

Cooperative Mankala-companies – The Acceptability of the Company Form in EC Competition Law

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Abstract

Due to economic necessities, a unique ownership model for energy production companies, the so-called Mankala-companies, has been developed in Finland. The purpose of the Mankala-companies is to produce affordable energy for their owners. Since the owners of the companies answer respectively for the production costs of the produced energy, they have not been considered to gain taxable profit, although the companies produce electricity at a price lower than the market price.

The Mankala-model has been seen as very important for the Finnish industry and has thus been allowed so far. However, due to the European Commission's efforts to increase competition within the energy market and its unfavorable statements on similar arrangements with anticompetitive potential, there might be a need for reassessment of the acceptance of the model. On this account, the article tries to open the conversation around the issue although leaving the resolutions open for future evaluation.

Full Article

1 Introduction¹

The energy markets are highly concentrated in Europe. Despite efforts, competition has not increased in a desirable way in this field. The European Commission has not been satisfied with the development of competition in the markets, and with the fact that the energy market seems to be limited

¹ This article is based on the author's article Cooperative Mankala-companies published in OGEL 3/2009.

to a few major players.² The EU-area is increasingly dependent on imported energy.³ In particular, the need for Russian oil and gas has continued to increase, and the market mechanisms creating new production capacity are still lacking within the EU.

Finland and the Nordic Countries, excluding Iceland, form their own united market area where a large portion of electricity trade is organized through the Nord Pool exchange.⁴ At the moment about 70 % of the electricity is traded through this exchange.⁵ Within the EU the Nordic market area has often been given as an example of a functional energy market.⁶ Despite this, competition in the markets in Finland and in the Nordic Countries is not comprehensive. Despite there being approximately 120 producers and 400 power plants in Finland, energy production can be seen to focus on two companies: Fortum, with a market share of 40 % of all production forms in Finland, and the industry-owned Nordic Power Ltd. with a market share of 20 %. Other producers are retailers and large-scale industry as well as to a growing degree overseas companies such as Vattenfall and E. On.⁷

As an exception to Europe, in Finland there has developed a unique ownership model of energy production companies: the cooperative, so-called Mankala-companies⁸. The Mankala-principle denotes a company where the joint owners are obligated to answer for the costs in proportion to their ownership in the company, and the ownership gives the joint owners the right to the produced electricity.⁹ This means that the shares don't equal dividend. Instead of making a profit, the purpose of the company is to produce affordable energy for the owners.

2 Kroes, Neelie (SPEECH/07/574).

3 Liuhto 2008, p. 39.

4 For more information see: <www.nordpool.com>.

5 Commission Report 2008: The share of Finland's trade has grown from 5 % in 1998 to about 45 % in 2007.

6 Commission Report 2005.

7 The Finnish Energy Market Authority homepages. Available in www-format: <<http://www.energiamarkkinavirasto.fi/data.asp?articleid=107&pgid=38>>.

8 The name of the company form arises from The Finnish Supreme Administrative Courts decision 1963: B I 5 that handled an energy company located in Mankala area in Järvenpää city.

9 Kaarresalo 2007, p. 180.

Due to the characteristics of the Mankala-companies, the cooperation has some problematic features when it comes to EU competition law. The purpose of this work is to consider the acceptability of the Mankala-companies from a competition law point of view, and to perceive the possible effects of the cooperation for the competition in Finland and the Nordic countries. The aim of this review is to bring up the critical as well as the positive aspects of the cooperation model as a base for discussion.

2 Mankala-companies

2.1 History and Background

The Mankala-model can be seen to result from the Finnish forest industry's need for energy. They consumed vast amounts of electricity in their production but didn't have the capacity to execute large power plant investments individually. Consequently these companies established Nordic Power Ltd in 1943 to secure affordable electricity and better wherewithal for the companies. Later other industry companies and local retailers have joined the cooperation.

