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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

Pursuant to the Competition Act (948/2011, *fi: kilpailulaki*) a concentration must be notified to the Finnish Competition and Consumer Authority ("FCCA") if:

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

The applicable substantive test is the significant impediment to effective competition ("SIEC") test, which is intended to be equivalent to the SIEC test provided in the EU Merger Regulation. Other substantive merger control rules, including the definition of a concentration, are mostly in line with European Union rules.

The Finnish Competition Authority merged with the Consumer Agency on 1 January 2013, forming the new FCCA, but this has no notable practical effects on merger control. The abbreviation FCCA is used throughout this article whether reference is made to the new Authority or the old Finnish Competition Authority.

During calendar year 2012, 24 concentrations were notified to the FCCA. This number is roughly in line with the typical yearly number of notifications, which has been around 15-35 notifications since the current jurisdictional thresholds came into force in 2004. In 2011, 27 concentrations were notified to the FCCA.

In 2012, the FCCA reviewed 22 concentrations:

- Nineteen of these cases were cleared unconditionally during the so-called Phase I investigation. In Phase I investigations, the FCCA must decide whether further investigations are required within one month from the receipt of the notification. If the acquisition clearly does not have restrictive effects on competition, the FCCA must approve the concentration. The average amount of days spent on Phase I investigations in 2012 was 15.
- Three of these cases were subject to Phase II investigations. These entailed a merger in the field of production and selling of ready-made concrete, and concrete and other building materials products *(Rudus Oy / Lemminkäinen Rakennustuotteet Oy)*; a merger in the field of agricultural trade (*DLA International Holding A/S / Hankkija-Maatalous Oy*); and a merger in the field of plastic pipes, fittings, wells and other similar products designed for the construction and infrastructure technology *(Uponor Oyj / KWH-Yhtymä Oy / Joint venture)*. In Phase II, the FCCA has three months from taking the decision to further investigate the proposed concentration, after which it may attach conditions on the implementation of a concentration, approve it without conditions, or propose that the Market Court prohibits the concentration. Two of the above-mentioned cases were cleared unconditionally in Phase II.
- One of the Phase II cases, *Uponor Oyj/KWH-Yhtymä Oy/Joint venture*, is still pending. The parties have significant market shares in the market of plastic pipes, fittings, wells and other similar products. They also produce a wide range of these products, while smaller competitors only produce a more limited range. The FCCA has concerns over the significant market shares of the proposed concentration, the already strong position of the parties, especially in products made from plastic, as well as possible barriers to entry. In Phase II, the FCCA will further investigate

the role of substitute materials for plastic, as well as the impact of imported products, to assess the competitive situation fully. Further, with the approval of the parties, the FCCA requested the Market Court to extend the Phase II investigation for one extra month. The FCCA found out during its investigation that the parties were also active in sales to industrial customers; information that was not provided in the original notification.

- During 2012, the FCCA has not made any decisions of inapplicability nor carried out any proceedings for failure to notify a concentration. No concentrations were referred to the European Commission by the FCCA or *vice versa*, and no new applications to amend or repeal commitments given in earlier cases were made. One such application is still pending.

New developments in jurisdictional assessment or procedure

The new Competition Act entered into force on 1 November 2011. With the new Act, substantive merger control rules were fully harmonised with the EU Merger Regulation (139/2004). The applicable substantive test is now whether the concentration significantly impedes effective competition in the Finnish markets or a substantial part thereof, in particular, as a result of the creation or strengthening of a dominant position (the SIEC test). The FCCA has also published its own Guidelines on Merger Control, which are to a great extent in line with the European Commission's Guidelines.

The FCCA's Guidelines provide a general framework for the substantive assessment of concentrations under the Finnish merger control rules. The assessment is, as a starting point, in line with the SIEC assessment used in other jurisdictions. Pursuant to the Government Bill for a Competition Act (88/2010), the applicable substantive test is intended to be equivalent to the SIEC test provided in the EU Merger Regulation and practice of the European Courts, and the Guidelines of the European Commission may be used for interpretative purposes when assessing concentrations in Finland.

However, it is noteworthy that the Competition Act does not contain a provision exactly similar to Article 2(4) of the EU Merger Regulation, which deals with joint ventures leading to co-ordination of the parent companies' behaviour. Despite the fact that no such provision exists, in connection with introducing the SIEC test in 2011, it was assumed that such co-ordinated effects will now be examined under the SIEC test. According to the FCCA's Guidelines, the SIEC test offers a better chance to address the possible negative competitive effects that might arise due to a joint venture between competing parent companies. Further, the Guidelines state that the SIEC test also addresses so-called "gap situations" in oligopolistic markets more efficiently than the previous test based on creation or strengthening of dominance.

