government).

Oligopoly facilitating practices are not so clearly covered. Although the basic prohibition is intended to cover tacit collusion, that possibility has not been tested. The broad phrasing ("agreement, decision or corresponding practice") suggests that liability could be found without having to prove a formal agreement. The FCA's guidelines describe "facilitating practices" that could attract enforcement attention, particularly information exchanges that lead to harmonising behaviour about pricing, production, or sharing markets. But the circumstantial proof would be difficult (OECD CLP 1999). The degree of integration needed to constitute an "undertaking" that is directly subject to the law cannot usually be shown simply by parallel conduct, and the government made clear at the time the law was strengthened in 1988 that the provision about associations would not be used to deal with oligopoly (FCA, 2002).

Sanctions actually applied against horizontal collusion may be too light to deter, though. Although horizontal agreements about price and market division have been banned for a decade, there have been few enforcement actions. One explanation might be that Finnish businesses are unusually law abiding. Another explanation might be that the enforcement agency may lack necessary tools and support. The courts have not been willing to apply strong sanctions against horizontal agreements, in part because they have tended to require a showing of specific intent to violate the law—and because they seem reluctant to find that Finnish businesses would do such a thing. A recent example of this leniency arose in forestry, an industry that the FCA has made a priority because of its importance to the Finnish economy. The FCA has tried to be even-handed, by preventing the major buyers from colluding to keep prices down, while denying producers an exemption that would enable them to collude to keep prices up (FCA, 2001, p. 24). Upon finding an exchange of market information among buyers that was taken to amount to, or at least facilitate, market division and price fixing, the FCA recommended substantial fines against 3 major wood-products firms. After appeals, the fines were reduced to only 1/7 of the FCA's recommendation. The FCA is concerned that sanctions that are actually applied may not be strong enough to deter, because they are not proportionate to the parties' benefits from collusion (FCA, 2002).

BOX 3.3: THE EU COMPETITION LAW TOOLKIT

The law of Finland follows, with some variations, the elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements**: Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.
- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.
- **Abuse of dominance**: Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50 percent, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.
- **Reforms in administration**: Recent and proposed reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and would eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria would apply directly in decisions applying the law, and these decisions would increasingly become the responsibility of national competition authorities.

Vertical agreements

Most vertical restraints are permitted, unless they are imposed by a dominant firm. Only one vertical practice is clearly forbidden. The first substantive provision of the competition statute prohibits even requesting that customers observe maximum or minimum resale price levels (Art. 4). Other vertically-imposed restraints are not generally prohibited, unless the firm imposing them has a dominant position. A dominant firm may not use unfair business practices that restrict its customers' freedom of action or use its position to restrict competition in other markets. And a dominant firm may not use exclusive sales or purchasing agreements, in the absence of a "justified cause" (Art. 7(3)). Other vertically imposed restraints, and all vertical relationships that do not involve a dominant firm, are subject to the general rule-of-reason terms of Art. 9. For these restraints that are not prohibited, there is no market share test, and the FCA has the burden of proof.

Toleration is consistent with an efficiency-based competition policy. Finland's treatment of vertical relationships and restraints is more flexible than the traditional EU combination of blanket prohibition with detailed exemptions. Controls on intra-brand competition imposed by non-dominant firms do not typically lead to enforcement action in Finland. But the flexible approach is capable of dealing with novel situations. For example, a December 2001 Council decision objected to a restraint concerning roaming agreements in telecoms, imposed by a firm that would not have been considered dominant. Rather, the Council was concerned that industry conditions implied the potential for joint dominance.

Abuse of dominance

Rules about dominance are nuanced. A firm (or an association of firms) that has the power to "significantly control the price level or terms of delivery" or in some "corresponding manner" influence the competitive conditions in a defined market is considered to have a dominant position (Art. 3(2)). The statute's list of particular examples of prohibited abuse includes unfair trading terms that restrict customer freedom, pricing that is exploitative ("likely to be unreasonable") or predatory ("likely to restrict competition"), and using dominance in one market to restrict competition in another one (Art. 7). But refusals to deal and exclusive sales or purchasing agreements are only prohibited if the firm cannot show it has a "justified cause" for them. A justified cause for refusal to deal might be the customer's inability to pay or the supplier's lack of capacity, and a justified cause for an exclusive dealing arrangement might be to protect investments against free riding. Finding a dominant position does not depend on a market share test, although market share may be used as a guideline for investigation. Finding dominance may depend, though, on showing there are barriers to entry. If barriers are low, high market share is less likely to be considered a sign of a dominant position. Policy considerations other than competition, such as an alleged need to improve municipalities' poor financial condition, are not relevant (FCA, 2002). Sanctions for abuse of dominance include fines and orders against the misconduct, but not structural relief to break up the dominant position itself (FCA, 2002).

The flexible approach applies the prohibition to small-scale markets and to legal monopolies. Finding dominance depends on the definition of a market. The statute makes clear that for these purposes, the geographic scope can be smaller than the entire country. Finding appropriate definitions of product and geographic markets has been a particular challenge in dealing with such issues as discriminatory pricing for advertising in local media (FCA, 2001, p. 22). Where a buyer's purchase decision makes it "captive" to a seller for an extended, indeterminate period, and the buyer makes a significant sunk-cost investment in the relationship, their interdependence may define a relevant market in which to assess dominance and abuse. This context-sensitive conception, which has been applied to cases involving utilities and aftermarket spare parts, obviates the need for a separate legal principle about abuse of "economic dependence." At larger scale, an enterprise that enjoys a dominant or monopoly position by virtue of legislative grant or exemption is still prohibited from trying to extend its dominance by limiting competition in another market (FCA, 2002). The general prohibition could not easily be applied to oligopoly situations, though. Abuse by more than one firm is described in terms of an "association" of firms. This term is more limiting than the parallel description in EU law.[7] The original commentary noted that "joint dominance" could only be found under Finnish law among parties that are involved in wilful, systematic co-operation. Common behaviour among firms with a high collective market share, without more, could not be considered joint dominance (OECD CLP, 1999).

Discrimination to discourage competition is challenged, in order to support restructuring traditional monopolies. The use of loyalty discounts is a familiar tactic to put off competitive entry. The Supreme Administrative Court upheld a significant fine against the major dairy products firm for using such a pricing structure (FCA, 1998).[8] The tactic reappeared as competition entered the electric power sector. The FCA has examined the "bonus customer" system used by some local energy firms. Typically, the firm offers a discount for completing a long-term contract. This might constitute abuse of dominance under Art. 7, or it might lead to harm in violation of Art. 9; either finding, though, would depend on context. A bonus for loyalty could be pro-competitive when offered by a smaller firm trying to break into the new energy markets, but not when offered by an incumbent monopolist in order to keep new entrants away from existing customers. Regardless of that context, the FCA has stressed that the pricing and discount criteria applied to different customer groups should be clear and non-ambiguous (FCA, 2002).

Denying network access, or charging too much for it, can be abuse even if the dominant position is authorised by law (FCA, 2002). This problem appeared frequently in the early stages of electric power reform. A 1995 decision found abuse by 71 local distribution companies in setting basic and connection tariffs that discriminated against small and medium sized suppliers. Standards for identifying abuse in this setting include fair treatment, cost accountability, transparency, and reasonableness of profits, which is determined in part by benchmarking against other electricity companies or similar enterprises (FCA, 1996, p. 100). More recently, the FCA tried to obtain substantial fines, of €841,000 and €5 million, against municipal energy firms for unreasonable pricing of transmission services and district heating; however, the Competition Council did not agree that the pricing amounted to abuse and thus denied the orders and the fines (FCA, 2002). That decision has created some uncertainty about the analysis and standards for challenging pricing as abusive, whether or not there is an issue of network access.[9] The Competition Act relies principally on indirect means of dealing with price abuses, by ensuring the existence of conditions under which prices would be set by market forces. This recent Council decision implies that direct effort to use the Competition Act to evaluate and control abusive prices may be impracticable (FCA, 2002).

Mergers

Merger control, the newest part of the law, prevents market-dominant positions. The FCA treats the legal standard, whether the transaction would create or strengthen a dominant position which significantly impedes competition, as a dominance test, not a "substantial lessening of competition" rule. The FCA believes that the test could be met if high concentration increased the risk of oligopolistic collusion (OECD CLP, 1999). Merger control applies to true mergers, acquisitions of control or assets, or setting up joint ventures that operate as autonomous economic units, and to transactions by all kinds of entities regardless of their ultimate ownership (Art. 11). In particular, because the Competition Act applies to publicly-owned firms, transactions that privatise public holdings are subject to competition review (FCA, 2002). The FCA applies a standard analysis, beginning with defining product and geographic markets and using analytic methods like those used by the EC. Market shares are treated as indicative, not dispositive. Other factors that are considered in assessing the risk of dominance include whether the post-merger firm will have special advantages that its competitors cannot match, the situations of the competitors that will remain in the market, the bargaining power of the merged firm's customers and the market power of its suppliers, and the prospects for relatively quick competitive responses (FCA, 2002).

Prospective efficiencies and imminent failure are considered, but sceptically. The prospect of lower costs, synergies, or new products may be considered to offset anti-competitive effects. The FCA will also consider, though, whether the efficiencies could have been gained by means that are less anti-competitive than the merger and whether the benefits of the efficiencies are likely to be passed on to consumers (FCA, 2002). A "failing firm" principle applies: if the customers would have ended up dealing with the acquiring firm in any event because of the acquired firm's bankruptcy, the FCA believes there is no cause to intervene.[10] Here too, the FCA will consider the alternatives, that is, whether there is another buyer whose acquisition of the same assets would be less anti-competitive (FCA, 2002).

Merger notification requirements are based on size and on operation in Finland. There are two parts to the notification threshold: combined annual (worldwide) turnover in excess of €336 million (FIM 2 billion), and turnover of two (or more) individual parties in excess of €25 million (FIM 150 million). In addition, the object of the acquisition or transaction must conduct business in Finland (FCA, 2002). A transaction that meets these requirements must be notified within a week from the acquisition of control, and it may not be put into effect before the decision of the FCA.[11] If the transaction also falls within the EU merger regulation, it need not be notified in Finland, and Finnish merger control jurisdiction does not apply to it unless the European Commission refers it to the FCA (Art. 11a). Failure to notify on time is punishable by a fine, of up to €670,000 (FCA, 2002).

Merger reviews have met statutory deadlines. The first stage of review is the FCA's determination whether the transaction is covered by the law and whether to initiate further, second-stage proceedings. If the FCA does not move to the second stage within a month after receiving the complete notification, then the transaction is deemed approved. If the FCA undertakes an investigation, it has 3 months to propose conditions or to ask the Market Court to prohibit the transaction. The Market Court may extend this second stage by up to 2 months. Here too, if the FCA does not act within the deadline, then the transaction is deemed to be approved.[12] A decision by the Market Court to prohibit a transaction must be made within 3 months after receiving the FCA's proposal (Art. 11h) (FCA, 2002).[13] The maximum time for review and decision could thus be as long as 9 months after notification. Reviews have usually been shorter than this theoretical maximum. First stage review took an average of 21 days in 2000, and second stage review, for the mergers that went into that process, took 73 days (FCA 2001). These times were shorter than in 1999, as increasing experience evidently improved the FCA's efficiency (FCA, 2002). In 2001, though, second-stage review generally required the full 90 days.

Other policies and agencies are not involved in merger control, except to a limited extent in insurance. Merger review and control is the responsibility of the competition policy bodies. The FCA investigates and negotiates, and it can impose conditions, while a decision to block a merger must be made by the Market Court. There is no provision for intervention by the government, and policies and effects other than competition are not considered. Acquisitions involving the insurance and pension fund industries require approval from relevant sectoral regulators, to ensure compliance with prudential requirements. Notification of those transactions to the FCA is not required if the regulator has asked the FCA for an opinion during its own review process and the FCA has said there is no impediment to approving it (Art. 11c(2)).

Problems with mergers are usually resolved by imposing conditions. Conditions are typically subject to deadlines and enforced by penalty payments or conditional fines. Structural conditions are preferred, such as divestiture of a business operation, a co-operation agreement, or an intangible or intellectual property right. Conduct commitments about price levels or dealing with particular customers are more difficult to oversee, and they may not adequately correct the effects of dominance (FCA, 2002). Nonetheless, conduct commitments have sometimes been accepted. Some examples of recent merger actions include:

- Permitting a combination that resulted in a 2 firm oligopoly accounting for over 70% of the tour-organising business (with the next largest firm's market share only 15%). One partner in the transaction was Finnair. The FCA's goal was to protect the possibility of another charter operator entering the market. Conditions imposed included giving equal treatment to all tour operators and limiting exclusive arrangements about airline seats to the level that had been accounted for by the acquired operator (FCA, 2001, p. 29).

