

Unclassified

English - Or. English

22 November 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

The Role of Innovation in Enforcement Cases – Note by Finland

5 December 2023

This document reproduces a written contribution from Finland submitted for Item 3 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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1. Introduction

1. This contribution discusses the approach of the Finnish Competition and Consumer Authority (hereinafter the FCCA) to the role of innovation in competition enforcement.¹ The focus is on the recent amendment to the Finnish Competition Act², which enables the FCCA to intervene in a larger number of transactions involving anti-competitive effects. The contribution explains the key factors behind this national change.

2. Framework for assessing innovation related questions

2. The Competition Act regulates anti-competitive mergers and anti-competitive practices. Mergers which fulfil the criteria of a notifiable transaction and exceed certain turnover-based thresholds must be notified to the FCCA. The FCCA intervenes with mergers if they significantly impede effective competition in the Finnish markets or a substantial part thereof, in particular when resulting in the creation or strengthening of a dominant position. Consequently, the FCCA applies the SIEC test³, which is applicable, among other things, to the elimination of actual and potential competition as well as to the restriction of innovation competition. The future development of the markets is also taken into consideration.

3. As regards anti-competitive practices, such as anti-competitive agreements and abuses of a dominant position, the provisions of the Competition Act, i.e. Sections 5, 6 and 7, are identical to those of Articles 101, 101(3) and 102 of the TFEU. The FCCA therefore assesses potential restrictions to technical development or investments as well as potential exemptions, such as those based on the promotion of technical or economic progress in Article 101(3) of the TFEU.

4. Innovation related questions as theories of harm and efficiency defences are assessed based on general economic principles in accordance with the case law of the Court of Justice of the European Union, European Commission's decisional practice as well as other guidance, i.e., guidelines and notices published of the European Commission.

¹ The FCCA's approach to innovation is also discussed in its contributions to the following OECD roundtables: the Concept of Potential Competition (DAF/COMP/WD(2021)14; Innovations and Competition in Land Transport (DAF/COMP/WP2/WD(2016)10; Disruptive Innovations in Legal Services (DAF/COMP/WP2/WD(2016)1; Competition, Patents and Innovation I (DAF/COMP(2007)40; Merger Review in Emerging High Innovation Markets (DAFFE/COMP(2002)20;

² The Competition Act is available in English at: https://www.finlex.fi/fi/laki/kaannokset/2011/en20110948_20221297.pdf.

³ The SIEC test (*Significant Impediment to Effective Competition*) applied by the FCCA is equivalent to that of Article 2 of the EU Merger Regulation (139/2004) ("EUMR").

5. The Merger Notification Form⁴ requires the notifying party to disclose information about the possibilities of incumbents to expand production⁵, possible products under development of the merging parties and competitors, products about to be launched in the near future or plans to increase production or sales capacity, and an estimate of the market shares of the merging parties in the next three to five years. Additionally, the notifying party is obliged to disclose information on the importance of research and development and its share of the turnover on the markets in general as well as for the merging entity.⁶

3. Amendment to the Competition Act to widen the scope of merger control

6. This section discusses the developments which eventually led to legislative changes in Finland with one of the aims being the fostering of innovations in the Finnish markets.

3.1. Background

7. Prior to the amendment to the Competition Act, the FCCA had advocated for lower turnover-based thresholds and the right to require a notification when thresholds are not met, i.e., an introduction of a call-in option. These were considered to enable the FCCA to investigate killer acquisitions and harmful concentrations of more traditional markets which previously fell below thresholds.

8. In the Nordic report “Digital platforms and the potential changes to competition law at the European level - The view of the Nordic competition authorities” (hereinafter the Nordic Report) of 2020⁷, the FCCA, together with Nordic competition authorities, recognised that “a particular source of competition concern stems from killer acquisitions”. By referring to recent publications on killer acquisitions the Nordic Report states that “while mergers between big tech companies and young start-ups may generate important synergies and efficiencies,⁸ tech giants may also buy an innovative start-up to pre-empt future competition”⁹, “the underlining theory of harm involving the incumbent “killing” the development or production of the target or eliminating its own internal efforts to

⁴ The Notification Form, in Finnish, is provided as an annex to the Decree by the State Council on the obligation to notify a concentration (1012/2011), <https://www.finlex.fi/fi/laki/ajantasa/2011/20111012>. Section 4 of the FCCA Guidance which deals with the provision of information and documents is based on the Notification Form. It also recognises killer acquisitions where an incumbent acquires an entrant and drives down entrant’s operations. Additionally, it identifies a situation where an entrant acquires an incumbent and drives down its own operations (a so-called reverse killer acquisition situation).

