Merger Control

The purpose of merger control is to maintain the functioning of markets by intervening with such mergers leading to either a dominant or a strengthened position, that significantly impede competition in Finland. Corporate mergers and acquisitions are assessed on the basis of their effects in Finland, and the assessment also takes into account the future development of the markets.

The FCA issued a total of 104 decisions concerning corporate acquisitions and mergers in 2001. In five cases, the merger was approved on the basis of certain conditions. In 2000, the number of merger-related decisions was 114.

Even though the number of decisions made last year was almost the same as the year before, the total number of all corporate merger cases decreased from the previous year. The total number of new cases in 2001 was 150, compared to 184 the previous year. A total of 23 written statements were issued last year in cases other than those submitted as corporate merger notifications.

Compared to previous years, the workload in merger control has been increased due to the necessity to monitor the adherence to conditions attached to previous merger decisions, and the applications for amending such conditions.

The most important merger-related decisions of 2001 were:

<table>
<thead>
<tr>
<th>The parties</th>
<th>The date and Diary No of the decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Carlsberg AS/the brewery business of Orkla ASA</td>
<td>2.1.2001, D. No. 573/81/00</td>
</tr>
<tr>
<td>Finland Post Ltd/Atkos Printmail Oy</td>
<td>2.2.2001, D. No. 2/81/01</td>
</tr>
<tr>
<td>Metsäliitto Osuuskunta/Vapo Oy</td>
<td>8.3.2001, D. No. 1021/81/00</td>
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<tr>
<td>YIT Group Oyj/Calor AB</td>
<td>7.5.2001, D. No. 1025/81/00</td>
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<tr>
<td>Sonera Oyj/Loimaan Seudun Puhelin Oy</td>
<td>3.8.2001, D. No. 1202/81/00 (The decision of the</td>
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<tr>
<td></td>
<td>Competition Council against the merger, issued on</td>
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<td></td>
<td>18.12.2001, an appeal in the Supreme Administrative</td>
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<tr>
<td></td>
<td>Court is pending)</td>
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</table>

- **Carlsberg/Orkla:** On 2.1.2001, the FCA conditionally approved the corporate merger between the Danish Carlsberg A/S and the Norwegian Orkla ASA. The main condition for approving the merger was that Orkla would dispose of the Hartwall shares in its possession and would not nominate its representative to the Board of Directors or other administrative bodies of Hartwall. The decision also included a condition, based on the undertakings given by the parties, whereby Carlsberg undertakes to ensure that Sinebrychoff does not reveal its sales data or technical information in the meetings of the Brewery Association or directly to the Brewery Association, for statistical or other purposes.
Orkla sold its shares in Hartwall during the autumn of 2001. The other conditions have also been met, either in the manner specified in the original decision, or in a manner later ordered by the FCA. The FCA has issued a statement to Carlsberg on the condition of exchange of information with the Brewery Association regarding its operations. The FCA stated that it is not appropriate to start deciding on the acceptability, from the competition aspect, of the exchange of information between competitors, possibly required by the administration of beverage container recycling and the uniform container system on the basis of the regulations governing corporate mergers. Such assessment must be carried out on the basis of the regulations of the Competition Act, not on the regulations on corporate mergers, as this better allows taking into account the overall effect of the competition restraint.

- **Georgia-Pacific/Fort James:** On 30.1.2001, the FCA conditionally approved the corporate merger whereby Fort James Corporation is merged with Georgia-Pacific Corporation. Georgia-Pacific Corporation is a U.S. multi-industry corporation that manufactures, *inter alia*, paper and so-called dispensers for sanitary products. Fort James Corporation manufactures soft tissue products and paper towels for consumers and institutions. In Finland, Fort James has production facilities in Nokia and Ikaalinen. The competitive problems caused by the merger included those caused by the arrangements between Georgia-Pacific and its main competitor on the Finnish market, Metsä-Tissue Oyj, which resulted in such significant ties being formed between Georgia-Pacific and Metsä-Tissue that competition between the two companies would not have been genuine. Therefore, the merger could, due to these ties, lead to the creation of a joint dominant position for Georgia-Pacific and Metsä-Tissue. Between them, the two companies have an extremely high joint market share in certain sectors of the Finnish soft tissue market, 85–100%.

