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The Concept of Potential Competition – Note by Finland

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm

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1. Introduction

1. This contribution provides information about the approach of the Finnish Competition and Consumer Authority (hereinafter the FCCA) to potential competition.

2. The Competition Act (948/2011)[1] regulates, among other things, anti-competitive mergers,[2] and anti-competitive practices. Mergers which fulfil the criteria of a notifiable transaction and exceed certain turnover-based thresholds must be notified to the FCCA. The FCCA intervenes with mergers if they significantly impede effective competition in the Finnish markets or a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position. Consequently, the FCCA applies the SIEC test, which is applicable, among other things, to the elimination of actual and potential competition as well as to the restriction of innovation competition. The future development of the markets is also taken into consideration. However, due to the current high notification thresholds the FCCA is not able to intervene with all transactions which may result in anti-competitive effects, such as "killer acquisitions" or rapid concentrations of markets below thresholds. More detailed information about the assessment of mergers is provided in the Merger Guidelines of 2011[3].

3. As regards anti-competitive practices, such as anti-competitive agreements and abuses of a dominant position, the provisions of the Competition Act, i.e. Sections 5 and 7, are identical to those of Articles 101 and 102 of the TFEU. The FCCA has explicitly stated that its approach to potential competition and barriers to entry in merger cases is the same as in cases concerning anti-competitive practices. The focus of the contribution is therefore on merger control.

4. In most cases, the analysis of potential competition and barriers to entry has been a part of the general analytical framework without explicitly affecting the outcome. However, in few cases the analysis has had an effect to the outcome. The FCCA has concluded, for example, that due to the competitive constraint represented by potential competition there are no competition concerns. On the contrary, the FCCA has identified competition concerns if potential competition is not sufficient to restrain concerns or the merger results in the elimination of potential competition.

[1] The Competition Act is available at https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/competition-act/#C4. The working group appointed by the Ministry of Economic Affairs and Employment published a draft to amendment the Competition Act in May 2020. Based on this draft, the Government Bill to amend the Competition Act was published in November 2020. The proposed amendments to the Competition Act mainly result from the national transposition on the so-called ECN+ Directive (i.e. Directive (EU) 2019/1). In addition, the Competition Act will be amended on the basis of national needs. The Government Bill is under the parliamentary review. The Ministry's Press Release of 5 November 2020, "Enforcement of competition law to become more effective", https://tem.fi/-/kilpailusaantojen-noudattamisen-valvonta-tehostuu?languageId=en_US.

[2] Chapter 4 of the Competition Act.

[3] Merger Guidelines are available at https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/suuntaviivat/en/guidelines-1-2011-mergers.pdf.

5. The contribution consists of the following sections. After the introduction, Section 2 provides the FCCA's general approach to potential competition. The Section discusses potential competition as a competitive constraint and the elimination of potential competition, including killer acquisitions. Also, the above-mentioned need for a change regarding notification thresholds is discussed. In Section 3, the FCCA addresses the framework for analysing potential competition and barriers to entry. The focus is on the guidance provided in the Merger Guidelines. In Section 4, the FCCA provides some examples of the competition law enforcement. The cases are grouped into three categories: i) potential competition as an insufficient competitive constraint, ii) potential competition as a sufficient competitive constraint, and iii) the elimination of potential competition. In Section 5, some concluding remarks are presented.

2. FCCA's approach to potential competition

2.1. Potential competition as a competitive constraint

6. When appraising the effects of a merger on competition, the Merger Guidelines state that the FCCA examines not just existing competition but also competitive pressure caused by potential competitors, in other words the ability of undertakings other than those already operating on the market to begin competing against the merged entity within a relatively short timeframe by realigning their supply or by expanding their geographic operating area.[4]

7. The significance of potential competition usually comes down to the issue of entry. For entry to be considered a sufficient competitive constraint on the merged entity, it must be shown to be likely, timely, and sufficient to deter or defeat any potential anti-competitive effects of the merger.[5]

8. The Merger Guidelines also state that potential competition is conceptually different from supply-side substitutability, which is one of the factors considered in the context of the identification of relevant markets. The main purpose of the market definition is to identify, in a systematic manner, the immediate competitive constraints facing the merged entity. The temporal criteria is therefore stricter. In the context of relevant markets, an assessment of supply-side substitutability includes considerations such as whether other economic operators on the market are able to increase their output or change their portfolio or distribution channels so as to produce competing products and offer these alternatives to consumers relatively easily and quickly and without incurring notable additional costs or risks.[6]

2.2. Elimination of potential competition

9. A significant impediment to effective competition usually results from a merger between undertakings that are already active on the same relevant markets. However, in some circumstances a merger between undertakings that do not have overlapping operations on the same relevant markets can also result in a significant impediment to effective competition by removing, or reducing, important competitive constraints on one

[4] Merger Guidelines, p. 90.

[5] Merger Guidelines, p. 90.