- Permitting a combination of major dairy products firms into one with a share of 80% of milk purchased (in a national market). Structural conditions required divesting brands and some assets that would otherwise have been shut down. Behavioural conditions required the firm to sell milk to competitors and in effect to toll-process milk for them; this condition was necessary because the co-operatives and producers themselves would not be subject to an order to make them sell to those competitors. This was the first merger that raised the "failing firm" issue; the FCA rejected the parties' claims (FCA, 2001, pp. 32, 57).

- Divestment by Waste Management Co. of its Finnish operation threatened to create a dominant player in handling hazardous wastes, which would enjoy the advantages of a unique ability to offer a bundle of services and of holding 8 of 11 regional exclusive licences to handle recycled motor oil. Structural conditions included requiring it to give up 4 of those licences and to divest some other overlapping operations, Behavioural conditions included a promise not to enter tying contracts (FCA, 2001, p. 30).

- A proposed merger of 2 US paper and forest product firms, Georgia Pacific and Fort James, was made conditional on terminating a joint venture, to avoid the risk of joint dominance in Finnish markets for certain commercial and institutional products.

- Sonera, with a large share of mobile phone and internet service, tried to acquire the digital transmission service of the Finnish public broadcasting company. The FCA was concerned mostly about pre-emption of other multi-network providers (FCA, 2001, p. 32-34), and the parties abandoned the transaction because the conditions demanded were too stringent.

- In the privatisation sale of government shares in the conglomerate Vapo to the forest industry firm Metsäliitto, structural conditions required divestiture of activities related to wood-based fuels. In addition, the firm undertook some behavioural commitments (FCA, 2002). No buyer was found for the assets to be divested, though, and the transaction was abandoned (FCA, 2002*a*).

Table 3.1: Recent merger review experience

	2000	2001
Decisions	114	104
Proposed to ban	1	0
Approved with conditions	5	5
Approved, no conditions	104	99
Notifications cancelled	27	21
Other closed issues	35	27

Source: FCA 2002.

Related policies: subsidies, unfair practices, and consumer protection

Anti-competitive state aids are not a responsibility of the FCA. They could, in theory, be controlled under the Competition Act's general principles. There is no separate provision in Finnish law for the registration and control of subsidies and preferences, which can distort competition and motivate otherwise unnecessary regulation. But the general terms of Art. 9 could probably be applied to a distortion of competition that resulted from state aid. Issuing an effective order, though, would depend upon there being an "business undertaking" involved, which would be subject to the law's remedial powers (Art. 16). The possibility of applying Art. 9 to state aids has been mentioned in a decision about a municipal laundry service, which was actually treated as a violation of procurement rules. No decision has actually applied Art. 9 yet to correct or prevent unfair competition or other distortion due to state aid or subsidy.

Rules about "unfair" competition may become better integrated into competition policy. The Competition Act itself does not deal with unfair marketing practices, although they can affect the efficiency of market competition (FCA, 2002). These are treated as matters for private dispute, which have been decided by the Market Court and the civil courts. Although these cases are proceedings, between private parties, consumer authorities must be heard (FCA, 2002). Merging the Competition Council jurisdiction into the newly constituted Market Court is an opportunity to develop mutually consistent understandings of these rules. The jurisprudential tradition of unfair competition sometimes protects the positions of individual traders, without regard to the net effects on overall efficiency and economic performance. Although some see a risk that the Market Court will lead competition law away from Finland's efficiency-based tradition, the combination might also ensure against protectionist interpretations of rules about such things as sales below cost, while emphasising the importance of consumer interests in disputes about what kind of competition is considered unfair.

Strong consumer protections could complement competition policy. The Consumer Protection Act deals with marketing abuses. It is applied by courts, although consumer disputes with businesses are often settled through the Consumer Complaints Board. Consumer interests are also looked after by the Finnish Consumer Agency and the Consumer Ombudsman. As in other Scandinavian countries, Finnish consumer protections have traditionally been strong, indeed, stronger than the EU's. Consumer groups, and the government's general consumer policy, recognise the important role of competition in protecting consumer interests. But consumer policy has been more concerned with issues of equity and distribution. The Consumer Ombudsman has tried to keep the FCA informed about its actions. The two agencies have different views, though, about such matters as the risk that setting product and performance standards too high could harm consumer interests by limiting competition. They are now discussing a project about promoting transparency in consumer markets. A recent action suggests both the degree of vigilance over consumer issues and the economic sophistication underlying it: the Market Court rejected an advertisement that promised to match or beat competitors' prices, in part because such commitments can support an agreement not to cut prices.

Institutional issues: enforcement structures and practices

Competition policy institutions

Two bodies apply the competition law. The Finnish Competition Authority (FCA) is responsible for investigation, negotiation, and recommendation of enforcement action. In March 2002, the newly reconstituted Market Court replaced the Competition Council as the independent decision-maker with the power to impose orders and fines.

Creating a stronger enforcement agency was part of the 1988 competition policy reform. The FCA is attached to the Ministry of Trade and Industry (MTI). The Director-General of FCA is appointed by the Government and can be removed by the same means. The only formal qualifications for the post are relevant experience and a master's degree. The FCA personnel are appointed or employed by the Director General. Despite the FCA's position within the budgetary aegis of MTI, the government and MTI do not have the legal authority to interfere with its decisions and actions. The Director-General enjoys no legal tenure protection, but the same individual has served in the post for 14 years.

MTI is involved in legislation, policy, and managing state investments, but not in enforcement. Drafts of legislation about competition policy are typically prepared by a committee of experts that includes officials and experts from outside the bureaucracy. As part of the budget and planning process, MTI and FCA consult annually about the FCA's plans and priorities. FCA prepares a discussion paper identifying the key industries and subjects that the FCA intends to concentrate on. In 2001 these included marketisation of public services, competition in infrastructure industries, and the financial sector (FCA, 2001). FCA is somewhat more independent than some other bodies that appear to be in a similar structural and functional relationship to MTI, such as the National Food Administration, the National Consumer Administration, the National Consumer Research Centre, the Consumer Complaint Board, and the Energy Market Authority, among others. MTI also holds the government's shares in several state-owned companies and manages the state's remaining shareholdings in several state-related companies. These shareholder roles could lead to at least the appearance of a conflict of interest. MTI in its shareholder capacity might be expected to object to an application of the competition law against one of these state-owned or state-related firms that reduced the value of its shares. The independence of the principal first-instance decision-making body, and the potential for third-party action, tend to reduce this kind of concern but cannot eliminate it entirely.

The Competition Council was an "administrative-judicial" body, with the power to impose orders and fines to enforce the Competition Act. It also decided appeals from FCA actions, such as granting or denying negative clearances and exemptions and imposing conditions on mergers. It had other responsibilities, too, and much of the Council's workload was public procurement matters (FCA, 1998). Its 9 members, appointed by the President on nomination by the government, served part-time for 3 year terms. Although its function was quasi-judicial, it was not formally a court, and only one of its members, the chair, was a judge. The Council depended on MTI for resources to support its small staff.

The Council's status was the subject of debate for several years. Reasons advanced for change included the Council's limited resources and its uncertain position as an administrative body connected to MTI, acting as a decision-making tribunal yet not really a court. But the principal reason for change was a Ministry of Justice desire to reduce the number of small, specialised tribunals. The Ministry of Justice proposed in 1999 to combine the Council and the old Market Court into a new court. Both the FCA and the Competition Council objected to combining the two jurisdictions. Instead, they recommended upgrading the status of the Competition Council, to make it an independent special court dealing only with competition issues. When it was suggested the next year that competition issues be handled by regional administrative courts, the FCA demurred again, fearing that regular administrative courts would lack relevant expertise (FCA, 1999). The parties that dealt regularly with the Council and the old Market Court were not dissatisfied with their processes or decisions. There may have been a resource imbalance, though. The Council appeared to be stretched, while the old Market Court was not fully employed. Business interests wanted to retain a separate decision-maker, as a check on the FCA's discretionary power. And they preferred a specialised court of some kind, out of concern that a court of general jurisdiction would tend to defer too much to the expertise of the enforcement agency. The Council clearly has not deferred to the FCA in enforcement matters: in 2001, the Council rejected all 4 of the FCA's proposals for orders, and it set fines below the level the FCA proposed in 3 of the 4 matters seeking sanctions (FCA, 2002*a*). But the Council was not a rubber-stamp for respondents, either. It rejected most appeals against FCA decisions denying exemptions, and on one occasion it tried to block a merger that the FCA had approved subject to conditions (FCA, 2002*a*).

The new Market Court will decide cases about competition, public procurement, and marketing practices. In competition matters, it has the same power that the Competition Council had, to issue orders and impose fines and to hear appeals from FCA actions, and it has the same power as the Competition Council had concerning public procurement. It also has the consumer protection and unfair competition jurisdiction of the old Market Court, concerning subjects such as deceptive advertising and unreasonable contract terms. It is authorised to divide itself into 2 chambers, reflecting these two jurisdictions. But if it did so, the benefits of cross-fertilization between doctrines—or the risks of cross-contamination—could be limited. The Market Court combines judges with market experts. Its judges and chief justice have the usual protections of judicial independence, such as lifetime tenure and salaries that are set by statute. Several of the judicial members will serve on this court full-time. In addition, there are part-time non-judicial experts, appointed by the government for 4 year terms, to assist them. The level of staff support appears to be about the same as the Council had; however, the Market Court's resources will now be provided through the Ministry of Justice, rather than MTI. As a true court, it is expected to follow standard judicial processes more closely than the Council did, and it has procedural authority which the Council lacked, such as subpoena power to compel attendance of witnesses.

These institutional changes should lead to more openness in proceedings. The FCA has already taken advantage of technology to publicise its work. Public versions of FCA decisions are published on its web site, and press releases are issued for the most important decisions (FCA, 2002). The FCA has issued guidelines to describe its policies about topics of current public interest such as restraints, when the "prohibition" principle was adopted in 1992, and the *de minimis* exemption and mergers, when the law was amended in 1998. The Council's actions were not as well publicised. For example, it had not put its decisions on the internet. Observers expect that the Market Court will begin to do so. In addition, Market Court proceedings, like those of other courts, will be open to the public, subject to rules to protect confidential information. The Council's administrative proceedings had been closed.

Competition law enforcement

The FCA initiates matters, but FCA decisions are subject to Market Court review, and FCA proposals require Market Court action. The FCA can decide that conduct is exempt from the statutory prohibitions, because it meets the statutory criteria for exemption, and it can issue a negative clearance, ruling that conduct does not fall within the statutory definition of what is prohibited (Art. 19, Art. 19a). If the FCA refuses to grant an exemption, the applicant may appeal to the Market Court (FCA, 2002). If the FCA decides that a negative clearance should be revoked, because of changes in law or fact or because the clearance had been based on misinformation, it must make a proposal for action to the Market Court. The FCA investigates potential problems and reviews merger filings, and it can try to negotiate resolutions or conditions with the parties. If the FCA determines that an order or sanctions should be imposed, or if parties to a merger cannot reach agreement with FCA about conditions to impose, then FCA must make a proposal for action to the Market Court. In proceedings at the Council, and now at the Market Court, parties have access to the file so they can respond to the FCA's claims, and they can put on their own case with documents and witnesses. Thus, the process of applying the law in the first instance looks much like adversary litigation, in which respondents enjoy more procedural protections than they might in purely administrative processes such as those at the EC.

Powers of investigation focus on obtaining documents. In dealing with complaints and investigating possible breaches, Regional State Administration offices may be involved as well as the FCA (FCA, 2001; FCA, 2002; Competition Act, Art. 10). The law obligates businesses to provide documents and written answers to questions (Art. 10) and to submit to inspections (Art. 20). A "business secret of a technical nature" need not be provided, though (Art. 23). No court order is required to implement the basic investigative powers. The investigating official "shall have the right to request oral explanations on the spot and to take copies of the documents to be investigated" (Art. 20(4)). The police may be called in to help with inspections (Art. 20(5)). Compliance with the investigative process is enforced by conditional fines (Art. 25), whose level is set by the generally applicable statute on such fines. The FCA may request access to public documents (FCA, 2002). Obtaining confidential information from other agencies is controlled by the Act on the Openness of Government Activities.[14]

Deadlines are being met for mergers, but other complex matters are taking more time. The FCA had been beating the merger review deadlines handily until 2001. That year, the second stage investigations usually took the full 90 days available. Other matters, which are not subject to binding formal deadlines, are taking longer, too. The average time for FCA non-merger decisions has increased from one year to 16 months, although a "decision by letter" may wrap up a simple matter in a month or two. Processing exemptions in 2001 took an average of about 9 months, up from 5-6 months the year before. The FCA ascribes the longer times to the greater complexity and importance of the cases, particularly the ones it has initiated itself (FCA, 2002, FCA, 2002*a*). A deadline may be triggered if an interim order is issued to protect the market situation pending final action. When the FCA orders interlocutory relief, which can include an order to supply a party on non-discriminatory terms, it must notify the Market Court within a week, and it must make a proposal about the primary issue within a month. The FCA must normally give the party that will be subject to the interim order an opportunity to be heard before the order is issued (Art. 14).[15] The Market Court may also issue a temporary order for the duration of its own proceedings (Art. 17). Where an interlocutory order is in effect, the Market Court's proceedings must begin within a month of its receipt of the proposal (Art. 17). Thus, where there is an identified need for urgency, the rules provide for expedition.

