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The Concept of Dominance in Estonian Competition Law

One of the aims of competition law is to set out rules for ensuring that companies holding a position of strength in the market would not take adverse advantage of such a position to the detriment of customers, suppliers, or competitors. By controlling mergers, competition law aims to prevent the emergence of dominant companies in order to prevent possible restriction of competition in the future. Therefore, the concept of dominance or dominant position appears as one of the central concepts of competition law. Additionally, in order to determine whether the ban against abuse of dominance set out in § 16 of the Estonian Competition Act¹ applies to a certain company or whether a merger may be prohibited due to the creation or strengthening of dominant position, it is vital to define and understand the concept of dominance first.

The aim of this article is to provide an in-depth analysis of how the approach to the concept of dominance has evolved in the Estonian Competition Board's practice since the adoption of the current Competition Act in October 2001. It is important to note that the definition of dominant position in the Competition Act has changed over the years. Therefore, we first give an overview of the changes in the legal definition of dominance and, thereafter, inspect the relevant practice of the Competition Board.

The analysis takes notice of the use of the concept of dominance both in decisions relating to possible abuse of dominant position under § 16 of the Competition Act and in merger control decisions. It will be interesting to explore whether the evolution of the approach to the concept of dominance has been uniform in abuse and merger cases. We analyse cases wherein the Competition Board established the existence of dominance, as well as cases in which no dominance was determined to exist, since the latter also provide valuable insight into the Competition Board's reasoning concerning dominance.

1. Definition of dominance under the Competition Act

1.1. The definition of dominant position until 1 August 2004

It is important to note that two somewhat distinct definitions of dominant position have been laid down, in different versions of the most recent legislation referred to as the Competition Act. Until 1 August 2004, the definition of dominant position was set out in § 13 as follows:

For the purposes of this act, an undertaking in a dominant position is an undertaking holding at least 40 per cent of the turnover in the market or whose position enables it to operate in the market to an appreciable extent independently of competitors, suppliers, and buyers.

¹ Konkurentsiseadus. – RT I 2001, 56, 332; 2007, 13, 69 (in Estonian). English translation available at <http://www.legaltext.ee/> (1.10.2007).

The explanatory memorandum to the draft Competition Act² noted that the definition of dominant position in such a wording corresponded to the relevant EU laws, and particularly to the principles established in the Michelin case.³ It must be noted, however, that the wording of the above § 13 of the Competition Act does not fully support such correspondence. It appears from the previous text of the definition that dominant position was deemed to exist whenever an undertaking held at least 40 per cent of the turnover in the relevant market, and there was no need for further analysis of market power. At the same time, if less than 40 per cent of the turnover in the market could be attributed to the undertaking, then it might have been seen as dominant if its position enabled it to act to an appreciable extent independently of its competitors, suppliers, and buyers.

This definition recognised only single firms' dominance, since it referred to one undertaking only, not several undertakings, in its wording.⁴ At the same time, it has been established in EU competition law that in certain cases companies may be deemed to be collectively dominant. Generally, collective dominance may arise in an oligopolistic market, where the market is highly concentrated — i.e., where there are relatively few market players and where the market shares of the market players are comparatively high. In such a market, it might be that none of the undertakings is dominant on its own, but the high concentration of the market increases the likelihood that the undertakings are able to co-ordinate their behaviour and thus collectively hold a dominant position. However, as is stated already above, the previous definition did not enable taking into account potential concerns that might have arisen out of collective dominance.

1.2. The definition of dominant position since 1 August 2004

As of 1 August 2004, the emphasis of the definition is no longer placed on a purely market-share-oriented criterion; instead, a dominant position is established foremost on the basis of the market power of an undertaking. The 'market share of 40 per cent' condition serves as a rebuttable presumption of dominant position. As another significant amendment, the existence of collective dominant position was recognised after the above-referenced changes to the Competition Act entered into force.