[6] Merger Guidelines, p. 65, 90, footnote 106.

or more undertakings.[7] This can be the case where a merger eliminates a potential competitor.[8] Merger Guidelines categorize an elimination of a potential competitor as a special circumstance of anti-competitive effects of a horizontal merger.[9]

10. In addition to the elimination of potential competition, the Merger Guidelines also provide information about other forms of negative effects on potential competition. A vertical merger may give rise to foreclosure and therefore to a significant impediment to effective competition. Foreclosure can take many different forms, such as discouraging the entry of new potential competitors to the market or hampering the access of existing undertakings to important production inputs or distribution channels. Input foreclosure arises where the merged entity would be likely to restrict the access of downstream rivals to important production inputs, thereby raising rival's costs. Customer foreclosure arises where the merged entity would be likely to restrict the access of upstream rivals to a sufficient customer base on downstream markets. More information about the effects and forms of foreclosure are provided in the Merger Guidelines.[10]

11. As regards anti-competitive practices, the FCCA has assessed, among other things, whether the dominant undertaking's pricing, such as price discrimination, margin squeeze or predatory pricing would give rise to foreclosure.

2.3. Killer acquisitions

12. Because of the high turnover-based notification thresholds for mergers, there is not much discussion on killer acquisitions in Finland. However, the FCCA, together with other Nordic competition authorities, recognise that "a particular source of competition concern stems from killer acquisitions". This was expressed in "Digital platforms and the potential changes to competition law at the European level - The view of the Nordic competition authorities" (hereinafter the Nordic Report).[11] By referring to recent publications on killer acquisitions the Nordic Report states that "while mergers between big tech companies and young start-ups may generate important synergies and efficiencies,[12] tech giants may also buy an innovative start-up to pre-empt future competition"[13], "the underlining theory of harm [involving] the incumbent "killing" the development or production of the target, or eliminating its own internal efforts to innovate and develop competing products and

[7] Merger Guidelines, p. 73.

[8] Merger Guidelines, p. 79.

[9] Merger Guidelines, p. 79.

[10] Merger Guidelines, p. 82-83.

[11] Digital platforms and the potential changes to competition law at the European level. The view of the Nordic competition authorities. September 2020, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/pm-yhteisraportit/nordic-report-2020-digital-platforms-and-the-potential-changes-to-competition-law-at-the-european-level.pdf.

[12] Nordic Report, p. 13 referring to World Economic Forum (2019), "Competition Policy in a globalized, digitalized economy", White paper, http://www3.weforum.org/docs/WEF_Competition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf

[13] Nordic Report, p. 13 referring to Cunningham C, Ederer F, Ma S (2018), "Killer Acquisitions", https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

services"[14]. The Nordic Report also acknowledges that when it comes to mergers, "the highly dynamic and fast-moving nature of digital markets makes it difficult to predict the counterfactual scenario, i.e. how the market is likely to evolve in the absence of a merger"[15]. The higher degree of uncertainty in making these sorts of predictions in digital markets is likely to affect any assessment of potential competition as well.

13. While the Nordic competition authorities express their commitment to a robust enforcement of competition rules, their also recognize that "under the current rules, many acquisitions involving small innovative start-ups will not be notified to competition authorities, since they fall below merger notification thresholds commonly based on turnover."[16] For example in Finland, the FCCA does not have powers to investigate transactions if they remain below the turnover thresholds set by the Competition Act, i.e. the combined turnover of the parties exceeding EUR 350 million and the turnover from Finland of at least two of the parties exceeding EUR 20 million each.[17] The FCCA has explicitly stated that it should be able to investigate potentially problematic transactions that remain below the current notification thresholds. [18] Consequently, the FCCA strongly advocates for amending the Competition Act with lower thresholds and introduction of call in powers.

14. As regards the definition of killer acquisitions, the FCCA recognizes that not all mergers between a bigger traditional player and a small rival are considered as killer acquisitions. In Finland, a bigger problem is harmful concentrations of more traditional markets which fall below thresholds. An example of this is the rapid concentration of the Finnish healthcare market, leading to a harmful market concentration below notification thresholds but not being an example of killer acquisitions.

3. Framework for assessing potential competition and barriers to entry

3.1. Potential competition as a competitive constraint

15. The analytical framework for assessing potential competition and barriers to entry is provided in the Merger Guidelines. The framework is very similar to that of the European Commission's Horizonal Merger Guidelines.[19]

16. The Merger Guidelines state that for entry to be considered a sufficient competitive constraint it must be likely, timely, and sufficient to deter or defeat any potential anti-

[14] Nordic Report p. 13 referring to OECD (2020), "Start-ups, Killer Acquisitions, and Merger Control – Background Note" DAF/COMP/2020)5, p 6, https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf.

[15] Nordic Report, p. 10.

[16] Nordic Report, Foreword and p. 13.

[17] Section 22 of the Competition Act.

