FINLAND

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I. Introduction

The Finnish Act on Restrictions of Competition (480/1992), has last been amended by Act 318/2004 (which entered into force on 1 May 2004), ("*Laki kilpailunrajoituksista"),* the "Competition Act") in order to reflect the entry into force in May 2004 of EC Council Regulation 1/2003 on the implementation of the rules on competition laid dawn in Articles 81 and 82 of the Treaty ("Regulation 1/2003").

The Competition Act is administered by the Finnish Competition Authority ("*Kilpailuvirasto*", the "FCA"), subject to judicial review by the Market Court ("*Markkinaoikeus*"), with appeal to the Supreme Administrative Court ("*Korkein Hallinto-oikeus*").

Irrespective of the fact that Finnish competition law specifically allows business undertakings to claim damages from other business undertakings in compensation for losses incurred due to intentional or negligent breaches of competition rules, such claims have until recently not to any significant degree been the subject of litigation.

It is expected that antitrust litigation in Finland will increase in the years to come. As a first sign in this direction, a Finnish telecommunication company has last summer initiated a lawsuit against a competitor for damages alleged to have been incurred due to abuse of dominant position[1]. The lawsuit was, however, withdrawn without the court having ruled on the matter.

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there a distinction between EC and national law in this regard?

Non-contractual economic losses are under Finnish law only compensated if they result from (i) a punishable act, (ii) the exercise of public authority or (iii) other particular grounds for compensation exists.

Consequently, in a non-contractual relationship a natural or legal person must, as a rule, bear its own economic losses, unless it can demonstrate that written law or legal practice specifically entitle it to compensation for damages. Insofar as damages for breaches of antitrust law is concerned, business undertakings can seek damages under the relevant provision of the Competition Act, while claims for damages by consumers must be raised in accordance with the Finnish Damages Act (1974/412, as amended, "Vahingonkorvauslaki", the "Damages Act"). In the absence of an explicit statutory basis for class actions by consumers, such claims for damages cannot be made in Finland.

1 The plaintiff, Saunalahti Group Oyj, the defendant, Länsilinkki, forum, District Court of Turku, amount of damages, approximately MEUR 1,7 according to press release of 5 August 2003, published by Kauppalehti Online.

With respect to undertakings, the Competition Act contains a specific and explicit provision (Article 18a) obliging "a business undertaking", which either intentionally or negligently breaches national competition law, to compensate any damages caused to "another business undertaking".

Article 18a of the Competition Act reads as follows:

"(1) A business undertaking, who, either intentionally or negligently, violates the prohibitions prescribed in Articles 4 or 6 or articles 81 or 82 of the EC Treaty is obliged to compensate the damage caused to another business undertaking. The compensation for damage shall cover compensation for the expenses, price difference, lost profits and other direct or indirect economic damage resulting from the competition restriction.

(2) The compensation may be adjusted if a full compensation is considered unreasonably demanding in view of the nature and extent of the damage, the circumstances of the parties involved and other relevant issues.

(3) The right for compensation shall expire if the action for damages has not been instituted within five years from the date that the business undertaking was informed, or should have been informed, of the occurrence of the damage.

(4) During its proceedings regarding an action for damages, the court may request a statement from the Finnish Competition Authority."

It follows that on the part of business undertakings, there is a distinct statutory basis for claims of damages following an infringement of the competition rules. The legal basis is the same as regards violations of national competition rules and Articles 81 and 82 of the EC Treaty.

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

Finland has only one national general court system consisting of District Courts ("*Kärajäoikeudet*"), Courts of Appeal ("*Hovioikeudet*") and a Supreme Court ("*Korkein oikeus*"), and one national administrative court system, consisting of Administrative Courts ("*Hallinto-oikeudet*") and a Supreme Administrative Court.

In addition, the Finnish court system comprises a few specialized national courts, having jurisdiction with respect to specific disputed matters, one of which is the Market Court ("*Markkinaoikeus*) (with appeal to the Supreme Administrative Court).