The current definition of dominant position set out in § 13 of the Competition Act is the following:

For the purposes of this act, an undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables it/them to operate in the market to an appreciable extent independently of competitors, suppliers, and buyers. Dominant position is presumed if an undertaking or several undertakings operating in the same market account for at least 40 per cent of the turnover in the market.

This definition of dominance is more similar to that applied in EU competition law. However, the current wording still seems to have shortcomings. In careful reading of the second sentence of the above definition, one can notice certain controversy. It appears from that sentence that if several undertakings together hold a market share of 40 per cent, they are presumed to be collectively dominant. Pursuant to such regulation, all undertakings should be presumed to be constantly dominant, because no matter how many competing undertakings there are in the market, their combined market share is always 100 per cent — i.e., more than 40 per cent. Therefore, the current wording of the definition of dominant position, especially insofar as it concerns collective dominance, is not really logical and might, in our opinion, give rise to problems of interpretation.

2. Cases proceeding on the basis of the previous definition of dominant position

2.1. Abuse of dominance

From the practice of the Competition Board in abuse-of-dominance cases, it may be concluded that in the time of validity of the earlier definition of dominant position (from 1 October 2001 until 1 August 2004) the Competition Board supported the purely textually based interpretation of § 13 of the Competition Act and held there to be a dominant position when an undertaking had a market share of at least 40 per cent in the relevant market.

² The explanatory memorandum is available at <http://web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=710&t=E> (17.09.2007) (in Estonian).

³ European Court of Justice 9.11.1983, 322/8 (Michelin v. Commission). – ECR 1983, p. 3461.

⁴ The text of § 13, *inter alia*, states the following: “[...] an undertaking in a dominant position is an undertaking [...]”.

This can be seen from the STV⁵ and Telset⁶ cases, ruled upon by the Competition Board just two days prior to the entry into force of amendments to the Competition Act in relation to the definition of dominant position. Namely, the Competition Board held that both STV and Telset held a dominant position in the cable network services market in Maardu. The companies STV and Telset were the only providers of cable network services in Maardu, and the Competition Board found that the situation of both corresponded to the definition of a dominant undertaking since STV and Telset each accounted for more than 40 per cent of the relevant market in Maardu.

It is interesting that, even though the Competition Board found both undertakings to be dominant, it went further and carried out an analysis of the market power of STV and Telset. The Competition Board noted that STV had entered the cable network services market in Maardu in 2002 and quickly increased its market share to more than 40 per cent. At the same time, the market share of Telset decreased. The Competition Board remarked that a previous competitor, AS Nom, had sold its network to STV due to the aggressive entry to the market by STV and their below-cost price levels.

The Competition Board noted that, due to the limited number of customers in the cable network services market in Maardu, increase in the market share of one undertaking can take place only at the expense of its competitors. The Competition Board analysed the increase of turnover and customers of STV and the corresponding decrease in the customers and turnover of Telset and noted that a status of economic power and market power in neighbouring areas enabled STV to maintain an unreasonably low price level, the purpose of which could be the exclusion of competition from the relevant market.

One could argue that, as a result of such a market power analysis, the Competition Board should have concluded that STV had a dominant position in the market and Telset did not, since Telset was not in a position to act to an appreciable extent independently in the market.

The Competition Board did not examine whether STV and Telset held a collective dominant position. This is understandable since the Competition Act as in force at the time of the infringements and the date of the Competition Board decision did not support the possibility of a ruling of collective dominant position. One might argue that the Competition Board could have overcome this obstacle by taking the decision on 1 August 2004 instead of 30 July 2004, since the new amendments to the Competition Act supported the possibility of collective dominant position.

