# Global merger control: Finland

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18

In 2021 (up to Q3), the FCCA approved 18 transactions unconditionally

3

In 2021 (up to Q3), the FCCA approved 3 transactions subject to commitments



# Finland

**By Marika Harjula, Martina Castren**

## Key developments & impact on merging parties

The merger control procedure before the Finnish Competition and Consumer authority (the FCCA) is increasingly built upon a sophisticated and meticulous economic analysis. Investigations have become highly data-driven—in particular in cases with potential concerns—and economists have outnumbered lawyers in the FCCA's merger control unit.

As economic analysis has taken a more essential role in the merger investigations, the duration of reviews has extended accordingly. While the statutory review period in Finland is 92 business days (23 days for Phase I and 69 days for Phase II), the investigations in recent complex matters have taken almost a year when taking into account the pre-notification discussions between the authority and the parties, extensions to the review period granted by the Market Court (up to 46 days) and other delays caused by e.g., an incomplete notification or the FCCA "stopping-the-clock" while waiting for input from the parties. Nevertheless, in simple transactions with no significant overlaps between the parties, relatively swift clearance can be expected.

The FCCA has adopted a strict policy with respect to incomplete notifications. Indeed, if essential information is not included in the notification, or information submitted during the process contradicts the notification, the authority does not hesitate to declare the notification incomplete and restart the review period—even during Phase II.

The authority has also become more active in requesting extensions to the statutory review period from the Market Court. The parties normally support such requests, but the FCCA has equally secured extensions despite the parties' objections. While the merging parties are often under time pressure to submit a merger notification, it is important to understand that rushing may backfire later on in the process, especially in potentially complex cases.

While pre-notification is voluntary in theory, parties are strongly encouraged to engage in pre-notification discussions with the authority. A potentially lengthy pre-notification phase is de facto mandatory in cases that are likely to raise competition concerns as well as in cases that may otherwise require extensive data collection by the parties and/or the FCCA. However, even in straightforward cases, it is often in the interests of the merging parties to enter into pre-notification discussions with the FCCA, given e.g., the above-mentioned risk of being declared incomplete. Generally, it is advisable for parties to have transparent and early communication with the FCCA in all cases, as case handlers are usually allocated on a first-come first-served basis, and the authority normally requires approximately five business days to review draft notifications in simple deals.

An aspect of the Finnish process that often surprises companies that are not familiar with it is the publicity of the process. While pre-notification discussions are conducted on a confidential basis, after the submission of the notification, the case file is open to third parties to the extent that there are no statutory grounds for keeping the information confidential. When dealing with the FCCA, the merging parties should therefore be prepared to provide non-confidential versions of their submissions in the course of the proceedings.

Despite the emphasis on publicity, Finnish legislation does not allow the authority to organize a data room for the parties' advisors to review third-party data used in the authority's assessment, a process in place in many other jurisdictions.

In principle, submissions to the FCCA should be made in Finnish, while the authority normally accepts

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English-language economic analyses and other underlying documents. Finnish companies with Swedish as their official language can make submissions in Swedish.

As has been the case for some time, the FCCA routinely requests transaction-related documents as part of its review. However, contrary to the trend in the EU, where increasingly extensive requests for internal documents have become the norm in complex transactions, the FCCA in general does not require extensive production of internal documents. The FCCA considers internal documents as a reliable way of gauging the parties' intentions, but does not base its analysis on such evidence. Nevertheless, transaction-related materials remain potentially disclosable to the FCCA, so companies looking at potential transactions should take a prudent approach to document creation and management, both in terms of information memoranda and other market-facing materials, but also with respect to internal communications.

The FCCA has recently become more focused on avoiding failed remedies, and has encouraged parties to engage in timely and careful remedy design. The FCCA has clearly communicated its preference for structural remedies in cases with horizontal concerns, and has systematically rejected behavioral commitments in such cases. In principle, behavioral commitments may be accepted as the primary remedy only in vertical cases.

The authority has also started paying more attention to remedy purchasers. In April 2021, in the merger between Finnish alcoholic beverage company Altia Oyj and its Norwegian counterpart, Arcus ASA, the FCCA imposed an upfront buyer condition for the first time, making the closing of the transaction conditional on the approval of the remedy buyer. Only a few months later, the FCCA imposed an upfront buyer condition in another case (a transaction in the building automation sector between Assemblin AB and Fidelix Holding Oy in July 2021). The authority has publicly noted that finding buyers post-closing has turned out to be challenging in various previous cases and indicated that upfront buyer requirements could become standard practice, especially in concentrated markets. As such, parties should be prepared for upfront buyer conditions in remedy cases going forward, and should consider potential remedies and the viability of buyer candidates early on in the process, in order to ensure the effectiveness of their potential remedy proposals and therefore to avoid procedural delays.

