



Finnish Competition Authority (FCA) Guidelines

On Merger Control

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on merger control

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The new Finnish Competition Act (948/2011) entered into force on 1 November 2011. These guidelines replace the communication issued by the Finnish Competition Authority (FCA) on merger control in 1998 and the amendments made to the same in 2004. The objective of these guidelines is to clarify the principles according to which provisions governing merger control are interpreted and to provide more detailed instructions on the application of said provisions. It is not possible to anticipate all eventualities as regards different kinds of mergers and any potential interpretive issues associated with the same in this communication. Should any such issues arise, the interested parties are encouraged to contact the FCA.

I FCA merger control procedure

1 Introduction

This chapter briefly describes the main points of the FCA's merger control procedure. The objective of this chapter is to provide an overview of what merger control entails, how the procedure progresses, what kinds of action the FCA takes when appraising mergers, and what the potential outcomes of the procedure are. This chapter is not exhaustive, and many of the themes mentioned here will be discussed in more detail later on in this communication.

2 Before the merger notification

The merging parties can consult the FCA regarding the merger control procedure even before submitting the merger notification required under the Finnish Competition Act. The FCA provides advice on interpreting and applying the merger control provisions of the Finnish Competition Act. Many notified mergers are preceded by preliminary consultations during which the parties explain the planned merger to the FCA in more detail. The FCA recommends that the parties contact the FCA well in advance of submitting the merger notification.

The FCA also provides advice on many different aspects of mergers and takeovers. Much of the advice relates to the obligation to notify and issues such as the acquisition of control under the Finnish Competition Act, the economic autonomy of joint ventures, the definition of the parties to the concentration, and the calculation of turnover. Advice can also be given on the information required for merger notifications and the steps involved in the merger control procedure.

In practice, anyone can contact the FCA for information about interpretive issues relating to the obligation to notify in relation to mergers. Individuals contacting the FCA can do so in the strictest confidence¹ and, in some cases, without identifying the undertakings concerned. The FCA can give provisional opinions on the interpretation of the merger control provisions of the Finnish Competition Act over the telephone, in the course of preliminary consultations, or in writing, if so requested.

¹ Any enquiries sent to the FCA in writing are, upon receipt, considered official documents under the Finnish Act on the Openness of Government Activities (621/1999) and are as such subject to the confidentiality provisions of said act.

The interpretations of the FCA are based on information provided by enquirers. Ultimate responsibility for the accuracy and completeness of the information provided to the FCA always rests with whoever disclosed the information. Responsibility for fulfilling the obligation to notify and for submitting the merger notification, however, rests with those whose legal obligation it is to do so. Any opinions issued by the FCA in response to enquiries are always limited to the case at hand.

Many notified mergers are preceded by preliminary consultations. Preliminary consultations promote the fulfilling of the obligation to notify² and help the FCA to process mergers in a timely fashion. The primary objective of preliminary consultations is to increase the understanding of both the FCA and the parties to the concentration of any issues that may be pertinent to the appraisal process.³ Preliminary consultations are always held in the strictest confidence, and the FCA generally refrains from publishing information about mergers that have not progressed beyond the pre-notification stage.⁴

The FCA must be provided with a written description of the planned merger or a draft of the merger notification well in advance of the preliminary consultations.⁵ The information should ideally include basic details about the undertakings concerned, a description of the merger and the reasons behind it, and an overview of the markets that the merger may affect, including estimates of the parties' market shares on these markets. Previous decisions by competition authorities⁶ can be consulted to identify the markets that are relevant from the perspective of individual mergers.

The pre-notification contacts provide the possibility to preliminarily assess the competitive effects of the merger and the scope of information to be submitted in the merger notification. The FCA can waive some of the notification requirements⁷ on the basis of the pre-notification consultations, if a full notification is deemed unnecessary for appraising the merger. The FCA can also agree to the use of a short-form notification procedure⁸ as a result of the preliminary consultations. However,

² The obligation to notify will be discussed in more detail below in Chapter II Obligation to notify.

³ The process for appraising the potential anti-competitive effects of mergers will be discussed in more detail below in Chapter V Appraisal process.

⁴ This rule may be waived if the merger has already been made public or if the interested parties give consent to publishing the information.

⁵ This requirement may be waived if the consultation is held for purely informative purposes.

⁶ The decisions of at least the FCA and the European Commission should ideally be consulted to this end.

⁷ For more information, see Section IV.4 Finnish Government Decree on the scope of the obligation to notify.

⁸ For more information, see Section IV.5 Short-form merger notification procedure.

the FCA cannot give a final verdict on any potential competition concerns or other aspects of the appraisal process during the preliminary consultations, and any comments made by FCA representatives during the consultations are therefore provisional. In many cases preliminary consultations can be held over the telephone.

3 After the merger notification

The merger control procedure officially begins when the FCA receives a correct and complete merger notification.⁹ The notification must be submitted following the conclusion of an agreement, acquisition of control, or the announcement of a public bid but before closing the transaction.¹⁰ The FCA instigates the appraisal process as soon as the notification is received by requesting opinions or statements, usually in writing, from the customers, competitors, and suppliers of the merging parties, as well as from any relevant trade unions and associations and other interested parties.

If any third parties believe that the merger is likely to impede competition, these concerns must be made known to the FCA as soon as possible. Ideally, any views on the implications of the merger should be clearly explained and reasoned, providing examples and supporting documents where possible.

The FCA usually receives the majority of the information that it uses in appraising the competitive effects of mergers from the merging parties. This information is supplied either in the merger notification or on the basis of specific requests by the FCA. Information supplied by the parties generally includes plans relating to the merger, such as internal memoranda on its economic rationale and effects on competition (minutes of board of directors' meetings, studies, analyses, reports, etc.) and information about sales figures, capacity, and other aspects relating to the affected markets.

The FCA also requests market information from third parties. Moreover, the FCA can consult experts and publications produced by various research institutions or conduct surveys and other investigations. The information on which the FCA bases its appraisal also includes previous decisions of the FCA and other competition authorities. The FCA regularly visits undertakings and meets with various interested parties to appraise the competitive effects of mergers.

9 For more information about the effect of failure to submit a correct and complete notification on processing times, see Section IV.6 Failure to notify and incorrect and incomplete notifications.

10 The FCA can also begin to process the merger before the agreement has been signed, if the transaction is deemed very likely to close. However, the merger must be sufficiently tangible and public to allow the FCA to consult third parties as normal.

4 Processing times

The FCA issues its opinion on the merger within one month of the beginning of the merger control procedure. The FCA can either clear the merger at this juncture or initiate further proceedings. Further proceedings are initiated if the initial investigations suggest that the merger may have anti-competitive effects. The objective is to investigate the implications of the merger more thoroughly and to appraise the severity of any anti-competitive effects. The FCA has three months to conclude its investigation. The Finnish Market Court can extend the deadline by up to two months.¹¹

If the merging parties, or entities within the same group of companies, fail to provide the FCA with all of the information requested for the purposes of appraising the merger within the deadline or if the information provided is incomplete or inaccurate, the FCA can extend the processing time. This rule is primarily designed to discourage undertakings from intentionally ignoring their duty to disclose the required information or from deliberately providing incomplete or incorrect information.¹²

5 Decisions

The FCA clears mergers that do not give rise to anti-competitive effects as provided in the Finnish Competition Act.

If the FCA finds that a merger is likely to have anti-competitive effects¹³ it can impose conditions on the merger or propose to the Finnish Market Court that the merger be prohibited or dissolved. The FCA has a duty to consider any remedies proposed by the notifying parties for eliminating competition concerns before resorting to asking the Finnish Market Court for a prohibition.

In problematic cases, negotiations are conducted on the basis of remedies proposed by the notifying parties to the FCA. The FCA is not in a position to impose unilaterally any conditions on mergers. In practice, negotiations therefore involve the notifying parties proposing commitments that they believe will eliminate the competition concerns identified. Issues relating to enforcing and monitoring the implementation of these remedies are also discussed at this time. The FCA consults other market participants and decides on the adequacy of the proposals on

¹¹ For more information about processing times, see Section IV.2 Processing times.

¹² For more information, see Section IV.2.3 Extending processing deadlines.

¹³ For more information, see Chapter V Appraisal process. Mergers on the electricity market are subject to special provisions under the second paragraph of Section 25 of the Finnish Competition Act. The aforementioned chapter also contains more information about these provisions.

the basis of market testing, inter alia. If the remedies proposed by the parties are deemed sufficient for eliminating the competition concerns associated with the merger, the parties are asked to commit to the remedies in writing, whereafter the FCA orders that the remedies are to be complied with. The FCA cannot impose any conditions that the notifying parties have not consented to.

The FCA cannot ask the Finnish Market Court to prohibit a merger if the remedies proposed by the notifying parties are sufficient for eliminating the competition concerns identified. If remedies that would eliminate the competition concerns cannot be agreed, the FCA has a duty to ask the Finnish Market Court to prohibit the merger. In these circumstances, the Finnish Market Court must rule on the case within three months of the FCA's proposal.¹⁴

6 Business secrets associated with mergers

Any document submitted to the FCA is subject to the provisions of the Finnish Act on the Openness of Government Activities (621/1999). According to the act, all documents held by public authorities are considered public unless otherwise provided in the Finnish Act on the Openness of Government Activities or in other laws. Anyone can request information about specific public documents held by public authorities. According to the twentieth subparagraph of the first paragraph of Section 24 of the Finnish Act on the Openness of Government Activities, documents containing information on a private business or professional secret, as well as documents containing other comparable private business information, shall be secret if access would cause economic loss to the private business in question.

The elevated level of protection granted for business secrets is observed by the FCA in the assessment of mergers at the office. However, the FCA has a duty to grant access to any documents received in connection with merger control upon requests made under the Finnish Act on the Openness of Government Activities. The FCA asks all individuals and organisations dealing with the FCA with regard to mergers to clearly indicate any business secrets contained in written correspondence (e.g. e-mails) or other documents, for example, by highlighting or underlining such sections. The FCA also accepts so-called public versions of documents that contain business secrets, i.e. versions where the business secrets have been removed or blacked out. Ideally, public ver-

¹⁴ Issues relating to remedies, the associated negotiations, and the prohibition of mergers will be discussed in more detail below in Chapter VI Conditional clearance and prohibition of mergers.

sions of documents should be submitted at the same time as the original documents. However, the FCA also makes its own assessment as to whether sections that have been identified as business secrets really are business secrets under the Finnish Act on the Openness of Government Activities.

II Obligation to notify

1 Overview

Provisions on merger control are included in Chapter 4 of the Finnish Competition Act.¹⁵ The provisions entered into force on 1 November 2011. The FCA must be notified of all mergers that meet the criteria stipulated in the act, and transactions must not be closed until clearance or conditional clearance has been granted or until the transaction can be deemed to have been cleared otherwise. The obligation to notify has been laid down in Section 23 of the Finnish Competition Act. More detailed information about the scope of the obligation to notify is provided in a Finnish Government Decree (1012/2011).¹⁶ An annex to the decree includes a detailed list of the information that must be submitted in the notification.

The new merger control provisions apply to mergers agreed after 1 November 2011. A merger is considered to have been agreed once an obligation to notify materialises under Section 23 of the Finnish Competition Act.

2 Application of merger control provisions

The FCA must be notified of all transactions that are considered mergers under Section 21 of the Finnish Competition Act where the turnovers of the undertakings concerned in the transaction exceed the thresholds specified in Section 22 of the act.¹⁷ According to the first paragraph of Section 21 of the Finnish Competition Act, any transaction that involves the acquisition of control as defined in Chapter 1 Section 5 of the Finnish Accounting Act (1336/1997) or an acquisition of a corresponding actual control, the acquisition of a business or a part thereof, merger, or the creation of a joint venture which shall perform on a lasting basis all of the functions of an autonomous economic entity constitutes a merger. Generally speaking, all arrangements that affect the structure of the

¹⁵ The merger control provisions of the Finnish Competition Act are discussed in more detail in the government bill associated with the act (HE 88/2010) and especially in the detailed grounds provided in the bill. Earlier government bills relating to the old Finnish Act on Competition Restrictions may also be cited as precedents where applicable with regard to issues relating to the obligation to notify and the calculation of turnover, for example (see HE 11/2004 and HE 243/1997).

¹⁶ Finnish Government Decree on the scope of the obligation to notify (1012/2011).

¹⁷ For more information, see Chapter III Calculation of turnover and Finnish Government Decree on the calculation of the turnover of merging undertakings (1011/2011).

market and result in a change of control or a transfer of business assets are subject to merger control.¹⁸

Section 21 of the Finnish Competition Act does not apply to contracts and cooperative arrangements that regulate the market behaviours of market participants, and these are instead governed by Sections 5–7¹⁹ of the act where applicable. For example, a joint sales company set up by competitors is governed by Section 5, because this kind of a joint undertaking does not constitute a joint venture that has permanent control over all of the functions of an autonomous economic entity under the fourth subparagraph of the first paragraph of Section 21 of the act. On the other hand, an agreement that regulates market behaviour can be cleared through the merger control procedure if it constitutes an ancillary restraint, i.e. an arrangement that is necessary for the implementation of the merger.²⁰

The merger control provisions of the Finnish Competition Act do not apply if the merger is governed by Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation)²¹, except in situations where the Commission refers the case to the FCA under the fourth paragraph of Article 4 or Article 9 of the regulation. The national merger control provisions of other countries, on the other hand, have no bearing on the obligation to notify in Finland. It can therefore be necessary to notify several national competition authorities.

According to the fifth paragraph of Article 3 of the EC Merger Regulation, certain temporary ownership arrangements are not considered concentrations under the regulation and the Commission does therefore not need to be notified. Provided that the other criteria applicable to the obligation to notify are met, these transactions nevertheless need to be notified in Finland, as the Finnish Competition Act does not include provisions exempting temporary ownership arrangements. Where the turnover thresholds stipulated in the EC Merger Regulation are exceeded, temporary ownership arrangements do not need to be notified in Finland, as the Commission has sole jurisdiction over concentrations that have a Community dimension. The FCA provides advice on the obligation to notify and the scope of the obligation as necessary.

¹⁸ For more information about the concept of control and different ways of acquiring control, see Section 3 Notified mergers.

¹⁹ Where a restriction on competition is likely to have major implications on trade between the Member States of the EU, Articles 101 and 102 of the Treaty on the Functioning of the European Union also apply.

²⁰ See Chapter VII Ancillary restraints.

²¹ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJEU L 24, 29 January 2004, p. 1

3 Notified mergers

3.1 Overview

According to Section 21 of the Finnish Competition Act, any transaction that involves the acquisition of control, the acquisition of a business or a part thereof, merger, or the creation of a joint venture constitutes a merger. The type of the merger can have a bearing on which of the undertakings concerned has an obligation to notify and when. According to the third paragraph of Section 23 of the Act, the obligation to notify falls on the party that acquires control, a business, or a part thereof, the parties involved in a consolidation, or the founding members of a joint venture.

The EC Merger Regulation refers to mergers as concentrations. The European Commission has issued a Consolidated Jurisdictional Notice under the EC Merger Regulation ('Jurisdictional Notice').²² The Jurisdictional Notice includes information about the concept of concentration. Since the definition provided for a concentration in the EC Merger Regulation and the definition provided for a merger/concentration in the Finnish Competition Act are largely compatible, the Jurisdictional Notice of the Commission and the associated interpretations can also be used to interpret the Finnish Competition Act where applicable.²³

3.2 Acquisition of control

3.2.1 Overview

Control means the possibility of exercising decisive influence over the actions and competitive behaviour of an undertaking. Control is not tied to the legal form of the arrangement. With regard to the acquisition of control, the party with an obligation to notify is the party acquiring control. Mergers involving a replacement of one or more of the parties exercising joint control or where the structure of control changes otherwise are exceptions to this rule. In these cases, the undertakings that retain joint control may have an obligation to notify even if they are not actually contractual parties in the transaction. These situations will be discussed in more detail below.²⁴ According to the first subparagraph of the first paragraph of Section 21 of the Finnish Competition Act, a merger can involve the acquisition of control as defined in Chapter 1 Section 5 of the Finnish Accounting Act (1336/1997) or an acquisition of a corresponding actual control.

²² Commission Consolidated Jurisdictional Notice, OJEU C 95, 16 April 2008, p. 1.

²³ Government Bill on the Finnish Competition Act (HE 88/2010), Section 21, detailed grounds.

²⁴ See Section 3.5.3 Special circumstances relating to joint control.

3.2.2 *Acquisition of control under the Finnish Accounting Act*

Chapter 1 Section 5 of the Finnish Accounting Act defines control as the majority of voting rights or the power to appoint the majority of the members of the undertaking's governing body or the majority of the individuals who appoint the members of the governing bodies. In a limited company, the majority of voting rights or the power to appoint the majority of the members of the governing body is based on share ownership, membership, articles of association, partnership agreement, or other similar rules or agreements. Provisions on calculating voting rights are included in the fourth and fifth paragraphs of the aforementioned section of the act.

3.2.3 *Acquisition of a corresponding actual control*

The acquisition of decisive influence in another comparable manner as referred to in the first subparagraph of the first paragraph of Section 21 of the Finnish Competition Act differs from the acquisition of control under the Finnish Accounting Act in several ways. Control can be acquired by other means than those stipulated in the Finnish Accounting Act, the acquirer can be a natural person or a foundation, there can be one or more acquirers, and control can be acquired indirectly through a joint venture, for example. In a limited company, even a relatively small number of votes can amount to control, if there are several shareholders or if shareholders regularly fail to attend annual meetings.²⁵ For example, if only half of the total votes of an undertaking are regularly represented in annual meetings, acquiring shares that correspond to more than a quarter of the voting rights can amount to the power to appoint the majority of the members of the undertaking's board of directors.

Acquiring sole control in an undertaking usually requires the power to appoint the majority of the members of the board of directors. Control can be deemed to have been acquired even before any decisive influence has been exercised as regards the board of directors; the decisive factor is the possibility to change the composition of the board of directors or to exercise decisive influence otherwise. Examples of cases involving the acquisition of decisive influence include provisions in articles of association, shareholders' agreements, or financial agreements

²⁵ See, for example, the ruling of the FCA on 3 August 2001 on conditional merger clearance in the case of Sonera Oyj/Loimaan Seudun Puhelin Oy (1202/81/2000), where the FCA found that the 16.67% holding of Sonera amounted to decisive influence over Loimaan Seudun Puhelin Oy because the shares were divided between several different shareholders and the clause governing voting restrictions had been removed from the articles of association.

that give a minority party in a board of directors a possibility to make major strategic business decisions alone.

An undertaking's financial dependence on a minority shareholder can also give this party a possibility to make major business decisions alone. Examples of the aforementioned major strategic decisions include the undertaking's budget, business plan, investments, mergers and take-overs, the appointment of senior management, and other critical business decisions. The acquisition of control over the business plan or the budget is usually the clearest indication that decisive influence has been acquired. Control can also be deemed to have been acquired in situations where only one shareholder has the possibility to block strategic decisions on the basis of veto rights or voting rules.

Terms and conditions relating to controlling investment risks and for guaranteeing recovery under credit facilities provided by financial institutions or conventional financial agreements do not usually constitute control under the first subparagraph of the first paragraph of Section 21 of the Finnish Competition Act per se. The more power a financial agreement gives to influence decision-making with regard to the undertaking, the more likely this is to amount to the acquisition of control under the first subparagraph of the first paragraph of Section 21 of the Act. A financial institution clearly has control if it holds the majority of voting rights or has the power to appoint more than half of the members of the undertaking's board of directors.

Decisive influence can also be acquired as a result of the combined effect of a minority interest, mezzanine financing, terms and conditions of conventional financial agreements, and the financial dependence of the undertaking receiving finance. It is especially important to note with regard to control that is based on financial relationships that the acquisition of control does not require that the arrangement is permanent. For example, a financial institution, an insurance company, or an investment firm that acquires the majority of shares in an undertaking is deemed to have acquired control even if the holding is designed to only last for a specific loan period.

3.2.4 Joint control

Control can also be acquired jointly. Joint control exists in situations where two or more shareholders²⁶ need to agree on the undertaking's strategic decisions in order to run the business. Joint control can be based, for example, on an even distribution of shares with voting rights

²⁶ Shareholders can be undertakings or natural persons.

between two shareholders, an even number of votes between two shareholders in the undertaking's decision-making bodies, an equal right to appoint members of the governing bodies, a shareholders' agreement on exercising joint control, or a provision in the articles of association. A minority shareholder can also be deemed to have joint control if the shareholder in question has a possibility to block strategic decisions pertaining to the undertaking. The acquisition of joint control is subject to merger control if the undertaking over which joint control is exercised constitutes an autonomous joint venture under the fourth subparagraph of the first paragraph of Section 21 of the Finnish Competition Act. Joint control and special circumstances relating to joint control will be discussed in more detail below in Section 3.5 Joint ventures.

3.3 Acquisition of a business or a part thereof

One of the forms of mergers mentioned in the second subparagraph of the first paragraph of Section 21 of the Finnish Competition Act is the acquisition of a business or a part thereof. This refers to the acquisition of control over business assets in a manner that causes a structural change on the market. For example, the acquisition of a machine, a piece of equipment, or a production facility without a customer base, know-how, or personnel is usually not considered a merger under the Finnish Competition Act. If, however, the assets allow the acquirer to run a business and if turnover can be attributed to the assets, the acquisition usually constitutes a business or a part thereof as referred to in the aforementioned section of the act. Where the transfer of assets includes personnel, the transaction usually amounts to a merger.²⁷ In some cases, the acquisition of intellectual property rights can be deemed to constitute an acquisition of a part of a business, even if no personnel are transferred in the transaction. The acquisition of intellectual property rights can have critical implications on business in the high-tech sector, for example. Notified mergers also include dissolutions of joint ventures where the business or a part of the business of the joint venture is transferred to one of the parties involved in the joint venture or to a third party. The obligation to notify falls on the party acquiring the business or a part thereof.

