Merger Control

Jurisdictional comparisons **Second edition 2014**

General Editors:
Jean-François Bellis & Porter Elliott,
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Foreword

Jean-François Bellis & Porter Elliott, Van Bael & Bellis

There was a time not so long ago when very few countries in the world had merger control laws. In most jurisdictions, there was no need to notify a merger for prior approval before closing. How different the situation is today. It is estimated that upwards of 100 countries now have merger control laws, and in most of these countries, qualifying mergers, acquisitions and – in some cases – joint ventures must be notified and cleared by the local regulators before they can be implemented. Today, the need to obtain merger control approvals is often the number one factor delaying the closing of deals around the world.

Unfortunately, while more countries have merger control than ever before, there remains relatively little harmonisation, with each jurisdiction having its own rules on what types of transactions must be notified, what thresholds apply, what the procedure is and how long it takes. Even the substantive test for determining whether a notified transaction will be approved is not the same in every jurisdiction. With merger control authorities becoming tougher in their enforcement practices, the challenges facing merging companies have never been more daunting. This book aims to help.

With contributions from leading law firms covering 49 of the most important jurisdictions worldwide, this second edition of *Merger Control* endeavours to address the most common and critical questions of merging companies and their lawyers, including some which are less often addressed in other books of its kind, such as whether pre-notification consultations are customary in a given jurisdiction, whether 'carve-out' arrangements may be implemented to allow for closing to take place in jurisdictions where approval is still pending, whether the jurisdiction at issue has a track record of fining foreign companies for failure to file and whether it has ever issued penalties for 'gun-jumping' offences.

Adopting the reader-friendly Q&A format that has been used successfully in other volumes of *The European Lawyer Reference Series*, including the first edition of *Merger Control* (2011), this book sets out to answer for each jurisdiction the key questions those on the front line are most likely to have, including:

- Whether notification is mandatory (as in most jurisdictions where the thresholds are met) or voluntary (as, for example, in Australia, New Zealand, Singapore and the UK). If mandatory, is the requirement to file based purely on the parties' turnover (as in the EU and many other jurisdictions worldwide), or are there other factors that need to be considered, such as market share (eg, in Portugal, Spain and the UK), asset value (eg, in Russia and Ukraine) or the size of the transaction (eg, in the US)?
- Is there a filing deadline and/or a requirement to suspend implementation pending receipt of an approval decision? In most jurisdictions, there is no filing deadline so long as the deal is not closed until it has been approved, but there are exceptions.

- How onerous is the filing? Most jurisdictions have detailed notification forms that must be completed (Germany being a notable exception), although some forms take far more time to complete than others. For example, although certainly not always the case, it is not unusual for notifications to the European Commission to exceed 100 pages (not counting annexes) and to include very detailed legal and economic analysis. By comparison, the US Hart-Scott-Rodino form is short and straightforward, and it can usually be completed in a matter of days (although a second request in the US can be extremely burdensome).
- What factors are likely to be considered by the relevant authorities in assessing the legality of the transaction? While it must be assumed that every authority will focus first and foremost on whether the transaction would raise competition concerns in its territory, some authorities are more likely than others to consider theories of competitive harm that go beyond traditional concerns related to high combined market shares, such as the risks of vertical foreclosure. Similarly, non-competition issues, such as industrial policy or labour policy, may be more likely to be considered in some jurisdictions than others.

Although by no means a substitute to seeking the advice of local counsel, this book aims to address these and other critical questions in a concise and practical way, and therefore to serve as a valuable resource to companies and counsel navigating their way through the twists and turns of obtaining the required merger control approvals worldwide.

Compiling the second edition of *Merger Control* has truly been a group effort. With this in mind, we would like to thank all the authors for their contributions, as well as the team of *The European Lawyer* for their diligence in bringing this book to fruition. We also wish to express our gratitude to our colleagues at Van Bael & Bellis who assisted us on this project, in particular Reign Lee for her editorial support, and Els Lagasse and Veerle Roelens for their secretarial assistance.