**92**

The statutory review period in Finland is 92 business days, but complex investigations take longer in practice

The Altia/Arcus transaction, which was notified to competition authorities in Finland, Sweden and Norway, is also illustrative of continued close cooperation between the Nordic competition authorities in transactions affecting the Nordic region. The competition authorities of Denmark, Finland and Sweden cooperate through the European Competition Network (ECN); however, there is also a Nordic Agreement on Cooperation in Competition Cases between the authorities in Denmark, Finland, Iceland, Norway and Sweden that provides inter alia for more effective information sharing between the Nordic authorities in merger cases. In Altia/Arcus the authorities cooperated on the review rather openly, even referring to each other's reviews in their publications. However, close cooperation does not necessarily entail uniform results across the Nordic countries in a given case—in Altia/Arcus, for instance, an upfront buyer condition was imposed by the FCCA and the Norwegian Competition Authority, but the Swedish Competition Authority (which also cleared the transaction subject to commitments) did not require an upfront buyer.

## Recent cases

In 2021, toward the end of Q3, the FCCA accepted 18 mergers unconditionally and three mergers conditionally (*Assemblin AB (Triton) / Fidelix Holding Oy, Valio Oy / Heinon Tukku Oy and Altia Oyj / Arcus ASA*). As discussed above, 2021 so far has seen the FCCA increase its focus on the effectiveness of remedies, in particular through the imposition of an upfront buyer condition in two out of the three conditional clearance decisions (the third one involved a behavioral commitment, so the upfront buyer issue was not relevant).

In 2020, the FCCA accepted 19 mergers unconditionally, two mergers conditionally (*Donges Teräs Oy / Ruukki Building Systems Oy and Automatia Pankkiautomaatit Oy / Loomis AB*) and proposed the prohibition of one transaction (*Mehiläinen Yhtiöt Oy / Pihlajalinna Oyj*). In addition, the Market Court prohibited one merger in accordance with the authority's proposal made in 2019 (*Kesko Oyj / Heinon Tukku Oy*). Year 2020 was historical in Finnish merger control, as the Market Court prohibited a merger for the first time when it ruled in February 2020—in line with the FCCA's proposal—that grocery wholesaler Kesko could

not acquire its rival, Heinon Tukku. The FCCA requested the 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 restaurants and hotels.

At the core of the dispute were the FCCA and the parties' different views on the definition of the relevant product market. According to the authority, broadline distributors, such as the parties, that offer a broad range of products to foodservice customers, do not compete in the same market as smaller specialist suppliers focusing on a limited number of product categories, or manufacturers of daily consumer goods supplying products directly to foodservice customers. The parties argued for a broader product market. The Court agreed with the authority's approach and found that the acquisition would have created a dominant position in the market for broadline wholesale distribution of groceries to foodservice customers. Heinon Tukku was later acquired by Valio, a manufacturer of dairy products. The FCCA approved the deal in July 2021, subject to conditions designed to ensure that Valio does not use sensitive competitor information gained in the wholesale business.

In September 2020, the FCCA issued a proposal to prohibit the merger between healthcare firms Mehiläinen and Pihlajalinna. After the oral hearing at the Market Court in November 2020, the parties' merger agreement lapsed and the acquirer's public purchase offer expired. Despite the objections of the merging parties, the Court refused to assess the substance of the 3-to-2 deal given that it was no longer going to take place.

The FCCA's prohibition proposal was preceded by a ten-month investigation, the largest in the authority's history. Consequently, the decision amounts to more than 400 pages and is accompanied by a 200-page annex on economic analysis. The broad overlapping portfolios of the parties and unique characteristics of national healthcare services triggered the need for an in-depth review of the deal. The FCCA's prohibition proposal was based e.g., on the following elements: (i) the Finnish healthcare market is dominated by three national players, the merging parties and Terveystalo; (ii) the market has concentrated rapidly and the top-three players have multiplied their combined market shares within a short period of time; (iii) the top-three players offer a similar range of services (occupational healthcare and medical and examination services in the private and the public sector); and (iv) the target (Pihlajalinna) has expanded its range of services in recent years, becoming a significant competitor for the two leading firms, Mehiläinen and Terveystalo.

**400**

FCCA's prohoibition proposal in Mehilainen/ Pihlajalinna was over 400 pages long and accompanied by a 200-page annex on economic analysis

The detailed investigation was based on extensive data available to and collected by the authority. During its review, the FCCA identified competition concerns in several healthcare segments, including inter alia private medical services in 16 local markets, occupational health services in 21 locations, private hospital services in four hospital districts, and services provided to insurance companies, as well as public sector outsourcing in various segments. The authority's conclusion of the merger's negative effects on competition were based on a wide range of empirical and qualitative assessments, including bidding analysis and various price analyses.

A pivotal question in the investigation was whether public and private healthcare services belong to the same relevant product market and to what extent the public sector should be taken into account in the assessment of competitive effects. The question was decisive, since the public healthcare sector in Finland is four times the size of the private sector. While the parties argued that all healthcare services are within the same market, customer surveys, other qualitative reviews and a critical loss analysis showed that private service providers form a distinct relevant market.

Given the authority's deepened understanding of the healthcare sector, a high level of scrutiny can be expected in future deals in the sector. The authority is also aiming to prevent further concentration of the healthcare sector occurring through deals that do not trigger the national thresholds, and to prevent such rapid concentration of other sectors, by advocating for updates to the national merger filing thresholds, as discussed below.