As a general rule, civil court proceedings are, according to the Finnish Procedural Code ("*Oikeudenkäymiskaari*", the "Procedural Code"), to be instituted before the District Court of the place of the domicile of the defendant, or if against a Finnish branch of a foreign company and related to the branch, before the District Court of the place where the branch is undertaking business.

Since 1 March 2002, the Market Court has had exclusive competence to decide on competition matters, except, however, claims related to the recovery of damages caused by violations of competition rules. Antitrust damages claims are consequently dealt with by the ordinary national courts, i.e. the District Courts in the first instance with appeal to the Courts of Appeal and (subject to a leave of appeal) the Supreme Court.

All antitrust damages actions fall within the competence of the District Courts in the first instance, i.e. irrespectively of the value of the claim, whether the basis of the claim is national/EC law or contract/tort, and the identity of the parties (undertaking/individual or public authority).

All District Courts are competent to handle damages actions and no specialized competition panels/chambers exist within the respective District Courts.

The rules determining the competence of Finnish courts in relation to antitrust damages claims do not differ in any way from the rules applicable to other types of damages claims.

(ii) Are there specialized courts for bringing competition-based damages actions as opposed to other actions for damages?

No specialized courts for bringing competition-based damages actions, as opposed to other actions for damages, exist.

C. Who can bring an action for damages?

(i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factors are required with the jurisdiction in order for an action to be admissible?

(a) Standing

Under Finnish law it is required that the plaintiff can demonstrate that it has a direct individual and actual interest in the outcome of the dispute for an action to be admissible. Plaintiff is not, however, required to provide any proof as to the merits of its case before admission.

Jurisdiction

Finnish Courts have pursuant to the Procedural Code (Chapter 10) jurisdiction if the defendant is domiciled/has a seat in Finland or has property in Finland.

The jurisdiction of Finnish Courts within Member States are governed by the Brussels Regulation 41/2001 and the Brussels Convention with respect to Denmark. The jurisdiction of Finnish Courts is otherwise governed by the Lugano Convention and specific international agreement.

Article 18a of the Competition Act allows business undertakings to claim damages from other business undertakings caused by alleged breaches of the competition rules. "A business undertaking" is in the context of the Competition Act defined as an entity (whether a natural person, or a private or public legal person) who professionally offers for sale, buys, sells or otherwise obtains or delivers goods or services in return for compensation. Article 18a of the Competition Act, consequently, does not constitute a basis for e.g. consumers to claim damages.

The Competition Act further only applies to business conducted within the territory of Finland. It is, however, considered that the Act can also be applied to business arrangements taking place outside of Finland, to the extent that such arrangements significantly affect the Finnish market or is directed against Finnish consumers (see the former Finnish Competition Counsel's (*"Kilpailuneuvosto"*) decision DNo 934/61/99 of 5 September 2000, Metsäliitto Osuuskunta, Store Enso and UPM-Kymmene).

In the event that the alleged anti-competitive behavior has significant effects in Finland and/or is directed against Finnish consumers, action can further be taken against the offending undertaking irrespective of whether such business undertaking is Finnish or foreign (see the former Finnish Competition Counsel's decision DNo 5/359/93 of 27 January 1994, *A Ahlström/Kvaener*).

Outside the scope of the Rome convention, general principles of private international law determine which law to be applied in cross-border cases.

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Consumers could in theory institute antitrust actions in order to obtain compensation for economic losses for alleged distortions of competition on the basis of the Damages Act.. Class actions are, however, not available under Finnish law and consumer antitrust actions are therefore already for this reason not at present considered as a genuinely relevant cause of action.

For the last decade, the introduction of class actions into the Finnish procedural system has been under consideration. The fact that class actions can now be instituted in Sweden might re-start the debate in Finland.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

Article 18a of the Competition Act provides, as described above, business undertakings with a specific legal basis on which to seek compensation for losses caused by other business undertakings' intentional or negligent breaches of competition rules, irrespective of whether or not there exists a contractual relationship between the parties.

