

The International Comparative Legal Guide to:

# Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



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## THE CARTEL PROHIBITION

### 1 The Legislation

#### 1.1 What is the basis and general nature of the cartel prohibition?

The national cartel prohibition is prescribed in law. The statutory basis for the prohibition is Article 4 of the Act on Competition Restrictions (*laki kilpailunrajoituksesta* 27.5.1992/480, as amended; hereinafter the “Act”). The regime is civil and it only covers undertakings.

According to Article 1a of the Act, when a cartel may affect trade between the EU Member States, Article 81 of the EC Treaty will be applied.

#### 1.2 What are the specific substantive provisions for the cartel prohibition?

Article 4 of the Act provides for the following prohibition (English translation by the Finnish Competition Authority; hereinafter the “FCA”):

“(1) All agreements between business undertakings, decisions by associations of business undertakings and concerted practices by business undertakings which have as their object the significant prevention, restriction or distortion of competition or which result in the prevention, restriction or distortion of competition shall be prohibited.

(2) In particular, agreements, decisions or practices which:

1. directly or indirectly fix purchase or selling prices or any other trading conditions;
2. limit or control production, markets, technical development, or investment;
3. share markets or sources of supply;
4. apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
5. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connections with the subject of such contracts,

shall be prohibited.”

As can be seen, the national cartel prohibition is basically the same as the prohibition in Article 81(1) of the EC Treaty, although naturally there is no condition regarding the effect on trade between the EU Member States in it.

#### 1.3 Who enforces the cartel prohibition?

The FCA enforces the cartel prohibition. The FCA investigates the matter and if a cartel is found, it can take the matter to the Market Court by making the Market Court a reasoned proposal for the imposition of fines on the infringing undertakings. The amount of fines is included in the proposal. The FCA itself is only an investigative authority which lacks the power to impose fines. The Market Court is the first instance that can impose fines. Its decisions can be appealed to the Supreme Administrative Court.

#### 1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

After the opening of an investigation the FCA investigates the matter, e.g. the documents and other material it has obtained from surprise inspections and from a leniency applicant, if any. The investigation normally involves also e.g. information requests and interviews.

The next concrete procedural step after the opening of an investigation is the FCA’s draft proposal to the Market Court for the imposition of fines (a kind of draft Statement of Objections), if any. The addressees of the draft proposal for the imposition of fines will be given a possibility to make known in writing their views on the FCA’s objections. The FCA will peruse the replies and conduct further investigations if needed.

The FCA’s investigation will end with a proposal to the Market Court for the imposition of fines (a kind of Statement of Objections), if any, and, in the case of an application for immunity from fines, with a separate decision regarding immunity.

The Market Court will give the addressees of the FCA’s proposal a possibility to make known in writing their views on the proposal. Subsequently, there may be several submissions by the parties. The Market Court proceeding may involve a hearing. As said in the answer to question 1.3 above, the Market Court is the first instance empowered to impose fines, and its decisions can be appealed to the Supreme Administrative Court (see Section 7 below for the appeal process).

#### 1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences in the Act.

According to Article 2 of the Act, the Act does not apply to agreements or arrangements which concern the labour market. Also according to Article 2, the Act does not apply to “agreements, decisions or corresponding practices by agricultural producers or associations of producers concerning the primary production of

agricultural products when they promote an increase in the productivity of agriculture, the effective operations of the market, the availability of foodstuffs and the achievement of reasonable consumer prices and a lower cost level” (English translation by the FCA), unless, however, such practices, to a significant extent, prevent sound and effective competition in the agricultural product market, or lead to an abuse of a dominant position.

**1.6 Is cartel conduct outside Finland covered by the prohibition?**

The Act does not apply to competition restrictions outside Finland which do not have effects in Finland.

According to the Act, the Finnish Government may pass a decree that the Act be extended to cover a competition restriction that affects foreign states, if so required by an agreement made with a foreign state, or if the interest of Finland’s foreign trade so requires. In practice the government has not passed such decrees.

**2 Investigative Powers**

**2.1 Summary of general investigatory powers.**

**Table of General Investigatory Powers**

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	N/A
Carry out compulsory interviews with individuals	No	N/A
Carry out an unannounced search of business premises	Yes	N/A
Carry out an unannounced search of residential premises	No	N/A
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes	N/A
■ Right to retain original documents	No	N/A
■ Right to require an explanation of documents or information supplied	Yes	N/A
■ Right to secure premises overnight (e.g. by seal)	Yes	N/A

**Please Note:** \* indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

**2.2 Specific or unusual features of the investigatory powers referred to in the summary table.**

The FCA can carry out compulsory interviews with individuals only in the course of an unannounced search of business premises (it has the right to require oral explanations on the spot).

