



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
Finland: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Finland.

This Q&A is part of the global guide to Cartels. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/practice-areas/cartels/>

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1. **What is the relevant legislative framework?**

The Finnish competition rules are laid down in the Competition Act (948/2011). The Competition Act has, since its enactment in 1992, been subject to several amendments. The most recent substantive overhaul, which came into force 1 November 2011, resulted in the full harmonisation of the substantive provisions of the Competition Act with articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

The Competition Act has just recently been subject to review and the government proposal was approved on 7 March 2019. The amendments include, inter alia, broader

inspection rights for the Finnish Competition and Consumer Authority ("FCCA"), more efficient information exchange between national competition authorities and new rules concerning enforcement prioritising, and will enter into force in the near future, expectedly still in the course of 2019.

Also, as of 26 December 2016, the legislation concerning antitrust damages has been reworked, and as a result Act on Antitrust Damages Actions (1077/2016) was introduced. This enactment implement the EU Directive on Antitrust Damages (2014/104/EU) the aim of which is to ensure anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation.

The Competition Act does not apply to agreements or arrangements concerning the labour market. This exclusion has been interpreted narrowly to exclude only agreements or arrangements that directly concern the terms of employment. Moreover, as a general rule, the prohibition against restrictive agreements laid out in article 5 of the Competition Act does not apply to arrangements between the producers of agricultural products, groups of such producers or agricultural sector-specific groups that concern the production, selling, joint storage, handling or refining of agricultural products, provided that the arrangement concerned fulfils the criteria confirmed on the basis of article 42 TFEU, based on which articles 101 and 102 TFEU are not applicable. The Competition Act does, however, apply to such arrangements if they constitute an abuse of dominant position or significantly distort effective competition in the market for agricultural products.

2. To establish an infringement, does there need to have been an effect on the market?

No, the Competition Act expressly states that an infringement consists of behaviour which has as its object or effect the restriction of competition. Finnish competition authorities apply the EU principle and decision practice concerning a by-object or by-effect infringement.

3. Does the law apply to conduct that occurs outside the jurisdiction?

Yes, any conduct which has an effect on the Finnish market or a part thereof, regardless of where the conduct takes place falls under the Competition Act and the jurisdiction of the FCCA.

4. Which authorities can investigate cartels?

The principal authorities involved in the enforcement and supervision of the Competition Act are the FCCA and the Market Court. The FCCA is an independent body, subordinate to the Ministry of Economic Affairs and Employment of Finland. The Market Court is a special jurisdiction court vested with judicial powers in competition matters, amongst others. The Market Court has retained the exclusive competence to impose fines and conditional fines following violations of the Competition Act. When imposing fines and conditional fines, the Market Court must always act upon a proposal from the FCCA. Furthermore, the Market Court reviews, as first appellate instance, the decisions adopted by the FCCA under the Competition Act.

The Supreme Administrative Court is the ultimate court of appeal in competition matters hearing appeals against judgments rendered by the Market Court. In addition, the general courts of law hear cases concerning the enforceability and validity of contractual arrangements containing competition restrictions and claims for damages suffered by business undertakings as a result of conduct prohibited by the Competition Act.

5. What are the key steps in a cartel investigation?

The FCCA can initiate investigations into suspected competition restrictions ex officio or as a result of complaints or applications for immunity. The FCCA typically initiates investigations by conducting dawn raids (i.e. surprise inspections) at undertakings' business premises. This the FCCA has independent jurisdiction to do. In addition, the

FCCA must assist, upon request, in investigations conducted by the Commission pursuant to Council Regulation (EC) No. 1/2003.

Additionally, the FCCA can also carry out inspections outside business premises (e.g., in private residences) either independently or in assistance to the Commission. In all situation where private premises are investigated a search warrant is required from the Market Court.

Article 38 of the Competition Act, concerns an undertaking's rights of defence in connection with investigations carried out by the FCCA. Firstly, the undertaking has the right to be informed of its position in an investigation by the FCCA and the suspicions directed towards it. Further, the undertaking is entitled to information regarding documents related to the investigation and the state of the matter, unless precluded by the Act on the Openness of Government Activities or EU law. Finally, an undertaking has the right to be heard before the FCCA makes a proposal to the Market Court for the imposition of fines and the decision on the existence of a cartel under the Competition Act or the TFEU. The FCCA's allegations will be laid out in a written declaration containing all the facts that have come to its attention, as well as the resulting allegations and their ground. A time limit is then set for the undertaking to give its reply, either in writing or orally. The FCCA may also, subject to its discretion, arrange state of play meetings either by ex officio or by the parties' request at any point during the proceedings.

