GLOBAL LEGAL INSIGHTS

Merger Control

Fourth Edition

Contributing Editors: Nigel Parr & Catherine Hammon

Published by Global Legal Group

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Finland

Katri Joenpolvi, Leena Lindberg & Jarno Käkelä
Krogerus

Overview of merger control activity during the last 12 months

In 2014, 30 concentrations in total were notified to the Finnish Competition and Consumer Authority ("FCCA"). This number is somewhat higher in comparison with the annual average. By comparison, in 2013, only 21 concentrations were notified to the FCCA. Two concentrations were approved conditionally during 2014 (*Dava Foods Holding A/S* / *Muna Foods Oy* and *SATS / Elixia,* which was discussed in the Finland chapter of the previous edition of this book). The rest were approved during initial Phase I investigations. One merger notified, late in 2014 (*Elisa Oyj / Anvia Oyj*), was approved conditionally after Phase II investigations in April 2015.

Pursuant to the Finnish Competition Act (948/2011), Section 22 (1), the provisions on the control of concentrations will apply to a concentration where:

- the combined worldwide turnover of the parties to the concentration exceeds €350m; and
- the turnover of at least two of the parties accrued from Finland exceeds €20m for both.

The concentration must be notified to the FCCA only if these thresholds are exceeded. The FCCA does not have competence to investigate mergers falling within the jurisdiction of the European Commission, unless the Commission refers the case to the FCCA under the provisions of the EU Merger Regulation (139/2004). During 2014, there were no case referrals from the European Commission to the FCCA or *vice versa.*

When a concentration is being reviewed, the main competitors, customers and suppliers of the parties to the concentration are asked to submit statements within a tight schedule. The FCCA may also request statements from, for example, trade associations and other authorities.

The notification process has two phases. The initial phase (Section 26 (1) of the Competition Act, "Phase I") will take up to one month upon receipt of the notification. However, if the notification is significantly incomplete, the time period shall not begin until all the necessary information is submitted to the FCCA. The FCCA also has the power to freeze its own procedural deadlines ("stopping the clock") if the parties fail to provide all the necessary information. During 2014, the FCCA has not applied these provisions, but, in 2013, it found one notification incomplete, which postponed the deadlines.

If the acquisition does not require any further investigation, the FCCA approves the concentration in Phase I. The majority of concentrations are cleared during Phase I. Twenty-eight out of 30 notifications of concentrations submitted were cleared in Phase I investigation in 2014 and Phase II investigations were opened in two cases. In simple cases, the FCCA usually aspires to approve the concentration in approximately 10 working days, but it does not have any legal obligations to do so. During 2014, non-problematic Phase I clearance decisions appear to have been issued approximately within this timeline.

If it turns out in the Phase I investigation conducted by the FCCA that the notified concentration might significantly impede effective competition and thus a further investigation is required, the FCCA shall during the initial phase take a decision to initiate further proceedings (Phase II investigations). In Phase II, the FCCA has three months from taking the decision to further investigate the proposed concentration, during which the concentration and its effects on competition will be thoroughly analysed. During Phase II, the FCCA may approve the concentration with or without conditions or propose that the Market Court prohibits the concentration. The FCCA may request that this three-month period is prolonged by up to two months by the Market Court, which in practice requires that the parties to the concentration agree to such a request. During 2014, no such requests were made.

New developments in jurisdictional assessment or procedure

The new Competition Act entered into force on 1 November 2011, which harmonised the national merger provisions with the EU Merger Regulation (139/2004) with only minor exceptions related to e.g. so-called warehousing structures. The FCCA may be consulted, for example, on issues relating to the obligation to notify or the exact contents of the notification.

A merger case from 2014 worth noting for its procedural aspects is *Elisa Oyj* / *Anvia Oyj*. This proposed merger in the telecommunications industry was notified to the FCCA in December 2014, which approved it conditionally after in-depth Phase II investigations in April 2015. The FCCA found that only a 26.3% share of voting rights in the target company was large enough for Elisa Oyj to acquire sole control in Anvia Oyj. This appears to derive from the fact that the ownership of Anvia is diluted among a large number of private owners who usually do not attend the general meetings, which allows such a low share to constitute *de facto* control of the company. Exact details of the decision in this respect are not yet publicly available. The FCCA has come to similar conclusions in earlier cases, e.g. in *Sonera / Loimaan Seudun Puhelin* in 2001, where acquisition of less than 20% of shares and voting rights was deemed enough to constitute control.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition etc.

