Merger Control 2021

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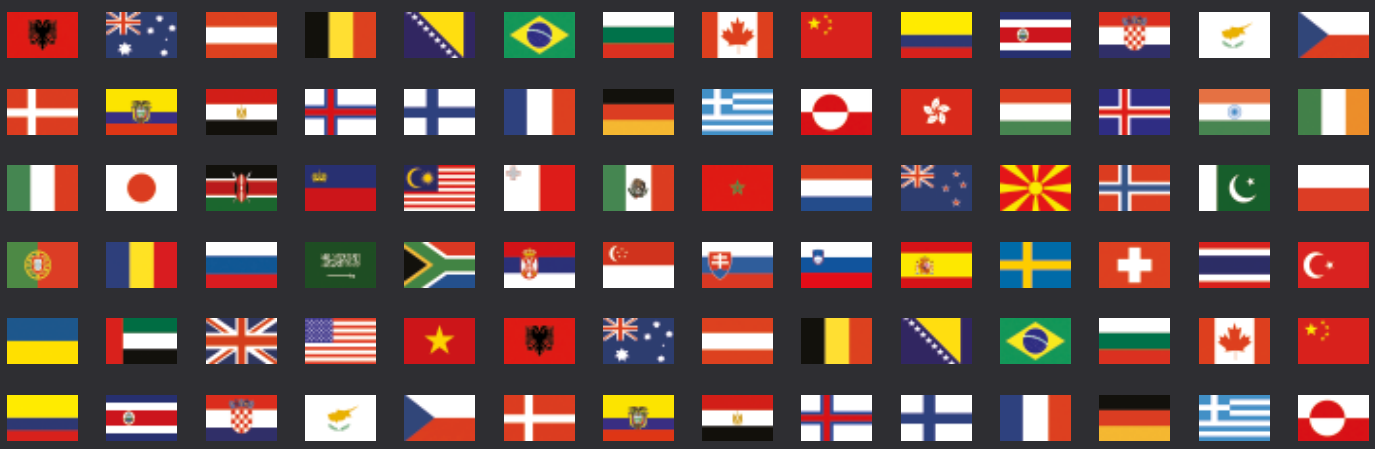
Thomas Janssens
Freshfields Bruckhaus Deringer



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Getting The Deal Through

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager
Adam Sargent
adam.sargent@gettingthedealthrough.com

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Lexology Getting The Deal Through is delighted to publish the twenty-fifth edition of *Merger Control*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on New Zealand and Vietnam.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Thomas Janssens of Freshfields Bruckhaus Deringer, for his continued assistance with this volume.

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Getting The Deal Through

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LEGISLATION AND JURISDICTION

Relevant legislation and regulators

1 | What is the relevant legislation and who enforces it?

The relevant legislation is the Competition Act (No. 948/2011) (the Competition Act), which entered into force on 1 November 2011 repealing the Act on Restrictions on Competition (No. 480/92). Provisions on merger control were first included in the now repealed Act on Restrictions on Competition on 1 October 1998. The Competition Act introduced a few substantive amendments to the merger control provisions, which further harmonise the Competition Act with EU rules.

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration in the first stage and either clears it, with or without conditions, or requests the Market Court to prohibit it. Only the Market Court is empowered to block concentrations.

Scope of legislation

2 | What kinds of mergers are caught?

The Competition Act applies to concentrations defined as:

- the acquisition of control of an undertaking;
- the acquisition of the whole or part of the business of an undertaking;
- a merger; and
- the creation of a joint venture performing all the functions of an autonomous economic entity on a lasting basis.

3 | What types of joint ventures are caught?

The establishment of a joint venture that performs all the functions of an autonomous economic entity on a lasting basis, that is, a full-function joint venture, will be caught by the Competition Act. A full-function joint venture must have sufficient resources, be independent of its parent companies, have its own staff, including operative management and operate on a permanent basis. The competition authorities interpret the concept of full-function joint venture in accordance with the guidelines set out by the European Commission.

4 | Is there a definition of 'control' and are minority and other interests less than control caught?

There is no definition of control in the Competition Act. In practice, the competition authorities interpret the concept of control in accordance with the European Commission's practice. Consequently, acquisitions of minority shareholdings and other interests less than control may establish joint or sole control, and therefore be caught by the merger control rules.