Brussels, March 2014

Foreword

Bernd Langeheine, Deputy Director-General, DG Competition, European Commission

Nowadays, an ever larger number of mergers need to obtain regulatory approval in several jurisdictions. The popularity of merger control is due to a general recognition that it is desirable to maintain a market structure which is conducive to effective competition and, therefore, crucial for a robust, innovative economic landscape. This is in the interest of consumers and market players at different levels alike.

As a consequence of globalisation, free trade and open markets merger control has become a key element of almost all competition law regimes around the world. Apart from problems related to costs and delays for closing the deal, multiple filings create a risk of inconsistent or even contradictory decisions. This is why all major competition authorities should cooperate closely on cases which require notification in several countries.

During 2011 and 2012, the European Commission, for example, worked together with other antitrust enforcers in about half of all cases for which an in-depth investigation was opened. The most notable example was the wide-ranging cooperation (ie with the US, Chinese, Japanese, Korean and Australian competition authorities) in the 'Hard-disk-drive cases' in 2011. Parties to a merger and their counsel generally have a keen interest in facilitating such cooperation in order to avoid conflicting decisions. This, in turn, requires knowledge about jurisdictional thresholds and other filing requirements as well as about the timelines of proceedings. This book provides a wealth of information on these and other relevant points for all important merger control systems around the world.

Competition rules and their enforcement will continue to be fragmented for lack of an international authority that would have jurisdiction over mergers and could take decisions for more than one country. There are, however, tendencies to avoid multiple filings at least at the regional level. In Europe, the situation is alleviated by the fact that, since 1990, there has been a merger control regime at the EU level under which mergers of a certain size that concern the competitive situation in several Member States are normally vetted by the European Commission. This is complemented by national rules on merger control which apply to all other relevant transactions, ie mainly those which are of a lesser size and which only concern one Member State.

In the EU, there are clear and explicit rules that lay down which (EU or national) authority has original jurisdiction over a merger. But there is also a mature system of referral mechanisms which mitigates the rigidity of the rules for case allocations and ensures that the best-placed authority deals with a particular merger. These referral provisions apply, in particular, where an operation needs to be notified in several Member States or where markets are wider than the national level and trade between Member States is affected.

The transfer of such cases from national authorities to the Commission will reduce the administrative burden for companies to the largest possible extent and avoid multiple filings. But the rules on referrals also foresee the transfer of merger cases from the EU level to a national authority in certain justified cases. A referral can take place upon the request of the parties, before an operation is notified or after notification at the request of a national competition authority. The application of these mechanisms has produced encouraging results over recent years. Between 2004 and the end of 2013, there were almost 280 referrals from national competition authorities to the EU Commission and approximately 130 in the other direction, ie to the national authority of a Member State. Nevertheless, one-stop shopping does not always work and there are still a large number of cases every year which are scrutinised by competition authorities in two or more EU countries (eg, 240 cases in 2007).

At the international level, the picture remains diverse. Intensive merger scrutiny in traditionally strong antitrust jurisdictions has been matched by new merger control regimes springing up in all parts of the world, most notably Asia and Latin America. Today, there are more than 100 merger control systems in force around the world which vary greatly not only with regard to notification requirements, but also with regard to other key elements such as timelines and filing fees.

Notifying parties and their lawyers continue to struggle with the proliferation of merger regimes and the ensuing divergences regarding procedures and substantive criteria or benchmarks. This situation is time-consuming and costly, in particular in cases where the actual impact of an operation in a given country is rather unimportant, but where low national jurisdiction thresholds nevertheless require a notification.

There are various discussion and coordination fora at the international level, such as the International Competition Network (ICN) or the Competition Committee of the Organisation for Economic Cooperation and Development which endeavour to produce more convergence of national merger control systems. Some progress has been achieved in the context of the ICN with the adoption of recommended practices on matters such as jurisdiction, procedure and even substantive assessment. Given the wide variety of underlying national circumstances (nature of the authority, administrative culture, enforcement powers) and the sensitivities often connected to issues of merger control, this remains, however, an undertaking which requires a lot of patience and which will only be crowned by success in the long term. In the meantime, the coexistence and parallel application of a large number of national merger control systems will continue.