On the procedural side, Phase I of the notification process takes one month, at the most, and Phase II takes three months, at the most. The Market Court may extend Phase II by no more than two months. The FCCA deems an extension of Phase II proceedings appropriate only in exceptional situations. The FCCA does not require the consent of the parties to ask for an extension of Phase II from the Market Court, but in line with its previous practice asked for such consent in *Uponor Oyj/KWH-Yhtymä Oy/Joint venture*. Should the parties resist an application, the Market Court may grant the extension only if weighty reasons exist.

Further, the FCCA has the power to freeze its own procedural deadlines ("stopping the clock") if the parties fail to provide information required by the FCCA or the information provided is inadequate or erroneous. The preparatory works of the Competition Act state that the provision is intended to be applied in situations where the parties are withholding information deliberately. In practice, the FCCA did not apply these provisions during 2012.

However, in the Finnish process, the FCCA does not at any stage have to find the notification complete. According to the Competition Act, the deadline does not start to run if the notification is essentially incomplete, or if essential changes in the notified facts take place, and these changes have an essential impact on the assessment of the concentration. A change in facts is deemed essential if the parties knew or should have known about these facts when submitting the notification. Further, since there is no statement when a notification can be considered incomplete, it is possible that the authority will refer to incompleteness of the notification if essential new facts appear. However, in *Uponor Oyj/KWH-Yhtymä Oy/Joint venture*, where the notification lacked information relating to sales to

industrial customers, the FCCA asked the Market Court to extend Phase II instead of declaring the notification incomplete.

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

The FCCA does not have any predefined key sectors or key policy areas in merger control. The Competition Act itself includes sector-specific rules for concentrations in the employee pension insurance, pension funds and insurance funds sectors, pursuant to which a concentration on those sectors must first be approved by the Financial Supervisory Authority. A separate notification to the FCCA is not required if the Financial Supervisory Authority has asked for the FCCA's statement during its investigations and the FCCA has found in its statement that no impediment for the approval of the concentration exists. Further, the Competition Act also stipulates that a merger in electricity markets may be prohibited if the combined share of the transmission operations of the parties to the concentration, and the entities or facilities controlled by them or in control of them, exceeds 25% of the amount of electricity transmitted at 400V in the transmission grid on a national level. Thus the FCCA may intervene with a concentration in the electricity sector if the 25% market share is exceeded and demonstrating significant impediment on effective competition is not required.

Based on the FCCA's strategic and operational focuses agreed annually with the Ministry of Employment and the Economy, the FCCA continues to focus on reducing the harm caused by concentrated retail trade. During the past few years, the FCCA has investigated several concentrations in the food industry. In these cases, the FCCA has been especially interested in both the industry and retail level of the food supply chain, both of which are rather concentrated in Finland. No other significant trends, or a particularly high number of concentrations within a certain sector, have emerged except for the apparently growing concentration in the insurance sector, where three concentrations have been cleared during the last 12 months *(OP-Pohjola cooperative / Business operations of Skandia Life, Local Insurance Mutual Company / Tapiola General Mutual Insurance Company and If Insurance Company Oy / Business operations of Tryg Forsikring A/S Finnish branch).*

In its decisions, the FCCA has lately also investigated the negative competitive structure of the markets and has taken into account issues such as whether the structural and economic links between the major market players affect the incentives of the companies in question. These assessments have led to joint dominance and facilitating practices becoming one of the FCCA's interest areas in merger control. Due to the concentrated markets in Finland, joint dominance has been a focus area in a number of major cases.

It is also noteworthy that 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 is 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 Competition Act does not include a provision similar to Article 3(5) of the EU Merger Regulation, according to which notification is not required in certain temporary arrangements where credit institutions or other financial institutions or insurance companies hold, on a temporary basis, securities they have acquired in an undertaking with a view to reselling them ("warehousing structures"). The FCCA states in its Guidelines that because the Competition Act does not include provisions exempting temporary ownership arrangements, these transactions have to be notified in Finland, provided that the other criteria applicable to the obligation to notify are met.

Pursuant to the Decree by the State Council on the obligation to notify a concentration, less information about the relevant markets is required if the parties are not competitors in any markets where their combined market share is at least 15%, or they do not have a vertical relationship at all, or the market share of neither party to the concentration and the entity or foundation part of the same group in such vertical markets does not exceed 20%.

Further, in individual cases, the FCCA may grant waivers to the obligation to notify if the effects of

a concentration for competition are likely to be minor, or if the information prescribed to be given is unnecessary, in certain parts, for the assessment of a concentration. In such cases, a short-form notification is available. The notifying party may ask the FCCA to approve the use of the short notification form before notifying the concentration in informal negotiations, or may alternatively notify the concentration straight with the short-form notification. In the latter case, the FCCA may ask for normal detailed notification, which must then be provided. The short-form notification is accepted, for example, in cases where companies who accrue turnover from Finland set up a joint venture with no connection to the Finnish markets.