Thresholds, triggers and approvals

5 | What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

A concentration must be notified to the FCCA if the combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland (including, for example, imports into Finland) of each of at least two of the parties exceeds €20 million.

In the calculation of the relevant turnovers, the turnover of the whole buyer group will be taken into account, whereas of the seller's turnover only the amount relating to the target of the acquisition is relevant. The rules concerning the parties whose turnover will be taken into account as well as the manner of calculating the turnover correspond for the most part with the provisions of the EU Merger Regulation.

If the target company is acquired in stages, all the acquisitions from the same seller over a period of two years are taken into account in the turnover calculation.

In cases of uncertainty as to whether the turnover thresholds are exceeded or not, the matter can be discussed with the FCCA.

The FCCA cannot under any circumstances investigate transactions that fall below the turnover thresholds.

6 | Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if the turnover thresholds are met, with no exceptions. However, concentrations meeting the thresholds set down in the EU Merger Regulation fall under the exclusive jurisdiction of the European Commission.

7 | Do foreign-to-foreign mergers have to be notified and is there a local effects or nexus test?

Foreign-to-foreign transactions will be caught if the turnover thresholds are met. The Competition Act does not contain any provisions on a particular local effects test. In practice, the FCCA applies a similar substantive test to foreign-to-foreign transactions as it applies to other transactions.

Joint ventures may have to be notified in Finland even if the joint venture does not have any operations in or sales into Finland. It is sufficient that the turnovers of the parent companies of the joint venture (which are the undertakings concerned) exceed the turnover thresholds.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

In certain insurance transactions, a notification to the FCCA is exempted if the Financial Supervisory Authority has requested a statement from the FCCA, and the FCCA has found no objections to the concentration. If such statement has not been requested, the concentration shall be notified to the FCCA after the parties have received an approval or a non-opposition decision from the Financial Supervisory Authority.

Foreign acquisitions of defence industry companies as well as companies in the civil sector considered critical to securing functions fundamental to society are subject to the Act on the Monitoring of Foreign Corporate Acquisitions in Finland (No. 172/2012). A foreign acquirer of a Finnish defence industry company must apply for an approval from the Finnish Ministry of Economic Affairs and Employment prior to the acquisition. Foreign acquisitions of non-defence industry companies are only subject to notification. In the defence industry, monitoring covers all foreign acquirers and domestic corporate acquirers in which a foreign owner holds at least 10 per cent of votes or has a corresponding de facto influence. In the civil sector, monitoring applies only to foreign acquirers domiciled outside EU and EFTA states and corporate acquirers domiciled in such states, in which a non-EEA or non-EFTA owner has the shareholding or de facto influence referred to above. The Act applies to acquisitions of at least 10 per cent, at least 33 per cent or at least 50 per cent of votes in a limited liability company or a corresponding de facto influence. In addition, the authority handling the matter may require an application for approval or a notification to be submitted if the buyer subsequently increases its influence in the target company even if the increase does not exceed the above thresholds. There is an ongoing legislative process to amend the Act on the Monitoring of Foreign Corporate Acquisitions in Finland to meet the requirements of the EU Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union. In addition, needs for amendments due to national considerations that have arisen will also be assessed. The amendments are intended to enter into force on 11 October 2020 when the EU regulation starts to apply.

NOTIFICATION AND CLEARANCE TIMETABLE

Filing formalities

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no specific deadline for filing a notification. Notification must be submitted to the Finnish Competition and Consumer Authority (FCCA) following the conclusion of the acquisition agreement, the acquisition of control, or the announcement of the public bid but prior to the implementation of the concentration. A concentration may also be notified to the FCCA as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration, for example, by a letter of intent or a memorandum of understanding signed by all parties to the concentration or by a public announcement of the intention to make a public bid. As there is no specific deadline for filing, sanctions are only relevant when the concentration is implemented before the FCCA has cleared it.

