

21 August 2020
BOF/FIN-FSA-CONFIDENTIAL
Partially secret

FIVA 9/02.05.05/2020
Openness Act 24 (1) 3

Recipient Danko Koncar
Subject Ordering payment of supplementary amounts of conditional fine

Unofficial translation

1 Decision

The FIN-FSA orders Danko Koncar (hereinafter Koncar) to pay the 12 supplementary amounts accrued from 17 May 2019 until 16 May 2020, amounting to a hundred and twenty million (120,000,000) euro, of the conditional fine imposed in the FIN-FSA decision of 21 February 2018 (Reg. no. FIVA 17/02.05.05/2017, hereinafter the FIN-FSA decision or the decision imposing the conditional fine). The conditional fine is payable to the state of Finland.

Koncar has failed to comply with the obligation imposed on him in the FIN-FSA decision to publish a mandatory bid referred to in chapter 6, section 10 of the Securities Markets Act (495/1989, hereinafter the SMA)¹ for shares issued by Afarak Group Plc (hereinafter Afarak) and securities issued by Afarak carrying entitlement to its shares as provided in the SMA within a month of being served the FIN-FSA decision. In its decision of 1 March 2019 (06266/18/7201), the Helsinki Administrative Court considered that the date of service of the decision imposing the conditional fine shall be the date when Koncar's appeal was received by the Administrative Court, i.e. 16 May 2018. Koncar has not published a bid required by the decision imposing the conditional fine within a month of service of the decision, i.e., by 16 June 2018. Koncar has not presented a valid reason for his failure to comply with the obligation.

The obligations and the running conditional fines imposed in the FIN-FSA decision to enforce them remain in force.

The Board of the FIN-FSA has made this decision regarding the ordering of payment of the supplementary amounts of the conditional fine in its meeting on 21 August 2020.

¹ In accordance with chapter 19, section 6, subsection 1 of the Securities Markets Act (746/2012) that replaced the Securities Markets Act (495/1989), if the bid threshold has been exceeded prior to the entry into force of the Act, the provisions of the Act to be repealed shall be applied. Hence, this decision refers to the provisions of the repealed Securities Markets Act.

2 Hearing

In its letter dated 6 July 2020 (Reg. no. FIVA 9/02.05.05/2020), pursuant to section 22 of the Act on Conditional Fines (1113/1990) 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 29 July 2020.

3 Justifications for the decision

3.1 Background

The FIN-FSA has, by its decision issued on 21 February 2018, obliged Koncar on the basis of section 33 a of the Act on the Financial Supervisory Authority (878/2008, hereinafter the FIN-FSA Act) 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 entitlement to its shares as provided in the SMA within a month of being served 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 has imposed, on the basis of section 33 a of the FIN-FSA Act, a conditional fine referred to in section 9 of the Act on Conditional Fines 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

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(10,000,000) euro per each full month during which the obligation was not complied with.

In its decision rendered on 1 March 2019 (06266/18/7201), the Helsinki Administrative Court considered that the date of service of the decision imposing the conditional fine shall be the date when Koncar's appeal was received by the Administrative Court, i.e. 16 May 2018. Koncar has not published a bid required by the decision imposing the conditional fine within a month of service of the decision, i.e. by 16 June 2018 and has not presented a valid reason for non-compliance with the obligation. The decisions of the Helsinki Administrative Court and the decision imposing the conditional fine became legally binding on 24 April 2020 when the Supreme Administrative Court rejected Koncar's application for a leave to appeal.

The base amount of the conditional fine, forty million (40,000,000) euro, has been ordered payable by Koncar with legally binding effect. Furthermore, on 14 June 2019, the FIN-FSA has ordered a total of a hundred and ten million (110,000,000) euro of supplementary amounts of the conditional fine payable by Koncar for the period from 17 June 2018 to 16 May 2019.

3.2 Service of the hearing letter

Koncar's view

Koncar considers that information concerning the hearing has not been served to him in a manner required by the law. Hence, the FIN-FSA has not served the hearing letter properly to Koncar, and the deadline to provide a statement has not begun to lapse yet. Koncar deems that the notice shall be served in accordance with the law, considering that he does not have a domicile or address in Finland. According to Koncar, his address and other contact information are known to the FIN-FSA.

In his statement, Koncar's attorney, attorney-at-law Kai Kotiranta (hereinafter Kotiranta) refers to section 56, subsection 3 of the Administrative Procedure Act and states that his assignment does not cover taking receipt of notifications or for example hearing letters on behalf of the principal, and that his powers of attorney have been restricted in this respect. Therefore, according to Kotiranta, all official notices must be personally served to Koncar in accordance with provisions on the service of notices. According to Kotiranta, the restriction his assignment in this respect has already been known to the FIN-FSA previously.