6. What are the key investigative powers that are available to the relevant authorities?

The FCCA has extensive investigative powers. These mirror, to a great extent, the powers conferred on the European Commission under Regulation 1/2003. The FCCA's investigative powers include the following.

Requests for information

The FCCA may send requests for information to any undertaking, to which the latter

has a legal obligation to reply. Where an undertaking intentionally or negligently provides incorrect information in response to an information request, or fails to submit information within the specified time limit, the FCCA may impose a fine. Furthermore, the intentional provision of incorrect information may entail criminal liability (a fine or imprisonment) under the Finnish Penal Code.

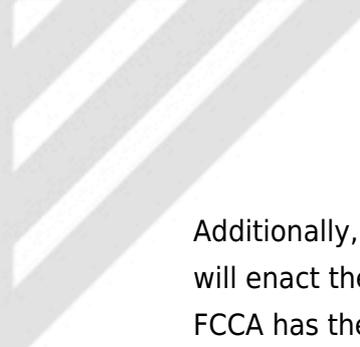
Inspections

The FCCA may conduct inspections at undertakings' business premises or private premises (e.g. residences of its directors). Advance notice of an inspection may be given but, and especially where undertakings are suspected of participation in a cartel, the FCCA tends to carry out inspections without prior warning. An inspection of private premises requires prior judicial authorisation to be granted by the Market Court.

While conducting an inspection, the FCCA has far-reaching powers of entry and seizure, and undertakings are required to cooperate with any investigation (article 37 of the Competition Act). The FCCA's officials are empowered to:

- enter premises and examine books, financial accounts and other documents (including files and emails stored on computers, mobile phones and tablets);
- copy or take extracts from such books and business records;
- request on-the-spot oral explanations and record the answers given; and
- seal business premises and books or records for a period and to the extent necessary for the conducting of an inspection.

As regards the FCCA's power to examine undertakings' business records and to make copies of any documents relevant to the investigation, the FCCA generally takes the view that it is competent to decide whether a particular document is relevant to its investigation, except in the case of documents to which legal privilege is applied. Following the inspection, the undertaking may write to the FCCA setting out its objections to the inclusion of certain documents in the FCCA's file.



Additionally, the reworked Competition Act, which will enter into force later this year, will enact the FCCA with broader inspection rights than previously. In the future, the FCCA has the right to conduct a so-called "continued inspection", whereupon the FCCA takes copies of the electronic material and continues reviewing the copied material in its own premises.

Moreover, in the course of an inspection the FCCA has the power to question representatives of an undertaking as regards explanations on facts or documents relating to the subject matter and purpose of the inspection. These answers can be recorded.

Power to question

According to article 34 of the Competition Act, the FCCA has the right to question representatives of business undertakings or other individuals who can reasonably be suspected to have acted in furtherance of the competition restriction being investigated. These questioning sessions may be recorded.

7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

Article 38(3) of the Competition Act lays down the rights of an undertaking to the confidentiality of its correspondence with external legal counsel (legal professional privilege) regardless of the jurisdiction they are qualified in. Following the ECJ case law, legal advice produced by in-house counsel is not protected by the legal professional privilege.

8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal

admission required?

Full immunity is only available for hard-core cartel infringements and for one company in respect of any one cartel infringement.

According to the Competition Act, the FCCA may refrain from imposing a fine on an undertaking that has participated in a cartel where the applicant undertaking: (i) provides the FCCA with information and evidence on a competition restriction, which allows the FCCA to conduct a surprise inspection; or (ii) provides the FCCA with information and evidence after it has conducted a surprise inspection which allows the FCCA to conclude that Section 5 of the Competition Act and/or Article 101 TFEU has been infringed.

Both types of information must be provided to the FCCA before it has obtained it from other sources.

Further the applicant must satisfy the following conditions: (i) the applicant must immediately terminate participation in the competition restriction (unless the FCCA advises it to do otherwise); (ii) the applicant must cooperate with the FCCA continuously throughout the investigation; (iii) the applicant does not destroy any relevant evidence; and (iv) the applicant does not disclose to any third party (with the exception of the European Commission or a competition authority of another country if it is necessary for the investigation of the restriction concerned) the fact that it has made an application for immunity from or reduction of fines to the FCCA.

Immunity cannot be obtained by a company which has coerced other undertakings to participate in the cartel.

9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

According to Article 15 of the Competition Act, an undertaking that is first to provide the FCCA with information and evidence significant for the clarification of the

infringement, its extent or nature, will obtain a fine reduction of 30 percent to 50 percent, the second applicant will obtain a reduction of 20 percent to 30 percent and other applicants fulfilling the criteria would see their fines reduced by a maximum of 20 percent.

