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Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Finland

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Finland --

1. General points

1. The Finnish Competition Authority (FCA) is responsible for competition law enforcement in Finland. The FCA investigates competition restraints and controls mergers.¹ The other main bodies responsible for competition law enforcement are the Market Court and the Supreme Administrative Court.

2. The Competition Act entered into force in September 1992 and has subsequently been amended. Merger control provisions were included in the Competition Act in 1998. Finland is currently in the process of amending the Competition Act. In 2007, the Ministry of Employment and the Economy appointed a working group to assess the need to amend the Competition Act. In 2009, the group submitted its report proposing new competition legislation. The Government Bill was brought before the Parliament in 2010. If the law proposal is approved, the legislation will become effective in 2011.

3. The above-mentioned proposals also foresee some changes in merger control. One proposal includes a change from the currently used dominance test to the SIEC test. Accordingly, intervening in a merger would no longer require the establishment or strengthening of dominance. A merger could be prohibited or the FCA could attach conditions on its implementation if it significantly impedes effective competition in Finland. Applying the same test as the European Commission would facilitate case allocation and cooperation among the authorities. Further proposals include the elimination of the deadline set for compulsory notifications and the possibility to extend processing time limits.

4. A concentration shall be notified to the FCA if the combined aggregate worldwide turnover of the parties exceeds EUR 350 million and the turnover of a minimum of two parties derived from Finland exceeds EUR 20 million. Notification is mandatory and shall be made by using a Notification Form.² Information required in the Notification Form is similar to that requested by the European Commission in the Form CO. The FCA will accept the simplified notification when companies, to which turnover derives from Finland, set up a joint venture or obtain joint control in a company which has no connection to the Finnish markets. The FCA does not impose fees for filing of notifications.

5. The concentration shall not be implemented prior to the FCA's decision in the matter. The primary method to eliminate any harmful effects of a merger is to impose conditions upon it. If harmful effects cannot be addressed by conditions, the FCA shall make a proposal to the Market Court to prohibit the merger.

¹ Information about the FCA and its activities is available on the FCA's web pages at www.kilpailuvirasto.fi/english. The web pages contain, for example, the English press releases of all the major cases of international interest, an English version of the FCA's Yearbook and the brochure entitled "Efficiency through Competition", which also provides information about the FCA's tasks and activities.

² Decision by the Ministry of Trade and Industry (currently Ministry of Employment and Industry) on the Obligation to Notify a Concentration.

6. The provisions on merger control in the Competition Act as well as the procedures of the FCA are applied in a uniform and objective manner, regardless of the nationality of the parties to the merger. The same standards apply to both Finnish and foreign undertakings.

2. Specific questions

2.1 *Co-operation among competition authorities (international, regional and bilateral)*

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

7. There have not been any instances of conflict.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

8. The FCA has a cooperation agreement with the Russian Federal Antimonopoly Service (FAS). The concrete form of the cooperation is the reciprocal visit of officers.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

9. The Competition Act is silent about foreign interests. Informal contacts, however, are common between the competition authorities and ensure non-conflicting outcomes and consistent remedies.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?*

10. The FCA is actively involved in the work and deliberation of international organisations. The FCA participates in the work of the OECD Competition Committee and its subcommittees Working Party 2 and Working Party 3. The FCA also participates in the work of the ICN and its various working groups, such as Merger Working Group.

11. With regard to the implementation of recommendations by these organisations, the ICN Recommended Practices for Merger Notification and Review Procedures led to the reassessment of the nexus when the Competition Act was amended in 2004. The work products of the OECD and ICN are also used by case handlers in the course of merger investigation and in legislative procedure as background information.

12. The FCA is also actively involved in the European Competition Authorities (ECA) network. The cooperation in the ECA e.g. consists of the exchange of information and the experience between the competition authorities. When an agency part of the network receives a notification of a merger which exceeds the notification threshold in several ECA countries, it conveys the information on the merger and the contact information of the relevant case-handler(s) to the other members. The case-handlers in the different countries may then exchange non-confidential information on the case with each other. The exchange of confidential information is only possible if the national and EU-provisions allow it.

13. The FCA also receives information about mergers which exceed notification thresholds in other jurisdictions in the Notification Form.

2.1.5 Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

14. The FCA does not belong to any regional organisation in the field of competition law. The FCA actively participates in cooperation between other Nordic competition authorities. The cooperation includes an annual meeting. Finland, however, is not a party to the Nordic cooperation agreement between Denmark, Iceland, Norway and Sweden which allows the exchange of confidential information between the respective competition authorities.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

15. The FCA considers that the current notification thresholds are appropriate to catch mergers which have an impact in Finland. In addition to the thresholds that concern the combined aggregate worldwide turnover, the turnover of a minimum of two of the parties derived from Finland must exceed EUR 20 million.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

16. The FCA has requested information from parties involved in cross-border mergers who are located outside Finland. The FCA has not encountered any major problems in obtaining the information. Foreign parties to a merger usually use a legal representative who is established in Finland and through whom the requests for information are in practice submitted.

