FINNISH COMPETITION AUTHORITY

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# REFUSAL TO DEAL

## Introduction

This paper presents the FCA's experiences on how to evaluate refusals to deal. In the early 1990s, cases of unconditional refusal to deal were still lodged with the office. Nowadays, there are very few unconditional refusals, but there are several examples of constructive refusals in various forms, etc. margin squeeze or some other form of pricing-related conduct.

According to the FCA's view, the exact classification of a dominant firm's conduct into any one category from a competition law viewpoint (refusal to deal, discrimination etc.) is becoming less and less essential in an abuse of dominance case as attention is increasingly been paid on the impacts the conduct has on effective competition and ultimately consumers.

The FCA provides answers to some questions presented in the questionnaire. Some of the most important cases are presented more thoroughly.

**Questions 1 and 2**: Under the Finnish antitrust law, a refusal to deal is assessed identically with the Article 82 of the EC Treaty and the relevant case-law of Commission, Court of First Instance and The European Court of Justice is followed. For further information, see under headline "Legal Framework".

**Question 3**: Relevant provisions apply only to dominant firms.

**Question 4**: Refusal to deal is only an administrative violation and administrative sanctions are imposed.

**Question 5**: There have been several in-depth investigations with a suspected refusal to deal involved during the past ten years. The exact number of cases is not available.

**Question 6**: During the past ten years, there have been six cases with a court decision finding an unlawful refusal to deal. A short description of five cases is provided below. See also under headline "Experiences" where one of the aforementioned cases and two additional cases (an older one and one still pending in the court) are described more thoroughly.

One of the cases concerned the conduct of the Finnish Meteorological Institute (FMI). The Institute held a monopoly in the Finnish weather service market until 1996. After that, it was made possible for private weather service providers to obtain weather data from national meteorological institutes. It was found that the FMI lowered the quality level of the radar images it delivered to the Swedish Meteorological Institute between June and December 1999. The FMI's competitor Foreca Oy bought its meteorological data from the Swedish Institute. At the same time, the FMI was using first grade radar images in its own commercial weather service operations. The Competition Council found that the FMI had abused its dominant position in the market of weather data. The conduct did not have acceptable financial or technical grounds and was harmful for the operations of the Institute's competitors.

Three of the cases involved a margin squeeze in the supply of unbundled local loop. The companies involved were local incumbent telecom operators, namely Salon Seudun Puhelin Oy, Turun Puhelin Oy

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and Elisa Communications Oyj. The rental fees charged by the incumbent operators from their competitors were higher than those charged from the end-users of the incumbents. Therefore, the conduct de facto blocked entry and hindered effective competition in a situation where the telecommunications sector was recently opened for competition. In 2001 the Competition Council found that the companies had abused their dominant positions respectively and the Supreme Administrative Court rejected the appeals of Turun Puhelin Oy and Salon Seudun Puhelin Oy in 2002. Elisa Communications Oyj did not appeal.

In the case concerning the market of port tugging the FCA found that Alfons Håkans Oy and Finntugs Oy had together abused their dominant position in the port tugging markets in some areas during 1992 - 1997. The case included several forms of abuse including refusal to deal aspect. In some special circumstances an urgent need for co-operation may arise between tugging companies for example because of exceptional weather conditions. Alfons Håkans and Finntugs refused to offer their assistance for competitors and so artificially hindered their ability to be active in the market. The Competition Council stated that there was no acceptable grounds for refusal to deal. The Supreme Administrative Court confirmed the Competition Council's decisions in January 2002.

**Question 8**: When evaluating legality of refusals to deal, FCA follows the same criteria as are followed under Article 82 of the EC Treaty.

**Question 12**: The analysis is the same whether a former state-created monopoly is involved or not.

**Question 13**: The Finnish jurisdiction recognizes the concept of "constructive" refusal to deal. In fact, a vast majority of the investigations conducted by the FCA lately have involved a "constructive" rather than an unconditional refusal. The evaluation is similar with the Article 82 of the EC Treaty.

**Question 14**: The Finnish jurisdiction recognizes the concept of margin squeeze. Almost all cases dealt in the telecommunications sector have involved a margin squeeze. The assessment is similar with the Article 82 of the EC Treaty.

## Legal Framework

The Finnish Act on Competition Restrictions was reformed in 2004. The purpose of the reform was to harmonise the Act with EC competition rules. Prohibited competition restrictions are now defined in Finland as in the EC Treaty. Following the reform, the Finnish Act is interpreted identically with the EU provisions when assessing prohibited restrictions. Hence, the Finnish legal standard in assessing refusals is similar to EU law.

## Experiences

The FCA presents briefly some of the most important cases in its jurisdiction involving a refusal to deal, either an unconditional or a constructive refusal.

Neste/SEO

In some cases the FCA has also encountered a situation where a vertically integrated dominant producer refuses to sell on same conditions for a supplier seeking entry to the retail markets as it does to its own retailer. In the case concerning *Neste Oy*[1] the company differentiated the sales conditions of its fuel as regards one operator (SEO) in a manner which resulted in Neste refusing a wholesale relationship with SEO.