10 Which parties are responsible for filing and are filing fees required?

The acquirer of control, or those acquiring joint control, the acquirer of business, the parties to the merger or the founders of a full-function joint venture are responsible for filing. There are no filing fees.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Under the main rule, no steps may be taken to implement the transaction prior to its clearance. However, when the Market Court is investigating a transaction on the basis of the FCCA's request to block it, the prohibition on the implementation ceases in one month from such request, unless the Market Court orders the suspension to continue.

The FCCA and the Market Court may, upon request, permit certain implementing measures to be taken during the investigation period. Further, a party that has launched a public bid can purchase the shares offered prior to clearance, even though it may not use its voting rights to determine the competitive behaviour of the target company. The same rule applies in certain cases where shares are redeemed.

Pre-clearance closing

12 What are the possible sanctions involved in closing or integrating the activities of the merging businesses before clearance and are they applied in practice?

If the transaction is closed before clearance, a fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed. The fine is imposed by the Market Court on the basis of the FCCA's request. When the amount of the fine is set, attention is paid to the nature, extent, degree of gravity and duration of the infringement. The fine will be imposed, unless the infringement is considered minor or the imposition of the fine is otherwise unnecessary in view of safeguarding competition.

Further, the Market Court may – at the request of the FCCA – prohibit the concentration or order the concentration to be dissolved or annulled, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control to restore the conditions of effective competition. The Market Court may, instead of prohibiting the concentration, attach conditions on its clearance. The request of the FCCA must be notified to the parties within one year from the closing of the transaction.

There are no decisions so far where sanctions would have been imposed for closing before clearance.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

The same rules apply to foreign-to-foreign mergers. However, there are no decisions so far where sanctions have been imposed for closing before clearance in foreign-to-foreign mergers.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Implementation of a merger before clearance is, under the main rule, prohibited also in foreign-to-foreign mergers. However, under the Competition Act, the FCCA has the possibility to decide to grant permission to implement a merger before clearance.

Public takeovers

15 Are there any special merger control rules applicable to public takeover bids?

No. However, a party that has launched a public bid can purchase the shares offered prior to clearance, even though it may not use its voting rights to determine the competitive behaviour of the target company.

Documentation

16 What is the level of detail required in the preparation of a filing, and are there sanctions for supplying wrong or missing information?

The notification form is broadly similar to Form CO of the EU Merger Regulation. Various types of information must be given – depending on the details of each case – inter alia, on the parties, the transaction structure, relevant markets, competitors, customers, suppliers, market conditions, entry barriers, trade associations and ancillary restraints. The notification form must be completed in Finnish or Swedish; appendices to the notification are generally also accepted in English. Standard appendices include corporate documents of the parties, the agreements bringing about the transaction being notified, certain internal analysis of the transaction itself, as well as the markets relevant to the assessment of the transaction. Generally, the FCCA has been less stringent on requiring internal documents to be produced (in comparison, for example, to the European Commission).

In certain circumstances, the notification may be filed with the FCCA using the 'short-form' notification. The short-form notification is mainly used in notifying joint ventures that do not have connections to the Finnish markets. Such a situation may be deemed to exist where the joint venture – or the jointly controlled undertaking, as the case may be – has no business activities in Finland and generates no turnover from Finland.

The FCCA may, in individual cases, grant waivers in respect of the information to be given if certain information is deemed unnecessary for the investigation or if the transaction affects competition only to an insignificant extent.

Supplying wrong or misleading information to the FCCA is sanctioned in the Criminal Act (39/1889).

Investigation phases and timetable

17 What are the typical steps and different phases of the investigation?

Under the main rule, the FCCA will, after it has received a notification, send a market inquiry to the competitors, customers and suppliers of the parties to the concentration. The aim of the procedure is to establish the structure of the market and the competition conditions therein, and to afford the relevant market players the possibility to be heard on the planned concentration.

Should the FCCA decide to initiate a second-phase investigation, more detailed questions may be sent to competitors, customers and suppliers. The statements as well as other issues pertinent to the case will be discussed with the parties.

Parties are generally advised to engage in pre-notification consultations with the FCCA in all cases and in cases where the horizontal overlap or vertical links between the parties' activities are considerable, it is recommended to approach the FCCA as early as possible, even prior to definitive signing of the transactional agreements, so as to ensure that the process starts as early as possible.