²⁷ However, this is not an absolute prerequisite. See, for example, the ruling of the FCA on 20 April 2001 on merger clearance in the case of Biowatti Oy/Kankaanpää pulpwood chipping plant (273/81/2001), where the FCA found that although no personnel were transferred to the purchaser, the assets acquired amounted to more than an individual machine or piece of equipment, which allowed the acquirer to use the assets to run a business and to attribute turnover to the assets. The merger therefore involved an acquisition of a business under the second paragraph of Section 11 of the Finnish Competition Act.

3.4 Merger

According to the third subparagraph of the first paragraph of Section 21 of the Finnish Competition Act, a consolidation of two formerly autonomous undertakings also constitutes a merger. Consolidation can involve absorption, where one or more undertakings are absorbed by the receiving undertaking. Alternatively, consolidation can involve the amalgamation of at least two undertakings that together form the receiving undertaking. More detailed provisions on the consolidation of undertakings are included in the Finnish Limited Liability Companies Act, the Finnish Cooperatives Act, the Finnish Foundations Act, and the Finnish Insurance Companies Act, among others. The obligation to notify falls on the undertakings involved in the consolidation. In the case of absorption, both the receiving undertaking and the merging undertaking have an obligation to notify. In the case of amalgamation, the obligation to notify falls on the undertakings that form the receiving undertaking.

3.5 Joint ventures

3.5.1 Overview

According to the fourth subparagraph of the first paragraph of Section 21 of the Finnish Competition Act, the creation of a joint venture that takes permanent control over all of the functions of an autonomous economic entity constitutes a merger. A joint venture is subject to merger control if it is intended to operate on a lasting or permanent basis and if it has sufficient resources to operate independently of the founding members.

According to the third paragraph of Section 23 of the Finnish Competition Act, the obligation to notify falls on the undertakings forming the joint venture.²⁸ The basic prerequisite for merger control provisions to apply is that the transaction involves a structural arrangement aimed at transferring control or business assets. If control is divided between two or more parties after the transaction, the arrangement can amount to a notified joint venture. In addition to the setting up of a new joint venture, merger control provisions also apply to arrangements where two or more undertakings acquire joint control over a third undertaking that does not belong to the same groups of undertakings as the parties acquiring control.²⁹ Moreover, a situation where joint control is established over an undertaking that was previously controlled by one party alone can amount

²⁸ The parties that exercise control over the joint venture.

²⁹ In the latter case, the criterion that the joint venture takes permanent control over all of the functions of an autonomous economic entity does not need to be met and instead the fact that the acquisition involves a business to which turnover can be attributed is enough to establish the obligation to noti-

to a notified merger. Merger control provisions also apply to structural arrangements that cause control to be transferred or the structure of control to change. Moreover, enlarging a joint venture can amount to a notified merger.³⁰

In order for merger control provisions to apply to arrangements associated with joint ventures, 1) control must be divided between at least two parties involved in the joint venture, 2) the joint venture needs to have control over all of the functions of an autonomous economic entity, and 3) the joint venture needs to be intended to operate on a lasting or permanent basis. However, the appraisal as to whether or not a joint venture constitutes a merger is not based on individual criteria but on the overall situation. As regards joint ventures, the FCA also refers to the Commission's Jurisdictional Notice where applicable (especially Sections 91–109).³¹

3.5.2 *Joint control*

Joint control exists where two or more shareholders must reach a common understanding in determining the strategic commercial behaviour of an undertaking. Joint control is characterised by the possibility of a deadlock situation. This results from the power of two or more shareholders to reject proposed strategic decisions.

Joint control exists where two or more shareholders must reach a common understanding in determining the strategic commercial behaviour of an undertaking. Joint control is characterised by the possibility of a deadlock situation. This results from the power of two or more shareholders to reject proposed strategic decisions.

In some cases, joint control arises from the joint exercise of voting rights. In these situations, several minority shareholders agree either expressly or otherwise to vote together in order to gain control over the undertaking. Very exceptionally collective action can occur on a de facto basis where strong common interests exist between minority shareholders to the effect that they would not act against each other in exercising their rights in relation to the joint venture.

fy. This is due to the fact that the structure of the market changes even if the acquired undertaking only provides services to its parents.

30 For example, a change where a (formerly) non-autonomous joint venture begins to sell products or services to parties other than its parents can constitute a notified merger.

31 The FCA bases its appraisal as to whether or not a joint venture operates on a lasting basis and has control over all of the functions of an autonomous economic entity on the interpretations associated with the EC Merger Regulation where applicable, as provided in the detailed grounds given for the fourth subparagraph of the first paragraph of Section 11 in the Government Bill on amending the Finnish Act on Competition Restrictions and certain associated acts (HE 243/1997).

In the absence of strong common interests, the possibility of changing coalitions between minority shareholders normally excludes the assumption of joint control.

In the absence of strong common interests, the possibility of changing coalitions between minority shareholders normally excludes the assumption of joint control.

3.5.3 Special circumstances relating to joint control

(i) Introduction

Certain changes in the structure of control over an undertaking can create a situation of joint control and amount to a notifiable merger. A change that causes joint control to be replaced by sole control also creates an obligation to notify.

(ii) A change from sole control to joint control

Sole control changes to joint control when one or more shareholders acquire joint control over an undertaking that was previously subject to sole control. If the shareholder that previously held sole control continues to have joint control over the undertaking, the arrangement constitutes a setting up of a joint venture and therefore falls under Section 2 of Finnish Government Decree on the calculation of the turnovers of merging undertakings (1011/2011). If the shareholder that previously held sole control continues to have joint control over the undertaking with the new shareholders, all of the parties sharing joint control are considered to be founding members of the joint venture and therefore have an obligation to notify.

(iii) A replacement of an existing shareholder in an already jointly controlled undertaking or other change in the structure of control

An obligation to notify arises if the number of controlling shareholders increases or if an existing shareholder is replaced. However, a replacement of a subsidiary by its parent as a controlling shareholder is not deemed to amount to a change in the structure of control and is therefore not a notifiable merger. A reduction in the number of controlling shareholders does not usually constitute a notified merger, except where this leads to a change from joint control to sole control or a replacement of an existing shareholder.

With regard to situations where changes take place in the structure of joint control, the obligation to notify falls on all of the shareholders that

remain in joint control of the undertaking after the transaction. The obligation to notify applies to all parties exercising joint control even if no changes take place in the holdings of individual shareholders.

(iv) A change from joint control to sole control

Joint control changes to sole control when one or more shareholders sell their shares in the joint venture and the remaining shareholder gains sole control. The shareholder that retains sole control over the undertaking is considered to have acquired control and therefore has an obligation to notify the FCA.

3.5.4 Economic autonomy

(i) Introduction

In order for merger control provisions to apply, joint ventures usually³² need to fulfil the criterion of having control over all of the functions of an autonomous economic entity.

(ii) Operative management and sufficient resources

In order for merger control provisions to apply, joint ventures need to have operative autonomy and sufficient economic and tangible assets to operate independently on the market. Operative autonomy does not mean that the controlling undertakings could not influence the strategic decisions of the joint venture. Autonomous joint ventures generally have their own personnel (including operative management and marketing and sales personnel), business premises (for production, warehousing, and sales), and financial independence.

(iii) Relationship between the parents and the joint venture

In order for merger control provisions to apply, joint ventures need to be able to perform the functions normally carried out by undertakings operating on the same market independently. A joint venture is not considered an autonomous economic entity if its business relies on the parents beyond an initial start-up period.

Merger control provisions do not apply to joint ventures established solely for the purpose of assisting the parents in specific functions such as research and product development. An appraisal of joint ventures es-

³² Merger control provisions can also apply to non-autonomous joint ventures where they acquire business assets from third parties. The dissolution of a non-autonomous joint venture can also amount to a notifiable merger especially if the assets originally invested in the joint venture change hands upon dissolution.

established for the purpose of outsourcing functions of the parents takes into account not just whether the joint venture operates independently and actively but also whether the market has other undertakings that specialise in the same business as the joint venture. The existence of other undertakings on the market can be considered an indication that the services of the joint venture are not limited to assisting its parents.

Extensive sale/purchase relations between the joint venture and its parents can amount to the joint venture not being considered an autonomous economic entity and therefore to it not being a notifiable merger. The crucial element here is the proportion between sales to the parents and sales to third parties or purchases from the parents and purchases from third parties. If more than half of the sales of the joint venture are to third parties, it can be deemed to be autonomous.³³ In relation to purchases made by the joint venture from its parents, the autonomy of the joint venture is questionable in particular where little value is added at the level of the joint venture itself. The appraisal also calls attention to whether the parents and the joint venture deal with each other on the basis of normal commercial conditions. The fact that, for an initial start-up period only, the joint venture relies almost entirely on sales to or purchases from its parents does not normally affect the applicability of merger control provisions. However, the start-up period should normally not exceed a period of three years.

If the joint venture operates in a supply or distribution network provided by the parents, long-term or extensive trading between the parents and the joint venture does not necessarily make the joint venture exempt from merger control. For example, long-term and extensive trading between the parents and the joint venture can be due to the fact that the parents dominate the supply or demand of the products or services in question. In addition to the reasons behind the extent of trading between the parents and the joint venture, the appraisal also calls attention to how significant the trading relationship is to business. As regards raw materials and other production inputs, special attention is called to the cost of the inputs sourced from the parents or the joint venture relative to the sale price of the finished product. The greater the significance of mutual trade is to business and the smaller the value added through the supply or distribution network between the parents and the joint venture, the more likely it is that the joint venture is not considered autonomous under the Finnish Competition Act. Merger control provisions

33 Situations where less than 50% of sales are to third parties are analysed on a case-by-case basis. In these circumstances, special attention is called to whether the joint venture deals with its parents on the basis of normal commercial conditions.

do not generally apply if the joint venture acts as a sales agency for distributing the products of the parents. If, however, the joint venture performs the normal functions of a trading company and procures a significant percentage of its supplies from other parties than the parents and if there are other undertakings that specialise in the sale and distribution of the products in question on the market, merger control provisions usually apply. Even where the joint venture uses the distribution networks or sales facilities of one or more of its parents, it does not necessarily lose its status as an autonomous economic entity if the parents only act as representatives of the joint venture

3.5.5 Operation on a lasting basis

In order for merger control provisions to apply, the joint venture needs to be intended to operate on a lasting or permanent basis. The fact that the parents commit resources to the joint venture normally demonstrates that the joint venture is intended to operate on a lasting basis. The existence of provisions on the dissolution of the joint venture or the possibility for one or more parents to withdraw from the venture does not automatically prevent the joint venture from being considered as operating on a lasting basis. If the agreement specifies a period for the duration of the joint venture, this period needs to be sufficiently long to bring about a lasting change in the structure of the market. Joint ventures established for a finite duration of just a few years are usually not considered to be operating on a lasting basis. Based on case law, the Commission considers a minimum period of approximately 10–15 years sufficient. In special circumstances, joint ventures established for a shorter finite duration can also be considered to be operating on a lasting basis. Merger control provisions do not apply to joint ventures established for the execution of a specific project, for example. A joint venture also lacks the sufficient operations on a lasting basis at a stage where there are decisions of third parties outstanding that are of an essential core importance for starting the joint venture's business activity. Examples of such circumstances include pending licence applications.

3.5.6 Changes in the activities of joint ventures

Joint ventures can enlarge the scope of their business by acquiring assets or rights from their parents. This kind of an enlargement can amount to a new notifiable merger. However, this requires that the other criteria set on notifiable mergers are also met. If the scope of a joint venture is

enlarged without additional assets, contracts, know-how, or rights being transferred, no new notifiable merger is deemed to arise.

A change in activities can turn a non-autonomous joint venture into an autonomous joint venture if it acquires control over all of the functions of an autonomous economic entity, for example by beginning to sell large volumes of products to parties other than its parents. If the other criteria are met, this kind of a change amounts to a notifiable merger.

3.5.7 Non-autonomous joint ventures (i.e. non-full function joint ventures)

Joint ventures that do not have control over all of the functions of an autonomous economic entity are not notifiable, and the potential restraints on competition related to such arrangements are instead appraised according to Sections 5–7³⁴ of the Finnish Competition Act.

Merger control provisions can also apply to non-autonomous joint ventures if they acquire business assets from third parties.³⁵ Moreover, the dissolution of a non-autonomous joint venture can create an obligation to notify.³⁶

3.5.8 Cooperative agreements relating to commercial behaviour

It is important to note with regard to arrangements relating to joint ventures that contracts and cooperative agreements that only regulate the commercial behaviour of undertakings are, with the exception of ancillary restraints, not governed by merger control provisions and are instead appraised under the provisions of Sections 5–7³⁷ of the Finnish Competition Act. Restrictions on competition are considered ancillary restraints if they are directly related to and necessary for the implementation of a notified joint venture.³⁸

3.6 Special considerations

3.6.1 Indirect acquisition of control

Control can also be acquired indirectly through a joint venture, for example.³⁹ The parents of a joint venture are considered to have acquired

³⁴ Where a restriction on competition may appreciably affect trade between the EU Member States, Articles 101 and 102 of the Treaty on the Functioning of the European Union also apply.

³⁵ For more information, see Section 3.6.1 Indirect acquisition of control.

³⁶ This is the case especially if the assets originally invested in the joint venture change hands upon dissolution.

³⁷ Where a restriction on competition is likely to have major implications on trade between the Member States of the EU, Articles 101 and 102 of the Treaty on the Functioning of the European Union also apply.

³⁸ See Chapter VII Ancillary restraints.

³⁹ Government Bill on amending the Finnish Act on Competition Restrictions and certain associated acts (HE 243/1997), Section 11(1), detailed grounds.

control if the joint venture is used as the parents' agent in the acquisition and if the joint venture, although formally responsible for making the acquisition, does not have control over all of the functions of an autonomous economic entity. The appraisal as to which party has acquired control calls attention to the objective of setting up the joint venture, the operation of the joint venture, the financial independence of the joint venture, and other financial factors that determine whether the joint venture is considered a *de facto* party in the transaction

3.6.2 *Internal restructuring*

According to the second paragraph of Section 21 of the Finnish Competition Act, merger control provisions do not apply to internal restructuring as referred to in the first paragraph of the section. The merger control provisions of the Finnish Competition Act therefore do not apply to mergers that take place within a group of undertakings. However, situations where one undertaking acquires the remaining shares of another undertaking belonging to the same group from a third party and where joint control established under a shareholders' agreement, for example, is therefore dissolved do not constitute internal restructuring. This changes the structure of the market and therefore amounts to a merger under the first paragraph of Section 21 of the Finnish Competition Act.

3.6.3 *Two-year rule*

A merger can consist of two or more transactions that bring about the acquisition of control or a business or a part thereof. These kinds of situations are governed by the fourth paragraph of Section 24 of the Finnish Competition Act. When determining the turnover of an acquired business, the calculations include any transactions involving the acquisition of a business or a part thereof from the same undertaking within a period of two years from the last transaction. This is done irrespective of whether or not the earlier transactions relate to a legal person or only to specific functions, for example. The objective of the provision is to ensure that the legal obligation to notify cannot be circumvented by splitting the merger into several separate transactions. The turnover of the acquired business is calculated taking into account all acquisitions from the same group of undertakings. The obligation to notify cannot be circumvented, for example, by declaring a parent as the vendor in one transaction and a subsidiary as the vendor in another. Similarly, any acquisitions from the same vendor by other undertakings belonging to the same group as the acquirer are also taken into account where these have taken place within the previous two-year period.

III Calculation of turnover

1 Overview

One of the conditions for merger control provisions to apply is that the turnover thresholds specified in Section 22 of the Finnish Competition Act are exceeded. The jurisdiction between the FCA and the European Commission also comes down to turnover thresholds. The turnover thresholds that establish jurisdiction to the Commission are specified in Article 1 of the EC Merger Regulation.

According to Section 22 of the Finnish Competition Act, merger control provisions apply to all mergers where the aggregate turnover of the undertakings concerned exceeds EUR 350 million and where at least two of the undertakings concerned each have a turnover of more than EUR 20 million generated in Finland. More detailed provisions on identifying the undertakings concerned are included in the third paragraph of Section 21 of the Finnish Competition Act.

More detailed provisions on the calculation of turnover are included in Finnish Government Decree on the calculation of turnover of parties to concentration. The objective of this chapter is to clarify problematic situations that can arise with regard to calculating turnovers.

The undertaking concerned need to be especially careful when determining what income counts towards turnover according to the Finnish Government Decree in cases where the calculations are instrumental to deciding whether the turnover thresholds are exceeded.

2 Definition of turnover

2.1 Introduction

Turnover as referred to in Sections 22 and 24 of the Finnish Competition Act comprises the amounts derived by the undertaking concerned in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary activities worldwide after the deduction of sales rebates and of value added tax and other taxes directly related to turnover as provided in the Finnish Accounting Act (1336/1997)⁴⁰ (first paragraph of Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration).

⁴⁰ The FCA has previously held that car tax also constitutes a tax that can be deducted from turnover under the decree. This interpretation is also consistent with the case law of the European Commission.

The calculation of the turnovers of credit institutions, investment firms, and other financial institutions as well as insurance companies and pension providers under the Finnish Competition Act will be discussed in more detail below in Section 2.7 Credit institutions, investment firms, and insurance companies.

2.2 Preceding financial year

More detailed provisions on dating and signing financial statements are included in Chapter 3 Section 7 of the Finnish Accounting Act. According to the Act, all financial statements must be dated and signed by the reporting entity. If the reporting entity is a corporation or a foundation, the annual accounts must be signed by the board of directors or the responsible partners together with the managing director or another person in a comparable position.

Turnover is calculated on the basis of the last audited financial statements preceding the notified merger. For example, if an undertaking's financial year coincides with the calendar year and it agrees on a merger (signs the agreement) on 1 January 2010, turnover is calculated on the basis of the audited 2008 financial statements even if the 2009 financial statements were to be audited before the merger is closed. However, turnover calculations can be adjusted in certain circumstances, as will be discussed below.⁴¹

2.3 Ordinary activities

Amounts derived from ordinary activities comprise the income achieved from the sale of products or the provision of services in the normal course of the undertaking's continuing and systematic business operations or activities that have become established as part of the undertaking's business.⁴² This definition corresponds to the definition of turnover or similar income as provided in the Finnish Accounting Act. Any future reference to turnover also includes other similar income.

2.4 Amounts included in turnover

2.4.1 Overview

The definition of a group provided in the Finnish Limited Liability Companies Act is not consistent with the definition of a group of undertakings provided in Section 24 of the Finnish Competition Act. This is why

⁴¹ See Section 2.5 Adjustments to turnover calculations in certain circumstances.

⁴² The definition of ordinary activities is based on the case law of the Finnish Accounting Board.

consolidated financial statements produced according to Chapter 6 Sections 2 and 3 of the Finnish Accounting Act do not necessarily include all of the amounts that count towards turnover in the context of mergers.

Turnover includes the amounts derived from the sale of products and the provision of services in the course of the undertaking's operating activities. All amounts received from inventories, for example, are generally considered to count towards turnover. Operating income is not limited to amounts received from the sale of products or the provision of services but also includes rental income, for example.⁴³

As regards mergers, turnover comprises the amounts referred to in Section 22 of the Finnish Competition Act and Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration. The undertakings' own interpretation of what constitutes turnover in their financial statements is not relevant. In practice, interpretive issues can arise from whether specific receivables are recorded in the income statement under turnover, other operating income, or extraordinary items, for example. Due to these kinds of interpretive issues, the turnover declared in an undertaking's financial statements does not necessarily correspond to the definition of turnover under the Finnish Competition Act and Finnish Government Decree on the calculation of turnover of parties to concentration.

2.4.2 *Pass-through items*

According to accounting regulations, turnover does not include so-called pass-through items that typically do not have a direct impact on the income formation of undertakings; undertakings pass these items on as they are, on the same conditions, and at the same price, and there is no expectation of profit.

For example, turnover of travel agencies comprises the amounts received from the tours organised by the agencies themselves. The turnover of travel agencies that sell tours provided by other travel agencies includes the commissions received. Turnover also includes commissions received from other services regularly provided by travel agencies (such as travel insurance).

2.4.3 *Public aid*

Any public aid received by undertakings counts towards turnover as provided in rules governing accounting. Aid or compensation is included

⁴³ This is the case with property companies, for example.

in turnover if it is granted towards the undertaking's ordinary activities, if the undertaking is the final beneficiary of the aid, if the aid has a direct impact on the undertaking's income formation, if it is received as compensation for the provision of a service, and if it is directly related to the sale of a commodity.

2.5 Adjustments to turnover calculations in certain circumstances

2.5.1 Adjustments resulting from the length of the financial year

According to the second paragraph of Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration, turnover is adjusted to correspond to a period of twelve months if the financial year of the undertaking is either shorter or longer. For example, if the undertaking's financial year is eighteen months long, the turnover is divided by eighteen and then multiplied by twelve.

2.5.2 Adjustments resulting from mergers

Turnover is a measure of the economic resources associated with mergers in practice and the actual financial position of the parties at the time of the merger. If the turnover reported in the last audited financial statements does not provide an accurate picture of these economic resources, the calculations need to be adjusted.

This is the case, for example, if one or more of the merging parties has divested or acquired a business or a part thereof after the end of the financial year. Any turnover generated by divested businesses is deducted from the turnover reported in the last financial statements, and any turnover generated from an acquired business is added. However, these deductions and additions are only made for transactions that have closed before the notified merger⁴⁴ (i.e. before the action that gives rise to the obligation to notify) unless the acquisition or sale of a business is necessary for the implementation of the merger.