In practice, concentrations that clearly raise no concerns are cleared rather quickly. The FCCA has sometimes issued clearances within a week.

Similarly to the EU rules, the concentration may be notified prior to the actual signing if the parties can sufficiently reliably show their intention to merge. Sufficiently reliable intent may be expressed by signing a letter of intent, memorandum of understanding or by announcing publicly the bid regarding the relevant shares. The planned concentration must, however, be concrete enough for the FCCA to investigate it on the basis of provided information. The FCCA has the obligation to immediately begin investigating the concentration after the notification has been made, as the time limits start to run.

The FCCA has the power to propose that the Market Court imposes fines up to 10% of the turnover of the preceding year for implementing a concentration without notifying it ("gun-jumping"), but in practice such proposals have not been made. This seems to suggest that the FCCA is not especially keen on proposing fines because of pre-implementation if the failure to notify has not been intentional and if the concentration in question does not have any actual competitive effects.

Key economic appraisal techniques applied, and 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 on certain claims deriving from the market definition.

After the market definition has been finalised, the competitive effects of the merger are assessed. This 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. As the SIEC test, which has been applied for a year now, focuses more strongly on competitive effects and less on market shares and structural considerations, market definition and market shares will 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.

A recent example of assessing the relevance of market entry and barriers to entry can be found in the FCCA's decision in *Rudus Oy / Lemminkäinen Rakennustuotteet Oy.* The parties were active in, *inter alia*, ready-made concrete and other concrete products. The geographic markets regarding ready-made concrete were defined local in scope, and while the national combined market share of the parties did not raise serious concerns, in some local markets the merging parties' combined market shares were as high as 85%. The FCCA opened a Phase II investigation to further investigate the proposed concentration's effects on competition.

The parties claimed there was excess capacity in the markets and entry was fairly easy, so no significant impediment to effective competition could arise. Drawing from the Commission's Horizontal Merger Guidelines, the FCCA noted that when entering a market is sufficiently easy, a merger is unlikely to pose any significant anti-competitive risk. After assessing entry conditions in-depth, the FCCA

noted that especially in those areas where the combined market shares of the parties were highest or where other market participants had noted that the concentration would cause competition problems, there had either been recent entries by third parties or there were plans to enter the market. Based on this finding, the FCCA concluded that the concentration would not significantly impede effective competition in ready-made concrete markets despite the combined high market shares, and after assessing the concentration's effects on competition in other markets, cleared the concentration without remedies.

A recent example of a merger leading to efficiencies can be found in the FCCA's decision in *DLA International Holding A/S / Hankkija-Maatalous Oy,* a concentration in the field of agricultural trade. DLA acquired control in Hankkija-Maatalous Oy from Suomen Osuuskauppojen Keskuskunta (SOK), leaving the latter with a minority ownership of 40%. Hankkija-Maatalous was, prior to the acquisition, wholly owned by SOK and was responsible for developing SOK's agriculture business and SOK's Agrimarket chain, which, in turn, is a chain specialising in agriculture production materials, farming machines and gardening business. Retail co-operatives that are part of the Agrimarket chain were not included in the concentration and remained separate undertakings in the field of agricultural trade. However, these co-operatives planned to continue co-operating with Hankkija-Maatalous in certain operations after the acquisition. Prior to the acquisition, DLA owned Yrittäjien Maatalous Oy and Melica Oy, companies also active in the field of agricultural trade. DLA, in turn, is partially owned by Danish Agro A.m.b.A. The FCCA had initial concerns that the concentration might significantly impede effective competition in various Finnish agricultural product markets and opened a Phase II investigation.

During the Phase II investigation, the FCCA noted that the retailing of Hankkija-Maatalous may become more effective after the acquisition, because in the future the company is able to benefit from the bigger procurement volumes of the Danish Agro Group. According to the FCCA, this and the strengthening bargaining power of the concentration may ultimately show as more affordable sales prices to the end-customer. After assessing other competitive effects, the FCCA came to the conclusion that despite the high combined market shares of the concentration on some markets, and the fact that other retail co-operatives belonging to the same association of undertakings as SOK could not be regarded as creating significant competitive pressure, as long as SOK owns a minority of Hankkija-Maatalous, the concentration did not cause a significant impediment to effective competition and thus cleared it without remedies.

Otherwise, during the first year of applying the SIEC test, no significant cases have emerged where effects on competition have been assessed with econometric models, or at least the FCCA has not made public in its decisions whether it has applied such models or not. However, the FCCA has not only trained its existing staff extensively on the SIEC test, but has also recruited new staff specialising in competition economics during 2012. Further, the authority has publicly stated that it is also establishing an external group of economists to consult when assessing the effects of notified mergers. Together these developments mean that the FCCA is better prepared to carry out complex econometric analysis if required, and it can be expected that such analyses will be carried in the future in appropriate cases.