**2.3 Are there general surveillance powers (e.g. bugging)?**

No, there are no general surveillance powers in a cartel investigation.

**2.4 Other powers of investigation.**

The most important investigatory powers are mentioned in the answer to question 2.1 above.

**2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?**

Searches of business premises will be carried out by the FCA. The FCA may ask the State Provincial Offices to help carry out searches of business premises. It can carry on searches of residential premises only when acting for the European Commission (authorisation of the Market Court required).

Although not under any specific obligation to do so, normally the FCA will wait for a while for legal advisors to arrive.

**2.6 Is in-house legal advice protected by the rules of privilege?**

The question of legal privilege is not exhaustively dealt with in national law. With regard to in-house legal advice, the FCA would follow the EU practice, e.g. the judgment of the Court of First Instance of the European Communities in September 2007 in *Akzo Nobel* (joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities*). Consequently, in-house legal advice is not privileged.

**2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals.**

There are no other material limitations of this kind.

**2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?**

If an undertaking does not allow the FCA e.g. to enter its premises, warehouses, land and vehicles or to examine e.g. its books, financial accounts, computer files or other relevant documents when the FCA is carrying out an inspection, the FCA may impose a conditional fine to enforce these obligations. The Market Court, and not the FCA itself, is empowered to order the conditional fine to be paid. In practice, a conditional fine has never been used in connection with a cartel investigation.

Providing the FCA with false information is a criminal offence punishable with fines or imprisonment.

**3 Sanctions on Companies and Individuals**

**3.1 What are the sanctions for companies?**

The maximum penalty allowed in the Act is an administrative fine of 10% of the total turnover in the preceding year. So far fines imposed in Finland have been far from the maximum.

With regard to the amount of the fine, the Act only provides that the gravity, extent and duration of the competition restriction be considered. The government bill about the Act adds some further guidance in this respect, but there are no detailed guidelines regarding the amount of the fine.

Other sanctions provided in the Act include conditional fines (see the answer to question 2.8 above regarding conditional fines connected to a search by the FCA).

**3.2 What are the sanctions for individuals?**

There are no sanctions in the Act for individuals for cartel behaviour.

**3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?**

According to Article 22 of the Act, a fine cannot be imposed if the FCA has not made its proposal for the imposition of fines to the Market Court within five years of the cessation of the cartel conduct or of the cartel having come to the knowledge of the FCA.

**3.4 Is cartel conduct by individuals potentially an extraditable offence?**

No, cartel conduct by individuals is not an extraditable offence.

**3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?**

As there are no sanctions in Finland for individuals (e.g. former or current employees) for cartel behaviour, this issue does not arise in national cases. If an employee is involved in a cartel investigation in another jurisdiction, Finnish law does not prevent a Finnish company from paying the legal costs and/or financial penalties imposed on the employee.

**LENIENCY / WHISTLE-BLOWING**

**4 Leniency for Companies**

**4.1 Is there a leniency programme for companies? If so, please provide brief details.**

Yes, the Act provides for a leniency programme. The programme consists of immunity from and reduction of any fine which would otherwise have been imposed. Immunity is available only in the context of cartels whereas reductions are available also with regard to other types of restrictions of competition. Immunity is available only for one undertaking.

Immunity will be granted to the leniency applicant if the undertaking:

1. provides the FCA with information on a competition restriction which allows the FCA to intervene in the restriction;
2. provides the information before the FCA has obtained it from elsewhere;
3. delivers to the FCA all cartel-related information and documents in its possession;
4. co-operates with the FCA during the whole investigation; and
5. has ended or immediately ends involvement in the restriction after having provided the FCA with the information in point 1 above.

Reductions of fines may be given if an undertaking has considerably assisted the FCA in the investigation of a competition restriction. The Act does not provide for any percentages or ranges regarding the level of possible reductions of fines.

In the case of an immunity application, the FCA itself issues a decision whether the above conditions for immunity are fulfilled or

not. This decision cannot be appealed. In the case of reductions, the FCA states its view in its proposal for the imposition of fines to the Market Court but it is the Market Court which will decide independently whether fines will be imposed and what the appropriate level of reductions, if any, is to be. Thus, at least in theory, there is much more uncertainty with regard to reductions than to immunity.

**4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?**

A marker system is not explicitly provided in the Act. Nevertheless, the FCA may secure a company's position in the queue for a short period of time in order for the company to gather and provide all the information in its possession on the suspected cartel.

**4.3 Can applications be made orally (to minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation)?**

Yes, leniency applications can be made orally. Whether this will actually minimise any possible subsequent disclosure risks in the context of civil damages follow-on litigation is somewhat uncertain due to the nature of the current Finnish law on access to information and lack of court precedents.