Enforcement action can lead to orders or fines. The Market Court may issue an order to prohibit an agreement or practice, to terminate conduct that violates the law, or to oblige a business to deliver product to another on non-discriminatory terms (Art. 16). In addition, the Market Court can impose fines for engaging in prohibited conduct. The Competition Act provides the same level of sanction for all of the conduct prohibited by Arts. 4-7, namely a fine ranging from FIM 5,000 to 4 million, that is, from €800 to €670,000. The exact level is determined by the nature, extent, and duration of the violation. A fine exceeding this upper limit can be imposed if it is warranted by the nature of the restriction and the circumstances of the case, up to a ceiling of 10% of the previous year's turnover (Art. 8). Where the violator is an association, it is unclear whether this maximum fine could be based on the turnover of the members, or only on that of the association itself. Sanctions apply only to the undertaking involved in a prohibited act. Individual executives of corporate bodies do not risk personal liability or punishment for the corporate acts that they authorise or participate in. The fine can be waived if the practice is minor or imposing a fine is otherwise unjustified. The basic level of fine is low, compared to recent EU actions, although it may be high compared to Nordic and Finnish standards. The ceiling, of 10% of turnover, is comparable to similar ceilings in the EU area, but well below what some jurisdictions can seek. The highest fine actually imposed so far, about €4.2 million, was for abuse of dominance through discriminatory denial of access to telecoms infrastructure. The Council and the courts have often set fines well below the level the FCA has proposed.

BOX 3.4: ARE SANCTIONS TOO LOW FOR EFFECTIVE DETERRENCE?

FCA charged three major forest products firms, Stora Enso, UPM-Kymmene and Metsaliitto Osuuskunta, with colluding to reduce the prices they paid for wood. The FCA asked for a fine of €3.4 million against each company. This was about 5 times greater than the basic statutory fine level, but far below the maximum of 10% of these firms' turnover, which could have been €1 billion or more. The Competition Council imposed fines one-half of what FCA had recommended, €1.7 million per firm. On appeal, the Supreme Administrative Court cut that again, down to €500K per firm. This is below the top of the basic statutory range, and far below the FCA's estimate of the parties' likely gain from the challenged practice.

The statute provides little guidance about the reasons that can justify imposing a fine greater than the statutory maximum of €670,000, referring only to the nature of the restriction and the circumstances of the case. The Government's explanatory memorandum offers little more guidance, mentioning some potentially relevant factors such as repetition, particular harm to other businesses, scope of the violation, and need for the sanction to exceed the gain from the restriction. The Supreme Administrative Court gave several reasons for reducing the fines in this case, some of them obviously related to these factors:

- The information exchange (from which the agreement on price was inferred) happened at meetings called by the sellers, with the sellers present. Evidently, the court believed that this showed the parties thought this was a continuation of a normal business practice, and not a violation of law. The court thus implied that strong sanctions are only justified against deliberate, wilful violations.
- The activity was limited in geographic scope. This point may have been mentioned because the scope of activity is one of the factors mentioned in the government's explanatory memorandum.
- The meetings had positive effects for the wood trade. Thus, there was no showing of the factor of "particular harm to other businesses." This observation also implies that the court might recognize an "efficiency" justification for price fixing.
- There was no evidence showing how the parties to the restraint on competition benefited from it. Here too, the reasoning calls into question the concept of a *per se* prohibition against horizontal collusion about price.
- The agreement on price was not proved by direct evidence, but was only inferred from circumstances. It is not clear whether the court believed it unlikely that there was an agreement in fact, or whether the court was sceptical about trying to prohibit tacit collusion.

The outcome may represent a failure of proof by the FCA, which may have believed the agreement should be prohibited *per se* and thus did not produce detailed demonstration of benefits to the parties or of harm to particular sellers or the economy. Some features of the case that tended to show a likely adverse effect on market competition are not among these listed in the statute or explanatory memorandum, notably that the buyers were important factors in a concentrated market for a homogeneous product. The FCA tried to emphasise one of the factors from the guidance, the repetition of the practice for 4 years. Indeed, the FCA had decided that the statute prohibited this conduct when it imposed strict conditions on an exemption for more limited co-operation that it granted in 1994. The FCA believed that the companies were deliberately flouting that earlier decision. The court, though, may have believed that the parties' failure to follow the FCA's decision was not as serious a disregard of the law as failure to obey a court order would have been.

Appeals can determine the shape of policy. The Council has not hesitated to substitute its judgement for the FCA's in rulings about conditions imposed on mergers and other matters, notably exemptions and negative clearances, for which the Council served as the avenue of appeal. FCA action, or inaction, in response to a complaint can also be appealed. The Council has on occasion disagreed with the FCA's determination that a complaint was of minor importance, and it has sent the matter back with instructions to investigate it further. No further appeal is permitted for some FCA actions, which are principally procedural: whether to undertake a further investigation of a merger, to issue an interlocutory order, or to perform an inspection (Art. 21). Parties must comply with an FCA request for information while they appeal it, unless the Market Court orders otherwise (Art. 21). Appeals from decisions of the Council, and now the Market Court, can be taken to the Supreme Administrative Court. Here too, a few matters are not appealable to this level, namely decisions about exemptions, negative clearances, or extension of time for merger review (FCA, 1998). The FCA as well as the parties may appeal Market Court rulings (FCA 2002). An example is the FCA's appeal of a Council decision rejecting, for the first time, a merger that the FCA had approved subject to conditions. This case is also an important test of the FCA's ability to manage the merger review process, as the appeal to the Council was brought by a third party competitor, not by the merging parties. The FCA was concerned that permitting third-party collateral attacks against consummated mergers will lead to investor uncertainty.[16] The parties to the thwarted merger, unsurprisingly, also appealed. In July 2002, the Supreme Administrative Court overturned the Council decision and agreed with the FCA action.

Other enforcement methods

Private suits are possible, but the possibility has not been seriously tested. In general, civil courts may hear private disputes about infringements of the Competition Act and claims for compensation based on them (FCA, 2002). Terms of contracts that violate the prohibitions of the statute, an order of the Competition Council or the Market Court, or an obligation imposed by the FCA are unenforceable (Art. 18). Violation of the statutory prohibitions can be the basis for private lawsuit without the need for any prior public enforcement action. But if the conduct at issue is not subject to one of the prohibitions, then only a violation of an order issued under Art. 9 could be the basis for civil suit. Damages that might be claimed could include additional expenses, price differences, or lost profits. Suits for damages must be filed within 5 years, beginning when the plaintiff learned, or should have learned, of the damage (Art. 18a(3)). The competition bodies may assist the civil courts in these cases; indeed, if the suit is not simply about damages, the court must give them an opportunity to be heard (Art. 27). There has not yet been a suit claiming damages, but there has been at least one case seeking a court order, against a restraint imposed by a municipality. So far, that suit has been unsuccessful, as the court held that the Competition Act could not be applied in an administrative-court proceeding; that decision is being appealed. There is no provision in Finnish procedure for class or collective actions, and thus it may be that only companies, not ultimate consumers, could claim damages.

The FCA does not yet have full authority to apply EU Art. 81 and 82. It is unclear whether private parties could claim damages for violation of the EU treaty prohibitions under Finnish procedures. The substantive rules under the EU treaty and the Finnish competition law are essentially the same, and the FCA and the Competition Council have referred to EU cases in interpreting the parallel provisions of Finland's law. As a matter of substantive law, Finnish institutions could be deemed to have jurisdiction to apply EU principles, but Finnish law does not contain the necessary authorisation to use national procedures to apply those principles and the sanctions that go with them. The anticipated amendment of EU Regulation 17, which would devolve responsibility to national authorities to apply the EU rules, would require Finland to amend the Competition Act (FCA, 2002). A committee is likely to be established to consider what changes might be needed.

International trade issues in competition policy and enforcement

International aspects of competition policy have been treated cautiously. The first law from 1958 reflected the economic nationalism of the era, tolerating competitive restraints on exports and even on imports. The 1973 revision finally applied competition policy to restraints on import trade. The Competition Act now applies to a restriction of competition outside Finland if that conduct is directed against Finnish customers. By implying the need for a direct connection between the act and harm in Finland, the statute evidently prescribes something less than a full "effects" test.[17] Two recent cases illustrate the distinction. The FCA declined to pursue a complaint about low prices of imported birch pulpwood from Russia, even though Finnish firms were involved in the collusion, because the direct effect of that conduct was in Russia and the imports increased supply and stimulated competition in Finland (FCA, 2001, p. 25). On the other hand, the FCA asserted jurisdiction over an agreement involving foreign firms not to market products in Finland, because the restriction was directed against Finnish customers and the agreement was considered to have an impact on the Finnish market (FCA, 2002). In general, firm nationality is not by itself a relevant consideration in the application of the Competition Act. Potential foreign-source supply or foreign entry are considered in analysis, case by case (FCA, 2002).

Co-operation has concentrated on Nordic countries and other neighbours. The Nordic country agencies find co-operation particularly valuable because much of the business affecting them is organised on a Nordic basis. The FCA and the other Nordic country competition agencies have a formal agreement on procedures for co-operation. This agreement, entered in May 2000, gives guidance about notifying each other and co-ordinating actions. It provides for both negative and positive comity. It permits them to share non-confidential information, but sharing is not obligatory. The FCA also has co-operation agreements with the competition agencies of two particularly significant neighbours, Estonia and Russia (FCA, 2002).

Agency resources, actions, and implied priorities

Resource commitment has been stable, but turnover is high. For the last several years, the FCA has had about 56-57 employees (full-time equivalent). Including temporary trainees, interns, or non-military servicemen, the FCA has about 61.5 person-years of personnel support. In addition, about 9 person-years are devoted to competition enforcement matters at regional state administration offices (FCA, 2002; FCA, 2002*a*). Budgets have also been stable for several years. But the employees have been less stable. About 20% or the staff come and go each year, and about 40% of the staff have fewer than 2 years experience at the FCA. The turnover problem is shared with many other government bodies, as the private sector lures away younger staff. Increasing the salaries at the FCA to persuade them to stay will be difficult, because the FCA is already paying more than, for example, the Ministry itself. The FCA has 2 administrative sections, an international section (which is increasingly engaged with EU responsibilities), a merger unit, and 3 “market” sections, for telecoms, utilities, and finance; trade, industry, transport, and services; and government, construction, and environment. As of 1 October 2002, the non-administrative personnel will be reorganised into three sections, for mergers and abuse of dominance, cartels (including vertical and publicly-imposed restraints), and advocacy.

Table 3.2: Trends in FCA Competition Policy Resources

	Person-years	Budget (€)
2001	57	
2000	56	3 596 362
1999	55	3 363 759
1998	55	2 949 512
1997	55	2 791 920
1996	55	2 768 036

Source: FCA, 2002, FCA 2002*a*

Mergers and *ex officio* matters are taking more resources. The addition of merger review authority and responsibility in late 1998, with its deadlines for action, shifted the FCA's focus and allocation of resources. The number of non-merger matters dropped by a third from 1998 to 2000, and those done on the FCA's own initiative declined to only 8 in 2000 (FCA, 2001). Those cases tend to be more complex. To make resources available, the FCA has tried to dismiss a larger number of matters that are simply disputes about supplier or competitor relationships that have little effect on market competition. This FCA effort to focus its resources has sometimes met resistance at the Council, when the complainant has appealed the dismissal and the Council has referred the matter back to the FCA for action. But the FCA continues to try to concentrate on matters with greater public impact, which take more time and attention to resolve.