The right to obtain damages under Article 18a of the Competition Act covers compensation for actual losses such as expenses, price differences, lost profits and other direct or indirect economic damage resulting from a breach of competition rules.

(ii) Other forms of civil liability (e.g. disqualification of director)

Finnish law does not allow for the disqualification of directors in the context of private civil litigation. Provisions on the disqualification of directors exist in certain insolvency and bankruptcy situations.

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

The infringement would have to imply fault. In the absence of case law on this issue, no applicable standards have been developed either with respect to undertakings or consumers.

If it has been established by a final decision that EC competition rules have been violated, a party seeking compensation for damages would not need to prove this himself when seeking damages.

A business undertaking seeking damages under Article 18a of the Competition Act would need to establish (i) that another business undertaking(s) intentionally or negligently is breaching or has breached competition rules within the territory of Finland (as determined above), (ii) that plaintiff has incurred losses and (iii) that such losses have been caused by said other business undertaking(s)' behavior, i.e. as a result of the prohibited anti-competitive action(s).

Depending on the circumstances of the specific case and the weight of the plaintiff's evidence, a more or less heavy burden of disproving the plaintiff's allegations will rest with the defendant.

The compensation may, according to Article 18a(2), be adjusted if full compensation is considered unreasonably demanding in view of the nature and extent of the damages, the circumstances of the parties involved and other relevant issues.

E. Rules of evidence

(a) General

(i) Burden of proof

In antitrust cases, the major hurdle would most often be for the party seeking damages to establish sufficient proof regarding the causality between the defendant's behavior and the plaintiff's loss (understood as an unbroken chain of events linking the breach to the loss). The burden of proof of these elements lays with the party claiming damages.

All relevant evidence should, as a rule, be invoked by the parties in their written statement at the preparatory stage of the proceedings and presented before the court during an oral hearing.

No presumptions exist with respect to certain types of evidence.

Both CEOs, CFOs, company board member and employees may be subpoenaed.

(ii) Standard of proof

No specific provisions on standard of proof exist under Finnish law. The court will in each case assess the relevance, materiality and weight of the evidence that the parties present during the proceedings and determine the outcome by applying the law to the facts that it finds have been established by the parties.

The distortion of competition does not as such constitute a criminal offence under Finnish law.

Injunction proceedings are available both to individuals and the FCA. The standard of proof required is lower.

(iii) Limitation on forms of evidence

Written witness statements are generally not permitted.

Witnesses may refuse to testify due to professional secrecy or the fact that they are close relatives of the parties.

(iv) Rules of discovery

Finnish law does not provide for any mechanism comparable to pre-trial exchange of documents or other "discovery" under common law. When proceedings have been instituted, Finnish courts may, however, upon the request of a party, order the other party (or even a third party) to disclose a specifically specified document, if deemed relevant for the court's assessment of the case. If not applied with, the order may be enforced and non-compliance may be sanctioned with fines.

Under Article 27(2) of the Competition Act, the court shall grant the FCA the right to be heard when handling cases related to the infringement of competition rules and, is entitled, at its own discretion or upon request from a party, to request a statement from the Market Court, if the assessment of the case requires special expertise in competition-related matters.

On the basis of Article 15 of Regulation 1/2003 the court may also in proceedings involving the application of Articles 81 and 82 EC ask the Commission to give its opinion on questions concerning the application of the Community competition rules, or the Commission may at its own initiative submit observations to the court where the coherent application of Articles 81 and 82 EC so requires.

It would be for the court to decide on a case by case basis to which extent it will allow for and rely on evidence obtained through discovery in other countries. No specific rules exist with respect hereto.

Court proceedings are, as a main rule, public. If the assessment of a case requires that business secrets are divulged, the court can, however, upon request restrict public and adverse party access to such information.

(b) Proving the infringement

(i) Is expert evidence admissible?

Expert evidence may be used.

Experts are as a main rule appointed by the parties and considered as party evidence. Experts' statements are not restricted to matters of fact. E.g. legal expert statements may also be submitted. Expert statements are generally submitted in writing, subject to subsequent oral questioning of the expert before the court.

