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Merger Control

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Finland

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Overview of merger control activity during the last 12 months

In 2015, 26 concentrations in total were notified to the Finnish Competition and Consumer Authority ("FCCA"). By comparison, in 2014, 30 concentrations were notified. After Phase II investigations, one concentration was approved conditionally (*Elisa Oyj / Anvia Oyj*) and one unconditionally (*EQT VI Limited / Animagi Oy*) during 2015. The rest were approved during initial Phase I investigations. One merger notified in late 2015 (*Ruokakesko Oy / Suomen lähikauppa Oy*), was transferred to Phase II in January 2016.

Pursuant to the Finnish Competition Act (948/2011), Section 22 (1), the provisions on the control of concentrations will apply to a concentration where:

- the combined worldwide turnover of the parties to the concentration exceeds €350m; and
- the turnover of at least two of the parties accrued from Finland exceeds €20m for both.

The concentration must be notified to the FCCA only if these thresholds are exceeded. The FCCA does not have competence to investigate mergers falling within the jurisdiction of the European Commission, unless the Commission refers the case to the FCCA under the provisions of the EU Merger Regulation (139/2004). During 2015, there were no case referrals from the European Commission to the FCCA or *vice versa.*

When a concentration is being reviewed, the main competitors, customers and suppliers of the parties to the concentration are asked to submit statements within a tight schedule. The FCCA may also request statements from, for example, trade associations and other authorities.

The notification process has two phases. The initial phase (Section 26 (1) of the Competition Act, "Phase I") will take up to one month upon receipt of the notification. However, if the notification is significantly incomplete, the time period shall not begin until all the necessary information is submitted to the FCCA. The FCCA also has the power to freeze its own procedural deadlines ("stopping the clock") if the parties fail to provide all the necessary information. A recent example where the FCCA has found the notification to be incomplete is *Elisa Oyj / PPO yhtiöt Oy, Kymen Puhelin Oy ja Telekarelia Oy* (2013), which postponed the deadlines by approximately three weeks.

If the acquisition does not require any further investigation, the FCCA approves the concentration in Phase I. The majority of concentrations are cleared during Phase I. Twenty-four out of 26 notifications submitted were cleared in Phase I in 2015 and Phase II investigations were opened in two cases. In simple cases, the FCCA usually aspires to approve the concentration in approximately 10 working days, but it does not have any legal obligations to do so. During 2015, non-problematic Phase I clearance decisions appear to have been issued approximately within this timeline.

If it turns out in the Phase I investigation conducted by the FCCA that the notified concentration might significantly impede effective competition and thus a further investigation is required, the FCCA shall during the initial phase take a decision to initiate further proceedings (Phase II investigations). In Phase II, the FCCA has three months from taking the decision to further investigate the proposed concentration, during which the concentration and its effects on competition will be thoroughly analysed. During Phase II, the FCCA may approve the concentration with or without conditions or propose that the Market Court prohibits the concentration. The FCCA may request that this three-month period is prolonged by up to two months by the Market Court. The FCCA's practice is to require consent of the parties to the concentration to such a request. During 2015, no such requests were made.

New developments in jurisdictional assessment or procedure

The new Competition Act entered into force on 1 November 2011. The Act harmonised the national merger provisions with the EU Merger Regulation (139/2004) with only minor exceptions related to e.g. so-called warehousing structures. The FCCA may be consulted confidentially, for example, on issues relating to the obligation to notify or the exact contents of the notification.

According to Section 30 of the Competition Act, the FCCA may lift a condition attached to the implementation of a concentration or mitigate it due to a significant change in market conditions or another substantial cause. Such decisions are rather rare. However, during 2015 the FCCA lifted or mitigated conditions in three earlier cases based on applications by the notifying parties.

The first case concerned pay-tv markets (*MTV Oy*), where conditions were originally imposed in 2008. In this case the FCCA considered the conditions no longer necessary, as the Finnish pay-tv market had changed over time. This allowed the FCCA to lift the conditions entirely by its decision of 5 February 2015. One condition remained in force until 31 December 2015.