The applicable substantive test is the so-called SIEC test, under which it is assessed whether the proposed merger significantly impedes effective competition in Finnish markets or a substantial part thereof, in particular, as a result of creating or strengthening of a dominant position. The SIEC test is considered to be a useful reform to the assessment, in particular, because now the assessment can have a stronger focus on the actual competitive effects of the merger. The FCCA has also published its own Guidelines on Merger Control, which are largely in line with the European Commission's Guidelines. In the Government Bill for the Competition Act (88/2010), it is stated that the practice of the European Courts and the Commission's Guidelines can be used when assessing a merger in accordance with the Act.

The FCCA does not have any specific key sectors that it would particularly focus on in merger control.

If the merger takes place in the communications or energy markets, the FCCA customarily requests a statement from the Finnish Communications Regulatory Authority or the Energy Authority. In addition, the Competition Act includes some sector-specific regulation for concentrations in the employee pension insurance, pension funds and insurance fund sectors.

Any concentration in these sectors has to be notified to and approved by the Finnish Financial Supervisory Authority. In these cases no separate notification to the FCCA is required if the Financial Supervisory Authority has asked for the FCCA's statement concerning the proposed merger and the FCCA has required such a notification. Thus, the legislator makes sure that in every case the competitive assessment is conducted by the FCCA.

Due to Finland's slightly isolated location from the rest of Europe and the effects this might have on cross-border trade, especially geographic markets are defined somewhat differently than in EU practice. The FCCA tends to take national markets as a starting point, and extensive economic and statistical evidence on wider markets may be required to convince the FCCA that the markets are wider than national. Mere reliance on EU cases finding EU- or EEA-wide or broader markets will not suffice in this respect.

The vast majority of the decisions issued by the FCCA are rather concise and, thus, neither the relevant product nor the relevant geographical markets are defined unless necessary, which practice is somewhat similar in comparison with the one conducted by the Commission. The FCCA customarily refers to the market definitions submitted by the notifying party concerning both the relevant product markets and the relevant geographical markets. In general, the FCCA refrains from defining the relevant markets in its decisions unless this is necessary for the purposes of issuing the decision.

As mentioned above, no sectors are subject to special interest, but in practice the FCCA has gained major experience assessing mergers in several industries over the years. Such industries include the telecommunications industry, where the FCCA assessed the acquisition of *TDC Oy Finland* and *TDC Hosting Oy* ("TDC") by *DNA Oy* ("DNA") in 2014. TDC offered its fixed and mobile communications services solely to business clients, whereas DNA was active both in the business and consumer segments. Typically for telecommunications mergers, the FCCA assessed both horizontal and vertical effects of the concentration. Due to the limited overlapping activities and strong competition from the two largest telecommunications companies *Elisa Oyj* and *TeliaSonera Finland Oyj,* the concentration was cleared in Phase I.

Healthcare services were assessed in some detail in the merger between *Mehiläinen Oy* ("Mehiläinen") and *Mediverkko Yhtymä Oy* ("Mediverkko"), where Mehiläinen acquired sole control of the latter one. Mehiläinen offers social and healthcare services and certain expert medical services such as surgical services, clinical laboratory services and X-ray services, and furthermore, some publicly funded services such as services related to child welfare and mental health. Mediverkko is focused on producing social and healthcare services in cooperation with the public sector.

The relevant markets included, for instance, different social services. The FCCA assessed the markets for industrial health services, outsourcing services within the healthcare sector, private clients of healthcare services and the social services of aged people. The FCCA found that the parties were focused on different market segments and there were thus few overlapping activities. There were multiple alternative service providers within the same relevant markets and the parties' market shares were moderate, which allowed the FCCA to approve the merger without conditions.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

The competitive effects of concentrations are assessed on the relevant product markets and geographic markets. In its investigations, the FCCA assesses the market definition

presented by the notifying party and third parties in their answers to the FCCA's requests for comments and information.

The SIEC test, which has been applied for over three years now, focuses more strongly on competitive effects and less on market shares and structural considerations. However, market definition and market shares still remain important, but not necessarily decisive factors in the assessment. The FCCA has stated that its investigations will focus more on the economic basis of concentrations and on the likely conduct of the market actors following the merger.