Nowadays the Mankala-model is a common ownership arrangement in the electricity production companies of the Nordic countries.¹⁰ In Finland, for example, Teollisuuden Voima Oyj, owned by Fortum and Nordic Power, and in Sweden nuclear power plants in Forsmark and Oskarshamn, cross owned by Vattenfall, Sydkraft and Fortum are organized in this way.¹¹

2.2 Purpose

The purpose of the Mankala-companies is to produce electricity for the joint owners at the lowest possible cost. This can be achieved by producing the energy by themselves or by functioning as a procurement company and buying the energy from associated companies.¹² The owners gain electricity in proportion to their ownership at a cost price. The owners can use the

¹⁰ See the report from Nordic competition authorities 1/2007.

¹¹ See Oskarshamns home pages <www.okg.se> and Forsmarks home pages <www.vattenfall.se>.

¹² For example Etelä-Pohjanmaan Voima Oy functions as a clear procurement company.

electricity in their own production or sell it on through the exchange or bilaterally.¹³

As was mentioned earlier, the purpose of the company-model is not to make a profit for the owners and therefore the purpose differs from the presumption in the Finnish Limited Liability Companies Act.¹⁴ This means that the differing purpose has to be mentioned in the articles of association.¹⁵ When the purpose is to produce affordable, tax-free electricity for the owners instead of making profit, the joint owners have to answer for the production costs in proportion to their ownership in the company.¹⁶

The profit distribution is organized reversely compared to dividend. The joint owners get the profit through low procurement costs. This profit can be called other earning from the company. This other earning is tax free, which is one of the main benefits of the model. According to The Supreme Administrative Court's decision in 1963 the joint owners were not considered to get taxable profit when the company produced them electricity at a lower price than the market price.¹⁷

The company can deliver cost price electricity to the owners only in proportion with each owner's ownership, not more than the owning share, because the overstepping amount would probably be handled as taxable profit.¹⁸ Selling goods at a price lower than the market price has often been handled as distinguished payment of dividend.¹⁹

The other earning or right to the produced electricity is defined in the articles of association of the production company. The baseline is that the joint owners get electricity in proportion to their ownership. Through the

13 The Market Court decision: 123/08 Case number 209/06/KR, 14.3.2008. The generality of the owner's are connected to the Nordic grid.

14 Chapter 1 paragraph 5. Available in English online <<http://www.finlex.fi/en/laki/kaannokset/2006/en20060624>>.

15 Airaksinen & Co. 2006, p. 47-48.

16 Kaarresalo 2007, p. 180.

17 The Supreme Administrative Court, case number 1963: B I 5.

18 The joint owner doesn't answer for the production costs of this overstepping share. This means that the margin between the cheap electricity and market price electricity formulates a profit that can be compared to dividend. From a taxation point of view the joint owner is seen to produce the electricity itself up to its proportional share of the ownership.

19 Romppainen & Co. 2000, p. 132.

series of shares it is possible to define exactly how much and from which production form each company gets electricity. The shares can provide the right to electricity from a certain production form or from a certain power plant. There are often more series' of shares, even dozens more, than in the example below.²⁰ By combining the shares and production forms the owners can mix their gaining portfolio to match their needs.

An example of the use of series of shares could be as follows. The owners of A shares have the right to available electricity provided by X Ltd. or from elsewhere, mainly produced with water power or its substitute, in proportion to their ownership of A shares in the company. The owners of A shares are obligated to answer for the production costs of this production form in proportion to their ownership of A shares. The owners have the obligation regardless of whether they have used their right to the capacity or not.

The owners of B shares have the right to available electricity provided by X Ltd's power plant 1 or 2 or from elsewhere, mainly produced with nuclear power or its substitute, in proportion to their ownership of B shares in the company. The owners of B shares are obligated to answer for the company's fixed production costs in proportion to their ownership of B shares regardless of whether they have used their right to the capacity or not, and obligated to answer for the company's variable production costs in proportion to the gained amount, observing the variable costs of each form of electricity production.

2.3 The Joint Owners and the Partnership

The owners of Mankala-companies consist mostly of wholesalers and retailers and on the other hand of companies with large energy consumption, such as large industrial companies.²¹ This means that there are both electricity sellers and buyers in the partnership. In the articles of association and in the shareholders agreement there are set mechanisms that make it possible to control the transfer of the shares, as well as to ensure that the demands set for the joint owners are fulfilled.