  The co-operation between Georgia-Pacific and Metsä-Tissue particularly concerned the product development, marketing and sales of dispensers and their related products, as well as the strategic plans for their development in the joint enterprise of Georgia-Pacific and Metsä-Tissue. The condition for approving the merger was that Georgia-Pacific Corporation abandons this co-operation with Metsä-Tissue Oyj. The result of severing these ties was the creation of conditions for genuine competition between Georgia-Pacific and Metsä-Tissue on the Finnish market.

- **Finland Post/Atkos Printmail:** On 2.2.2001, the FCA approved a corporate merger whereby Atkos Printmail Oy is transferred from the joint control of Finland Post and TietoEnator to the sole control of the Finnish Postal Service. The decision was conditional and issued without submitting the case for further proceedings. Atkos Printmail provides its customers with printing, mailing and direct marketing services. The company possesses considerable market power in printing and mailing services. In its decision, the Department states that the eLetter offered by Finland Post and the printing and mailing services offered by Atkos Printmail are similar, with the exception that the eLetter service by the Finland Post also includes the delivery of letters.

  Finland Post has a monopoly in the delivery of addressed letters in Finland. In its decision, the FCA states that the merger provided Finland Post with an opportunity to use postal charges to cross-subsidise the competing elements of the eLetter service, such as printing and mailing. Using the cross-subsidy, and letter delivery conditions that possibly discriminate against the competitors of Atkos Printmail, Finland Post has the opportunity to favour Atkos Printmail at the cost of its competitors. The merger will also result in Finland Post having the possibility of using package pricing and joint marketing to make it more difficult for new players to enter the market.

  The approval of the merger was granted on the condition that Finland Post would keep Atkos Printmail as a separate subsidiary and would refrain from transferring any of its present business operations to Finland Post Ltd. The decision also carries a condition whereby Finland Post agrees to offer the delivery services for products similar to the eLetter, at terms and conditions that are general,
equal, non-discriminatory and transparent, to external companies and companies within the Finland Post Group. This undertaking reduces the risk of cross-subsidisation associated with the merger.

- **Metsäliitto/Vapo:** On 23.1.2001, the FCA requested that the European Commission partially transfer the Vapo/Metsäliitto merger for investigation by the FCA. The transfer request was based on Article 9 of Council Regulation (EEC) No. 4064/89 of 21.12.1989 on the control of concentrations between undertakings. The initiative for making the request came from the Commission. The FCA approved the merger on 8.3.2001, but attached conditions upon its implementation.

  In the transaction, the Finnish State sold 33.3% of the shares it held in Vapo to Metsäliitto. According to the Shareholder’s Agreement between the parties, Vapo became a joint enterprise under the joint control of the State and Metsäliitto, i.e. they jointly decide on its business operations.

  The starting point of the Department’s appraisal was the dominant position held by Vapo in the market for peat energy, as well as its operations in the market for wood-based fuels. Metsäliitto, in turn, owns Biowatti Oy, a bio-energy company with countrywide operations, specialising in wood-based fuels. The wood-based fuels are, in practice, the only form of energy competing with peat. Metsäliitto’s share of the total wood fuel market of 6.4 TWh is approximately 30%, and Vapo has a share of about 20%. Wood and peat fuels are used in particular by industry as well as by district heating and electricity companies.