Experts may also be appointed by the court in respect of matters deemed relevant for the court's assessment of the case, but this is very rarely done in practice.

(ii) To what extent, is cross examination permissible?

Witnesses will most often be heard first by way of examination in chief, then cross-examination and finally re-examination by the parties' representatives. The judge(s) also are allowed to put questions to the witnesses.

(iii) Under what conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

The burden of proving that a violation of competition rules has occurred rests on the party alleging the violation, unless the claim is based on a final decision which already establishes that a violation has taken place. Also in such case, the plaintiff would, however, need to prove that it has suffered a loss and that this loss has been caused by the defendant as a result of prohibited anti-competitive action(s).

A decision by the national competition authority concluding that a violation of competition rules has occurred is subject of appeal to the Market Court. An appeal shall according to Article 22 of Finnish Administrative Judicial Procedure Act be presented to the Market Court within 30 days of the concerned party's receipt of the decision. If the decision is not appealed within the prescribed time limit, it will be final and as such constitute conclusive proof of a violation.

A decision by the Market Court confirming that a violation of competition rules has occurred can be appealed to the Supreme Administrative Court within 30 days of the concerned party's receipt of the judgment. If the Market Court's decision is not appealed within such time limit to the Supreme Administrative Court, it will likewise be final and as such constitute conclusive proof of a violation.

Statements and/or decisions made by authorities or courts in other EU Member States may also be presented as evidence by the parties. The evidential value of such material will depend on the ruling court's assessment of its relevance in each case and the finality of the decision in question.

(c) Proving damages

(i) Are there any specific rules for evidence of damages?

In antitrust cases, it can be particularly difficult to provide proof regarding the extent of losses, as any reduction in business could obviously also depend on many other internal as well as external factors within the plaintiff's company and/or the market in which it operates.

Finnish courts are pursuant to the Procedural Code (Chapter 17, Article 6), as a rule, entitled to award damages based on what they estimate constitutes reasonable compensation, in the event that the plaintiff has been able to prove that violation has taken place and causality exists, but proof regarding the exact amount of the plaintiff's loss cannot be obtained or would be exceptionally difficult/costly to provide.

The Procedural Code recognises two types of partial judgments. In the first type of situation, a partial judgment can be given in a litigation, in which distinct pleas have been raised allowing a court to decide one or several of these while deferring judgment on the remainder. For instance, in private enforcement of the Competition Act or Articles 81 and 82 of the EC Treaty, a plaintiff could seek a judgment declaring the defendant to have acted in violation of the competition rules together with a claim for damages. A court can give a declaratory judgment and adjudicate on the award of damages at a later stage. The second type of partial judgment can be given in litigation where the resolution of the main issue depends on the resolution of a related issue. A court could give a judgment in the related issue pending the decision in the main cause of action. For instance, a claim for damages suffered as a consequence of a violation of competition rules could be preceded by a judgment finding a defendant to have breached the Competition Act or Articles 81 or 82 of the EC Treaty. In similar fashion, partial arbitral awards are possible in arbitration proceedings.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

A business undertaking seeking damages under Article 18a of the Competition Act would need to establish that the loss in question has been caused as a result of the prohibited anti-competitive action(s). There have been no claims for compensation for damages suffered as a result of a violation of the Competition Act, but the following can said on the basis of the travaux prepratoires of the Competition Act. There appears to be no requirement of foreseeability under Article 18a of the Competition Act. A business undertaking further down in the distribution or production chain (for instance, a retailer whose has obtained his supplies from a wholesaler) can claim damages under Article 18a of the Competition Act provided that he can establish the causal link between the infringement of competition rules and the damages he has suffered. In the absence of case law it is difficult to state in any more detail on the courts' likely approach to causation in competition litigation cases.

The right to obtain damages under Article 18a of the Competition Act covers, as mentioned above, compensation for actual losses such as expenses, price differences, lost profits and other direct or indirect economic damage resulting from a breach of competition rules.