Managing multiple filings with a variety of national competition authorities requires important skills in terms of legal knowledge, organisation and coordination. This book provides valuable insights and guidance with regard to these complicated processes and it will be of great assistance to corporations and their counsel.

Brussels, March 2014

Finland

Krogerus Attorneys Ltd Katri Joenpolvi & Leena Lindberg

LEGISLATION AND JURISDICTION

1. What is the relevant merger control legislation? Is there any pending legislation that would affect or amend the current merger control rules described below?

Merger control rules are included in Chapter 4 of the Competition Act (948/2011). There are currently no pending amendments effecting merger control rules. However, the annual performance agreement between the Ministry of Employment and the Economy and the Finnish Competition and Consumer Authority ('FCCA') states that a review of the functionality of current merger control rules, especially the turnover thresholds, shall be carried out during 2014.

2. What are the relevant enforcement authorities, and what are their contact details?

The Finnish Competition and Consumer Authority ('FCCA') has the sole jurisdiction to assess mergers where the relevant thresholds set in the Competition Act are met. The FCCA was created by merging the Finnish Competition Authority and the Finnish Consumer Agency on 1 January 2013. The FCCA's contact details in merger control issues are:

The Finnish Competition and Consumer Authority
Postal address: P.O. Box 5, 00531 Helsinki, Finland
Visiting address: Siltasaarenkatu 12 A, 00530 Helsinki, Finland
Switchboard: +358 (0)29 505 3000
Fax: +358 (0)9 876 4396

3. What types of transactions are potentially caught by the relevant legislation?

The definition of concentration covers acquisition of control, acquisition of business or a part thereof, merger and creation of a joint venture performing all the functions of an autonomous economic unit on a lasting basis. The definition of concentration is in line with the definition of concentration employed in the EU Merger Regulation (139/2004) and is effectively applied similarly, although the FCCA retains some case-specific discretion.

Internal arrangements within a group of companies that do not amount to a change of control do not have to be notified.

4. Are joint ventures caught, and if so, in what circumstances?

The creation of a joint venture that carries out functions of an autonomous

economic unit on a lasting basis falls within the scope of the definition.

5. What are the jurisdictional thresholds?
A concentration must be notified where the aggregate worldwide turnover of the parties exceeds EUR 350 million and the turnover of each of at least two of the parties accrued from Finland exceeds EUR 20 million for both. The relevant turnovers are based on the last confirmed financial statements.

6. Are these thresholds subject to regular adjustment?
No. The current thresholds have been applied since 1 May 2004.

7. Are there any sector-specific thresholds?
Special rules on calculating the turnover of credit institutions, investment firms and other financial institutions exists. Otherwise, no sector-specific thresholds exist.

8. In the event the relevant thresholds are met, is a filing mandatory or voluntary?
The notification is mandatory when the turnover thresholds are exceeded and the transaction falls within the scope of the definition of concentration.

As an exception to the above, the Finnish Financial Supervisory Authority is in some cases under an obligation to request a statement from the FCCA when a transaction is subject to the provisions of the Employee Pension Insurance Act, Pension Fund Act, Insurance Fund Act or Pension Foundation Act. If the FCCA has in this context stated that it has no reasons to oppose the approval of the concentration, the parties do not have to notify the concentration separately to the FCCA.

9. Can a notification be avoided even where the thresholds are met, based on a 'lack of effects' argument?
No. If the turnover thresholds and the definition of concentration are met, all transactions must be notified.

10. Are there special rules by which a notification of a 'foreign-to-foreign' transaction can be avoided even where the thresholds are met?
No. The Competition Act does not treat foreign-to-foreign transactions differently. If the turnover thresholds are met and the concentration is not referred to other competition authorities under EU rules, foreign-to-foreign transactions must be notified to the FCCA.