  Had the merger been approved unconditionally, it would have resulted in the strengthening of a dominant position with restrictive effects on the peat market, and in the creation of a dominant position in the market for wood-based fuels. The key condition for approving the merger was that Vapo must, in practice, give up all wood-based fuel procurement and supply operations in Finland, outside the merged group. Metsäliitto, in turn, undertakes to cancel part of Biowatti’s wood fuel supply agreements with customers outside the merged group, as well as some of the wood fuel procurement agreements with parties outside the group.

  The operations divested from the concentration of enterprises will form a viable and competitive business entity with regional coverage, holding a 20–40% share of the total market for wood-based fuels. The conditions set by the FCA require that the buyer of the business operations must be independent of the merged parties and must have adequate financial and other resources. The buyer must be approved by the FCA, and an independent expert will be nominated to oversee that the conditions are met.

  On 21.12.2001, the Finnish State and Metsäliitto requested that the FCA amend the conditions attached to the merger, because no interested buyer candidates had been found for the parts to be divested. Later however, on 19.3.2002, the parties announced that they had signed a new Letter of Understanding concerning the sale of shares in Vapo, with the effect that the transaction that was the subject of the decision by the FCA was annulled.

- **YIT/Calor:** On 7.5.2001, the FCA approved a merger whereby the YIT Corporation acquired the entire share capital of the Swedish company Calor AB. Both YIT and Kalmeri Oy, the Finnish subsidiary of Calor, offer pipeline installation and maintenance services for the process and energy industry. The merger was approved in its proposed form after further proceedings.

  FCA’s investigations particularly focused on the competitive situation in the markets for large industrial pipeline installations worth several million Finnmarks, because some of the players in the market had disclosed to the Department that the merged company would attain an extremely strong position in the market for large industrial pipeline contracts. The investigations found that, despite the considerable market share of the concentration and its other competitive advantages, enough competing alternatives were still available in the market so that the concentration could not be considered to achieve such a dominant position as would substantially restrict competi-
tion. It was found that the competitors of the concentration had, after the merger, won large contracts that had been the subject of major expected threats to competition regarding the merger. Splitting contracts down to smaller parts had also made more alternatives available to the buyers. Due e.g. to these factors, the FCA took the view that the merger did not create or strengthen a dominant position as stipulated in the Competition Act.

- **Sonera/Loimaan Seudun Puhelin/Turun Puhelin:** On 16.2.2001, Sonera Corporation notified the FCA of a corporate acquisition whereby it acquired, through a directed emission, 16.67% of the shares and voting rights in the Loimaa regional telephone company, Loimaan Seudun Puhelin Oy (LSP). This results in factual control of LSP because the remainder of its ownership is otherwise totally scattered into small shareholdings. The transaction was conditional to LSP first having bought 33% of the shares in the Turku telephone company, Turun Puhelin (TP), from the City of Turku. This was a total transaction whereby LSP acquired the control of TP, and Sonera acquired the control of LSP.

  The acquired party, LSP, is a telephone company operating within 11 municipalities, owned by some 11,500 holders of a subscriber line. TP is a telecom group with local operations in many of the key sectors of the electronic communications business. In their respective operating areas, both LSP and TP have possessed considerable market power in the markets for the rental of telecom copper lines, the local trunk network and cable television network, and the local telecom services provided to both private customers and the small- and medium-sized companies. The concentration of both the subscriber line networks and the cable television networks into the hands of Sonera’s corporate conglomerate, which at the same time is dominating the markets, will add to its market power. In addition, both LSP and TP have been operating as the key distribution channels for the products of some of Sonera’s competitors.

  The key conditions for approving the transaction were that LSP and TP give up most of the mobile telephony infrastructure they had earlier been leasing to Sonera’s competitors and that Sonera sells the fixed area network that it had constructed in the Turku region. In addition, TP agreed to sell one of its regional telecom centres and to lease part of its cable television network capacity to its competitors. Certain other conditions were also imposed on the parties with regard to their behaviour in relation to the provision of fixed and mobile network infrastructure and the distribution of certain products. An independent expert, approved by the FCA, was nominated to oversee that the conditions are met.