The second case concerned healthcare services (*Terveystalo Healthcare Oy,* conditions originally imposed in 2011). In this case, the imposed conditions were mitigated. The FCCA stated that a mitigation of the conditions was admitted due to the changes in the market conditions and the target's poor economic situation, which was seen as alluding to "another substantial cause" in the Competition Act.

The third case concerned dairy products (*Valio Oy*, conditions originally imposed in 2000). In this case the application had apparently been pending for about four years. In its decision, the FCCA accepted to lift only some of the conditions imposed. The applicant had withdrawn its application regarding some other conditions during the procedure after receiving the draft decision for comments. Based on public information the applicant has submitted, a new application arguing that the conditions should be mitigated by, e.g. gradually decreasing the obligation to sell certain products to competitors or a transitional period, should be imposed. The FCCA has not ruled on this latest application yet.

The FCCA is empowered to carry out surprise inspections as a part of its merger control investigations and has in practice recently also done so. These powers were clarified with a change that took effect on 1 March 2015. Pursuant to the amendment, the FCCA has during an inspection at the premises of an undertaking the right to access information, including emails and other electronic files, which are held by a third party. These third parties could be for example IT, such as cloud and storage services providers. Such third parties are obliged to provide the requested information to the FCCA.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The applicable substantive test is the so-called SIEC test, under which it is assessed whether the proposed merger significantly impedes effective competition in Finnish markets or a substantial part thereof, in particular, as a result of creating or strengthening of a dominant position. The SIEC test is considered to be a useful reform to the assessment, in particular, because now the assessment can have a stronger focus on the actual competitive effects of the merger. The FCCA has also published its own Guidelines on Merger Control, which are largely in line with the European Commission's Guidelines. In the Government Bill for the Competition Act (88/2010), it is stated that the practice of the European Courts and the Commission's Guidelines can be used when assessing a merger in accordance with the Act.

The FCCA does not have any specific key sectors that it would particularly focus on in merger control. However, the FCCA has in general paid close attention to the grocery trade sector in recent years due to the very concentrated state of the industry and the special provision introduced to the Competition Act on 1 January 2014, which imposes dominant position to undertakings active in this sector with a market share of at least 30%. However, based on the preparatory works, this provision does not have direct effects on merger control assessments. Against this background, the pending *Ruokakesko / Suomen Lähikauppa* case involves interesting horizontal and vertical issues as K group, the player with the second-highest market share in the retail level, intends to acquire Suomen Lähikauppa, the fourth-largest player on the daily consumer goods retail markets, specialising in neighbourhood stores. After the merger, the two largest retail groups would control over 85% of the retail markets. The FCCA opened Phase II investigations on 11 January 2016 in this case, stating that the concentration may have harmful effects on competition in terms of both the retail sale and procurement of daily consumer goods markets.

If a merger takes place in the communications or energy markets, the FCCA customarily requests a statement from the Finnish Communications Regulatory Authority or the Energy Authority. In addition, the Competition Act includes some sector-specific regulation for concentrations in the employee pension insurance, pension funds and insurance fund sectors. Any concentration in these sectors has to be notified to and approved by the Finnish Financial Supervisory Authority. In these cases no separate notification to the FCCA is required if the Financial Supervisory Authority has asked for the FCCA's statement concerning the proposed merger and the FCCA has not opposed the concentration in its statement. Thus, the legislator makes sure that in every case the competitive assessment is conducted by the FCCA.

Due to Finland's slightly isolated location from the rest of Europe and the effects this might have on cross-border trade, especially geographic markets are defined somewhat differently than in EU practice. The FCCA tends to take national markets as a starting point, and extensive economic and statistical evidence on wider markets may be required to convince the FCCA that the markets are wider than national. Mere reliance on EU cases finding EU- or EEA-wide or broader markets will not suffice in this respect.

