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“Special responsibility” through clear-cut market share threshold — Proposed new assessment criterion for addressing dominance in Finnish grocery retail sector

Mika Oinonen (Finnish Competition Authority, Finland) · Saturday, December 15th, 2012

Background

A special programme for promoting healthy competition in Finland was launched in the early 2012. One key objective of the programme is to tackle the challenges in enhancing effective competition in the Finnish grocery retail sector, identified e.g. in the so-called Europe 2020 Strategy approved by the European Council in July 2012. Resulting from the programme, a new section (7 a) pertaining to the abuse of dominant position is now proposed to be added to the Finnish Competition Act (948/2011). According to the proposed section, an actor in the retail trade would automatically be considered dominant in the consumer goods trade market if its national market share exceeded 30 per cent. The Government bill on the amendment to the Competition Act (“GbCA”) is scheduled for submission to Parliament by the end of 2012.

Finnish grocery retail markets and identified (potential) problems to effective competition

Finland’s consumer goods retail market is one of the most concentrated ones in Europe both in terms of retail and buyer concentrations. Characteristic to it are considerably long distances combined with relatively small population and low market volume. Today, the market is largely dominated by two major companies of which the largest one – “S Group” – has a market share exceeding 45 per cent and the other – “K Group” – a market share exceeding 35 per cent of the national market. Together the S and K Groups thus possess more than 80 per cent of the national market. The rest (less than twenty per cent) is divided between a number of competitors (Suomen Lähikauppa Oy < 8 per cent and others – including Lidl's ~ five per cent – together < 12 per cent).(1) The current market form results from a major structural change, which has taken place during the last 15-20 years. During these approximately two decades, the two main companies have increased their combined market share by more than 25 per cent, whilst market shares of the smaller rivals have either decreased or far stayed the same (in the long run).(2) In the future, even further market concentration is anticipated. The S and K Groups are both vertically integrated upstream and their operations effectively – although to a somewhat varying extent –

steered by central corporations.(3)

The competitive dysfunctioning of the food supply chain and the resulting consumer harm (higher prices, narrower selection etc.) as a pronounced reason for enhancing competition and market access to the highly concentrated Finnish consumer goods retailer markets have been noted in several international and national studies.(4) The potential reasons for competition problems in Finland may be roughly categorized as those relating to the opportunities of the two major retail companies to abuse market power in the highly concentrated markets and those relating to the specific entry barriers to the market resulting e.g. from land use planning. I will bypass the latter issue in this post, since it is meant to be remedied by measures other than the GbCA. Regarding the former, a type of harmful conduct – abuse of buying power – has gained particular weight among the different explanations to potential competition problems and resulting consumer harm. The issue has lately been discussed e.g. in the Finnish Competition Authority's study on buyer power in the trade in groceries. The study indicates the existence of several "grey area" types of action applied by powerful grocery retailers to the suppliers, namely gratuitous marketing allowances, repurchase requirements, use of private labels and category management.(5) According to the GbCA, such business practice measures, which may be considered "unfamiliar to healthy competition", are made possible by the retailers' strong market position, as measured by their market shares, in particular.(6)

“Special responsibility” through a clear-cut market share threshold

The key objective of the GbCA is to enhance the workability of competition in the Finnish consumer goods grocery markets and particularly to prevent unfair and discriminatory procurement practices resulting from a strong market position of a company. It serves the purpose of ensuring that the largest retail trading groups treat suppliers and others in the market in a non-discriminatory manner. It is not meant to prevent major trading groups from achieving even greater market shares by competitive methods. The provision covers all grocery retailers steered by central corporations.

The GbCA gives considerable importance to market shares by suggesting a clear-cut threshold for dominance (30%), which, by definition, will enable the decision-maker to hold a company formally dominant. No further analysis regarding the existence of dominance itself is thus needed. However, the need to assess “abuse” still remains, as the GbCA would affect neither the necessity to assess abuse nor the assessment criteria themselves.

As a consequence, the new provision would bring major retailers more easily into the scope of the “special responsibility” principle set to dominant firms in the case law of article 102 TFEU. This is in fact one of the key reasons for the whole proposition; i.e. to compel major companies to make more careful self-assessment of any potentially anti-competitive nature of their current (and future) “grey area” practices as they will then be assessed under the prevailing principle of “special responsibility” of a dominant firm to the market. As one well knows, this principle de facto sets stricter limits to the conduct of a firm compared to the conduct of a formally non-dominant firm.