However, we are of the opinion that in this case STV and Telset were not collectively dominant. It is true that Telset applied below-cost prices to its services because similar prices were set by STV; however, Telset did not establish such below-cost prices because of co-ordination of behaviour with STV but since it was forced by economic pressures to do so.⁷

2.2. Merger control

Similarly to its approach in abuse cases, the Competition Board applied a mainly textual interpretation of § 13 of the Competition Act in merger cases. Thus, where the merging parties' market share collectively exceeded 40 per cent, they always were deemed to have a dominant position. In such cases, the Competition Board could establish that such dominance would not significantly impede competition or, alternatively, prohibit the merger or apply remedies to eliminate competition problems.⁸

When the combined market share of the parties was less than 40 per cent, the Competition Board did not deem the companies to be gaining dominance post-merger. The reasoning applied in establishing absence of dominance was based primarily on low market share, but the Competition Board in some cases provided additional arguments such as the existence of competitors and their economic and financial strength, lack of entry barriers, and the structure of the market.⁹

If the parties' market share exceeded 40 per cent, the Competition Board appeared to substantiate the absence of significant impediment to competition with arguments that, as will be evident below, are being used to

⁵ Competition Board 30.07.2004, No. 20 (AS STV). This and all other referred Competition Board cases are available on the Internet on page <http://www.konkurentsiamet.ee/?id=10322> (17.09.2007) (in Estonian). This case concerned the below cost prices of cable network services. Since STV did not fulfil the Competition Board precept and did not raise the prices to an acceptable level, a further decision was taken by Competition Board to prohibit below cost prices (Note 13).

⁶ Competition Board 30.07.2004, No. 19 (AS Telset).

⁷ We believe that in accordance with the EU practice in the field of collective dominant position, Telset and STV would not have been found collectively dominant. See Commission guidelines in "DG Competition discussion paper on the application of article 82 of the Treaty to exclusionary abuses", pp. 43–50. Available at <http://ec.europa.eu/comm/competition/antitrust/art82/discpaper2005.pdf> (17.09.2007).

⁸ It should be noted that the Competition Board has not prohibited any mergers so far, but has applied remedies in several cases.

⁹ See, e.g., Competition Board 2.11.2005, No. 50-KO (Rakentajain Konevuokraamo/Cramo Holding B.V); Competition Board 12.05.2004, No. 15-KO (Baltic Tele AB/ AS Eesti Telekom); Competition Board 30.01.2004, No. 2-KO (Lemmikäinen Oyj/AS Talter).

substantiate a finding of absence of dominance. For instance, in Tallinna Piimatööstus/Meierei Tootmise AS¹⁰, which concerned the market for the city's milk products, the merging parties' market share came to 48 per cent. The Competition Board noted that, since the large retail chains, which enjoy substantial purchasing power, affect demand greatly, the merging parties could not unreasonably affect retail prices, and all market participants were found to have equal opportunities for marketing their products.

In some cases, the Competition Board did not state any conclusion concerning dominance. In Interinfo Baltic/Eniro Eesti¹¹, which concerned the market for directory media advertising, the Competition Board referred to the combined market shares¹², analysed the position of the merging parties' main competitor, and mentioned low entry barriers. In conclusion, the Competition Board noted that the relevant circumstances did not allow the presumption that the position of the merging parties would enable them to act independently of competitors in the market and, therefore, their post-merger combined market share would not significantly impede competition. While the decision contains parts of the wording of the statutory definition of dominance, the Competition Board did not state whether it deemed the merging parties to be in or achieve dominant position or not. Another interesting aspect of this decision is that, even though the decision was taken at a time when the old definition of dominant position was still in force (on 20 June 2005), it already referred to today's definition.

3. Cases proceeding from the current definition of dominant position

3.1. Abuse of dominance

Further to the adoption of the current legal definition of dominant position, the range of market characteristics that the Competition Board analyses in its decisions seems to have broadened. Below we will consider various elements that the Competition Board in practice has considered to be indicators of dominant position or of absence of the same.

3.1.1. Existence of economic power

Analysis of the existence of economic power of the undertaking concerned appears to be one of the most commonly scrutinised considerations in the Competition Board's abuse-of-dominance cases. This is illustrated by the STV case.¹³ In that case, the Competition Board argued that STV had a position of economic strength as compared to the only other operator in the market (the net turnover realised by STV in 2003 was more than five times larger than that of Telset, and the net profit of STV in financial year 2003 was nearly equal the net turnover realised by Telset). This argument, together with the fact that STV held a market share exceeding 40 per cent, was among the main indicators considered by the Competition Board to be sufficient for establishing the existence of dominant position.