Table 3.3: Trends in Competition Policy Actions

	horizontal agreements	vertical agreements	abuse of dominance	mergers
2001: matters opened				150
sanctions or orders sought				5[2]
orders or sanctions imposed				1
total sanctions imposed	€1.6 million		€4.7 million	
2000: matters opened	22	23	74	184
sanctions or orders sought[1]	1		6	6[2]
orders or sanctions imposed[3]	0	0	3	1
total sanctions imposed	0	0	0	0
1999: matters opened	41	30	78	143
sanctions or orders sought[2]	0	1	3	5[2]
orders or sanctions imposed[3]	1	0	1	0
total sanctions imposed	0	0	0	0
1998: matters opened	38	24	78	23
sanctions or orders sought[2]	2	0	2	0
orders or sanctions imposed[3]	0	1	0	0
total sanctions imposed	0	0	0	0
1997: matters opened	46	35	56	n/a
sanctions or orders sought[2]	3	2	2	0
orders or sanctions imposed[3]	3	1	2	0
total sanctions imposed	0	0	0	0

	horizontal agreements	vertical agreements	abuse of dominance	mergers
1996: matters opened	42	32	77	n/a
sanctions or orders sought[2]	0	0	2	0
orders or sanctions imposed[3]	0	0	1	0
total sanctions imposed	0	0	0	0

1. Action sought or taken by FCA.

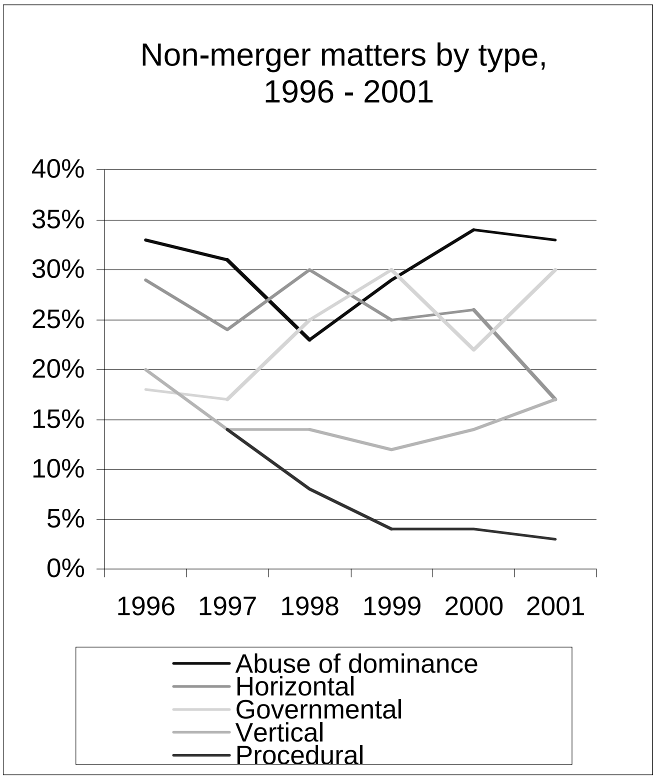
2. In 2001, 5 approved conditionally, one of which was banned, on appeal, by the Competition Council; in 2000, 5 approved conditionally, 1 proposal to ban; in 1999, 5 approved conditionally.

3. Order issued by Competition Council.

Source: FCA, 2002, FCA, 2002*a*.

The largest single category of FCA matters is abuse of dominance. But most of these appear to be competitor complaints about each other's pricing and marketing strategies. The FCA tracks separately a category of "governmental" restraints on competition. The proportion of these matters in 2001 was just below that for complaints about abuse of dominance. By sector, the largest number of cases in 2000-2001 was in telecoms (FCA, 2001). At one time, from 1992 to 1996, the FCA had separate Deregulation Unit, following up on the deregulation project begun in 1988. Now, one of the FCA's priorities is the "government and markets" project and competition issues that arise as market methods are used to provide public services (FCA, 2002).

Figure 3.1



Source: FCA, 2002.

Limits of competition policy: exemptions and special regulatory regimes

General provisions for exemption are narrow, but they are applied with sensitivity. Competition policy has been able to provide a sound framework for broad-based regulatory reform, because general exemptions are limited and there are few provisions for special treatment for particular types of enterprises or actions.

The FCA and the Council have taken the position that legislated exemptions should be explicit and limited to what is necessary to achieve a policy goal. Where anti-competitive conduct is authorised or compelled by other rules or by decisions of other government bodies, it cannot be prohibited or sanctioned under competition law. This common principle applies in Finland as well: the Competition Act is considered a general law, so special laws authorising anti-competitive actions can supersede it. But the FCA takes the position that such special legislation must provide for that derogation explicitly. The FCA contends that a law or regulation concerning a specific economic activity will take precedence only if the special law expressly provides for an exemption that directly applies to specific circumstances in contravention of the Competition Act. The FCA finds support for this principle of statutory construction in the 1997 report of the working party that prepared the latest amendments to the Competition Act. Where such an explicit derogation is encountered, the FCA can try to correct it, by exercising its general authority to file initiatives seeking to change anti-competitive special laws or other regulations (FCA, 2002).[18]

Government enterprises and private enterprises operating under special authority are fully subject to the Competition Act. The Competition Council stated the rule, that an entity operating pursuant to special statutory authority would be subject to the Competition Act if it would not compromise the basic purpose of the special legislation and if competition problem is not due to the special law but to the way the entity has implemented it. In the particular case, the claim was that a municipally-owned laundry took advantage of cross-subsidies to under-price competitors (FCA, 2002). The Competition Council noted that there should be no distinction in treatment where a public entity could entrust the operation to a private one, or where private businesses engage in the same activities as the government entity. In a January 2002 decision about the Finnish Road Administration, the FCA found that "the concept of a business undertaking includes all the activities of the state, municipalities and other public entities that have been organised in accordance with commercial principles as companies or public undertakings or that can otherwise be regarded as being primarily commercial in character" (FCA, 2002). Publicly owned entities are generally treated as undertakings covered by the Competition Act. For example, the FCA investigated the government-controlled fertiliser manufacturer Kemira Agro Oy for abuse of dominance (through tying contracts and price discrimination) (FCA, 2002). By contrast, statutory activities in health care, social welfare, or education might not have been considered economic business undertakings (FCA, 2002). That treatment could evolve, though. Finland is supporting development of market-based alternative means for providing many of these services. The FCA is treating these developments principally as an opportunity for policy advocacy and advice to the local governments involved. As the operations become more commercialised, the Competition Act should apply to them.

Small firms are not exempted, although small-scale restraints may escape enforcement. The Competition Act authorizes the FCA not to take action against a restraint that has only a minor effect on competition (Art. 12(1)). There is no other formal statutory exemption for small business. More elaborate small-business exemptions have been suggested and debated. One proposal would have permitted small businesses to band together to enhance their competitiveness against large corporations. Another would have called on the FCA to grant an individual exemption where the SME's contracting counterpart was an enterprise in a dominant position (FCA, 2002). In the event, the 1998 amendments to the Competition Act added only the general, discretionary *de minimis* principle. The principle does not necessarily depend on the size of the enterprise at all. Conduct by a large firm might be exempted if it has a minor effect. The FCA has interpreted the principle to be consistent with some of the more detailed proposals that appeared in the debate about the treatment of small firms, though. A restriction is considered minor if the parties' market share is under 5%; however, naked restrictions (those designed solely to limit competition) would not be considered minor regardless of market share (FCA, 1998). The FCA would be concerned if a number of individually minor agreements had a significant effect when cumulated. Fines have been imposed on small businesses for agreements that were obviously intended to suppress competition, such as bid rigging among taxi drivers. If small business is uneasy about relying on the FCA's exercise of enforcement discretion under Art. 12, it may apply for a particular exemption under Art. 19, inviting the FCA to consider and evaluate net effects, including the availability of competitive alternatives (FCA, 2002).

Few traditional monopolies or explicit exclusions remain. Finland moved early to introduce competition in most infrastructure sectors, such as telecoms, energy, and transport (except for rail). The commonly-encountered exemptions related to labour are limited. But there are a few anomalies, such as the vestigial national monopoly for alcoholic beverage retailing, and there are sectoral regulations which may impair competition more than necessary.

Labour

Agreements that concern the labour market are excluded (Art. 2(1)). The statutory exclusion is explained on the grounds that collective bargaining involves a form of economic competition that is qualitatively different from competition among business enterprises (FCA, 2002). Court rulings have limited the exclusion so that terms of labour agreements cannot be used to limit competition in markets outside the scope of the agreement. The documents that accompanied the 1987 Competition Act pointed out that the exclusion would not apply to terms of labour agreements that related to such subjects as limitations on the employer's customer relationships, rather than the terms and conditions of employment. The Supreme Administrative Court upheld that understanding in 1995, finding that the exclusion did not cover an agreement that prevented a paper mill from out-sourcing security and cleaning services. The court found that awarding a contract to an outside firm did not affect the pay, hours, or other terms of employment of the in-house employees (FCA, 2002).

Agricultural co-operatives

The exclusion for agriculture is limited to the primary producer level, and it is not absolute. The Competition Act does not apply to agreements, decisions, and practices among producers of primary agricultural products or their associations, as long as those agreements promote increased productivity, improve markets, promote availability, and achieve reasonable prices and lower costs (Art. 2(2)). Despite the exclusion, the Competition Act does apply if the arrangement to a significant extent prevents sound and effective competition in the agricultural product market or leads to an abuse of a dominant position (Art. 2(3)). The exclusion is phrased to cover, and thus exempt, the operation of laws to support producers' incomes, which are considered analogous to laws about collective bargaining. The exclusion permits associations of producers to represent their members in negotiations with buyers and processors. Even so, the intention was that the exclusion would not permit producers to use these groups to agree on minimum prices or to prevent members from using other distribution channels. After the primary product stage, further trade, manufacturing, and marketing are not exempted (FCA, 2002). Enforcement actions at the processing level have targeted abuse of dominance by the major dairy company, horizontal co-operation about purchase prices and market division in the meat processing industry, and abuse of dominance by a grain trader. The provisions were amended at the time of EU accession in 1995 (FCA, 2002). This was an event of particular sensitivity in this sector, as exposure to EU competition cut agricultural producer prices in half. To compensate for the loss, transitional national support was implemented, but there was nevertheless a significant fall in farm income. Agricultural subsidies have remained very high, and in contrast to the OECD average, support even increased in 2000.

Telecoms

Telecoms services, liberalised in the 1990s, are fully subject to the Competition Act. The Telecommunications Market Act (TMA) also applies, imposing some obligations on vertically integrated operators that have competition-policy motivations and effects. The telecoms regulator, FICORA, may refer problems to the FCA if the conduct at issue might violate the Competition Act. There is no formal process governing this relationship, though. The Council took the position that action by the FICORA would not preclude action by the FCA, either as a practical matter or as a matter of law. The jurisdictions overlap, but the laws are not symmetrical. Neither the Competition Act nor the TMA states or implies that the Competition Act would not apply, while the TMA notes that conduct might need to be evaluated under both laws[19] (FCA, 2002). The FCA has concentrated considerable resources on this sector, which has accounted for the largest share of both enforcement matters and advocacy comments. FCA decisions have dealt with such issues as interconnection and access pricing by local exchanges, pricing of interconnections to call centres, non-discriminatory access and pricing for co-location of internet service providers, and non-transparency of terms for internet protocol operation. Many cases have involved "ownership discount" arrangements, which can discourage entry (FCA, 2001, pp. 21-21). And the FCA has resisted efforts by major network players to acquire dominant positions in cable infrastructure, because cable is the most likely source of alternative fixed-line service, and most local cable firms in Finland are owned by the local phone company (FCA, 2001, pp. 49-50).

Electric power

Electric power was also liberalised, subject to special rules about transmission market power. The industry was opened to competition beginning in 1995, with small customers also included as of 1998, but production and wholesale markets remain concentrated. A unique feature of Finland's electric power industry probably encouraged competition-promoting reform: distribution was widely decentralised, and there were even 2 interlinked, separately owned high-voltage transmission grids. One was controlled by a vertically integrated state-owned firm, which spun it off into a separate subsidiary in 1992 in anticipation of reform. Another was owned by a consortium of major self-producers, including paper, metal, and chemical companies, selling surplus power. The grid operators were granted an exemption from the Competition Act so they could set up a common nodal pricing system for transmission (OECD, 1997). The retail market was served by local firms, most of them municipally-owned, operating under licenses issued by MTI which granted monopoly concessions for retail sale and imposed universal service obligations.