Other implicated parties will subsequently be given access to the oral application by providing them with a transcript of it, made by the FCA. The treatment of oral applications in Finland is still developing.

**4.4 To what extent will the application be treated confidentially and for how long?**

Naturally, the FCA does not reveal the fact that it has received an application (or applications) before its surprise inspections (dawn raids). After the surprise inspection, as a general rule, the FCA does not make public the fact that an inspection was conducted. However, if any of the implicated parties make it public, e.g. due to the Stock Exchange rules in case of a publicly listed company, also the FCA will normally confirm in a statement that surprise inspections have taken place. In this statement the FCA will also reveal the fact that a leniency application has been received and the identity of the applicant. It is at the discretion of the FCA whether it issues a statement regarding any subsequent application for reduction of fines. So far such statements regarding subsequent applications have not been issued.

In case the inspections, the leniency application and the identity of the leniency applicant do not become public in the ways stated above at approximately the time of the inspection, they will become public at the latest when the FCA makes a proposal to the Market Court for the imposition of fines. This is also when an application for the reduction of fines subsequent to any immunity application becomes public, if it has not become public earlier.

The application itself will be treated as confidential by the FCA and no access to it will be granted. The FCA has an interest in protecting the leniency programme and it can protect the programme e.g. by treating the applications as confidential. However, the other implicated parties will be given access to the applications. This will happen at the latest when the FCA provides them with its draft proposal to the Market Court for the imposition of fines. In the case of an oral application, however, the other implicated parties will not be given the FCA's recording of the application but instead a transcript of it, made by the FCA, as stated

in the answer to question 4.3 above. Naturally, access to any business secrets and other confidential information in an application is never granted to anyone.

Note that the treatment of leniency applications is still developing in Finland and that there are no court precedents regarding the FCA's view and practice that, apart from other implicated parties, no access to applications will be granted. Although it is in the interest of the FCA to protect the leniency programme e.g. by limiting access to applications, the current Finnish law on access to information does not make this an easy task.

#### 4.5 At what point does the continuous cooperation requirement cease to apply?

In the case of an immunity application, the continuous cooperation requirement applies until the decision of the FCA regarding the immunity. This decision, which deals only with the granting of the immunity and which cannot be appealed, will be given at the same time as the FCA makes its proposal for the imposition of fines to the Market Court regarding the other implicated parties. See also the answer to question 4.1 above.

In the case of an application for a reduction of fines, there is no continuous cooperation requirement.

## 5 Whistle-blowing Procedures for Individuals

### 5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Anyone (including natural persons) can report cartel conduct to the FCA or ask the FCA to investigate certain anticompetitive conduct, but only undertakings can apply for leniency. As explained in Section 3 above, there are no sanctions in the Act for individuals for cartel behaviour. Individuals who report cartel conduct would not have any direct personal benefit from doing so. An employee's prior contact with the FCA in this respect could adversely affect the employer-company's chance of subsequently obtaining immunity, as one of the conditions for immunity is that the undertaking provides the information before the FCA has obtained it from elsewhere (see the answer to question 4.1 above for conditions for immunity).

## 6 Plea Bargaining Arrangements

### 6.1 Are there settlement or plea bargaining procedures (other than leniency)?

No, there are no such procedures at the moment.

## APPEALS AND DAMAGES ACTIONS

## 7 Appeal Process

### 7.1 What is the appeal process?

The FCA is an investigative authority which investigates cartels but lacks the power to impose fines. Instead of being able to impose fines, the FCA makes its reasoned proposals for the imposition of fines to the Market Court. The Market Court - a Helsinki-based specialist court dealing with e.g. competition law matters - is

empowered to impose fines as the first instance.

The decisions of the Market Court can be appealed to the Supreme Administrative Court within 30 days of the decision. No permission is required for an appeal to the Supreme Administrative Court. The decisions of the Supreme Administrative Court cannot be appealed.

### 7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

As said, the FCA lacks the power to impose fines. If it wants fines to be imposed, it can take the matter to the Market Court by making a reasoned proposal for the imposition of fines, which includes the amount of fines. So far the Market Court (and its predecessor) has normally imposed lower fines than proposed by the FCA, sometimes much lower. Often the Supreme Administrative Court, on appeal, has lowered the fines even from what the Market Court imposed.

The reason that the courts have imposed lower fines than proposed by the FCA is not necessarily that the liability finding of the FCA was somehow flawed or because the FCA's penalty setting process was flawed, it is rather that the low level of competition law fines in Finland may have an implicit connection to fines and damages in non-competition law related matters in civil courts, where the amounts in Finland have never been substantial. However, there has been an increasing amount of pressure in Finland for some time now to increase the level of competition law related fines.