11. Does the relevant authority have jurisdiction to initiate a review of transactions which do not meet the thresholds for a notification?
No. The FCCA is competent to investigate only those transactions that meet the jurisdictional thresholds.

NOTIFICATION REQUIREMENTS, TIMING AND POTENTIAL PENALTIES

12. Is there a specified deadline by which a notification must be made?

No. The notification must be made before the transaction is implemented. Specifically, the notification must be made after the conclusion of an agreement, acquisition of control or the announcement of a public bid.

13. Can a notification be made prior to signing a definitive agreement?

The notification may be made as soon as soon as the parties can sufficiently demonstrate their intent to close the transaction. This can be done, eg, by submitting a signed letter of intent or a memorandum of understanding, or by a public announcement of the intention to make a public bid.

14. Who is responsible for notifying?

The party acquiring control or business or a part of thereof must take care of the notification. The entities or foundations participating in a merger and the undertakings founding a joint venture are also under an obligation to make a notification.

15. What are the filing fees, if any?

There are no filing fees.

16. Where a notification is necessary, is approval needed before the transaction is closed/implemented (is there a waiting period or a suspension requirement)?

Yes. The transaction may not be implemented before the FCCA has cleared the transaction.

17. If there is a suspension requirement, is it possible to apply for a derogation in order to close before approval is granted? If so, under what circumstances?

Yes. The FCCA may grant permission to implement the merger prior to clearance in individual cases. Typically, the permission concerns only some implementation measures, not the entire transaction. However, a permission may be given for closing at least outside Finland.

18. Are any other exceptions (carve-outs etc) available to allow parties to close/implement prior to approval?

Measures necessary to preserve and safeguard assets and measures necessary to ensure the continuing of business may be implemented.

19. What are the possible sanctions for failing to notify a transaction?

On a proposal by the FCCA, the Market Court may impose fines of up to 10 per cent of the infringing party's turnover where the party has failed to notify the concentration. The Market Court may also order the concentration to be dissolved. The FCCA has never made such a proposal.

20. What are the possible sanctions for implementing a transaction prior to receiving approval (so-called 'gun-jumping')?

On a proposal by the FCCA, the Market Court may impose fines of up to 10 per cent of the infringing party's turnover where the concentration has been implemented before the FCCA issued its clearance decision. The Market Court may also order the concentration to be dissolved. The FCCA has never made such a proposal.

21. What are the possible sanctions for implementing a transaction despite a prohibition decision or in breach of a condition/obligation imposed by a conditional clearance decision?

On a proposal by the FCCA, the Market Court may impose fines of up to 10 per cent of the infringing party's turnover where the concentration has been implemented against the prohibition decision of the Market Court or the Supreme Administrative Court. The Market Court may also order the concentration to be dissolved.

In case the conditions attached to a merger control decision by the FCCA or the Market Court have not been complied with, the FCCA may propose that the Market Court prohibit the concentration or order it to be dissolved. The FCCA may also propose that the Market Court impose fines up to 10 per cent of the infringing party's turnover in such cases. In actuality, the FCCA has never made such a proposal.

The FCCA must make a proposal to the Market Court to either prohibit or dissolve the concentration no later than one year from the final decision becoming legally valid, or from the implementation of the concentration.

22. What are the different phases of a review? Is there any way to speed up the review process?

The review by the FCCA is divided into two phases, the latter of which is initiated only if the FCCA considers it necessary to investigate the concentration further.

Phase I investigations last for a maximum of one month from the receipt of the notification. During Phase I, the FCCA decides whether it investigates the notified concentration further and opens the Phase II investigation, or approves the concentration with or without conditions. If the FCCA does not make a decision within one month, the concentration is considered approved. The FCCA clears the concentration during Phase I if there are no significant harmful effects on competition.