²⁰ For example the articles of association in Nordic Power Ltd. (3-4 §).

²¹ See list of Nordic Power's shareholders: http://www.pohjolanvoima.fi/fi/pohjolan_voima/osakkaat/?id=7728.

Firstly, only the aforementioned companies that sell the gained electricity on to end users or use it in their own production are accepted into the partnership. Secondly, the companies have to be capable of meeting the production costs that the desired share requires. In practice, this is ensured by the articles of association, as it gives the owners the right to reclaim the transferred shares and sets the board's approval as a prerequisite for the transfer. The approval is given only if the new company underwrites to fulfill the shareholder's obligations and is capable of answering for the costs.²²

The Mankala-model can be described as a long, and in principle a forever-lasting contract, in which the companies bind themselves to the obligations of the joint owners, which in turn leads to the fact that new companies' entry to the partnership is hindered. Despite the articles of association making it possible to enter the partnership in principle, in practice it is almost impossible, because the reclaiming right and the requirements of approval make it possible for the owners and the board to thwart the attempt. This leads to a closed production and retail unit that has a stable position and which is independent from the markets.

2.4 Shareholder Agreement

Because the ownership model and the purpose of the company differs from normal, it is in practice essential to consummate a shareholder agreement and other agreements – such as different cooperation agreements – that organize and govern the activity. This is because the governance of a cooperative company may become more challenging than normal. A shareholder agreement is therefore a prerequisite for the cooperation.²³

The shareholder agreement in a cooperative company relates – besides the above mentioned access possibilities – in particular to the distribution of profits or other earning from the company, and on the other hand to the distribution of the costs.²⁴ The other earning from the company is defined by including detailed and often very technical regulations in the agreement for the determination of the selling price of energy. The costs are distributed

22 For example articles of association of Nordic Power Ltd.

23 Hannula – Kari 2007, p. 59.

24 Hannula – Kari 2007, p. 91.

as expressed in the example above in point 2.2. in proportion to the ownership of each production form.

The regulations of the shareholder agreement can be included in their entirety in the articles of association. In this case they cannot, however, contradict the Limited Liability Companies Act.²⁵ Also from a practical point of view this may be unfeasible due to their extent and elaborateness. Because the shareholder agreement only binds its parties, it is an instrument used to specify the regulations of the articles of association that bind also the company.²⁶

3. Mankala-companies and Competition Law

3.1 The Ground for Evaluation – EC Article 81

Agreements, cooperations and standardized procedures restricting competition horizontally are forbidden in both the Treaty on European Union and the Treaty establishing European Community and in the Finnish legislation.²⁷ On the community level the injunction is defined in EC 81 article. On the national level the regulation is based on 4.1 § in the Act on Competition Restrictions (480/1992).

The challenge for the enforcement of the regulations is that there are both acceptable and unacceptable collaborations that fit within the phrasing of the articles.²⁸ This is why it cannot directly be said whether a form of collaboration is forbidden or not. Furthermore, even if a collaboration is found to be forbidden, it can still be accepted if it is seen to benefit consumers through more effective production or technical or economic development.²⁹

The choice between national or community legislation depends on whether the collaboration may have an impact on trade between the member states.³⁰ Because the national regulation is to be interpreted in the spirit of the EC

25 Helminen 2006, p. 97.

26 Hannula – Kari 2007, p. 13.

27 Kuoppamäki 2006, p. 22.

28 Ojala 2005, p. 105.

29 Jones – Sufrin 2008, p. 271.

30 Jones – Sufrin 2008, p. 199.

legislation, and because the enforcement of these two would without exception lead to the same result, only the EC article 81 is discussed about.³¹

The article 81 consists of 3 paragraphs. The first paragraph specifies the forms of forbidden collaboration including a non-comprehensive list of the most harmful collaborations. The second paragraph decrees the consequence of automatic invalidity on the forms of collaboration in paragraph 1. In the third paragraph is described the possibility of exceptions to the automatic invalidity because of benefit to consumers.³²

3.2 Collaboration Between the Shareholders – a Horizontal Review

From a competition law perspective, Mankala-companies can be firstly handled as horizontal collaboration as the joint owners are mostly on the same production level.³³ In this case rival companies on the same level are committing horizontal collaboration by agreeing on the production and selling price to the owners. Second, the cooperation can also be seen as vertical collaboration where buyers and retailers are integrated with production.