Turnover also needs to be adjusted with regard to any transactions that have been closed during the financial year covered by the last audited financial statements if the changes in turnover resulting from these transactions are not fully reflected in the financial statements in question. In these situations, the turnover figures contained in the audited financial statements need to be adjusted in order to be able to deduct the turnover generated by businesses divested during the financial year in

⁴⁴ This changes the practice adopted under the Finnish Act on Competition Restrictions whereby a binding agreement on a merger or another action that created an obligation to notify under Section 11(c) of the Act before agreeing on the notified merger at hand was sufficient for turnover to be adjusted, and instead these transactions now need to be closed in order for turnover to be adjusted. The objective of the reform is to make Finland's national practice consistent with EU law.

question and to add the turnover generated by businesses acquired. In other words, any turnover generated by a sold business needs to be deducted from the turnover reported in the latest financial statements, and any turnover generated by an acquired business needs to be added in full.

What has been stated here with regard to the divestment of business assets also applies to closure of businesses.

2.6 Deductions from the aggregate turnover

According to the fourth paragraph of Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration, the aggregate turnover must not include turnover derived from the sale of products or the provision of services between each of the parties and entities within the same group of companies as defined in the first or third paragraph of Section 24 of the Finnish Competition Act.⁴⁵ However, only turnover derived from intra-group transactions is deducted. Turnover derived from the sale of products or the provision of services between the parties to concentration is not deducted from the aggregate turnover. The rule on the deduction of intra-group turnover does not apply to cases involving a change of control under Section 3 of the Decree. This is because where a change of control occurs in a jointly controlled undertaking, the undertaking in question is an undertaking concerned and its turnover is therefore calculated according to the rules applicable to situations involving the acquisition of control.

2.7 Credit institutions, investment firms, and insurance companies

According to the first subparagraph of the second paragraph of Section 22 of the Finnish Competition Act, the turnover of credit institutions, investment firms, and other financial institutions governed by the provisions of Chapter 9 of the Finnish Credit Institutions Act (121/2007) comprises the combined amount of the categories of income reported in an income statement produced according to said act. According to Annex 1 of the Finnish Financial Supervisory Authority standard on financial statements and management reports (Standard 3.1), categories of income include interest revenue, net leasing income, income from equity instruments, income from fees and charges, net income from securities and currency trade, net income from financial assets held for sale, net hedging income, net investment property income, and other operating income.

⁴⁵ Amounts derived from the sale of products or the provision of services between the undertaking being acquired and the vendor, for example, therefore cannot be deducted from the turnover of the undertaking being acquired.

According to Annex 2 of the standard, the income of investment firms comprises income from fees and charges, net income from securities and currency trade, income from equity instruments, interest revenue, net income from financial assets held for sale, net hedging income, net investment property income, and other operating income. For the purposes of the Finnish Competition Act, the turnover of investment firms is therefore calculated on the basis of the category titled ‘income from investment activities’ in the firms’ income statements.

The aforementioned rules on the calculation of turnover also apply to determining the turnover of foreign credit institutions and investment firms for the purposes of the Finnish Competition Act where these institutions would, were they Finnish, be governed by the Finnish Credit Institutions Act. The definition of the undertakings governed by the Finnish Credit Institutions Act is consistent with Directive 2006/48/EC relating to the taking up and pursuit of the business of credit institutions (EC Credit Institutions Directive). The definition provided in the first subparagraph of the second paragraph of Section 22 of the Finnish Competition Act for the categories of income that form the turnover of credit institutions and investment firms is consistent with Directive 86/635/EEC on the annual accounts and consolidated accounts of banks and other financial institutions).

Credit institutions and investment firms that produce their financial statements according to the IFRS calculate their turnovers on the basis of similar factors, although the names of the categories of income are different. The turnover reported in relation to mergers must be derived directly from the categories of income reported in income statements and any associated notes. (For more information, see Finnish Financial Supervisory Authority Standard 3.1, Chapter 9.4.2 Key performance indicators and per share and per interest data, pp. 104–106.)

For the purposes of the Finnish Competition Act, the turnover of insurance companies (life insurance, accident insurance, and employee pension providers) comprises income from insurance premiums and, in the case of pension funds, income from fees and charges and pension contributions. Income from insurance premiums is calculated according to rules issued by the Finnish Financial Supervisory Authority.⁴⁶ The definition given in the rules for income from insurance premiums is consistent with that of Directive 91/674/EEC on the annual accounts and consolidated accounts of insurance undertakings.

⁴⁶ See Finnish Financial Supervisory Authority series of regulations and guidelines for insurance companies, employee pension providers, insurance associations, insurance cooperatives, branches of third-country insurance companies, and statutory pension institutions (2/002/2008, issued on 1 October 2008) as well as regulations and guidelines for pension funds (4/002/2007, issued on 14 December 2007).

Where credit institutions, investment firms, and other financial institutions governed by the provisions of Chapter 9 of the Finnish Credit Institutions Act or insurance and pension providers or pension funds exercise control over an undertaking that engages in other kinds of business than those specified in the second paragraph of Section 22 of the Finnish Competition Act, any turnover derived from such business is included in the combined amount of the categories of income, income from insurance premiums, or income from fees and charges of said undertakings. From the perspective of merger control, the turnover of these undertakings can therefore also include other categories of income than those specified in the aforementioned special legislation.

According to the third paragraph of Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration, any turnover generated by divested businesses after the end of the financial year is deducted from the turnover and any turnover generated by acquired businesses is added. Calculations of the income derived by insurance companies from insurance premiums and the income derived by pension funds from fees and charges and pension contributions therefore also take into account any insurance stock sold and liabilities transferred after the end of the financial year covered by the financial statements but before the notified merger where these affect the level of income derived from insurance premiums and fees and charges. Transfers relating to individual reinsurance premiums are taken into account where they amount to a divestment or acquisition of a business or a part of thereof.

Income from insurance companies' investments in shares, securities, real estate, or other assets is not included in the companies' income from insurance premiums except in cases where these investments amount to the acquisition of control over the undertakings involved. As regards transactions that amount to the acquisition of control, the turnover derived from the acquisition is added to the insurance companies' income from insurance premiums.

3 Calculation of turnover in different types of mergers

3.1 *Overview*

The form of merger affects the determination of the undertakings concerned and the turnovers attributed to them. Different types of mergers have been discussed above in Section II.3 Notified mergers. The following sections briefly describe certain criteria used to identify the undertakings concerned and issues relating to the calculation of the turnovers of the undertakings concerned under the Finnish Competition Act.

3.2 *Acquisition of control*

Control can be acquired by one or more undertakings. The object of acquisition can also comprise one or more undertakings. As regards the calculation of turnover, the undertakings concerned generally comprise the party acquiring control and the undertaking being acquired. The identification of the undertakings concerned is usually relatively straightforward especially in cases involving the acquisition of sole control.

Issues relating to the calculation of turnover in cases involving the acquisition of joint control or changes in the structure of (joint) control will be discussed in more detail below in Section 3.5 Joint ventures.

3.3 *Acquisition of a business or a part thereof*

In situations involving the acquisition of a business or a part of a business, the undertakings concerned from the perspective of the calculation of turnover comprise the party acquiring the business or a part of a business and the business or function being acquired.

3.4 *Consolidation*

In situations involving absorption, the undertakings concerned from the perspective of the calculation of turnover comprise the receiving undertaking and the merging undertaking.

In the case of amalgamation, the undertakings concerned comprise the merging undertakings that form the receiving undertaking.

3.5 Joint ventures

3.5.1 Creation of a joint venture

In cases involving the creation of a new joint venture under the fourth subparagraph of the first paragraph of Section 21 of the Finnish Competition Act, the undertakings concerned from the perspective of the calculation of turnover comprise the founding members of the joint venture.⁴⁷

3.5.2 Acquisition of joint control

In cases where undertakings acquire joint control over an existing undertaking or business or a part of a business and where none of the parties acquiring control previously exercised sole control or joint control over the business or function in question, the undertakings concerned comprise the undertakings acquiring joint control on one hand and the undertaking or business being acquired on the other.

3.5.3 A change from sole control to joint control

Where an existing undertaking was previously subject to sole control and one or more new shareholders acquire joint control over the undertaking so that the shareholder that previously held sole control continues to jointly control the undertaking with the new shareholders, the arrangement is regarded as a creation of a new joint venture under Section 2 of Finnish Government Decree on the calculation of turnover of parties to concentration. The undertakings acquiring joint control and therefore the undertakings concerned from the perspective of the calculation of turnover comprise both the undertaking previously in sole control and the undertaking(s) acquiring control.

In calculations, the turnover generated by the undertaking being acquired counts, in full, towards the turnover of the undertaking previously in sole control. Turnover is calculated as in cases involving the creation of a new joint venture.

3.5.4 A change from joint control to sole control

In situations involving a change from joint control to sole control, the undertakings concerned from the perspective of the calculation of turnover comprise the undertaking that gains sole control and the undertaking over which control is exercised.

⁴⁷ The parties that exercise control over the joint venture.

The turnover of the undertaking over which control is exercised does not count towards the turnover of the party that gains sole control. The turnover of the undertaking over which control is exercised is therefore not apportioned equally among the undertakings previously in joint control.

Any amounts derived from the sale of products or the provision of services between the undertakings previously in joint control and the undertaking over which control is exercised are also not deducted from the turnover.

3.5.5 A replacement of an existing shareholder in an already jointly controlled undertaking or other change in the structure of control

In situations where one of the undertakings exercising joint control is replaced or where the structure of control changes, the undertakings concerned comprise the shareholders that remain in joint control and the undertaking over which control is exercised.

The turnover of the undertaking over which control is exercised does not count towards the turnovers of the undertakings that retain control. The turnover of the undertaking over which control is exercised is therefore not apportioned equally among the undertakings previously in joint control.

Any amounts derived from the sale of products or the provision of services between the undertakings previously in joint control and the undertaking over which control is exercised are also not deducted from the turnover.

3.5.6 Acquisition of control through a joint venture

In situations where shareholders of a joint venture use the joint venture as a means of acquiring control, the shareholders of the joint venture can be deemed to be the parties that acquire control rather than the joint venture.⁴⁸ In situations where shareholders of a joint venture use the joint venture as a means of acquiring control, the shareholders of the joint venture can be deemed to be the parties that acquire control rather than the joint venture.

If the undertaking acquiring control is a joint venture that has control over all of the functions of an autonomous economic entity (full-function joint venture), in other words an undertaking that has sufficient economic and other resources to operate on a lasting basis and that is already active on the market, the undertakings concerned usu-

⁴⁸ See also Section II.3.6.1 Indirect acquisition of control.

ally comprise the joint venture and the undertaking over which control is acquired. In these circumstances, the turnovers of the groups of undertakings to which the parents of the joint venture belong also count towards the turnover of the joint venture under Section 24 of the Finnish Competition Act.

4 Allocation of turnover of the undertakings concerned

Once the undertakings concerned have been identified, their turnovers are calculated according to Section 24 of the Finnish Competition Act and Finnish Government Decree on the calculation of turnover of parties to concentration. This section discusses Section 24 of the Finnish Competition Act, which deals with the turnovers of the controlling undertakings.

The turnovers of undertakings acquiring control, a business or a part of a business, receiving undertakings in the case of absorption, merging undertakings in the case of amalgamation, and founding members of joint ventures are deemed to include the turnovers of any undertakings that have control over the aforementioned undertakings and over which the aforementioned undertakings themselves exercise control. Turnover also includes any turnover generated by other undertakings that are controlled by the undertakings that exercise control over the aforementioned undertakings as well as turnover generated by any other undertakings or foundations over which natural persons who exercise control over the aforementioned undertakings exercise control.

Moreover, the acquirer's turnover includes a portion of any turnover generated by undertakings over which the acquirer or undertakings that are related to the acquirer as provided in the first or third paragraph of Section 24 of the Act exercise joint control with another undertaking concerned or with another undertaking; the turnover should be apportioned equally among the undertakings according to the number of undertakings exercising joint control.⁴⁹

The turnover of undertakings being acquired includes any turnover generated by the undertaking over which control is acquired, the business or a part of a business being acquired, and, in the case of absorption, any turnover generated by the merging undertaking. Where mergers involve acquiring parts of one or more undertakings, only turnover related to the acquired functions is taken into account.

⁴⁹ For more information, see Section 6.2 Division of the turnover of joint ventures in certain circumstances.

The turnover generated by undertakings over which control is acquired and, in the case of absorption, the merging undertakings, includes any turnover generated by undertakings over which the undertakings being acquired exercise control directly (subsidiary) or indirectly (subsidiary of a subsidiary) and a portion of any turnover generated by undertakings over which the the undertaking being acquired or undertakings that are related to the the undertaking being acquired as provided in the third paragraph of Section 24 of the Act exercise joint control with another undertaking concerned or with another undertaking; the turnover should be apportioned equally among the undertakings according to the number of undertakings exercising joint control.

5 Geographic allocation of turnover

According to Section 22 of the Finnish Competition Act, an obligation to notify materialises where the turnover of the undertakings concerned generated in Finland exceeds certain thresholds. According to Finnish Government Decree on the calculation of the turnovers of merging undertakings, turnover generated in Finland includes the amounts derived by the parties from the sale of products or the provision of services in Finland. Turnover is considered to have been generated in *the geographic location* of the customer at the time of the transaction.⁵⁰

According to the provision, the location of the customer is therefore what determines the geographic allocation of turnover generated from the sale of products or the provision of services. The basic principle is that *turnover is considered to have been generated in the geographic location where the undertaking competes with other goods or services providers*. This is usually also the place where contractual obligations are carried out, in other words where services are actually provided or to which products are delivered.

Situations can arise with regard to the sale of products where the geographic location of the customer as declared at the time of signing the contract differs from the billing and/or delivery address. In these situations, the location where the contract is signed and the address to which the products are delivered are usually more important than the billing address.

With regard to the provision of services, the location where the services are provided to customers is the decisive factor. In cases where either the service provider or the customer travels, turnover is considered

⁵⁰ The location in which the product or service is used is therefore usually not material in the appraisal of the geographic allocation of turnover.

to have been generated at the place of destination of the traveller, in other words where the services are actually provided to the customer.⁵¹ In cases where a service is provided without either the service provider or the customer having to travel, turnover is usually considered to have been generated in the geographic location of the customer.

The Finnish Market Court discussed the geographic allocation of turnover generated from the provision of services in its ruling No 580/08/KR.⁵² In the case in question, the Finnish Market Court agreed with the view of the FCA which held that the case involved a service provided to Finnish customers; the court found that the country in which the foreign service provider in question was based and the location of its satellite transmitters were irrelevant as regards the fact that competition over the Finnish pay television market takes place in Finland.

The following is an example of the FCA's previous interpretations of the issue of the geographic allocation of turnover:

As regards cross-border passenger transport, the FCA has held that competition is considered to take place in the geographic location of the customer. The customer was considered to be located in the country of departure regardless of where he or she was physically at the time of purchasing the ticket. In the case in question, some tickets were purchased over the Internet and the customers were not necessarily physically present in the country of departure at the time of purchase. All income derived from ticket sales was nevertheless considered to have been generated in the country of departure of the customer and attributed to the undertaking from which tickets were purchased. This was considered to be the case even though the section of the journey that made up the cross-border element was operated by another undertaking to which the undertaking that sold the tickets paid all of the income derived from that section of the journey, barring the commission.

⁵¹ As regards air travel, see, for example, the Commission's decision on 27 June 2007 in Case No COMP/M.4439 – Ryanair/Aer Lingus and the decisions referred to in footnote 12 of said decision.

⁵² Ruling No 580/08/KR of the Finnish Market Court on 30 October 2009.

6 Special considerations relating to the calculation of turnover

6.1 *Natural persons*

Control can also be acquired by natural persons. Turnover attributable to natural persons includes any turnover generated by one or more undertakings or foundations over which the natural person exercises control.

6.2 *Division of the turnover of joint ventures in certain circumstances*

Where the undertakings concerned or undertakings that are in such a relation to it as provided in the first or third paragraph of Section 24 exercise joint control with other undertakings concerned or undertakings that are in such a relation to them as provided in the first or third paragraph of Section 24 or with other undertakings, any turnover generated by the jointly controlled undertaking is apportioned equally amongst all of the controlling parties (Section 4 of Finnish Government Decree on the calculation of turnover of parties to concentration). Moreover, any amounts derived from the sale of products or the provision of services between undertakings belonging to a same group of undertakings under the fourth paragraph of Section 1 of Finnish Government Decree on the calculation of turnover of parties to concentration are deducted from the turnover.

The provision included in Section 4 of the decree does not apply to situations involving a change in the structure of control as provided in Section 3 of the decree. In these situations, the jointly controlled undertaking is considered to be the undertaking being acquired.

6.3 *Mergers involving state-owned undertakings*

In situations where the party acquiring control and the undertaking over which control is acquired are both owned by the same state-owned undertaking, the transaction is usually regarded as internal restructuring if both the acquirer and the undertaking being acquired belong to the same economic unit. However, if the undertakings belong to different economic units which each have independent power of decision, the transaction will be deemed to constitute a concentration under the Finnish Competition Act. If both the acquirer and the undertaking being acquired retain independent power of decision after the transaction, the transaction is only regarded as an internal restructuring even if both parties become subject to the control of a single entity, such as a holding company, as a result of the transaction.

Where a state-owned undertaking exercises its rights as a public authority to provide services of general interest instead of pursuing to influence the business decisions of the undertaking, these rights do not constitute control under the Finnish Competition Act except in cases where they are aimed at or can result in the state-owned undertaking acquiring a position where it has decisive influence over the operation of the undertaking.

According to Section 5 of Finnish Government Decree on the calculation of turnover of parties to concentration, any turnover derived from the economic activities of state-owned undertakings and the turnover of undertakings controlled by state-owned undertakings include turnover derived from any other economic activities of the same state-owned undertaking and the turnover of other undertakings controlled by the state-owned undertaking, if the state-owned undertaking in question coordinates economic decision-making between these undertakings.

The first essential prerequisite for the turnover derived from the other economic activities of a state-owned undertaking and the turnover of other undertakings controlled by the state-owned undertaking to count towards turnover calculations is that the state-owned undertaking in question *actually coordinates* the business and competitive behaviour of the economic activity or undertaking involved in the merger and its other economic activities or other undertakings under its control.

Another factor to be taken into consideration is the question of independent power of decision. For the purposes of calculating the turnovers of undertakings concerned, all of the undertakings and economic activities that form an economic entity that has *independent power of decision* therefore need to be taken into account, regardless of the way the assets of these undertakings are managed or the applicable rules on administrative oversight.

6.4 Two-year rule

Where the acquisition of a business or a part of a business comprises two or more transactions, the turnover of the business being acquired is considered to include the turnovers of any businesses or functions acquired from the same undertaking or foundation or from undertakings belonging to the same group of undertakings as provided in Section 24 of the Finnish Competition Act within a period of two years prior to the acquisition, regardless of whether or not the acquired functions constitute bodies corporate.⁵³ According to the provision, any turnover derived

⁵³ See also Section 11.3.6.3 Two-year rule.

from other acquisitions made by the acquirer or by other undertakings belonging to the same group of undertakings from the same group of undertakings within the previous two years is also taken account.

Any turnover derived from undertakings acquired from the same undertaking during the previous two years is included in the turnover of the business being acquired regardless of whether or not the FCA investigated the merger in question.

The two-year rule applies to the acquisition of control, the acquisition of joint control, the creation of a joint venture, the acquisition of a business or a part thereof, and consolidation.

6.5 Conversion of turnovers into euros

The annual turnover of undertakings is converted into euros at the middle rate for the twelve months concerned.⁵⁴ The same procedure is used in situations where undertakings have sales in several different currencies. The total turnover given in the consolidated audited accounts and in the undertaking's reporting currency is converted into euros at the aforementioned yearly middle rate. The audited annual turnover figures must be converted as such and not be broken down into quarterly or monthly figures that would then be converted individually.

⁵⁴ Information about exchange rates can be found in the European Central Bank's Monthly Bulletin, for example.

IV Notification procedure

1 Obligation to notify

According to Section 23 of the Finnish Competition Act, the FCA needs to be notified of mergers following the conclusion of an agreement, acquisition of control, or the announcement of a public bid under Chapter 6 Section 3 of the Finnish Securities Markets Act but before closing the transaction. The FCA can also be notified as soon as the parties can demonstrate good faith intent to close the transaction. Good faith intent can be demonstrated, for example, by a letter of intent or a memorandum of understanding signed by all of the interested parties or by a public announcement of the intention to make a public bid. The manifestation of intent needs to be tangible enough for the FCA to be able to initiate the appraisal process on the basis of the same.

It is also important to note that the FCA has no obligation to begin investigating mergers that have not been made public. In these cases, time does not begin to count towards the processing deadlines even if the merger is notified appropriately otherwise.⁵⁵

The second paragraph of Section 23 of the Finnish Competition Act includes a special provision on mergers that are governed by insurance legislation.⁵⁶ As regards these mergers, the FCA needs to be notified once the parties have been told that the Finnish Financial Supervisory Authority approves of the merger or does not object to it. However, no notification is required if the Finnish Financial Supervisory Authority has consulted the FCA and the FCA has issued an opinion stating that there are no objections to the merger. A notification is required if the FCA's opinion states that the merger cannot be approved as is.

2 Processing times

2.1 Processing deadlines

According to the first paragraph of Section 26 of the Finnish Competition Act, the FCA initiates the merger control procedure as soon as the notification is submitted. The FCA has one month from the beginning of the procedure to issue an opinion on the merger (Phase I); at

⁵⁵ Government Bill on the Finnish Competition Act (HE 88/2010), Section 23, detailed grounds.

⁵⁶ These include mergers that are governed by the provisions of Chapter 3 or Chapter 10 of the Finnish Employee Pension Providers Act (354/1997), Chapter 11 of the Finnish Pension Funds Act (1774/1995), or Chapter 12 of the Finnish Insurance Funds Act (1164/1992).

this juncture, the FCA can either clear the merger or refer the case to further proceedings (Phase II). If the FCA fails to initiate further proceedings within one month of receiving the notification, the merger is deemed to have been cleared.