In the Neste case¹⁴, the Competition Board analysed the economic power of Neste in relation to other wholesale and retail distributors of motor fuels. The Competition Board noted that several indicators evidenced a considerably strong economic position on the part of Neste: amount of equity capital, low debt coefficient, large network of petrol stations, and high turnover in the retail sale of motor fuels (which enabled better conditions for purchasing fuels). At the same time, the Competition Board held that such a strong economic position did not on its own mean that Neste would have had a dominant position.

In the Inforing case¹⁵, the Competition Board found that Inforing had greater economic strength than its competitors; however, in this case the Competition Board did not analyse the profit and turnover of the undertaking. Inforing is a publisher of media prints; accordingly, the Competition Board analysed its economic strength on the basis of various items published by Inforing. The Competition Board stated that Inforing was one of the largest publishers of publications in the Russian language and it operated in various geographic and product markets. The board enumerated the publications published by Inforing and maintained that, on account of its activities in various neighbouring markets, it had stronger market power than its competitors. Nevertheless,

¹⁰ Competition Board 6.09.2002, No. 55-KO (Tallinna Piimatööstuse AS/Meierei Tootmise AS).

¹¹ Competition Board 20.06.2005, No. 35-KO (Interinfo Baltic OÜ/Eniro Eesti AS).

¹² The market shares were not disclosed in the publicly available version of the decision.

¹³ Competition Board 22.06.2005, No. 3 (AS STV).

¹⁴ Competition Board 27.07.2005, No. 39-L (AS Neste Eesti).

¹⁵ Competition Board 28.06.2006, No. 30-L (AS Inforing).

the Competition Board indicated that the competitors of Inforing as well had significant market power. Ultimately, the Competition Board found that Inforing did not have a dominant position.

3.1.2. Very high market shares

Regardless of the trend that purely market-share-based analysis tends not to be accorded as much weight in the Competition Board's abuse-of-dominance decisions adopted on the basis of current definition of dominance as compared to the decisions adopted on the basis of the previous definition, very high market shares still appear to be one of the most significant elements evidencing the existence of dominance.

In the case of Elion^{*16}, the Competition Board made reference to an EC Competition law textbook^{*17}, stating that a high market share (75 per cent or greater) that has been maintained over a considerable time has been considered such strong evidence of dominant position that there is no need for further analysis. In this case, the market share of Elion in the telephone services market was 83–87 per cent and in the leased-line services market 76.2 per cent. In its finding of dominance, the Competition Board also referred to the fact that Elion possessed a fixed telephone network covering the entire territory of Estonia, which was considered to constitute an essential facility. On the basis of these market share figures and due to the undertaking's possession of essential facilities, the Competition Board concluded that Elion was a dominant undertaking. Regrettably, the Competition Board did not specify the relevant markets, where Elion had such dominant position; however, it can be presumed that the Competition Board had in mind the telephone services market and leased-line services market. Besides these markets, the interconnection services market was considered in this decision in brief (it was stated that Elion had a market share of 34 per cent in said market in 2003); however, no further conclusions as to whether Elion was dominant in this market were stated.

In the next case concerning Elion^{*18}, the Competition Board again cited Elion's high market shares and considered such high market shares together with the possession of an essential part of the infrastructure to be indicators of dominant position. However, in addition to these factors, the Competition Board noted in this case that the fact that Elion's market share had remained high even after the termination of the concession agreement between the Republic of Estonia and AS Eesti Telefon (now Elion) was a further feature supporting the finding of dominance.