The majority of the joint owners in Mankala-companies have their own retail activities.³⁴ The main characteristic for vertical collaboration is that the consortium is governed by a company on a higher level, which controls the retailers.³⁵ In the Mankala-companies the governing level consists of buyers and retailers, in other words, companies that would normally form the lower levels, and therefore the commands are given by a group of companies to the production company.³⁶ This means, that even though the collaboration may be considered to include vertical collaboration and vertical restrictions of competition, when taking into account the collaboration between the joint owners and their ability to govern the production company, the form

31 Kuoppamäki 2006, p. 40-42.

32 Jones – Sufirin 2008, p. 124.

33 The estimation of the nature in the cooperation in Teollisuuden Sähkömyynti Oy, The Finnish Competition Authority: Case number 27/67/96.

34 See the list of owners in The Nordic Power Ltd. <http://www.pohjolanvoima.fi/fi/pohjolan_voima/osakkaat/?id=7728>.

35 Commission Notice 2000.

36 The board is nominated by the owners in the general meeting and in this way is lacking independency.

of collaboration is to be considered horizontal. Hence the evaluation is to be done under EC article 81.

3.3 Mankala-companies – Forbidden Collaboration?

Due to the above characteristics of the Mankala-model – as described in section 2 above – the competition issues and the acceptability of the collaboration have to be examined in detail. The examination shows that there are facts that contribute to different directions in this evaluation.

In the evaluation of competition issues of production agreements it should firstly be decided whether the collaboration falls under article 81 restrictions. The main purpose of a Mankala-company is not to restrict competition, which merits – instead of automatic invalidity – a further examination of the effects.³⁷

Firstly, production agreements where the parties do not compete with each other don't have a restricting effect on competition.³⁸ The owners of Mankala-companies consist mostly of retailers and industrial companies. Although not all of the joint owners compete with each other, the majority of the Mankala-companies have an ownership where the companies compete amongst themselves. Therefore the collaboration may have restricting effects on competition.

Secondly, agreements defining prices, restricting production or sharing markets are forbidden. When the collaboration does not clearly belong to any of the above groups, further examination of the effects has to be done.³⁹ The production collaboration within a Mankala-company does not easily belong to any of these groups.

Thirdly, the collaborating companies have to have enough market power to be classified as forbidden under the 81 article. Even if the collaboration could lead to a restriction of competition it is allowed if the total market share of the collaborating companies is less than 20%. Furthermore, due

³⁷ Jones – Sufrin 2008, p. 220.

³⁸ Commission Notice 2001, point 24.

³⁹ Commission Notice 2001, point 26.

to the concentration of the markets the collaboration may be allowed even if this percentage is exceeded.⁴⁰ In several Mankala-companies the owner companies have market power of this amount.⁴¹

In the following chapters, I will discuss the problematical competition issues of the Mankala-cooperation with the aim of highlighting the most relevant facts for the evaluation. The discussion is not based on any concrete company but on the principle itself. Later, in section 3.4, the benefits of the cooperation in light of paragraph 3 in EC article 81 will be discussed.