F. Grounds of justification

(i) Are there any grounds of justification?

The starting point is that the injured party is entitled to "full compensation", i.e. the damages to be paid should be sufficient for the injured party to be restored as closely as possible to the position in which it would had been had the anti-competitive conduct not taken place.

On the other hand, the injured party may under Finnish law not gain profit from the damages (referred to as "unjust enrichment"). Compensation for damages is, consequently, assessed on the basis of the actual injury suffered by the plaintiff. "Unforeseeable" damages are further not compensated.

(ii) Are the passing on defence and indirect purchaser issues taken into account?

We are not aware of any relevant case law regarding the "passing on" of overcharges. It may be assumed that the plaintiff would have to establish that it

would not obtain an unjust enrichment, in case the defendant is able to prove, or present strong evidence demonstrating that the plaintiff has in fact not incurred losses, because it has, or very likely has, passed on possible overcharges to a subsequent purchaser.

Indirect purchasers may in theory claim damages, but would need to prove that they themselves have suffered losses, i.e. that the alleged higher price has been passed on to them. No relevant case law has been found as to whether there exists a presumption that the alleged higher price has been passed on.

(iii) Is it relevant that the plaintiff if (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

It follows from the Article 18a (2) of the Competition Act (and the Damages Act (Chapter 6, Article 1) that the compensation may be adjusted if full compensation is considered unreasonable demanding in view of the nature and extent of the damage, the circumstances of the parties involved and other relevant issues (e.g. that the injured party has contributed to the occurrence of damages).

According to the Damages Act (Chapter 6, Article 2), the obligation to compensate damages shall be imposed jointly and severally, if the court finds that sufficient evidence has been presented in that the damages have been caused by two or more business undertakings (and provided that a claim to that effect has been presented).

It further follows from the Damages Act (Chapter 6, Article 3) that the amount of damages to be paid shall be divided between all liable business undertakings according to what the court finds reasonable, basing itself on the degree of each business undertaking's responsibility for the loss which has been suffered, the advantage that each business undertaking has obtained and other relevant circumstances (and provided that a claim to that effect has been presented).

In the event that the court has divided the payment of damages between several business undertakings, but one business undertaking has in fact paid damages to an extent that exceeds its part, such an undertaking is entitled to be indemnified by the other liable undertakings.

Claims for the division of liability and/or indemnity would often be dealt with in separate subsequent proceedings, but would not affect the rights of the plaintiff, to whom all defendants are liable jointly and severally.

G. Damages

(a) Calculation of damages

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

Compensation for damages under Finnish law is considered to have two functions: restitution and prevention. Restitution aims at redressing the harm and loss which has been incurred, prevention aims at encouraging diligence to avoid causing damage in the first place.

The starting point is, as mentioned above, that the damages to be paid should be sufficient for the injured party to be restored as closely as possible to the position in which it would had been had the anti-competitive conduct not taken place. On the other hand, the injured party may not gain profit from the damages (referred to as "unjust enrichment").

Compensation for damages is, consequently, assessed on the basis of the actual injury suffered by the plaintiff. "Unforeseeable" damages are further not compensated.

As explained above, partial judgments may be obtained.

(ii) Are damages awarded for injury on the national territory or more widely (EC or otherwise)

Depending on the specific case, also losses incurred more widely may be taken into consideration.

(iii) What economic models are used by courts to calculate damages?

No relevant case law exists.

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimates used?

Damages are calculated on the basis of the actual losses which have been incurred by the plaintiff. Estimates will depend on the kind of loss for which compensation is sought.

(v) Are there maximum limits to damages?

No general or specific maximum limit to damages exists, but damages are not always awarded in full.

(vi) Are punitive or exemplary damages available?

Punitive or exemplary damages are not available under Finnish law.

(b) Interest

(i) Is interest awarded from the date the infringement occurred, the date of judgment or the date of a decision by a competition authority?

According to the Finnish Interest Act ("*Korkolaki*") interest on damages can be claimed as of one month from the day on which the claim for damages was first presented, if accompanied by an explanation as to the basis on which the claim is made.