According to the statement, it is unknown whether the notice has been served to Koncar. Therefore, it is also unknown whether any deadline has begun to lapse in the matter. Kotiranta states that, as far as he knows, the previous hearing letters have not been served to Koncar either, which has also been confirmed by the FIN-FSA. According to

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Kotiranta, the present statement is given on the basis that the FIN-FSA has submitted a hearing letter concerning Koncar to Kotiranta. Since the FIN-FSA's interpretation in the matter is unknown, a statement must be made in order to avoid any loss of rights. However, it cannot be deduced on the basis that a statement is made, that Koncar approves the method of service or considers the service to have been taken place in accordance with the law. The authority must observe the law in its conduct, also in the matter of service.

Koncar requires that actions by authorities concerning himself are made in accordance with the law, and that the authority must take precautions at its own initiative to ensure that the law is complied with.

The FIN-FSA's view

The FIN-FSA considers that the hearing concerning ordering the payment of the supplementary amounts of the conditional fine was conducted in compliance with the Act on Conditional Fines and the Administrative Procedure Act.

In accordance with section 22 of the Act on Conditional Fines, before the imposition or ordering the payment of a conditional fine or the imposition or enforcement of enforced compliance or enforced suspension, the party concerned shall be provided an opportunity to provide an explanation in accordance with the provisions of section 34 of the Administrative Procedure Act. A hearing referred to in section 34 of the Administrative Procedure Act does not require verifiable service of the hearing letter. The FIN-FSA states that no particular reasons have arisen in the case to use other than standard service.

In accordance with section 12, subsection 1 of the Administrative Procedure Act, the services of an attorney or a counsel may be used in an administrative matter. In accordance with section 56, subsection 3 of the Administrative Procedure Act, service on a private individual may be effected on a person authorised by the party, unless the right of the authorised person to receive service has been specifically restricted or unless the service is to be effected on the party personally.

On 21 September 2017, Kotiranta notified to the FIN-FSA that he acts as an attorney for Koncar and requested that any notices and other communications pertaining to the matter be submitted to him as the attorney. The letter concerning the ordering of the supplementary amounts of the conditional fine payable was submitted to Kotiranta as standard service by email. Koncar's response was drawn up and submitted to the FIN-FSA by Kotiranta on 29 July 2020, and once again in the response Kotiranta was specified as the attorney of the person subject to the hearing, and Kotiranta's contact details were indicated as the process address. The FIN-FSA states that Kotiranta has acted as the attorney of the person subject to the hearing throughout the process concerning the bid obligation and the conditional fine, and that the facts presented above demonstrate that Kotiranta is factually authorised to

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represent his principal and receive service of a hearing letter. The FIN-FSA has acted in accordance with the law in the hearing, since it is possible to use an attorney in an administrative matter, and a hearing letter is not a document whose service should be made against proof of receipt.

3.3 Language of the hearing letter

Koncar's view

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Koncar states that the hearing letter was not provided to him in his native language. According to Koncar, he does not understand Finnish at all and understands English only slightly. Openness Act 24(1)3 and on the Administrative Court, Koncar was heard in his native language, Croatian. In Koncar's view, he has the right to use his native language also in other proceedings with authorities, particularly when the matter or matters concern are of considerable importance with respect to his rights or obligations. Koncar deems that in this administrative matter, his linguistic rights should be honoured and he should have the right to receive notices, other letters and decisions concerning himself in his native language, that is in Croatian. According to Koncar, this demand has already been made previously to the FIN-FSA, yet it has not been satisfied.

The FIN-FSA's view

In accordance with section 26, subsection 2 of the Administrative Procedure Act, the matter may be interpreted or translated into a language that the party can be considered to understand sufficiently in view of the nature of the matter. The FIN-FSA deems that Koncar understands English sufficiently, and therefore the provision of section 26 of the Administrative Procedure Act has not required translating the hearing letter or decision into Croatian (Koncar's native language).

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The FIN-FSA's view of Koncar's language skills is based on the fact that, Openness Act 24(1)3 Koncar has used English as his working language, his emails are in English and he has made appearances in English. Openness Act 24(1)3

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Openness Act 24(1)3
Openness Act 24(1)3
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Openness Act 24(1)3²

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² Openness Act 24(1)3

3.4 Substantive prerequisites for ordering the supplementary amounts of the conditional fine payable

Content of the hearing letter

Koncar has not published a bid required by the decision imposing the conditional fine within a month of service of the decision, i.e., by 16 June 2018, and has not presented a valid reason for non-compliance with the obligation.