The assessment of actual competitive effects includes an assessment of the current market situation, market entry and possible barriers to entry, as well as other factors that balance the market power of the merging entity (e.g. customers' bargaining power). Where appropriate, efficiency gains resulting from the concentration will also be taken into account, but it remains for the notifying parties to demonstrate that the concentration leads to efficiency gains that benefit consumers.

In general, the assessment of the effects of a concentration on the markets can be characterised as a general assessment of many factors, with the purpose of estimating the effects of the merger on a future market situation. After the adoption of the SIEC test, the FCCA focuses more on the effects of the concentration, which trend characterises the whole assessment procedure. However, more traditional assessment methods have still remained valid in the FCCA's decision-making practice for practical reasons. The FCCA usually does not have enough time during Phase I to carry out any sophisticated economic analysis, which means that market shares still play a significant role when screening the concentration. High market shares can easily create an initial concern that a merger might have restrictive effects on competition, which could lead to the opening of Phase II investigations.

In some cases since the adoption of the SIEC test, the FCCA's Phase II investigations call for an in-depth economic assessment to be carried out, and the FCCA has shown itself to be capable of such analysis within the strict time limits of merger investigations. The FCCA has applied upward pricing pressure (UPP) analysis and has also recently carried out rather extensive empirical research such as consumer surveys during Phase II investigations. It appears that the cases investigated during 2014 did not warrant the use of such more complicated tools.

Case example: *Dava Foods Holding A/S* and *Muna Foods Oy*

The only concentration that was accepted as subject to conditions in 2014 was the merger between *Dava Foods Holding A/S* ("Dava") and *Muna Foods Oy* ("Muna Foods"). The case illustrates well the rather complicated assessment of the concentration's vertical effects on competition, the significance of foreseeable development of the markets and evidence of previous successful entry by competitors, as well as the problematic nature of minority shareholdings in competing undertakings under certain circumstances.

Dava is a holding company that belongs to the *Danish Agro* group, and a parent company to *HEDEGAARD foods A/S*, which is active in the production, packaging and distribution of eggs and egg processed products in both Sweden and Denmark. The other party, *Munakunta*, is a producers' co-operative society, which is active in procurement, packaging and distribution of eggs, as well as in manufacturing and selling of egg processed products and products related to poultry production.

Muna Foods in turn is an undertaking established for the purposes of the concentration and to which all business conducted by Munakunta was transferred. Dava acquired a 50% share

and sole control in Muna Foods, whereas Munakunta would have a 50% share in Muna Foods as well.

The FCCA assessed the following relevant product markets: procurement of eggs, packaging and distribution, egg processed products and products related to poultry production. The FCCA noted that import of eggs to Finland is rather marginal, which led to the conclusion that the relevant geographic markets were assessed to comprise Finland only. According to the notifying party, the market share of Munakunta in egg sales in Finland was between 30 and 40%. Munakunta in turn is not active in purchasing, procuring or manufacturing of chicken feed.

Competitive assessment

In its assessment, the FCCA did not find any proof that would indicate competition in the procurement of eggs would be distorted, but some market players had expressed their concerns regarding distortions in competition in the chicken feed markets. Some actors' main concern was that when all the chicken feed markets are focused on a single conglomerate, which is also a leading actor in the egg business, this is a considerable risk to the functioning of the markets. For instance, according to the concerns expressed by the market players, the concentration might lead to unfair favouring of its own egg producers in comparison to actors falling outside of the concentration. This could potentially have led to exclusion of the competitors of Muna Foods.

According to the notifying party, the proposed transaction would lead to significant synergy gains. The discount system would be based on purchasing volumes and concentration of purchases by combining the chicken feed procurements of Muna Foods' producers. Hence, these synergy gains would be passed on as discounts to clients. However, no concrete or exact plans had been done yet concerning *i.a.* the functioning of the discount system, since the purchase terms would be in their precise form only after the transaction. Furthermore, the notifying party emphasised that there would not be any intention to favour the producers of Munakunta.