The Electricity Market Act of 1995 made major changes.[20], Its goals are to combine sound and effective competition in generation and sale with reasonable pricing and fair service in network operation.[21] The "needs test" to build new generation capacity was eliminated completely; entry on small scale (below 250 mW) had already been open, since 1989. No permit is needed to sell, import, or export electricity. There are no local and regional monopolies any more; however, retailers must offer electricity on equal terms to captive customer groups. "Network" companies need permits, which define their geographic areas of primary responsibility. With nodal pricing for transmission, the price of network service does not depend on location within an area of responsibility. To remove barriers to competition, the Energy Market Act calls for separating power sales from grid operations, requiring transmission networks to grant access to competitors, and obliging grid operators to transmit electricity on demand. Grid access must be at reasonable rates, on fair and non-discriminatory terms, with due regard for capacity constraints, reliability of supply, and efficiency. Accounting separation—separate income statements for all, and separate balance sheets for capital intensive operations—is required between generation, sales, and grid operations, by municipal as well as by private operators (FCA, 2002). High-voltage transmission was separated from the other electricity companies in 1997 and transferred into a new company, Fingrid Oy, which also controls the transmission links to neighbouring countries. The grid company's principal shareholders are the two power largest producers (and the owners of the grids that were separated and then combined), state-owned Fortum and privately-owned Pohjolan Voima with one fourth each, and the Finnish state with one eighth.

The Energy Market Authority (EMA) has the principal responsibility to monitor grid access and pricing. EMA, with a staff of about 15, is a special agency under MTI. In this sector, its principal responsibility is to regulate transmission rates, on the theory that this function is a natural monopoly. Transmission service is not excluded from the Competition Act, and the FCA has also been concerned about grid access and pricing. The EMA and the FCA do not have a formal arrangement for dividing responsibility, but a general agreement to avoid duplication is implemented by exchanging information and views. The FCA has tried to apply the Competition Act prohibition against excessive grid access charges. In a 2002 decision declining to find certain access charges to be an abuse of dominance, the Competition Council explained how they could be subject to both the Competition Act and the Energy Markets Act. It is more difficult to show that prices are an abuse of dominance under the Competition Act than to show that they are not "just" under the sectoral law. A price that is found not to be just under the Energy Markets Act standard would not necessarily be an abuse of dominance. But a price that is just could not violate the Competition Act.

Wholesale and retail electric power prices are not regulated. Rather, prices are subject to the general principles of competition law about discrimination, predation, and exploitation. As the restructuring process has proceeded, the expected effects of greater price competition are being observed. At first, only industrial customers, using over 500 kW, were free to choose their supplier. After the Finnish market was opened, the first firm to take advantage was the Swedish state-owned power company, Vattenfall, signing up two large Finnish companies. When the large companies got the option to shop around, about half of the companies eligible negotiated better contracts, although only about 6% actually changed suppliers. In 1997, the threshold was eliminated, and the market was opened for all types of customers. Until late 1998, however, the requirements for measuring equipment had the practical effect of keeping smaller customers tied to their historic suppliers. When those requirements were eliminated too, there was a significant downturn in prices for all customers.

Vertical ties and concentration in generation still require vigilance. The Competition Act contains a special rule about acquisitions in the electric power industry, aimed principally at preventing the re-creation of vertically-integrated monopoly (FCA, 1998; FCA, 2002). A merger, either horizontal or vertical, that would lead to a share over 25% on a national basis of 400 volt transmission may be prohibited (Art. 11d(2)). This rule permits banning a transaction that might not result in the kind of market share usually associated with single-firm dominance. MTI is preparing an amendment to the Electricity Market Act that would require more extensive vertical separation of network operations. There are still 87 vertically integrated companies. The proposal, to require separation by companies that transmit more than 130 GWh annually in the 400 V network, would affect 38 of them, accounting for over 80% of the power at issue. An MTI working group report in 2001 suggested some steps to encourage competition for smaller customers, such as permitting them to change suppliers once a year without charge.

Natural gas

Natural gas is a regulated national monopoly. Finland receives all of its natural gas by pipeline from Russia, and the gas grid covers only the south-eastern part of the country. Finland has an exemption from the EU's Natural Gas Directive, postponing open competition until the grid has been connected to the European network and Finland has more than one source of supply. Meanwhile, the monopoly importer and grid operator, Gasum Oy, is regulated by the EMA. Most gas goes to industrial users, such as industrial power plants and district heating. Local distribution accounts for only 5% of consumption. Although competition is not fully open, the sectoral legislation[22] permits large customers (with annual purchases over 5 million cubic meters) to trade in a secondary market, which Gasum Oy opened in 2001.

Water and sewer services

Water and sewer services are local monopolies. Local governments and property owners bear responsibility for providing these services. Most of the 1 500 waterworks and 650 sewer service providers have been either integral parts of municipal governments or municipal enterprises. The trend now is toward making them separate, even corporatised, entities. National legislation sets basic standards for regulation by local health care and environmental protection authorities and regional environmental centres. Charges must be reasonable and equitable, based on costs and a reasonable return on investment. Where the entities are not separately organised, there must be accounting separation. The Consumer Ombudsman has a role in ensuring compliance with consumer protection rules. The FCA can apply the Competition Act to prevent abuse of dominance, including excessive prices.

Transport

Road transport has been liberalised, to a greater or lesser extent, since 1991. In trucking, constraints on backhauling, private carriage, and intermodal operation may have continued to impede competition into the late 1990s, though. In bus service, operating a scheduled line still requires a license from local authorities, and that may depend upon a finding of unserved need. Requiring a showing of need can limit effective competition; on the other hand, authorities may grant licences to several firms for the same service, as long as it is self-supporting. Only 3 municipalities operate buses themselves. There are hundreds of licensed bus companies, few of them very large. Local authorities also use competitive tenders to provide service to under-served rural areas. To support the service, the local government may pay the provider the difference between actual revenue and the profitability threshold for which the provider bid. Overall results have shown the efficiency of private operation. In Helsinki, prices fell 33% at first and services improved through newer buses. There has since been a shakeout and prices have risen, but they remain 15-20% below the pre-competition level. There have been some complaints about service quality, such as high driver turnover and environmental problems. These conditions may result from how particular tenders were managed, if municipalities made inadequate provision for quality control or permitted contracts that gave greater weight to labour claims than to environmental considerations.

Taxis may still be subject to entry and rate controls. Entry is limited by a system of needs-based assessment applied by the Regional State Authorities. The Ministry of Transport and Communications sets tariffs. In theory, these are maximum prices, but in practice, they are the standard, fixed price. Change in this system appears unlikely. The Ministry published a working group report in 2001 about taxi services in the Helsinki metropolitan area. The working group, which included representatives of taxi sector, did not suggest opening the sector to competition.

Rail competition will come slowly. Railway services are still essentially a monopoly. In anticipation of the eventual award of operating licences, the state system has been corporatised and functionally separated into units for freight service, passenger service, and maintenance. It has also begun engaging in more commercial relationships, such as contracting with the association of municipalities around Helsinki for passenger services. But further liberalisation will come no faster than the EU timetable. International freight, amounting to 3% of traffic, will be open to competition in 2003. In part because Finland's track gauge is Russian, not European, most international rail traffic is eastward.

Banking and insurance

Financial services are now fully subject to the Competition Act and FCA jurisdiction, including notification for bank mergers. From 1964 to 1988, financial sectors were exempt from the then-applicable competition law. When they were brought back within the Competition Act in 1988, the sectoral agencies applied it. The Bank Supervision Office, for banking, and the Ministry of Social Affairs and Health, for insurance, had the primary power to bring matters to the Competition Council; the FCA could act only if the sectoral regulators did not (OECD CLP, 1998). Since 1998, only the FCA has the power to apply the Competition Act in banking; however, the FCA must offer the bank regulator, which is now the Financial Supervision Authority (FSA), an opportunity to issue a statement about an FCA matter involving the banking sector, and the FSA may ask the FCA to investigate (FCA, 2002). Bank mergers are subject to special provisions of the Credit Institutions Act, under which the FSA must be notified if a credit institution proposes to take a 10% or greater interest in another credit institution. If the FSA finds that the acquisition would harm the functioning of the credit institution, with respect to sound and prudent operating principles, it can either object to the purchase or deny the purchaser the power to exercise voting rights (OECD CLP, 1998).

In insurance, the sectoral regulator still has some enforcement authority. The Insurance Supervision Authority (ISA) has the power to propose that a restriction chiefly affecting the insurance industry be brought to the Market Court for an order or sanctions. The ISA has not actually done so yet (FCA, 2002). As before, the FCA has the power to propose action if the ISA does not. The ISA also has the first opportunity to examine a merger involving an insurance firm. If the ISA disapproves it, there is no need for a filing at the FCA. If the ISA approves it, then a filing at the FCA and separate FCA review and approval would needed (assuming the relevant thresholds are met); however, if the ISA has requested and received a statement from the FCA that there is no competition-policy impediment to approval, formal notification to the FCA is not necessary. So far, the agencies have not taken divergent positions about any insurance mergers. The interesting cases are those where the agencies might want to impose conditions, and they have to work out common positions (OECD CLP, 2000*a*).

Financial services remain one of FCA's priorities. Concentration is high, especially for banking services, where the combined market share in Finland of the three biggest companies is around 90%. Markets for these services may no longer be national, though. Large financial services firms often operate throughout the Nordic area. Finland's largest bank is not Finnish. Despite high concentration, competition is strong, especially for services that can also be supplied by foreign companies. Finnish banking has embraced new technology vigorously, as retail banking is increasingly done electronically. Technological developments can raise competition issues, as well as resolve them, by redefining the scope of market and competition.

Alcoholic beverages

Alko, Ltd., a state-owned company, has a statutory monopoly on retail sales of alcoholic beverages.[23] A few products can be sold outside the monopoly: low-alcohol beers and ciders and domestic berry wines sold directly at the producer's location. Alko's monopoly is supervised by the National Product Control Agency for Welfare and Health, STTV.[24] The National Health Project report in April, 2002 evidently calls for reducing the alcohol level cutoff, now 4.7%, and thus expanding the scope of Alko's retail monopoly. There had been some controversies about possible abuse of Alko's obviously dominant position, through discriminatory practices affecting the wholesale and import markets. EU rulings about the operation of national alcoholic beverage monopolies require transparent, non-discriminatory, objective methods for product selection. Alko's monopoly was once even broader, covering importation and wholesale trade as well. Those functions are now partly liberalized. Importers and wholesalers must have a licence from STTV, but licensing is a ministerial formality. Anyone who meets the qualifications may be licensed. Restaurants, for example, may obtain licences and thus import directly. Alko’s production and wholesale activities have been separated from the retail operation, into Altia Ltd. Altia is supposed to operate in competition with private firms. Plans to privatise Altia are so far unrealised. Political pressure to find a national solution (and keep the Koskenkorva and Finlandia brands of vodka in Finnish hands) resulted in a loss of interest by international buyers. Altia is managed by MTI.

Retail trade

Regulatory constraints as well as high concentration and industry co-operation may be dampening retail competition. In small, relatively open economies such as Finland, non-traded services such as retail are often a principal competition issue. Land use controls have discouraged entry by large-scale operators. Foreign chain retailers have only become established in Finland within the last 2 years. Controls on operating hours can inhibit competition among outlets that are already in the market. Those controls were relaxed somewhat in 2001. Smaller stores (below 400 square meters) selling everyday consumer products may now open on Sundays year-round. But other retailers may open on Sundays only over the summer (May-August) and at the end of the year (November-December). On days when opening is permitted, hours are limited, to 7:00 to 21:00 daily, 7:00 to 18:00 on Saturdays, and 12:00 to 21:00 on Sundays. Permission for Sunday opening or longer hours can be obtained from the Regional State Authorities for special occasions or for shops whose location justifies longer hours. Some kinds of retail operations are exempted from the opening hours limits. The exemption seems to be explained by bargaining clout, as much as by inherent function. The exempted operations include pharmacies, auto dealers, flower and garden shops, and art galleries, as wells as shops in unusual settings, such as kiosks, airport and harbour retailers (but only for international passengers), hotel and restaurant premises, open markets, auctions, hand crafts, and shops on wheels and in rural areas. The explicit purpose of the legislation is to protect particular retail sectors from competition. The law calls for annual reports from the government on the effects of the changes on workers and the distribution of trade, and a review of experience after 3 to 5 years, before any changes in the law will be considered. Thus changes will not be made before 2004-06 at the earliest.

Pharmacies

Pharmacies are licensed by the National Agency for Medicines, which issues licences on the basis of a determination of need as well as qualifications. There is a tariff schedule of recommended maximum prices, which are *de facto* the uniform prices found in the market. When providers in Helsinki responded to a tender with identical prices based on this tariff, the FCA brought an enforcement action against the evidently collusive offer. No penalty resulted, though, for the firms claimed that there were required to follow this price guidance. The enforcement effort did produce a statement from the Ministry of Health that it was not illegal to set prices below the tariff—even though its purpose, motivated by distributional and equity considerations, is to ensure that prices are uniform across the country. The FCA has proposed the abolition of means testing for location of pharmacies, and of recommended retail prices for pharmaceuticals, in interventions in mid-1990s (FCA, 1996*a*). That advice was not heeded. On the contrary: under new legislation effective in 2003, retail price competition for some pharmaceutical products will be formally eliminated, because those prices will be set by decree of the Government.