18 What is the statutory timetable for clearance? Can it be speeded up?

In the first phase, the concentration will be examined by the FCCA. The FCCA's investigation deadlines were amended by an amendment of the Competition Act that entered into force on 17 June 2019. Under the new provisions, the FCCA has a period of 23 working days during which it has to clear the concentration as such or with conditions, conclude that the transaction will not be caught by the Competition Act or decide to initiate a second-phase investigation.

If the FCCA decides to initiate a second-phase investigation it must, within 69 working days of such decision, either clear the concentration as such or with conditions, or request the Market Court to block it. The Market Court can extend the deadline by 46 working days, giving the FCCA a maximum of 115 working days for a Phase II investigation. Having received the FCCA's request to block a concentration, the Market Court has three months to clear the concentration as is, clear it with conditions or prohibit it.

There is a pending proposal to temporarily extend the FCCA's Phase II investigation period by 23 working days to 92 working days owing to the covid-19 pandemic. The proposal is considered a matter of urgency and is intended to enter into force as soon as possible. If adopted, the extended deadline will apply to mergers notified to the FCCA between 2 July 2020 and 31 October 2020.

With the Market Court procedure included, the maximum aggregate investigation period of a concentration may amount to over nine months (which includes the possible 46-working-day extension of the FCCA's second-phase investigation period). However, this is expected only in cases where there is significant overlap between the parties' activities and the resulting market shares are high; under the main rule, most concentrations are cleared in the first phase. Depending on the complexity of the case, the FCCA's first phase investigations typically take approximately two to four weeks.

The time limits set for the FCCA's decision-making will not start running until a complete notification has been filed. In addition, the FCCA has the power to 'stop the clock' if the parties fail to respond to the FCCA's request for additional information within the set time limit or provide essentially insufficient or incorrect information. In such cases, the FCCA may extend the time limits for decision-making by the corresponding number of days during which the requested information was outstanding.

The merger review procedure in the FCCA may be speeded up by pre-notification discussions, to which the parties are generally encouraged by the FCCA. Also, it might be worth noticing that pre-notification discussions will in most cases de facto speed up the merger review, but they do not affect or change the time limits prescribed for the review.

SUBSTANTIVE ASSESSMENT

Substantive test

19 What is the substantive test for clearance?

A concentration may be prohibited if it significantly impedes effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position (SIEC test). The SIEC test, also applied by the European Commission, was introduced in the 2011 reform of the Competition Act and replaced the dominance test applied previously. However, finding of a dominant position remains as a typical example of a situation amounting to a significant impediment of effective competition. Under the Competition Act, an undertaking is considered dominant if it can significantly influence the price level, terms of delivery or other conditions of competition at a given level of production or distribution. In addition to dominance cases, the SIEC test is primarily intended to enable intervention in certain arrangements between competitors on markets that can be considered as oligopolistic, where, however, the market leader is not involved and no dominant position is created.

The substantive test may be countered with the failing, or 'flailing', firm defence. In the recent *Kesko/Lähikauppa* case, the Finnish Competition and Consumer Authority (FCCA) allowed the acquisition of Lähikauppa by one of the major retail grocery chains Kesko even though the market shares of the combined entity in some of the relevant regional markets was nearly 100 per cent.

20 | Is there a special substantive test for joint ventures?

No. The competition authorities will apply the SIEC test as with respect to other concentrations.

Theories of harm

21 | What are the 'theories of harm' that the authorities will investigate?

The 'theories of harm' based on which the FCCA assesses the notified transactions and the increase in market power include the horizontal effects as well as the vertical and conglomerate effects of the transaction. When assessing whether the concentration may significantly impede effective competition based on these effects, the FCCA takes into account, for example, the market shares of the parties, the economic and financial strength of the concentration, the amount and nature of residual competition, the bargaining power of customers and suppliers, potential competition, barriers to entry and saturation of the markets.

Non-competition issues

22 | To what extent are non-competition issues relevant in the review process?

Non-competition issues are not relevant in the FCCA's review process.

Economic efficiencies

23 | To what extent does the authority take into account economic efficiencies in the review process?