3.3.1 Obstacles to Increasing Competition in the Energy Markets

A study by the Nordic competition authorities shows that competition in the energy markets is not yet at the desired level. Furthermore, the Finnish National Competition Authority has conducted a study on the energy markets in order to evaluate whether there are disadvantages that require Authority action. Both studies sent a clear message: the ownership of production should not become more centralized. In addition, increasing the amount of investments and ensuring that all market parties, including new companies, have equal opportunities to invest in production and to join larger production plant investments were seen as the most important objectives in the studies.⁴²

Relating to the future of Mankala-companies, an important fact in the Nordic study was that the joint ownership and cross-ownership of production was seen as one reason for the centralization of production in the Nordic markets. The study also pointed out that joint ownership of production inevitably increases the risk of non-competitive behavior, and an extensive joint ownership may also affect the market price on the Nordic markets.⁴³ The risk of non-competitive behavior often actualizes through information sharing between the owner companies.⁴⁴

40 Commission Notice 2001, point 96.

41 In the Nordic Countries, for example Fortum Plc or Vattenfall Plc taking part in the cooperation leads to a situation where the limit is exceeded.

42 See the Report from the Nordic Competition Authorities 2007 and the Report from the Finnish Competition Authority 23/13.9.2007.

43 Report from the Nordic Competition Authorities 2007, p. 16.

44 Report from the Nordic Competition Authorities 2007, p. 17.

The study shows that the joint ownership of production has not changed significantly since 2003. Joint ownership is very common within water-power in Norway⁴⁵ and within nuclear power in Sweden.⁴⁶

The European Commission has in some contexts stated that arrangements similar to the Mankala-model may be anticompetitive. It is likely that the Commission will take the question up for closer examination in the future.⁴⁷ The Commission has already started procedures against Gas de France and the Belgian Electrabel after suspecting that the companies were restricting competition in their native countries. The examination concentrates on long term supply agreements between several large industries and leading companies. The Commission pointed out that, considering the market power of the suppliers and the amount as well as the length of the contracts, the agreements may hinder the accessibility of the markets and so restrict competition by taking the buyer companies off the markets.⁴⁸

The procedures may relate to Mankala-companies through the fact that the supply contracts in the Mankala-companies last indefinitely, and thereby result in the above situations: they bind the potential buyers to the company and this way take them off the market. Although the cases pertain to agreements with individual buyers⁴⁹ it may be seen that the Mankala-model in reality also has similar restricting effects. A large amount of the joint owners are major electricity consumers, and the supply agreements are only replaced with the special company model (see section 2). It should be noted, however, that the supply companies in the above cases have a monopoly position, which is not the case with Mankala-companies.

3.3.2 Accessibility of Production Plants

Building new production capacity is very inconvenient in Finland. Water power is already in full use, nuclear power demands huge investments and a lengthy permission process, coal-fired power plants are victims of the emis-

45 In Norway the share is about 30%.

46 The building of new nuclear and waterpower plants is forbidden in Sweden. This has led to a growth of the cooperated nuclear power, Report from the Nordic Competition Authorities 2007, p. 16.

47 Talus 2008, p. 651.

48 Commission Report 2007.

49 Cf. the description above of the Mankala-companies as not self-reliant.

sion trade and the renewable production sources are dependent on supporting politics. The competition authorities have stressed that no more obstacles should be placed on production investments.⁵⁰

When the articles of association and the shareholder agreement in a Mankala-company give ownership in the company as a condition for sale, it means that an outsider company⁵¹ has no ability to buy electricity from production companies owned in a Mankala way. This in turn makes new retailers dependent on the Nord Pool spot price, and as the market price is often below the Nord Pool spot price this further decreases the accessibility of the markets.⁵² The building of new production capacity has hereby been made inconvenient, and as the Mankala-companies bind a large amount of the production to the owners, entry on to the markets is difficult.

3.3.3 Independence of the Companies as a Base

The main principle of the European Court of Justice is that every player individually defines their actions on the markets, and that arrangements restricting this are restrictive of competition.⁵³ The production company should itself define its actions, pricing and customers. This prerequisite is not realized in the Mankala-companies. The joint owners steer the company in accordance with their own goals.⁵⁴ Hence the cooperation can be seen as limiting and controlling production in the way article 81(1)(c) forbids. The Mankala-company can be seen as a production plant as indicated in article 81(1)(c), whose production the joint owners are steering with agreements.