The base amount of the conditional fine has been ordered payable by Koncar with legally binding effect. Furthermore, on 14 June 2019, the FIN-FSA ordered a total of a hundred and ten million (110,000,000) euro of supplementary amounts payable by Koncar for the period from 17 June 2018 to 16 May 2019.

The FIN-FSA is considering taking measures to order payable the 12 supplementary amounts accrued from 17 May 2019 until 16 May 2020, totalling a hundred and twenty million (120,000,000) euro, since the main obligation under paragraph 1 of the FIN-FSA's decision has not been complied with, and, in the FIN-FSA's view, no valid reason has been stated for the non-compliance.

The FIN-FSA considers that the prerequisites to order the 12 supplementary amounts of the conditional fine accrued from 17 May 2019 until 16 May 2020 payable have been met.

Koncar's view

In accordance with section 10, subsection 1 of the Act on Conditional Fines, an authority which has imposed a conditional fine may order it payable if the main obligation has not been complied with and no valid reason has been stated for the non-compliance.

Koncar considers that it is undisputed in this matter that Koncar has not launched a public bid to Afarak shareholders. No public bid has been launched, because in Koncar's view, he is not under the obligation to launch a bid under the Securities Markets Act. Koncar does not own any shares in Afarak. Koncar considers that he does not have control over such shareholders that alone or together exceed the threshold of ownership in Afarak shares required for the obligation to launch a bid. According to Koncar, the administrative process conducted in the matter does not alter this legal fact and Koncar's view in the matter.

Koncar considers that there are no material grounds to impose any additional amounts of the conditional fine in the matter.

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The FIN-FSA's view

It is undisputed in the matter that Koncar has not launched a mandatory bid for Afarak shares and securities issued by Afarak carrying entitlement to its shares. Hence, the obligation 1 imposed in the FIN-FSA decision has not been complied with.

In his response, Koncar has mainly repeated the claims he made in the hearings concerning the imposition of the obligation to launch a bid and the imposition of the conditional fine as well as the ordering the conditional fine payable in 2018. As to the claims made by Koncar on deeming Koncar comparable to a shareholder, on control over Kermas Limited (hereinafter Kermas) and Kermas Resources Limited, on acting in concert and on the arising and the assignment of the obligation to launch a bid, more extensive arguments are presented in sections 3.2.2–3.2.8 of the FIN-FSA decision.

The FIN-FSA considers that Koncar and entities under his control³ 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 to exercise control in Afarak. The FIN-FSA emphasises 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. This is explained in more detail in sections 3.2.3–3.2.6 of the FIN-FSA decision and Appendix 2 thereto.

Fulfilment of prerequisites to order the supplementary amounts of the conditional fine payable

Koncar has not published a bid required by the FIN-FSA's decision within a month of service of the decision, that is, by 16 June 2018. Hence, Koncar has not complied with obligation 1 imposed on him in the FIN-FSA decision. No valid grounds for failure to comply with the obligation have been presented.

The base amount of the conditional fine has been ordered payable by Koncar with legally binding effect. The supplementary amount of the running conditional fine imposed in the FIN-FSA decision is ten million (10,000,000) euro per each full month during which the obligation is not complied with. On 14 June 2019, the FIN-FSA ordered a total of a hundred and ten million (110,000,000) euro of supplementary amounts payable by Koncar for the period from 17 June 2018 to 16 May 2019.

The total amount of supplementary amounts of a conditional fine which can be ordered payable by one decision is limited to three

³ Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.

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times of the base amount, i.e. up to a hundred and twenty million (120,000,000) euro in this case.

Since the obligations still have not been fulfilled, the FIN-FSA considers that the preconditions have been met to order the 12 supplementary amounts accrued from 17 May 2019 until 16 May 2020 payable, totalling a hundred and twenty million (120,000,000) euro.

The obligations and the running conditional fines imposed on Koncar in the FIN-FSA's decision to enforce them remain in force.

3.5 Amount of conditional fine

Content of the hearing letter

In his responses concerning the imposition of the conditional fine or ordering the conditional fine payable, Koncar has not presented any evidence [redacted] Openness Act 24(1)23 [redacted]. The market value of Afarak shares held by Koncar through an entity controlled by him is approximately 25 million euro. [redacted] Openness Act 24(1)3 [redacted]. Koncar may also fulfil the obligations imposed in the FIN-FSA decision so that the mandatory bid is made in his stead by an entity fully owned and controlled by him.

Koncar's view

[redacted] Openness Act 24(1)23 [redacted]. Koncar considers that he does not exercise, and has not exercised, control in Afarak's shareholders in a manner claimed by the FIN-FSA. [redacted] Openness Act 24(1)23 [redacted].