In the review process, the authorities will take into consideration the increase in production efficiency and dynamic efficiency resulting from the concentration that appear in the Finnish market, provided that the efficiency gains are passed on to customers and may only be achieved through the concentration. The weight given to economic efficiency considerations depends, inter alia, on the significance of the efficiencies and the likelihood of their achievement. In general, the principles established in the European Commission's Horizontal Merger Guidelines are also applicable in Finland.

REMEDIES AND ANCILLARY RESTRAINTS

Regulatory powers

24 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Finnish Competition and Consumer Authority (FCCA) investigates a concentration and either clears it, with or without conditions, or requests the Market Court to prohibit it. If the impediment to competition may be avoided by attaching conditions to the implementation of the concentration, the FCCA shall primarily order such conditions to be followed. However, the FCCA can only impose conditions that the parties have approved. Thus, if the FCCA and the parties cannot agree on suitable conditions, the FCCA has to make a proposal to the Market Court to prohibit the concentration.

If the Market Court finds that the concentration would significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, the Market Court may prohibit the concentration. If the transaction has already been implemented, the Market Court may order it to be dissolved, for example, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of joint control, to restore the conditions of effective competition. Further, the Market Court may, instead of prohibiting or ordering the dissolution of the concentration, attach conditions for its clearance.

If the parties implement a transaction before clearance or without regard to a prohibition of the concentration or conditions imposed by the competition authorities, an administrative fine of up to 10 per cent of the total turnover of the relevant undertakings may be imposed.

Remedies and conditions

25 | Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Both the FCCA and the Market Court may clear a concentration on the condition that certain undertakings are given by the parties to the concentration. In fact, under the Competition Act, the FCCA should always endeavour to impose conditions rather than request that the Market Court prohibits a concentration. Typically, competition concerns identified by the FCCA may be resolved by imposing conditions on the clearance. Thus far, the FCCA has proposed that a concentration be prohibited only four times, although several cases have entered the second-phase investigation and have been resolved by commitments given by the parties. The Market Court has prohibited only one of these four concentrations. The remaining three were approved subject to conditions. However, one of these concentrations was abandoned owing to the strict conditions imposed and one restructured and re-notified to the FCCA. Where conditions are imposed, the authorities usually prefer structural remedies, such as divestments, but behavioural undertakings have also been accepted.

26 | What are the basic conditions and timing issues applicable to a divestment or other remedy?

The FCCA may impose conditions on the implementation of a concentration if the harmful effects on competition (the significant impediment of effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position) can thus be avoided. The FCCA may not require a remedy that does not strictly address and have an effect on the harmful effects that the Competition Act aims to avoid. The remedies may be structural or behavioural. The possibility of imposing conditions should be explored prior to prohibiting the concentration. The conditions imposed should not be more severe than necessary for the removal of the anticompetitive effects of the concentration. The FCCA can only impose conditions that the parties have approved.

The FCCA may decide that a condition (eg, divestment requirement) imposed on an involved party is to be fulfilled within a certain time period, for example, six months for a divestment. The FCCA supervises the implementation of the conditions in accordance with its decision to approve the concentration and may, for instance, nominate a trustee to monitor the implementation of the conditions and to report to the FCCA thereof.

27 | What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Up to this point, there have been no foreign-to-foreign merger cases in which the FCCA would have required remedies.

Ancillary restrictions

28 | In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

It is possible to request in the notification form that the FCCA also clears any restrictions ancillary to the notified concentration. Typically accepted ancillary restrictions are limited to non-compete obligations on the seller, supply or purchase agreements and licence agreements.

INVOLVEMENT OF OTHER PARTIES OR AUTHORITIES

Third-party involvement and rights

29 | Are customers and competitors involved in the review process and what rights do complainants have?

Under the main rule, competitors, customers and suppliers of the parties to the concentration will be heard in the investigation. However, the Supreme Administrative Court has held that competitors are normally not allowed to appeal against a decision to clear a concentration, as the right to complain requires that the decision may have had a direct effect on the complainant's rights, obligations or interests.

Publicity and confidentiality

30 | What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Finnish Competition and Consumer Authority (FCCA) lists the received notifications on its website (the names of the parties and the notification date). Otherwise, the FCCA is reluctant to comment publicly on pending merger control procedures. Confidential information is protected by clearly indicating the business secrets in all documents submitted to the FCCA.