3.3.4 Information-Sharing Within the Cooperation

Rival companies owning production jointly increases the risk of non-competitive behavior between the companies. One main risk is information-sharing between the owners.⁵⁵ The degree of non-competitive behavior is dependent on how the administration and governance of the company is

50 Finnish Competition Authority Yearbook 2007, p. 27.

51 For example a local retailer.

52 Report from the Nordic Competition Authorities 2007, p. 76.

53 European Court of Justice: Case C-49/92 P.

54 See the estimation of the nature in the cooperation in Teollisuuden Sähkömyynti Oy, The Finnish Competition Authority: Case number 27/67/96.

55 Report from the Nordic Competition Authorities 2007, p. 16-17.

organized. The risk can be reduced by developing governing procedures, and concretely by minimizing the communication between the owners.⁵⁶

In Finland, the Market Court has claimed that cooperation in a Mankala-company doesn't give the joint owners any specific information about other owners, and that the cooperation doesn't lead to a possibility to interact with other companies' activity on the markets. According to the Court, the owners get only commonly available information about the rival companies' market activities through the cooperation.⁵⁷

3.3.5 Price Adjusting

The price of other earning from the company is defined in the shareholder and other agreements and is the same for all owners within the different production forms. This does not mean that the retail prices would be intentionally horizontally adjusted and agreed on by the joint owners. The arrangement can, however, in real terms lead to a situation where the retail price is naturally adjusted, when the retailer owners have exactly the same acquisition costs and, consequently, are all in the same position. Besides, the companies know the acquisition costs of the other owners. When the companies have a multiplicity of collective costs and when they have the same end product, the companies have a chance to adjust their competitive behavior.⁵⁸ One can therefore wonder, whether true competition really can develop between these owners, or whether the cooperation does in fact also adjust the retail prices.

3.4 The Benefits

3.4.1 The Prerequisites for the Acceptance of Restricting Cooperation

The prerequisites for the acceptance of restricting cooperation are defined in article 81 paragraph 3. When the cooperation fulfills the prerequisites, the arrangement can be accepted even though it has otherwise been classified as forbidden. The prerequisites are cumulative, which means that the

⁵⁶ Report from the Nordic Competition Authorities 2007, p. 23.

⁵⁷ Market Court: 123/08 case number 209/06/KR, 14.3.2008.

⁵⁸ Ojala 2005, p. 236.

cooperation has to fulfill them all to be accepted.⁵⁹ In order to be accepted, the restricting cooperation has to improve the production or distribution of goods, or promote technical or economic progress, allowing consumers a fair share of the resulting benefits. However, the restrictions have to be absolute and the arrangement must not lead to elimination of competition in the markets.⁶⁰

The Mankala-companies can be seen to have effects that improve production efficiency. These can be found mostly in the scale advantages that a larger production unit has compared to a situation where all the owners would drive their own production. The cooperation may lead to a rational reorganization through the withdrawal of overlapping organizations.⁶¹ A larger unit also has more potential to improve technical development and innovations. In the case of energy production this can mean developing new production technology or increasing the effectiveness of the existing capacity. For example, Nordic Power Ltd. has together with its joint owners invested over 14 billion Euros in research into renewable production forms since 1990.⁶²

A fair share of the above mentioned benefits have to end up with the customers, which in the EC law means natural persons. It is conceivable that the cooperation could have enough benefits of this kind to fulfill the requirements of acceptance. The bulk of the owners, the industrialists for example, use the gained electricity themselves and only a minority of the produced electricity reaches customers. The benefactors are therefore mainly companies instead of consumers. The benefit through retail-owners depends on the procurement alternatives of the retailers and on the circumstances in the field.⁶³ One should also compare whether the possible benefits gained through the retailers are bigger than the benefits lost through the restrictive

59 Commission Notice 2004.

60 Jones — Sufrin 2008, p. 124.

61 Cf. the estimation of effectiveness through cooperation, The Finnish Competition Authority, case number 27/67/96, 23.12.1997.

62 See more from the homepage of Nordic Power Ltd.

< http://www.pohjolanvoima.fi/en/projects/biofuel_programme/?id=7687>.

63 The fact that the spot price has often been below the market price gives actors in Mankala-companies an advantage towards an actor dependent from the Nord Pool electricity.

effects. The increasing of competition through the possible dissolving of the company form could affect the prices at least the same amount.