In its assessment concerning the vertical effects of the concentration, the FCCA referred to its own vertical guidelines on merger control and assessed, firstly, whether it would be beneficial for Danish Agro to conduct exclusive measures, and secondly, whether it would be a realistic option for it (incentives and ability to foreclose). The FCCA pointed out that there would not be any direct vertical integration between the producers of Munakunta and Danish Agro and therefore, even if Danish Agro offered exclusive discounts only to producers of Munakunta, it was not guaranteed they would pass on these discounts to their clients. However, the FCCA's threshold for intervention due to the vertical effects was not exceeded.

Upcoming changes in the markets and assessment of market entry

According to publicly available information, one of the reasons the merger was investigated thoroughly was probably that a major player in chicken feed markets, Raisioagro, had made public its withdrawal from these markets before the concentration was notified. However, according to the FCCA, this could leave space for new players, which led it to assess entry conditions. Regarding entry into the markets, the FCCA found proof that prior to the proposed concentration there had been successful entries to the market by new players. Hence, the FCCA did not consider it likely that due to the proposed concentration, Danish Agro would have either the incentives or ability to foreclose its competitors.

Minority shareholding in most significant remaining competitor

The FCCA also assessed issues concerning acquiring a minority share in a competitive

chicken feed producer, *RehuX Oy* ("RehuX"). The minority holding consisted of 12.7% of the outstanding shares and votes of RehuX, including the right to appoint one of its board members.

The FCCA noted that the chicken feed markets in Finland were already highly concentrated. As noted above, the biggest actor in the market had been *Raisioagro* with its 40-50% market share. *Danish Agro* had been in second place with a market share of 30-40%. The FCCA pointed out that due to the announced withdrawal from the market by Raisioagro in September 2014, the chicken feed markets would become even more concentrated, which the FCCA must take into account in its assessment.

According to the assessment conducted by the FCCA, due to the fact that few competitors would remain active on the relevant market after the proposed transaction, the minority share of Danish Agro in its most significant competitor would have harmful effects on competition. According to the FCCA, the minority shareholding would lead to anti-competitive effects, since it could increase the acquirer's incentives and ability to unilaterally either increase prices or limit its production. Alternatively, the minority share held by Danish Agro in RehuX could increase opportunities and incentives to coordinate operations in the chicken feed markets, since the possession and the board membership would offer Danish Agro the privilege to gain such information from RehuX. Thus, Danish Agro would be able to restrict usage of some competition strategies otherwise useful for RehuX.

Commitments and divestments

Based on the above, the FCCA found that the minority share held by Danish Agro would significantly impede effective competition in the Finnish market or in a substantial part thereof. In consequence, Dava Foods committed to divest the minority share of RehuX to a suitable buyer, which has to be independent from parties of the notified merger and cannot belong to the same group as either Dava Foods or Munakunta. Furthermore, Dava Foods committed to make sure that no sensitive information concerning RehuX and its present and designated actions shall be transferred to Dava Foods or any other undertaking belonging to the same group.

According to the FCCA's assessment, the commitments addressed its concerns and thus the proposed merger could be approved conditionally.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Where a merger raises competition concerns, in that it could significantly impede effective competition, the notifying parties can propose commitments to the FCCA in order to resolve the competition concerns. The FCCA has an obligation 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 FCCA is responsible for ensuring that the remedies are implemented as agreed. Since the FCCA's primary responsibility is to find an agreeable solution, it cannot ask the Market Court to prohibit a merger if the remedies proposed by the notifying parties are sufficient for eliminating the competition concerns identified.

In practice, the FCCA is always willing to meet the parties and discuss the proposed concentration and possible commitments.

The Competition Act presupposes that mainly structural remedies should be used in merger control cases. The FCCA has also stated that it favours structural remedies over behavioural

ones and tends to refrain from accepting the latter. *NCC Roads Oy / Destia* case in 2011 is a good example of this policy. The parties had proposed behavioural remedies or limited structural remedies only, while the FCCA required clear structural ones. Further, the fulfilment of the proposed remedies was uncertain and their implementation would have required constant surveillance by the FCCA. When sufficient remedies were not offered, the FCCA made a proposal for the Market Court to prohibit the merger.