Cross-border regulatory cooperation

31 | Do the authorities cooperate with antitrust authorities in other jurisdictions?

Yes, the FCCA cooperates on a regular basis with other antitrust authorities in other jurisdictions. The FCCA is part of the European Competition Network (ECN), which is a cooperation forum of the European Commission and the national competition authorities of the member states. The operation of the ECN is based on Council Regulation No. 1/2003 and facilitates the exchange of information and case allocation between the participating authorities. While the work of the ECN does not directly relate to merger control, the members of the ECN engage in cooperation and exchange of best practices in the area of merger control in the context of the EU Merger Working Group. The FCCA is also a member of the European Competition Authorities (ECA). One of the main focuses of the ECA is the cooperation of national authorities in relation to multinational merger control processes. As regards the allocation of and information exchange between the national authorities and the European Commission in merger cases, please refer to the EU Merger Regulation. In addition to the European cooperation networks, the FCCA cooperates closely with competition authorities in other Nordic countries and, in 2017, joined the Cooperation in Competition Cases Agreement between Denmark, Iceland, Norway and Sweden. The Nordic competition authorities meet annually and form special working groups to facilitate the cooperation. All in all, the FCCA participates in approximately 30 different international working groups relating to competition policy.

JUDICIAL REVIEW

Available avenues

32 | What are the opportunities for appeal or judicial review?

The Finnish Competition and Consumer Authority (FCCA)'s decision on whether it will initiate a second-phase investigation may not be appealed. Further, in the 2011 reform of the Competition Act, the right of the notifying party to appeal a decision whereby the FCCA has conditionally approved a transaction was removed.

As a general rule, other decisions of the FCCA made under the merger control rules may be appealed to the Market Court by such parties whose rights, obligations or interests the FCCA's decision has directly affected. Decisions of the Market Court may be further appealed to the Supreme Administrative Court.

Both the Market Court and the Supreme Administrative Court have confirmed that the FCCA's clearance decision does not normally have a direct effect on the rights, obligations or interests of the competitors of the undertakings concerned, and thereby the competitors do not generally have the right to appeal such decisions to the Market Court.

Time frame

33 | What is the usual time frame for appeal or judicial review?

When decisions of the FCCA are appealed to the Market Court, the Market Court does not have a time limit on its decision-making. However, when the FCCA proposes to the Market Court that a concentration be prohibited, the Competition Act sets a three-month time limit on the Market Court to rule on the case.

The Market Court ruled on one merger control case in 2019 approving the FCCA's request to prohibit the acquisition of Heinon Tukku Oy by Kesko Oyj. This was the first time a concentration has been prohibited by the Market Court. The decision was delivered in three months owing to the time limit set in the Competition Act for such decisions.

In other types of cases, the handling times in the Market Court vary greatly depending on the nature of the case. To give some examples, in 2009, the Market Court delivered a decision concerning an appeal against the conditions imposed by the FCCA on the clearance of an acquisition (acquisition of C More Group AB by TV4 AB, MAO:525/09), which was delivered in approximately 10 months. A similar decision on appeal against conditions imposed on the clearance of an acquisition delivered in 2008 (acquisition of E.ON Finland Oyj by Fortum Power and Heat Oy, MAO:123/08) took approximately 20 months. Interim decisions, such as interim injunctions concerning remedies, are typically made within one to three months. For example, in 2009, a decision concerning an application for an interim injunction to avoid implementing conditions imposed on the clearance of an acquisition while the appeal against the conditions was pending (acquisition of C More Group AB by TV4 AB, MAO:580/08/KR) was delivered in approximately two months.

The Market Court's decisions (eg, decisions to prohibit a transaction) are appealed to the Supreme Administrative Court. The handling times of the Supreme Administrative Court vary significantly depending on the nature of the case. The Supreme Administrative Court did not rule on any merger control cases between 2011 and the first half of 2020. In 2010, the Supreme Administrative Court ruled on only one merger control case, where it dismissed the FCCA's appeal against the Market Court's decision that removed the conditions imposed on the acquisition of E.ON Finland Oyj by Fortum Power and Heat Oy. The decision was issued by the Supreme Administrative Court in approximately 28 months. In 2009, the Supreme Administrative Court delivered one merger control decision concerning an interim injunction, where the decision was issued in approximately three months owing to its urgent nature. In all competition law cases decided by the Supreme Administrative Court in 2019, the average decision-making time was 25.7 months.