Further proceedings are initiated if the initial investigations suggest that a merger is likely to have anti-competitive effects. The objective is to investigate the implications of the merger more thoroughly and to appraise the severity of any anti-competitive effects. According to the second paragraph of Section 26 of the Finnish Competition Act, the FCA has three months to conclude its investigation. The Finnish Market Court can extend the deadline by up to two months.⁵⁷

2.2 Calculation of deadlines

The notification is considered to have been submitted on the date during the office hours of which the FCA receives it.⁵⁸ Time begins to count towards the deadline of Phase I under Section 26 of the Finnish Competition Act from the date on which the notification is received. The deadlines specified for the merger control procedure in the Finnish Competition Act are calculated on the basis of calendar months. Time begins to count towards the first deadline of one month from the date on which the FCA receives the merger notification. The deadline expires after one month, at the end of office hours on the day with the same number as the date on which the notification was received.⁵⁹ If the month in question does not have as many days as the preceding month, the deadline expires on the last day of the month. For example, if a notification arrives at the FCA by the end of office hours on 31 October, the one-month deadline expires on 30 November. If the expiration date falls on a weekend or a public holiday, the deadline expires on the following working day. Time begins to count towards the Phase II deadline of three months from the date on which the FCA decides to initiate further proceedings. The same general rules apply to calculating the Phase II deadline as to the initial one-month deadline.

⁵⁷ For more information, see Section 2.4 Extending the Phase II deadline.

⁵⁸ The concept of office hours is governed by Finnish Government Decree on the opening hours of government agencies (332/1994). According to Section 1 of the decree, government agencies are open on weekdays between 8.00 am and 4.15 pm.

⁵⁹ Deadlines under the Finnish Competition Act are calculated according to the Finnish Act on the Calculation of Statutory Deadlines (150/1930). As regards mergers that need to be notified to the Commission, deadlines are calculated on the basis of the number of working days.

2.3 *Extending processing times*

The FCA can extend the processing times associated with the merger control procedure under the third paragraph of Section 26 of the Finnish Competition Act if the merging parties or other undertakings that belong to the same group of undertakings and are therefore related to them as provided in the first, second, or third paragraph of Section 24 of the act fail to provide the FCA with all of the information requested for the purposes of appraising the merger within the deadline or if the information provided is incomplete or inaccurate.⁶⁰ This rule is primarily designed to discourage undertakings from intentionally ignoring their duty to disclose the required information or from deliberately providing incomplete or incorrect information. Although the provision applies not just to the merging undertakings but also to the entire groups of undertakings to which the parties belong, the merging parties also have to supply the requested information. In certain special circumstances, the parties on whom the obligation to notify falls are not entitled to decide on the submission of information. This is the case with hostile bids, for example. In fact, the FCA can generally only extend processing times in situations involving information that the parties on whom the obligation to notify falls are able to supply. Failure of third parties to submit information therefore does not lead to longer processing times.

The FCA sets a deadline by which the requested information needs to be submitted. The provision on extending processing times becomes enforceable if the deadline has expired without the requested information having been submitted or if the information provided is incomplete or inaccurate. In these circumstances, the FCA issues a decision/request for the missing information and announces that a longer processing time will be required. In situations governed by the third paragraph of Section 26 of the Finnish Competition Act, the processing time is extended by the same number of days as has elapsed since the deadline on which the information was to be submitted. The date on which the information is submitted to the FCA also counts towards calculating the extension. A document is considered to have been received on the date during the office hours of which it arrives at the FCA. Saturdays, Sundays, and public holidays also count towards the extension. The FCA notifies the notifying parties of the length of the extension once the requested information has been received.

⁶⁰ See also Section 6 Failure to notify and incorrect and incomplete notifications.

Provisions on appealing decisions relating to extended processing times are included in Section 44 of the Finnish Competition Act. According to the first paragraph of Section 44, any decision made by the FCA to extend processing times under the third paragraph of Section 26 of the act cannot be appealed separately, and instead appeals need to relate to the main case.

2.4 Extending the Phase II deadline

If the FCA so requests, the Finnish Market Court can extend the Phase II deadline of three months by up to two months. It is extremely rare for the FCA to request an extension to the Phase II deadline.

The deadline can be extended in the aforementioned manner in order to investigate remedies to anti-competitive effects in cases governed by the third paragraph of Section 25 of the Finnish Competition Act, for example, or in situations where the notifying parties inform the FCA towards the end of the period reserved for the investigations that the original arrangements relating to the merger are being revised to such an extent that further investigations by the FCA are necessary. If the notifying parties object to the longer processing time, the deadline can only be extended if extremely good reasons exist.

3 Information and documents to be submitted

Merger notifications submitted by economic operators must comply with Finnish Government Decree on the scope of the obligation to notify, issued on 1 September 2011 (1012/2011). The notification must include all of the information specified in the decree, unless the FCA has granted a waiver of some of the requirements. The sections of the notification must follow the numbering and headings specified in an annex to the decree. All of the compulsory information must be included in the notification itself and not in annexes, for example. The information must be correct and complete. The notification must be submitted to the FCA. Notifications are registered as having been received on the working day during the office hours of which they arrive at the FCA.⁶¹ Merger notifications must be addressed to

*Finnish Competition Authority
Merger Control
(street address) Pitkäsillanranta 3
PO Box 332, FI-00531 Helsinki
kirjaamo@kilpailuvirasto.fi*

⁶¹ See footnote 58.

The FCA must be provided with one original version of the notification and any supporting documents as well as four copies and an electronic version. The notification must be written in Finnish or Swedish.⁶² Annexes to the notification can usually also be in English. The FCA can order the notifying parties to provide a Finnish or Swedish translation of any especially important or ambiguous annexes. The notifying parties must clearly indicate any business secrets contained in the notification or its annexes. The FCA also recommends that the notifying parties submit an electronic version of the notification from which any business secrets have been removed.

4 Finnish Government Decree on the scope of the obligation to notify

An annex to Finnish Government Decree on the scope of the obligation to notify includes a detailed list of the information that must be disclosed in merger notifications. The decree refers to ‘the party to the concentration’ in many places. This does not refer to the vendor and the purchaser but to the party acquiring control and the undertaking being acquired, for example. More detailed provisions on the determination of the parties to the concentration are included in the third paragraph of Section 21 of the Finnish Competition Act. The following sections contain notes on certain sections of the notification form annexed to the decree. The numbering and headings of the sections are consistent with the layout described in the decree.

4. Concentration

The legal form of the merger must be specified in Section 4.1 according to the classifications provided in the first, second, third, and fourth subparagraphs of the first paragraph of Section 21 of the Finnish Competition Act.

Section 4.2 is reserved for a brief description of the arrangements associated with the proposed merger, such as its economic and financial structure, the business operations involved, and the structure of ownership and control both before and after the transaction. The notification must also include a brief description of the economic and other factors underlying the transaction, the economic rationale for the transaction, and the objectives of the transaction.

⁶² Finnish Language Act (423/2003).

As regards the economic structure of the transaction, a brief description of the assets that are to be transferred in the transaction in order to achieve the desired outcome must be provided. As regards financial arrangements, information must be provided on how the transaction is to be funded (e.g. by buying or trading shares). However, the notification does not need to specify the origin of the funds used to buy shares, for example. This is due to the fact that the description of the merger provided in Section 4 is to be used, after the removal of business secrets, as the basis for announcing the proposed merger, where applicable, for consulting with interested parties, and for requesting statements from competitors, customers, or suppliers.

Where the merger involves the acquisition of a business or a part thereof, Section 4.3 must also include a brief description of the premises, machinery, personnel, intellectual property rights, or other similar assets associated with the merger.

The subsections of Section 4.4 are reserved for information about joint ventures. This information must be provided whenever the merger involves a joint venture, even where no new joint venture is formed. The information in Section 4.4 is therefore required, for example, whenever changes take place in the structure of joint control. The information required under Section 4.4 include details such as what joint control is based on, whether the joint venture has operative autonomy and is operating on a lasting basis, what agreements and other business arrangements exist between the shareholders and the joint venture, what businesses and resources the founding members are allocating to the new joint venture, what products and services the new joint venture provides and in which geographic markets, and who the most important customers and suppliers of the joint venture are.

5. Information on turnover

Turnover as referred to in Section 24 of the Finnish Competition Act comprises the amounts derived by the undertaking concerned in the preceding financial year from the sale of products and the provision of services falling within the undertaking's ordinary activities worldwide after the deduction of sales rebates and of value added tax and other taxes directly related to turnover. More detailed provisions on the calculation of turnover are included in Finnish Government Decree on the calculation of the turnovers of merging undertakings.

Where turnover has been adjusted under Section 1 of the aforementioned decree due to the financial year of the undertaking concerned be-

ing shorter or longer than twelve months or due to a merger agreed after the end of the financial year in question, the manner of adjustment and grounds for the same must be described in Section 5.3. Grounds for adjustment must include a description of the merger, including details about the parties involved, a brief description of the transaction, and annexes specifying the turnover derived from the undertaking(s) acquired.

Section 5.4 is reserved for details about any public aid granted towards the operating activities of the merging parties and other undertakings and foundations belonging to the same group of undertakings during the previous financial year, with the exception of mergers where there is no doubt as to the turnover thresholds specified in Section 22 of the Finnish Competition Act being exceeded.

Where the aggregate turnover of the merging undertakings exceeds EUR 2,500 million, a brief explanation as to why the merger is notified in Finland and not to the European Commission under the EC Merger Regulation must be provided in Section 5.6.

6. Information on ownership and control

Section 6.1 is reserved for information about other undertakings that belong to the same groups of undertakings as the merging parties. The concept of a group of undertakings is explained in the introductory section of the annex to Finnish Government Decree on the scope of the obligation to notify. Where undertakings engage in business on the relevant markets referred to in Section 7.1 of the annex, the notification must include information about the nature of control and operative arrangements between each of the undertakings and the merging parties. The section is to be used to describe the grounds on which control can be exercised in annual meetings, meetings of the boards of directors, or the undertakings' strategic decision-making processes, for example.

Section 6.2 is reserved for declaring any holdings acquired by the merging parties and any other undertakings belonging to the same groups of undertakings within the previous two years in undertakings that operate on the aforementioned relevant markets. All holdings must be declared regardless of how small they are.

Section 6.3 is reserved for disclosing information about any holdings of each of the merging parties and any other undertakings belonging to the same groups of undertakings that either separately or together entitle the undertakings involved to a share of at least ten percent of the share capital or voting rights of undertakings or foundations that operate on the relevant markets as referred to in Section 7.1.

Section 6.4 is reserved for disclosing information about any members of the governing bodies or operative management of the merging undertakings or other undertakings belonging to the same groups of undertakings who hold *similar* positions in other undertakings. A similar position is not the same as the *same* position, and instead this provision also applies to situations where a person acts as a managing director of one undertaking and as a member of the board of directors of another, for example.

7. *Affected markets*

The objective of the subsections of Section 7 is to identify the markets on which the merging undertakings operate and to establish the competitive position that they hold on these markets.

7.1 *Relevant markets*

The objective of the section on relevant markets is to identify the product groups and geographic markets that are relevant from the perspective of the competitive analysis of the merger, in other words the products that compete or can compete with the products offered by the merging undertakings. The concept of relevant markets will be discussed in more detail in Section V.6 below.

Sections 7.1.1 and 7.1.2 are reserved for information about product markets that may be affected by the merger. The merging parties must identify any products that they offer where their market share exceeds the thresholds specified in the aforementioned sections. The notifying parties are also asked to explain why they consider these products to be relevant in this context.

Section 7.1.1 of the annex to the decree is reserved for information about any markets where at least two of the merging undertakings or undertakings belonging to the same groups or undertakings engage in business and where their combined market share amounts to at least fifteen percent of the Finnish market or a relevant part therein. The concept of a group of undertakings is explained at the beginning of the annex. Any market shares held by undertakings over which the merging parties exercise joint control must also be taken into account. A relevant segment of the Finnish market can comprise a city or a large town, urban area, or region, for example. The objective of the section is to provide information about the horizontal implications of the merger.

Section 7.1.2 of the annex to the decree relates to information about product markets where one of the merging undertakings or other un-

undertakings belonging to the same group of undertakings hold a market share of at least twenty percent where these are upstream or downstream from markets where another party involved in the merger or other undertakings belonging to the same group of undertakings operate. The objective of the section is to provide information about the vertical implications of the merger. Section 7.1.3 of the annex to the decree relates to information about relevant markets that do not meet the criteria associated with the two previous sections but that are either parallel or upstream or downstream and therefore closely related to these markets. All markets from which at least one party involved in the merger or other undertakings belonging to the same group of undertakings derive turnover must be declared. The objective of this section is to supplement the information provided in Sections 7.1.1 and 7.1.2 of the notification by presenting an overview of how the aforementioned markets relate to other markets. The section also provides information about the conglomerate effects of the merger. Moreover, this section can, where applicable, be used to indicate the reasons why products sold on related markets are not considered to be relevant under Sections 7.1.1 and 7.1.2. The information disclosed in this section describes how the merging parties or other undertakings belonging to the same groups of undertakings operate on these markets. This relates to situations where the merging undertakings operate on different markets which nevertheless are closely linked to each other. One example of such circumstances is where one of the parties is a computer manufacturer and the other a software provider. The information provided in Section 7.1.3 must also include details about these kinds of markets.

7.2 Market information

Section 7.2 uses the term ‘relevant geographic markets’. These are defined on the basis of the geographic areas where the merging undertakings operate as well as the geographic areas where customers have a realistic opportunity to acquire the products in question. Relevant geographic markets comprise areas where competitive conditions are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because competitive conditions are appreciably different in those areas. If the relevant geographic markets of the merging undertakings are considered to extend beyond the national borders of Finland, the notifying parties must specify the areas to which the information provided relates.

Section 7.2.2.2 is reserved for information about mergers on the electricity market, namely an estimate of the amount of electricity distributed by each of the merging parties and other undertakings belonging to the same groups of undertakings at 400 V in the national electricity grid. The estimate must be as up-to-date as possible. The estimate must take into account any acquisitions of distribution plants and other changes in rights over distribution capacity made after the date on which statistics were last compiled⁶³ The estimates must include all electricity distributed through the networks of the merging parties or other undertakings and plants belonging to the same groups of undertakings regardless of whether they own the networks or control them on the basis of rental or leasing agreements, for example.

7.2.3 Main competitors

Section 7.2.3.1 is reserved for listing the five most important competitors and estimating their market shares.

The information must cover all of the markets referred to in Sections 7.1.1–7.1.3. The information must include competitors operating both in Finland and potentially on wider relevant geographic markets.

7.2.4 Main customers and suppliers

Section 7.2.4.1 is reserved for listing the five most important customers and suppliers and their contact details. The information must cover all of the markets referred to in Sections 7.1.1–7.1.3 and include details of the percentage of aggregate turnover that the merging parties and other undertakings belonging to the same groups of undertakings derive from sales to these customers and purchases from these suppliers.

7.2.6 Factors affecting market entry and exit

Section 7.2.6.2 is reserved for a general assessment of factors relating to market entry and exit and the profitability of business. In particular, the information must include details about the total costs of entry for a significant and viable competitor, any legal or regulatory barriers to entry (such as operating licences), any restrictions created by the existence of intellectual property rights, the importance of economies of scale and scope, and access to sources of supply and distribution channels.

Where the notifying parties believe that there are undertakings that are likely to enter the market, Section 7.2.6.3 is reserved for informa-

⁶³ Regulation issued by the Finnish Energy Market Authority on publishing key figures relating to the national electricity grid (1345/01/2005).

tion about such entrants (and their contact details) and about the reasons why such an entry is likely as well as an estimate of the time within which such an entry is likely to occur.

7.2.7 Other market information

Section 7.2.7 is reserved for an assessment of the significance of the factors listed in subsections a)–q) from the perspective of the business to which the merger relates, from the perspective of operating on the markets referred to in Sections 7.1.1 and 7.1.2, and with regard to what effects the proposed merger is likely to have on the factors mentioned in these sections. The FCA can provide more information about assessing the factors relating to this section in connection with the pre-notification consultations. The objective of Section 7.2.7 is best illustrated by the following example: Subsection a) relates to the evolution of the markets and the future development of supply and demand. The notifying parties must assess, firstly, how the merger is linked to the evolution of the markets, secondly, how the evolution of the markets has affected the operation and structure of the industry in general, and, thirdly, how the merger is likely to affect the evolution of the markets, in other words whether it is likely to accelerate market development or create conditions for the emergence of new markets.

In addition to subsection a), the notifying parties must provide an assessment of the manner in which economic operators on the market produce, price, and sell their products, including information about distribution channels, vertical integration, and the provision of products together with other products; information about the opportunities of economic operators that already operate on the market to expand their production capacity; information about the total capacity of the markets and about what proportion of this capacity is accounted for by each of the merging parties or other undertakings or foundations belonging to the same groups of undertakings as regards the total capacity and what their respective rates of capacity utilisation have been during the previous three years; information about whether any of the merging undertakings or their competitors have products that are likely to be brought to the market in the near term or plans to expand production or sales capacity as well as an estimate of the projected sales and market shares of the parties over the next three to five years; information about the importance of customer preferences and brand loyalty; the role of product differentiation in terms of attributes and quality and the extent to which the products of the merging undertakings are close substitutes; the role

of switching costs (in terms of time and expense) for customers when changing from one supplier to another; information about the segmentation of customers into different groups with a description of the ‘typical customer’ of each group; information about the extent to which the public sector is an important participant as a source of demand; the degree of concentration or dispersion of customers and suppliers and the effects of this on the freedom of action of economic operators on the market; the importance of research and development and its percentage of turnover on the market in general and within the business involved in the merger in particular; the importance of exclusive distribution contracts and other types of long-term contracts; the scale and importance of service networks (networking) prevailing between undertakings on the market; the importance of maintenance and repair services as parameters of competition and information about the competitive situation regarding these services; information about the price levels prevailing on each of the relevant markets referred to in Sections 7.1.1 and 7.1.2 relative to geographically nearby markets; and information about any other prevailing market conditions that are likely to be important from the perspective of appraising the effects of the proposed merger on the markets.

7.3 Market information to be provided in situations where the market share thresholds specified in Section 7.1.1 or 7.1.2 are not exceeded

In situations where the market share thresholds specified in Section 7.1.1 or 7.1.2 are not exceeded, Section 7.3.1 is reserved for a brief description of the products sold and the services provided by each of the merging undertakings (or their business areas) as well as of the geographic area where products are sold or services provided.

Moreover, Section 7.3 must be used for providing information about the size of the markets described in Section 7.3.1 and about the market shares of the merging parties, as well as details of the most important competitors, customers, and suppliers. The information must cover the previous full calendar year. The FCA can provide more detailed advice on the scale of the information to be provided in Section 7.3 and waive some of the requirements associated with the obligation to notify as regards the investment portfolios of venture capitalists, for example, in the course of the pre-notification consultations.

8. Views of the party obliged to notify on the effects of the concentration

In situations where the notifying parties wish the FCA to consider efficiencies, Section 8.1 is reserved for information about the efficiency

gains generated by the merger, the extent to which consumers and the Finnish market are likely to benefit from these, and the reasons why the merging parties cannot achieve these gains to a similar extent by means other than through the proposed merger and in a manner that is not likely to raise competition concerns.

5 Short-form merger notification procedure

Provisions relating to the obligation to notify can, in some situations, lead to notifications about mergers that have little impact on the Finnish market. For example, the obligation to notify applies to arrangements where undertakings that derive turnover from Finland set up joint ventures abroad. The short-form notification procedure has been developed for these kinds of situations, among others. The objective of the short-form merger notification procedure is to reduce the amount of information that needs to be provided and the costs incurred by the notifying parties in certain situations.

The short-form notification procedure is provided in the second paragraph of Section 1 of Finnish Government Decree on the scope of the obligation to notify, according to which the FCA can, in individual cases, waive some of the requirements associated with the obligation to notify in situations where the proposed merger is likely to have negligible effect on competition or if some of the information usually required is deemed unnecessary for appraising the merger.

The use of the short-form notification procedure is not limited to joint ventures that have no links to the Finnish market, and instead the FCA assesses the expediency of the short-form notification procedure on a case-by-case basis. The notifying parties can request the FCA's consent to using the short-form notification procedure before submitting the notification in the course of the preliminary consultations, for example. In situations where there is no need to hold preliminary consultations but the notifying parties consider the conditions for using the short-form notification procedure to be fulfilled, the merger notification can be submitted using the short-form notification procedure and the FCA's consent sought for this at the same time. If the FCA finds that the normal extent of information is required for the effects of the merger to be appraised, the FCA informs the notifying parties of this immediately in order for the notifying parties to submit a full merger notification.

If necessary for appraising the effects of the merger, the FCA can still request additional information from the notifying parties even where the conditions for using the short-form notification procedure are fulfilled. As long as the information supplied in the short-form notification is not materially incomplete or misleading, time begins to count towards the one-month Phase I deadline as soon as the notification is received even if the FCA requests additional information. If, however, the FCA finds that the normal notification procedure needs to be followed instead of the short-form notification procedure, the FCA can request a full merger notification before the end of the one-month Phase I deadline. In these situations, time only begins to count towards the statutory deadline from the date on which the full merger notification is received.⁶⁴ If the merger notification is found to be incomplete, the FCA informs the notifying parties of this as soon as possible. The FCA can still waive some of the requirements associated with merger notifications on a case-by-case basis.

In order for the FCA to be able to appraise the effects that the merger is likely to have on competition and the expediency of the short-form notification procedure to this end, a brief description of the current and projected business operations of the merging parties, including information about the kind of business the undertaking formed as a result of the merger is intended to operate and where, must be provided at the beginning of the notification.

These guidelines include an annex that lists the information that must be provided to the FCA when using the short-form notification procedure.