[18] See e g. FCCA Press Release of 5 October 2018, "FCCA cannot investigate the effects of the Onnibus acquisition on consumer prices in the long-distance coach services market", https://www.kkv.fi/en/current-issues/press-releases/2018/5.10.2018-fcca-cannot-investigate-the-effects-of-the-onnibus-acquisition-on-consumer-prices-in-the-long-distance-coach-services-market/

[19] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 05.02.2004, p. 5-18.

competitive effects of the merger.[20] The assessment of entry is carried out on a case-by-case basis. Therefore, it is not possible to provide unequivocal definitions of what constitutes a timely entry or when entry is to be considered sufficient to deter or defeat anti-competitive effects of the merger. This can depend on several different factors, such as the characteristics and dynamics of the market and the economic resources of potential entrants. An examination of the likelihood of entry usually focuses on the economic rationale of entry and any potential risks involved. High risks and costs of failed entry generally make entry less likely.[21]

17. As regards anti-competitive practices, the FCCA considers to what extent, among other things, potential competitors, can restrict the use of market power of an undertaking. The mere threat that a competing undertaking is expanding its business, or a potential competitor will enter the market may limit the use of market power by the undertaking. The expansion or entry may be considered likely if it is sufficiently profitable. In this context, the FCCA assesses the barriers to expansion and entry, and the reactions, and risks and costs of failure. Typical barriers to entry include major economies of scale or claims on capital, different immaterial rights, heavily differentiated products and restraints in the access to the distribution channels.[22]

3.2. Barriers to entry

18. The Merger Guidelines define and categorize barriers to entry and provide some examples of forms that barriers to entry can take.[23]

19. As regards the definition of barriers to entry, the Merger Guidelines state that barriers to entry affect the likelihood and extent to which the threat of potential competition constrains the ability of the incumbents to act independently of other market participants.[24] The approach presented in the Merger Guidelines - arguably influenced by the approach according to which any impediment that has the effect of reducing competition constitutes a barrier to entry - is also applicable in abuse of dominant position cases. A barrier to entry can thus be defined as an impediment that fulfils the criteria of affecting the constraining effect of the threat of potential competition.

20. Barriers to entry can be divided into legal, economic, and technical barriers. Examples of legal barriers to entry include intellectual property rights, supply quotas set by public authorities, licences, and type approvals. Economic barriers include high entry and exit costs, especially where these costs are high relative to the anticipated profits. Other examples of economic barriers include the threat caused by the ability of merging undertakings to strategically commission excess capacity, lack of distribution channels or supply networks, strong brands of incumbent undertakings, agreements between suppliers and customers, and cross-shareholdings. Technical barriers to entry can arise from economies of scale and scope, production processes, or innovations, for example. The higher the volumes required for achieving economies of scale on a market, the higher the barriers to entry are said to be. Economies of scope enjoyed by undertakings that operate on multiple markets can also create barriers to entry. Economies of scope exist where an

[20] Merger Guidelines, p. 90.

[21] Merger Guidelines, p. 90, footnote 105.

[22] FCCA website "How to detect dominant position?".

[23] Barriers to entry was also discussed in Finland's contribution to OECD Roundtable on Barriers to Entry in 2005 http://www.oecd.org/daf/competition/abuse/36344429.pdf.

[24] Merger Guidelines, p. 90.

undertaking is able to engage in multiple business activities at lower costs than what would be possible if the businesses were separate. Vertically integrated undertakings can also gain similar advantages, if potential entrants are forced to enter several levels of the supply chain simultaneously or if operating at just one level of the distribution or supply chain would be unprofitable.[25]

21. Barriers to entry can also be divided into natural and strategic barriers. Natural barriers are not set by undertakings but result from market characteristics such as the technical barriers described above. Strategic barriers are barriers that undertakings create by their actions. Barriers resulting from strategic behaviour can arise, for example, if an incumbent undertaking is able to increase rivals' costs or to lower their anticipated profits. Rivals' costs can be increased by raising the costs of accessing supply or distribution channels, for example. Similar effects can also arise if demand for a product and the success of entry hinge on advertising. Undertakings with significant economic resources can deter entry by increasing advertising. Rivals' profits can be lowered, for example, by adopting pricing practices that make it more difficult for customers to switch to new suppliers.[26]

22. Barriers to entry do not need to foreclose potential competition completely or for an indefinite period of time. It is enough that they deter or delay entry for a period of time that is significant from the perspective of effective competition.[27]

23. The costs of entry usually only amount to barriers in situations where the costs are high, and they no longer affect the behaviour of incumbent undertakings. The significance of barriers to entry depends on the characteristics and evolutionary stage of the market. On some markets, a single barrier, such as the lack of distribution channels, supplies, technology, or a strong brand, can be a crucial deterrent to entry. Historical examples of entry and exit in the industry and the market positions of recent entrants can provide useful information about the size of entry barriers. [28]

24. An assessment of barriers to entry also needs to take into consideration exit barriers. These are primarily related to the costs associated with exit. Even a small risk of failed entry could deter entry if the costs associated with entering are high and the entrant would not be able to use its investments in other business activities after exiting the market.[29]

25. As regards evidence, in merger cases the FCCA receives information about barriers to entry from the replies of its questionnaires to market participants, i.e. competitors, customers, suppliers and eventually trade associations. Market participants are requested to provide information about the types of barriers to entry in the market and to assess their significance as well as to provide information about firms that have recently entered or exited market and the alleged reasons for entry or exit.