BOX 3.5: PROFESSIONAL SERVICES—NO LONGER AN ISSUE IN FINLAND

Professional services in many countries are to some extent exempted from full application of competition law. Not in Finland, though. In general, entry is open and providers may compete over price. At the outset, the FCA made it a high priority project to eliminate the professional associations' "recommended" fee schedules. After the associations put up some resistance, all of their recommended fee schedules are now gone. Regulatory requirements prescribe minimum necessary qualifications for some tasks, such as for auditors of larger companies. And self-regulation tries to promote an image of high-quality service. In the legal profession, some lawyers belong to a bar association which exercises a supervisory role over its members. Members of the bar association are preferred providers under insurance policies that cover legal fees, but there are no regulatory limitations on provision of legal services by non-member lawyers—or indeed, even by laymen. When issues arise in these markets, the Competition Act is applied. For example, the dental association in Helsinki advised its members to boycott a city tender for services, on the grounds that the city was usurping their function of prescribing treatment plans for patients. The FCA intervened, and the association backed down (FCA, 2002*a*).

Competition advocacy for regulatory reform

Competition policy has been linked to regulatory policy at least since Finland's economic reform efforts began in the 1980s. Competition policy has not been confined to enforcement against restrictive private practices. Rather, many of the most important contributions of the competition policy bodies have been interventions in the policy-making process.

The striking breadth of the advocacy agenda is explained by the scope of the reforms of Finland's economic system over the past 15 years, and the demands of Finland's entry into the EU in that period. Moving to a decentralised market economy required revising or eliminating the characteristic features of collusive corporatism. The competition policy bodies not only called attention to the need for change, but also offered expert assessments of the competition policy implications of change to the government, the business community, and the media. Much attention was devoted to traditionally regulated industries such as telecoms, energy, financial markets, and media, but the changes ranged well beyond conventional infrastructure deregulation.

Competition advocacy helped lay the foundation for reform. The National Board of Trade and Consumer Affairs prompted MTI to set up a working group in 1985 to examine deregulation. This was the first major national regulatory reform initiative. Unnecessary barriers to entry were identified in professional services, trucking, buses, taxis, electric power, foodstuffs, and construction. The Board's own statements criticised legal monopolies, exclusive rights, and monopolies in tendering. Meanwhile the Competition Ombudsman, the predecessor of the OFC and FCA, issued statements about constraints on competition in trucking, ocean shipping, professional services, and bakery prices and hours, and called for dismantling a wide range of regulations ranging from Helsinki University's almanac privilege to import licences for cheese, poultry, and physical fitness equipment, professional qualifications for chimney sweeps, and publicly-set pharmaceutical prices.

With new institutions and resources after 1988, efforts expanded greatly. Between 1988 and 1996, the OFC issued 385 official statements on regulatory issues, an average of nearly 50 per year. In addition, it issued 120 initiatives calling for particular changes in regulations, or an average of 15 per year. And OFC personnel were constantly involved in "informal" advocacy, counting some 400 occasions to participate in working groups on regulatory issues. Of all of these efforts, the largest number dealt with agriculture, telecoms, and retailing. The OFC believed its most significant advocacy was in electric power, telecoms, transport, environmental regulation, oil products, and alcoholic beverages.

The results of these advocacy efforts outline Finland's regulatory reform experience. Some examples:

– Abolition of price control (1988).

– Liberalisation of crude oil and petroleum product imports (1991); this was the outcome of a joint working group of MTI and OFC, established in 1989 on OFC's initiative.

– Liberalised entry into trucking, by eliminating the needs test for licensing (1991).

– Liberalisation of the kiosk business (1991).

– Liberalised entry into the hotel and restaurant industries (1991).

– Abolition of the sugar import monopoly (1992).

– Abolition of needs testing in scheduled domestic air traffic (1993).

– Increased competition in telecommunications (1994).

– Abolition of needs testing from driving school operating permits (1994).

– Liberalised entry into motor vehicle inspection (1995).

– Adoption of the Electricity Market Act (1995).

– Abolition of the University of Helsinki's almanac monopoly (1995).

– Abolition of the state-owned monopoly's exclusive right to import, export, produce, and wholesale alcoholic beverages (1995). Alko retained its retail monopoly, though.

– Corporatising the government-run state grain storage centre (1995).

– Ending the state-owned bank's exclusive right to conduct the Finnish state's payment traffic.

– Adoption of a new Water Regulation Act, to increase transparency and control monopoly.

The pace has continued, with over 50 FCA statements and several initiatives appearing each year (FCA, 2001, pp. 73-75; FCA, 2002). Advocacy in a sector has been handled by the FCA staff section that deals with that sector. There was no special unit for advocacy, although the subject matter of the government and markets project necessarily called upon that unit to concentrate on special advocacy goals, as much as conventional enforcement. A separate advocacy unit is being established, effective October 2002. Advocacy occupies about 6 person-years at the FCA, including 3 on the government and markets project (FCA, 2002). This is a substantial commitment, amounting to about 10% of staff resources.

Explicit statutory authority underpins this ambitious programme. The act establishing the FCA instructs it to "investigate competitive conditions, examine competition restrictions, take measures to eliminate harmful effects of competition restrictions, and take initiatives to promote competition and to dismantle any restrictive regulations and orders."[25] The FCA need not wait for an invitation to examine a problem or make its views known. Statutory authority for advocacy may not have been strictly necessary. It was added to the law in 1992, after the competition bodies' advocacy efforts were already well underway. Government policy had already given the competition agency responsibility for promoting pro-competitive reform. Under the 1989 action programme for the promotion of competition, approved by the Cabinet Committee on Economic Policy, measures that restrict competition were not to be included in new legislation. To make that instruction effective, the Government called on ministries to request a statement from the FCA before issuing any orders or regulations that restrict competition, and to reference the FCA's advice in their proposal memorandum.

Compliance with the 1989 instruction may have declined over time, though. One reason may be that the most obvious kinds of restraints have been eliminated, and ministries are less aware now of how their proposals could affect markets. For example, a proposed Legal Aid Act in 2001 would extend the availability of free legal aid and limit the provision of some services to public legal aid offices. Although this would limit competition (by excluding private lawyers), there was no consultation with FCA (or MTI) before the bill was presented to the Parliamentary committee (FCA, 2002). Another reason for a decline in consultations may be that some other parts of the government consider the 1989 instruction to have been a policy of the government of that time, which is no longer binding after a change of administration. In some cases, the spirit of the 1989 instruction is ignored, by asking for FCA views too late in the process. It is much more difficult to engage in productive exchange about the shape of the product when the statement from the FCA is not requested until a bill is about to go to Parliament.

Increasingly, FCA staff is participating in formal committees and task forces to consider and draft reform proposals. The FCA has deliberately moved to develop channels of communication with other agencies so that issues are identified at an early stage, and the FCA has an opportunity to influence proposals as they are being developed, rather than comment toward the end of the process after another agency has invested considerable resources and reputation in its proposal (FCA, 2002). In 2001, FCA representatives served on working parties dealing with retail, local services, pensions, and environmental regulation (FCA, 2002*a*). This is not a new activity, of course. Participation in such task forces dates back at least to 1985. In the mid-1990s, OFC representatives served on boards and working parties about subjects such as customs, international trade, EU accession, agricultural marketing, food and drink industry issues, financial services, road transport, and electric power.

BOX 3.6: COMPETITION POLICY IN PREPARING ELECTRIC POWER REFORM

An initiative of the OFC General Director in the late 1980s led to an MTI working group, including OFC and the Ministry of Finance, which began examining this issue. Acquisitions in the industry prompted formation of an Electric Utility Committee at the ministry in 1990. OFC served on this committee as well. Proposals included imposing an obligation to transmit power for other customers and separating transmission and distribution from generation. A Working Group on the Electricity Act was set up in 1992 to draft legislation; again, OFC served on this Working Group. The draft bill was finished in February 1993, and the Energy Market Act became effective in 1995. In this process, OFC argued successfully against creating an exclusion from the Competition Act.

An ongoing controversy about environmental policy illustrates the problems and the process. Small businesses have complained to the FCA that the tax incentive for recycling beverage containers distorts competition. Packages in a recycling system that has been formally accepted by the environment minister do not incur an environmental tax. The approved system, for bottles, is run by the large Finnish producers. Small and foreign producers who want to enter the system, and thus avoid the tax, complain that they must bear disproportionate costs because the system imposes conditions such as requiring a reserve stock in Finland. The FCA has called attention to how the system could distort competition and undermine efficiency, and it has proposed that smaller producers be exempted from the requirements in order to even the competitive balance (FCA, 2001, p. 26). The FCA filed its first initiative on this problem with the Ministry of Finance in 1998, and followed with statements to the Ministry of the Environment (1999) and Parliament (2000). In 2001, the Ministry of Finance appointed a working party to identify the problems and propose improvements (FCA, 2002). The working party is to report in October 2002. In the meantime, the EC too has suggested that such systems could distort competition. The competition policy questions of interest are whether the rules of the system could be changed to encourage market competition for the products without undermining the environmental goals, or whether an entirely different recycling system would achieve the environmental goals without discouraging entry.

Since 1998, the FCA's "government and markets" project has combined advocacy with enforcement to address the public sector's activities as producer and seller. Finland traditionally maintained a large, publicly owned production sector, whose operations, at the national and municipal level, were typically sheltered from competition. During the 1990s, that protection declined as the functions were increasingly opened up for competition from private-sector providers. The scope of those operations competing with private-sector firms expanded during the depression Finland was enduring at the same time. Private-sector firms were particularly sensitive to this competition, because of their own economic straits. The FCA received many complaints that public sector entities were using revenues from protected activities to cross-subsidise operations in competitive markets. These complaints did not lead to enforcement action, although some of the claims nearly met the legal criteria for predatory pricing. The pattern of complaints, and the prospect that this would become a recurring issue, led the FCA to set up this special project in 1998, assigning 3 full-time staff and launching several *ex officio* investigations of state-owned production entities. Many situations that began as enforcement investigations are being resolved through advocacy and changes in laws and institutions. The FCA considered this project complete in 2001. As marketisation expands, these public sector operations will essentially become businesses subject to the general rules of the Competition Act (FCA, 2002*a*). Examples of the project's work illustrate the scope of public sector involvement in markets:

– Road maintenance: Most road maintenance and construction work had been done by a unit in the Finnish Road Administration. Thus the producer and the purchaser of the services were divisions of the same government agency. Bids from private firms were invited in some pilot projects, but the private bidders complained that the inside firm was winning contracts because of unfair cross-subsidisation and predatory prices. Following an FCA initiative, the operating unit, Finnish Road Enterprises, was separated from the authorising body in 2001. After a four-year transition period, all construction and maintenance on the public roads will be subject to open public tender. An FCA representative is on the Ministry-appointed group that is overseeing implementation (FCA, 2002). In the meantime, FCA is encouraging Finnra to use tendering for smaller projects, to support the prospects of potential new entrants (FCA, 2001, p. 15).

– Grain trading and storage: The FCA investigated complaints that Avena, the state-owned grain trader, was using anti-competitive means to steer cargo handling and storage services to a related firm and was charging too much for storage services. Avena changed its policies and lowered its storage prices during the investigation, so no formal enforcement action resulted (FCA, 2001, p. 15). In response to a June 2000 FCA proposal, the National Emergency Supply Agency issued a tender for grain traders to manage and store reserve supplies. (FCA, 2002).

– Weather data: The Finnish Meteorological Institute (FMI), with a legal monopoly on producing and distributing basic weather radar data, also runs a commercial weather service. When a commercial competitor appeared in 1999, using the radar data that FMI transmitted to its Swedish counterpart, FMI responded by degrading the quality of the data it provided internationally. The FCA sought a fine against FMI for abuse of dominance and called on the Ministry of Transport and Communications to separate and corporatise FMI's commercial functions. In early 2002, the Competition Council imposed a fine, of €20,000. The working group examining the structural issue concluded in 2001 that that the weather service should be separated, although it did not agree with FCA that weather services for civil aviation should also be spun off into the new entity (FCA, 2002*a*).

