Supervision of Markets and Conduct of Business

Recipient
Danko Koncar

Subject of application
Imposition of obligation to launch a bid and conditional imposition of a fine

Unofficial translation

1 Decision

The Financial Supervisory Authority (the FIN-FSA) considers that Danko Koncar (b. 3 September 1942, hereinafter Koncar) has failed to comply with the obligation to launch a public bid provided in chapter 6, section 10 of the Securities Markets Act (495/1989, hereinafter the SMA)[1] for shares issued by Afarak Group Plc (former Ruukki Group Plc, hereinafter Afarak, Ruukki or target company) and securities issued by Afarak carrying entitlement to its shares.

The FIN-FSA considers that Danko Koncar and entities controlled by him have acted in concert, as referred to in the SMA, at least with Hino Resources Co. Ltd (hereinafter Hino), Finaline Business Limited (hereinafter Finaline) and his spouse Jelena Manojlovic (hereinafter Manojlovic) to exercise control in Afarak. By virtue of chapter 6, section 10, subsection 4 of the SMA, the FIN-FSA considers that, among the persons acting in concert, the one with the obligation to launch a bid is Koncar.

The FIN-FSA considers that the obligation to launch a bid arose on Koncar at the latest on 22 October 2009 when the combined voting rights of Kermas Limited (hereinafter Kermas), an entity controlled by him, and Hino exceeded three-tenths (3/10), which is the portion of voting rights giving rise to the obligation to launch a bid provided in chapter 6, section 10 of the SMA. Koncar has failed to comply with the abovementioned obligation to launch a public bid.

By virtue of section 33 a of the Act on the Financial Supervisory Authority (878/2008, hereinafter the FIN-FSA Act), the FIN-FSA obliges Koncar to:

1. publish a mandatory bid referred to in chapter 6, section 10 of the SMA for Afarak shares and securities issued by Afarak carrying

[1] The provision on entry into force provided in chapter 19 section 6, subsection 1 of the new Securities Markets Act 756/2012 repealing the SMA (495/1989), providing that if the bid threshold has been exceeded prior to the entry into force of the Act, the provisions of the Act to be repealed shall be applied. Hence, in this decision, references are made to the repealed Securities Markets Act.

entitlement to its shares as provided in the SMA within a month of becoming aware of the FIN-FSA's decision;

2. after the obligation under paragraph 1 has been filled, to launch a bid procedure as provided by the SMA within a month of publishing the mandatory bid; and

3. after the obligation under paragraph 2 has been filled, to execute the bid in accordance with its terms and conditions.

In order to enforce the abovementioned obligations 1–3, the FIN-FSA imposes a conditional fine referred to in section 9 of the Act on Conditional Fines (1113/1990) as follows:

1) as regards the obligation to publish a mandatory bid referred to above in paragraph 1, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which the obligation was not complied with;

2) as regards the obligation to launch a mandatory bid procedure referred to above in paragraph 2, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which the obligation was not complied with; and

3) as regards the obligation to execute a bid referred to above in paragraph 3, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which the obligation was not complied with.

Koncar may also fulfil the obligations imposed in this decision so that the mandatory bid is made in his stead by an entity fully owned and controlled by him.

2 Hearing

In its letter dated 10 January 2018 (hereinafter the hearing letter), the FIN-FSA stated that Koncar with entities controlled by him[2] have acted in concert as referred to in the SMA, at least with Hino, Finaline and Manojlovic, to exercise control in Afarak. [redacted]

[2] Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.
[3] [redacted]

Pursuant to section 22 of the Act on Conditional Fines and section 34 of the Administrative Procedure Act (434/2003) referred to therein, the FIN-FSA provided, prior to decision-making, Koncar an opportunity to express his opinion on the matter and to submit an explanation on such demands and information which may have an effect on the resolution of the matter. Koncar responded to the FIN-FSA by a letter dated 8 February 2018.

3 Justifications for the decision

3.1 Processual claims made by Koncar in his response

3.1.1 FIN-FSA's competence in the matter

Koncar's view

In Koncar's opinion, the FIN-FSA does not have competence to decide on launching a public bid, to oblige Koncar to launch a public bid or decide on its terms and conditions. Since such obligations do not exist, one cannot impose a conditional fine to enforce the fulfilment of a non-existent obligation.

In his response, Koncar states that the matter being resolved and commented is in essence a hearing referred to in section 22 of the Act on Conditional Fines. Koncar considers that, before a conditional fine can be imposed, it must be resolved which obligation is concerned in the matter (the breach of which could result in a conditional fine). In other words, before consideration of the issue of a conditional fine is relevant, the FIN-FSA must have resolved whether Koncar is subject to an abovementioned obligation to make a public bid as referred to in the SMA. Koncar has denied that he ever was or is under such an obligation. Koncar also states that no FIN-FSA decision on the matter has been rendered to him.

In Koncar's opinion, it should be assessed first whether the currently valid Securities Markets Act or another legal act binding on Koncar contains a specific provision vesting the FIN-FSA with the competence to i) decide that the obligation to make a public bid has arisen on a person and ii) decide that the person concerned must make a public bid. Furthermore, it is apparent that valid legislation should also provide the specific competence to the FIN-FSA to iii) decide on the terms and conditions of a public bid. This assessment should be based on the contents of valid law.

In Koncar's opinion, the hearing letter does not specify the legal norm or any other provision that is valid and hence binding on Koncar, based on which the FIN-FSA would have had the competence to render the abovementioned decisions. Koncar considers that neither the SMA nor any other law contains a norm vesting the FIN-FSA with such a right or competence. It must be noted that for example the FIN-FSA regulations and guidelines 9/2013 Takeover bid and the obligation to launch a bid do not present such an authorisation or potential course of action.

In Koncar's view, since the FIN-FSA lacks the right based on law, or competence in general to i) decide whether an obligation to make a public bid has arisen on Koncar, ii) decide that Koncar must make a public bid

and/or iii) decide on the terms and conditions of the bid, including eg the bid price, the FIN-FSA could not have decided on the above obligations in the absence of a specific statutory authorisation, when Koncar denies the existence of such an obligation. In Koncar's view, the FIN-FSA's competence can hence only be based on valid law, and valid law does not provide the FIN-FSA with such competence. Furthermore, if such an authorisation or competence existed, Koncar should have the right to oppose to such the decision concerned and in general to be informed that the FIN-FSA is preparing a case concerning the imposition of an obligation on him, and after a potential decision he should have recourse to the right of appeal in the matter.

Koncar is requesting the FIN-FSA to answer without delay what the FIN-FSA's competence is based on, when and how the process against Koncar was brought up, when the decision about Koncar's obligation to launch a bid was made and issued to Koncar, who made it, whether it was made in writing and what kind of appeal instructions were given to Koncar.

In his opinion, Koncar has not breached any provisions related to the financial markets referred to in section 33 a, subsection 1 of the FIN-FSA Act, and the FIN-FSA does not have the right based on valid law to conduct such an assessment.

Koncar considers that the FIN-FSA's competence in circumstances referred to in section 33 a of the FIN-FSA Act as such is undisputed. Koncar states that exercising the competence referred to in said provision, however, requires the undisputed existence of an obligation that is subject to the conditional fine. In Koncar's view, if the existence of the obligation is subject to dispute, this disagreement must first be resolved with legally binding effect.

Koncar states that the basis of section 33 a of the FIN-FSA Act appears to be that the FIN-FSA has the right to impose a conditional fine among other things in circumstances where a supervised entity or another financial market participant in its activities fails to comply with provisions governing financial markets, or the regulations issued thereunder. In Koncar's view, what is meant by provisions governing financial markets remains unclear in the text of the Act, and the Act does not indicate that the provisions generically or specifically refer to the SMA. In Koncar's opinion, if the provision had specifically referred to the SMA, this would have been specifically indicated in the Act. This was not the case.

Hence, Koncar considers that section 33 a of the FIN-FSA would be applicable as suggested by the FIN-FSA only in circumstances where the existence of an obligation was undisputed and such an obligation had been violated against. In this case, it is questionable at least whether Koncar had been under an obligation to make a public bid on 22 October 2009. In fact, legal review of the matter clearly demonstrates that he was not under such an obligation. However, resolution of the matter in the abovementioned manner giving rise to the obligation does not fall within the FIN-FSA's competence.