26. Also, the Notification Form[30] obliges the notifying party (or parties) to provide information, for example, about recent entries and exits as well as the main factors affecting

[25] Merger Guidelines, p. 91.

[26] Merger Guidelines, p. 91.

[27] Merger Guidelines, p. 92.

[28] Merger Guidelines, p. 92.

[29] Merger Guidelines, p. 92.

[30] The Notification Form is provided as an annex to the Decree by the State Council on the obligation to notify a concentration (1012/2011), https://www.kkv.fi/en/facts-and-advice/competition-affairs/legislation-and-guidelines/decree-by-the-state-council-on-the-obligation-to-notify-a-concentration-10122011/.

the ease of market entry or exit or the profitability of business operation.[31] The Notification Form explicitly lists the following factors to be provided: "the cost factors and the value/amount thereof resulting from the entry of a major competitive entrant; formal entry barriers, such as operating licences; restrictions resulting from immaterial rights; economies of scale and scope; and access to sources of supply and sales channels".

27. The notifying party must also provide information about the possibilities of incumbents to expand production[32] and possible products under development of the merging parties and competitors, the products about to be launched in the near future or plans to increase production or sales capacity and an estimate of the market shares of the merging parties in the next three to five years.[33] The notifying party who considers entry to the market likely, must provide description (with contact information) of likely entrants and an estimate of the time within which the entry is likely to occur, and the reasons which make entry by the said undertaking likely.[34]

28. In addition, the FCCA can generally request the information on the basis of Section 33 of the Competition Act which states that an undertaking or association of undertakings is obliged to provide the FCCA, at its request, with all the information and documents needed for the investigation of the content, purpose and impact of a restraint on competition and for clarifying the competitive conditions, and to conduct a merger assessment.

3.3. Elimination of potential competition

29. A merger that eliminates a potential competitor can have very similar anti-competitive effects, whether coordinated or non-coordinated, as mergers between undertakings that already have overlapping operations on the same markets. This is the case where such mergers eliminate a significant source of competitive pressure that could (or does) considerably constrain the behaviour of the undertakings that operate on the market.[35]

30. For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions need to be fulfilled. The conditions are the same as provided in the European Commission's Horizonal Merger Guidelines. First, the potential competitor needs to be an undertaking that already exerts a significant constraining influence or that would be very likely to grow into an effective competitive force in the near future. This is the case if the potential competitor possesses assets that could easily be used to enter the market without incurring significant sunk costs and if it is prepared to incur the necessary sunk costs to enter the market in a relatively short period of time. Second, there must not be a sufficient number of other potential competitors which could maintain sufficient competitive pressure after the merger. These conditions are more likely to be met in situations involving closely related product markets and neighbouring geographic areas.[36] For the first condition, the Merger Guidelines do not explicitly discuss or distinguish the concepts of perceived potential competition and actual potential competition. However, the elements of two types of potential competition can be identified. For the second condition, the Merger Guidelines do not provide more guidance on what

[31] Sections 7.2.6.1 and 7.2.6.2 of the Notification Form.

[32] Section 7.2.7.1(c) of the Notification Form.

[33] Section 7.2.7.1(e) of the Notification Form.

[34] Section 7.2.6.3 of the Notification Form.

[35] Merger Guidelines, p. 79.

[36] Merger Guidelines, p. 89.

would consist a sufficient number of other competitors, either. This will be decided on a case-by-case basis.

31. In assessing the likelihood of an anti-competitive foreclosure scenario in vertical mergers, the FCCA usually examines the following three conditions: (i) whether the merged entity would have, post-merger, the ability to foreclose access to inputs or customers, (ii) whether it would have the incentive to do so, and (iii) whether a foreclosure strategy would have a significant detrimental effect on competition and therefore consumer welfare downstream. [37]

32. As stated in Chapter 2.3, the FCCA has advocated for amending the Competition Act with lower thresholds and introduction of call in powers. That would enable the FCCA to investigate killer acquisitions and harmful concentrations of more traditional markets which fall below thresholds.

33. As regards the framework for analysing killer acquisitions, there are two necessary conditions for competitive harm to exist. First, the acquired firm would have the resources to continue developing its product without the merger (*credible threat of competition*). Second, the acquiring firm stops developing the acquired firm's product (*the kill element*). However, these conditions are very difficult to analyse without an in-depth investigation.

