

The Supreme Administrative Court has ruled that the majority of the significant market power (SMP) obligations imposed on Digita Oy by the Finnish Communications Regulatory Authority (FICORA) are lawful (KHO 2018:96).

Decision of Supreme Administrative Court with regard to the case concerning Digita Oy

On 5 July 2018, the Supreme Administrative Court ruled (KHO 2018:96) on the appeals filed by Digita Oy on the one hand and the Finnish Broadcasting Company (YLE), MTV Oy and Sanoma Media Finland Oy on the other concerning the decision of 24 April 2015 by the Finnish Communications Regulatory Authority (FICORA) about the significant market power (SMP) of Digita Oy. The Supreme Administrative Court held an oral hearing on the matter in January 2018.

The decision of the Supreme Administrative Court is exceptionally extensive even as compared to a typical communications market case; the decision exceeds 340 pages, with around 180 pages devoted to the reasoning of the Supreme Administrative Court.

The SMP decision, subject to appeal, of the Finnish Communications Regulatory Authority (FICORA)

In its SMP decision subject to appeal, FICORA considered Digita to have significant market power in the wholesale market in terms of access to antenna sites and antenna capacity, and regarding television transmission services and nationwide radio transmission services. By its SMP decision, FICORA imposed an SMP obligation on Digita with respect to matters such as the leasing of antenna sites and antenna capacity at primary broadcasting stations, and an SMP obligation to apply cost-oriented maximum pricing for access to antenna sites.

In its decision, FICORA defined 38 of Digita's exceptionally high masts suitable for television and radio broadcasting, which are capable of covering almost the whole of mainland Finland and around 99 percent of its population, as primary broadcasting stations. These masts form the backbone of UHF television and FM radio broadcasts.

In the SMP decision FICORA set to Digita an obligation to lease antenna sites concerns the space required on the mast for the antenna and feeder cable as well as an obligation to permit other telecommunications companies access to the necessary related functions of the broadcasting station. On the other hand, the antenna leasing obligation concerns Digita's existing antenna, feed cable and duplex capacity, and the associated functions was placed.

FICORA set to Digita also the obligation to apply cost-oriented maximum pricing for access to antenna sites. Cost-oriented maximum pricing means that FICORA binds Digita, as an SMP company, to apply the pre-fixed maximum euro prices, which Digita is allowed to collect from other telecommunication companies, when charging for access to the antenna site. Cost-oriented maximum pricing obligation shall be in force for a period of three years.

Appeals against FICORA's SMP decision

In its appeal, Digita demanded the annulment of FICORA's SMP decision in its entirety, not only on procedural or maladministration grounds related to the preparation of the SMP decision, but also on the material grounds that the 38 Digita's exceptionally high telecommunications masts subject to FICORA's regulatory decision, for example, could have been substituted by other, mainly shorter telecommunications stations, and that FICORA lacked the competence to impose a maximum cost-oriented pricing obligation.

In their joint appeal, YLE, MTV and Sanoma demand, inter alia, that FICORA should have imposed to Digita cost-oriented maximum pricing obligation in accordance with the efficient operator model.

Admissibility of appeals filed by YLE, MTV and Sanoma

Contrary to Digita's view, the Supreme Administrative Court ruled that the joint appeal by YLE, MTV and Sanoma should be admissible despite the fact that the decision subject to appeal was not directed at the telecommunications companies in question, which were therefore not immediately subject to FICORA's original decision.

According to the reasoning of the Supreme Administrative Court, the SMP decision imposed on Digita could affect the position of the said telecommunications companies on the television and radio broadcasting markets as referred to in the Framework Directive (Article 4, Section 1), as interpreted in the caselaw of the Court of Justice of the European Union e.g. on case C-282/13 T-Mobile Austria. In its assessment, the Supreme Administrative Court also recognised the importance of the right to an effective remedy and to a fair trial provided for in the EU Charter of Fundamental Rights (Article 47). The decision subject to appeal was therefore regarded as potentially having a direct effect on the rights and interests of the companies as provided in Section 6(1) of the Administrative Judicial Procedure Act.

Procedure applied to setting SMP obligations

The Supreme Administrative Court rejected Digita's appeal presented on procedural grounds.

The Supreme Administrative Court was of the view that, although the SMP decision subject to appeal had not been made within the three-year deadline calculated from the previous SMP decision concerning Digita – as provided in the Framework Directive (Article 16, subparagraph a) and the Information Society Code (Section 52(1)) – and FICORA had not presented a request to the European Commission for an extension to the deadline, the principle of legitimate expectations could not be applied to Digita with regard to FICORA's withdrawing or mitigating the SMP obligations in question. The SMP decision shall remain in force until FICORA issues a new SMP decision amending the previous SMP decision on the basis of a new market analysis.

According to the decision by the Supreme Administrative Court, the cooperation with FICORA regarding the preparation of the SMP decision had fulfilled the conditions set by the Information Society Code (Section 308), as well as the Framework Directive (Article 16) and European Commission's guidelines for market analysis and assessing significant market power.