The FIN-FSA's position

The FIN-FSA considers to have legal competence in the matter. The obligation to launch a bid is provided on in the Securities Markets Act (746/2012), and according to chapter 1, section 6 of the Act, compliance with the Act shall be supervised by the FIN-FSA. A similar obligation was also included in chapter 7, section 1 of the SMA. In accordance with section 33 a, subsection 1 of the Act on the FIN-FSA, if a supervised entity or other financial market participant has in its activities failed to comply with the provisions governing financial markets, or the regulations issued thereunder, the FIN-FSA may, under penalty of a fine, order the supervised entity or other financial market participant to fulfil its obligations, provided that the negligence is not negligible. Provisions of the SMA on the obligation to launch a bid are provisions governing financial markets as referred to in the FIN-FSA Act.

By virtue of section 5, subsection 7 of the FIN-FSA Act, Koncar is another financial market participant referred to in the FIN-FSA Act. Since Koncar has failed to comply with the provisions governing financial markets, and the negligence is not negligible, section 33 a of the FIN-FSA Act applies to the matter, and the FIN-FSA may oblige Koncar, by a conditional fine, to launch a mandatory bid for Afarak shares and securities carrying entitlement to its shares.

On the grounds presented below, the FIN-FSA considers that Koncar has failed to comply with the obligations provided in the SMA. By this decision, the FIN-FSA obliges Koncar to fulfil his obligations provided in the SMA and imposes a conditional fine to enforce the obligations laid down in section 1 of this decision. The FIN-FSA will decide separately on the enforcement of the conditional fines pertaining to each of the obligations if Koncar fails to comply with the obligations imposed on him.

Koncar has stated that the FIN-FSA does not have the right to decide and rule on the terms and conditions, including for example the bid price, applicable to a public bid. The FIN-FSA notes that, by this decision, it obliges Koncar to launch a public bid in accordance with the provisions of the SMA. The FIN-FSA supervises that the terms and conditions of the bid are not contrary to the provisions of the SMA.

3.1.2 Claims related to evidence used by the FIN-FSA

Koncar's view

In his response, Koncar states that the measures and assessment by the FIN-FSA are based on emails and documents received by the FIN-FSA from an unknown person. According to Koncar, it is naturally clear that the emails and documents, to the extent that they are even actual and real documents, have been taken dishonestly (stolen) from Koncar in violation of his fundamental rights and other rights. Hence, according to Koncar, the FIN-FSA has received and began to utilise documents taken from Koncar / received by way of crime. That is impossible. Since the provider of the documents has not been identified, whether it has even been

adequately attempted, it cannot be excluded that these documents have been provided to the FIN-FSA by another authority.

Koncar is of the view that the FIN-FSA has based its assessment without any criticism to documents taken from Koncar unlawfully. Such material falls within the scope of a prohibition on use.

According to Koncar, the emails purportedly written and sent by Koncar are taken from the abovementioned material stolen from Koncar. Hence, they have not been for example confiscated from Koncar in a lawful coercive measures procedure. Therefore, there is no certainty or information of the real content or true author of the documents. Koncar categorically denies the authenticity of the emails concerned and also that he is event the author or sender of the messages. It is obvious that the material has been submitted to the FIN-FSA in order to do harm to Koncar, and therefore the FIN-FSA should take a critical stance to the material concerned and not adopt it, [redacted] as key source for its assessment. If the material had been acquired lawfully and the documents were certainly authentic, their sender would have no need to conceal his or her identity from the authority. An authority should not act at all on the basis of documents and information obtained by crime.

The FIN-FSA's position

To begin with, the FIN-FSA states that the emails and documents concerned were initially submitted in April 2013 to the FIN-FSA, which provided them to the police. [redacted]

The FIN-FSA considers that the claim made by Koncar that the emails and documents were taken from material stolen from Koncar can be assessed in accordance with provisions and principles concerning prohibitions on use. There are no provisions in the Administrative Procedures Act or elsewhere in the law on a prohibition on use in the administrative procedure concerning the imposition of a conditional fine. However, the matter can be assessed fundamentally on the basis of chapter 17, section 25, subsection 3 of the Code of Judicial Procedure (4/1734), applicable to criminal litigation. The provision is discretionary, and concerned with the usability of evidence. It provides as follows:

> *The court may use also evidence that has been obtained unlawfully, unless such use would endanger the conduct of a fair trial, taking into consideration the nature of the case, the seriousness of the violation of law involved in the obtaining of the evidence, the significance of the method in which the evidence was obtained in relation to its credibility, the significance of the evidence in respect of the decision in the case, and the other circumstances.*

An administrative procedure under the Administrative Procedures Act is conducted in compliance with the principle of free consideration of evidence. The case subject to the decision is affected by significant public interest in finding out the truth about the matter. The matter is of serious

nature as it is concerned with one of the key provisions of the SMA protecting minority shareholders.

[redacted]

Due to the abovementioned, the FIN-FSA considers that even if the emails and documents had been taken from Koncar unlawfully, there is no impediment to using them as evidence in the case.[4]

[redacted]

3.1.3 Privilege against self-incrimination

Koncar's view

Koncar considers that the FIN-FSA is attempting to break Koncar's privilege against self-incrimination. According to Koncar, securities market participants as a rule must provide truthful and accurate information to the FIN-FSA and correspondingly respond truthfully to any questions posed.

[redacted]

[redacted]

[4] This is also consistent with the ruling of the Supreme Administrative Court KHO:2016:100. According the ruling, documentation received from a foreign tax authority was considered as evidence even though the possibility could not be precluded in the case that a crime had been initially committed in the context of obtaining the documents demonstrating the connections between A and the bank for the foreign authorities.

[5] [redacted]

The FIN-FSA's position

The FIN-FSA states that the key content of the privilege against self-incrimination is the right of not testifying against oneself in a criminal case and the right of not contributing to the determination of one's guilt. The privilege against self-incrimination is generally considered to mean that evidence obtained in violation of the privilege against self-incrimination cannot be used in a pending criminal process. Secondly, the privilege against self-incrimination is violated in a situation where information is demanded by coercion in a non-criminal process, where criminal litigation is expected or pending in respect of the same matter.[6]

The FIN-FSA states that this case is not concerned with a criminal matter but a decision to be issued in an administrative matter concerning the use of administrative enforcement based on the FIN-FSA Act, the Act on Conditional Fines and the Administrative Procedures Act. Neither is the matter about the imposition of a punitive administrative sanction, as stated in section 3.1.4 of the decision. Hence, the FIN-FSA's conduct in the matter does not violate Koncar's privilege against self-incrimination. Neither has the FIN-FSA demanded Koncar to present a new statement by coercion. Hence, Koncar's claim concerning the violation of his privilege against self-incrimination is also unjustified on this basis.

Furthermore, the FIN-FSA states that the provision of section 33 a, subsection 3 on the privilege against self-incrimination does not apply to the matter.

3.1.4 Applicability of the prohibition on double jeopardy to the matter

Koncar's view

[redacted]

[6] The privilege against self-incrimination is provided among other things on in chapter 17 of the Code of Judicial Procedure (4/1734) on concerning the presentation of evidence in criminal litigation.

The FIN-FSA's position

The FIN-FSA states that the case is a matter of conditional fine procedure falling within the scope of indirect administrative enforcement, where the authority seeks to ensure that the party concerned itself fulfils its statutory obligation it has failed to comply with. The conditional fine is imposed in order to enforce the fulfilment of the main obligation, and its purpose is to make the party concerned to fulfil the obligation concerned. The recipient of the conditional fine can avoid the conditional fine being ordered for payment by complying with the obligation imposed by the authority.