About the indispensability of the restrictions is to be said that the company model is based on the restrictions and they are in this way indispensable in the way article 81 requires. The cooperation must not eliminate competition in the markets, and it can quite clearly be found – especially if cooperation between the largest players is avoided – that the cooperation doesn't have this effect.

3.4.2 Large-scale Benefits

Besides the benefits listed above, the cooperation can be found to have also other, larger-scale benefits, such as production security of energy and self-sufficiency. The competitiveness of the Finnish industry through affordable electricity is also an important benefit to the state economy.⁶⁴

One of the unquestioned benefits of the model is that it has shown itself to be an excellent way to execute new investments. The model is an expedient way to share the costs and risks of a new plant investment between several actors. The model has been seen to be very important to the Finnish industry on the one hand, and on the other hand it has proven to be the only way for new investments in the current situation.⁶⁵ The EU Directorate General of energy DGTRE has shown interest in the model as a solution for investment passivity.⁶⁶ The nuclear power plants Olkiluoto-3 under construction and Olkiluoto-4 in the planning stage owned by TVO and the nuclear power plant project of Fennovoima are examples of the model's positive effects.⁶⁷

Because the model enables investments it can be argued that the model may, through vertical integration, even increase competition on the production

64 Kara 2005, p. 102.

65 Kara 2005, p. 102.

66 Interview of Timo Rajala (Kauppalehti 21.10.2004, p. 12. Available in www-format <www.kauppalehti.fi>).

67 More on the projects: <<http://www.tvo.fi/www/page/ol3projekti/>> and <<http://www.fennovoima.fi/hanke/>> .

level through a decrease in the market share of the leading companies.⁶⁸ This way the model increases the pressure of competition in the field.⁶⁹

4 Overall Examination and the Future of the Model

The examination of competition issues of Mankala-companies is no easy task. Firstly the form of the collaboration is unclear and it is open to interpretations of how the collaboration is placed in the structure of article 81. The fact that there can be found both vertical and horizontal aspects of the collaboration makes the evaluation even harder. The social importance of energy and the relatively undeveloped situation of the energy markets also affect the evaluation and broaden the examination, stretching it outside the article 81. So the evaluation of the acceptability of the company model is to be based, among the prerequisites of the 81 article, on a general evaluation of the effects where all the aspects are weighed in their entirety.

The acceptability of the company model is also dependent on the development of the market and on the historical situation in which the acceptability is examined. At the time when the production cooperation was started the model constituted an important and definitely acceptable production model. The markets were non-competitive and the national production was remote. Now the situation is very different. The trade through the Nord Pool exchange has been continually growing and it can be presupposed in the light of the reports and goals of the Nordic competition authorities and EU Commission that the development will go towards ownership unbundling and individuality of production units, resulting in a Nord Pool driven trade. An opposing argument is presented in a report by Mikko Kara, in which he states that production cooperation is essential in the current situation.⁷⁰ And the fact that there are three cooperative nuclear power plant projects running at the moment proves that the model is at least a solution to investment passivity.

68 Kara 2005, p. 101-102.

69 Market Court 123/08 case number 209/06/KR, 14.3.2008.

70 Kara 2005, p. 102.

Bibliography

Literature

- Airaksinen, Manne, Pulkkinen, Pekka and Rasinaho, Vesa, *Osakeyhtiölaki 1*. Helsinki, Talentum 2006. (Airaksinen & Co. 2006)
- Hannula, Antti and Kari, Matti, *Osakassopimuksesta*. Juva, WSOY pro 2007. (Hannula – Kari 2007)
- Helminen, Sakari, *Osakeyhtiön yhtiöjärjestys*. Helsinki, Talentum 2006. (Helminen 2006)
- Jones, Alison and Sufrin, Brenda, *EC Competition Law. Text, Cases and Materials*. Third edition. Oxford University Press 2008. (Jones – Sufrin 2008)
- Kaarresalo, Toni, *Kilpailuttamisvelvollisuus julkisissa hankinnoissa*. Helsinki, Edita 2007. (Kaarresalo 2007)
- Kuoppamäki, Petri, *Uusi kilpailuoikeus*. Helsinki, WSOY 2006. (Kuoppamäki 2006)
- Ojala, Marjo, *EU- kilpailuoikeus*. Helsinki, Edita 2005. (Ojala 2005)
- Romppainen Leena, Raunio Merja, Kotiranta Kare and Ukkola Outi, *Osakeyhtiön varojen jakaminen ja verotus*. Jyväskylä, Gummerus Kirjapaino Oy 2000. (Romppainen & Co. 2000)