In Phase II, the FCCA has three months to decide to impose conditions on the implementation of a concentration, approve it without conditions or make the proposal of prohibition to the Market Court. The FCCA may ask the Market Court to extend the Phase II investigation period by up to two months, which it has done in some complex cases (eg, in *TV4 AB/C More Group AB* and in *Uponor Oyj/KWH-Yhtymä joint venture).* Usually, the FCCA asks consent from the parties in such cases. In case the parties have not given their consent, the Market Court should not approve the application unless there are weighty reasons supporting the grant of the extension.

The FCCA is open for confidential pre-notification negotiations which may lead to the FCCA requiring less information of a concentration and/or clearing it more rapidly after the actual notification is submitted. The FCCA aims to clear cases where there are clearly no anti-competitive effects within 10 working days of the notification.

23. Is there a possibility for a 'simplified' procedure or shorter notification form and, if so, under what conditions would this apply?

The notification must be prepared in accordance with the Decree by the State Council on the scope of the obligation to notify a concentration (1012/2011).

Pursuant to the Decree, the FCCA may on request grant exemptions to the information required in the notification in individual cases where the FCCA deems the effects on competition to be minor. The exemption may concern certain information specified (eg, information on certain markets).

A concentration may also be notified by using a short-form notification. The party may ask the FCCA whether it approves the use of the short form or simply notify the concentration in accordance with the short form. However, the FCCA may always require the notifying party to use the normal detailed notification form. For instance, the use of short form may be justifiable where companies set up a joint venture which does not accrue any revenue or have any other connection to the Finnish market.

Furthermore, the Decree on obligation to notify the concentration provides less onerous obligations for submitting information on the relevant markets in specified circumstances. This requires that the parties are not competitors in any markets where their aggregate market share exceeds 15 per cent and there is no vertical relationship, 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 per cent.

24. What types of data and what level of detail is required for a notification?

The notification must include the information specified in the Decree by the State Council on the scope of the obligation to notify a concentration. In general, if no exemptions are granted, the notification must include information of, eg, the party obliged to notify, other parties to the concentration, the seller, a description of the concentration, the parties' turnovers and details on ownership and control. Detailed information of affected markets (eg, total value, volume, main competitors, market shares, entry conditions, effect of foreign trade etc) and the views of the notifying party must be provided.

25. In which language(s) may notifications be submitted?

The notification must be submitted in Finnish or Swedish, but it is possible to submit annexes in English. In a case of important or unclear annexes, the FCCA has right to require translations in Finnish or Swedish.

26. Which documents must be submitted along with a notification?
The following documents must be included: trade register extracts, documents relating to the concentration, such as public bids, the latest annual report of each party to the concentration and each entity or foundation part of the same group of companies, the latest financial statement and the written authorisation of appointed representatives.

The provided information may be accompanied by annexes that the parties consider necessary. The notification form states that assessments and memoranda prepared by the notifying party in connection with the transaction must be included, but, in actuality, such documents are not usually submitted. The FCCA may request such information later during the process if deemed necessary.

27. What are the possible sanctions for providing incorrect, misleading or incomplete information in a notification?
The FCCA has the power the 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. According to the preparatory works of the Competition Act (Government Bill 88/2010), the provision is intended to be applied in situations where the parties are withholding information deliberately. The FCCA has not made it public whether it has applied this provision yet.

The FCCA is not required at any stage to issue a formal decision finding the notification complete. According to the Competition Act, the clock does not start on the Phase I deadline until sufficient information is provided, 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. This provision has been applied on a few occasions (eg, the FCCA's decision *Elisa Oyj/PPO-Yhtiöt Oy, Kymen Puhelin Oy and Telekarelia Oy*).

Furthermore, it must be noted that providing an authority with false evidence is a criminal offence.

28. To what extent is the relevant authority available for pre-notification discussions? Are pre-notification consultations customary?
Before making the notification it is possible to engage in confidential negotiations where the parties may discuss the preliminary views of the authorities and specify the information to be provided. While the FCCA typically grants audience for such meetings, negotiations are mainly held in more complicated matters. These kinds of open pre-notification discussions make it possible for the FCCA to evaluate the concentration before the clock starts on the procedural deadlines.