– Government procurement: A central entity, Trading House Hansel, has handled procurement for all levels of government. Suppliers, particularly small businesses, have complained that this limits or eliminates their opportunities to sell directly, especially to local and municipal governments. So far, FCA investigations have not found prohibited restraints. But the procurement system is being reformed, and one element of the reform will be a change in Hansel's legal status. The FCA's comment on the procurement development plan suggested that it over-emphasised the potential economies of scale, while disregarding the risk of monopoly. The FCA argued that the key elements were independent procurement units and profit responsibility to encourage efficiency and transparency (FCA, 2002*a*).

– Forestry: The FCA found no abuse of dominance in the production of seeds and seedlings by the Forest and Park Service; however, following an FCA recommendation, the Service's commercial operations were separated and corporatised (FCA, 2002*a*).

– Employment services: The Ministry of Labour proposed to establish a commercial temporary labour service, to complement its employment-agency function. The FCA advised that such a service should be set up in an entity that was independent of any other Ministry operation and put on the same footing as competing private enterprises (FCA, 2002*a*).

– Education: Commercial vocational training schools complained about unfairly subsidised competition from publicly funded institutes. The scope of this conflict was broad: hotel and restaurant service, computer training, driving, nature tourism, psychological testing, massage, environmental testing, flue gas measurement, building and construction, and hairdressing. The FCA recommended that the public entities set fees on a commercially viable basis for their programmes that compete with private sector offerings. The Ministry of Education, which supervises the institutes, endorsed this recommendation (FCA, 2002).

– Social service subsidies: The slot machine association subsidises social services, such as home health care for the elderly, that are provided by local governments, often through contracts with non-profit organisations. These subsidies total €350 million annually. Private providers of these services have complained that the subsidies give their competitors an unfair advantage (and they have lobbied for expanding the scope of subsidies, to include private providers as well as the "third-sector" non-profit providers). The FCA has worked with the association, which is under the direction of Parliament, on a statement of principles to reduce the distortion of competition (FCA, 2001, p. 18). The framework that FCA proposed for analysing subsidy distortions is now being applied to other topics, such as sports (FCA, 2002*a*). MTI is trying to encourage the use of the slot machine funds on functions that do not compete with private firms, in part to avoid contravening EU rules about state aids.

BOX 3.7: MARKETISING LOCAL PUBLIC SERVICES

Local governments are legally responsible for a wide range of welfare and other services. Municipal governments, joint municipal boards, and regional councils provide primary and secondary health care, dental services, social services, income support, primary, secondary, and vocational education, housing, water and sewer service, waste disposal, transport, cultural and leisure services, town and regional planning, environmental protection, and roads. For some of these functions, local governments have exclusive competence. Municipalities receive state support for some functions, in part to compensate for regional variations in wealth. In the past, most governments have provided medical, social and other services directly, for free or at nominal charge. Municipalities have been free to provide social and medical services by purchasing them on the market at least since the early 1990s. Until recently, few had used that option very much. But that is changing quickly. The FCA and the regional governments recently surveyed 15 municipalities and found that all of them had begun to turn to the market for these services to some extent (FCA, 2002).

Problems with the traditional means of providing these services are increasingly evident. As the population ages, the costs of health and elder care are increasing. The higher taxes needed to pay for these services may be reducing Finland’s competitiveness in international markets. And the increasing integration of Finland’s economy into the European and world economies exposes the comparatively low productivity of its non-traded service sectors. To maintain the quality of services, some way needs to be found to provide them more efficiently. An obvious way to improve efficiency is to rely more on market institutions. At one scale, municipalities could enter market-based relationships with providers of services. At the opposite scale, residents might choose their own providers and pay for them with municipally-financed vouchers. Another alternative to the current approach would be to return to a centralised system that was used until the 1980s, with services provided, or at least paid for, at the national level. Although this might save on some common costs, it could increase the costs of control and co-ordination.

A report issued in late 2001 by an MTI working group has fuelled the debate (MTI, 2001). The report finds that purchasing services, rather than providing them directly, promises both greater flexibility and increased efficiency. But demand for quality is also increasing. Thus, the report concludes that municipalities must retain their supervisory responsibility, both in providing services through outsourcing and in supporting a client-producer “voucher” system. The report proposes that the legislation governing these services include general provisions to support marketisation. In particular, municipalities should develop cost accounting for their own production, so they can evaluate alternatives before engaging in their own production, and they should examine the effects of their own production on private activity in the sector involved. To make service vouchers workable, the report proposes ways to clarify their tax treatment. The report emphasizes the need to maintain competitive neutrality as public entities enter a market occupied by private providers. It also recognises that municipalities may need to band together to expand their customer base and offer services efficiently. A challenge to introducing market methods is that consumers appear to be satisfied with the services they are getting now, and are not sensitive to the threat of longer-term problems if nothing is changed.

The Ministry of Health and Social Services, which did not participate in the consultation process on the MTI report, may have a different perspective. Some local governments have resisted pressure to comply with procurement rules calling for competitive bidding, especially about health and social services, and this Ministry has begun to suggest that medical care, at least, might be exempted from those rules. A reason for concern is that low price might be inconsistent with high quality. The general procurement rules permit rejecting the low bid, but the quality-based reasons for doing so must be justified. Documenting that justification is difficult, though. Under the traditional system, this Ministry has set quality standards for municipalities to meet. Compliance with those standards is encouraged by ”informational guidance” more than by coercion or intervention, though.

Both market-based and public systems of providing medical and social services face the same challenges, of honouring individual needs while maintaining universal service, and of ensuring, or even just assessing, the quality of that service. The traditional regulatory approach has been to try to assure quality of output by controlling the inputs, but increasingly attention is turning to measurement of the services actually delivered. Finland’s association of local governments is working with others in Nordic area on means of assessing quality of service delivery, to help understand better whether municipalities are meeting their targets. One project is setting up a Nordic system of “diagnostic related groups” to collect and classify data on medical care outcomes. Another is developing measures of “functional independence” for assessing the quality of care provided to the elderly. The Ministry of Health and Social Services and patient organisations too are collecting data on service quality and quality measurement.

The health care system already combines public and private providers. Many individuals work in both spheres, maintaining private practices while also holding public health positions. Still, in 1999, less than 2% of medical care services were provided by the private sector; by contrast, about 10% of other social services were provided privately. Many of the private providers are non-profit entities, supported by subsidies funded by the state slot machine monopoly. Individual purchase of privately-provided health care service is supported by insurance, through the independent Social Insurance Institute. A voucher-type system is used for some non-medical services, such as day care. Experiments with alternative institutions include creation of small firms in rural areas to mediate contracting for privately provided medical services, supplying expertise, and perhaps economies of scale and scope, that are beyond the capacity of small municipalities. There is at least one hospital with private (foreign) capital, and municipalities are combining to set up and provide laboratory services.

When service providers band together, they attract the attention of the competition policy agency. Joint ventures to improve efficiency may of course be permitted, even encouraged. But not all joint action would be benign or efficient. The FCA has been asked about the implications of municipalities offering a common bid in response to a tender offer for educational services. The FCA noted that, as a technical matter, the agreement would not necessarily be prohibited if the local government entities were conceived as being under common ”ownership”; however, the FCA also warned that excessive co-operation and concentration of suppliers would be unwelcome from a competition policy perspective (FCA, 2002*a*). Municipalities themselves have faced this problem, as their efforts to procure taxi services have encountered bidding cartels.

More often, the entry of public entities into private markets has led to complaints about unfair competition and abuse of dominance. Such accusations have already been levelled at the laboratory business set up by a federation of municipalities in central Finland. Others have claimed that hospitals sell occupational health, laboratory, and x-ray services at non-commercial prices. The participation of the insurance system complicates the analysis (FCA, 2001, pp. 16-17). The basis for the alleged unfair advantage could be direct subsidy, cross subsidy from monopoly services, or failure to account for common and capital costs. In the past, the Competition Council has been criticised for taking a formalistic approach in identifying these cross-subsidies). The FCA's recent work with the slot machine subsidy problem has tried to set out a systematic framework for analysing these cases.

Conclusions and policy options

Finland has compiled an impressive record of market-driven reform since the mid-1980s. From early and large-scale restructuring of network monopolies to eliminating the many vestiges of corporatist control, competition policy principles and institutions were at the centre of this effort. The focus now on the role of market institutions in providing traditional government services continues this tradition, and does so in a characteristically systematic, non-doctrinaire, pragmatic fashion. The need to increase productivity in non-traded services, particularly government services, is well understood. The pace of reform may be slowing as issues become more difficult. But Finland is asking the difficult questions about the relationships among quality, equity, efficiency, and choice. And decentralisation, which seems to be a problem to be solved, also makes available a laboratory for experimentation to find solutions.

To be sure, competitive markets have not yet reached every corner. In Finland as elsewhere, it has been difficult to establish competition for taxis and trains, local retailers are protected by controls on operating hours and on large-scale competitive entry, and pharmacies are more controlled than competitive. Some enterprises that are connected to the state could present problems. These range from idiosyncrasies, such as the retail alcoholic beverage monopoly, to some major corporations where the state's large ownership interests challenge the goal of maintaining efficiency-based policy, in the face of implicit pressure to protect the value of the state's holdings. Sectoral regulation shows little sign of conflict with competition law and policy, and competition principle is well established as the basis for conventional economic regulation. But in some areas there is work to be done. Candour is appreciated, at least: the legislature has made no secret that controls on retail opening are intended to prevent competition.

The role of competition policy in the reform process has become less clear over time. One reason may be that the relevance of competition policy to current problems seems less clear. The first stages of reform, about removing controls on prices and trade, ending restrictive practices, and restructuring monopolies, were obviously dominated by concerns about market competition. By contrast, the competition policy issues raised by efforts to improve the system of providing public social and health services are not as obvious. The FCA continues its advocacy efforts unabated. But the formal process for consultation with FCA about how regulatory proposals affect competition, dating from 1989, appears to have fallen into disuse. Perhaps this is because other parts of the government do not understand clearly how their proposals could affect competition. And perhaps it is because the consultation requirement is seen as a product of a different time, a different government, and different officials. Now, the competition minister in MTI may still call attention to the need for consultation as proposals work their way through the government, but often the need only appears when the matter has already reached the Parliament.

Finland's competition law and institutions demonstrate the value that particular local experiences add to familiar general principles. The substantive law varies the EU toolkit. Its treatment of exemption criteria and rules about vertical restraints anticipated recent EU reforms. The heritage of Finland's early competition policy efforts survives in Art. 9, which restates fundamental policy standards in a forward-looking legal rule. This may be a useful resource for applying competition policy in non-conventional situations such as government involvement in markets. The new Market Court, the latest instance of reform through institutional change, may represent another kind of resource and opportunity for applying consistent principles broadly. The jurisdiction of the old Market Court had been limited to marketing practices and complaints about unfair competition. Adding the jurisdiction of the old Competition Council and the efficiency-based perspective of the Competition Act could tend to correct for the "protectionist" tendency of the unfair-competition tradition—if the Market Court actually operates so that these concepts can inform each other. The Market Court process could encourage the elaboration of competition policies that are attentive to the consumers' interests, as well as consumer protection and market practice rules that are attentive to how competitive markets actually work. To be sure, a strong separate decision-maker complicates the position of the enforcement agency. A specialised competition court or tribunal may become the principal source of policy, at least about enforcement, if not regulation. Tension between the specialised tribunal and the executive enforcement office is not always creative. Finland has had an independent, specialised decision-maker since 1973, so these issues are familiar. The Competition Council sometimes disagreed with the FCA's decisions and recommendations, and the Market Court is likely to follow the same constructively sceptical course. If the Market Court's decision-making role expands, the FCA's role as a prosecutor, more than a decision-maker, would become clearer.

The FCA is generally seen to be working well. Those who deal with the agency regularly find it to be responsive and fair. Its workload and priorities reveal conflicting demands on its resources. A high proportion of FCA matters have dealt with abuse of dominance. Some of these matters implement the reform agenda, in telecoms and electric power. Some have addressed market power exercised by state-related enterprises. Some may represent prudent solicitude for the interests of small business, and many are the inevitable result of the FCA's implicit obligation to respond in some way to each complaint. Attention to issues of market dominance may also be explained by Finland's economic and geographic situation, in which achieving economies of scale has probably tended to imply comparatively high concentration in many markets. Cartel enforcement has gotten less attention, at least in recent years. The FCA made cartels a top priority at first and achieved notable success against them. But those were old-fashioned explicit cartels, organised through industry associations. Uprooting clandestine ones will be a different matter. The task is complicated by the courts' apparent reluctance to impose significant sanctions against horizontal violations. If sanctions are not significant, then one of the most effective enforcement tools against clandestine collusion, the promise of leniency in exchange for insiders' direct evidence, does not work. The FCA is trying to focus its resources on *ex officio* projects and on horizontal matters. Those resources may be stretched, so that other matters are delayed. Some applicants have complained about the length of time it takes for the FCA to issue decisions on applications for exemptions and negative clearances.