(ii) What are the criteria to determine the levels of interest?

Interest can according to the Interest Act be claimed with a yearly rate of 7 % above the relevant reference rate applied by the European Central Bank.

(iii) Is compound interest included?

No.

H. Timing

According to Article 18a(3) of the Competition Act, the right to claim compensation for damages related to the distortion of competition expires if an action has not been instituted within five years from the date that the business undertaking had knowledge, or should have had knowledge, of the occurrence of the damage. The degree of diligence required of the plaintiff would depend on the court's assessment of the specific circumstances (how difficult it was for the plaintiff to become aware of the violation) and available evidence (whether or not defendant is able to prove that the plaintiff has not been sufficiently active).

In civil proceedings before the District Courts, it follows from the Procedural Code that the ruling court shall consist of three professional judges and that the case shall be prepared by one judge. According to the Procedural Code a single judge may also decide smaller and less complicated disputes. However, in practice more significant cases are, with the consent of the parties, decided by a single judge.

There are no trials by jury and in commercial disputes lay judges are not involved.

The duration of civil proceedings depends on the complexity of the disputed matters and the workload of the court. A full-scale lawsuit in a large commercial dispute would often take the District Court one to three years to decide. Further one to three years in case of an appeal.

The parties in dispute may agree to have their case decided in the District Court by only one judge in order to speed up the process.

Court proceedings are, as a general rule, public. If the assessment of a case requires the divulging of business secrets, the court can, however, upon request of the parties restrict access to such information by the public or by other parties.

Finnish law does allow for publication of judgments.

I. Costs

A minor registration fee is paid to the court upon the institution of legal proceedings.

The plaintiff is not required to provide security for the defendant's costs.

Finnish law does not prohibit that "no win no fee" or "contingency fee" agreements are entered into. It is, however, very rarely done in practice and under the Rules of the Finnish Bar Association ("*Suomen Asianajajaliitto*") permitted only if reasonable and in accordance with the ratified grounds for fees.

The court has power to order compensation for costs provided that the parties have presented claims to this effect. In such a case, the losing party will, as a general rule, be ordered to compensate the winning party's legal fees and costs in full. The court may, however, also order only partial compensation or that each party shall bear it own costs, e.g. in case the matter has been so unclear that there have been weighty grounds for the lawsuit.

Recoverable costs comprise possible court fees and expenses (including compensation to witnesses) as well as the fees of the winning party's counsel (both local and foreign), to the extent that such expenses and counsel fees are considered reasonable.

Legal aid and legal aid insurance are available. Legal aid is available to persons, who are impecunious or indigent and in need of legal assistance. Legal aid may be available also to private enterprises provided that the enterprise seeking the aid is in financial difficulties and that the circumstances justify the grant of aid. However, companies and other associations within the meaning of the Companies Act (734/1978 "Osayhtiölaki") do not qualify for legal aid.

Legal aid insurance is provided for by insurance companies. Legal aid insurance can be applied for by any natural or legal person although the grant rests solely within the discretion of the insurance company in question. Where a person has, in addition to legal aid, legal aid insurance, litigation cost will be first covered by the legal aid insurance. The legal aid will then only cover the of the costs exceeding the legal aid insurance.

In large commercial disputes the costs vary between 20,000 EUR and 200,000 EUR in the District Court. If the case is appealed, one would have to add a similar amount for the handling of the case before the Court of Appeal.

There exist no specific rules on the taxation of costs.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

The statutory provision contained in Article 18a of the Competition Act provides business undertakings with a specific legal basis for claiming damages for breach of competition rules.

(ii) EC competition rules are regarded as being public policy. Does that influence any answers given

The fact that EC competition rules are regarded as public policy does not appear to have any influence on the answers given above.

(iii) Are there any differences according to whether the defendant is a public authority or a natural or legal person?

In an action for compensation for damages for breach of competition rules it makes no difference whether the defendant is a public authority or a natural or legal person.