The prohibition on double jeopardy (*ne bis inidem)* based on the case law by the European Court of Human Rights does not apply to conditional fines in any respect, since the conditional fine procedure does not constitute a punitive sanction but, as stated above, a way of administrative enforcement where the authority seeks to force a party violating the law to rectify its non-compliance. In its year book decision KHO:2016:96, the Supreme Administrative Court has stated as follows in this regard:

> A conditional fine procedure including the conditional imposition of a fine and ordering it for payment after the obligation is not complied with, is not intended as a punitive sanction, but its objective is to ensure compliance with the main obligation, in this case compliance with the cleaning obligation under the Waste Act and restoration of the environment to the condition preceding the conduct in violation of the prohibition on littering. Since the conditional fine imposed to enforce the cleaning obligation was not a punitive sanction, the enforcement of a conditional fine and conditional imposition of a new fine were not in breach of the prohibition of ne bis in idem.

This position is also reflected by the fact that the prohibition on double jeopardy is provided on in chapter 4 of the FIN-FSA Act concerning punitive administrative sanctions[7], but not on chapter 3 of the Act on supervisory powers providing on the FIN-FSA's competence to impose a conditional fine.

The FIN-FSA states that the prohibition on double jeopardy does not apply to the matter, and hence the FIN-FSA has not acted in the matter in violation of the prohibition on double jeopardy.

3.1.5 Expiry of obligation to launch a bid

Koncar's view

In his response, Koncar considers that the obligation to place a public bid has in any case already expired. According to Koncar, the Act on the Expiry of Debt applies to monetary debt and other obligations. The obligation to place a public bid is another (than monetary) obligation

[7] In accordance with section 42, subsection 3 of the FIN-FSA Act: "An administrative fine or a penalty payment may not be imposed on anyone that is under suspicion for the same act in a criminal case under criminal investigation, consideration for charges or pending before the court. Similarly, an administrative fine or a penalty payment may not be imposed on anyone that has been rendered a final judgment for the same act."

referred to in section 1 of the abovementioned Act. The framework of norms concerning expiry concerns all obligations under property law. Hence, all performance obligations with monetary value fall within the scope of the framework of norms concerning expiry. Koncar considers that a mandatory public bid refers to a statutory procedure giving rise to a claim by the shareholders concerned on the redeemer, if they concede to the redemption. Koncar also states that the obligation to pay the redemption price is a property law obligation following the obligation to launch a public bid. According to Koncar, the FIN-FSA's impression is that Koncar has not offered consideration to other shareholders in the case at hand, even if he had been under the obligation to do so (in the FIN-FSA's opinion) since 22 October 2009.

Furthermore, Koncar states that the general period of expiry under section 4 of the Act on the Expiry of Debt is three (3) years. In this case, it makes no difference what is the point in time from which the period of expiry would be considered to have begun, since the obligation has in any event expired now in 2018. In the FIN-FSA's opinion, Koncar's obligation to launch a bid would have begun at the latest on 22 October 2009. If this were the case, according to Koncar, it would have expired at the latest on 22 October 2012.

In Koncar's view, since the obligation has expired, it has also ceased to exist.

The FIN-FSA's position

The FIN-FSA considers that the obligation to launch a bid has neither expired nor ceased to exist. The law does not provide on the potential expiry of the obligation to launch a bid. A view has not been taken on the matter either in the justifications of the SMA or in the justifications of the Act on the Expiry of Debt (728/2003, hereinafter the Expiry Act).

The Expiry Act applies, in accordance with its justifications, to performance requirements based on the law of obligations. Although the government proposal deems monetary liabilities the most important subject of the Act, its scope of application is considered difficult to define.[8] If the obligation to launch a bid were assessed from the perspective of expiry under civil law, the FIN-FSA considers that it would be a question of the potential expiry of an obligation to launch a bid based on law (positive obligation referring to an action) and not an assessment of a debt relationship based on civil law. Therefore, the views presented by Koncar on the expiry of the debtor/creditor relationship in a bid procedure following an obligation to launch a bid (payment obligation of the offeror vs the claim of the shareholder) and its period of expiry, if any, are not relevant, since a review of the potential applicability of the framework of norms on expiry must concern the main obligation, which is the obligation to launch a bid.

If the obligation to launch a bid was deemed to expire, in the FIN-FSA's view it would be subject to the so-called secondary period of expiry of ten

[8] Government proposal 187/2002, p. 25.

years provided in section 8 of the Expiry Act, since the starting date of the period of expiry of the obligation to launch a bid is not determined on the basis of sections 5 to 7 of the Expiry Act, the due date of the obligation is not agreed on in advance and the obligation is not the consideration for a performance by the counterparty.[9] Koncar also himself notes that the obligation concerning the launch of a public bid is another obligation (than monetary liability) referred to in section 1 of the Expiry Act. Therefore, the conclusion suggested by Koncar on the application of the general period of expiry of three years to other obligations than monetary liabilities is not consistent in this case.

Even if the secondary period of expiry were applicable to the obligation to launch a bid, the obligation would not thus have expired, since it had emerged on 22 October 2009.

3.1.6 Resolution of the demand by minority shareholders and communication thereof

Koncar's view

Koncar notes that certain shareholders of Afarak have presented a demand to the FIN-FSA on 18 September 2017 to order Koncar and/or Kermas Resources Limited to make a public bid for Afarak shares at the price of at least 2.50 euro per share.

In its hearing letter dated 10 January 2018, the FIN-FSA has stated that the matter at hand and to which the hearing concentrates is neither about the minority shareholders' demand nor processing the said demand. As the FIN-FSA has stated, the question would be instead about the examination of the matter carried out by the FIN-FSA at its own initiative and thereto related consideration about imposing a conditional fine.

In Koncar's view, the content of the hearing letter implies that the FIN-FSA has rejected the demand by the minority shareholders or left it uninvestigated, and such a decision has not been communicated to Koncar or the claimants.

The FIN-FSA's position

The FIN-FSA states that the claim has no bearing on the matter at hand, since the case is not a matter of processing the demand by the minority shareholders. The FIN-FSA began to process the matter after Afarak's minority shareholders had presented their demand to the FIN-FSA on 18 September 2017. At its own initiative, the FIN-FSA examined the issue of Koncar's obligation to launch a bid more extensively than regarding the so called Finaline transaction referred to in the minority shareholders' demand.

[9] The secondary period of expiry has been applied for example to various positive obligations pertaining to the performance of work or other activities as well as negative obligations pertaining to not doing something or allowing something (Linna, Tuula: Velan vanhentuminen (2016), p. 71).

The FIN-FSA will resolve the demand by the minority shareholders separately and reserve an opportunity for Koncar, if needed, to state his opinion in the case before its resolution.

3.2 Failure to comply with the Securities Markets Act

3.2.1 Applicable legislation

Upon its entry into force, the current Securities Markets Act (746/2012) repealed the SMA. Chapter 19, section 6, subsection 1, second sentence of the Act provides as follows:

Where the obligation to launch a takeover bid has arisen before the entry into force of the Act, the provisions of the Act to be repealed shall apply.

Obligation to launch a takeover bid

Chapter 6, section 10, subsections 1–3 of the SMA provide as follows:

A shareholder whose portion exceeds three-tenths of the voting rights carried by the shares of a company after the share of the company has been admitted to public trading (a party under the obligation to launch a bid) shall launch a takeover bid for all the remaining shares and securities entitling to its shares issued by the company (mandatory bid). A mandatory bid shall be launched also if the portion of the shareholder, as a result of other than a mandatory bid, exceeds one half of the voting rights carried by the shares of the company after the share of the company has been admitted to public trading.

The portion of voting rights of the shareholder referred to in subsection 1 shall include:

1) the shares held by the shareholder and by organisations and foundations controlled by him as well as shares held by their pension foundations and pension funds;

2) the shares held by the shareholder or other organisation or foundation referred to in subsection 1 together with another; as well as

3) the shares held by other natural persons, organisations and foundations that act in concert with the shareholder to exercise control in the company.

In calculating the portion of voting rights referred to in subsection 1, a restriction on voting based on the law or the Articles of Association or on another contract shall not be taken into account. Votes carried by shares held by the company itself or by an organisation or foundation controlled by it shall not be taken into account in calculating the total number of votes of a company.

The question which of the persons, organisations or foundations referred to in subsection 2 shall be under the obligation to launch a bid

shall, in unclear cases, be decided by the Financial Supervision Authority.