4. Examples of enforcement of competition law

4.1. General remarks

34. Even where the merged entity gains a significant degree of market power, the merger may not be deemed to give rise to a significant impediment to effective competition if there are factors that effectively counter-act any anti-competitive effects that the merger would otherwise have. Among those factors are potential competition and entry.[38]

35. When assessing potential competition as a competitive constraint, the FCCA has considered, among other things, the following factors: risks and costs of entry, profitability of entry (incl. effects on price level), timeliness of entry (usually within two years), the strong market position of incumbents, technological development (as a factor facilitating entry), undertakings' plans for entry or expansion, access to a sufficient customer base, the required scope of product range and geographic operating area for entry and the potential for an entry only by an acquisition of incumbent undertaking. Where barriers to entry are high, potential competition is not sufficient to eliminate competition concerns. A merger may also eliminate potential competition. In these cases, the conditions are designed to address this elimination.

36. In some cases, the FCCA has assessed potential competition without explicitly stating to what extent the analysis has affected the outcome of the case.

37. The FCCA has also identified some mergers which might have had a potential for killer acquisition analysis or at least for a more detailed analysis of their effects on competition. One example is the *DNA/Moi Mobiili* merger. The Finnish mobile operator market is a triopoly of Elisa, Telia and DNA. Moi Mobiili, a startup, was able to obtain a share in the market just in a few years. In 2019, it was bought by DNA. The transaction

[37] Merger Guidelines, p. 83.

[38] Merger Guidelines, p. 88.

was not notified to the FCCA as Moi Mobiili's turnover did not exceed the 20 million euros threshold. The parties did not reveal the value of the transaction.

38. Another example is the *Alma Media/Nettix* merger. Quite recently, Alma Media, one of the largest media companies in Finland, acquired Nettix, the leading marketplace for e.g. motor vehicles. In the Finnish market for online classified vehicle advertising, Nettix is a market leader. The transaction was not notified to the FCCA as Alma Media's turnover falls short of the 350 million thresholds. The 20 million euros threshold did, however, exceed.

39. Some of the cases in which the FCCA and the Market Court have analysed potential competition and entry are discussed below.

4.2. Potential competition as an insufficient competitive constraint

40. In *Kesko/Heinon Tukku*[39], the Market Court prohibited the merger - for the first time in the Finnish competition law enforcement practice - upon the proposal by the FCCA. The merger would significantly have impeded competition in the broadline distribution of groceries to Finnish foodservice customers, such as hotels and restaurants and led to Kesko having a dominant position in the market, where the parties have a combined market share of up to 60-70%. In its judgment, the Market Court also ruled on, among other things, on entry. At first, the Market Court stated that neither the FCCA or the merging parties had provided any specific calculations or estimates about the costs of entry and expansion. In this case, the costs were considered potential barriers to entry as there were no claims for any legal barriers to entry or equivalent barriers. The Market Court also stated that a small-scale entry would not be sufficient and timely enough to prevent the negative effects of the merger on competition. When assessing entry, only undertakings able to restrain – based on the timeliness and the scope of entry – the anti-competitive effects of a merger on competition are taken into account. The Market Court concluded that there were no competitors entering the market or expanding their businesses therein in order to remove the anti-competitive effects identified.

41. The FCCA in turn, referred in its analysis to the decision practice and the European Commission's Horizontal Merger Guidelines. Accordingly, the FCCA stated first that entry must be likely. The mere possibility of entry is not sufficient to deter or defeat the anti-competitive effects of the merger. The undertakings must have the ability and incentive to enter the market. Entry must also be sufficiently profitable. Second, entry must be timely (usually within two years) and, third, it must be sufficient. In this case, the FCCA considered that a countervailing entry would require a new broadline distributor offering a broad range of products and operating in the large geographic area or a specialist supplier to expand into a broadline distributor offering a broad range of products. Also, the costs relating to the construction of terminal and transport network as well as to the customer

[39] Judgment of the Market Court of 17 February 2020 in Case 2019/375; FCCA's proposal to prohibit the merger of 18 November 2019 in Case KKV/55/14.00.10/2019 ; FCCA Press Release of 19 March 2020, "The prohibition of the merger between Kesko and Heinon Tukku became legally binding", https://www.kkv.fi/en/current-issues/press-releases/2020/19.3.2020-the-prohibition-of-the-merger-between-kesko-and-heinon-tukku-became-legally-binding/; FCCA Press Release of 17 February 2020, "Kesko's acquisition of Heinon Tukku blocked by the Finnish Market Court", https://www.kkv.fi/en/current-issues/press-releases/2020/17.2.2020-keskos-acquisition-of-heinon-tukku-blocked-by-the-finnish-market-court/; FCCA Press Release of 18 November 2019, "The FCCA proposes the Market Court to prohibit the merger between Kesko and Heinon Tukku", https://www.kkv.fi/en/current-issues/press-releases/2019/the-fcca-proposes-the-market-court-to-prohibit-the-merger-between-kesko-and-heinon-tukku/

acquisition restrain entry. According to the FCCA, entry without an acquisition of an incumbent undertaking operating in the market for distribution would be challenging and time-consuming. The FCCA concluded its analysis by stating that the merger would result in the significant impediment to competition.