The vast majority of the decisions issued by the FCCA are rather concise and, thus, neither the relevant product nor the relevant geographical markets are defined unless necessary, which practice is somewhat similar in comparison with the one conducted by the Commission. The FCCA customarily refers to the market definitions submitted by the notifying party concerning both the relevant product markets and the relevant geographical markets.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The competitive effects of concentrations are assessed on the relevant product markets and geographic markets. In its investigations, the FCCA assesses the market definition presented by the notifying party and third parties in their answers to the FCCA's requests for comments and information.

The SIEC test applied since 2011 focuses more strongly on competitive effects and less on market shares and structural considerations. However, market definition and market shares still remain important, but not necessarily decisive factors in the assessment. The FCCA has stated that its investigations will focus more on the economic basis of concentrations and on the likely conduct of the market actors following the merger.

The assessment of actual competitive effects includes an assessment of the current market situation, market entry and possible barriers to entry, as well as other factors that balance the market power of the merging entity (e.g. customers' bargaining power). Where appropriate, efficiency gains resulting from the concentration will also be taken into account, but it remains for the notifying parties to demonstrate that the concentration leads to efficiency gains that benefit consumers.

In general, the assessment of the effects of a concentration on the markets can be characterised as a general assessment of many factors, with the purpose of estimating the effects of the merger on a future market situation. After the adoption of the SIEC test, the FCCA focuses more on the effects of the concentration, which trend characterises the whole assessment procedure. However, more traditional assessment methods have still remained valid in the FCCA's decision-making practice for practical reasons. The FCCA usually does not have enough time during Phase I to carry out any sophisticated economic analysis, which means that market shares still play a significant role when screening the concentration. High market shares can easily create an initial concern that a merger might have restrictive effects on competition, which could lead to the opening of Phase II investigations.

In some cases since the adoption of the SIEC test, the FCCA's Phase II investigations have called for an in-depth economic assessment to be carried out, and the FCCA has shown itself to be capable of such analysis within the strict time limits of merger investigations. The FCCA has stated that its standard practice is to involve the authority's economists in Phase II cases. The FCCA has, for example, applied upward pricing pressure (UPP) analysis and has also recently carried out rather extensive empirical research such as consumer surveys during Phase II investigations.

Case example: *EQT VI Limited / Animagi*

This case involved acquisition of control over Animagi Oy, a chain of veterinary service clinics, by private equity investor EQT. EQT already owned Univet Oy, a competing veterinary service provider. The parties had overlapping activities particularly in the small animal veterinary market. After in-depth investigations, the FCCA stated that the threshold for intervention was not exceeded. However, the case involves some noteworthy aspects.

Although the merged entity had relatively high regional market shares in veterinary services, the FCCA found that this is unlikely to give the merged company a level of market power which it could exploit to the detriment of customers. The FCCA explicitly stated that high market shares alone could not provide evidence of harm to competition in the case. During Phase II, the FCCA carried out a price comparison analysis between regions where only one party was present and regions where both were present. Although pricing

varied strongly from region to region, this analysis also suggested that the parties had not been significant sources of pricing pressure to each other prior to the merger, so the merger would not cause a significant impediment of competition in these services. According to the FCCA's investigations, there remained sufficient competition in each region and the concentration's market power would be offset by the entry of potential new competitors into the sector and the potential of existing companies to expand their operations. Furthermore, concentration in the highly fragmented veterinary market could not as such be considered a harmful development for consumers. The FCCA also acknowledged that concentration, and the establishment of chains, could also generate efficiency gains that benefit consumers in the form of services of higher quality and variety.

As the investigations in other markets did not reveal any significant impediment of effective competition, the FCCA accepted the concentration unconditionally.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Where a merger raises competition concerns, in that it could significantly impede effective competition, the notifying parties can propose commitments to the FCCA in order to resolve the competition concerns. The FCCA has an obligation to consider these remedies, and if the conditions proposed by the notifying parties are deemed sufficient for eliminating the competition concerns associated with the merger, the parties are asked to commit to the remedies in writing. The FCCA is responsible for ensuring that the remedies are implemented as agreed. Since the FCCA's primary responsibility is to find an agreeable solution, it cannot ask the Market Court to prohibit a merger if the remedies proposed by the notifying parties are sufficient for eliminating the competition concerns identified.