Generally speaking, the FCA consents to the use of the short-form notification procedure in situations involving arrangements where undertakings that derive turnover from Finland set up a joint venture abroad or acquire joint control over an undertaking that has no links to the Finnish market. In these situations, both new joint ventures and undertakings over which joint control is being acquired are referred to as joint ventures. A joint venture is not considered to be linked to the Finnish market if it has no business operations in Finland and derives no turnover from Finland. Where the joint venture imports goods to Finland, the merger needs to be declared to the FCA using the normal merger notification procedure, because importation to Finland generates turnover in Finland. The normal notification procedure must also be used in situations where the joint venture has a subsidiary, a sales of-

⁶⁴ First paragraph of Section 26 of the Finnish Competition Act.

office, a maintenance service, a branch, or any other place of business in Finland. When assessing whether the joint venture is considered to be linked to the Finnish market, the FCA also takes into account any plans of the joint venture to operate on the Finnish market in the near term.

The obligation to notify is best illustrated by the following example: Two undertakings that operate in Finland⁶⁵ (A and B) decide to set up a joint venture. As regards the calculation of turnover, the parties that are considered to be involved in the merger are the undertakings setting up the joint venture. An obligation to notify therefore materialises if the combined worldwide turnover of A and B exceeds EUR 350 million and if the turnover derived by both A and B separately from Finland exceeds EUR 20 million. The short-form notification procedure can be used, if A and B set up the joint venture abroad and the joint venture and no undertaking over which it exercises control have business operations in Finland and derive no turnover from Finland. The normal merger notification procedure must be used if the joint venture exports products to Finland or if the joint venture is set up in Finland.

6 Failure to notify and incorrect and incomplete notifications

The consequences of failure to notify are discussed in Sections 28 and 30 of the Finnish Competition Act. The consequences of incorrect and incomplete notifications are discussed in Section 26 of the act.

According to Section 28 of the Finnish Competition Act, economic operators that implement a merger without observing the merger control provisions of the Finnish Competition Act are subject to a fine, except in cases where the merger is of minor significance or where the imposition of a fine is deemed otherwise unfounded from the perspective of ensuring effective competition. Fines are imposed by the Finnish Market Court according to the FCA's proposals.

According to Section 30 of the Finnish Competition Act, the Finnish Market Court can, according to the FCA's proposal, prohibit or dissolve a merger or impose conditions on the merger if the notifying parties have provided incorrect or misleading information that has materially affected the outcome of the case or if the transaction has been closed contrary to the decision of the FCA or the Finnish Market Court or before the merger has been cleared. The FCA must notify the merging parties of the case being reopened within one year of the ruling becoming final or the transaction closing.

⁶⁵ Undertakings that derive turnover from Finland.

In order for this to happen, the incorrect or misleading information must relate to material facts which, had they been known to the competition authorities, would have affected the outcome of the case. A merger can also be prohibited or dissolved retrospectively in situations where the notifying parties fail to abide by the conditions imposed by the competition authorities or where the transaction is closed despite a prohibition. The FCA must notify the merging parties of the case being reopened within one year of the ruling that was based on incorrect or misleading information becoming final or the merger transaction closing. Where a case has been decided on the basis of the first or second paragraph of Section 25 of the Finnish Competition Act or the first paragraph of Section 29 of the act, time begins to count towards the one-year deadline on the last day of the deadline set on processing the case. As regards mergers that involve more than one transaction, time begins to count towards the one-year deadline on the date of the last transaction. The provision of incorrect or misleading information can also amount to providing false documents to a public authority under Chapter 16 Section 8 of the Criminal Code of Finland (39/1889) as referred to in Section 47 of the act.

According to the first paragraph of Section 26 of the Finnish Competition Act, time does not begin to count towards the one-month deadline set on processing the case if the notification submitted is materially incomplete. Where some sections of the information supplied are incomplete, the notification must include an explanation as to why the information in question has not been provided.

In some circumstances, the provision can also be interpreted as meaning that time does not begin to count towards the deadline if the information provided changes materially and if these changes have significant implications on the appraisal process. Material changes are any changes taking place in the information supplied to the FCA that the notifying parties are aware of or should have been aware of and that should have been declared had they been known at the time of submitting the notification. Examples of material changes that are deemed to have significant implications on the appraisal process include changes in the undertaking being acquired or changes in agreements that are critical to the merger, such as supply contracts.

V Appraisal process

1 Overview

Effective and free competition benefits consumers and undertakings. Effective competition brings benefits to consumers, such as lower prices, higher-quality products, and a wider selection of products and services.

Not all mergers impede effective competition. Mergers can also have positive implications on competition, or their impact can be neutral.

However, in some circumstances mergers can impede effective competition on the markets. Mergers can have a significant impact on the market power of one or more undertakings. Merger control is aimed at preventing mergers that, by increasing the market power of one or more undertakings, would be likely to give undertakings the ability to profitably increase prices, reduce output, choice, or quality of goods and services, diminish innovation, prevent the entry of new potential competitors or restrict mobility within the market, or otherwise influence the parameters of competition.

The objective of this chapter is to clarify the general principles that the FCA applies when appraising the suitability of mergers in the context of the Finnish market. The following sections are not intended as an exhaustive checklist to be mechanically applied by the FCA in each and every case when appraising mergers. Instead, the competitive analysis in a particular case is always based on an overall assessment of the foreseeable impact of the merger in the light of the relevant factors and conditions. It may not be necessary to analyse all the elements in relation to each and every merger.

In its assessment, the FCA considers, in relevant parts, the interpretations and other guidelines issued by the European Commission and the European Court of Justice.

2 New substantive test

The adoption of the new Finnish Competition Act (928/2011), which entered into force on 1 November 2011, coincided with the adoption of the so-called SIEC test ('significant impediment to effective competition'). The test corresponds to the test provided in the EC Merger Regulation, and it therefore harmonises Finland's merger control procedures with those of the European Commission, for example.

The SIEC test focuses on the effects of mergers on effective competition on the markets. From the perspective of the appraisal process, the test is designed specifically to measure how much competition is lost as a result of the merger.

In order to appraise the likely effects of mergers on competition, the FCA usually begins by identifying – to whatever degree is necessary in each case – the relevant markets, by analysing any potential merger-induced negative effects on competition, and any potential counterbalancing effects, such as efficiency gains that may result from potential competition and the merger. However, the appraisal process is not necessarily tied to any one procedure. Instead, the competitive analysis in a particular case is always based on an overall assessment of the foreseeable impact of the merger in the light of the relevant facts.

Many different types of information and analytical tools can be used in the appraisal, depending, for example, on the root cause of the merger's potential anti-competitive effects. Relevant information can be acquired from many different sources.

From the perspective of the appraisal process, useful sources of information often include documents supplied by the merging parties relating to their views of the prevailing competitive situation, the rationale for the merger, and its objectives, for example. It is also often useful to consult customers and other market forces (such as suppliers and competitors)⁶⁶ to gauge their views on the competitive situation, any special characteristics of the markets, and their likely reactions to changes resulting from the merger in terms of prices and production volumes, for example.

The FCA often uses information about market shares and the concentration of markets in its appraisal. Experience-based direct comparisons to previous effects of market entry and exit on prices or the market shares of economic operators can also prove useful for the purposes of the appraisal. Some indications of the merger's effects can also be derived from economic analyses. In some situations, useful indications of the merger's effects can be derived from economic (e.g. econometric) and statistical data, provided that enough reliable data are available. These methods can be useful when assessing the potential non-coordinated anti-competitive effects of a merger between close competitors, for example.

No universal order of importance can be established between different kinds of information, and instead some information can be more

⁶⁶ In some situations, it can also be useful to consult other parties that monitor the markets involved in the case at hand, such as research institutions conducting different kinds of market analyses.

important than others depending on the special characteristics of each case. The same information and analytical tools can also be important with respect to different elements of the appraisal. For example, different kinds of consumer and market surveys can provide valuable information not just about the interchangeability of products but also about the potential anti-competitive effects of mergers.

One of the objectives of the new test provided in the EC Merger Regulation was to eliminate any uncertainty about whether the regulation also applies to mergers that do not lead to dominance per se but that nevertheless have anti-competitive implications resulting from so-called non-coordinated⁶⁷ behaviour of undertakings on oligopolistic markets ('gap' cases/situations).⁶⁸ Despite the changes introduced to the test, the objective is to follow earlier case law where applicable. The creation or strengthening of a dominant market position was still presumed to remain the most common indicator of a significant impediment to effective competition.⁶⁹ In the light of case law developments during the years following the introduction of the new test, the prediction made in 2004 appears to have held true.

Similarly to the provisions of the EC Merger Regulation, the new test introduced under Section 25 of the Finnish Competition Act also enables intervention in the aforementioned gap situations. In practice, this means that the threshold for intervention may no longer be tied to a formal finding of a dominant market position in all cases in the future.

It must nevertheless be noted that, as indicated by the wording of Section 25 of the Finnish Competition Act and the associated government bill (HE 88/2010), a finding of a dominant market position remains a typical example of situations amounting to a significant impediment to effective competition. The FCA has several years of experience of applying the dominance-based test. The concept of a dominant market position has been previously applied not just to the dominance of a single undertaking but also to the combined dominance of several undertakings. In principal, a so-called 'gap' situation is likely to only arise in special circumstances in Finland (as in the EU).

67 The term 'non-coordinated effects' comes from the European Commission's guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ('Notice on Horizontal Mergers'). The Notice on Horizontal Merges also refers to 'coordinated effects'. For more information, see the European Commission's guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal C 31, 5 February 2004, pp. 5–18, Section 22.

68 See EC Merger Regulation, Sections 24 and 25.

69 See, for example, the European Commission's guidelines on the assessment of horizontal mergers, Section 4.

In practice, the test provided in the new Finnish Competition Act stresses the significance of the impediment to competition (including so-called 'gap' situations) similarly to the revoked Finnish Act on Competition Restrictions. Competition can be considered to be significantly impeded as a result of a merger as provided in Section 25 of the Finnish Competition Act if the merger's negative effects on effective competition are long-lasting or substantial. This means that a merger can be cleared despite the creation or strengthening of a dominant market position if the merged entity is likely to lose its dominance in the near term due to the entry of new undertakings to the markets or an increase in international competition, for example. The finding of a significant impediment to effective competition is always based on an overall assessment of each case, and it can depend on the relative size of the merger entity on the market, its economic and financial strength, the bargaining power of customers and suppliers, or the projected development of the market and the rate of development, for example.

It is therefore justifiable to presume that the concept of market dominance will continue to play a key role in determining whether a merger amounts to a significant impediment to effective competition under the new Finnish Competition Law. As a result, this communication is intended, where applicable, to uphold the instructions that are based on the administrative practice established under the revoked Finnish Act on Competition Restrictions (480/1992).

In addition to providing a solution to the aforementioned 'gap situations', the SIEC test is also better suited than the dominance-based test for intervening in situations where competition is impeded at the level of the founding members of joint ventures. In some circumstances, the appraisal of mergers involving the setting up of a joint venture can require an assessment of the significance of the merger and its effects on competition between the founding members of the joint venture. The joint venture can enable coordinated competition between the founding members if the founding members are able to follow and monitor each other's actions via the joint venture. Moreover, the economic significance of a joint venture to its founding members can be so great that the founding members refrain from competing with each other on other markets in order to ensure the continued viability of the joint venture. The SIEC test also enables intervention in situations where competition between the founding members of a joint venture decreases as a result of the setting up of the joint venture, provided that the conditions set with regard to the test on the significance of anti-competitive effects are met.

3 Dominant market position

An undertaking is said to have a dominant market position when it is able to operate sufficiently independently of actual or potential competitors, customers, and suppliers on the market. In particular, an undertaking is considered dominant when it has significant influence over prices or supply conditions. Another condition is that competitors, customers, and suppliers are not, through their own actions, able to influence the manner in which the dominant undertaking uses its market power to any significant degree or sufficiently quickly.

Dominance is often characterised by the existence of a technical, legal, strategic, economic, or other competitive advantage that the undertaking's competitors are unable to match by copying or by developing other competitive advantages of their own. A dominant market position is usually linked to a large customer base.

Customers, suppliers, and competitors can be dependent on a dominant undertaking in different ways. Customers may need to source their goods from the dominant undertaking due to the absence of comparative options. Dominant undertakings can also have control over procurement or marketing and distribution channels, forcing suppliers into contractual relationships. Undertakings that enjoy a dominant position relative to their competitors are usually able to respond to any competitive actions that they take and therefore to influence prices or supply conditions.

A merger is considered to create a dominant market position if an undertaking achieves the aforementioned level of freedom to operate independently of its competitors, customers, and suppliers on a certain market as a result of the merger. A merger is considered to strengthen a dominant market position if an existing ability to operate sufficiently independently of competitors, customers, or suppliers expands as a result of the merger. In most cases, an undertaking achieves a dominant market position alone, but in some situations dominance can also be shared by several economic operators.

4 Classification of mergers

Mergers can be classified as either horizontal or non-horizontal. Horizontal mergers are mergers between competitors, in other words undertakings that operate on the same product markets or at the same level of the supply chain. In these situations, the products or services provided by the parties are largely interchangeable from the perspective of customers. Horizontal mergers result in a reduction in the number of independ-

ent undertakings and changes in the relative market shares of competing undertakings, and they therefore change the structure of the market.

Horizontal mergers can have significant anti-competitive effects. Horizontal mergers can significantly impede effective competition by affecting the competitive pressure faced by the merging parties or third parties. Horizontal mergers can also change the structure of competition by increasing the likelihood of coordinated behaviour between undertakings or by facilitating or reinforcing coordinated behaviour between formerly independent undertakings.

Two broad types of non-horizontal mergers can be distinguished: vertical mergers and conglomerate mergers. Vertical mergers involve undertakings operating at different levels of the supply chain. Conglomerate mergers are mergers between undertakings that operate on markets that have neither horizontal nor vertical ties.

Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers. For example, non-horizontal mergers have no direct implications on the market shares of the undertakings on their relevant markets because the undertakings are not in direct competition with each other.

However, there are circumstances in which non-horizontal mergers can significantly impede effective competition. This is the case, for example, if a vertical merger results in an undertaking gaining control over important sources of supply or distribution channels on which its competitors also rely. Conglomerate mergers can also significantly impede effective competition, for example in situations where a merger gives the merged entity an opportunity to leverage a strong market position from one market to another, allowing it to foreclose competitors from the market and therefore to reduce competitive pressure on the merged entity. Vertical and conglomerate mergers can also have negative implications on post-merger competitive conditions by increasing the likelihood of undertakings that operated independently before the merger engaging in coordinated behaviour or by making coordination easier or more effective for undertakings that were coordinating before the merger.⁷⁰

Mergers can have both horizontal and non-horizontal effects. The overview provided in this chapter on the appraisal process mostly deals with horizontal mergers, but the general guidance is also relevant in the context of non-horizontal mergers. Certain aspects that are relevant to the specific context of non-horizontal mergers will be discussed below in Section 7.3 Anti-competitive effects of non-horizontal mergers.

⁷⁰ For more information on coordinated effects associated with non-horizontal mergers, see Section 7.3.4 and also Section 7.2.2 where applicable.

5 Counterfactual analysis of mergers

In appraising whether mergers significantly impede effective competition, the FCA usually compares the competitive conditions that would result from the merger with the conditions that would prevail without the merger. In most cases, the competitive conditions that exist at the time of the merger constitute the relevant comparison for appraising the effects of the merger. In some cases, however, the FCA takes into account future changes to the market that can reasonably be predicted, such as market liberalisation or the likely entry or exit of undertakings.⁷¹

6 Identification of relevant markets

The appraisal process usually comprises two stages: identification of relevant markets and competitive analysis.⁷² This section includes more detailed information about the identification of relevant markets. The competitive analysis will be discussed in Section 7. In practice, the information compiled in connection with identifying the relevant markets can also be useful for the purposes of the competitive analysis and vice versa, and it is therefore not always possible to clearly separate the two stages of the appraisal process.

6.1 Overview

The objective of the market definition stage of the process is to identify and determine the parameters of competition between the merging entity and its actual competitors. The main purpose is to identify, in a systematic manner, the immediate competitive constraints facing the merged entity. Various considerations leading to the delineation of the relevant markets can also be of importance for the competitive analysis of the merger.⁷³

The markets that are considered relevant under competition law usually include both product markets and geographic markets. These will be discussed in more detail below in Sections 6.4 and 6.5. It is worth stressing here that relevant markets are always defined on a case-by-case basis. The definition of relevant markets is linked to the potential anti-competitive effects that are relevant to each case, and the scale of the markets that are considered relevant can therefore vary from one case

⁷¹ This can be the case with undertakings that are facing financial difficulties, for example. For more information, see Section 7.5 Failing firm.

⁷² A detailed examination of the relevant markets may not be necessary, for example, in situations where preliminary investigations confirm that the merger has no significant anti-competitive effects.

⁷³ The identification of relevant markets is therefore only one of the tools used in the overall assessment of the competitive effects of mergers. The appraisal process does not end with the identification of relevant markets.

to the next, even within the same industrial sector. The information that needs to be taken into consideration can also vary from one case to the next, and it is not always necessary to obtain all of the information listed in this section.

6.2 Demand-side substitutability and supply-side substitutability

Demand-side substitutability and supply-side substitutability can both have implications on the identification of relevant markets.

Demand-side substitutability is the single most direct and substantial constraint on the independent operation of undertakings on markets. Undertakings have little influence over prices and supply conditions if their trading partners can easily switch to using alternative goods or to sourcing goods from suppliers located elsewhere. An assessment of demand-side substitutability includes considerations such as what goods customers and consumers consider interchangeable with the goods provided by the merging parties and which geographic markets buyers can access to source alternative products. The likelihood of demand-side substitutability depends on the existence of technical barriers to switching to alternative products, the level of costs and time involved in switching, for example.

Supply-side substitutability is taken into consideration in situations where its effects are as direct and substantial as those associated with demand-side substitutability. 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. Supply-side substitutability is also one of the factors that are taken into consideration in the course of the competitive analysis. In these circumstances, the issue of supply-side substitutability is usually related to assessing potential competition.⁷⁴

⁷⁴ Potential competition is conceptually different from supply-side substitutability. For example, slightly stricter temporal criteria are usually applied when supply-side substitutability is considered in the context of the identification of relevant markets than in the context of potential competition.

6.3 Hypothetical monopolist test

Another useful tool for identifying relevant markets is the so-called hypothetical monopolist test (also known as the SSNIP⁷⁵ test). The test is used in many systems of antitrust law, including EU competition law.

The test is used in many systems of antitrust law, including EU competition law.⁷⁶ The test is aimed at identifying the relevant product markets and geographic areas that a hypothetical monopolist could profitably monopolise. In the light of the test, a relevant market is defined as the narrowest possible product market or geographic area where the aforementioned conditions exist.⁷⁷

The test is used to identify competing products and the geographic areas where these products are available and that significantly restrict the pricing policies of the merging undertakings. In practice, examination usually begins with posing the question of whether the aforementioned type of increase in the prices of the products offered by the merging undertakings would be profitable in the geographic area where the products are sold. If the price increase would prove unprofitable as a result of the subsequent drop in sales volumes, the nearest alternative products are added to the market and the geographic area widened and the same question then posed again. This process is repeated until the answer is yes, i.e. until a group of products and a geographic area where such a price increase would be profitable are found.

In practice, the test is basically a theoretical analogy; it is not a mechanical calculation that, by inputting certain kinds of data, automatically produces an answer on the scope of the relevant markets. Rather, the test provides a conceptual framework within which it is possible to organise the information that is relevant for the identification of relevant markets. The test can be used to identify both product markets and geographic markets.

6.4 Relevant product markets

Relevant product markets generally comprise all products that customers and consumers consider interchangeable or easily substitutable due to their attributes, price, and intended purpose. Both demand-side substitutability and supply-side substitutability can be taken into consideration when identifying relevant product markets.

⁷⁵ SSNIP stands for 'Small but Significant Non-Transitory Increase in Price'.

⁷⁶ The reference point is usually the prevailing price level. In some circumstances, the test can be based on some other price level, such as a lower price level than that prevailing at the time.

⁷⁷ In practice, however, a relevant market can sometimes be wider than the narrowest possible market indicated by the test.

In practice, there are many different kinds of information that can be of importance in defining relevant product markets. One example is product attributes and the intended purpose of products, which are often the first useful parameters for defining the scope of alternative products.⁷⁸ Notable similarities in product attributes and the intended purpose of products can be considered a clear indicator that products belong to the same market. However, product attributes and the intended purpose of products alone are not enough to establish substitutability. For example, strong brands can form a separate market from other similar products. Product attributes and the intended purpose of products are also not a prerequisite for products to belong to the same relevant market.

In assessing substitutability between products, it is sometimes useful to analyse recent phenomena and their effects on product prices or demand, for example. Examples of such phenomena include the launch of new products and any resulting changes in the sales of some competing products.

Various kinds of econometric and statistical tools can also be used to identify relevant markets, provided that enough reliable data are available. With the hypothetical monopolist test in mind, considerations such as margins in potentially relevant product markets and the sensitivity of demand to changes in the prices of these products can be examined on the basis of the cross-price elasticity of demand, for example. Another potentially useful indicator is the degree of substitutability on potentially relevant product markets, which can be evaluated by estimating cross-price elasticities or diversion ratios between products, for example.⁷⁹

Evidence of past customer switching patterns and reactions to price changes at different times and in different areas can also provide important information. For example, customer and consumer reactions to price changes can depend on the costs incurred as a result of individual products relative to the other costs of customers and consumers. Customers and consumers are less likely to react to price changes if the costs incurred are negligible relative to total costs than if the costs are significant. The costs involved in switching from one product to another can also be of importance.⁸⁰

78 It can also be useful to assess product attributes and the intended purpose of products with the hypothetical monopolist test in mind.

79 The same tools can also be largely used when appraising non-coordinated effects, for example. For more information, see Section 7.2.1 Non-coordinated effects.

80 These can also include costs that are not strictly monetary, such as inconvenience or uncertainty resulting from changing suppliers.

Information useful for identifying relevant markets can be acquired from many different sources. For example, consumer and market research often provides useful information. Internal surveys conducted by the merging parties and other documents on the profitability of business can also provide information, especially where these surveys have been conducted earlier during normal operations (i.e. not specifically for the purposes of the merger notification).