The grant of a reduction of fines is additionally conditional upon the conditions laid out in the previous section regarding the conditions for full immunity.

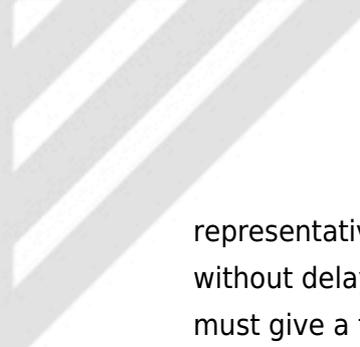
10. **Are markers available and, if so, in what circumstances?**

Yes, but only for immunity applicants. The FCCA's immunity and leniency guidelines provide that the FCCA 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 a suspected cartel.

The grant of a marker is conditional upon the applicant informing the FCCA of the following: (i) name and address, (ii) reasons for the leniency application, (iii) cartel participants, (iv) description of the products subject to the cartel, geographical reach, duration, and the overall nature of the cartel, (v) estimate of the time needed to collect the necessary information and the nature of the information that will be submitted, (vi) applications made to other competent authorities regarding the same cartel conduct and (vii) whether the applicant is planning to lodge an application for immunity or reduction of fines to other competent authorities.

11. **What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?**

The applicant must cooperate with the FCCA continuously throughout the investigation. According to the FCCA's leniency guidelines, the cooperation must be tangible, extensive and continuous. The applicant must submit all relevant information and evidence in its custody without delay to the FCCA, as well as give the FCCA access to its employees and representatives, both past and present. The applicant and its



representatives and employees must answer the FCCA's questions and requests without delay. The cooperation must be unprompted and bona fide, and the applicant must give a true and undistorted picture about the cartel, its actions and the applicant's role and initiative in the cartel. Cooperation requirement will not be fulfilled if a substantive part of the applicant's relevant employees do not cooperate with the FCCA. The applicant must also not with its own actions impede the FCCA's investigations. The cooperation obligation starts when the leniency application is lodged and continues until the FCCA's investigation concludes.

12. **Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

Not applicable.

13. **Is there an 'amnesty plus' programme?**

No.

14. **Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

The Competition Act does not provide for any settlement procedure for the handling of cartel cases in which the parties and the FCCA would agree on the nature and the scope of the illegal activity and the appropriate sanction. Fines are imposed by the Market Court on the proposal of the FCCA. The Market Court is not bound by the FCCA's recommendation in setting the amount of the fine.

However, in practice, there have been cases where the FCCA has decided to close the

case without sanctions when the addressed companies have ended the investigated conduct during the proceedings. This is more likely in non-cartel cases but could be possible regarding cartels that are of a limited scope and significance.

15. **What are the key pros and cons for a party that is considering entering into settlement?**

Not applicable.

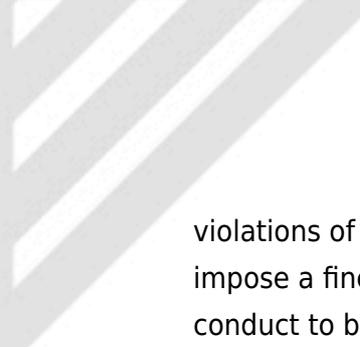
16. **What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The collaboration between the FCCA and the other European competition authorities has significantly increased following the entry into force of Regulation 1/2003 and the creation of the ECN. This cooperation relates, inter alia, to the investigation and prosecution of cartels. In practice, the FCCA has taken advantage of the ECN network either by requesting a competition authority from another member state to assist in the acquisition of information or by referring a case to the competition authority of another member state. The ECN also has different subgroups for certain industries (e.g. transport, telecoms, food) and competition restraints types (e.g. cartels, vertical restraints) where the NCA's regularly meet and discuss ongoing cases.

In addition, the FCCA takes part in Nordic cooperation between authorities from Sweden, Norway, Denmark, Iceland, the Faroe Islands and Greenland. The Nordic authorities signed an Agreement on Cooperation in Competition Cases in 2017.

17. **What are the potential civil and criminal sanctions if cartel activity is established?**

The Competition Act provides for the imposition of administrative fines following



violations of the substantive provisions of the Competition Act. The Market Court will impose a fine upon a proposal from the FCCA, unless the Market Court deems the conduct to be minor or the imposition of the fine as otherwise unjustified. The maximum amount of fine that can be imposed on an infringing undertaking is 10% of the annual worldwide turnover of the business undertaking in question during the last year of its participation in the infringement concerned.

In several instances, the fines proposed by the FCCA have been reduced or annulled by the Market Court, both in cases of abuse of dominant position and prohibited cooperation between competitors.