⁵ Section 7.2.7.1(c) of the Notification Form.

⁶ Sections 7.2.7.1(e) and (l) of the Notification Form.

⁷ Digital platforms and the potential changes to competition law at the European level. The view of the Nordic competition authorities (hereinafter the Nordic Report). September 2020, <https://www.kkv.fi/en/competition-affairs/international-cooperation/> (available at point: Nordic Cooperation/Reports)

⁸ Nordic Report, p. 13 referring to World Economic Forum (2019), “Competition Policy in a globalized, digitalized economy”, White paper, http://www3.weforum.org/docs/WEF_Compition_Policy_in_a_Globalized_Digitalized_Economy_Report.pdf

⁹ Nordic Report, p. 13 referring to Cunningham C, Ederer F, Ma S (2018), “Killer Acquisitions”, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707.

innovate and develop competing products and services”¹⁰. The Nordic Report also acknowledges that when it comes to mergers, “the highly dynamic and fast-moving nature of digital markets makes it difficult to predict the counterfactual scenario, i.e., how the market is likely to evolve in the absence of a merger”¹¹. The higher degree of uncertainty also affects the assessment of innovation competition.

9. While the Nordic competition authorities expressed their commitment to a robust enforcement of competition rules, they also recognized that “under the current rules, many acquisitions involving small innovative start-ups will not be notified to competition authorities, since they fall below merger notification thresholds commonly based on turnover.”¹² At the time, the FCCA did not have powers to investigate transactions if the combined turnover of the parties did not exceed EUR 350 million and the turnover from Finland of at least two of the parties did not exceed EUR 20 million each. The FCCA has explicitly stated that it should be able to investigate potentially problematic transactions that remain below the current notification thresholds.¹³

10. The Nordic Report was followed by the FCCA study of 2021¹⁴, which was commissioned by the Ministry of Economic Affairs and Employment and which indicated that the above-mentioned turnover thresholds allowed harmful mergers to escape the FCCA review and that the turnover threshold should be lowered. The thresholds were considered to be too high, especially when taking into account the size of the Finnish economy as well as when comparing with the respective thresholds of nearby peers. In addition, the study suggested that the FCCA should be provided with a call-in option. The study proposed that mergers should be subject to the FCCA’s review where the combined turnover of the parties resulting from Finland exceeds EUR 100 million, and the turnover of at least two of the parties resulting from Finland exceeds EUR 20 million. The study also proposed that the FCCA should have a call-in option where the combined turnover of the parties resulting from Finland would exceed EUR 50 million.

11. The FCCA study referred to the international discussion and the need to intervene in killer acquisitions. As regards to the framework for analysing killer acquisitions, the study refers to the two necessary conditions for competitive harm to exist. First, the acquired firm would have the resources to continue developing its product without the merger (*credible threat of competition*). Second, the acquiring firm stops developing the acquired firm’s product (*the kill element*). However, these conditions are very difficult to analyse without an in-depth investigation.

12. A call-in option would enable the FCCA to intervene in early-stage killer acquisitions as well as anticompetitive *high-value* transactions, meaning cases in which the

¹⁰ Nordic Report p. 13 referring to OECD (2020), “Start-ups, Killer Acquisitions, and Merger Control – Background Note” DAF/COMP/2020)5, p 6, [https://one.oecd.org/document/DAF/COMP\(2020\)5/en/pdf](https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf).

¹¹ Nordic Report, p. 10.

¹² Nordic Report, Foreword and p. 13.

¹³ See e.g. FCCA Press Release of 5 October 2018, “FCCA cannot investigate the effects of the Onnibus acquisition on consumer prices in the long-distance coach services market”, <https://www.kkv.fi/en/current/press-releases/fcca-cannot-investigate-the-effects-of-the-onnibus-acquisition-on-consumer-prices-in-the-long-distance-coach-services-market/>.