  The FCA is of the opinion that, without the said conditions, the merger would have led to the creation or strengthening of a dominant position significantly impeding competition, at least in the areas of leasing the equipment required for the maintenance of the network subscriber line, the trunk network and cable television and mobile phone networks locally and the markets of the mobile telephony services nationally. Without the conditions, the merger would, in practice, have led to a situation where one corporate conglomerate would, in the operating areas of LSP and TP, have had simultaneous control of the infrastructures of both the competing fixed network and the mobile network.

  The decision of the FCA was appealed at the Competition Council. The appellants were the local telephone companies Lännen Puhelin Oy and Salon Seudun Puhelin Oy, the network operator Suomen 2 G Oy and DNA Finland Oy, a mobile operator competing with Sonera Corporation. In its decision of 18.12.2001, the Competition Council took the view that the two latter companies had the right of appeal concerning the decision of the FCA. The Competition Council anulled the FCA decision and banned the merger. With the exception of Suomen 2 G Oy and DNA Finland Oy, all parties have appealed the case to the Supreme Administrative Court.
Several merger decisions, and statements to the parties of the mergers, issued last year, expressed views of interpretation regarding the merger regulations. The main interpretation problems were caused by the two-year rule applied to mergers involving companies within the same line of business, which has now taken full effect as the merger control regulations have been in force for more than two years. New situations calling for interpretation will keep emerging in practical merger cases.

- The two-year rule and Joint Venture as the party acquiring control\(^6\) (548/80/01): The request for a statement, addressed to the FCA, concerned an arrangement where a Joint Venture (JV) acquired a company (Subject) operating in the same line of business. The JV itself had been the Subject of a corporate merger during the two previous years, with the result that an Investor had now become a co-owner in the JV with the Private Individual that had previously been the sole owner, so that the Investor and the Private Individual now jointly controlled the JV.

  The FCA was requested to comment on whether the formation of the Joint venture, i.e. the transformation of sole control into joint control, could be construed as such earlier corporate acquisition by the acquiring party as would require that the turnover of the JV, or half of it, should be added to the turnover of the new Subject under Article 11 b, Paragraph 5 of the Competition Act.

  According to Article 11 b, Paragraph 5 of the Act, when calculating the turnover of the Subject of an acquisition, it will be supplemented with the turnovers of all the companies or trusts operating in Finland and in the same line of business, that the acquiring party had acquired control of during the two years preceding the acquisition of the Subject. According to the earlier case history of the FCA, it is not necessary that the acquiring party in all the transactions that are being taken into account under the two-year rule is the same juridical person. For example, in the case of Hafab/Muovi 90 (9.3.1999, D. No. 65/81/99), the turnover of the Subject of the acquisition, Muovi 90, was added together with the turnover of the acquiring party itself, i.e. Hafab, because the Pipelife Group had acquired the sole control of Hafab during the preceding two years. Therefore, the two-year rule cannot be circumvented by first having the parent company in the role of the acquiring party, followed by one of its subsidiaries.

  The matter concerning the JV was about whether the above principle should be applied to the acquisition of the Subject. The FCA statement expressed the view that this firstly depends on whether the JV was within the same economic control, in the sense that its acquisition of the Subject can equally be seen as an acquisition by the Private Individual and the Investor on the basis of economic facts. Secondly, the statement also discussed the juridical nature of the merger resulting in the changed circumstances of control in the JV.