Consideration in a mandatory bid

Chapter 6, section 11, subsections 1–2 of the SMA provide as follows:

With regard to a mandatory bid, the consideration shall be an equitable price. A consideration in the form of securities or a consideration in the form of a combination of securities and cash may be offered as an alternative to a cash consideration.

In determining an equitable price, the starting point shall be the highest price for the shares subject to the bid paid during the six months preceding the arising of the obligation to launch a bid by the party under the obligation to launch a bid or by a person, organisation or foundation in a relationship referred to in section 10, subsection 2, to him. Such price may be derogated from for a special reason.

Acquisitions during the bid period and thereafter

Chapter 6, section 13, subsection 1 of the SMA provides as follows:

If the party launching a takeover bid or a person, organisation or foundation in a relationship referred to in section 10, subsection 2, to him, after the making public of a voluntary bid or the arising of the obligation to launch a bid and prior to the close of the offer period, acquires shares in the offeree company on terms that are more favourable than those of the bid, the offeror shall change his bid to correspond to this acquisition on more favourable terms (obligation to raise).

Procedure in a mandatory bid

Chapter 6, section 14, subsection 2 of the SMA provides as follows:

The party under the obligation to launch a bid shall make the bid public within one month from the arising of the obligation to launch a bid. The takeover bid procedure shall be started within one month from the making the bid public.

Controlled entity

Chapter 1, section 5 of the SMA provides as follows:

A shareholder, participant or a member shall have control in an organisation when he has:

1) more than half of the voting rights produced by all the shares or participations of the organisation and the majority of voting rights is based on ownership, membership, the Articles of Association, a partnership agreement or corresponding rules or some other agreement; or

2) the right to appoint or dismiss a majority of the members of the Board or of a corresponding body of an organisation or of a body with this right, and this right to appoint or dismiss is based on the same facts as the majority of voting rights referred to in subparagraph 1.

In calculating the share of voting rights referred to in subsection 1 a voting restriction based on the law or the Articles of Association of an organisation, on a partnership agreement or other corresponding rules or on some other agreement shall not be taken into account. In calculating the total number of votes in an organisation, those votes attached to shares or participations belonging to the organisation itself or an organisation controlled by it, shall be deducted.

If a shareholder, participant or member together with organisations controlled by him or these organisations jointly, have the control referred to in subsection 1 in an organisation, also the latter organisation shall be considered an organisation under his control.

The provisions of this section on a controlled organisation shall, where applicable, be applied to a controlled foundation.

3.2.2 Equating Koncar with a shareholder and control in Kermas

Content of the hearing letter

The FIN-FSA considered that Koncar and entities[10] controlled by him have acted in concert, as referred to in the SMA, at least with Hino, Finaline and Manojlovic to exercise control in Afarak.

According to Afarak's insider register Koncar has personally owned Afarak shares at least between 12 December 2012 and 21 July 2015.
As a person controlling a shareholder he has however been comparable to shareholder and thus been within the scope of application of the provision on obligation to launch a takeover bid as referred to in the hearing letter.[11]

Koncar's view

Koncar states that he was neither a shareholder in Afarak nor exercised control in Kermas in 2009. Koncar denies the FIN-FSA's view that he had control in Kermas on 22 October 2009. According to Koncar, the control belonged to another completely different person.

On 22 October 2009, Koncar did not have control referred to in chapter 1, section 5 of the SMA in Kermas, or even thereafter in Hino and/or Finaline. These companies were not under Koncar's control, and the parties have not had any concert with respect to Afarak.

[10] Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.
[11] Government proposal 6/2006, p. 44 and the Financial Supervision Authority's standard 5.2c, Chapter 7.1.

The FIN-FSA's position

Koncar has claimed that, in 2009, control in Kermas belonged to another person than Koncar himself, but he has not presented any clarification to support the claim.

According to Afarak's public insider register, Kermas has been an entity under Koncar's control without interruption from 31 March 2008 to 2 July 2016.[12] Kermas was also described as an entity controlled by Koncar in Afarak's annual reports 2008–2015.[13] In addition, in its notification of major shareholdings on 30 April 2015, Koncar stated that both Kermas and Kermas Resources Limited are under Koncar's control.

Based on the above grounds, the FIN-FSA does not consider Koncar's claim pertaining to control in Kermas credible and deems that Koncar has had control in Kermas. In addition, the FIN-FSA considers that Koncar has also had control in Kermas Resources Limited for the entire period when the company has held shares in Afarak.

The purpose of regulation concerning the obligation to launch a bid is to protect the other shareholders in a company in circumstances where control in the company is concentrated to a single shareholder or parties acting in concert.[14] Acting in concert is assessed on the basis of the actual circumstances from the perspective of the minority shareholder. It is possible to act in concert on the basis of an agreement and also without a specific agreement, since consistent behaviour among shareholders may also be based on other kind of common understanding.[15]

In accordance with the justifications of chapter 6, section 10 of the SMA, also a shareholder's parent company not owning shares itself falls within the scope of the provision if it has diversified its ownership to companies belonging to the group.[16] With a view to the purpose of regulation on the obligation to launch a bid, the FIN-FSA considers correspondingly that a natural person owning shares through companies controlled by himself is comparable to a shareholder in applying the provision of chapter 6, section 10 of the SMA.[17] Hence, it makes no difference from the perspective of application of chapter 6, section 10 of the SMA, whether Koncar himself has directly owned shares in Afarak. Similarly, the fact that Koncar has transferred the shares owned by Kermas to Kermas

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[12] The issuer's obligations under the Securities Markets Act to maintain a public shareholder register were repealed as of 3 July 2017.
[13] Annual Report 2008, pp. 10 and 84; Annual Report 2009, pp. 99 and 136; Annual Report 2010, pp. 71 and 107; The Board of Directors Report and
Annual Financial Statements 2011, p. 95; The Board of Directors Report and Annual Financial Statements 2012, p. 82; The Board of Directors Report and Annual Financial Statements 2013, p. 86; Annual Report 2014, pp. 30, 35, 40, 45, 124 and 156 and Annual Report 2015, pp. 63, 79, 81 and 85.
[14] Article 3 (1) (a) and Article 5 (1) of the Directive on takeover bids and Government proposal 6/2006, p. 44.
[15] Government proposal 6/2006, p. 44.
[16] Ibid.
[17] The same view has also been presented in jurisprudential literature, see. Karjalainen – Laurila – Parkkonen: Arvopaperimarkkinalaki (2008), p. 358.

Resources Limited in 2015 plays no role in the assessment of the obligation to launch a bid.

3.2.3 Acting in concert

Content of the hearing letter

The FIN-FSA considered that Koncar and entities[18] controlled by him have acted in concert, as referred to in the SMA, at least with Hino, Finaline and Manojlovic to exercise control in Afarak. [redacted] As regards Manojlovic, the FIN-FSA's view was consistent with the position stated in chapter 7.3 of the Financial Supervision Authority's standard 5.2c.[20]

The FIN-FSA considered that the purpose of the arrangement as a whole was, among other things, to hide the ownership of shares by diversifying part of the holdings to separate legal persons, at least in order for Koncar to avoid the obligation to launch a bid. This was also demonstrated by the email messages referred to in the hearing letter.

Koncar's view

Koncar states that he has not hidden his holdings in Afarak or any other company and that he would not even have had any need to do so. Koncar has not diversified his holdings in Afarak and has not sought to avoid any obligation belonging to him by doing so.

Koncar and/or Kermas, Hino and/or Finaline (and/or Manojlovic) have not acted in concert in order to exercise control in Afarak. Neither have the abovementioned parties have in concert exercised control or any other influence in Afarak. There is no evidence of that in the hearing letter [redacted]

On 22 October 2009, Koncar did not have control referred to in chapter 1, section 5 of the SMA in Kermas, or even thereafter in Hino and/or Finaline. These companies were not under Koncar's control, and the parties have not had any concert with respect to Afarak.