Assessment of vertical and conglomerate mergers

The FCCA deals briefly with vertical and conglomerate mergers in its Guidelines. The FCCA notes that non-horizontal concentrations are generally less likely to significantly impede effective competition than horizontal mergers. Further, the FCCA states that non-horizontal mergers often provide substantial scope for efficiencies. However, negative effects on competition, especially in the form of foreclosure, co-ordinated or non-co-ordinated effects, may also arise from vertical or conglomerate mergers. The FCCA describes these briefly in its Guidelines. In general, due to the introduction of the SIEC test, vertical and conglomerate mergers are assessed similarly to the EU Merger Regulation and no noteworthy differences exist.

In *Lohja Rudus Oy Ab / Abetoni Oy,* the FCCA examined a number of possible negative vertical effects of a concentration in the markets for cement and concrete. The FCCA was particularly concerned about the effect of the strong market position of Finnsementti, a dominant undertaking in the cement market, in relation to Abetoni's firm position in the ready-mixed concrete market. The FCCA also examined

whether the acquisition favours Abetoni in the raw material purchases with regard to competitors, and whether Finnsementti's position will be further reinforced when Abetoni is transferred to the same group. In addition, the FCCA examined the strengthening of Lohja Rudus' market position in the closely related ready-mixed concrete market. The possibility of Lohja Rudus to tie the sales of ready-mixed concrete and aggregates to the sales of Abetoni's products in land construction projects was also under review. However, after an in-depth Phase II investigation, the FCCA found no evidence of such effects and approved the concentration unconditionally.

Similar vertical effects were also investigated in the recent *Rudus Oy / Lemminkäinen Rakennustuotteet Oy* case. Finnsementti Oy, which belongs to the same group as the buyer, Rudus Oy, still had a significant market share of 70-80% in producing and selling of cement, which is one of the main crude materials for concrete. Several market participants had noted that the already strong position of Finnsementti would be further strengthened and competition would be reduced in the cement markets after the merger. Additionally, the target was also active in manufacturing step-ladder units, which also use cement as their crude material. After assessing the production costs of these units, the FCCA came to the conclusion that the competitive situation would not change materially and there still remained parties that were not dependent on the supplies of Finnsementti.

In *Suomen Posti (Finnish Post) / Atkos Printmail Oy,* the FCCA examined the vertical effects of the merger on the postal and printing markets. In the FCCA's view, the proposed concentration could have caused negative competitive effects on these markets, because the acquirer could have favoured Atkos Printmail over its competitors in the future, which, in turn, would have strengthened the already dominant acquirer's market position. Suomen Posti committed to keep Atkos Printmail as a separate subsidiary and not to transfer its current business operations to Suomen Posti. The remedies were straightforward and offered already in Phase I, which made it possible to clear the concentration without opening a Phase II investigation.

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 a duty to consider these remedies, and if the remedies 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 Finnish 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 informally 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. *NCC Roads Oy / Destia* 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, the FCCA has never approved a divestment commitment that need not be adhered to, on the grounds that 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, recent examples of clearing concentrations based on behavioural remedies only exist where they are found appropriate and sufficient to counter the problems identified (*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 of conditional clearance decisions already in Phase I exist. These have taken place especially when the notifying party has submitted its commitments and the information necessary to investigate the concentration to the FCCA already 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.

Commitments and appeals

It is also noteworthy that pursuant to the Competition Act, the FCCA has the duty to negotiate the 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, or is unwilling to approve commitments, the FCCA has stated it will have to approve the concentration, the only course of action available is for these cases to proceed to the Market Court as a prohibition proposal. A good example of this is the *NCC / Destia* case, where the commitments proposed by the parties were not sufficient to address the competitive concerns, a view upheld by the Market Court.

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 is the removal of a single commitment or the whole remedies package.

Key policy developments

No significant developments relating to merger control have taken place during 2012, since the new Competition Act entered into force in November 2011.

Reform proposals

The FCCA continues to focus on reducing the harm caused by concentrated retail trade. The daily consumer goods trade is particularly noteworthy, as it is the most concentrated in Europe, with 80% of the market controlled by two retail chains. To address the issue of potential abuse of market power

by these chains, the Government issued on 20 December 2012 a much-debated Bill to amend the Competition Act. The proposal would add a new provision stipulating that an undertaking in the daily consumer goods trade would have a dominant market position if its market share exceeds 30%. However, the Bill explicitly states this new provision has no effect on control of concentrations, as the applicable substantive test in the Competition Act is equivalent to the SIEC test provided in the EU Merger Regulation.

No other reforms have been proposed.

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