  According to a memorandum issued by the FCA on merger control, in situations where the party acquiring control is a Joint Venture in charge of all business operations that are typical of independent financial units, and already established in the market, the parties in a merger are normally the JV and the acquired subject. On the other hand, in situations where the facts, such as the shareholders’ substantial participation in initiating, arranging or financing the transaction, point to the JV being used as a tool for a corporate acquisition by the parent company, the parent companies can be considered as the true parties of the transaction (see also the Commission Report on the concept of companies taking part in a concentration of companies, Point 28). In

\(^6\) For applying the 2-year rule in situations where the turnover of companies acquired by a shareholder of a Joint Venture company, in the same line of business, are added to the turnover of a Subject acquired by the Joint Venture, see the FCA Yearbook 2000, p. 74.
these cases, the turnover of the Subject of the acquisition is calculated together with the turnover of the company, using the joint control pro-rata to its control in the JV.

The report obtained by the FCA suggested that the JV had the necessary financial and other resources to carry out business operations independently, and that the acquisition of the Subject took place at the initiative and in the interest of the Subject. The turnover of the JV was tens of times larger than the turnover of the Subject, so that the JV could not be considered dependent on, e.g., the financial support of the shareholders. The JV could, therefore, be considered the true party acquiring the Subject.

Regarding the nature of the merger concerning the acquisition of control in the JV, the FCA stated that the transformation of the sole control by the Private Individual into a joint control by the Private Individual and the Investor could not be considered similar to the arrangement implemented in the case of Hafab/Muovi 90 described above. The situation with respect to applying the two-year rule would have been different if the Private Individual and the Investor had jointly acquired control in the JV, in which case the later implemented joint acquisition of control would, for the purpose of applying the two-year rule, be treated in the same manner as the acquisition by the JV. In the latter case, the turnover of the JV would be added to the turnover of the newly acquired Subject in the same manner as in the case of Hafab/Muovi 90.

In its statement, the FCA took the view that the turnover of JV should not be added to the turnover of the Subject on the basis of the two-year rule. Therefore, there was no need to report the merger to the FCA.

- **The two-year rule and a non-independent JV as the Subject of an earlier acquisition (571/80/01):** The party acquiring control had, during the two years preceding the new transaction, acquired joint control of the company. The JV only produced services for one of its two major shareholders, which is why it could not be considered as an operationally independent Joint Venture company as defined in Article 11, Paragraph 1(4) of the Competition Act. The FCA took the view that when calculating the turnover in accordance with the two-year rule, only corporate acquisitions and mergers that can be considered as corporate acquisitions or mergers, in the meaning of the regulations governing mergers, will be taken into account. The turnover of the non-independent JV was, therefore, not added to the turnover of the subject of the new merger.

- **The date used in determining the turnover of the previously acquired Subject (Decision 15.6.2001, D. No. 454/81/01):** In 2001, Atkos Oy acquired Postlink Oy, a company in the same line of business. Atkos had itself been transferred from the joint control of Finland Post and TietoEnator into the sole control of Finland Post. According to Article 11 b, Paragraph 5 of the Competition Act, the turnover of the subject of the acquisition, Postlink, was calculated together with the turnover of Atkos during the financial year for which the latest audited Final Accounts were available, on the date the merger was implemented. On this basis, the 1999 turnover of Atkos was added to the turnover of Postlink.

- **The two-year rule and a public bid (1058/80/01):** The request for statement included a question about the date, which would be decisive when determining whether the turnover of a company acquired earlier through a public bid should be added to the turnover of the subject of a new acquisition. The possible alternative dates are, for example, the date the bid was announced, the date that the majority shareholding was acquired, the date the bid expired, or the date when the Subject of the acquisition was taken over. In its statement, the Department stated that the deciding date is the date of making the bid, in accordance with Article 6, Paragraph 2 of the Securities Markets Act. The opinion was analogous to the Implementing Provision of the merger regulations. According to the Provision, merger control is applicable to mergers implemented after the Act has come into force. The grounds for the Implementing Provision (HE 243/97) state that the
implementation of a merger refers to a date specified in Article 11 c, Paragraph 1 of the Act, and this date of implementation is the date from which the period for notifying the merger is calculated.