In its prohibition proposal to the Market Court, the FCCA referred to the European Commission's practice as well as to the case-law of the Court of Justice of the European Union to support structural remedies. The FCCA stated its view that behavioural remedies are generally difficult to supervise and that this is the case especially where the FCCA in practice would have ended up supervising whether the merged entity sold asphalt mass to third parties with reasonable prices or not. Further, it is very likely that the FCCA would not approve divestment commitments that need not be adhered to on the grounds that a suitable buyer or tenant cannot be found. In earlier cases, the parties have committed to abandon the concentration if the divestment requirement could not be fulfilled (*Metsäliitto/ Vapo)*. Alternatively, secondary commitments have also been given in case primary commitments could not be fulfilled *(Carlsberg / Orkla)*.

However, recent examples of clearing concentrations based on behavioural remedies only exist where they are found appropriate and sufficient to counter the problems identified (*Terveystalo Healthcare Oy / ODL Terveys Oy* in 2011). To address the FCCA's concerns concerning the hospital services of Oulu and the medical services in Kajaani and Kemi-Tornio, the parties offered such behavioural commitments that allowed the customers to have the opportunity to purchase operations conducted in private hospitals also from doctors outside the concentration. Additionally, Terveystalo undertook to follow the same national prices as elsewhere in the more competitive parts of Finland with regard to the medical services offered to private customers in the region of Kajaani and Kemi-Tornio. The FCCA was of the opinion that without these commitments price increases pertaining to the services would have been imminent.

The FCCA may issue a conditional clearance decision during Phase I or Phase II. However, clearing a concentration conditionally does not affect the FCCA's procedural deadlines. Because of this, most conditional decisions are postponed until Phase II. However, some examples of conditional clearance decisions already in Phase I exist. These have taken place especially when the notifying party has submitted its commitments and the information necessary to investigate the concentration to the FCCA already before submitting its official notification. These kinds of open pre-notification discussions make it possible for the FCCA to evaluate the concentration already before the procedural deadlines start to run.

Commitments and appeals

It is also noteworthy that, pursuant to the Competition Act, the FCCA has the duty to negotiate commitments or remedies with the parties, but it cannot make commitments binding that the parties have not proposed. If the FCCA does not accept the commitments proposed, it must make a proposal to the Market Court to prohibit the concentration. Further, a notifying party cannot appeal a decision by which the commitments it has given have been ordered to be followed, nor can it appeal the conditional approval decision in itself.

In practice, this means that if the company is unwilling to submit commitments at all or early enough for the FCCA to market-test them, or is unwilling to submit commitments the FCCA has stated are needed to approve the concentration, the only course of action

available for the FCCA is to prepare a prohibition proposal to the Market Court. Both recent prohibition proposal cases (*NCC / Destia* in 2011 and *Uponor / KWH / Joint venture* in 2013) are examples of cases where the commitments proposed by the parties were not sufficient to address the competitive concerns, a view upheld by the Market Court.

If the Market Court does not agree with the FCCA's proposal to prohibit the concentration, it has the power to impose conditions it sees suitable to address the competitive concerns. The decision of the Market Court may be appealed to the Supreme Administrative Court. It is also noteworthy that third parties retain a right to appeal a conditional merger control decision if they are considered to be affected by the decision in the sense specified in the Finnish Administrative Judicial Procedure Act. However, in practice, third parties in a merger control case have never been considered to be in such a position.

Pursuant to the Competition Act and earlier practice of the Supreme Administrative Court (*Sonera / Loimaan Seudun Puhelin)*, the Market Court can prohibit a concentration only based on a proposal by the FCCA. An appealing party can thereby not have a concentration prohibited. Hence, the only effect an appeal might have in case the appealing party should be considered to have the right to appeal, is the removal of a single commitment or the whole remedies package.

The FCCA may also lift or mitigate the conditions attached upon application if a significant change in market conditions or another substantial cause warrants this. This has occurred sometimes, lastly in early 2015 when the FCCA approved *MTV Oy*'s application to lift the conditions attached to the FCCA's approval of the merger of *TV 4 AB* and *C More Group AB* in 2008. The FCCA concluded that the Finnish pay-TV market has changed so much since 2008 that the conditions imposed on MTV at the time of the merger are no longer needed to ensure competition.