3.1.3. Inability to increase prices

The Competition Board appears to accept evidence of inability to increase prices on the part of the undertaking concerned as an argument in favour of a finding of absence of dominance — in particular, where the ability of the undertaking concerned to act independently of its buyers or suppliers has been undermined by the countervailing power of such parties. This was the situation in the Tallinna Piimatööstus case^{*19}, wherein the Competition Board considered the inability of Tallinna Piimatööstus to increase its prices to be an indicator of lack of dominant position. The board found that Tallinna Piimatööstus increased the sale prices of its products in November 2004 and as a result of such an increase lost its rights as the main milk product supplier to one supermarket chain and was also unable to sell city milk products in the previous quantities to its other purchasers. As a result, Tallinna Piimatööstus reduced the prices of milk and other city milk products in order to stay in competition with other milk handlers.

The Competition Board referred also to countervailing power from the supply side. In particular, the Competition Board noted that there was intense competition in the market for purchasing raw milk in Estonia. Tallinna Piimatööstus bought only 18 per cent of the Estonian raw milk production volume in 2004, and its closest competitor bought ten per cent. The Competition Board concluded that Tallinna Piimatööstus could not act independently of competitors and the producers of raw milk in the market for purchasing raw milk, as most of the suppliers of raw milk were not bound by any permanent contracts and any attempt to decrease the purchase prices or otherwise worsen the purchase terms would result in a change of co-operation partner. Moreover, the accession of the sellers of raw milk to associations had enabled them to impose more burdensome terms for raw milk supplies on purchasers (the producers of city milk products) in the event of large supplies.

In the Neste case^{*20} the Competition Board noted that in the event of a considerable increase in prices Neste would have lost clients to competitors and in the event of an excessive decrease in price, by contrast, Neste's economic indicators would have deteriorated. The inability on Neste's part to increase the prices was considered by the Competition Board to be one of the major indicators demonstrating lack of dominant position in this case.

¹⁶ Competition Board 17.03.2005, No. 14-L (Elion Ettevõtte AS).

¹⁷ L. Ritter, F. Rawilson, W. D. Braun. EEC Competition Law. Boston 1991.

¹⁸ Competition Board, 04.04.2005, No. 16-L (Elion Ettevõtte AS).

¹⁹ Competition Board 15.05.2006, No. 21-L (Tallinna Piimatööstuse AS).

²⁰ See Note 14.

3.1.4. Lack of entry barriers, and evidence of entry

A further argument applied for judging there to be absence of dominance in the event of market shares exceeding 40 per cent has been lack of entry barriers — in particular, if supported by evidence of entry of viable competitors in recent years. The Kristin case^{*21} serves as an example in this respect. In this case, funeral bureau Kristin held a market share exceeding 40 per cent; however, the Competition Board did not find this undertaking dominant.

The Competition Board defined the relevant market to be the funeral services market and found that Kristin had three competitors in this market in Tallinn and its vicinity in Harjumaa. The Competition Board noted that Kristin had a market share of 41.4 per cent in 2004 and 43.6 per cent in 2003 and that Kristin had seen the most significant decrease in market share (2.2 per cent) when judged alongside its competitors. At the same time, the market share of the latest entrant to the market, Forsius Holding OÜ, had increased 2.2 per cent in the same span of time. The Competition Board considered such changes in the market shares of the relevant undertakings to be an indicator that there were no significant barriers to entry in the funeral services market and that new undertakings could enter this market.

3.1.5. Market structure

The above Kristin case^{*22} is noteworthy for also containing an analysis of market structure that the Competition Board considered to support a finding of absence of dominance. The Competition Board noted in this case that, even though Kristin's market share exceeded 40 per cent and was higher than the market shares of the two closest competitors, the difference in market shares was not so large that it would have enabled Kristin to act independently of its competitors. Furthermore, the Competition Board pointed out that none of the companies could increase the prices of the services independently from their competitors without losing the buyers of their services; thus, none of the companies could act independently of the buyers.

3.1.6. Presumption of dominance, and burden of proof

As noted above, the Competition Act sets out the presumption of dominance in cases where an undertaking has a market share of at least 40 per cent. The text of the law implies that this is a rebuttable presumption — in cases of a market share of at least 40 per cent, further evidence can be provided to show that the undertaking in fact does not have a dominant position.