Koncar also notes that, according to the hearing letter, Koncar could also fulfil the obligations imposed in the FIN-FSA decision so that the mandatory bid were made in his stead by an entity fully owned and controlled by him. However, the FIN-FSA does not specify such a controlled company. According to Koncar, there is no such company. Therefore, among other reasons, he is unable to comply with the procedure suggested by the FIN-FSA.

The FIN-FSA's view

In accordance with section 11 of the Act on Conditional Fines, a conditional fine may be ordered payable at a lower amount than that imposed if the main obligation has been fulfilled in material respects, the

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payment capacity of the obligor has been significantly impaired or there are other justified grounds to reduce the amount of the conditional fine.

In his response dated 29 July 2020 to the hearing letter concerning ordering the payment of the supplementary amounts of the conditional fine, Koncar did not demand reduction of the amount of the conditional fine. However, in a previous hearing concerning the imposition of the conditional fine and in his appeal to the Administrative Court concerning the imposition of the conditional fine, he stated that if there were legal grounds to impose a conditional fine in the matter, its base amount should not be any more than 50,000 euro and supplementary amount no more than 10,000 euro.

The FIN-FSA states that the justifications to the amount of the conditional fine are presented in section 3.3.3 of the FIN-FSA decision.

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Koncar has claimed that he does not have such an entity fully under his control that could launch the mandatory bid. The FIN-FSA considers that the FIN-FSA decision does not oblige one to make a mandatory bid through a fully-owned controlled company, but only provides the possibility to do so.

Koncar has not fulfilled the main obligation imposed to him in any respect. Koncar has not presented any clarification of his payment capacity being significantly impaired after the imposition of the conditional fine. Neither has he presented any clarification of him or the entities controlled by him having even sought to raise funding in order to publish and execute a bid. Koncar has, by particularly reprehensible conduct, failed to comply with the provisions on the obligation to launch a bid. Koncar's misconduct has served to undermine confidence in the securities markets. Therefore, the FIN-FSA considers that there are no other justified grounds referred to in section 11 of the Act on Conditional Fines to reduce the amount of the supplementary amounts of the conditional fine.

Based on the grounds presented above, the FIN-FSA considers that the supplementary amounts of the conditional fine accrued by the time of ordering shall be ordered payable at the amount imposed.

4 Applicable provisions

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 a conditional fine, order the supervised entity or other financial market participant to fulfil its

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obligations, provided that the negligence is not negligible. The conditional fine may also be targeted, subject to special grounds, at a person employed by a supervised entity or by another financial market participant or at anyone else acting on behalf of such person. The provisions of this subsection shall also apply to such other undertaking belonging to a conglomerate as referred to in the Act on the Supervision of Financial and Insurance Conglomerates that fails to meet its responsibilities under the said Act or the regulations issued thereunder.

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

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

In accordance with section 10, subsections 1 and 2 of the Act on Conditional Fines:

An authority which has imposed a conditional fine may order it payable if the main obligation has not been complied with and no valid reason has been stated for the non-compliance. A conditional fine may be ordered payable once the decision on its imposition has gained legal effect, unless the decision has been provided as valid regardless of any appeal.

The amount of supplementary amounts of a conditional fine which can be ordered payable by one decision is limited to three times of the base amount. Any supplementary amounts exceeding this amount and concerning conditional fine periods which started before the decision was made to order the conditional fine payable will lapse.

Section 11 of the Act on Conditional Fines provides as follows:

A conditional fine may be enforced at a lower amount than that imposed if the main obligation has been fulfilled in material respects, the payment capacity of the obligor has been significantly impaired or there are other justified grounds to reduce the amount of the conditional fine.

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5 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 disclose its decisions on ordering conditional fines payable. The FIN-FSA considers that, by virtue of section 43, subsection 2 of the FIN-FSA Act, there are no grounds to leave the ordering of the conditional fine payable undisclosed.

FINANCIAL SUPERVISORY AUTHORITY

ANNELI TUOMINEN

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Anneli Tuominen
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Secretary to the Board

For further information,
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Enclosures

Appeal instructions

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Appendix

Instructions for appeal

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.

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.

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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.

You may also lodge appeal using the electronic communication service of the administrative courts and courts of special jurisdiction, at <https://asiointi2.oikeus.fi/hallintotuomioistuimet>.

There will be a fee charged in accordance with the Act on Court Costs (1455/2015) for processing the matter. The fee is 260 euro. The Act on Court Costs (1455/2015) contains separate provisions on cases when no costs are charged.

Contact details

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