Market definition can also be affected by differences between customer segments and in the prices of products. For example, markets can be deemed to be separate due to the fact that products are sold to appreciably different customer groups at different prices or subject to different supply conditions even if the physical product attributes and the intended purpose of the products suggest that the products belong to the same market.

6.5 Relevant geographic markets

The objective of identifying relevant geographic markets is to establish the markets where competition from undertakings or products or a credible threat of the same can restrict the merged entity's use of market power.

The assessment of relevant markets mostly focuses on the operating areas of the merging undertakings and the areas where customers have realistic access to the products in question. Relevant geographic markets comprise areas where competitive conditions are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because competitive conditions are appreciably different in those areas.

The definition also depends on the realistic ability and willingness of suppliers to divert production or supply from one area to another, the realistic ability and willingness of customers to switch suppliers, appreciable differences in the market shares of undertakings in different areas, and appreciable differences in product prices, quality, or other attributes in different areas.

The identification of relevant markets can involve an examination of barriers to increasing supply in specific geographic areas. These kinds of barriers can be related to accessing distribution channels, high costs involved in setting up distribution networks, public regulation of economic activity, and technical standards. The structure and development of trade flows can also be of importance in defining relevant geographic markets.

Transport costs and transport challenges arising from the nature of products can result in customers and consumers in certain areas not sourcing products from other areas and render trade between certain areas economically unviable. Transport costs are an especially notable geographic constraint with regard to physically large, low-value products. From the perspective of the identification of relevant geographic markets, the importance of transport costs can depend on the locations of the production facilities of different suppliers relative to each other, production costs in different areas, and price differences between areas.

The nature and attributes of products can also be of importance in defining relevant geographic markets. For example, some products can only be used in certain areas. The definition can also depend on consumer preferences, appreciable differences in the market shares of undertakings compared to undertakings operating on nearby markets, the realistic ability of customers to switch to products offered by undertakings operating elsewhere, appreciable price differences, and regional differences in distribution channels.

7 Competitive analysis

In order to be able to appraise the likely effects of a merger on effective competition on the relevant markets, the FCA usually examines the effects that the merger is likely to have on market structures and analyses any potential anti-competitive effects of the merger and any potential countervailing factors, such as potential competition and efficiency gains. These will be discussed in more detail below.

7.1 Market structure and structural indicators

The FCA usually begins the competitive analysis by examining the changes that are likely to result from the merger as regards the structure of the relevant markets. There are various structural indicators that are useful for this purpose, such as market shares, the Herfindahl-Hirschman Index (HHI), and concentration ratios (CR). Comparisons between the pre-merger and post-merger market shares or other market concentration indicators of the merging parties and their competitors provide a basis for drawing conclusions on the merger's effects on the relative market positions of the merging parties and their competitors as well as on the overall concentration level on the market.

Market shares (on relevant markets) can be determined on the basis of sales volumes or value, for example.⁸¹ Sales volumes are a particularly useful indicator in situations where suppliers produce similar and similarly-priced products, and value is a useful indicator when this is not so. Where anti-competitive effects are appraised relative to suppliers, the volume or value of purchases is examined.

The market share of the merging entity is usually calculated by adding together the pre-merger market shares of the merging undertakings. Market shares can also be examined over several years. An examination of fluctuations in market shares and the underlying reasons can provide useful information about the competitive process and the likely development of competitive conditions. For example, a high market share that an undertaking has maintained for a long period of time can be a sign of a highly independent position, while changes in the position of the market leader and losses in market shares can undermine this interpretation and provide an indication of the future significance of its competitors.

Market share calculations also provide opportunities for using certain other structural indicators. Examples of these kinds of market concentration indicators include the HHI and the CR. The HHI is calculated by summing the squares of the individual market shares of all of the undertakings operating on the market.⁸² While the absolute level of the HHI can give an initial indication of the competitive pressure on the market post-merger, the change in the HHI (known as the 'delta') is a useful proxy for the change in concentration directly brought about by the merger.⁸³ The HHI takes into account the number of undertakings and their relative sizes (according to market shares). The HHI gives proportionally greater weight to the market shares of the larger undertakings.

The CR is a measure of the total output produced in an industry by a given number of leading undertakings, usually three or four ('CR₃' or 'CR₄'). The CR is calculated by adding up the market shares of the (usually three or four) leading undertakings.⁸⁴ Unlike the HHI, the CR does not take into account the relative sizes of the undertakings.

81 In some situations it can also be useful to calculate market shares on the basis of capacity, for example.

82 For example, a market containing four undertakings (A, B, C, and D) with market shares of 40%, 30%, 20%, and 10%, respectively, has an HHI of $40^2 + 30^2 + 20^2 + 10^2$ (1,600 + 900 + 400 + 100) = 3,000. The HHI ranges from close to zero (in an atomistic market) to 10,000 (in the case of a pure monopoly).

83 The change in the HHI can be calculated by deducting the pre-merger HHI from the post-merger HHI. It can also be calculated independently of the overall market concentration by doubling the product of the market shares of the merging undertakings. For example, a merger of undertakings B and C, as referred to in footnote 82, would mean a delta of $2bc = 1,200$.

84 For example, the CR₃ of a market where the three largest undertakings are A (30%), B (25%), and C (20%) would be 75.

The market shares of the merging parties and other structural indicators, such as the HHI and the CR, often provide useful first indications of the market power of the merging entity. For example, extremely high market shares are generally an indication of considerable market power, while extremely low market shares indicate a lack thereof. Moreover, the greater the difference between the market shares of the two largest undertakings and the more atomistic the market shares of other competitors, the more likely it is that the undertaking with the highest market share enjoys considerable market power.

However, market shares and indicators such as the HHI and the CR alone do not provide enough information about the competitive effects of mergers. Due to the effect of other factors, these kinds of indicators cannot be deemed to give rise to a presumption of either the existence or the absence of competition concerns. It can therefore be necessary to take into account several different factors when examining market shares and indicators such as the HHI and the CR. Factors that can significantly increase the market power of undertakings in practice and boost their independence of other economic operators include economic and financial strength, available capacity, various vertical relationships in supply or distribution networks, scope of product selection and other synergies, and strong product identity (e.g. in the case of brands). On the other hand, the significance of high market shares can be undermined by negative market share development, strong bargaining power of customers, market share volatility resulting from infrequent large purchases, potential competition, rapid technological development, and competitive advantages of the most important competitors, for example. From the perspective of the competitive analysis, considerations such as whether one or more of the merging parties are important innovators or maverick undertakings with a high likelihood of disrupting coordinated conduct in ways that are not necessarily reflected in market shares can also be of importance.⁸⁵

Market shares and other similar structural indicators are therefore not as such decisive of whether a merger is deemed to significantly impede effective competition, and no specific intervention thresholds can be set. In order to form a conclusion, other factors also need to be assessed.

7.2 Anti-competitive effects of horizontal mergers

In assessing whether a merger is likely to significantly impede effective competition as provided in Section 25 of the Finnish Competition

⁸⁵ For more information, see, for example Section 7.2.1 Non-coordinated effects and Section 7.2.2 Coordinated effects.

Act, the FCA analyses any potential anti-competitive effects of the merger. Horizontal mergers can significantly impede effective competition. Horizontal mergers result in a reduction in the number of independent undertakings operating on the market (or attempting to enter the market), which can affect the competitive pressure faced by the merging undertakings, their competitors, and customers, as well as their incentive to compete. Mergers can also have implications on the intensity of competition.

The potential anti-competitive effects of mergers can be divided into two broad conceptual categories: coordinated and non-coordinated effects. A single merger can have both coordinated and non-coordinated effects, which is why it is sometimes difficult to draw a clear line between them. Coordinated and non-coordinated effects will be discussed below. The following sections also discuss two sets of special circumstances; situations where a merger creates or strengthens buyer power and situations where a merger eliminates a potential competitor.

7.2.1 Non-coordinated effects

Changes resulting from mergers can significantly impede effective competition on a market where they have non-coordinated (or unilateral) effects. Mergers can remove, or reduce, important competitive constraints on one or more undertakings, and result in a significant impediment to effective competition without undertakings expressly, or even tacitly, coordinating their operations.

Mergers can have direct implications on competition between the merging parties: They can result in a loss of competition between the parties and therefore eliminate the resulting competitive pressure, which can allow the merging undertakings to profitably increase prices, for example.⁸⁶ In some situations, the reduction in competitive pressure brought about by mergers can also benefit competitors. For example, subsequent price increases by the merged entity can switch some demand to rival undertakings which, in turn, can find it profitable to increase their prices without express, or even tacit, coordination.⁸⁷ This can result in a considerable increase in the prices of not just the merged entity but also its competitors.⁸⁸

⁸⁶ This can be the case, for example, in situations where a price increase by one of the merging undertakings would, prior to the merger, have been likely to result in a loss of sales to the other merging undertaking(s). The merger is therefore likely to create conditions where such losses can be at least partially offset by increased sales by the other merging undertaking(s), therefore reducing the total loss.

⁸⁷ Undertakings simply react independently to likely changes in the commercial behaviour of each other.

⁸⁸ In these circumstances, the negative effects of the merger are therefore not limited to the customers of the merging undertakings but also extend to other customers and potentially all customers on the rel-

A number of factors can influence whether significant non-coordinated effects are likely to result from a merger. The following are a few examples:

- The merging undertakings have large market shares
- Market shares have remained relatively stable for a long time
- There are only a few notable competitors on the market
- The merging undertakings are close competitors, their products are likely to be perceived as interchangeable by a large percentage of customers, and there are no alternative products offered by competitors
- Customers have limited possibilities of switching suppliers due to the fact that there are only a few or no alternative suppliers on the market or that they would face substantial switching costs
- Competitors have limited possibilities of reacting in a timely manner to price increases by increasing their own output on the market due to binding capacity constraints or the fact that the expansion of capacity or the deployment of excess capacity is costly
- The merged entity would be able to hinder the expansion or entry of rival undertakings due to having control or influence over patents or other types of intellectual property rights, the supply of inputs or distribution possibilities, or economic or financial dominance
- The merger involves a ‘maverick’ undertaking that has more of an impact on competitive dynamics than its market share suggests or a recent entrant or a strong potential competitor that is attempting to enter the market and is likely to cause considerable competitive pressure on the undertakings that already operate on the market in the future

The list is not exhaustive. Not all of these factors need to be present, and the aforementioned factors are not, if taken separately, necessarily decisive in giving rise to significant anti-competitive non-coordinated effects. Rather, the list is an example of the kinds of factors that the FCA takes into consideration when appraising the likelihood and significance of such factors on markets.

In practice, the significance of different factors can vary from one case to the next. In the case of homogeneous product markets, for example, it is often justifiable to call attention to the market shares of the

merging undertakings, the degree of concentration on the market, the number of competitors and their actual significance on the market, such as their ability to react to the merged entity's price increases or reductions in output due to capacity constraints, and the ability of customers to switch suppliers.

In other situations, it can be necessary to examine how close the merging undertakings are as competitors. Anti-competitive effects are usually more likely to arise from mergers implemented on heterogeneous product markets where a significant percentage of customers consider the products of the merging undertakings to be interchangeable and where there are no alternative products offered by competitors than from mergers where the products offered by one of the merging undertakings are more readily substitutable by the products of a third party than by those of the other merging undertaking.

Useful information about the closeness of the merging parties as competitors can be derived from estimations of the cross-price elasticities of the products involved or diversion ratios between products, for example.⁸⁹ The higher the degree of substitutability between the products of the merging undertakings, the more likely the merger is to result in considerable price increases. Indications of how likely it is that the merger will result in considerable profitable price increases can be derived from examinations of the pre-merger margins of the merging undertakings' products⁹⁰ and the sensitivity of customers to changes in the prices of the products offered by the merging parties.⁹¹ With the possibility of price increases resulting from mergers between close competitors in mind, other sources of information and various econometric tools can also prove useful.

In most cases, mergers that give rise to non-coordinated effects significantly impede effective competition by creating or strengthening the dominant position of a single undertaking. In some situations, mergers that give rise to non-coordinated effects can also significantly impede effective competition without creating or strengthening a dominant position. For example, this is the case with mergers that involve two suppliers of clearly interchangeable heterogeneous products as described

89 The higher the likelihood of customers switching between the products of the merging undertakings, the more closely they are considered to be competing and the more likely it is that the merged entity will raise prices significantly. It can also be useful to analyse the percentage of customers that are likely to be lost to other competitors.

90 High margins increase the value of the merged entity's sales and can therefore increase the likelihood of price increases.

91 This information can be derived from analyses of the cross-price elasticity of demand for the undertakings' products, for example.

above and where the merged entity forms the second largest undertaking on an oligopolistic market. In addition to eliminating important competitive constraints that the merging parties previously exerted on each other, these kinds of mergers can also have wider implications on the competitive intensity of the market by reducing competitive pressure on the remaining competitors.

7.2.2 Coordinated effects

Mergers can also have so-called coordinated effects (this is often referred to as a collective dominant position). Changes brought about by mergers in competitive dynamics also significantly impede effective competition by increasing the likelihood of previously independent undertakings to begin coordinating their behaviour in order to raise product prices or to lower their quality or production volumes. Mergers can also make coordination easier, more stable, or more effective for undertakings that were already coordinating before the merger.

Coordination can take various forms. It can involve keeping prices above the competitive level, limiting production volumes, or dividing the market, for instance by geographic area or by customer group.

Coordinated effects are more likely to emerge on highly-concentrated oligopolistic markets where two or more undertakings consider it possible and economically rational to coordinate their commercial behaviour. Coordination does not need to involve express agreements or actual exchange of information between undertakings. So-called tacit coordination can be enough. Coordinated effects are considered to be present as long as two or more undertakings recognise their mutual interdependence and the benefits available from coordinated behaviour.

In appraising coordinated effects, the FCA examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable. Three conditions are usually necessary for coordination to be considered possible or more likely:⁹²

First, coordination is usually more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work. Several factors can affect this, such as market transparency, any structural links between the undertakings, such as cross-shareholding or participation in joint ventures, symmetry between the undertakings in terms of market shares and cost structures, and whether the products are homogeneous or differentiated. Generally, the less complex and the more stable

⁹² For more information, see the ruling of the General Court (formerly known as the Court of First Instance) in Case T-342/99, *Airtours v Commission*.

and transparent the economic environment and the smaller the number of undertakings involved, the easier it is for undertakings to reach a common understanding of the terms of coordination. In order for coordination to be considered sustainable, the coordinating undertakings need to be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. This is usually easier on more open and operationally transparent markets.

Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Even where coordination is in the common interest of the coordinating undertakings, individual undertakings also often have separate short-term interests to deviate from the terms of coordination by lowering prices or by selling beyond their own geographic area, for example. Coordination is not sustainable unless the consequences of deviation are sufficiently severe to convince coordinating undertakings that it is in their best interest to adhere to the terms of coordination. In order for deterrent mechanisms to be effective, they need to be credible, timely, and sufficiently severe to convince undertakings that it is not worth deviating from the terms of coordination. The deterrent mechanisms can take many forms, such as severe price cuts, output increases, or cancellation of joint ventures. Moreover, retaliation need not necessarily take place on the same market as the deviation.

Third, the reactions of outsiders, such as current and future competitors not participating in the coordination as well as customers, should not be able to jeopardise the results expected from the coordination. Successful, sustainable coordination is unlikely if non-coordinating outsiders, such as a small group of current competitors, strong potential competitors, or customers with considerable bargaining power, can undermine the stability of coordination.⁹³

A number of factors can influence whether changes brought about by mergers in competitive dynamics are likely to significantly impede effective competition by increasing the likelihood of coordinated effects or by making coordination easier or more stable for undertakings that were already coordinating before the merger. The following are a few examples:

- The market is highly concentrated
- Only a few undertakings remain on the market after the merger
- The coordinating undertakings are symmetrical in terms of market shares and cost structures, for example, and their products are homogeneous

⁹³ This is the case, for example, if a small group of current competitors has the ability and incentive to render a capacity decrease implemented by the oligopoly unprofitable by increasing its own capacity.

- The market is open and transparent
- The market has institutional factors that promote coordination or the exchange of information, such as trade unions or associations, or the undertakings participate in practical arrangements, such as agreements relating to the exchange of information
- Market shares have remained relatively stable for a long time
- Demand and costs are stable and easily predictable
- The merger involves a ‘maverick’ undertaking that has more of an impact on competitive dynamics than its market share suggests or a recent entrant or a strong potential competitor that is attempting to enter the market and is likely to cause considerable competitive pressure on the undertakings that already operate on the market in the future.

The list is not exhaustive. Not all of these factors need to be present, and the aforementioned factors are not, if taken separately, necessarily decisive in giving rise to significant anti-competitive coordinated effects. Rather, the list is an example of the kinds of factors that the FCA takes into consideration when appraising the likelihood and significance of such factors on markets.

7.2.3 Special circumstances

(i) Situations where a merger creates or strengthens buyer power

Horizontal mergers can impede effective competition by strengthening the market power of one or more undertakings relative to competitors and customers. In some circumstances, horizontal mergers can also impede effective competition relative to suppliers by creating or strengthening the bargaining power (buyer power) of one or more undertakings operating towards the beginning of the supply chain.

Buyer power created or strengthened as a result of mergers can give undertakings a position where they can negotiate lower prices or otherwise more favourable terms and conditions. For example, buyer power that creates or strengthens a dominant position can give undertakings a possibility to operate sufficiently independently of suppliers to exercise considerable influence over critical parameters of competition.

Buyer power does not necessarily impede competition or have adverse effects on consumers. Increased buyer power can allow undertakings to negotiate lower prices for production inputs. If, for example, increased buyer power lowers input costs without restricting downstream

competition, a proportion of these cost reductions is likely to be passed on to consumers in the form of lower prices.⁹⁴

However, this is usually only the case if the buyer power does not lead to a drop in total output or restrict competition on markets towards the end of the supply chain. Possibilities of undertakings with increased buyer power to influence prices by reducing their purchase of inputs can lead to a drop in the overall levels of output on the final product markets and therefore harm consumer welfare, especially in situations where upstream markets (suppliers) are highly fragmented. The creation or strengthening of buyer power can also significantly impede competition on downstream product markets. Undertakings with increased buyer power can use their position relative to suppliers to foreclose competitors from the downstream product markets by pressurising suppliers to abstain from supplying their competitors, which in turn can further increase the buyer power of the dominant undertakings on the markets in question and significantly harm consumer welfare.⁹⁵

(ii) Situations where a merger eliminates a potential competitor

Mergers that significantly impede effective competition usually involve transactions between undertakings that are already active on the same relevant markets. However, mergers between undertakings that do not have overlapping operations on the same relevant markets can also significantly impede effective competition in some circumstances. This can be the case where a merger eliminates a potential competitor.

A merger with a potential competitor can significantly impede effective competition in situations where one of the merging undertakings operates on a market where neither competing undertakings nor customers can generate enough competitive pressure. These kinds of mergers 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.

94 In some circumstances, buyer power can also create a considerable countervailing power relative to suppliers with substantial market power, such as those enjoying a dominant position, by restricting their ability to operate independently of their customers and therefore reducing any potential anti-competitive effects. For more information, see Section 7.4.1 Bargaining power of customers and suppliers.

95 In these circumstances, any savings derived from reduced input costs, for example, are unlikely to be passed on to consumers in the form of lower prices.

For a merger with a potential competitor to have significant anti-competitive effects, two basic conditions need to be fulfilled. 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.

7.3 Anti-competitive effects of non-horizontal mergers

This section discusses the competitive analysis of vertical and conglomerate mergers. In practice, the focus of this section is on certain competition aspects that are relevant to the specific context of vertical mergers and conglomerate mergers. The general guidance provided with regard to the appraisal of horizontal mergers in Section 7.2 above is also relevant in the context of non-horizontal mergers.

7.3.1 Overview

Vertical mergers involve undertakings operating at different levels of the same supply chain, such as where a manufacturer of a certain product merges with one of its distributors. Conglomerate mergers are mergers between undertakings that operate on markets that have neither horizontal nor vertical ties.

Non-horizontal mergers are generally less likely to significantly impede effective competition than horizontal mergers. First, unlike horizontal mergers, vertical or conglomerate mergers do not entail the loss of direct competition between the merging undertakings on the same relevant market. Undertakings involved in these kinds of mergers do not operate on the same relevant markets and are not in direct competition with each other. Purely non-horizontal mergers do not directly reduce the number of undertakings operating on the market (or potential competitors wishing to enter the market), and they have no direct im-

plications on the market shares of the merging undertakings or on the degree of market concentration.⁹⁶

Second, non-horizontal mergers often provide substantial scope for efficiencies. A characteristic of vertical mergers, for example, is that the activities and products or services of the undertakings involved are complementary to each other. The integration of complementary activities, products, or services within a single undertaking can produce significant efficiencies. A characteristic of vertical mergers, for example, is that the activities and products or services of the undertakings involved are complementary to each other. The integration of complementary activities, products, or services within a single undertaking can produce significant efficiencies, which in turn can increase the ability and incentive of the merging undertakings to operate pro-competitively for the benefit of consumers.⁹⁷ Conglomerate mergers between undertakings that offer complementary products or services can also lead to considerable efficiencies and therefore to lower prices and other benefits to consumers.⁹⁸

However, there are circumstances in which non-horizontal mergers can significantly impede effective competition. This is the case, for example, if a vertical merger results in an undertaking gaining control over important sources of revenue or distribution channels on which its competitors also rely. Conglomerate mergers can also have significant anti-competitive effects in certain circumstances. This is the case, for example, in situations where a merger gives the merged entity an opportunity to leverage a strong market position from one market to another in order to allow it to foreclose competitors from the market and therefore to reduce competitive pressure on the merged entity. Vertical and conglomerate mergers can also have negative implications on post-merger competitive conditions by increasing the likelihood of undertakings that operated independently before the merger engaging in coordi-

96 In the case of vertical mergers, for example, any potential increase in market power on a certain market is the result of vertical links between the markets on which the merging undertakings operate.

