



9 July 2018

FIVA 4/02.05.05/2018

Confidential

Openness Act 24 (1) 3

Recipient

Danko Koncar

Subject

Ordering payment of conditional fine

Unofficial translation

1 Decision

The FIN-FSA orders Danko Koncar (hereinafter Koncar) to pay the base amount of forty million (40,000,000) euro and the supplementary amount accrued by the date of enforcement, amounting to ten million (10,000,000) 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), that is a total of fifty million (50,000,000) euro. 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. The deadline for publishing a bid lapsed on 18 May 2018. Koncar has not presented a valid reason for his failure to comply with the obligation.

The obligations and the running conditional fines enforcing them imposed in the FIN-FSA's decision remain in force. The Board of the FIN-FSA has made this decision regarding the ordering of payment of conditional fine in its meeting 9 July 2018.

2 Hearing

In its letter dated 21 May 2018 (Reg. no. 17/02.05.05/2017), 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 11 June 2018.

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that if the bid threshold has been exceeded prior to the entry into force of the Act, the provisions of the Act to be repealed shall be applied. Hence, in this decision references are made to the repealed Securities Markets Act.



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

The FIN-FSA's decision has been served to Koncar by means of service by public notice. Information on displaying the decision has been published in the Official Gazette, the Finnish newspaper Helsingin Sanomat and Financial Times on 11 April 2018. Koncar is considered to have been served the decision on the seventh day after publication of the public notice in the Official Gazette, that is, on 18 April 2018.



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3.2 Service of the hearing letter

Koncar's view

Koncar considers that information on the hearing was not served to him in accordance with the procedure prescribed by 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.

The FIN-FSA's position

The FIN-FSA considers that the hearing concerning the imposition 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 and ordering payment of a conditional fine or the imposition and 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 private individuals may be effected on a person authorised by a 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, Koncar's attorney 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 conditional fine payable was submitted to Koncar's attorney as standard service by email and a letter. Koncar's attorney confirmed receipt of the hearing letter and its appendices and submitted Koncar's response to the FIN-FSA by the deadline.



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3.3 Language of the hearing letter

Koncar's view

Koncar states that the hearing letter was not served to him in his native language. According to Koncar, he does not understand Finnish at all and understands English only slightly.

[REDACTED] 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 concerned 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 and decisions concerning himself in his native language, that is in Croatian.

The FIN-FSA's position

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).

[REDACTED]

3.4 Substantive prerequisites for ordering the conditional fine payable

Content of the hearing letter

Koncar has not published a bid required by the FIN-FSA's decision within a month of service of the decision, that is, by 18 May 2018.

The FIN-FSA is considering taking measures to order the base amount and the supplementary amounts accrued payable by the date of enforcement, 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 base



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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 is not complied with.

The FIN-FSA considers that the preconditions for ordering the conditional fine 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 holds it 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 SMA. 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.

Koncar considers that he does not exercise control in Afarak's shareholders in a manner claimed by the FIN-FSA. Koncar considers that he neither exercises, nor has ever exercised, control in Hino Resources Limited and/or Finaline Business Limited, or with respect to shares in Afarak owned by them.



Koncar considers that there are no grounds to order the conditional fine to be payable by Koncar in the matter. The matter should not be resolved before the administrative court has resolved Koncar's appeal to prohibit and/or suspend the enforcement.

The FIN-FSA's position

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, obligation 1 imposed in the FIN-FSA decision was not complied with.



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In his response, Koncar has mainly repeated the claims he made in the hearing concerning the imposition of the obligation to launch a bid and the imposition of the conditional fine. 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 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 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 18 May 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 FIN-FSA considers that the prerequisites to order the base amount of forty million (40,000,000) euro payable in the matter have been met.

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. Since the obligation has not been fulfilled for the time being, the first supplementary amount accrued on 18 June 2018. The FIN-FSA considers that the preconditions for ordering one supplementary amount payable have been met.