So far the Market Court has never decided on a case where a reduction of fines was applied for. Therefore, it remains to be seen whether the Market Court will accept the level of reduction proposed by the FCA or whether the court will adjust it. From a policy point of view the Market Court should not lower the reduction proposed by the FCA as this would increase the uncertainty for companies applying or considering applying for reduction. It can be mentioned in this context that in the case of a successful *immunity* application, the matter (i.e. the immunity part of a case) never goes to the Market Court in the first place as the FCA itself is empowered to decide on the immunity (as opposed to reduction) and its decision cannot be appealed.

## 8 Damages Actions

### 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

In principle anyone can bring a civil damages action against a cartel member (also independently of any finding of an infringement by the FCA or the courts). In practice, however, bringing a damages action is made much easier for an undertaking than for a non-undertaking (e.g. a consumer). This is because of a specific article of the Act (Article 18a), which explicitly provides that undertakings which infringe the cartel prohibition are obliged to compensate other *undertakings* for the damage caused. A non-undertaking would have to bring a damages action on the basis of the general act on damages (*vahingonkorvauslaki* 31.5.1974/412, as amended), the conditions of which are stricter.

According to Article 18a of the Act on Competition Restrictions, the right to claim damages expires if the damages action has not been brought within five years of the damage having come to the knowledge (or presumed knowledge) of the undertaking. Any damages granted will consist of single damages only. Normally the successful party in civil court proceedings can have its legal costs compensated by the unsuccessful party.

## 8.2 Do your procedural rules allow for class-action or representative claims?

Yes, a new act (*ryhmäkannelaki* 13.4.2007/444) regarding a certain kind of class-action entered into force on 1 October 2007. Before this, class-actions were not possible in Finland.

The application of the new act has been remarkably limited in two ways. First, it allows an action to be brought only with regard to cases between consumers and undertakings. Thus, e.g. undertakings cannot benefit from this new act in bringing damages (or any other) claims. Second, consumers are always represented by the Consumer Ombudsman. No-one else has the standing to bring a class-action.

As a general rule a member of the class cannot be held responsible for costs.

The class-actions will be dealt with in one of the six district courts named in the act. So far, no class-actions have been brought.

In practice, it is somewhat uncertain to what extent the new act will increase consumers' chances for bringing a damages action against a cartel member (see also the answer to question 8.1 above).

## 8.3 Have there been successful civil damages claims in the past?

So far damages actions for loss suffered as a result of cartel conduct are very rare in Finland, especially in normal civil courts. There are many reasons for this, and they are not all particularly specific to Finland. In general, the reasons can perhaps best be found in the European Commission's Green Paper "Damages actions for breach of the EC antitrust rules" dated 19 December 2005 (see: [http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0672en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0672en01.pdf)). "Out of court" settlements are not common either.

## OTHER MATTERS

### 9 Miscellaneous

#### 9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

After the major amendments to the Act, like the introduction of leniency, in May 2004, there have not been statutory changes directly in the field of cartels and leniency. However, some cases - especially the two largest cartel cases so far in Finland, i.e. the so-called asphalt case and the so-called wood procurement case - have contributed to the practical application of the Act in many ways, although e.g. both of the cases mentioned are still pending at the Market Court at the time of writing. See also the answer to question 8.2 above regarding the new act on class-actions.

Looking ahead, it is expected that the long-awaited decision of the Market Court in the asphalt case, expected at the time of writing in late December 2007, will shed more light on many important aspects regarding cartels and cartel procedures in Finland.

Although there are no imminent statutory developments, it can be mentioned that a working group has been set up by the government to peruse the need for amendments to the Act. The work of the working group is in its early stages.

#### 9.2 Please mention any other issues of particular interest in Finland not covered by the above.

There are no such issues specific to Finland.



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The nearly 10-year practice of Ilkka Leppihalme includes mainly EU and national competition law but also e.g. mergers and acquisitions and dispute resolution. Leppihalme obtained his national Master's degree in law in Helsinki University and his LL.M. at King's College London. He was an associate at Freshfields Bruckhaus Deringer in Brussels in 2001-2004. His career includes also a year as a trainee judge in a District Court in the Helsinki Metropolitan area. At LMR Leppihalme has e.g. submitted the first ever leniency application in Finland. This was done on behalf of Finland's fourth largest company, UPM-Kymmene Corporation, in the above-mentioned wood procurement case. He represents the construction giant NCC in the asphalt case, so far the largest cartel case in Finland, also mentioned above. Leppihalme has advised also e.g. The Nielsen Company, Powerwave Technologies, Inc., Outokumpu, SOK, VR Group (National Railways), Luvata, Amer Sports Corporation and Danisco. He was recently invited to present an attorney point of view before the working group of the Ministry of Trade and Industry on amendments needed to the Act. Leppihalme speaks Finnish, English, Swedish and French.

# LMR

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