Sole use of market shares and a few other issues

The proposed amendment has attracted considerably varying views for and against. It has been criticized, among others, for being too vague to settle the current problems which would require more "custom-made" solutions to the more clearly determined problems (which the proposition fails to do). It has been questioned whether the focus of the amendment is in fact in exploitative actions instead of exclusive actions, which have traditionally come first in the FCA's antitrust policy, and whether it thus actually hits the right target, but merely unnecessarily increases the FCA's workload. It has also been questioned whether the proposition is de facto accordant with the traditional EU antitrust practice. This is an issue a proposition like this obviously highlights. It has also been considered extravagant and even as a risk of adverse effects. By setting a general "objectivity obligation" to firms reaching the set out threshold, the proposition could entail a risk of even more dull market activity as it might, for instance, make it more difficult for them to promote the market entry of small local suppliers through more favourable purchase conditions. On the other hand, the proposition has also been favoured e.g. by clarifying assessment and facilitating interference to problem cases. In some cases, it has been considered necessary but still inadequate.(7)

The issue is wide and practically impossible to handle in this short post. Clearly, it includes numerous at least potentially relevant issues worth further discussion. I will here shortly tackle only one general (though rather wide) issue – basing assessment on a sole market share threshold. From the competition authority's point of view, the proposed amendment raises somewhat mixed opinions and expectations. On the one hand, any workable modifications to the prevailing assessment tools that effectively give better possibilities to enhance market competition by interfering with market structure and performance harming conduct are certainly welcomed. When it comes to the new amendment, a sole clear-cut market share threshold may have advantages. Undeniably, it would, for instance, make the assessment of dominance easier for competition authority as one only needed to consider one simple criterion. In the light of the current market shares, the two major retailers would automatically be considered dominant, which might well have a positive effect regarding currently alleged misuse of very strong market positions. It might even create some sort of specific deterrence effect for the future, as the companies faced a risk of being assessed under the "special responsibility" principle. Further, maybe even an argument set out in the GbCA that the provision would facilitate the assessment by giving less emphasis on detailed market definition exercise could hold true, at least partially.

But as generally noted in so many instances before, in the real life, overly simple, one-sided assessment principles (basically of any kind) do not fit the assessment of competition problems very well. Market shares, in particular, have attracted wide discussion as to how well they actually indicate dominance. A general conception is that any strict threshold, not assessed in the light of the specific characteristics of the case at hand (market dynamics etc.), is just overly simplifying. Nowadays, it is difficult to find a reasonable justification, either from economic theory or case law, for the use of market shares as a standalone indicator of market power, and this is even more so regarding the suggested market share threshold, which is undeniably rather low for

any general proxy for dominance. In casu, it may of course prove to be correct, but this is impossible to know for sure without also assessing other factors of the case at hand. Arguably, such a low threshold easily also faces a risk of type I error, in particularly. Further, it seems questionable how far the assessment of dominance and the assessment of its abuse are in fact possible to artificially separate from each other (which arguably happens if the amendment is approved). Furthermore, the idea of single dominance with more than one dominant firm in the same relevant market – e.g. dominant firms I and II – seems terminologically questionable at least if considered in the light of EU antitrust tradition (also compare merger control and the discussion as to the necessity for changing the substantive test).

Finally

My personal view is that proper measures to solve the problems facing the competitive dysfunctioning of the food supply chain and the resulting consumer harm in Finland are without doubt needed.(8) Depending on one's viewpoint, this may mean either the adoption of new and/or modified assessment tools or simply more efficient use of the existing ones. The proposed amendment is clearly one attempt to give the competition authority better means to enhance competition in these very problematic markets.

However, one may justly question both the amendment's theoretical basis and its real impact on the problems relating to the Finnish grocery trade market. Extending the "special responsibility" principle by means of a new assessment criterion adopted as a part of sector-specific legislation will undoubtedly improve the FCAs ability to question a company's conduct in that specific sector, and may in some cases even improve odds to the judgment. However, it is not the dominant position itself, but particularly its abuse that is prohibited. In practice, the proposed amendment is thus unlikely to entirely eliminate problems included in the assessment, but may rather push them forward to later stage – to the assessment of abuse. Furthermore, there are important issues, such as problems related to the fear of complaining about unfair negotiations practices, which the proposed amendment arguably does not solve.