97 Because demand for these kinds of products is positively correlated (an increase in the price of one product also decreases demand for the other), integration can provide an increased incentive for the merged entity to seek to decrease prices in order to benefit from the increased demand for the complementary product. Integration can also provide an increased incentive to eliminate or decrease double mark-ups, because the undertaking can capture a larger fraction of the benefits by decreasing prices and increasing output. Similarly, integration can provide the merging parties with a joint incentive to increase sales at one level in order to gain benefits at another by investing in services or product innovations, for example, or to increase efficiency by investing in new production processes or by improving coordination between production and distribution.

98 This is the case especially in situations involving conglomerate mergers between undertakings that offer products or services that are symmetrically complementary, in other words products and services that complement each other equally well.

nated behaviour or by making coordination easier or more effective for undertakings that were coordinating before the merger.⁹⁹

Similarly to horizontal mergers, the potential anti-competitive effects arising from vertical and conglomerate mergers can also be divided into two broad conceptual categories: coordinated and non-coordinated effects. A single merger can have both coordinated and non-coordinated effects. The following subsections, 7.3.2 and 7.3.3, discuss coordinated effects and the most common reason giving rise to coordinated effects: foreclosure.

7.3.2 Vertical mergers

7.3.2.1 Foreclosure

Vertical mergers generally only give rise to a significant impediment to effective competition where the merger is likely to give rise to what is called foreclosure. 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. This reduces the competitors' ability and incentive to compete effectively, which in turn helps the merged entity to take advantage of the market power that the merged undertakings possess on one or more of the upstream or downstream markets to the detriment of customers by profitably increasing the prices charged to customers, for example.

Two forms of foreclosure that amount to anti-competitive non-coordinated effects can be distinguished: (i) input foreclosure and (ii) customer foreclosure.

- (i) Input foreclosure arises where, post-merger, the new entity would be likely to restrict the access of downstream rivals to important production inputs, thereby raising their costs and damaging their ability to compete effectively on the market in question. The reduction in competitive pressure could allow the merged entity to profitably increase the prices charged to customers.
- (ii) Customer foreclosure arises where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base on downstream markets, which in turn damages their ability to compete effectively over the supply of products offered towards the beginning of the supply chain. The foreclosure of upstream ri-

⁹⁹ For more information on coordinated effects, see Section 7.3.4 and also Section 7.2.2 where applicable.

vals is also likely to raise downstream rivals' costs. The reduction in competitive pressure could allow the merged entity to profitably use its market power, for example by increasing prices or lowering output on downstream markets.

In practice, foreclosure can occur in various forms. The merged entity can decide to stop supplying competitors altogether, to restrict supplies, to raise the price it charges when supplying competitors, or to otherwise make the conditions of supply less favourable by degrading the quality of the input supplied, for example. The merged entity can also decide to reduce its purchases from upstream rivals or stop purchasing from its upstream competitors altogether and instead source all of its required goods or services from its own upstream division.

7.3.2.2 Competitive analysis

In assessing the likelihood of an anti-competitive foreclosure scenario, the FCA usually examines 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.

(i) Ability to foreclose

The ability to foreclose access to inputs usually requires that the merged entity possesses an important input required for the manufacture of a product of downstream competitors, such as a critical component or an input that represents a significant cost factor relative to the price of the downstream product. For input foreclosure to be a concern, the merged entity needs to have a significant degree of market power on upstream markets. It is only in these circumstances that the merged entity can be expected to have a significant influence on competitive conditions on upstream markets and therefore, possibly, on prices and supply conditions on downstream markets. The merged entity would only have the ability to foreclose its rivals if they were unable to react to the merged entity's attempts to reduce access to its upstream products or services by increasing their own capacity or efficiency.

When considering whether the merged entity would have the ability to foreclose access to customers, the FCA examines whether there are

sufficient economic alternatives on the downstream market for the upstream rivals to sell their output. The FCA is generally unlikely to raise competition concerns on the grounds of customer foreclosure if there is a sufficiently large customer base, at present or in the future, that is likely to turn to independent suppliers. For customer foreclosure to be a concern, it must be the case that the merger involves an undertaking that is an important customer with a significant degree of market power. Several different factors need to be taken into consideration in the competitive analysis, such as whether there are significant economies of scale or scope on the input market.

(ii) Incentive to foreclose

The merged entity also needs to have the incentive to foreclose access to inputs or customers. The incentive to foreclose usually depends on the degree to which foreclosure would be profitable. Essentially, the merged entity faces a trade-off between the possible costs associated with foreclosure and the profit gained from being able to raise prices. The trade-off is likely to depend on the merged entity's profit margins on upstream and downstream markets, its market shares on downstream markets, the efficiency of the merged entity's upstream and downstream divisions, and any capacity constraints and other similar factors.

(iii) Likely impact on effective competition and consumer welfare

In order for a foreclosure scenario to be deemed anti-competitive, it also needs to cause significant harm to effective competition on the relevant markets. This can be the case, for example, if foreclosure eliminates a major competitor or a particularly aggressive smaller competitor. The emphasis is on the overall impact that the merger is likely to have on effective competition and therefore ultimately on customers. Potential harm caused to individual competitors can be an indicator that competitive pressure has weakened and that a significant impediment to effective competition has therefore arisen, but it is not alone a decisive factor in competitive analyses.¹⁰⁰ In practice, the relevant benchmark is whether foreclosure could have a detrimental effect on consumer welfare on downstream markets, for example in the form of higher prices.

¹⁰⁰ This is why mergers that damage the market positions of certain competitors can be cleared if there are enough countervailing factors such as efficiency gains. Basic principles relating to the appraisal of countervailing factors will be discussed below in Section 7.4.

7.3.3 Conglomerate mergers

7.3.3.1 Foreclosure

Conglomerate mergers generally only have significant anti-competitive effects in situations where they confer on the merged entity the ability to leverage a strong market position from one market to another in order to foreclose rivals on the market in question. In these circumstances, the reduced ability and incentive of the rivals to compete effectively reduce the competitive pressure on the merged entity, which in turn can confer on the merged entity the ability to use its market power to the detriment of customers, for example by profitably increasing the prices charged to customers.

There are many ways in which merged entities can foreclose rivals to the extent that amounts to a significant impediment to effective competition. The most immediate way in which the merged entity may be able to use its market power on one market to foreclose competitors on another is by conditioning sales in a way that links the products on the separate markets together. This is done most directly either by tying or bundling. 'Tying' usually refers to situations where customers that purchase one good (the tying good) are required to also purchase another good from the producer (the tied good). 'Bundling' refers to situations where two or more products are only sold jointly or where the products are also available separately, but the sum of the stand-alone prices is higher than the bundled price due to various discount practices, for example.

7.3.3.2 Competitive analysis

In assessing the likelihood of an anti-competitive foreclosure scenario, the FCA usually examines three conditions: (i) whether the merged entity would have the ability to foreclose its rivals, (ii) whether it would have the incentive to do so, and (iii) whether a foreclosure strategy would have a significant detrimental effect on competition on the relevant markets, therefore causing harm to consumers.

(i) Ability to foreclose

In order for the effects of bundling or tying to be considered to significantly impede competition, the merged entity needs to have a significant degree of market power on at least one of the markets concerned. This can be the case where at least one of the merging parties' products is viewed by many customers as particularly important and there are few

relevant alternatives for that product, for example because of product differentiation or capacity constraints on the part of rivals.

Further, foreclosure through tying or bundling is usually more likely to amount to a competition concern where there is a large common pool of customers for the individual products and where the majority of customers tend to buy both products instead of only one of the products. Such a correspondence in purchasing behaviour is more likely to be significant when the products in question are complementary.

In practice, there are several factors that can prove relevant when appraising whether merged entities are able to foreclose rivals by means of tying or bundling. For example, the foreclosure effects of bundling and tying are likely to be more pronounced in industries where there are economies of scale and the demand pattern at any given point in time has dynamic implications for future conditions of supply. It can also be necessary to examine the technical properties and other special attributes of products and their effects not just on buyer behaviour but also on the merged entity's own ability to commit to making their tying or bundling strategy a lasting one. For example, the technical properties of the products can make them unlikely to be bought by the same customers. On the other hand, customers can have a strong incentive to buy the range of products concerned from a single source rather than from many suppliers, due to savings in transport costs, for example.¹⁰¹

(ii) Incentive to foreclose

The merged entity also needs to have the incentive to foreclose its rivals. The incentive to foreclose usually depends on the degree to which foreclosure would be profitable. Essentially, the merged entity faces a trade-off between the possible costs of foreclosure and the possible gains from expanding market shares or being able to raise prices on the relevant markets due to its market power. The trade-off is likely to depend on a number of factors, such as how likely customers are to be deterred by the bundling and tying and to switch to competing products or bundles, the relative value of each of the products for the merged entity¹⁰², the own-

¹⁰¹ Although the fact that a merged entity has a broad portfolio of products does not as such raise competition concerns, the range of products can sometimes be considered to increase market power. This can be the case, for example, in situations where customers value diversity and are willing to buy both products (instead of just one of them) and where offering these kinds of product portfolios involves considerable overheads and there are no, or only a few, competing undertakings that could offer a similar range of products.

¹⁰² It is unlikely that the merged entity would be willing to forego sales on one highly profitable market in order to gain market shares on another market where turnover is relatively small and profits are modest.

ership structure of the merged entity¹⁰³, the possibility that the conduct is unlawful, and whether the decision to tie or bundle products is likely to increase profits by gaining market power in the tied goods market and/or to protect market power in the tying goods market.

(iii) Likely impact on effective competition and consumer welfare

In order for a foreclosure scenario to be deemed anti-competitive, it also needs to cause significant harm to effective competition and be likely to therefore also harm consumers on the relevant markets. This can be the case, for example, if foreclosure eliminates a major competitor or a particularly aggressive smaller competitor. Anti-competitive effects can also arise from practices that deter entry by potential competitors, for example by forcing potential competitors to enter several product markets (tied and bundled products) at the same time.

On the other hand, competition is unlikely to deteriorate following a conglomerate merger if there remain enough rivals on any of the markets concerned that can challenge the merged entity by pricing more aggressively. The same holds when few rivals remain but these have the ability and incentive to expand output. Unlike single-product suppliers, undertakings that tie or bundle several complementary products can also benefit from being able to take into account the positive effect of a drop in the price of one of their products on the sales of another. Conglomerate mergers can therefore also give the merged entity an incentive to lower prices.

From the perspective of the competitive analysis, the emphasis is on the overall impact that the merger is likely to have on effective competition and therefore ultimately on customers. Potential harm caused to individual competitors can be an indicator that competitive pressure has weakened and that a significant impediment to effective competition has therefore arisen, but it is not alone a decisive factor in competitive analyses.¹⁰⁴ In practice, the relevant benchmark is whether foreclosure could have a detrimental effect on consumer welfare, for example in the form of higher prices.

¹⁰³ For example, in cases where two undertakings have joint control over an undertaking that is active on one market and only one of them is active on the neighbouring market, the undertaking without activities on the latter market may have little interest in foregoing sales on the former market.

¹⁰⁴ This is why mergers that damage the market positions of certain competitors can be cleared if there are enough countervailing factors such as efficiency gains. Basic principles relating to the appraisal of countervailing factors will be discussed below in Section 7.4.

7.3.4 Coordinated effects

In some circumstances, non-horizontal mergers can also have negative implications on post-merger competitive conditions by increasing the likelihood of undertakings that operated independently before the merger engaging in coordinated behaviour or by making coordination easier or more effective for undertakings that were coordinating before the merger.

For example, vertical integration can give the merged entity access to valuable information about sale prices on other markets, which can facilitate coordination on the markets in question. Vertical mergers can facilitate coordination on both upstream and downstream markets.

Conglomerate mergers can also create or strengthen coordinated effects in many different ways. Where a merger results in foreclosure, the reduction in the number of rivals or the considerable weakening of their ability to compete effectively can also give the merged entity's rivals an incentive to engage in coordinated behaviour in order to benefit from the increased price level. Moreover, undertakings that engage in competitive interaction on multiple markets are likely to have better access to information about the competitive conditions prevailing on different markets, which in turn can make it easier for undertakings to reach a common understanding on the terms of coordination and increase the scope and effectiveness of disciplining mechanisms, because deviations from the agreed terms of coordination on one market can also be retaliated on another market.

The basic principles of appraising coordinated effects have been discussed above in Section 7.2.2 in connection with horizontal mergers. The same general rules also apply to appraising the potential coordinated effects of non-horizontal mergers.

7.4 Countervailing factors

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 counteract any anti-competitive effects that the merger would otherwise have. A few of the most common countervailing factors will be discussed below.

7.4.1 Bargaining power of customers and suppliers

In appraising the bargaining power of customers and suppliers, the FCA considers whether customers or suppliers are in a sufficiently strong position relative to the merged entity to counter any efforts of anti-compet-

itive behaviour by influencing the conditions of trade, in other words, whether the merged entity is likely to face sufficient competitive pressure from the direction of customers or suppliers.

Suppliers can have bargaining power, for example, because they possess a so-called must-stock brand that even customers with significant buyer power cannot leave out of their product selection. Customers can have bargaining power, for example, if they can credibly threaten to resort to alternative sources of supply should the supplier decide to increase prices or to otherwise deteriorate the conditions of supply. This can be the case if there are suitable alternative suppliers on the market that customers can, within a reasonable timeframe, switch to or if customers can credibly threaten to vertically integrate into the upstream market or to sponsor the entry of new suppliers to the market. Customers can also exercise countervailing buyer power by refusing to buy other products from the supplier or by delaying purchases (in order to allow new suppliers that they sponsor to enter the market, for example).

Although large and sophisticated customers are more likely to possess this kind of countervailing buyer power than smaller undertakings in fragmented industries, size alone does not determine the degree of bargaining power that customers and suppliers can exercise. Even a large customer loses some of its buyer power if the merged entity is able, for example, to take care of the customer's tasks through its own supply or distribution chain. In some cases, it can also be important to pay particular attention to the incentives of customers and suppliers to use their bargaining power to object to the terms and conditions set by the merged entity.

The bargaining power of customers and suppliers can be restricted by a number of factors, such as investments that are valuable only in specific business relationships and have no use otherwise. This can be the case, for example, where an undertaking has tailored its supply to the demand of a specific customer and changing this is costly or not feasible within a reasonable timeframe.

In practice, several different factors may need to be examined in order to determine whether the bargaining power of customers or suppliers amounts to a sufficient countervailing force. The degree to which the bargaining power of customers or suppliers protects the position of specific customers or suppliers relative to the merged entity is not relevant; what matters is how effectively this bargaining power is likely to prevent the merged entity from using its increased market power after the merger.

7.4.2 Potential competition and barriers to entry

Potential competition

When appraising the potential anti-competitive effects of mergers, the FCA examines not just existing competition but also competitive pressure caused by potential competitors, in other words the ability of undertakings other than those that already operate 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.¹⁰⁵

From the perspective of appraising the anti-competitive effects of mergers, the significance of potential competition usually comes down to the issue of entry. For entry to be considered a sufficient competitive constraint on the merging undertakings, it must be shown to be likely, timely, and sufficient to deter or defeat any potential anti-competitive effects of the merger.¹⁰⁶

As regards entry, the examination is always carried out on a case-by-case basis, and it is therefore impossible to provide unequivocal definitions of what constitutes a timely entry or when entry is to be considered sufficient to deter or defeat any potential anti-competitive effects of a 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 risk and costs of failed entry generally make entry less likely.

Barriers to entry

Barriers to entry affect the extent to which potential competition is likely to limit the ability of undertakings to behave independently of other market forces. Barriers to entry do not need to foreclose potential competition completely or for an indefinite period of time. It is enough that

¹⁰⁵ As regards entry, the examination is always carried out on a case-by-case basis, and it is therefore impossible to provide unequivocal definitions of what constitutes a timely entry or when entry is to be considered sufficient to deter or defeat any potential anti-competitive effects of a 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 risk and costs of failed entry generally make entry less likely.

¹⁰⁶ It is important to note 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 and usually subject to slightly stricter temporal criteria, for example. 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. For more information, see Section 6.2 Demand-side substitutability and supply-side substitutability.

they deter or delay entry for a period of time that is significant from the perspective of effective competition.

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. The higher the anticipated profits, the more likely entry is. 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. Economies of scale exist when an increase in the scale of production leads to a reduction in average unit cost. 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 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.

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 the costs of its rivals 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.

Barriers to entry do not need to foreclose potential competition completely, and instead they can be an indication of the incumbent undertakings' ability to prevent new entrants from gaining a significant market position. 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 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.

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 can 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.

7.4.3 Efficiencies

In order to assess whether a merger would significantly impede effective competition, any efficiency gains resulting from the merger also need to be examined.

Mergers with significant anti-competitive effects often give rise to a risk of efficiency loss. Competitive pressure usually affects the incentive of undertakings to compete effectively and to pass at least some of the efficiencies gained on to the consumers in the form of lower prices or better or more comprehensive product portfolios, for example. The lower the competitive pressure, the higher is therefore the risk of efficiency losses and harm to consumer welfare.

On the other hand, mergers can also have significant positive effects on the efficiency of the merging undertakings. Efficiencies generated by the merger can enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have. Efficiencies brought about by mergers can be production-related, such as improved product quality, more efficient production and distribution, the ability to offer a broader product portfolio with the same inputs, or other savings in production, supply, or distribution costs. Consumers can also benefit from dynamic efficiencies, such as new and improved products resulting from innovations in production or distribution.

The weight given to efficiency claims depends on how substantial the claimed efficiencies are, how likely they are to be achieved, and whether they promote competition for the benefit of customers and consumers.

Generally speaking, the more significant the anti-competitive effects of a merger, the more substantial efficiencies need to be. The FCA needs to be able to gain sufficient assurance that post-merger competitive pressure will be sufficient to ensure that the merged entity has the incentive to operate pro-competitively and to pass efficiency gains, to a sufficient degree, on to consumers. It is highly unlikely that a merger leading to a market position approaching that of a monopoly or a similar level of market power can be cleared on the grounds that efficiency gains would be sufficient to counteract its potential anti-competitive effects.

The FCA also needs to be able to ascertain that the claimed efficiencies are likely to be realised and that they actually benefit consumers. The nature of the efficiencies can be significant in this context. For example, cost efficiencies that lead to reductions in variable or marginal costs are more likely to be relevant to the assessment of whether efficiencies will lead to a net benefit to consumers than more speculative, dynamic efficiencies relating to innovation. Ostensible efficiencies, such as cost reductions that merely result from anti-competitive reductions in output, cannot be considered as efficiencies benefiting consumers.

The timeframe within which efficiencies are likely to be passed on to customers and consumers also matters. In order to be considered as a counteracting factor for the anti-competitive effects that a merger would otherwise have, the efficiencies must be sufficiently timely. Theoretical efficiencies that can potentially benefit consumers sometime in the distant future do not count.

It is for the merging parties to provide all the relevant information necessary to substantiate their efficiency claims and to demonstrate that they cannot be achieved without the merger. The claimed efficiencies also need to be a direct consequence of the merger. The FCA does not consider efficiencies that can be achieved by means of other, less anti-competitive means that are reasonably practical having regard to established business practices in the industry concerned.

The claimed efficiencies need to materialise on the Finnish market and be passed on to Finnish consumers or customers.

7.5 Failing firm

The FCA can clear an otherwise problematic merger if one of the merging parties is a failing undertaking.

The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This arises where the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger.

The FCA considers the following three criteria to be especially relevant for the application of a 'failing firm defence': (1) The merger is the only economically feasible way to prevent the undertaking from exiting the market in the near future. The undertaking would exit the market even in the absence of the merger. (2) There is no less anti-competitive alternative. (3) In the absence of the merger, the assets of the failing firm would inevitably exit the market.

It is for the notifying parties to provide the FCA in due time with all the relevant information necessary for the appraisal.

8 Appraisal of mergers on the electricity market

Mergers where one of the parties is an undertaking involved in electricity distribution are governed by the general provisions of the first paragraph of Section 25 of the Finnish Competition Act or the provisions of the second paragraph, which are specific to the electricity market.

According to the aforementioned second paragraph, a merger can be prohibited or conditions imposed on the merger if the total volume of electricity distributed at 400 V, post-merger, by the merging parties and other undertakings or electricity distribution plants belonging to the same groups of undertakings as provided in the first or third paragraph of Section 24 of the Finnish Competition Act amounts to more than 25% of the national electricity grid. Under this provision, intervention in mergers on the electricity market does not require that a significant impediment to effective competition can be demonstrated; the 25% threshold is enough.

VI Conditional clearance and prohibition of mergers

1 Overview

According to the third paragraph of Section 25 of the Finnish Competition Act, the FCA has a duty to negotiate remedies that could eliminate competition concerns arising from mergers before proposing that a merger be prohibited. Where a merger raises competition concerns in that it could significantly impede effective competition, the notifying parties can propose commitments to the FCA in order to resolve the competition concerns. The FCA has a duty to consider these remedies and if the remedies proposed by the notifying parties are deemed sufficient for eliminating the competition concerns associated with the merger, the parties are asked to commit to the remedies in writing. The FCA is responsible for ensuring that the remedies are implemented as agreed. Since the FCA's primary responsibility is to find an agreeable solution, it cannot ask the Finnish Market Court to prohibit a merger if the remedies proposed by the notifying parties are sufficient for eliminating the competition concerns identified.

The conditions imposed on the merging parties are usually structural. One example is a commitment to selling a specific business or a part of a business, production capacity, patent, or occasionally a trademark. Structural commitments can also relate to dissolving cooperative agreements or withdrawing from joint ventures.

Alternatively, the FCA can impose conditions on the merged entity's future behaviour, such as licensing and supply obligations. The conditions can also include elements of both structural commitments and behavioural commitments. The FCA generally only imposes non-structural conditions in situations where the competition concerns associated with the merger are temporary and likely to disappear after a certain transitional period.

2 Procedure

The FCA can consider remedies both during Phase I and Phase II of the merger control procedure. In practice, due to the tight deadlines stip-

ulated in the Finnish Competition Act, remedies are mostly discussed during Phase II.