The Supreme Administrative Court ruled that the provisions of the Framework Directive and the Information Society Code did not prevent FICORA from defining the wholesale market in radio and television transmission, which was not included in the Commission's recommendations, as a significant market. When formulating its market definition, FICORA had consulted the European Commission in accordance with the Framework Directive (Article 7, Sections 3–6).

The Supreme Administrative Court further found that no specific binding deadlines had been set for the consultation of parties in the Framework Directive (Article 6, Section 1), the Information Society Code (Section 310) or the Administrative Procedure Act (Section 36).

However, the Supreme Administrative Court was of the view that, when FICORA imposed an SMP maximum pricing obligation that was of a fundamental and new nature with regard to previous regulation, FICORA should have granted Digita a two-month consultation period in accordance with the Commission's guidelines on market analysis and significant market power. The Commission's guidelines were considered binding on national regulatory authorities in accordance with the caselaw of the European Court of Justice (Polkomtel judgement). However, since FICORA had extended the consultation period it had originally set and Digita had had a further opportunity to make a statement on FICORA's decision in the Supreme Administrative Court, the Supreme Administrative Court did not regard FICORA's decision as unlawful on the grounds of FICORA's failure to apply the two-month consultation period in accordance with the Commission's guidelines.

There were no grounds for regarding FICORA's decision as unlawful on any other of the procedural grounds presented by Digita.

Regulation of the television and radio transmission services wholesale market (market 18) as a significant market

Contrary to Digita, the Supreme Administrative Court held that, although the wholesale market for television and radio transmission services (market 18) is no longer included in the Commission's wholesale markets as defined in 2007 (2007/879/EC) or 2014 (2014/710/EU), FICORA had the authority under the latter recommendation (Section 21 and 22 of the preamble, and Section 2 of the Directive) to further designate markets other than those listed in the recommendation as significant markets, on the grounds of national circumstances. The fact that the market is no longer regulated in all Member States has no bearing on the assessment of the case.

According to Digita, in addition to terrestrial antenna networks, the significant product market includes satellite, cable, broadband and mobile networks. The Supreme Administrative Court referred to a recommendation of the Commission (2014/710/EU), which holds that the markets must be assessed from a forward-looking perspective and on the basis of prevailing market conditions. In its decision subject to the appeal, and in the grounds for the decision, FICORA could not foresee that changes would not occur in television and radio transmission methods during the period under review, which would reduce the significance of terrestrial antenna television.

According to Digita, FICORA did not present a sufficient account of why the SMP regulation concerned the 38 exceptionally high primary broadcasting station masts, referred to in the SMP decision, in particular. In the oral hearing at the Supreme Administrative Court, Digita provided an account of the substitutable nature of these 38 masts with, for example, shorter telecommunications masts. The Supreme Administrative Court found that, since the 38 exceptionally high primary broadcasting station masts had been internationally coordinated as ultra-high-frequency bands allocated to Finland, and the population coverage calculations were based on parameters in accordance with the international definition (M70), in its SMP decision FICORA was entitled to define the 38 Digita's masts as primary broadcasting station masts and base its regulation on these masts. The Supreme Administrative Court found that FICORA had acted within the limits of its discretionary powers when applying the regulation to the 38 primary broadcasting station masts.

Furthermore, the Supreme Administrative Court was of the view that FICORA had not exceeded its discretionary powers in imposing an SMP obligation on Digita regarding the

television and radio services market, which set the coverage of such services at around 99 percent of the population of mainland Finland. The population coverage of the shorter masts proposed by Digita as an alternative to the 38 primary broadcasting station masts fell below the coverage set by FICORA's SMP decision. In addition, due to the lack of available bandwidth, lower masts could not have compensated for the population coverage achieved by the transmission power of the primary broadcasting stations nor, due to their lighter structure, could shorter telecommunications masts bear UHF antenna. Furthermore, Digita's 38 primary broadcasting station masts had been built on optimal sites with regard to transmission, and consumer's reception antenna had been directed towards the masts.

Legality of SMP obligations applied to Digita

The Supreme Administrative Court regarded the definition of Digita as an SMP company justified, and did not regard any of the SMP obligations set by FICORA as unlawful, aside from those applied to pricing.

The Supreme Administrative Court referred to the Information Society Code (Section 71(3)) and the related preparatory work (HE 221/2013 vp), affirming that the intention of the legislature had been to leave e.g. cost definitions to the discretion of FICORA. Similarly, in its decision in case C-277/16 Polkomtel, interpreting the Access Directive (Section 20 of the preamble, Article 8 and 16), the Court of Justice of the European Union stated that the intention of the EU legislature had been to leave national regulatory authorities with wide discretion when selecting price control measures in the regulation of individual cases. The cost-oriented pricing procedure could therefore be regarded as lawful.