Authority Reports

- Commission Notice, *Guidelines on the Application of Article 81(3) of the EC Treaty (2004/C 101/08)*. (Commission Notice 2004)
- Commission Notice, *Guidelines on the Applicability of Article 81 of the EC Treaty to Horizontal Cooperation Agreements, OJ 2001 C3/02*, published 6/1/2001. (Commission Notice 2001)
- Commission Notice, *Guidelines on Vertical Restraints (2000/C 291/01)*. (Commission Notice 2000)
- Commission Report, *Report on Progress in Creating the Internal Gas and Electricity Market*. (15.11.2005 COM(2005) 568 final) (Commission Report 2005)
- Commission Report, *Commission initiates formal proceedings against Electrabel and EDF for suspected foreclosure of the Belgian and French electricity markets (MEMO/07/313 Brussels, 26 July 2007)*. (Commission Report 2007)
- Commission Report, *The National Report 2008 to the European Commission*. Available in www-format <http://ec.europa.eu/energy/electricity/benchmarking/index_en.htm> 4.1.2009 (Commission Report 2008)
- Kara, Mikko, *VTT Report: Päästökaupan vaikutus pohjoismaiseen sähkökauppaan. Ehdotus Suomen strategiaksi*. Helsinki, Edita Prima Oy 2005. (Kara 2005)

Report from the Finnish Competition Authority, A Level Playing Field Precondition for Sound Electricity Markets. 13.9.2007. Available in www-format <www.kilpailuvirasto.fi> (>news) 20.12.2008. (Report from the Finnish Competition Authority 23/13.9.2007)

Finnish Competition Authority Yearbook 2007. Available in www-format <<http://www.kilpailuvirasto.fi/tiedostot/vuosikirja-2007-englanti.pdf>> 11.1.2009 (Finnish Competition Authority Yearbook)

Report from the Nordic Competition Authorities 2007, Capacity for Competition Investing for an Efficient Nordic Electricity Market. Available in www-format <<http://www.kilpailuvirasto.fi/tiedostot/Capacity-for-competition.pdf>> 6.1.2009 (Report from the Nordic Competition Authorities 2007)

Articles and Publications

Kari Liuhto, EU's Growing Energy Import Dependency a Major Risk. Expert article 254 Baltic Rim Economies, 31.10. 2008 Bimonthly Review 5/2008. Available in www-format < <http://www.tse.fi>> (Erillislaitokset>Pan-Eurooppa Instituutti>Baltic Rim Economies) 20.12.2008. (Liuhto 2008)

Kroes, Neelie, European Commissioner for Competition Policy: Improving competition in European energy markets through effective unbundling (SPEECH/07/574) Available in www-format <<http://europa.eu>> (European Commission>Commissioners>Neelie Kroes>My speeches)

Talus, Kim, EY-energiaoikeus – kilpailuoikeutta ja sektorikohtaista lainsäädäntöä. Defensor Legis 4/2008. (Talus 2008)

Formal Sources and Legal Praxis

Act on Competition Restrictions (27.5.1992/480)

European Court of Justice: C-49/92 P.

EC Treaty (EYVL C 325 24.12.2002).

Limited Liability Companies Act (624/2006)

The Finnish Supreme Administrative Court's Decision: 1963: B I 5.

The Finnish Competition Authority: Case number 27/67/96, 23.12.1997.

The Market Court Decision: 14.3.2008 number 123/2008, Case number 209/06/KR