42. After the judgment of the Market Court, the *Valio/Heinon Tukku* merger was notified to the FCCA. Due to potential vertical concerns, the FCCA recently started a second phase proceedings in this case.

43. In *Mehiläinen Yhtiöt/Pihlajalinna*[40], the FCCA identified higher barriers to entry than those alleged by the notifying party. In this case, the FCCA proposed the Market Court to prohibit the merger between Mehiläinen and Pihlajalinna as the merger would significantly impede effective competition in the Finnish health services market. Post-merger, only two nationwide healthcare companies would remain in the market, i.e. Mehiläinen and Terveystalo, to whom Pihlajalinna has become a significant competitor. Pihlajalinna has traditionally been a strong player in services sold to municipalities, but the undertaking has expanded in recent years, especially in occupational health services and medical services. The Finnish healthcare market has concentrated rapidly over the last decade partly due to the acquisitions of smaller competitors. After the FCCA's proposal to the Market Court to prohibit the merger, Mehiläinen decided not to execute its offer to buy Pihlajalinna's shares**.** The Market Court held that there was no longer any need to rule on the action.

44. In this case, the notifying party argued that, in principle, barriers to entry were low (excluding occupational health services for offices located several regions and hospital services). According to the notifying party, the provision of occupational health services and medical services did not require large investment to diagnostics, as service providers can co-operate with specialised service providers. In addition, the technological progress has increased the provision of telemedical services with the effect of decreasing the need for office spaces. However, based on the replies to the FCCA's questionnaires to market participants barriers to entry and expansion are higher. For example, telemedical services are not considered as a substitute to the network of offices as telemedical services are applicable only for the treatment of certain types of diseases. Also, in some replies it was stated that the provision of services to insurance companies require a wide geographical operating area and a broad range of services. Wide coverage of office network is also important for the provision of occupational health services for offices located several regions. In addition, the replies reveal that smaller service providers depended on the partnership agreements with the larger service providers in the provision of occupational health services.

45. During the FCCA's investigation, Mehiläinen submitted two remedies proposals. However, the proposed remedies did not adequately address the identified competition concerns and the FCCA made a proposal to the Market Court to prohibit the merger.

46. In *Donges Teräs/Ruukki*[41], the FCCA assessed, as a part of the analysis, whether the merger would have anti-competitive effects on the market for steel frame structures for

[40] The FCCA decision of 29 September 2020 in Case KKV/1233/14.00.10/2019; the FCCA Press Release of 29 September 2020, "The FCCA proposes the Market Court to prohibit the merger between Mehiläinen and Pihlajalinna", https://www.kkv.fi/en/current-issues/press-releases/2020/29.9.2020-the-fcca-proposes-the-market-court-to-prohibit-the-merger-between-mehilainen-and-pihlajalinna/.

[41] FCCA Decision of 17 April 2020 in Case KKV/1238/14.00.10/2019; FCCA Press Release of 17 April 2020, "FCCA approved Donges Teräs Oy's acquisition of Ruukki Building Systems Ltd,

business premises and industrial building as well as on the market for turnkey deliveries of steel bridge structures. As part of the analysis, the FCCA assessed, among other things, the current business activities of foreign suppliers for steel frames and steel bridges in Finland and their potential to expand the provisions of steel structures to Finland. None of the foreign undertakings contacted by the FCCA did present any concrete plans for expansion to the Finnish market or assessed the related costs or time for an expansion. The response percentage for the FCCA's inquiry was low. However, the survey did not indicate any significant entry to the market in the foreseeable future. The FCCA also assessed the potential competition in the market for steel bridges by investigating the potential for Finnish suppliers to expand from steel frame structures for business premises and industrial building to steel bridge structures. Among those Finnish suppliers the FCCA contacted only one out of 28 had considered redirecting it businesses in the described way. The FCCA concluded that entry and potential competition were not sufficient to counteract the anti-competitive effects of the merger. The merger was conditionally approved as Donges Teräs undertook to sell a production plant of the Donges Group.