SMP obligation concerning cost-oriented maximum pricing

Referring to the aforementioned Polkomtel ruling, the Supreme Administrative Court was of the view that, with regard to the SMP obligation on the cost-oriented maximum pricing applied to each of the 38 primary transmission station masts, the Access Directive had no explicit provisions on the meaning of cost-orientation concerning prices and did not include specific regulations on imposing a maximum pricing obligation. FICORA's authority to impose a maximum pricing obligation is therefore based on the corresponding regulation in the Information Society Code (Section 71(4)). It is a prerequisite for imposing a maximum price obligation that pricing in breach of the obligation would markedly disrupt the market in question, and that a cost-oriented maximum pricing obligation would not be sufficient to eliminate barriers to competition or promote competition. The Supreme Administrative Court stated that exceptionalness was no longer required for the imposition of a maximum price obligation, unlike the situation in the case of the previously valid national regulation.

The Supreme Administrative Court found that the information available on the non-substitutable nature of Digita's primary broadcasting station masts, the impossibility of replicating them in practice, the lack of demand for leasing the antenna sites, the lack of comparable reference prices for antenna sites at primary broadcasting stations, and the lack of predictability of Digita's pricing at some stages, strongly suggest that Digita could keep its antenna site leasing prices at too high a level as provided in the Access Directive (Article 13, Section 1). FICORA had therefore acted within the limits of its discretionary powers in imposing a maximum price obligation on Digita. In case C-28/15, Koninklijke KPN and others, the Court of Justice of the European Union ruled that a national regulatory authority cannot be required to demonstrate that any obligations it imposes would actually achieve the objectives referred to in the Framework Directive (Article 8).

Contrary to YLE, MTV and Sanoma in their appeal, the Supreme Administrative Court holds that, in the case in question, FICORA had appropriately assessed the pricing methods involved in determining the cost-oriented price on the basis of the efficient operator principle. Given the extensive discretionary powers left with FICORA (when selecting a regulatory model) by the Court of Justice of the European Union and national legislation, FICORA did not act erroneously in defining the cost-oriented maximum price. FICORA could have assessed the cost-orientedness of prices and the maximum price in accordance with the efficient operator model upon its initial definition of the costs incurred by Digita.

The Supreme Administrative Court held that an SMP company has the right to a reasonable return on capital tied up in regulated business activities in accordance with the Access Directive (Section 20 of the preamble and Article 13, Section 1 of the Access Directive) and the Information Society Code (Section 71(4)(5)). Moreover, according to the Access Directive (Article 8, Section 4) and Information Society Code (Section 53(2)), any obligations imposed on an SMP company must be in due proportion to the objective pursued, and account must be taken of the SMP company's investments and risks when imposing such obligations. However, referring to the Koninklijke KPN judgement, the Supreme Administrative Court ruled that a national regulatory authority must ensure that any obligations applied to an SMP company correspond to all the objectives provided for by the Framework Directive (Article 8) and Access Directive (Article 13). In accordance with the same decision of the Court of Justice of the European Union, in a judicial review of a decision on an SMP company, a national court must ensure that the national regulatory authority complies with all requirements based on the objectives of the Framework Directive and Access Directive (as provided for in the aforementioned regulations).

The Supreme Administrative Court stated that Digita uses the structures and buildings at its primary broadcasting stations in activities regulated by the Information Society Code and in unregulated operations on the competitive market. Operations involving the leasing of primary broadcasting station masts are a regulated activity for which Digita has a right to a reasonable return on its invested capital. When pricing regulated services, an authority must be capable of specifying the boundaries between regulated and unregulated services, differentiating their costs from one another, and allocating the costs in accordance with the matching principle.

Furthermore, the Supreme Administrative Court found that the high masts set requirements on buildings located alongside them due to issues such as the danger posed by ice. The Supreme Administrative Court held that, with regard to the right of access of a representative of a telecommunications company, which has rented a site in accordance with the cost-oriented maximum price set by FICORA, in order to make necessary antenna installations on a mast, or to maintain and repair an antenna, the mast's maintenance canopy can be regarded as applying to the regulated activities of the parties leasing an antenna site at the primary broadcasting mast. In addition, the leasing out of an antenna site was regarded as including a small part of the maintenance premises required for the mast's annual maintenance, minor repairs and more extensive annual maintenance. For this reason, in accordance with the Information Society Code (Section 71(5)(5)), Digita was regarded as having the right to a reasonable return on any capital invested in a regulated business activity.

The Supreme Administrative Court regarded FICORA's SMP decision as unlawful insofar as Digita could not, pursuant to the decision, gain a reasonable return on the capital invested in the maintenance canopies and facilities with regard to regulated activities.

Since the maintenance canopies and facilities also served unregulated activities and since, based on an assessment of the matter, no evaluation could be made of what proportion of the maintenance canopies and facilities served regulated, and what part unregulated, activities, in these regards FICORA's decision should have been repealed and returned to FICORA for further consideration. However, because the time limit for the maximum price obligation imposed by FICORA had exceeded (having been in force for the maximum period) on 24 April 2018, there were no longer any grounds for repealing and returning the SMP decision to FICORA for reassessment.

The Supreme Administrative Court regarded FICORA's decision on SMP status as lawful in all other respects.