ENFORCEMENT PRACTICE AND FUTURE DEVELOPMENTS

Enforcement record

34 What is the recent enforcement record and what are the current enforcement concerns of the authorities?

During the first half of 2020, the Finnish Competition and Consumer Authority (FCCA) issued six unconditional clearance decisions in Phase I and one conditional clearance decision after a Phase II investigation (*Donges Teräs Oy/Ruukki Building Systems Oy*). In addition, two Phase II investigations are currently pending (*Mehiläinen Yhtiöt Oy/Pihlajalinna Oyj*, and *Loomis AB/Automatia Pankkiautomaatit Oy*).

In 2019, the FCCA issued a total of 34 merger clearance decisions. Out of these cases, four were cleared subject to conditions after a Phase II investigation (*Caverion Industria Oy / Maintpartner Group Oy*; *MB Equity Fund V Ky/A-Katsastus Group*; *Parma Oy/AS TMB*; *Posti Group Oyj/Suomen Transval Group Oy*). In addition, at the FCCA's request, the Market Court prohibited one concentration (*Kesko Oyj/Heinon Tukku Oy*). The FCCA also issued one decision amending the conditions imposed in merger clearance decisions in 2000 and 2004 on Valio, the largest dairy company in Finland, by reducing the raw milk quota Valio is required to sell to its competitors.

The FCCA has not officially identified any particular sectors or issues as its current enforcement concerns. However, on the basis of the recent decisions by the FCCA and the statements given by officials of the authority in the national media, it appears that the FCCA has a particular interest in the social and health services, grocery market, transportation, telecommunications, intellectual property rights, digital goods and services, energy, construction, primary production and competition neutrality of public sector services.

Reform proposals

35 Are there current proposals to change the legislation?

The reform of the Competition Act, which was initiated in 2015, reached an important juncture on 14 March 2017 when a working group appointed by the Finnish Ministry of Economic Affairs and Employment (MEE) published its final report (the Final Report). In the Final Report, the working group proposed a full spectrum of changes to the Competition Act concerning inspections, sanctions and information exchange between competition authorities, among others. The reform of the Competition Act takes place in two phases.

The first phase was initiated in December 2017 when the MEE submitted a draft government bill based on the Final Report for public consultation. The government bill was presented on 24 May 2018 and passed by the Finnish parliament on 7 March 2019. The legislative package passed by the parliament also includes amendments to the merger control investigation deadlines. The amendments entered into force on 17 June 2019.

The second phase concerns the implementation of the Directive to empower the competition authorities of member states to be more effective enforcers and to ensure the proper functioning of the internal market (2019/1) (the ECN+ Directive). In June 2019, the MEE appointed a working group to prepare the national implementation of the ECN+ Directive. The working group submitted a draft government bill for public consultation on 14 May 2020. In addition to amendments implementing the ECN+ Directive, the working group proposes amendments to increase predictability of fine levels. The proposed amendments are intended to enter into force by February 2021.

In addition, there is a pending proposal to temporarily extend the FCCA's Phase II investigation period by 23 working days to 92 working days owing to the covid-19 pandemic. The proposal is considered a matter of urgency and is intended to enter into force in June 2020. The extended Phase II investigation period would be in force until the end of October 2020.

Another notable legislative development includes a government bill concerning the inclusion of sector-specific merger control rules for the social and healthcare sector in the Competition Act for a fixed term, which was submitted by the MEE on 15 June 2017. However, this bill has been declared lapsed.