29. Where pre-notification consultations are possible, what measures does the relevant authority take to ensure that such discussions are treated confidentially?

The meetings and their participants are confidential. The FCCA is obliged to treat the matter as confidential until the official notification has been made, after which the FCCA registers the matter and names of the parties become public.

30. At what point and in what forum does the relevant authority make public the fact that a notification has been made?

The FCCA maintains a list of pending notifications on its website, where only the names of the parties, the notification date and the case number are stated. Information of new notified concentrations is published within some working days of the notification.

31. Once the authority has issued its decision, what information about the transaction and the decision is made publicly available?

Information about clearing cases unconditionally in Phase I is entered into the list of pending merger cases usually some working days after making of the decision. The FCCA usually publishes information on opening of Phase II proceedings, decisions issued in Phase II investigations or proposals to prohibit a concentration on the same or next working day on its website.

All decisions of the FCCA are published in its website after confidential business secrets have been omitted. This usually takes some weeks, in some cases longer.

While third parties have an extensive access to documents under the Act on the Openness of Government Activities (621/1999), business secrets are kept confidential.

SUBSTANTIVE ASSESSMENT OF THE MERGER, ROLE OF THIRD PARTIES AND REMEDIES

32. What is the substantive test for assessing the legality of a notified transaction?

The substantive test applied since 1 November 2011 is the significant impediment to effective competition ('SIEC') test. This test is equivalent to the SIEC test applied in the context of the EU Merger Regulation (139/2004). According to the preparatory works (Government Bill 88/2010), the case law of the European Courts and the Guidelines of the European Commission may be used in interpretation. Other substantive merger control rules also largely correspond to the EU merger control rules.

33. What theories of harm are considered by the authority in assessing the transaction? How concerned are the authorities with non-horizontal (eg, vertical or conglomerate) effects, and are any other theories of harm analysed (eg, coordination in the case of joint ventures)?

The FCCA applies an effects-based approach and investigates, for example, the horizontal, vertical and conglomerate effects of concentrations, including both unilateral and coordinated effects.

The FCCA deals briefly with vertical and conglomerate mergers in its

Guidelines on Merger Control. The FCCA notes that while non-horizontal concentrations are generally less likely to significantly impede effective competition than horizontal mergers, negative effects on competition, especially in the form of foreclosure, coordinated or non-coordinated effects, may also arise from vertical or conglomerate mergers. In general, due to the introduction of the SIEC test, vertical and conglomerate mergers are assessed similarly to the EU Merger Regulation and no notable differences exist.

Some examples where the FCCA has assessed vertical effects include its decisions in *Lohja Rudus Oy Ab/Abetoni Oy*, where FCCA examined a number of possible negative vertical effects of a concentration in the markets for cement and concrete. After an in-depth Phase II investigation, the FCCA found no evidence of harmful vertical effects and approved the concentration unconditionally. Another example of assessing of vertical effects in-depth in the construction sector is the FCCA's decision in *Rudus Oy/Lemminkäinen Rakennustuotteet Oy*. An earlier case involving harmful vertical effects, *Suomen Posti/Atkos Printmail Oy*, was cleared by the FCCA with remedies already in Phase I.

The FCCA considers the economic effects of the concentration broadly under the SIEC test, which allows it to intervene in, for example, possible cases of parent company coordination in joint ventures.

34. Are non-competition issues, such as industrial policy or labour policy, commonly taken into account in the assessment of the transaction?

No. While it is customary for the FCCA to request opinions of different interested parties such as other authorities, competitors, trade associations, customers and suppliers in merger control cases, the FCCA and the courts are independent and assess concentrations solely on the basis of their effects on effective competition.