In 2020, the FCCA also conducted a rare in-depth review of a vertical merger. Vertical deals do not usually trigger the need for scrutiny by the authorities, but that was not the case in *Automatia/Loomis,* a deal between cash-handling company Loomis and bank machine operator Automatia, owned by three Nordic banks. Automatia operates automated teller machines and is responsible for supplying Finnish banks and ATMs with cash. The FCCA was concerned about the transaction's effects on the highly concentrated markets for cash in transit and cash-handling services, but ultimately cleared it in October 2020 subject to behavioral remedies. The merged entity agreed to grant rivals access to its cash points and other services for the period of five years and agreed to continue buying cash management and transportation services from Loomi's main competitor, Avarn. According to the FCCA, *Automatia/Loomis* was the most thorough investigation into a vertical deal and marked the first time it applied economic analysis to assess the exclusionary effects of a vertical acquisition.

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## Recent changes in priorities

There have been no noticeable changes in merger enforcement priorities in the past year in Finland. The FCCA remains a robust enforcer toward any merger that could potentially lead to competition concerns either nationally or locally and across all industries, as evidenced by the variety of sectors subject to in-depth investigation in recent years.

## Recent studies and guidelines

In June 2021, the FCCA proposed lowering the national filing thresholds and introducing the power to request notifications of potentially problematic transactions falling below the present filing thresholds. Under the current rules, an obligation to notify a merger to the Finnish authority is triggered when the combined global turnover of the parties exceeds €350 million, and the turnover of at least two of the parties resulting from Finland exceeds €20 million. The proposed new thresholds would lead to a mandatory filing when the parties' combined Finnish (not global) turnover exceeds €100 million. The individual turnover requirement would remain at €20 million. The proposed rules would align the Finnish framework with other Nordic merger control regimes.

The authority's initiative is supported by its study showing that certain mergers harmful to competition and even some Finnish industries may currently escape the authority's scrutiny. According to the FCCA, the proposed amendment would increase the number of mergers reviewed by the authority by approximately one-third.

The study was conducted at the request of the Ministry of Economic Affairs and Employment of Finland, which is responsible for the Finnish competition regulation. The Ministry is considering whether legislative actions are required based on the authority's findings.

**1**

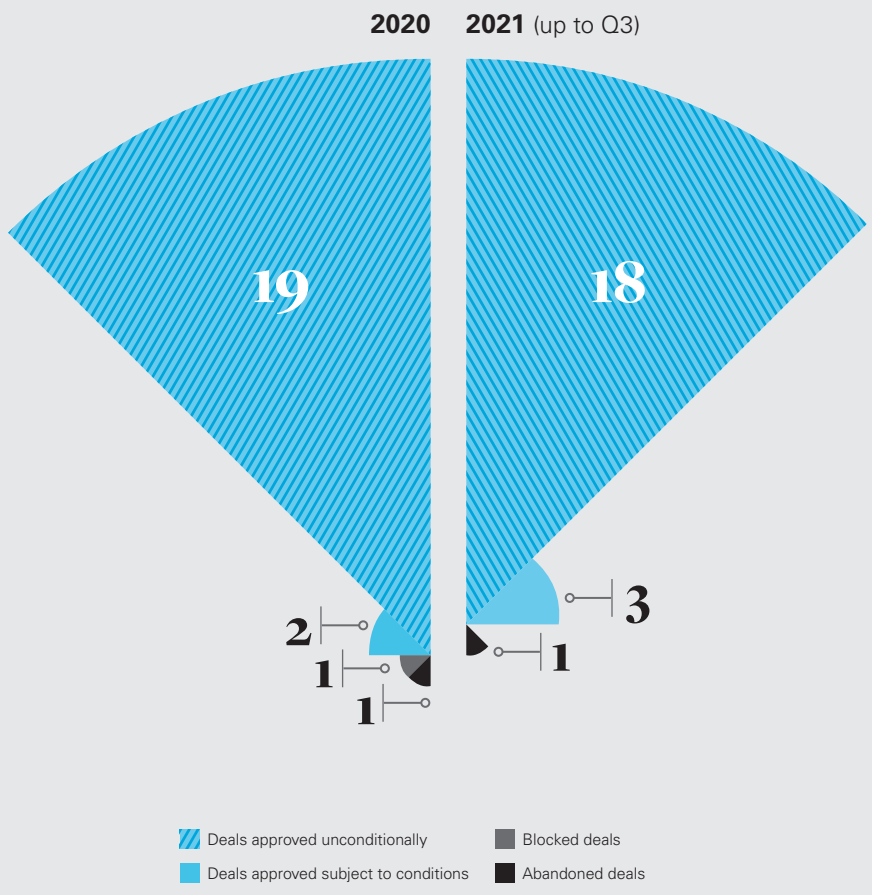
In 2020, the Market Court prohibited a merger for the first (and so far only) time

## Looking ahead

Other than the possible developments described above, no significant changes to Finnish merger control rules are expected in the near future.

### Number of cases reviewed by the FCCA

*Based on the date of the decision

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