The FIN-FSA's position

The purpose of regulation concerning the obligation to launch a bid is to protect the other shareholders in a company in circumstances where control in the company is concentrated to a single shareholder or parties acting in concert. Acting in concert is assessed on the basis of the actual circumstances from the perspective of the minority shareholder. It is

[18] Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.
[19] [redacted]

[20] Persons acting in concert with the shareholder shall always, in principle, comprise the shareholder's spouse [--]. The FIN-FSA may, in individual cases and for a justifiable reason, decide that these persons are not actually acting in concert.

possible to act in concert on the basis of an agreement and also without a specific agreement, since consistent behaviour among shareholders may also be based on other kind of common understanding.[21]

As presented in more detail below in sections 3.2.4–3.2.6, the FIN-FSA considers that Koncar and entities controlled by him[22] have acted in concert as referred to in the SMA at least with Hino, Finaline and Manoljovic in order to exercise control[23] in Afarak. Assessed as a whole, the arrangement at hand is intended among other things to hide shareholdings by allocating part of the holdings to separate legal persons at least in order for Koncar to avoid the emergence of obligation to launch a bid.

3.2.4 Acting in concert with Hino

Content of the hearing letter

[redacted]

[21] Government proposal 6/2006, p. 44.
[22] Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.
[23] In this context, control refers to a portion of voting rights exceeding the bidding obligation threshold, i.e. three-tenths, see Article 2(1)(d) and Article 5(1) of the Directive on takeover bids and Government proposal 6/2006, p. 43–44.
[24] [redacted]

[redacted]

25 [redacted]
26
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Koncar's view

In his response, Koncar professes not to exercise nor ever have exercised control in Hino. [redacted]

[redacted]

[redacted]

The FIN-FSA's position

The FIN-FSA finds that acting in concert is assessed on the basis of the actual circumstances from the perspective of minority shareholders. It is possible to act in concert on the basis of an agreement and also without a specific agreement, since consistent behaviour among shareholders may also be based on other kind of common understanding.[30]

Koncar has denied exercising control in Hino [redacted] The FIN-FSA states that acting in concert does not necessitate the exercise of control in another entity, but it may also consist of cooperation among shareholders based on an agreement or other kind of common understanding.

[redacted]

In the FIN-FSA's view, the abovementioned facts [redacted] considered as a whole demonstrate that there has been an agreement or at least common understanding between Koncar and Hino, based on which they have acted in concert as referred to in chapter 6, section 10 of the SMA in order to exercise control in Afarak. The acting in concert has been a long-standing and systematic, and investors operating in the markets have been unaware of it. Due to the acting in concert, the effective control in Afarak has been concentrated without making a mandatory bid required by law to other Afarak shareholders.

[30] Government proposal 6/2006, p. 44.

3.2.5 Acting in concert with Finaline

Content of the hearing letter

In the FIN-FSA's view, acting in concert with Finaline is a longstanding arrangement beginning at the latest in 2011 in connection with a 27-million euro transaction in Afarak shares. In the FIN-FSA's view, Koncar was a key actor both when Finaline acquired Afarak shares and disposed of them. Finaline had no previous business activities. Koncar and entities controlled by him funded Finaline's share transactions. In addition, the price paid by Finaline for Afarak shares exceeded significantly the prevailing price level. In the FIN-FSA's view, these facts considered as a whole demonstrated acting in concert.

Preparation of the Finaline-Hanwa share transaction

The FIN-FSA considered that the transaction between Finaline and Hanwa made in 2011 on 27 million Ruukki shares was prepared at the order of Koncar. When the agreement on the share trade between Finaline and Hanwa was being prepared, Evli Bank was initially sent an agreement version where the buyer was Bassanio Services Limited, an entity controlled by Alwyn Smit, and subsequently a version where the buyer was Alwyn Smit Sárl, an entity controlled by Alwyn Smit.[31]

The FIN-FSA considered that Alwyn Smit prepared the share transaction at Koncar's order, and that buyer was replaced by Finaline at Koncar's order and without Smit knowing.[32] The agreement was signed on 30 March 2011.[33]

[redacted]

[31] Pre-trial investigation record, p. 38.
[32] Pre-trial investigation record, p. 39.
[33] Pre-trial investigation record, p. 37.
[34] [redacted]

[redacted]

The use of a company such as Finaline with no concrete business activity as the buyer warrants the suspicion that the purpose of the arrangement was specifically to make the actual agent behind Finaline more difficult to ascertain and to make Koncar's connection with Finaline even more difficult to ascertain.[38]

Funding of the Finaline-Hanwa share transaction

Koncar and entities controlled by him entirely funded the transaction in 27 million Ruukki shares between Finaline and Hanwa, totalling 67.5 million euro. Finaline did not use its own funds at all in the share transaction. RCS even paid Evli's arrangement fee on its behalf.[39]

[redacted] All six loan contracts include the condition that the funds must be used in the purchase of Ruukki shares from Hanwa. The loan, considerable in amount, was extended to a non-operating company with no previous activity.[41]

According to the Pre-trial investigation record, Koncar had also taken other measures to fund the share transaction:

- There is reason to believe Koncar had an influence on decision making concerning the capital repayments by Ruukki. The capital repayments were used as part of the payment of consideration in 5/2011.[42]

- In 6/2011, Kermas requested the early repayment of a 5.67 million euro loan from Ruukki, and Koncar thanked for that "*in the name of Hanwa*[43]".

[redacted]

In his interrogation, Koncar did not answer whether the loans or interest had been repaid to the lenders. The flow of events related to the purchase agreement/share transfer agreement of 6 March 2014 gives reason to

35 [redacted]
36
37
38 Pre-trial investigation record, p. 40.
39 Pre-trial investigation record, p. 40–41.
40 [redacted]
41 Pre-trial investigation record, p. 40–41.
42 Pre-trial investigation record, p. 41.
43 Pre-trial investigation record, p. 41.
44 [redacted]

suspect that Finaline had not repaid the loans.[45] Instead, the shares were transferred to Hino in 2014 as "debt set-off".[46]

Execution of share transaction at a considerable premium

The price per share, 2.50 euro, used in the transaction between Finaline and Hanwa on 27 million shares was considerably higher than the market price (1.72 euro).[47] However, the price was the same price used on 20 May 2008 when Hanwa acquired 30 million shares from Kermas, an entity controlled by Koncar. Kermas in turn had acquired the shares a few minutes earlier from RCS, an entity controlled by Koncar. The FIN-FSA considered that the transactions of 2008 and 2011 are related to each other, and that Koncar arranged by the Finaline transaction the repurchase of shares from Hanwa at the price it had paid.

Transfer of shares to Hino

The 27 million shares acquired by Finaline were transferred in 2014 to Hino as "debt set-off". In 2014, Finaline's representative Pierre Moncheur de Rieudotte (hereinafter Moncheur) requested Evli Bank to transfer the Ruukki shares owned by Finaline to Hino. After the bank inquired the legal basis of the transfer, Moncheur stated that the transfer was part of a more extensive restructuring of debts and holdings. As a response to the inquiry by Evli Bank about the origin of the funds, Moncheur sent a loan agreement concluded between Koncar and Finaline. Once Evli Bank inquired how the transaction between Hino and Finaline was related to the loan agreement sent, Moncheur responded:

> "*The answer is the following, Hino Resources took over the loan from Danko Koncar. As you know, they are very close and it is a private agreement in between the two parties.*"[48]

[redacted]

Koncar's view

In his response, Koncar states that he has not exercised control in Finaline nor in regard of Afarak shares owned by Finaline. In his opinion, Koncar has never acted in concert with Finaline and Kermas and/or Koncar have not exercised common control with Finaline in Afarak.

Koncar refers to his concluding statement in the pre-trial investigation stating among other things that Koncar has not exercised any kind of control in respect of the Afarak shares purchased by Finaline from Hanwa

[45] Pre-trial investigation record, p. 41.
[46] Pre-trial investigation record, p. 44.
[47] Pre-trial investigation record, p. 42.
[48] [redacted]
[49]

and those owned by Finaline. Neither has Koncar exercised any kind of control in Finaline or in its holding or trustee company.

The concluding statement also states that the law firm in charge of preparing the share purchase agreement between Hanwa and Finaline has not advised Koncar and Koncar has not participated in the negotiations concerning the share transaction.