An interesting question is whether an undertaking with a market share of at least 40 per cent must prove a lack of dominant position or it is the Competition Board who must carry out further analysis to identify whether the undertaking has a dominant position. The Competition Act does not provide sufficient guidelines concerning the matter; however, the answer to this question can be found in the case law of the Competition Board.

In the Kristin^{*23} case, it does not appear that Kristin would have been called upon to provide any specific proof and reasoning in evidence of lack of dominant position even though it had a market share exceeding 40 per cent. Notwithstanding this, the Competition Board analysed the market on its own initiative and found that Kristin was not a dominant undertaking.

Thus, the Competition Board's current practice seems to suggest that the board is likely not to presume existence of a dominant position on the basis of market share only but is likely instead to carry out a market analysis before concluding that dominance exists.

At the same time, this position may be questioned in the light of the Neste case^{*24}, wherein the Competition Board noted that a market share of at least 40 per cent is one criterion in determining the existence of dominant position. Reference to the 40-per-cent market share as a criterion in determination of dominant position as opposed to considering this as a rebuttable presumption may be a matter of careless wording. At the same time, it may also highlight the difficulties of the Competition Board in moving away from a percentage-based approach in judging of dominant position. Since later cases have not repeated such wording and have truly referred to 40-per-cent market share as a presumption and not a set criterion among those for determining there to be dominant position, it may be appropriate not to assign too much importance to this case.

²¹ Competition Board 18.09.2006, No. 43-L (Matusbüroo Kristin OÜ).

²² *Ibid.*

²³ See Note 21.

²⁴ See Note 14.

3.2. Merger control

Under the current market definition, market shares of merging parties still constitute the starting point for determination of the presence or absence of a dominant position. However, the Competition Board's merger control decisions appear to devote substantial attention to a broader range of additional aspects than addressed under the earlier definitions. It is important to note, of course, that the range of such elements always depends on the specific circumstances of the case at hand. Therefore, also the growing variety of factors taken into consideration by the Competition Board should be attributed in part to the growing body of case law.

Below, we outline some of the most typical, as well as some perhaps more market-specific, additional features that have had impact on the Competition Board's finding of existence or absence of dominance in particular cases.

3.2.1. Economic and financial power

The economic and financial power of the merging parties or of their competitors appears to be an element that often is taken into account in merger cases as a feature supporting finding of either existence of dominance or the absence thereof.^{*25} Koduapteek/Nõmme Linnaapteek and others^{*26} provides an interesting example in this respect. A competitor of the merging parties had raised an argument against the merger stating that, since one of the merging parties belonged to an international business group (Tamro), it had strong economic and financial power, which, inter alia, enabled it to impede competition significantly. The Competition Board noted that a number of smaller competitors belonged to international groups and, furthermore, that the claimant itself had expanded its activities to Latvia and Finland, which allowed assuming that the claimant itself also had sufficient economic strength.

At the same time, it should be noted that the economic and financial power of the merging parties themselves can be an argument in support of the finding of their dominance. This was the case in Philip Morris/Amer-Tupakka^{*27}, which concerned the acquisition of Amer by a previously dominant industrial cigarette producer, Philip Morris.

3.2.2. Entry barriers and access to essential infrastructure

The existence or absence of entry barriers is another rather common factor to be taken into account by the Competition Board in its merger control decisions. In the above-mentioned Philip Morris/Amer-Tupakka case^{*28}, the Competition Board determined that there were several barriers to entering the market for industrially produced cigarettes, namely i) a need for substantial investment in order to achieve distribution of goods among retailers and to launch new products in a situation wherein the advertisement of tobacco products is forbidden, ii) sophisticated procedures related to tax stamps and excise warehouses, iii) high import taxes (57 per cent) on products from outside the EU, and iv) a need to prove the successfulness of new products and to carry out market research to determine the potential customer base for the products that would be included at the outlets of retailers. This concern, together with other arguments, such as the high market shares of the merging parties, their economic strength, and the substantially lower market shares of competitors, constituted grounds for the finding of dominance of the merging parties.