Key policy developments

The Finnish Ministry of Employment and the Economy has emphasised that in rather small Finnish markets it is essential to make sure that the markets remain competitive and that achieving the said goal requires a well-functioning merger control system. Many Finnish industry sectors are characterised by the fact that there are few players who possess market power and many markets are oligopolistic in nature. In line with this, the current position of the Ministry made public during 2014 is that if acquisitions of non-controlling minority shareholdings shall be subjected to merger control at the EU level, it is likely that the Finnish Competition Act will be amended accordingly. However, after Commissioner Vestager suggested in Spring 2015 that the Commission's proposal on this topic might be reviewed based on critical comments received from the public, no official plans to amend the Finnish Competition Act have been made public. Any development in this respect most likely awaits EU-level decisions on the topic. In addition, there is a widespread consensus in the society for the need to remove and limit unnecessary regulation, which may have an impact on preparation of any legislative proposals regarding control of minority acquisitions.

Although there is currently no control of minority acquisitions in Finland under the merger control regime, it is noteworthy that certain transactions in the defence sector, or transactions concerning assets which are considered vital to the national interest, may be reviewed under the Act on the Monitoring of Foreign Corporate Acquisitions. The procedure differs from the merger control regime and the competent authority under this Act is the Ministry of Employment and the Economy.

Reform proposals

Since the new Competition Act entered into force in 2011, no new major developments have taken place in the merger control sector and no concrete reform proposals are currently pending. There have been some statements in official documents about the need to re-assess the current jurisdictional thresholds.

The FCCA's powers to conduct inspections were clarified in March 2015 by amending the Competition Act in a way that expressly allows the FCCA to carry out inspections on businesses that have outsourced their information management to a third party. In such cases, inspectors will have the right to request the necessary information from the third party directly. The amendment was introduced in order to account for the growing trend of cloud computing (data storage over the internet). The FCCA may also carry out surprise inspections during merger control investigations, and according to publicly available information, has recently done so during the Phase II investigation of a complex case in 2013 (*Uponor / KWH / Joint venture*), where the FCCA apparently has reasons to suspect the correctness of the information provided by the parties.

Katri Joenpolvi
Tel: +358 29 000 6257 / Email: katri.joenpolvi@krogerus.com

Katri Joenpolvi has extensive experience in demanding competition law assignments. Katri also assists clients in competition and European law litigation and complex merger cases involving detailed remedy negotiations. Additionally, she is responsible for creating antitrust compliance programmes, assisting clients in regulatory matters and advising on EU law. Prior to joining Krogerus, Katri worked for the Finnish Competition Authority, where she acted as a deputy director for the last two years of her tenure. She has led the firm's top ranked Competition and Regulatory practice since 2003. She is personally ranked in Band 1 by Chambers Europe, which states she "is an 'exceptionally clever competition lawyer, who is very good at understanding a business from the perspective of the client, and has excellent leadership skills'. She has a stellar reputation for her wide-ranging competition knowledge and experience, and is particularly noted for her strong advice to clients from the telecoms and media sectors".

Leena Lindberg
Tel: +358 29 000 6371 / Email: leena.lindberg@krogerus.com

Leena Lindberg is the co-head of Krogerus' competition and regulatory practice. Prior to joining Krogerus, Leena worked with the FCA for 14 years, where she served also as a member of the board of directors. Among her responsibilities was managing the asphalt cartel investigation that led, in 2009, to the largest infringement fines ever imposed in Finland. Additionally, Leena was in charge of the FCA's merger control team and handled many merger and antitrust cases in the Market Court and the Supreme Administrative Court. Her international experience includes working for the European Commission's Directorate General for Competition, in addition to which she has represented Finland in a number of EU competition policy reform projects, including merger review and commission case proceedings. According to Chambers Europe, "…Clients praise her as a 'persistent negotiator with excellent people skills', who is 'very intelligent and structured in her thinking', and who 'delivers on everything that she promises'".

Jarno Käkelä
Tel: +358 29 000 6306 / Email: jarno.kakela@krogerus.com

Associate Jarno Käkelä specialises in competition and EU law as well as regulatory issues especially in the field of energy and telecommunications. He has assisted in merger control proceedings in various industries. Prior to joining Krogerus, Jarno worked as a legal adviser at the Finnish Energy Market Authority.

Krogerus

Unioninkatu 22, 00130 Helsinki, Finland
Tel: +358 29 000 6200 / Fax: +358 29 000 6201 / URL: http://www.krogerus.com

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