In addition, according to the concluding statement, Koncar did not participate in the preparation or execution of the transaction in which Finaline purchased 27 million Afarak shares from Hanwa, that the initiative to the funding agreement came from Hanwa and that Koncar had only arranged the funding for the share purchase transaction. He did not purchased the shares and Moncheur was the only economic beneficiary to the shares.

According to the concluding statement, the funding arrangement was not made to hide Koncar's ownership in Afarak, and there are no other facts relating to the matter that have been hidden. Koncar has never asked Moncheur to act as a "front" in the matter. The funding of the share transaction provided or arranged by Koncar was not contrary to the SMA or any other norm, and hence there was nothing preventing Koncar from doing so.

Koncar also refers to the decision made on 7 December 2016 by the prosecutor not to prosecute (Decision 16/2626). As regards the evidence, the prosecutor concludes for example as follows:

> Based on the pre-trial investigation material, one cannot conclude at least apparently to the outside, that the voting rights attached to the shares purchased in the name of Finaline would have been exercised in Ruukki Group's general meeting or otherwise by Koncar or an entity controlled by him.
>
> However, I do not see adequate demonstration of Koncar's actual control in Finaline or use of voting rights by him together with Finaline attached to Ruukki Group shares purchased by Finaline on the basis of any agreement or otherwise.

The FIN-FSA's position

The FIN-FSA refers to its position stated above in section 3.2.3. Acting in concert does not necessitate the exercise of control in another entity, but it may also consist of cooperation among shareholders based on an agreement or other kind of common understanding. The decision not to prosecute referred to by Koncar concluded that there was not adequate demonstration in the case of Koncar's actual control in Finaline or use of voting rights by him together with Finaline attached to Afarak shares purchased by Finaline on the basis of any agreement or otherwise. The decision not to prosecute does not adopt a stance on potential acting in concert by Koncar and Finaline. Actual control and acting in concert are assessed by different criteria.

Although the funding of share purchases as such does not usually constitute acting in concert between the parties, the actions by Koncar and Finaline have differed from the ordinary actions of mutually independent shareholders. The facts stated in the hearing letter demonstrate that Koncar was a key actor both when Finaline acquired Afarak shares and disposed of them. Finaline had no previous business activities. Koncar and entities controlled by him funded Finaline's share transactions. In addition, the price paid by Finaline for Afarak shares significantly exceeded the prevailing price level and corresponded to the price at which Hanwa purchased the Afarak shares in 2008 from an entity controlled by Koncar.

In the FIN-FSA's view, the abovementioned facts considered as a whole demonstrate that there has been an agreement or at least common understanding between Koncar and Finaline, based on which they have acted in concert as referred to in chapter 6, section 10 of the SMA in order to exercise control in Afarak. The acting in concert has been a long-standing and systematic, and investors operating in the markets have been unaware of it. Due to the acting in concert, the effective control in Afarak has been concentrated without making a mandatory bid required by law to other Afarak shareholders.

3.2.6 Acting in concert with Manojlovic

Content of the hearing letter

The FIN-FSA considered that Koncar with entities[50] controlled by him has acted in concert as referred to in the SMA with his spouse Jelena Manojlovic. The FIN-FSA's view was consistent with the position stated in chapter 7.3 of the Financial Supervision Authority's standard 5.2c.[51]

Koncar's view

Koncar states that, as shown by the FIN-FSA, the portion of voting rights held by his spouse Manojlovic in Afarak has been 0.06 percent at the maximum. Such a portion makes no difference in the matter. In addition, for the sake of clarity, Koncar states that Manojlovic uses her power of decision and control related to the Afarak share holdings and Koncar has no means of influence in this regard.

The combined portion of shares held by Kermas and Manojlovic do not exceed the threshold of 30 percent.

The FIN-FSA's position

According to the FIN-FSA's established interpretation of the SMA, a shareholder's spouse as a rule is always considered to act in concert with the shareholder. This interpretation was adopted in chapter 11, section 5

[50] Kermas, Kermas Resources Limited and RCS.
[51] Persons acting in concert with the shareholder shall always, in principle, comprise the shareholder's spouse [--]. The FIN-FSA may, in individual cases and for a justifiable reason, decide that these persons are not actually acting in concert.

of the current Securities Markets Act in connection with the overall reform of securities markets legislation.

Koncar has claimed that Manojlovic uses her power of decision and control related to the Afarak share holdings and Koncar has no means of influence in this regard. Koncar has not presented a more detailed clarification to support the claim. Therefore, the FIN-FSA considers that Koncar has not presented justifications giving grounds to believe that Koncar and Manojlovic would not act in concert.

However, the FIN-FSA also notes that Manojlovic's 0.06 percent proportion of voting rights as such has not had an impact in this case on the emergence of the obligation to launch a bid.

3.2.7 Arising of the obligation to launch a bid

Content of the hearing letter

The portion of voting rights of Kermas, an entity controlled by Koncar, calculated in accordance with chapter 6, section 10 of the SMA, in Afarak rose to 28.16 percent following share acquisitions conducted on 22 October 2009. At the time, the portion of voting rights held by Hino, similarly acting in concert with Koncar, amounted to 4.44 percent. Koncar and Hino's combined portion of voting rights attached to Afarak shares amounted to 32.60 percent, thus exceeding the bid threshold of three-tenths (3/10) of Afarak votes on 22 October 2009.[52]

The FIN-FSA considered that Koncar's portion of voting rights in the target company has, through acting in concert with Hino, Finaline and Manojlovic, continuously exceeded the bid threshold at least from 22 October 2009.

The combined portion of voting rights in Afarak held by Koncar, entities under his control and persons acting in concert still continued to exceed the bidding obligation threshold. According to a stock exchange release issued by Afarak on 5 December 2017, the portion of voting rights held by Kermas Resources Limited,[53] an entity controlled by Koncar, stood at 26.90 percent, or 27.25 percent after the deduction of treasury shares. Taking into account Hino's portion of voting rights at 14.25 percent calculated in the same manner and Manojlovic's portion of voting rights at 0.06 percent, the portion of voting rights of persons acting in concert amounted to approximately 41.56 percent.

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[52] Kermas' portion of voting rights in Afarak exceeded three tenths (3/10) on 12 November 2009. Kermas applied for an exemption from the obligation to launch a bid from the FIN-FSA. The application and the exemption granted on 25 November 2009 only concerned Kermas' portion of voting rights in Afarak. Even though Kermas reduced its portion of voting rights below 30 percent in accordance with the conditions of the exemption granted by the FIN-FSA, the combined portion of voting rights held by Kermas and Hino continued thereafter to exceed the bidding obligation threshold. The FIN-FSA finds that, had it been aware of the parties acting in concert at the time, this might have affected the deliberations concerning the exemption.

[53] According to a flagging notification made by Koncar on 30 April 2015, Kermas Limited sold 70,795,967 Afarak shares to Kermas Resources Limited.

Koncar's view

According to Koncar, no obligation to launch a bid has arisen on him and/or Kermas as of 22 October 2009.

The FIN-FSA's position

On the basis of the grounds presented above in sections 3.2.2–3.2.6, the FIN-FSA considers that Koncar and entities controlled by him have acted in concert with Hino, Finaline and Manojlovic. Koncar has not denied the portions of voting rights presented in the hearing letter. Therefore, the FIN-FSA considers as presented in the hearing letter that bidding obligation threshold was exceeded and the obligation to launch a bid arose on 22 October 2009.

The combined portion of voting rights in Afarak held by Koncar, entities under his control and persons acting in concert still continues to exceed the bidding obligation threshold. The portion of voting rights held by Kermas Resources Limited, an entity controlled by Koncar, stands at 26.90 percent, or 27.25 percent after the deduction of treasury shares. Taking into account Hino's portion of voting rights at 14.25 percent and Manojlovic's at 0.06 percent calculated in the same manner, persons acting in concert together hold approximately 41.56 percent of the voting rights.