Possession of essential facilities (a network, infrastructure, etc.) that competitors cannot duplicate or that it is economically inexpedient to duplicate but without access to which it is impossible to operate in the relevant market may also constitute an indication of dominance. This was the case in Elion/MicroLink^{*29}, where the Competition Board held that the merged entity would have been dominant in the wholesale broadband access market, since after the acquisition of MicroLink Elion had access to MicroLink's infrastructure, on which the merging parties' competitors in downstream markets were dependent.

3.2.3. Influence of statutory regulations and other market-specific policies

In a number of cases, the Competition Board has considered statutory price regulations or other market-specific policies as arguments supporting a conclusion of absence of dominance.

In Olympic/Kristiine Kasiino^{*30}, the Competition Board noted that the casino sector differs from other sectors because, in this sector, the casinos of the same undertaking compete with each other, which is why not only

²⁵ Competition Board 21.11.2006, No. 49-KO (Elion Ettevõtte AS/ Norby Telecom).

²⁶ Competition Board 23.11.2005, No. 54-KO (OÜ Koduapteek/Nõmme Linnaapteek OÜ and others).

²⁷ Competition Board 25.08.2004, No. 28-KO (Philip Morris Products S.A./Amer-Tubakka Oy, Amer-Yhtymä Oyj and Amernet B.V).

²⁸ *Ibid.*

²⁹ Competition Board 21.20.2005, No. 47-KO (Elion Ettevõtte AS/ MicroLink AS).

³⁰ Competition Board 22.03.2007, No. 13-KO (Olympic Entertainment Group AS/AS Kristiine Kasiino).

new casino operators but also existing operators constitute a source of potential competition to newly opening casinos. The Competition Board went on to refer to public policy concerns expressed with a goal of decreasing the number of casino operators as well as regulating payouts such that they have a fixed minimum and establishing other regulation applicable to all casino operators. On the basis of these arguments, the Competition Board came to the conclusion that the merger would not lead to creation or strengthening of a dominant position for the merging parties, even though their combined market share was likely to exceed 40 per cent.^{*31}

Furthermore, in *Koduapteek/Nõmme Linnaapteek and others*^{*32}, statutory price regulation appeared to be an argument against conclusion that an oligopolistic market existed. The Competition Board noted that, since the resale margins of pharmaceuticals have been set forth by law and the competition between wholesalers of pharmaceuticals is tense, no collusion between the wholesalers could be proved. Therefore, the merger was not found to create or strengthen the features of an oligopolistic market.^{*33}

4. Conclusions

In conclusion, it can be said that the change in the legal definition of dominance has had an impact on the practice of the Competition Board. A shift from mainly market-share-based analysis in the Competition Board's practice to assessment of a broader range of (more elaborate) considerations appears to be noticeable in both abuse and merger control cases.

Broadly, the evolution of the Competition Board's approach toward understanding of the concept of dominant position appears to be coherent in abuse and merger control cases. Perhaps merger control cases tend to pay more attention to arguments concerning the economic and financial strength of the market players, while such considerations are not so widespread in abuse cases. Moreover, one perhaps can notice more market-specific considerations in merger control decisions; however, this may be attributable to the greater number of cases involving a wider spectrum of sectors that have been subject to scrutiny in merger control cases as compared to abuse cases.

In general, besides market shares and the arguments related to the economic and financial strength of the market players, several other considerations — such as the existence or absence of entry barriers, inability to raise prices, and countervailing power of buyers and suppliers, as well as observations concerning the market structure — appear relevant in the Competition Board's analyses concerning the presence or absence of dominant position.

³¹ The market shares were not disclosed in the publicly available version of the decision, but other publicly available sources indicate to market share exceeding 40 per cent.

³² See Note 26.

³³ Such reasoning leaves room for discussion whether the Competition Board has knowingly avoided using the concept of collective dominance here and what the reasons for this are.