In practice, the FCCA is always willing to meet the parties and discuss the proposed concentration and possible commitments.

The Competition Act presupposes that mainly structural remedies should be used in merger control cases. The FCCA has also stated that it favours structural remedies over behavioural ones and tends to refrain from accepting the latter. The *NCC Roads Oy / Destia* case in 2011 is a good example of this policy. The parties had proposed behavioural remedies or limited structural remedies only, while the FCCA required clear structural ones. Further, the fulfilment of the proposed remedies was uncertain and their implementation would have required constant surveillance by the FCCA. When sufficient remedies were not offered, the FCCA made a proposal for the Market Court to prohibit the merger.

In its prohibition proposal to the Market Court, the FCCA referred to the European Commission's practice as well as to the case-law of the Court of Justice of the European Union to support structural remedies. The FCCA stated its view that behavioural remedies are generally difficult to supervise and that this is the case especially where the FCCA in practice would have ended up supervising whether the merged entity sold asphalt mass to third parties with reasonable prices or not. Further, it is very likely that the FCCA would not approve divestment commitments that need not be adhered to, on the grounds that a suitable buyer or tenant cannot be found. In earlier cases, the parties have committed to abandon the concentration if the divestment requirement could not be fulfilled (*Metsäliitto / Vapo*). Alternatively, secondary commitments have also been given in case primary commitments could not be fulfilled (*Carlsberg / Orkla*).

However, examples of clearing concentrations based on behavioural remedies only exist where they are found appropriate and sufficient to counter the problems identified (for

example, *Terveystalo Healthcare Oy / ODL Terveys Oy* in 2011). To address the FCCA's concerns concerning the hospital services of Oulu and the medical services in Kajaani and Kemi-Tornio, the parties offered such behavioural commitments that allowed the customers to have the opportunity to purchase operations conducted in private hospitals also from doctors outside the concentration. Additionally, Terveystalo undertook to follow the same national prices as elsewhere in the more competitive parts of Finland with regard to the medical services offered to private customers in the region of Kajaani and Kemi-Tornio. The FCCA was of the opinion that without these commitments, price increases pertaining to the services would have been imminent.

The FCCA may issue a conditional clearance decision during Phase I or Phase II. However, clearing a concentration conditionally does not affect the FCCA's procedural deadlines. Because of this, most conditional decisions are postponed until Phase II. However, some examples exist of conditional clearance decisions in Phase I. These have taken place, especially when the notifying party has already submitted its commitments and the information necessary to investigate the concentration to the FCCA before submitting its official notification. These kinds of open pre-notification discussions make it possible for the FCCA to evaluate the concentration already before the procedural deadlines start to run.

The only merger approved conditionally in 2015, *Elisa Oyj / Anvia Oyj,* was remedied through a rather standard divestiture of overlapping network infrastructure and related consumer broadband contracts. However, this case involved some interesting aspects as the acquisition of control was achieved through an ownership share of only 26.8% in the target company, which was seen as sufficient to establish control as the ownership structure of the target was scattered mostly to private persons who had historically been inactive in annual general meetings.

Commitments and appeals

It is also noteworthy that, pursuant to the Competition Act, the FCCA has the duty to negotiate commitments or remedies with the parties, but it cannot make commitments binding that the parties have not proposed. If the FCCA does not accept the commitments proposed, it must make a proposal to the Market Court to prohibit the concentration. Further, a notifying party cannot appeal a decision by which the commitments it has given have been ordered to be followed, nor can it appeal the conditional approval decision in itself.