35. Are economic efficiencies considered as a mitigating factor in the substantive assessment?

Yes. The FCCA notes in its Guidelines on Merger Control that mergers may lead to efficiencies. The FCCA states that it takes efficiencies into account when assessing the effects of a concentration on competition if the remaining competitive pressure is sufficient to ensure that the efficiencies arising from the concentration are transferred to a reasonable extent to the consumers. Other requirements include eg the condition that the efficiencies must derive directly from the concentration.

In its recent Phase II unconditional clearance decision in *DNA Oy/Digi TV Plus Oy*, the FCCA found out that the vertical integration effects of concentration may lead to economical efficiencies and may even increase competition in television distribution services. Other examples of assessing efficiencies include the FCCA's decision in *DLA International Holding A/S/ Hankkija-Maatalous Oy,* a concentration in the field of agricultural trade. The FCCA found that the retailing of Hankkija-Maatalous may become more efficient after the acquisition, as in the future the company is able to benefit

from the higher procurement volumes of the Danish Agro Group, the parent company of the acquirer, which in turn may ultimately result in more affordable sales prices to the end customer.

36. Does the relevant authority typically cooperate/share information with authorities in other jurisdictions?

The FCCA cooperates with other national competition authorities and the European Commission. Exchange of confidential information requires the parties' permission.

37. To what extent are third parties involved in the review process?

The FCCA customarily hears the customers, competitors and suppliers of the concentration as well as other authorities and trade associations during the review process. Third parties have an extensive right to access documents and may be granted audience with the FCCA to express their views especially during Phase II investigations.

However, the right to appeal the actual decision requires that the decision has a direct effect on the rights, obligations or interests of the complainant. In this regard, the Supreme Administrative Court has in its yearbook decision 2002:50 ruled that competitors generally cannot appeal a clearance decision. Pursuant to the Competition Act and the aforementioned decision of Supreme Administrative Court, the Market Court can prohibit a concentration only on a proposal by the FCCA. An appealing party, therefore, cannot have a concentration prohibited.

38. Is it possible for the parties to propose remedies for potential competition issues?

Yes. The parties may propose remedies for potential competition issues and it is up to the notifying party to propose sufficient remedies. Pursuant to the Competition Act, the FCCA cannot impose conditions on a concentration that are not approved by the notifying party. This effectively means that the parties have to come up with a proposition on remedies early enough so that the FCCA can properly assess the remedies within the relevant time limits.

39. What types of remedies are likely to be accepted by the authority (eg, divestment remedies, other structural remedies, behavioural remedies etc)?

The preparatory works of the Competition Act state that mainly structural remedies (ie, divestments) should be used in merger control cases. The FCCA also notes in its Guidelines on Merger Control that remedies which are ordered to be followed are usually structural.

The FCCA's prohibition proposal of 5 August 2011 in *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 remedies. In its prohibition proposal to the Market Court, the FCCA referred to the European Commission's decisional 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 products to third parties with reasonable prices.

Further, the FCCA has never approved a divestment commitment on a condition that the commitment need not be adhered to if the parties cannot find a suitable buyer or tenant. In earlier cases, the parties have thus committed to abandon the concentration if the divestment requirement cannot be fulfilled (eg, *Metsäliitto/Vapo)*. Alternatively, secondary commitments have also been given in case primary commitments cannot be fulfilled *(Carlsberg/Orkla)*.

However, recent examples of clearing concentrations based on behavioural remedies only can also be found in situations where they are found appropriate and sufficient to counter the problems identified (*Terveystalo Healthcare Oy/ODL Terveys Oy*).

40. What power does the relevant authority have to enforce a prohibition decision?

The FCCA has the power to propose that the Market Court prohibit a concentration or order it to be dissolved. If the parties implement a concentration against such a decision of the Market Court, or, after an appeal, the decision of the Supreme Administrative Court, the FCCA may propose that fines up to 10 per cent of the infringing party's turnover be imposed by the Market Court. So far, the FCCA has never made such a proposal.