17. The case-handlers of the FCA also regularly exchange views on pending merger cases with other competition authorities reviewing the same merger. The exchanged views consist of the views on market definition and general views of the market positions of the merging parties. In general, without permission from the parties, the FCA can only exchange non-confidential information. This concerns the exchange of information between the FCA and the EU Member States' competition authorities as well as between the FCA and other competition authorities. The confidential information between the Commission and the EU Member States' national authorities will be exchanged according to Council Regulation No 139/2004.

18. In one case, the FCA and another national competition authority exchanged Notification Forms. Before the exchange, all confidential information was deleted from the Notification Forms. The exchange provided both authorities e.g. with information about the scope of the markets subject to notification obligations.

2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

19. The FCA exchanges information about the current phase of the proceedings and the planned next steps with other competition authorities. The FCA is thus aware of actions taken by other competition authorities. The exchange of information may also concern the public versions of the draft remedies which the competition authority will market test. The FCA considers that these contacts have been sufficient to ensure non-conflicting outcomes and consistent remedies.

20. The FCA may also verify the parties' claims about the competitive conditions with another competition authority who investigates the same merger. In one case, discussions with another competition authority revealed that the parties' claims about the similarities of the competitive conditions in different geographic markets were not accurate. The fact that the competitive conditions were different affected the design of remedies in Finland.

2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

21. Political intervention is not possible in the area of merger control. This concerns both national and cross-border mergers.

2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

22. The Competition Act does not provide for non-competition considerations.

2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

23. The FCA considers that cross-border mergers do not provide any challenges that are unique to the Finnish merger control. The potential challenges of cross-border mergers, i.e. the timing of notifications and avoiding conflicting outcomes and inconsistent remedies, are common to all jurisdictions.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 *Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.*

24. The FCA has imposed remedies on cross-border mergers. The types of remedies are similar in national and cross-border mergers and have consisted, for example, of divestments and supply or sales terms.

2.3.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.*

25. The FCA favours structural remedies. However, in some cases the FCA has also applied behavioural remedies. Behavioural remedies have concerned, for example, sales terms.

26. In 2008, the FCA conditionally approved a transaction in which the television company owned by the Swedish Bonnier media group acquired control in C More Group AB, a company that offers pay TV channels under the Canal+ brand. The competition concerns related to the pay TV services market. The remedies e.g. consisted of the removal of restrictions on the separate sales of certain channels and the commitment to sell certain broadcasting rights to competitors. The aim of the remedies was to secure a versatile consumer supply and the possibilities of other companies to pose a competitive constraint on the merged entity.

27. The FCA has also applied behavioural remedies in two earlier cross-border mergers as follows.

28. In 1999, the FCA conditionally approved a transaction in which the Danish Danisco A/S acquired majority control in Cultor. Cultor is Finland's and Danisco Denmark's and Sweden's sole sugar producer. Although Danisco had not previously operated in the Finnish sugar market, it was Cultor's significant potential competitor. The merger would have strengthened the monopoly in the Finnish sugar market. The remedies related to the non-competition clauses between Cultor and Lännen Tehtaat, which the companies had set while combining their sugar production in 1990. Danisco committed to remove the provisions, which prevented Lännen Tehtaat from purchasing sugar from other parties than Cultor. The aim of the remedies was to increase potential import competition.

29. In 1999, the FCA conditionally approved a transaction where the American York International Corporation acquired the stock capital of the Danish Sabroe A/S. The merger would have strengthened Sabroe's leading position in the industrial refrigeration market. As a result of the merger, the three commonest ammonia compression brands would have been owned by the merged entity. York committed to use its control in Sabroe Finland e.g. to elicit Sabroe Finland to sell products of the York Group to all third contractors operating in Finland on non-discriminating terms. The aim of the remedies was to secure the availability of the commonest ammonia compressors in Finland and their spare parts to third contractors.

2.3.3 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

30. The FCA has encountered some difficulties in the implementation of remedies in cross-border mergers. In one case where a subsequent merger occurred, the acquiring company in the second merger found that due to certain changes in the distribution channels the conditions imposed on the previous owner were no longer valid and refused to implement them accordingly. The case is pending at the FCA.

2.3.4 *What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?*

31. The FCA usually applies a trustee to monitor the implementation of remedies. The appointment of trustee has not required assistance from other competition authorities.

2.3.5 *To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?*

32. The FCA has discussed, for example, the types of appropriate remedies with other competition authorities. The discussions have concerned remedies proposed to the FCA and/or remedies proposed to other competition authorities. So far, the FCA has not designed any common remedy package with other competition authorities.

33. In one case, the notifying party sent a remedy proposal already sent to the FCA to another competition authority who was reviewing the same merger. The competition authorities discussed the remedies but as the other agency did not impose remedies there was no need to design a common remedy package.

34. In one case, the remedies proposed to another competition authority provided the FCA with further assurance that the merger would not result in competition concerns. The merger, which was approved by the FCA without conditions, was subject to conditions in another jurisdiction. The FCA approved the merger mainly due to the fact that the relevant geographic markets were wider than national, thus enabling the FCA to conclude that high market shares in Finland did not reflect the market position of the merged entity in the wider geographic markets.