In practice, this means that if the company is unwilling to submit commitments at all or early enough for the FCCA to market-test them, or is unwilling to submit commitments the FCCA has stated are needed to approve the concentration, the only course of action available for the FCCA is to prepare a prohibition proposal to the Market Court. Both recent prohibition proposal cases (*NCC / Destia in 2011* and *Uponor / KWH / Joint venture* in 2013) are examples of cases where the FCCA found that the commitments proposed by the parties were not sufficient to address the competitive concerns, a view upheld by the Market Court. However, the Market Court procedure allows the parties to submit amended commitments during the procedure at the Market Court, and the Court may approve the concentration with such conditions also.

If the Market Court does not agree with the FCCA's proposal to prohibit the concentration, it has the power to impose conditions it sees as suitable to address the competitive concerns. The decision of the Market Court may be appealed to the Supreme Administrative Court. It is also noteworthy that third parties retain a right to appeal a conditional merger control decision if they are considered to be affected by the decision in the sense specified in the Finnish Administrative Judicial Procedure Act. However, in practice, third parties in a merger control case have never been considered to be in such a position.

Pursuant to the Competition Act and earlier practice of the Supreme Administrative Court (*Sonera / Loimaan Seudun Puhelin*), the Market Court can prohibit a concentration only based on a proposal by the FCCA. An appealing party can thereby not have a concentration prohibited. Hence, the only effect an appeal might have in case the appealing party should be considered to have the right to appeal, is the removal of a single commitment or the whole remedies package.

Key policy developments

The Finnish Ministry of Employment and the Economy has emphasised that in rather small Finnish markets it is essential to make sure that the markets remain competitive, and that achieving the said goal requires a well-functioning merger control system. Many Finnish industry sectors are characterised by the fact that there are few players who possess market power and many markets are oligopolistic in nature. The current position of the Ministry made public is that if acquisitions of non-controlling minority shareholdings shall be subjected to merger control at the EU level, it is likely that the Finnish Competition Act will be amended accordingly. Developments in this respect most likely await EU-level decisions on the topic. In addition, there is a widespread consensus in Finnish society for the need to remove and limit unnecessary regulation, which may have an impact on preparation of any legislative proposals regarding control of minority acquisitions.

Although there is currently no control of minority acquisitions in Finland under the merger control regime, it is noteworthy that certain transactions in the defence sector, or transactions concerning assets which are considered vital to the national interest, may be reviewed under the Act on the Monitoring of Foreign Corporate Acquisitions. The procedure differs from the merger control regime and the competent authority under this Act is the Ministry of Employment and the Economy. The Act allows intervention at an ownership level of 10%. However, no transactions have been prohibited based on the Act.

Reform proposals

The Ministry of Employment and the Economy has set up a working group to amend the Competition Act. The period of the working group lasts until the end of February 2017. The possible amendments shall come into force after public hearings and official legislative process. Based on information made public, matters related to merger control to be considered include at least changing the merger control procedural deadlines from currently applicable days to working days, similarly to the procedure at the European Commission. Based on information made public, items not currently on the official agenda of the working group include re-assessment of jurisdictional thresholds, the authority's right to require notifications when the thresholds are not met, and control of minority shareholdings.

Furthermore, it has been announced that the special provision which empowers the FCCA to intervene in concentrations in the electricity distribution industry, where the parties' combined amount of electricity distributed at 400 volts would exceed 25% measured on a national level, would be removed from the Competition Act. The provision, which was intended to address the harmful effects of vertical integration in the electricity sector, originates from times prior to national implementation of the EU internal market packages in electricity and has not been applied in practice. This change might be implemented separately from the broader reform.

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Leena Lindberg is the co-head of Krogerus' competition and regulatory practice. As a private practitioner since 2010, she has assisted clients in numerous merger control assessments and notifications before the FCCA and the European Commission across various industries, as well as coordinated merger control assessments in other jurisdictions. Prior to joining Krogerus, Leena worked with the FCA for 14 years, where she served also as a member of the board of directors. Leena was in charge of the FCA's merger task force and represented the FCA in many merger and antitrust cases before Finnish Courts. Her international experience includes working for the European Commission's DG COMP, in addition to which she has represented Finland in a number of EU competition policy reform projects, including merger review and commission case proceedings.

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