In this case, the principles why Neste refused to apply similar sales conditions to SEO as it did to its own subsidiary and other companies active in the similar markets became decisive in the argumentation. The Competition Council, which solved the case, ruled that a company in a dominant position may apply dissimilar price and other conditions to its clients if the grounds for differentiating the terms are objective and acceptable from a competition law viewpoint. However, Neste had applied such sales conditions which appreciably weakened SEO's ability to operate in the fuel market. Because Neste was refusing to sell to SEO on wholesale customer conditions, SEO was in a role of a retail client in the fuel deliveries. SEO did not differ from the other wholesale firms.

Lännen Puhelin

In the case involving the regional telephone company *Lännen Puhelin Oy (LP)*[2], LP as a dominant player prevented competition in the broadband Internet market. To compete in the area LP was dominant, the competitors of LP were required to gain access to LP's DSL-network to provide ADSL connections to end-users. However, LP delivered the wholesale product only on conditions which virtually disabled all effective competition on the retail market.

The constructive refusal in the LP case comprised of two separate forms of conduct. Firstly, LP offered to its competitors an IP-based wholesale product which did not enable effective competition with LP. The IP-based wholesale product essentially hindered competitors possibilities to differentiate their services. There were also several other problems, including for example data protection issues. In practice, it was impossible for the operators to offer reliable broadband services with the IP-based wholesale product.

Secondly LP offered to its competitors an ATM-based wholesale product, which would have enabled competition with LP as regards its technical properties in the retail market of broadband Internet connections. However LP had set the rental fees of the ATM-based wholesale product higher than the prices of LP's products in the retail market (margin squeeze).

The FCA made a proposal to the Market Court on the imposition of a competition infringement fine. However, the Market Court found that LP had not abused its dominant position. The Court based on its decision on two separate reasons: i) LP did not have a duty to deal with its competitors before it made its wholesale offer and price list public, because the Court found that the FCA had failed to show that LP had

1 Neste Oy (Dnr 3506, 3833, 3854/1/94), Supreme Administrative Court 30.11.1995.
2 Lännen Puhelin Dnr (949/61/2002), proposal to Market Court 21.10.2004. See also FCA's press release on October 27th 2004: http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2004-10-27.

voluntarily offered its wholesale product before the aforementioned launching of LP's public wholesale offer and ii) when LP had a duty to deal, the Court found that FCA had failed to show that IP-based wholesale product wasn't technically viable to enable competition. The FCA appealed, and the case is pending in the Supreme Administrative Court.

The case described above is a typical example of the present cases of refusal to deal. The abuse of dominance cases are increasingly difficult to investigate these days, because they often involve complex technical or other special features, which makes it increasingly difficult to distinguish between prohibited and permitted conduct. The LP case is also a good example of how, in certain sectors, it is possible by making minute changes in productisation to create a situation of a constructive refusal to deal with serious consequences. An additional problem in dynamically developing fields, such as telecoms, is that it may be difficult to detect the competitive impacts of a restraint particularly in the short term. Bearing this in mind, FCA finds it imperative to get a ruling from the Supreme Administrative Court, because the case Lännen Puhelin has an impact on the future assessment of dominance abuse concerning refusal to deal cases, especially in telecommunications and other sectors including complicated technical details.

SNOY

In the case involving *Suomen Numeropalvelu Oy*[3] (Finnish Telephone Number Service, SNOY), SNOY abused its dominant position by refusing to deliver telephone subscriber information to certain companies operating in the retail market of telephone directory services. SNOY itself is only active in the wholesale level of subscriber information, whereas the owners of SNOY operate in the in the retail level of catalogue service market. SNOY is the only firm that maintains a national database of telephone subscriber information and resells the information to service providers. Consequently, it is impossible to offer catalogue services to end customers without doing business with SNOY.

Since 2003, SNOY has refused to provide subscriber information to Oy Eniro Finland Ab (Eniro) to be used in online telephone directory that Eniro offered to end customers for free and without registration. SNOY argued that its refusal was justified on the grounds of data and privacy protection. The FCA found that by its conduct, SNOY sought to foreclose companies offering a new business model (i.e. catalogue services in the Internet for free without registration) from the market. By refusing to deal subscriber information SNOY was acting in the interests of its owners, which were competing with Eniro in the online directory market. SNOY's refusal to deal was not objectively justified as the privacy and data protection grounds presented by SNOY were shown to be both insufficient and artificial.

The SNOY case is a typical example of cases dealt by the FCA where dominant firm seeks to justify refusal to deal with the obligations of special legislation. FCA made a proposal to the Market Court on imposing an infringement fine on SNOY. In its ruling the Market Court held that SNOY's behaviour could not be objectively justified and that SNOY had abused its dominant position by applying business terms which unreasonably restricted the freedom of action of the customer. The Market Court thereby imposed a fine on SNOY. However, the Court overturned FCA's decision by which the FCA had obliged SNOY to deal

3 Suomen Numeropalvelu Oy, (Dnr 1097/61/2003), proposal to Market Court 17.5.2005. See also FCA's press release on May 18th 2005: http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2005-05-18. ,

with its customers because of the amendments made in the legislation on privacy protection in September 2005. The Court also found that SNOY's conduct was no longer abusive after 1st September 2005 due to privacy protection related reasons.