(vi) Is there any interaction between leniency programs and actions for claims for damages under competition rules?

Leniency programs have been introduced into Finnish competition law by the amendment of the Competition Act which entered into force on 1 May 2004.

It is at this point of time not possible to comment on whether there would be an interaction between leniency programs and actions for damages for breach of competition rules.

(v) Are there differences from region to region within Member States as regards damages actions for breach of national or EC competition rules?

It is at this point of time not possible to comment on whether there are differences from region to region within Finland as regards the handling of claims for damages for breach of competition rules.

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction.

The Market Court is, as mentioned above, not competent to handle claims for damages related to the recovery of damages caused by violations of competition rules. This means that separate, civil proceedings have to be instituted even in cases where the Market Court has ruled that a breach of competition rules has occurred.

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon.

As no established case law exists, it is not possible to provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages has been decided.

III. <u>Facilitating private enforcement of Articles 81 and 82 EC</u>

(i) Which of the above elements of claims for damages provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

The fact that the Competition Act already contains a provision (Article 18a) specifically entitling business enterprises to recover damages incurred due to breach of competition rules, combined with the fact that Finnish courts under the Procedural Code are allowed to award damages based on what they estimate constitute reasonable compensation, provide as such a relevant legal basis for the private enforcement of competition rules in Finland.

In the absence of established case law, it is not possible to point at any existing specific legal requirements that in practice have constituted obstacles to the private enforcement of competition rules in Finland. Giving the Market Court competence also to rule on damages claims when trying decisions from the FCA would obviously facilitate the institutions and handling of private damages actions for breach of competition rules and reduce costs.

The major obstacles to the bringing of private actions for damages, and the main reasons for such actions not having been taken in the past are, however, probably not specific to Finland, but rather pertain to competition damages actions in general. Such obstacles and reasons could be:

(i) the fact that damages actions for breach of competition rules can be very costly, because of the complexity of the legal tests (whether or not a breach has taken place and whether or not such behavior has resulted in related losses) which by their nature require that extensive market and economic analyses are carried out;

(ii) the fact that a private entity would most often not be in possession of (and would also have difficulties in providing) relevant and sufficient factual evidence (as this most often will require access to its competitors'/suppliers' business secrets);

(iii) the fact that any reduction in business could obviously also be attributed to many other internal as well as external factors within the plaintiff's company and/or the market, thus making the existence of a causal link very hard to prove; and

(iv) the fact that it is often very difficult to predict the outcome (and therefore also the possible economic risks) of a possible action, and particularly, at an early stage, i.e. before having spent resources on having carried out the above mentioned market and economic analyses and before having instituted legal proceedings (allowing for disclosure of relevant evidence from the other party(-ies) and/or third parties).

With leniency programs now having been introduced into Finnish law, this may lead to increased enforcement by the FCA and accordingly probably also to that the number of private antitrust actions for damages based on decisions by the FCA may increase.

(ii) Are alternative means of dispute resolution[2] available and if so, to what extent are they successful?

Arbitration is available, and very often applied in commercial disputes in Finland. The Finnish Arbitration Act is based upon the provisions of the UNCITRAL Model Law on arbitration. Damages claims based on the violation of competition rules have so far more often been presented in arbitral proceedings between contracting parties, where one of the parties has alleged that the parties' agreement violates competition rules.

The Finnish Bar Association has established mediation rules, but at present mediation and alternative dispute resolution mechanisms are not applied to any considerable extent in Finland.

In a report prepared by a working group under the Finnish Ministry of Justice which was presented during autumn 2003, it has been proposed that Finnish courts should also be entitled to engage in mediation. The Ministry of Justice is currently preparing a government bill to this effect.

It is possible to enter into out of court or pre-trial settlements to the extent that the determination of the matters in dispute does not require authority involvement.

2 Alternative dispute resolution (ADR) is in Europe (as opposed to the USA) usually defined as not including arbitration, see also the European Commission's own Green Paper on the subject (spring 2002).

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V. National case law summaries

None.