4.3. Potential competition as a sufficient competitive constraint

47. In *Terveystalo/Diacor*[42], the FCCA investigated the effects of the merger on the markets of occupational health care services, medical services offered to private customers, insurance company services and procurement services. The FCCA's approved the acquisition mainly because its investigations demonstrated that there was relatively little overlap in the business operations of the companies due to differences in the scope of their branch networks. One of the grounds for approving the acquisition was also the FCCA's conclusion that enough competition was left in the healthcare service market even after the acquisition. Mehiläinen, the most notable competitor of Terveystalo, was a considerably closer competitor of Terveystalo than Diacor. Of other competitors, Pihlajalinna had announced plans of expanding its operations substantially in the near future and OP-Pohjola had announced plans of expanding its network of Pohjola Hospitals during the next two years. In retrospect, these plans did not fully materialise, as Pihlajalinna opened up far fewer new medical centers than planned and Pohjola Hospitals decided to focus mostly on orthopaedics and divested its other specialties.

48. In *Terveystalo Healthcare/Lääkäriasema Pulssi*[43], the notifying party argued that low barriers to entry and potential competition as well as existing competitors effectively constrain the merged entity's potential incentives to increase prices. The FCA (the then Finnish Competition Authority) investigated the effects of the merger on the markets of occupational health care services, procurement services, insurance company services and medical services offered to private customers. According to the notifying party, any general medical practitioner or a specialist can provide services without significant costs. The notifying party also stated that the services provided by the private health service

subject to conditions", https://www.kkv.fi/en/current-issues/press-releases/2020/17.4.2020-fcca-approved-donges-teras-oys-acquisition-of-ruukki-building-systems-ltd-subject-to-conditions/.

[42] FCCA Decision of 23 March 2017 in Case KKV/1152/14.00.10/2016; FCCA Press Release of 23 March 2017, "FCCA approves acquisition of Diacor by Terveystalo", https://www.kkv.fi/en/current-issues/press-releases/2017/23.3.2017-fcca-approves-acquisition-of-diacor-by-terveystalo/.

[43] FCA Decision of 16 December 2011 in Case 927/14.00.10/2011; FCA Press Release of 19 December 2011, "FCA approves acquisition of Pulssi Oy by Terveystalo", https://www.kkv.fi/en/current-issues/press-releases/finnish-competition-authority/2011/19.12.2011-press-release-fca-approves-acquisition-of-pulssi-oy-by-terveystalo/.

companies are mainly carried out by self-employed practitioners and that the mobility of these practitioners further facilitates entry to the market. The FCA did not analyse the alleged low barriers to entry or provide any evidence that would be against those presented by the notifying party. The FCA concluded that the merger would not significantly impede effective competition in the Finnish markets or a substantial part thereof.

49. In *YIT-Yhtymä/Calor*[44], the FCA's investigations particularly focused on the competitive situation in the markets for large industrial pipeline installations as some of the market participants had stated that the merged entity would attain an extremely strong position in the market for large industrial pipeline contracts. Based on the FCA's investigation, there were only few foreign competitors operating in the Finnish market. However, the FCA considered that foreign competitors could form a credible threat for the use of market power by the merged entity. In the first phase, competition was mainly to be expected from Sweden and from Central Europe and possibly from Baltic Countries and Russia. The FCA concluded that despite the considerable market share of the merged entity and its other competitive advantages, enough competing alternatives were still available in the market so that the merger could not be considered to achieve such a dominant position as would substantially restrict competition.

50. As regards anti-antitrust practices, potential competition and barriers to entry were discussed and analysed in the FCA's investigation into *Yara's* pricing of agricultural fertilizers[45] and the alleged abuse of a dominant position. In its decision, the FCA stated that among the factors that will be discussed in the assessment of potential competition are those affecting the ease of entry. Factors such high sunk costs, costs faced by customers in switching to a new product, long-term contracts and sometimes heavy regulation are considered being likely to make it difficult for the emergence of competition in the market. Also, an incumbent's aggressive reputation and strategic investments can form de facto barriers to entry. Barriers to entry may also consist of an advantage of a dominant undertaking such as economies of scale, product variation, privileged access to natural resources, an important technology or an established sales or distribution channel. In its decision, the FCA concluded that the use of market power by Yara is constrained by the threat of expansion of actual competitors and potential competition. In a situation where, in addition to actual competition, there exists potential competition, Yara could not likely increase prices to an unfair level without losing its market share to competitors. The FCA stated that there were no clear indications that Yara's pricing of agricultural fertilizers would result in excessive pricing. The case was therefore closed.

51. After some years, the FCCA initiated an ex-officio investigation into *Yara's* practices in the trade of agricultural fertilizers.[46] Yara has a strong position in the fertilizer trade in Finland and the FCCA investigated certain procedures of Yara as possible abuse of a dominant position. In its investigation, the FCCA focussed on whether Yara's discount and support system restricted competition in the fertilizer market and impeded the market entry of competing fertilizer manufacturers. The FCCA also prepared an economic

[44] FCA Decision of 7 May 2001 in Case 1025/81/2000; FCA Yearbook of 2001, p. 32-33, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/vuosikirjat/kilpailuvirasto/2002/kivi-vuosikirja-2002-en.pdf.

[45] The FCCA decision of 19 December 2012 in Case 759/61/2008.