All in all, the proposed amendment is an interesting – though certainly not a problem-free – option, and its real impact de facto remains to be seen. It is truly a rather strong measure compared e.g. to the (grocery) "codes of practices" types of solutions applied in some countries (the UK, Ireland, France etc.). But then again, the results regarding such arrangements have not always been conclusive and flattering. In any event, it will be truly interesting to see how the practice develops if the amendment as such passes the legislation procedure.

(1) The figures refer to the situation in 2011.
(2) During this time, the S Group has also displaced the K Group from its former market leader's position.
(3) The information used here is based on the Government bill on the amendment to the Competition Act (948/2011) p.13-14, the FCA's study on buying power in the daily consumer goods trade (1/2012) p.11-12, available at: www.kilpailuvirasto.fi) and a report "The Development of power relations in the Finnish food markets" p.9 published by Pellervo Economic Research in 2011 (PTT Reports 230). The figures

effectively base on the Nielsen data as presented in the referred references.
(4) See e.g. European Central Bank: Structural features of distributive trades and their impact on prices in the Euro area. Structural issues report (September 2011), OECD Economic Review 2011 Finland 21.11.2011 and the FCA's study on buying power in the daily consumer goods trade (1/2012) available at: www.kilpailuvirasto.fi.
(5) The FCA's study on buying power in the daily consumer goods trade (1/2012).
(6) The Government bill on the amendment to the Competition Act (948/2011) p.13.
(7) A summary of statements received by the TEE as to the proposed amendment is available (currently though only in Finnish) at: http://www.tem.fi/files/34723/Lausuntotiivistelma.pdf.
(8) No need to say that the usual disclaimer also applies in this post.

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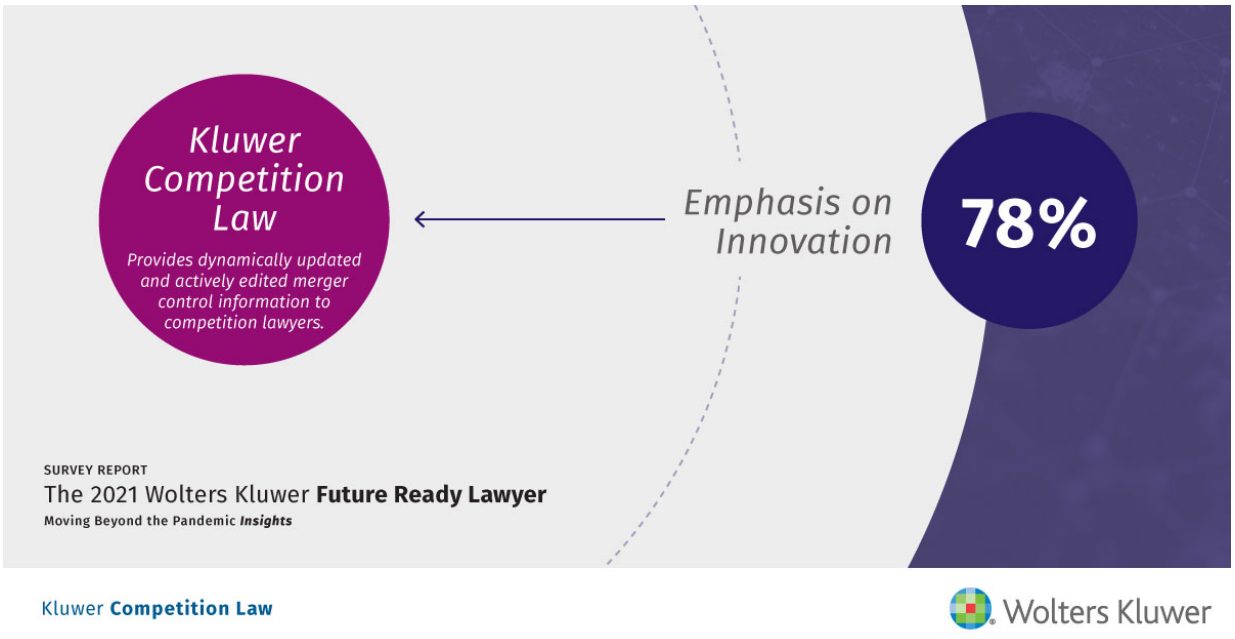

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