Policy options for consideration

The following options are recommended for consideration to strengthen the scope, effectiveness, and enforcement of competition policy and thus support its role in regulatory reform.

Incorporate consideration of competition impacts in the regulatory quality process.

The 1989 directive requiring prior consultation with the FCA about proposals that could impair competition was well conceived. Requiring the proponent not only to obtain the FCA's views about it, but also to respond to those views in its submission, will contribute to informed debate and decision. Regulations that constrain competition may sometimes be necessary, but their effects and tradeoffs should be understood clearly, and an effort should be made to achieve other goals in ways that do not impair competition. The present status of the 1989 directive seems to be unclear. If it is still in technically in force, then it should be observed. If it may have technically lapsed, a similar instruction should be reissued. Indeed, such a review of potential impacts on market competition should be an element of the general program for ensuring regulatory quality, applied both to new proposals and to matters that are already on the books. A systematic, general power of review is preferable to a purely ad hoc approach, even though many if not most items reviewed turn out to be competitively neutral. Experience in Finland and elsewhere shows that, as the market impact of regulatory proposals becomes less obvious, agencies may not know when they should ask for views about competitive effects of their proposals. Statutory authority to involve the competition agency in policy matters is already in place, and the FCA's advocacy and policy work has continued. Reaffirmation of the principle from the 1989 directive, integrated into a comprehensive regulatory quality programme, would ratify the importance of that work.

Discourage subsidies and preferences that distort competition.

In the FCA's government and markets project, a common theme has been how, or whether, private providers can successfully compete with government-related entities or subsidised non-profit entities. This will continue to be an important issue in the marketisation of public services. The FCA's development of a framework for analysis of subsidy issues, prepared in order to deal with complaints about the slot machine subsidies, shows the importance of a clear assessment of these effects. Conceivably, the Competition Act's general, prospective Art. 9 could be applied to control abuses. But this should be addressed in policy and program design, more than in competition law enforcement. It should not be left to the FCA to devise cost-effective ways to provide services that may not pay for themselves in individual cases.

Remove state holdings from positions that raise apparent conflicts of interest.

MTI's dual position as a major shareholder in large industrial enterprises and as the overseer of agencies such as the FCA that enforce the laws against these enterprises is unsatisfactory. The fact that the state has a direct ownership interest in the financial health of these enterprises by itself raises some concern about the even-handedness of regulation. The courts' refusal to impose significant fines in a case involving a major defendant in which the state has a substantial share underlines that concern. There has been no implication of actual impropriety in any particular case. It is a matter of appearances. But appearances do matter. There is an appearance of conflict in MTI's position, despite credible assurances that the ministry does not intervene in FCA's enforcement discretion. It would be better to eliminate the appearance of conflict, and the temptation to intervene, by moving the shareholder responsibility to another body, if not by eliminating state shareholding entirely.

Re-examine remaining constraints on competitive operation and entry in retail and services.

In small, open economies, competition problems may be concentrated in non-traded services. Providers' incentive to obtain legal authority for non-competitive methods of operation is only reinforced by a tradition of social solidarity. In its law enforcement capacity, the FCA has paid careful attention to formal horizontal and vertical structures in wholesale and retail trade. The regulatory barriers to competition are equally significant. Local competitors are likely to have used the land use control process to delay or prevent competitive entry. Regulation of opening hours channels competition and dilutes the effect of alternative retailing strategies. In Finland, the legislature has been more candid than most about the purpose of controlling retail hours. The law's purpose is self-evidently to limit competition and to protect the profits and positions of particular classes of retailers. When the effects of the controls are reviewed, the legislature intends to examine the impact on jobs and on the distribution of trade, which is at best a euphemism for the effects on particular current competitors. It will be instructive to compare Finland's experience to others. Flexibility often increases retail employment, albeit with a different mix of skills and work situations. If the purpose and effect of the controls are simply to protect incumbents from competition, then they should be repealed so consumers can decide for themselves when and where they want to shop. If the controls had a purpose other than controlling competition, then the rules should be tailored to that purpose

Needs-based controls on pharmacies should also be reconsidered. To be sure, there is some relationship between pharmacy operations and policies about paying for pharmaceuticals. But it has been official policy to permit price competition, at least below the official price ceilings. (That policy is evidently about to change, as retail prices for some pharmaceuticals will be set by government decree beginning in 2003). To make that policy a reality (to the extent price competition is still permitted for some products), pharmacies and entrants should have an opportunity to compete to serve the market with different pricing and operating strategies. Incumbents shielded by a needs-testing rule will treat the ceilings as a focal point for common prices, and their costs will adjust so that they appear to be making only a normal profit at that price level. In the absence of challenge by firms with different services, strategies, and cost structures, that will not change.

In local transport too, needs-based entry requirements should be reconsidered. Taxis are a problem everywhere, but needs-based entry control is not the solution. Regulation of safety and consumer services, price transparency, and properly enforced common carrier obligations should be sufficient to protect against abuses. For local bus services, competition for the market seems to be working reasonably well, despite complaints about the results of some tenders.

Integrate competition and consumer policy perspectives.

Consumer policy seems distant from competition policy, concerned with other issues, perhaps even still somewhat suspicious of markets. Although consumer policy statements acknowledge the importance of competition, the focus is elsewhere. Combining jurisdictions over these subjects in the new Market Court may help reconnect them, but only if the members of that body take advantage of the opportunity. If not, then creating the new institution will amount to little more than simplifying the organisation chart. Creating the new body has incurred some transition costs, but at the end of the process it looks unlikely that it will save on operating costs, as the total human and other resources available to this body appear about the same as were available to the two separate bodies before.

Apply enforcement resources, and effective sanctions, to horizontal issues.

The FCA recognises the need to address horizontal problems. The recent wood products litigation dealt with a characteristic and important kind of problem for a national enforcement agency in Europe, namely claims that major firms are colluding at the expense of local raw material providers. Experience elsewhere strongly suggests that problems of horizontal collusion are likely to be found in non-traded services. The FCA has already dealt with overt constraints in the professions and other services. Covert constraints are likely to be found in construction and related markets such as construction materials and contract services. Such constraints could include bid rigging or rotation for large projects and price collusion and anti-competitive work rules for subcontractors. Increased attention to horizontal matters will be a foundation for stronger enforcement co-operation in dealing with international cartels.

The apparent lack of judicial support for enforcement against horizontal restraints is discouraging. The FCA believed that the wood products collusion was a serious restraint, but the penalty eventually imposed was insignificant, compared to sanctions that have been applied against cartels elsewhere. This case alone may not be proof that the courts would not impose a significant fine against clandestine price-fixing. The theory and proof may have been more complex than the FCA realised at first. But the limitation on the range of sanctions provided in the Competition Act may have limited the courts' vision, too. An extraordinary showing is required to impose a fine greater than the cap, of €670,000. It is not yet clear what would constitute such a showing. The limit that would apply in the event of such an extraordinary showing, 10% of turnover, is consistent with European practice, but it is an illusion if it is unlikely ever to happen. (Some European jurisdictions authorise potentially much higher fines: the UK, for example, permits cumulating the 10% of turnover over three years). Based on deterrence models, even the 10% of turnover level may not be high enough, if collusion enables the conspirators to increase prices by a substantially greater amount. The recent review of experience among OECD competition enforcers suggests that 10% is a conservative estimate of the typical cartel overcharge. The basic range of sanctions under the Finnish law should be expanded greatly, by at least a factor of 10. Even more importantly, it should be possible to impose a sanction that has a deterrent effect, by computing the sanction based on turnover or gain from violation. And Finland might consider imposing some liability or sanction on the individuals who are responsible for the violations by corporate entities. The risk of personal liability can discourage an executive from authorising or engaging in illegal conduct, and the prospect of avoiding that liability can lead to confessions that strengthen enforcement against corporate misconduct.

Channel competitor complaints into private lawsuits

If the FCA concentrates more on horizontal issues, it will have fewer resources for handling competitor complaints about abuse of dominance. Those issues, which are often contract disputes at heart, are often suitable for resolution in private litigation. Finland's law permits an aggrieved party to bring suit now, without waiting for the FCA to act, at least with respect to clear violations. Private firms already can file private suits seeking orders against prohibited conduct. For conduct that is not prohibited but that might be covered by an order under Art. 9, a party must now go first to the FCA and seek an order. The Market Court hears these disputes only after the FCA has already ruled on them. These are often essentially private disputes among customers and suppliers, and often have little effect on competition at a larger scale. The Market Court's jurisdiction over complaints about unfair competition is a natural complement to these controversies. Finland should consider amending its procedures if necessary so that the FCA could send complaints directly to the Market Court for litigation and decision there, where it appears that they are essentially private disputes that should not occupy public resources for investigation and resolution.

Complete the changes needed to allow the FCA to apply Art. 81 and Art. 82.

Giving FCA the complete range of tools will increase flexibility and facilitate co-ordination with other enforcers in Europe. Adaptation should be straightforward. Finland's approach to exemptions is already what the EC is proposing as a reform: direct application of the criteria, rather than mandatory notification and exemption.

NOTES

1. 1958 Act on Competition Restrictions within the Economy.

2. Act on the Promotion of Economic Competition, 1964.

3. Act 480/1992 ("Competition Act"). All citations are to this statute, as most recently amended, unless otherwise noted.

4. Government proposal to Parliament for an amendment to the Competition Act (148/1987).

5. Art. 2, Act on the Finnish Competition Authority.

6. The standards under Art. 19 are also same as those that apply under Art. 6(2), except that under Art. 19 the parties need not show the agreement is "essential" to achieving the benefits.

7. Art. 82 of the Treaty of Amsterdam, in relevant part, prohibits "abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it …"

8. Liability was found under both EU and Finnish competition rules.

9. For example, the FCA has taken action against the Port of Helsinki for unreasonable, non-transparent, non-cost-based prices, and a firm selling peat was charged with discriminatory, non-cost-based pricing (FCA, 2001, p. 19). In the peat case, the firm was evidently basing discounts on customer elasticity of demand, rather than cost of service. Although it appears to exploit market power against the customers who are less able to turn to alternatives, charging higher prices to customers whose demand is less elastic can improve (static) allocative efficiency.

10. In describing this issue, the FCA also notes that the merger might be permitted if it is the only way to "prevent the removal of unnecessary capacity" (FCA, 2002). This formulation seems inconsistent with the direction of competition policy generally, to be concerned about efficiency. If capacity is truly unnecessary, being both excess to demand and comparatively inefficient, its removal from the market is not a matter for any concern. Indeed, it would be inconsistent with an efficiency-based policy to permit such a merger in order to keep the unnecessary capacity in operation.

11. The one-week deadline could be triggered by other events, depending on the form of the transaction: the publication of a public bid under the Securities Market Act, the executive body's decision to proceed with a merger, or the founding meeting of a joint venture. For mergers involving insurance institutions, it is triggered by the parties' receipt of approval from the Insurance Supervision Authority.

12. A public bid can be implemented after the 1 month first stage, but implementation may not be registered until final decision or approval (Art. 11g).

13. If the parties have supplied false information (which makes a difference to the decision), or merged despite disapproval, the Council may order it rescinded, but the FCA has to make such a proposal within a year after the deal is implemented (Art. 11i).

14. The first requirement under the Act on the Openness of Government Activities s that there be specific statutory authority for access. No provision of the Competition Act authorises access, so, if the requirements are cumulative, then the FCA's access to confidential information from other parts of the government may be limited. If they are not cumulative, then access would depend upon fulfilling the other requirements: consent by the party whose information is at issue, necessity for determining a tax matter or a judicial ruling, decision, or appeal; or performance of a specific monitoring task.

15. The FCA may issue an interim order *es parte* if "the urgency of the matter some other specific reason demands otherwise" (Art. 14).

16. FCA press release, Sonera/Loimann Seudun Puhelin, 18 January 2002.

17. The Government may authorise application whose effects are felt outside Finland if so required by an agreement with another country or if doing so would be in the interests of Finland's foreign trade (Art. 2(4)). And the limitation does not apply to the extent the Finnish authority is taking measures under EC rules (Art. 2(5)).

18. Act on the Finnish Competition Authority (711/1988), Art. 2.

19. Telecommunications Market Act, Art. 36.

20. Act 386/1995.

21. Electricity Market Act, Art. 1.

22. Natural Gas Market Act, 508/2000.

23. Act on Alcohol, Sec. 13.

24. (Sosiaali ja terveydenhuoltoalan tuotevalvontakeskus,)

25. Art. 1, cl. 6-7, Act on the Finnish Competition Authority.

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