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

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



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3.5 Amount of the conditional fine

Content of the hearing letter

In his response concerning the imposition of the conditional fine, Koncar did not address his payment capacity. The market value of Afarak shares held by Koncar through an entity controlled by him is approximately 63 million euro. [REDACTED]

[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

Koncar finds it clear that it is not possible for him to pay the conditional fines imposed by the FIN-FSA. [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 position

In accordance with section 11 of the Act on Conditional Fines, 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 obligee has been significantly impaired or there are other justified grounds to reduce the amount of the conditional fine.

In his response dated 11 June 2018 to the hearing letter concerning the ordering of the conditional fine payable, Koncar did not demand reduction of the amount of the conditional fine. However, in a previous hearing concerning the imposition of the conditional fine, he stated that if there were legal grounds to impose a conditional fine in the matter, it should not be any more than 50,000 euro per base amount and 10,000 euro per supplementary amount.

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. [REDACTED]



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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 states that the FIN-FSA decision does not oblige the execution of the mandatory bid through a fully owned controlled company but provides the possibility to do so.

Koncar has not fulfilled the main obligation imposed to him in any respect. Neither has he presented any clarification of his payment capacity being significantly impaired after the imposition of the conditional fine. Koncar has, by particularly reprehensible conduct, neglected 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 conditional fine.

Based on the grounds presented above, the FIN-FSA considers that the conditional fine shall be ordered payable at the amount imposed.

3.6 Ordering payment of a conditional fine without legal validity of the FIN-FSA decision imposing the conditional fine

Content of the hearing letter

Koncar has appealed the FIN-FSA decision imposing the conditional fine. In accordance with section 73, subsection 3 of the FIN-FSA Act, the FIN-FSA decision is enforceable despite an appeal, unless the administrative court separately forbids or suspends the enforcement of the decision.

Koncar's view

Koncar has appealed the FIN-FSA decision with the Helsinki Administrative Court. In the same context, Koncar has requested that the administrative court order suspension of the enforcement of the FIN-FSA decision. Koncar considers that the matter of the conditional fine should not be resolved before the administrative court has rendered a decision on Koncar's appeal to suspend enforcement.

The FIN-FSA's position

Koncar has appealed the FIN-FSA decision imposing the conditional fine. In accordance with section 73, subsection 3 of the FIN-FSA Act, the FIN-FSA decision is enforceable despite an appeal, unless the administrative court separately forbids or suspends the enforcement of the decision. By its interim decision of 21 June 2018 (J No 02810/18/7201), the Helsinki Administrative Court has rejected Koncar's demand to forbid the enforcement of the FIN-FSA decision. Koncar has the right to seek a permission from the Supreme Administrative Court within 30 days of service of the decision to appeal the interim decision.



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The FIN-FSA considers, that even if the FIN-FSA decision concerning the imposition of the conditional fine is not legally valid, the enforcement of the conditional fine is required by the importance of public interest, urgency of fulfilling the main obligation and severity of Koncar's misconduct. Koncar has, by particularly reprehensible conduct, neglected the provisions on the obligation to launch a bid. Koncar's misconduct has served to undermine confidence in the securities markets. The combined portion of ownership in Afarak held by Koncar, entities under his control and persons acting in concert still continues to exceed the bidding obligation threshold. The base amount and one accrued supplementary amount shall therefore be ordered payable even though the FIN-FSA decision on the imposition of the conditional fine is not legally valid.

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

In accordance with section 73, subsection 3 of the FIN-FSA Act:

The Financial Supervisory Authority's decision may be enforced prior to gaining legal effect. The decision shall remain in force until further notice, regardless of appeal, unless otherwise provided by the appellate authority or elsewhere in law.

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



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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, except where it has been provided or ordered that the decision must be complied with regardless of 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.

In accordance with section 11 of the Act on Conditional Fines:

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

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 publicly disclose conditional fines, which it has been ordered 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

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Enclosures

Appeal instructions



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Appendix

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



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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.

An appeal may also be lodged in the electronic service for administrative and special courts at <https://asiointi2.oikeus.fi/hallintotuomioistuimet>.

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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