The notifying parties must present to the FCA all of the practical remedies that they believe can eliminate the competition concerns identified as well as all relevant information required for appraising the proposed remedies. The proposals must be submitted early enough for the FCA to be able to appraise their viability within the deadlines set for decision-making. It is important to emphasise again that the responsibility for proposing adequate remedies package rests with the notifying parties.

The FCA examines the likely effects of the proposed commitments on the basis of the views of third parties and, where applicable, external experts. Market testing usually uncovers any attempts by undertakings to mislead the FCA, such as proposals to divest businesses that do not, in practice, contribute to the merger's anti-competitive effects or commitments that do not amount to a countervailing force.

Since the processing deadlines are often rapidly approaching towards the end of the remedial negotiations, there is not always time for further negotiations. Insufficient commitment offers can therefore lead to a situation where the FCA has no choice but to request that the Finnish Market Court prohibit the merger.

The notifying parties often identify many elements of the commitments as business secrets, which makes the FCA's task more difficult in terms of market testing, for example. In order to assess the proposed remedies reliably, the FCA needs to be able to describe the content of the commitments to third parties as accurately as possible.

Efficient remedies need to be capable of restoring enough competition on the market to eliminate any anti-competitive effects associated with mergers. The remedies need to eliminate competition concerns fully and on a lasting basis. The remedies must also not require continued monitoring by the FCA.

In practice, commitment offers vary from one case to the next, and their content depends on the severity and nature of the competition concerns identified. In general, commitment offers may be structured as follows:

- A brief overview of the competitive effects of the proposed commitments
- A brief overview of the competitive effects of the proposed commitments

- A breakdown of the measures that will ultimately allow the FCA to verify, unequivocally, whether or not the remedies have been implemented
- Details about the timeframe and procedure for implementing the remedies
- Information about any supplementary commitments aimed at enabling the start-up of the new entity
- Commitments relating to the divestiture process (e.g. measures to preserve the competitiveness of the divested business, requirements set on the suitability of the purchaser such as autonomy and competitive significance, procedure for keeping the FCA informed about the sales negotiations, and information about the purchaser approval process)
- Information about monitoring mechanisms (e.g. deadlines for implementing the remedies, details about the trustee responsible for monitoring compliance or for overseeing the divestiture, a detailed description of the trustee mandate, information about penalties or alternative solutions to be adopted in situations where the remedies cannot, for one reason or another, be implemented)

The FCA sets deadlines for implementing the remedies taking into account the legal provision whereby a merger can be dissolved should the agreed remedies not be implemented. According to Section 30 of the Finnish Competition Act, the order to dissolve a merger in these circumstances must be issued within one year of the date on which the conditional clearance becomes final or the transaction closes. This is why the FCA generally sets deadlines that are less than one year especially when remedies involve divesting businesses or other assets.

The appointment of a trustee often helps the FCA to monitor the implementation of remedies. The trustee must be impartial and independent of the parties involved. Trustees are generally better equipped than the FCA to identify any breaches of commitments, and they can, where necessary, be consulted in the case of disputes. The FCA typically appoints trustees to monitor compliance with technical details and to ensure the practical viability of remedies.

3 Waiving or modifying conditions set on mergers

According to Section 44 of the Finnish Competition Act, notifying parties cannot appeal against the FCA's decision to impose the conditions proposed by the notifying parties. As regards conditional clearance, the clearance and the associated conditions are interlinked. Without the conditions, the merger would give rise to the anti-competitive effects that the remedies are designed to eliminate.

According to Section 30 of the Finnish Competition Act, the FCA can waive or modify conditions set on mergers upon request in the event that there has been a significant change in market conditions or in other exceptional circumstances. The FCA's decision to modify the conditions set on mergers can be appealed to the Finnish Market Court as provided in the Finnish Administrative Judicial Procedure Act.

The provision can be applied, for example, if there has been a substantial change in market circumstances due to the entry of a new, significant undertaking. The deadlines set on implementing the agreed remedies can also be extended if the parties are unable to meet the deadline for reasons beyond their control.

4 Prohibition of mergers

If the competition concerns arising from a merger cannot be eliminated by means of commitments, the FCA has a duty to ask the Finnish Market Court to prohibit the merger according to the first paragraph of Section 25 of the Finnish Competition Act. According to the first paragraph of Section 29 of the Finnish Competition Act, the Finnish Market Court must rule on the case within three months of the FCA's proposal. In the absence of a ruling, the merger is deemed to have been cleared.

VII Ancillary restraints

1 Ancillary restraints and merger control

Ancillary restraints are restrictions directly related and necessary to the implementation of mergers which would otherwise be assessed according to Sections 5–7 of the Finnish Competition Act.¹⁰⁷ Ancillary restraints typically serve to facilitate the transfer of assets to the purchaser of an undertaking or the joint acquisition of control.

Any decisions issued by the FCA regarding mergers automatically cover ancillary restraints without the FCA having to assess such restrictions in individual cases. The principles according to which parties involved in mergers can assess for themselves whether – and to what extent – their agreements can be regarded as ancillary to a transaction will be discussed below.¹⁰⁸ The notifying parties can nevertheless request the FCA to expressly assess the ancillary character of restrictions in connection with the merger notification procedure.

2 General principles

Restraints that are ancillary to mergers restrict the merging parties' freedom of action on markets. Restrictions on competition that are based on agreements with third parties are not considered ancillary to the transaction in the case of mergers.

The appraisal of ancillary restraints is based on an overall assessment. Whether restrictions are considered to be directly related to mergers also depends on the market circumstances at the time of the merger. In general terms, the need for the purchaser to benefit from certain protection is more compelling than the corresponding need for the vendor; it is the purchaser who needs to be assured that he/she will be able to acquire the full value of the acquired business.

¹⁰⁷ Where a restriction on competition is likely to have major implications on trade between the Member States of the EU, Articles 101 and 102 of the Treaty on the Functioning of the European Union also apply.

¹⁰⁸ Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03) should also be consulted where applicable.

For restrictions to be considered ancillary to a merger, they must be directly related to the merger and necessary to the implementation of the merger. In determining whether a restriction is necessary, it is appropriate to ensure that its duration, subject matter, and geographic field of application do not exceed what the implementation of the merger reasonably requires.

2.1 The condition of direct relation

For restrictions to be considered ancillary to a merger, they must be directly related to the main transaction and intended to allow a smooth transition to the changed company structure after the merger. Indirect links between a merger and restrictions agreed by the parties do not make these restraints ancillary to the merger. It is not sufficient that an agreement has been entered into at the same time as the merger. Restrictions that are not related to the main transaction are not considered ancillary to the merger. For restrictions to be considered directly related to a merger, they must be aimed at bringing about more or less the same effects as the merger itself. However, ancillary restraints are always of secondary importance, and their effects have less weight than the merger itself.

2.2 The condition of necessity

Restrictions agreed by the merging parties are considered necessary to the implementation of the merger where, in the absence of these agreements,

- the merger could not be implemented or
- the merger could only be implemented under considerably more uncertain conditions or
- the merger could only be implemented at substantially higher cost or
- the merger could only be implemented over an appreciably longer period or
- the merger could only be implemented with considerably greater difficulty.

If equally effective alternatives are available for attaining the legitimate aim pursued, the undertakings must choose the one which is objectively the least restrictive of competition in order for the restrictions to be considered ancillary to the merger.

2.3 *Non-competition clauses*

General principles

Non-competition obligations imposed in the context of mergers are considered ancillary restraints and therefore exempt from the provisions of Section 5 of the Finnish Competition Act if their duration, their geographic field of application, and their subject matter are reasonable and if they do not restrict competition any more than what is necessary to the implementation of the merger and to guarantee the transfer of the full value of the assets transferred. Non-competition clauses are only considered necessary to the implementation of a merger where the merger involves a transfer of know-how, goodwill, or a customer base to the purchaser. Where only the tangible assets of an undertaking are being transferred, restrictions imposed on the vendor cannot usually be considered necessary for protecting the purchaser against competition.

Acceptable duration of non-competition clauses

The maximum duration of non-competition clauses that can be considered ancillary restraints depends on the circumstances. In most cases, non-competition clauses are justified for periods of up to three years. However, this only applies to mergers where the transfer of the undertaking includes the transfer of goodwill and a customer base as well as know-how. When only a customer base and goodwill are included, non-competition clauses are generally justified for periods of up to two years.

Examples of other factors considered in the determination of acceptable duration

The aforementioned guidelines on the acceptable timeframes of ancillary non-competition clauses are not applied mechanically. In assessing the necessity of non-competition clauses, the FCA takes into consideration the nature of the tangible and intangible assets of the undertaking concerned as well as the business environment in which the undertaking operates. Non-competition clauses can be justified for periods exceeding two years, for example where the parties can demonstrate an exceptionally high degree of customer loyalty. Where technical know-how accounts for an exceptionally high percentage of the value of the undertaking concerned, non-competition clauses can be justified for periods exceeding three years. On the other hand, where know-how is of little significance to the merger and the transfer is in fact limited to tangible assets, non-competition clauses of three years cannot be considered

ancillary to the merger. Non-competition clauses coinciding with a period during which the vendor retains ownership or control over the transferred undertaking can be considered ancillary to a merger where the vendor remains a notable minority shareholder or a member of the undertaking's board of directors after the merger. In exceptional circumstances, non-competition clauses that remain in force for a short period of time after the vendor has relinquished ownership or control over the transferred undertaking can also be justified.

Subject matter and geographic scope of non-competition clauses

In order to qualify as ancillary to a merger, the geographic scope of a non-competition clause must be limited to the area in which the transferred undertaking operates. Similarly, non-competition clauses must remain limited to products and services forming the economic activity of the transferred undertaking.

Undertakings and persons subject to non-competition clauses

In order for non-competition clauses to be considered ancillary to mergers, they must be limited to the vendor, the vendor's subsidiaries, or such agents of the vendor that could, by way of customer loyalty and know-how, quickly establish competition against the transferred undertaking in the absence of non-competition obligations. In exceptional circumstances, non-competition clauses that bind the purchaser can also be considered necessary to the implementation of the merger. Non-competition clauses that bind the purchaser can be considered ancillary to a merger, for example where the merger involves splitting a business that formerly constituted a uniform economic entity between the purchaser and the vendor.¹⁰⁹

Other similar ancillary restraints

The aforementioned principles also apply to other restrictions agreed between the parties where these have similar effects to non-competition clauses. For example, clauses restricting the percentage of shares that the parties can acquire in other undertakings operating in the same industry as the transferred undertaking can be deemed necessary to the implementation of the merger. Restrictions on the ability of the vendor to participate in the management of other undertakings operating in the same industry as the

¹⁰⁹ See the ruling of the FCA on 3 August 2005 on merger clearance in the case of Nissan Nordic Europe Ltd/Nissan business of Aro Oy (231/81/05), where the FCA considered non-solicitation clauses that bind the purchaser justifiable. See also the rulings of the FCA on 4 January 2002 on merger clearance in the case of General Electric Company/Bently Nevada Corporation (1089/81/01) and on 10 April 2000 on merger clearance in the case of Säkkipäline Puhtaanapito Oy/WM Ympäristöpalvelut Oy (49/81/00), where such clauses were rejected. Moreover, see FCA Yearbook 2000, pp. 72–73, which discusses the FCA's rulings on ancillary restraints (e.g. the ruling of the FCA on 24 February 1999 on merger clearance in the case of CapMan/Royal Rest (103/81/98)).

transferred undertaking can also be deemed necessary. Non-solicitation¹¹⁰ and confidentiality clauses can also have similar effects.

2.4 Licence agreements

In many cases, the vendor remains the owner of the intellectual property rights of the transferred undertaking in order to exploit them for activities other than those transferred. In these situations, the usual means for ensuring that the purchaser will have full use of the transferred business is to conclude licence agreements. Licences of intellectual property rights may be limited to the transferred business. Exclusivity clauses do not prevent licence agreements from being considered ancillary to mergers. Time limits also have no bearing on whether licence agreements are considered ancillary restraints. However, territorial restrictions in licence agreements are not considered ancillary restraints because territorial limitations on licences are not considered necessary to the implementation of mergers.

2.5 Purchase and supply obligations

Purchase and supply obligations between the merging parties can be considered necessary to the implementation of the merger in cases involving only a partial transfer of the vendor's business and where the viability of the transferred undertaking is based on previous integration of activities within the economic unity of the vendor's group of undertakings. In these situations, purchase agreements can be necessary for ensuring the continuity of supply to either the vendor or the purchaser. Supply agreements can be necessary for guaranteeing the quantities previously supplied by the vendor or the purchaser. However, purchase and supply obligations that provide for exclusivity are generally not considered necessary to the implementation of mergers. In examining the nature of purchase and supply obligations that provide for exclusivity, the FCA takes into consideration any alternative means of solving the issues resulting from the break-up of a former economic unity as regards access to inputs or guaranteeing the quantities previously supplied. For example, if the same outcome can be achieved by means of contractual terms regulating quantities¹¹¹, obligations that provide for exclusivity cannot be deemed ancillary to the merger. In any case,

¹¹⁰ The FCA has previously held that non-solicitation clauses are only justified when they are limited to active solicitation and exclude passive solicitation. Non-solicitation clauses also need to be limited to the senior management and other key personnel.

¹¹¹ As regards purchase obligations providing for fixed quantities, see, for example, the ruling of the FCA on 21 July 2006 on merger clearance in the case of Finland Post Corporation/Regional transport services of Kelpo Kuljetus Fi Oy (374/81/06). As regards obligations providing for minimum purchase and supply quantities, see, for example, the ruling of the FCA on 29 September 2000 on merger clearance in the case of Decidenti Oy Ab/Tikkurila CPS Oy (797/81/00).

the duration of purchase and supply obligations must be limited to a period necessary for the replacement of the relationship or dependency by autonomy on the market.¹¹²

2.6 Ancillary restraints and joint ventures

Non-competition obligations between a joint venture and its parents can be regarded as directly related and necessary to the implementation of the merger and therefore considered ancillary restraints. Generally speaking, the geographic scope of a non-competition clause must be limited to the area in which the parents offered the relevant products or services before establishing the joint venture. Similarly, non-competition clauses must generally be limited to products and services constituting the economic activity of the joint venture.

A licence granted by the parents to the joint venture can also be considered necessary to the implementation of the merger. The necessity of licence agreements is often based on the parents needing to exploit the intellectual property rights concerned for other activities and therefore not transferring them to the joint venture. Geographic limitations to licence agreements do not render them non-ancillary in the case of joint ventures. Exclusivity clauses are also not decisive as to whether or not agreements are considered ancillary to the merger.

The ancillary nature of purchase and supply obligations between joint ventures and their parents is generally examined in the light of the principles described above. The examination also takes into consideration whether the restriction is necessary for giving the joint venture access to the market. In addition to assessing whether agreements between joint ventures and their parents are ancillary to the merger, the examination needs to take into consideration the fact that a permanent relationship of dependency, an unnecessarily long duration of purchase and supply obligations, or an unnecessarily large number of products covered by the agreements can mean that the joint venture is not considered an autonomous economic entity under merger control provisions (see Section II.3.5 Joint ventures).

2.7 Non-ancillary restrictions agreed in the context of mergers

Where a restriction agreed in the context of a merger is not directly related to the main transaction and not necessary for the implementation of the merger, it is not considered ancillary to the merger. Such restrictions are not con-

¹¹² According to the European Commission, such obligations can be justified for a transitional period of up to five years.

sidered as part of the merger control procedure, and are instead appraised under Sections 5–7 of the Finnish Competition Act.¹¹³

¹¹³ Where a restriction on competition is likely to have major implications on trade between the Member States of the EU, Articles 101 and 102 of the Treaty on the Functioning of the European Union also apply.

Annex

Short-form notification

The information provided in the concentration notification shall be given using the numbering and headings of this annex. The business secrets in the notification and annexes shall be identified. With respect to a party to the concentration, as referred to in Section 24(1) of the Competition Act, entities or foundations part of the same group of companies as the party shall comprise of all those entities and foundations who are in such a relation to the said party as referred to under 24(1)1-4, and with respect to the object of the acquisition, the entities and foundations in such a relation to it as referred to under Section 24(3).

To allow the Finnish Competition Authority to assess the competitive impacts of the merger and the applicability of the short-form notification, at the beginning of the notification a short description of the present and future business of the parties shall be given, including information on what kind of business the concentration resulting from the merger shall engage in and where it shall operate. The notifier shall also provide at least the following information in the short-form notification:

1. Party obliged to notify

For each party obliged to notify:

- 1.1. Name;
- 1.2. The industries wherein the party obliged to notify operates;
- 1.3. Address;
- 1.4. Telephone and telefax number;
- 1.5. Liaison (name, position, telephone and telefax number and e-mail address);
- 1.6. Appointed representative (name, position, company, address, telephone and telefax number and e-mail address).

2. Other party to the concentration:

For each object of acquisition:

- 2.1. Name;
- 2.2. Industries wherein the party operates;
- 2.3. Address;
- 2.4. Telephone and telefax number;
- 2.5. Liaison (name, position, telephone and telefax number and e-mail address);
- 2.6. Appointed representative (name, position, company, address, telephone and telefax number and e-mail address).

3. Seller

Information on the seller of each object of acquisition (insofar as this is known by the party obliged to notify):

- 3.1. Name;
- 3.2. Industries wherein the seller operates;
- 3.3. Address;
- 3.4. Telephone and telefax number;
- 3.5. Liaison (name, position, telephone and telefax number and e-mail address);
- 3.6. Appointed representative (name, position, company, address, telephone and telefax number and e-mail address).

4. Concentration

- 4.1. The legal form of the concentration (cf. 21(1) of the Competition Act).
- 4.2. A brief description of the concentration arrangement. The business secrets in the description shall be identified.
- 4.3. In a case involving the founding of a joint venture:
 - 4.3.1. A description on the future business of the joint venture in Finland
 - 4.3.2. A description on stability and operational independence of the joint venture.

5. Information on turnover

See Sections 22 and 24 of the Competition Act and the Government Decree on the calculation of turnover of a party to a concentration (1011/2011):

- 5.1. The combined worldwide turnover of each party to the concentration and the entities and foundations part of the same group of companies as the party.
- 5.2. The combined turnover accumulated from within Finland of each party to the concentration and the entities and foundations part of the same group as the party.

6. Information on ownership and control

A list of all the entities and foundations part of the same group of companies as each party to the concentration.

7. Affected markets

- 7.1. Relevant markets
 - 7.1.1. Description of all the relevant product markets wherein a minimum of two parties to the concentration or the entities and foundations part of the same group of companies conduct business and wherein their combined market share is a minimum of 15 per cent in Finland or a relevant part therein.
 - 7.1.2. Description of all the relevant product markets wherein a party to the concentration or an entity or a foundation part of the same group operates and which are upstream or downstream of the manufacturing chain or the distribution channel of a product in relation to the markets where some other party or an entity or foundation part of its group of companies operates. The information shall be given if the combined market share of the party to the concentration and the entity or foundation part of the same group in some of the markets is a minimum of 20 per cent in Finland or a relevant part therein.
 - 7.1.3. Description of the product markets closely related to the product markets submitted in 7.1.1. or 7.1.2. above, which result in accrual of turnover at least to one party to the concentration or an entity or foundation part of the same group.

- 7.1.4. If the market share thresholds referred to in 7.1.1 or 7.1.2 do not exceed, a short description of the products or services (or business areas) offered by each party and the geographical area in which business is offered
- 7.2. Market information
If the relevant geographical markets are wider than Finland, the information prescribed in this section shall be given for both Finland and the relevant geographical market insofar as this is known by the party obliged to notify.
- 7.2.1. Sales volume and value and market share
The value (euros) and volume (units) of the sales of each party and each entity or a foundation part of the same group, and an estimate of their market shares in the markets referred to in sections 7.1.1.–7.1.4. above. The information shall be given for the full year preceding.
- 7.2.2. Main competitors
Five main competitors and an estimate of their market shares in the markets referred to in sections 7.1.1.–7.1.4. The name, address and telephone and telefax number of each competitor, and the name, position and e-mail address of a liaison. The information shall be given for the full year preceding.
- 7.2.3. Main customers
Five main customers which are not part of the same group of companies as the party to the concentration, in the markets referred to in sections 7.1.1.–7.1.4. The name, address, telephone and telefax number of each customer and the name, position and e-mail address of a liaison. The information shall be given for the full year preceding.

8. Ancillary restraints of the concentration

The ancillary restraints of a concentration refer to such competition restraints which are directly related to the concentration and necessary to its implementation. The concentration decision issued by the Finnish Competition Authority shall automatically cover the ancillary restraints of a concentration. If the party obliged to notify wishes to obtain the opinion of the Finnish Competition Authority on the ancillary character of the competition restraints agreed in the context of a concentration, the competition restraints which the party obliged to notify considers as ancillary restraints of the concentration and the grounds as to why these shall be considered ancillary shall be provided.

9. Notifications of the concentration to other authorities

- 9.1. Foreign competition authorities and
- 9.2. Finnish authorities and courts, to whom the parties to the concentration have notified or shall notify the concentration or from whom the parties have sought or shall seek permission for the concentration. The name, address, telephone, telefax number and e-mail address of each authority and the date of issue of the notification or application or the planned date.

10. Other issues related to the concentration

Other information that those obliged to notify consider necessary for the appraisal of the concentration.

11. Annexes to the notification

The notification shall contain the following annexes:

- an extract from the trade register for each party to the concentration;
- the documents concerning and relating to the concentration, such as agreements concerning or relating to the concentration and public bids;
- the latest annual report of each party to the concentration and each entity or foundation part of the same group of companies, and the latest profit and loss account drawn up; and
- the written authorisation of appointed representatives.

The information given in the notification may be supplemented by other annexes and specified by tables and diagrams. All the annexes must be original or certified copies. The notification shall contain a list of the annexes.

12. Date and signature

The notification shall be dated and signed.