3.2.8 Party under the obligation to launch a bid

Content of the hearing letter

By virtue of chapter 6, section 10, subsection 4 of the SMA, the FIN-FSA considered that, among the persons acting in concert, the one with the obligation to launch a bid is Koncar, who, in view of the above, had the largest interest in exercising control in Afarak. [redacted] Koncar has also played a key role in both when Finaline has acquired Afarak shares and disposed of them. Koncar with entities controlled by him have also funded Finaline's share acquisitions.

Koncar's view

According to Koncar, if it were deemed in the case that Kermas, Hino and Finaline had exercised common control in Afarak, the potential obligations provided in the Securities Markets Act would have applied to some of these companies but not at all to Koncar, who, after all, has and does not exercise any control in these companies.

The FIN-FSA's position

In accordance with chapter 6, section 10, subsection 4 of the SMA, the question of which one of the persons, entities or foundations referred to in

subsection 2 of said section is subject to the obligation to launch a bid, shall be resolved in unclear circumstances by the FIN-FSA. According to the justifications of the provision, it is particularly decisive in the determination of the party under the obligation to launch a bid, which one of the persons acting in concert effectively exercises control or has the largest interest in the target company.[54]

Based on the grounds presented above in section 3.2.2, the FIN-FSA considers that Koncar is comparable to a shareholder in the context of applying chapter 6, section 10 of the SMA. The facts presented above in sections 3.2.4 and 3.2.5 demonstrate that Koncar has been an active party in acting in concert and that he has had the largest interest in exercising control in Afarak.

By virtue of chapter 6, section 10, subsection 4 of the SMA, the FIN-FSA considers that the person under the obligation to launch a bid is Koncar. The FIN-FSA furthermore notes that, in accordance with the FIN-FSA's established interpretation of the SMA, Koncar may also fulfil the obligations imposed in this decision so that the mandatory bid is made in his stead by an entity fully owned and controlled by him.

3.2.9 Provisions of the SMA regarding the minimum amount of bid consideration

Content of the hearing letter

In accordance with chapter 6, section 11 of the SMA, in a mandatory bid, the consideration shall be an equitable price. In determining an equitable price, the starting point shall be the highest price paid for Afarak shares during the six months preceding the arising of the obligation to launch a bid, that is, between 21 April and 21 October 2009 by Koncar or a person, organisation or foundation in a relationship with him as referred to in chapter 6, section 10, subsection 2 of the SMA. According to information obtained by the FIN-FSA, Afarak shares were acquired during said period both by Kermas, an entity controlled by Koncar, and Hino, acting in concert with Koncar. [redacted] If Koncar had launched a mandatory bid under the requirements of the SMA in 2009, the consideration would have had to be at least 2.21 euro.

In accordance with chapter 6, section 13 of the SMA, if the party launching a takeover bid or a person, organisation or foundation in a relationship referred to in section 10, subsection 2, to him, after the arising of the obligation to launch a bid and prior to the close of the offer period, acquires securities in the offeree company on terms that are more favourable than those of the bid, the offeror shall change his bid to correspond to this acquisition on more favourable terms (obligation to raise). Finaline, acting in concert with Koncar, has acquired 27 million shares in the target company after the arising of the obligation to launch a bid and before its expiry at a price of 2.50 euro exceeding the

[54] Government proposal 6/2006, p. 45.
[55] [redacted]

consideration (2.21 euro). The minimum consideration should, by virtue of the SMA provision, be 2.50 euro.

Koncar's view

According to Koncar, in assessing the FIN-FSA's competence, it should also be assessed whether the FIN-FSA has the right to decide and rule on the terms and conditions, including for example the bid price, applicable to a public bid.

The FIN-FSA's position

In connection with the preliminary review of an offer document, the FIN-FSA usually assesses the justifications for the consideration offered and whether the consideration fulfils the requirements provided in the law.[56] Hence, Koncar is obliged by this decision to launch a public bid in accordance with the provisions of the SMA. In accordance with the SMA provision on the obligation to raise, the consideration in a mandatory bid should be at least 2.50 euro per share.

3.3 Conditional fine and amount of conditionally imposed fine

3.3.1 Applicable legislation

In accordance with section 33 a, subsection 1 of the FIN-FSA Act:

if a supervised entity or other financial market participant has in its activities failed to comply with the provisions governing financial markets, or the regulations issued thereunder, [--] the Financial Supervisory Authority may, under penalty of a fine, order the supervised entity or other financial market participant to fulfil its obligations, provided that the negligence is not negligible.

In accordance with section 33 a, subsection 4 of the FIN-FSA Act:

Unless otherwise specifically provided elsewhere in law, the Financial Supervisory Authority shall decide on ordering payment of a conditionally imposed fine. The provisions of the Act on Conditional Fines shall otherwise apply to the imposition and ordering payment of conditional fines.

Section 6 of the Act on Conditional Fines provides as follows:

A conditional fine is imposed by ordering the party concerned to comply with the main obligation on the pain of a fine. A separate conditional fine shall be imposed to enforce each main obligation.

[56] If the FIN-FSA considers that the consideration does not fulfil the requirements provided in the law, it may enforce the offeror to comply with the provisions of the law by a conditionally imposed fine (Government proposal 6/2006, p. 47).

The conditional fine is imposed either with a fixed amount in terms of markka or so that its amount is determined on the basis of passage of time (running conditional fine).

The imposition decision must clearly indicate what the party concerned is obliged to, and when, by which point in time, or as of which point in time the main obligation must be complied with. The length of the period shall reflect the quality and extent of the main obligation, the payment capacity of the person under the obligation and other facts affecting the matter.

Section 7, subsection 1 of the Act on Conditional Fines provides as follows:

A conditional fine may only be imposed on a party who has the legal and actual capacity to comply with the main obligation. If a penalty payment is imposed on several parties, each of them must be imposed separate conditional fines.

Section 8 of the Act on Conditional Fines provides as follows:

The amount of the conditional fine shall reflect the quality and extent of the main obligation, the payment capacity of the person under the obligation and other facts affecting the matter.

Section 9 of the Act on Conditional Fines provides as follows:

A running conditional fine is imposed by ordering a fixed base amount for the conditional fine and a supplementary item per each period specified in the decision (supplementary fine period), during which the main obligation has not been complied with.

3.3.2 Conditional imposition of fine

Koncar's view

Koncar considers that, given the reasons presented by him in his response, there are no grounds or even the possibility to assess the imposition of a conditional fine on him.

The FIN-FSA's position

The FIN-FSA states that, by virtue of section 5, subsection 7 of the FIN-FSA Act, Koncar is another financial market participant referred to in the FIN-FSA Act. As demonstrated above in section 3.2, Koncar has failed to comply with provisions governing financial markets, and therefore section 33 a of the FIN-FSA Act applies. The obligation to launch a bid is one of the key provisions of the Securities Markets Act, the purpose of which is to protect the other shareholders in a company in circumstances where control in the company is concentrated to a single shareholder or parties acting in concert.[57] As described above in this decision, Koncar has

[57] Government proposal 6/2006, p. 44.

hidden the ownership of shares by diversifying part of the holdings to separate legal persons at least to avoid the emergence of an obligation to launch a bid. Koncar's misconduct has served to undermine confidence in the securities markets. The misconduct by Koncar was not a minor one.

The conditional fine may be imposed on Koncar, since he has the legal and actual capacity to comply with the main obligations referred to in section 1 of this decision, as provided in section 7 of the Act on Conditional Fines.

The one-month deadline for the obligation to publish a bid and the subsequent obligation to launch a bid are consistent with the deadlines provided in chapter 6, section 14, subsection 2 of the SMA. Taking into account the nature and extent of the main obligation, the FIN-FSA considers that the statutory deadlines for the publication and launch of the bid procedure can be applied in the matter at hand. Koncar has the opportunity to comply with these deadlines. In determining the deadline, the FIN-FSA has also taken into account that the obligation to launch a bid is one of the key provisions of the Securities Markets Act protecting minority shareholders, and that Koncar's misconduct has served to undermine confidence in the securities markets.

The FIN-FSA imposes the conditional fines as running conditional fines, since the FIN-FSA is of the view that a running conditional fine is more effective than a fixed conditional fine in leading to the fulfilment of the main obligations.