¹⁴ FCCA Press Release: “FCCA study: Expanding the obligation to notify mergers would create significant consumer benefit”, 11 June 2021, <https://www.kkv.fi/en/current/press-releases/fcca-study-expanding-the-obligation-to-notify-mergers-would-create-significant-consumer-benefit/>. The Press Release includes a link to the FCCA’s study (available in Finnish).

transaction value greatly outsizes the target company's turnover (*value to turnover ratio*). This could be for example due to highly valued intellectual properties, patents, data, customer bases or ongoing development projects. Turnover might not always reflect a company's market power and valuation, as is often the case for digital services or pharmaceutical markets. Research has indicated that there is a need to intervene, as the acquisitions carried out by large technology companies in the United States and in Europe have clearly decreased the number of new companies entering the associated markets as well as investments into such markets.¹⁵

13. In its Assessment Memorandum of 2022, the Ministry of Economic Affairs and Employment discusses, among other things, different possibilities to execute a potential call-in option. A call-in option could be based on market shares, market position or turnover. There could also be a certain time limit for invoking the call-option as well as the possibility for voluntary notification. The Memorandum provides, for example, a minimum turnover threshold of EUR 3 million for a target company and a three-month time limit for the FCCA to invoke the call-in option, commencing from the triggering event for a notification under Section 23 of the Competition Act. A voluntary notification would provide the company with a certain level of predictability without a need to wait for the potential exercise of a call-in option. The Memorandum also refers to the FCCA's study according to which a call-in option would provide the possibility for higher turnover-based thresholds than in the absence of it. As a preliminary conclusion, the Memorandum states that the combined turnover of the parties resulting from Finland exceeding EUR 100 million could be justified. However, a call-in option would require certain conditions such as the possibility for a voluntary notification and a certain time-limit for invoking the call-in option in order to increase predictability and to limit any negative impacts.

3.2. The amendment to the Competition Act – New thresholds

14. Building upon the Nordic and FCCA studies, the Government Bill¹⁶ of 2022 examined the relationship between competition and innovation. Innovation was regarded as a key factor in promoting increases in productivity and as a direct result, the national GDP. Competition policy was identified as having a key role in driving and protecting innovation.¹⁷ In connection with its objective to protect innovation, the Government Bill highlighted three key issues: high thresholds, killer acquisitions, and a call-in option.

15. As of 1 January 2023, the turnover-based thresholds have been lowered. As proposed in the Government Bill, a transaction is notifiable when the parties' combined turnover in Finland exceeds EUR 100 million, and the turnover of each of at least two parties exceeds EUR 10 million in Finland. The new thresholds enable the FCCA to intervene in a larger number of transactions which could have anti-competitive and innovation-impeding effects, such as rapid concentrations of markets falling below previous thresholds. According to estimates, the new thresholds will lead to an approximate doubling of notifiable transactions from the current 30-40 annual notifications to 60-80

¹⁵ Koski, Heli, Otto Kässi ja Fabian Braesemann (2021). Killers on the road of emerging Start-ups. Implications for Market Entry and Venture Capital Financing. Etna Working Papers no. 81.

¹⁶ The Government Bill for the amendment of the Competition Act (HE 172/2022 vp). All relevant documents can be found in Finnish at: https://www.eduskunta.fi/FI/vaski/Kasittelytiedot/Valtiopaivaasia/Sivut/HE_172+2022.aspx.

¹⁷ Reference was also made to the Commission's communication (COM(2021) 713 final) *Competition Policy Fit for New Challenges*, which highlights the importance of innovation and its interplay with competition policy.

annual notifications. As regards 2023, the FCCA has so far received 40 notifications (as of 9 November 2023).

16. As the amendment to the Competition Act and the lowering of turnover based thresholds is a recent change, the FCCA's associated decision practice is scarce. Also, the FCCA has not applied innovation related theories of harm in merger or antitrust enforcement cases during the review period of five years.

17. In addition to lowering the thresholds, the FCCA originally proposed to have a call-in option with the key threshold being the parties' combined turnover of EUR 50 million. However, such call-in option, in addition to other implementation alternatives, was omitted due to opposition by the major Finnish business associations. Their concerns were mainly related to potential uncertainties with the closing of transactions as well as associated administrative costs of possible call-in proceedings.¹⁸

18. However, as the Government Bill noted, the amendment, lacking the call-in option entirely, will not be sufficient to solve the issue with killer acquisitions and high-value transactions, as the thresholds are not low enough to capture the acquisitions of start-ups with limited turnovers, regardless of their high valuation. Additionally, considering the limited size of the economy in the more remote areas of Finland, some transactions might not fall into the scope of the new thresholds, yet resulting into significant geographical concentrations. Consequently, the discussion around the call-in option may continue in the future.

¹⁸ Government Bill, p. 40-41.