JUDICIAL REVIEW

41. Is it possible to challenge decisions approving or prohibiting transactions? If so, before which court or tribunal?

A notifying party cannot appeal a conditional approval decision. If the FCCA makes a proposal to the Market Court to prohibit the concentration, the parties are asked to submit their written statement regarding the proposal to the Court. The decisions of the Market Court may be further appealed to the Supreme Administrative Court by the notifying party or the FCCA.

The notifying party cannot appeal a decision approving the concentration without commitments as according to the case law of the Market Court (MAO:115/I/02*, Biowatti Oy/Kankaanpään massahakelaitos*), the notifying party lacks the need for legal protection in such situations. The dispute in the matter concerned whether the acquisition of a single power plant as an asset amounted to a concentration and whether it should have been notified at all.

Third parties have the right to appeal a decision approving the concentration only 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. As the Market Court can prohibit a concentration only on a proposal by the FCCA, an appealing third party

can thereby not have a concentration prohibited. Hence, the only effect an appeal could have is the removal of a single commitment or the whole remedies package.

42. What is the typical duration of a review on appeal?

The Competition Act imposes a time limit of three months for the Market Court to render its decision in cases where the FCCA proposes the Market Court to prohibit the concentration. Otherwise, there is no time limit for the Market Court to issue its decision in appeals from the FCCA's decisions. The Market Court aspires to rule on all competition cases within a year after the matter became pending.

The Supreme Administrative Court has no deadlines.

43. Have there been any successful appeals?

In its decision in *Uponor/KWH-Yhtymä joint venture,* the Market Court set less onerous structural conditions for the concentration than apparently required by the FCCA, which had proposed that the concentration should be prohibited in the absence of sufficient remedies to the identified competition concerns. However, the conditions set by the Market Court were more stringent than the commitments that the parties had originally proposed to the FCCA. The decision thus illustrates the possibility to propose and 'negotiate' remedies for a concentration during the procedure at the Market Court.

A party may later file an application where it requests that the attached conditions should be changed or removed. The party may appeal the decision of the FCCA dismissing such an application. Such appeals have sometimes succeeded.

STATISTICS

44. Approximately how many notifications does the authority receive per year?

During 2013, 20 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 2012, 20 concentrations were notified to the FCCA.

45. Has the authority ever prohibited a transaction? How many prohibition decisions has the authority issued in the past five years?

The FCCA has issued three prohibition proposals since merger control provisions were included in the Finnish legislation. During the past five years, the FCCA has issued prohibition proposals in two cases, *NCC Roads/ Destia* (2011) and *Uponor/KWH-Yhtymä joint venture* (2013). After the Market Court would have required substantial remedies in *NCC Roads/Destia* (2011), the parties amended the concentration and notified it again, after which it was unconditionally approved by the FCCA. In *Uponor/KWH-Yhtymä joint venture*, the Market Court approved the notified concentration with

remedies. The first prohibition proposal in *Sonera Oyj/Yleisradio Oy/ Digita Oy* (2000) led to the parties abandoning the deal.

46. Over the past five years, in what percentage of cases have binding commitments been required in order to obtain clearance for a transaction?

Over the past five years, the FCCA has required commitments only in 0–2 cases pear year, which amounts to less than 5 per cent of all notified concentrations.

47. How frequently has the authority imposed fines in the past five years?

The FCCA has never imposed fines in merger control cases.

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Merger Control

Provisions on merger control are a key element of almost all competition laws around the globe, from the United States to the European Union, from China to Brazil.

Today, the need to obtain merger control approvals is often the number one factor delaying the closing of M&A deals worldwide. While more countries have merger control laws than ever before, merger control regimes differ dramatically from one another, not only with regard to notification requirements, but also in other key elements such as timing and costs.

Managing multiple filings with a variety of competition authorities requires important skills in terms of knowledge, organisation and coordination.

This second edition of ‘Merger Control’ provides valuable insights and guidance to these complicated processes and will be of great assistance to corporations and their counsel.