3.3.3 Amount of conditionally imposed fine

Content of the hearing letter

In the hearing letter, the FIN-FSA stated it was considering the imposition of a running conditional fine to enforce compliance with the obligations concerning the publication of a mandatory bid, launch of the bid procedure and execution of the bid. The FIN-FSA stated that the amounts of the base amount of the conditional fine it was considering were forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which each obligation was not complied with.

In determining the amount of the conditional fine, the quality and extent of the main obligation, the payment capacity of the person under the obligation and other facts affecting the matter were taken into account by the FIN-FSA in accordance with section 8 of the Act on Conditional Fines. In particular, the FIN-FSA's determination reflects the fact that the obligation to launch a bid is one of the key provisions of the SMA protecting minority shareholders, and that Koncar by his very reprehensible conduct has failed to comply with it. In addition, the amount and quality of the conditional fine were determined by the FIN-FSA so that the main obligations can be assumed to be fulfilled.

The amount of conditionally imposed fine was apportioned to reflect the minimum amount of bid consideration. The minimum amount of bid

consideration was 356 million euro at the time when the obligation to launch a bid arose, and approximately 379 million euro on 31 December 2017.

Koncar's view

Koncar states, with reference to the grounds presented in his response, that there are no grounds or even the possibility to assess the imposition of a conditional fine on him. In Koncar's view, the amount of the conditional fine is completely unreasonable and not supported by any norm or practice. The amount of the conditional fine is, according to Koncar, almost fanciful. Even if there were legal grounds to impose a conditional fine in the matter, it should not amount to any more than 50,000 euro per base amount and 10,000 euro per supplementary item.

The FIN-FSA's position

In accordance with the justifications of section 8 of the Act on Conditional Fines, the purpose of imposition of a conditional fine is to enforce the obligee to comply with the main obligation. The amount of the conditional fine shall be determined so that it can be assumed to lead to the fulfilment of the main obligation.[58]

In his response, Koncar considered that the conditional fine should not amount to any more than 50,000 euro per base amount and 10,000 euro per supplementary item. The FIN-FSA notes that the obligation to launch a bid is one of the key provisions of the SMA protecting minority shareholders. Koncar's misconduct has served to undermine confidence in the securities markets. The base amount and supplementary items suggested by Koncar cannot, in the FIN-FSA's opinion, be assumed to lead to the fulfilment of the main obligations.

In considering the base amount and supplementary items of the conditional fine, the FIN-FSA has taken into account the nature and extent of the main obligations, the payment capacity of the obligee and other facts affecting the matter.

The obligation to launch a bid is one of the key provisions of the SMA protecting minority shareholders. In order that the conditional fine can be assumed to lead to the fulfilment of the main obligations in this case, the FIN-FSA considers that the amount of the conditional fine must be proportionate with the combined minimum amount of the bid consideration.

The combined minimum amount of the bid consideration calculated on the basis of the SMA provision on the obligation to raise and the number of Afarak shares on 31 January 2018 was approximately 379 million euro.[59]

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[58] Government proposal 63/1990, p. 13.

[59] The aggregate value of the mandatory bid as at 31 January 2018 was calculated by multiplying the number of shares subject to the bid, 151,748,664 by the bid consideration of 2.50 euro per share under the obligation to raise. The number of shares subject to the bid was calculated by deducting the number of shares held by

Calculated in a similar manner, the combined minimum amount of the bid consideration at the time of emergence of the obligation to launch a bid in 2009 would have been approximately 356 million euro. The FIN-FSA considers that the running conditional fines imposed above in section 1 of the decision are adequate in amount for Koncar to be assumed to comply with the main obligations. In addition, the amount of the conditional fine imposed is supported, in the FIN-FSA's view, by the importance of public interest, urgency of fulfilling the main obligation and severity of Koncar's misconduct.

In his response, Koncar has not commented on his payment capacity. The FIN-FSA states that the market value of Afarak shares held by Koncar through an entity controlled by him is approximately 63 million euro. [redacted] The FIN-FSA furthermore points out that Koncar may also fulfil the obligations imposed in this decision so that the mandatory bid is made in his stead by an entity fully owned and controlled by him.

4 Disclosure of the decision

The FIN-FSA states that, in accordance with section 43 of the FIN-FSA Act, the main rule is that the FIN-FSA shall publicly disclose conditional fines imposed by it. The FIN-FSA considers that, by virtue of section 43, subsection 2 of the FIN-FSA Act, there are no grounds to leave the penalty payment undisclosed.

FINANCIAL SUPERVISORY AUTHORITY

ANNELI TUOMINEN	JARMO PARKKONEN
Anneli Tuominen Director General	Jarmo Parkkonen Head of Department

For further information

For further information, please contact Jarmo Parkkonen, Head of Department (tel. +358 9 183 5255, jarmo.parkkonen@finanssivalvonta.fi) and Sari Helminen, Head of Division (tel. +358 9 183 5264, sari.helminen@finanssivalvonta.fi) and Ville Kajala, Senior Policy Advisor, (tel. +358 9 183 5226, ville.kajala@finanssivalvonta.fi)

Enclosures

Appendix 1 Appeal instructions
Appendix 2 [redacted]

Kermas Resources Limited (70,795,967), Hino (36,991,903) and Manojlovic (150,000) from the total number of Afarak shares outstanding (259,686,534).

Appendix 1

Appeal instructions

Anyone wishing to lodge an appeal against the findings of the decision is requested to do so in writing to the Helsinki Administrative Court.

Appeal must be made within 30 days of notification of the decision. The appeal period excludes the day of notification of the decision.

If the decision has been posted in registered post (an advice of receipt), the date of notification is indicated in the receipt. The receipt is annexed to the appeal documents. If the decision has been posted as an ordinary letter it shall be considered to have been notified within seven (7) days of the dispatch date, unless otherwise indicated. If the decision has been notified in another manner, eg against receipt to a third party, other than the recipient of the decision (surrogate notification), the recipient of the decision shall be considered to have been notified of the decision on the third day from the date indicated in the receipt. If the decision has been notified as a service by publication, the service is considered to have been effected on the seventh day after the publication of the notice in the Official Gazette.

The appeal must be lodged in writing within the prescribed period to the Helsinki Administrative Court.

The petition for appeal, made to the Helsinki Administrative Court, must contain the following:

1. the decision to which the appeal relates
2. the aspects of the decision that should be amended and the changes being sought
3. the grounds for the changes
4. name and domicile of the appellant and
5. the address and telephone number through which the appellant can be contacted regarding the appeal.

If the right of attorney has been transferred to the appellant's legal representative or authorised proxy, or if the appeal is made by a third party, the name and domicile of such person is to be detailed in the appeal.

The petition must be signed by the appellant, or by his or her legal representative or proxy.

The petition must include the following annexes:

1. the decision to which the appeal relates, original or copy
2. proof of the date of service of the decision, or other proof of commencement of the period of appeal and
3. records relating to and supporting the grounds for the appeal, unless these have been delivered to the investigating authorities at the time of the initial hearing.

The legal representative must attach the appellant's letter of attorney to the petition, unless the appellant has given verbal notice of the power of attorney to the Helsinki Administrative Court. Lawyers and other court officials are required to present a letter of attorney only if so requested by the Helsinki Administrative Court.

If electronic documents submitted to the authorities define the scope of powers of the legal representative, the legal representative is not required to present a letter of attorney. The Helsinki Administrative Court may, however, demand that a letter of attorney be presented, if it has reason to question the scope of powers.

Appeal may be submitted to the Helsinki Administrative Court personally, shipped by post or through an agent or courier. The delivery of the petition by post or courier service occurs at the appellant's own risk. The petition must arrive at the Helsinki Administrative Court at the latest on the last day of the appeal period, during its opening hours.

Appeal may also be lodged electronically, arriving at the Helsinki Administrative Court's reception facility or IT system in a fully accessible format prior to expiry of the prescribed appeal period. Electronic delivery of documents occurs at the appellant's own risk.

Information on current court costs charged by the Helsinki Administrative Court is available at the address www.oikeus.fi. The Act on Court Costs (1455/2015) contains separate provisions on cases when no costs are charged.

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