- **Foreign enterprises and the two-year rule (284/81/01):** In a corporate merger, the parent company of the company making the acquisition had been the subject of an acquisition during the preceding two years. In the request for a statement, the FCA was asked whether the turnover of the Group of the parent company that had been the subject of the earlier acquisition should be added to the turnover of the subject company that was operating in the same line of business, or merely the turnover of the Group of companies operating in Finland. In its statement, the Department found that, according to the wording of Article 11 b, Paragraph 5 of the Competition Act, only the turnovers of the previously acquired subsidiaries operating in Finland were added to the turnover of the subject. Thus, the turnovers of the parent company’s subsidiaries operating in other countries were not added to the turnover of the company. However, the turnover accrued abroad will be added, for example, in situations where a previously acquired subsidiary, operating in Finland, had business operations abroad that were not organised into an independent registered company domiciled abroad (see also FCA Decision of 16.6.2001, D. No. 194/81/01, Lohja Rudus/VV-Pumppaus).

A frequently encountered interpretation problem related to merger regulations concerns the relation between merger control and the company’s outsourcing of business functions.

- **Outsourcing was considered a transfer of business (Decision of 22.2.2001, D. No. 1204/81/00, TietoEnator/Rautaruukki):** TietoEnator acquired the entire IT business of the Rautaruukki Group. The acquired business included the operating services produced by the transferred business, most of the development and maintenance services of data systems, the capital assets, service agreements, and approximately 150 employees. Notwithstanding the fact that the operations transferred to TietoEnator through the transaction were largely committed to Rautaruukki’s requirements for several years, the FCA took the view that this was a case of a transfer of business resulting in such structural market changes that it should be notified to the Department. This view was especially influenced by the fact that the transferred resources could also be used to serve other customers, not only Rautaruukki. This was also indirectly evidenced by the ancillary restraint attached to the transaction whereby the parties had agreed on Rautaruukki’s minimum purchasing obligation, which was reducing year by year.

- **Outsourcing did not lead to a structural change (514/80/01):** The heat generation of a factory was outsourced by a heat supply agreement whereby the factory leased the boiler plant used for heat generation, and the land where it was located, to the power generating company. In its statement, the FCA took the view that this arrangement did not constitute a transfer of business of which it should be notified. This assessment was influenced by the fact that the arrangement did not involve transferring customers, other than the factory itself, to the power generating company, the fact that the minor supplies of heat to the few other companies within the factory perimeter were still handled by the factory itself, and the fact that the transferred heat generating capacity was not sufficient for supplying energy outside the factory perimeter. Connecting the factory’s heat generating plant to an external district heating network would not have been economically viable. The power generating company could not sell heat or energy to customers other than the outsourcing factory. The arrangement did not lead to a structural change in the market which is why the obligation to notify the Department did not arise.
Matters processed in merger control during 2001
(figures for the previous year in brackets):

<table>
<thead>
<tr>
<th>Total no of decisions</th>
<th>Pending notifications</th>
<th>Pending prenotifications</th>
<th>Lapsed prenotifications</th>
<th>Other closed matters</th>
</tr>
</thead>
<tbody>
<tr>
<td>104 (114)</td>
<td>8 (9)</td>
<td>5 (10)</td>
<td>21 (27)</td>
<td>23 (35)</td>
</tr>
</tbody>
</table>

Decisions issued on mergers during 2001 by type of decision
(figures for the previous year in brackets):

- Proposal for banning the merger 0 (1)
- Approved conditionally 5 (5)
- Approved as applied during Stage II 1 (1)
- Approved as applied during Stage I 98 (103)
- The transaction not caught by the scope of the Act 0 (0)

The nationality of the parties in the merger decisions of 2001
(figures for the previous year in brackets):

- All parties Finnish 41 (49)
- All parties foreign 31 (40)
- At least one foreign party 32 (25)

Procedural decisions in 2001
(figures for the previous year in brackets):

- Derogation from implementation ban 4 (6)
- Substantially incomplete notification 1 (5)