[46] The FCCA decision of 27 October 2017 in Case KKV/217/14.00.00/2014. The FCCA Press Release of 27 October 2017, "The FCCA concludes the investigation of Yara's commercial practices", https://www.kkv.fi/en/current-issues/press-releases/2017/27.10.2017-the-fcca-concludes-the-investigation-of-yaras-commercial-practices/.

assessment of the discount system's market impacts. The FCCA's investigation did not reveal proof that Yara's practices would restrict competition. The case was closed.

4.4. Elimination of potential competition

52. In *Fortum Power and Heat/E.ON Finland*[47], the FCA stated that despite E.ON Finland's small market share in Finland it was a significant potential competitor for Fortum in the Finnish market. E.ON Group had explicitly informed that Nordic Countries were amongst the focus for its business growth plans. E.ON Finland, for example, had plans to invest in new production capacity. Therefore, in addition to the elimination of actual competition the merger would also eliminate a significant competitive constraint to Fortum. The merger was conditionally approved as Fortum divested some of its production capacity. Fortum, for example, offered to the Finnish market a virtual capacity for a certain period of time. The conditions were temporary because the situation in the Finnish electricity market was about to change due to, for example, the completion of the new nuclear power plant and the new transmission connection between the Finnish and Swedish electricity networks. The divested capacity would compensate the elimination of potential competition consisted of the investments plans by E.ON Finland.

In *Posti/Leijonajakelu*[48], the FCA conditionally cleared the merger whereby Finland Post acquired from the Sanoma Corporation part of Leijonajakelu's early morning delivery business. Barring conditions, the acquisition would have led to an appreciable strengthening of Finland Post's total position, the removal of potential competition in the early morning deliveries of newspapers and the strengthening of Finland Post's position with respect to advertisers. Although the parties to the merger had not previously competed with each other to a significant extent, they had formed a potential threat of competition in the market. The conditions imposed consisted, among other things, of the amendments to Finland Post's delivery contracts so as to enable its customers to transfer to possible alternative distributors. The conditions ensured that at least a similar situation prevails in the market post-merger.

5. Concluding remarks

53. In most cases, potential competition is one of the factors which is analysed when assessing the effects of a merger on competition or the alleged anti-competitive practices such as abuses of a dominant position. However, the analysis of the decision practice of the FCCA and the judgments of the Market Court indicates that only in few cases it has been a decisive factor for the outcome.

54. However, some conclusions can be drawn. First, it seems that evidence has an important role in the analysis of potential competition. For example, in *Kesko/Heinon Tukku*, the Market Court stated that neither the FCCA or the merging parties had provided

[47] FCA Decision of 2 June 2006 in Case 52/81/2006; FCA Yearbook of 2006, p. 25, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/vuosikirjat/kilpailuvirasto/2006/kivi-vuosikirja-2006-en.pdf.

[48] FCA Decision of 22 August 2003 in Case 146/81/2003; FCA Press Release of 22 August 2003, "Acquisition of Leijonajakelu by Finland Post Ltd approved conditionally", https://www.kkv.fi/en/current-issues/press-releases/finnish-competition-authority/2003/acquisition-of-leijonajakelu-by-finland-post-ltd-approved-conditionally/; FCA Yearbook of 2004, p. 70, https://www.kkv.fi/globalassets/kkv-suomi/julkaisut/vuosikirjat/kilpailuvirasto/2004/kivi-vuosikirja-2004.pdf.

any specific calculations or estimates about the costs of entry and expansion. In *Donges Teräs/Ruukki*, the FCCA in turn, stated that none of the foreign undertakings contacted by the FCCA did present any concrete plans for expansion to the Finnish market or assessed the related costs or time for an expansion.

55. Second, the FCCA has stated that its approach to potential competition and barriers to entry in merger cases is the same as in cases concerning anti-competitive practices. However, it is possible that some factors are emphasized differently. As regards anti-competitive practices, the FCCA has stated, for example, that a mere threat that a competing undertaking is expanding its business or a potential competitor will enter the market may limit the use of market power by the undertaking. For example, in *Yara* the FCCA concluded that the use of market power by Yara is constrained by the threat of expansion of actual competitors and potential competition. However, in some merger cases, such as *Kesko/Heinon Tukku*, the FCCA has stated that the mere possibility of entry is not sufficient to deter or defeat the anti-competitive effects of the merger.

56. Third, the assessment of potential competition is carried out on a case-by-case basis. As stated in the Merger Guidelines, the significance of barriers to entry depends on the characteristics and evolutionary stage of the market. On some markets, a single factor can be a crucial deterrent to entry whereas in others the analysis consists of the combination of different factors. Therefore, it is not possible to provide unequivocal definitions, for example, of what constitutes a timely entry or when entry is to be considered sufficient to deter or defeat anti-competitive effects of a merger. Digital markets inevitably affect the analysis of potential competition and bring new factors for the analysis.