ROSCHIER

Christian Wik
christian.wik@roschier.com

Sari Rasinkangas
sari.rasinkangas@roschier.com

Kasarmikatu 21 A
00130 Helsinki
Finland
Tel: +358 20 506 6000
Fax: +358 20 506 6100
www.roschier.com

UPDATE AND TRENDS

Key developments of the past year

36 What were the key cases, decisions, judgments and policy and legislative developments of the past year?

The year 2020 will remain in the history books as the year when the Market Court delivered its first-ever decision to prohibit a concentration. In February 2020, the Market Court handed down a decision prohibiting the proposed acquisition of Heinon Tukku Oy by Kesko Oyj, both active in wholesale of groceries. The Finnish Competition and Consumer Authority (FCCA) requested the Market Court to prohibit the acquisition, as it would have significantly impeded effective competition in the market for broadline distribution of groceries to Finnish food service customers, such as hotels and restaurants. According to the FCCA, the parties' combined market share in this market ranged between 60 and 70 per cent and a substantial number of customers considered the parties as their first or second choice in the supply of groceries. Therefore, the FCCA considered that, without the competitive constraint from Heinon Tukku, one of the few other full-range distributors, Kesko would have been able to increase its prices to the detriment of food service customers, and in the end raise the average bill paid by consumers. The parties argued, inter alia, that the acquisition does not raise competition concerns, as they face competition also from specialist distributors and food manufacturers offering a more limited range of products. However, the Market Court agreed with the FCCA's market definition and found that the proposed acquisition would have created or strengthened Kesko's dominant position in the market and, thus, would have led to significant impediment of competition. The Market Court found that the prohibition of the acquisition was the only way to safeguard effective competition in that case, as the behavioural remedies offered by Kesko did not adequately address the identified harm to competition. Kesko did not appeal the Market Court's decision, which became final.

The consistent trend towards stricter merger review can also be seen in the number of conditional clearance decisions. In 2019, the FCCA made a record also in this respect, as all four cases were cleared subject to conditions after a Phase II investigation (*Caverion Industria Oy/Maintpartner Group Oy*, *MB Funds/A-Katsastus Group*, *Parma Oy/AS TMB*, and *Posti Group Oyj/Transval Group Oy*). Interestingly, even though the FCCA clearly prefers structural remedies, in two of the conditional clearance decisions (*Posti Group Oyj/Transval Group Oy* and *MB Funds/A-Katsastus Group*) competition concerns were resolved with behavioural commitments. Both clearances were subject to a commitment by the buyer to continue offering the target's services to competitors for a transitional period and to limit transfer of confidential customer data.

Another trend worth noting is that the FCCA applied for additional time from the Market Court to complete its investigation in three cases in 2018 and two cases in 2019. This goes hand-in-hand with the increased number of Phase II investigations combined with the FCCA's scarce resources. The FCCA normally has 92 working days in total from the submission of a merger control notification until the end of Phase II to complete its investigation, but the Market Court may extend the deadline by a maximum of 46 working days upon request by the FCCA. In addition, the FCCA has adopted a more stringent approach to the assessment of completeness of notifications. Prior to 2018, the FCCA had not used its power to declare notifications incomplete, but since then it has used this power at least eight times.

Quick reference tables

These tables are for quick reference only. They are not intended to provide exhaustive procedural guidelines, nor to be treated as a substitute for specific advice. The information in each table has been supplied by the authors of the chapter.

Finland	
Voluntary or mandatory system	Mandatory.
Notification trigger/ filing deadline	Combined aggregate worldwide turnover of the parties exceeds €350 million and the aggregate turnover in Finland of at least two of the parties exceeds €20 million. Filing must be made prior to implementation. The filing can be made as soon as the parties demonstrate with sufficient certainty their intention to conclude a concentration.
Clearance deadlines (Stage 1/Stage 2)	The FCCA must either approve the concentration or initiate an in-depth investigation within 23 working days of the filing of the complete notification (Stage 1). If the FCCA decides to initiate an in-depth investigation, it must within 69 working days (or 115 working days with the permission of the Market Court) of such decision either approve the concentration or request the Market Court to block it (Stage 2).
Substantive test for clearance	Whether the concentration may significantly impede effective competition in the Finnish market or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position.
Penalties	Fines of up to 10 per cent of the total turnover of the relevant undertaking(s) may be imposed. In addition, the Market Court may order the concentration to be dissolved or annulled (eg, by requiring the undertakings concerned or assets brought together to be separated or by requiring the cessation of the joint control).
Remarks	Foreign-to-foreign mergers are caught where the relevant jurisdictional thresholds are met.

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