The violations of the substantive provisions of the Competition Act do not carry criminal penalties. However, the wilful submission of false information to the competition authorities may lead, under the provisions of the Penal Code, to criminal fines or a maximum imprisonment of six months.

18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The maximum amount of fine that can be imposed on an infringing undertaking is 10% of the annual worldwide turnover of the business undertaking in question during the last year of its participation in the infringement concerned. When determining the amount of the fine, the Market Court will consider the nature, scope and duration of the restriction. The Market Court is not bound by the FCCA's proposal in setting the amount of the fine. However, where the FCCA has not made a proposal for the imposition of a fine, the Market Court may not ex officio impose a fine. In such cases the Market Court may, however, decide to remit the case to the FCCA for reconsideration. Recent decision practice is described in more in answer 9 below.

There is a five-year limitation period for the imposition of fines following an infringement of the Competition Act. The limitation period begins from the date on

which the competition restriction occurred or, in the case of a continued infringement, the date on which the infringement ended. The FCCA's investigatory measures (eg, a dawn raid or the sending of a written request for information) interrupt the limitation period. Nevertheless, the FCCA cannot impose a fine if it has not made a proposal for the imposition of a fine to the Market Court within 10 years of the date on which the competition restriction occurred or, in the case of a continued infringement, after the date on which the infringement ended.

19. **Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

Yes, in principle the FCCA applies the parental liability doctrine as established by EU decision practice. The principle has also been confirmed in the decision practice of the Market Court and the Supreme Administrative Court.

20. **Are private actions and/or class actions available for infringement of the cartel rules?**

Contractual terms and other arrangements that violate the prohibitions set out in the Competition Act are invalid and unenforceable. The courts of law must take this into account *ex officio* even if the parties do not invoke such unenforceability in their pleadings.

The Act on Antitrust Damages Actions (1077/2016) provides for compensation for damage suffered as a result of a restriction on competition. Thus, "any individual (e.g., a business undertaking, but also a consumer or public body) who has suffered damage as a result of a deliberate or negligent breach of the substantive provisions of the Competition Act is entitled to compensation from the violating party.

A number of private damage actions have been brought before the general Courts in Finland. Both follow-on actions as well as actions independent from any FCCA decisions have been initiated.

Class actions were introduced in Finland by the Act on Class Actions (444/2007), which entered into force on 1 October 2007. However, damages for breaches of competition law were explicitly excluded from the scope of the Act.

21. **What type of damages can be recovered by claimants and how are they quantified?**

Compensation covers the expenses, price difference, lost profits, and all other direct or indirect economic damage incurred due to the violation.

The claimant must prove the quantum of the damage. In principle, evidence can be presented by any means and it is up to the court to determine the weight and relevance of a particular type of evidence. The court is entitled to estimate the amount of damages if the amount cannot be proven but it is evident that damage has been caused.

The Helsinki Court of Appeal upheld recently the District Court's decision in the raw wood procurement cartel damages case to dismiss actions for damages brought by eight private forest owners as being unsubstantiated. The Court of Appeal concluded on the basis of extensive economic evidence presented by expert witnesses, that the parties being able to show possible effects on prices was not sufficient to prove that damage had been inflicted. The Court of Appeal's judgment stayed final as no leave of appeal was granted by the Supreme Court.

22. **On what grounds can a decision of the relevant authority be appealed?**

A cartel decision by the FCCA is in practice always automatically subjected to the Market Court's review as the FCCA does not itself have the power to impose fines. In its review process, the Market Court will assess both the substantive and legal questions relevant to the case. As the Market Court is effectively the first decision making instance in cartel cases, its decisions are always appealable to the Supreme

Administrative Court based on factual or legal grounds.

23. What is the process for filing an appeal?

The FCCA's decisions, whether rejecting a complaint, closing an ex officio investigation or finding a competition restriction, can be appealed to the Market Court. A further appeal against the Market Court's judgment reviewing the FCCA's decision and imposing a fine can be lodged before the Supreme Administrative Court, which is the ultimate appellate instance for competition matters in Finland. The scope of an appeal to either the Market Court or the Supreme Administrative Court can be the appealed decision in its entirety or certain aspects thereof. As a general rule, the appeal must be lodged within 30 days from having been given notice of the decision concerned.

24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

On 14 December 2017, the Market Court handed down its judgement in the Bus Cartel case, where the Finnish Competition and Consumer Authority ("FCCA") had proposed fines up to EUR 38 million in total for the Finnish Bus Association, Matkahuolto and the bus transportation companies involved for engaging in prohibited cooperation between competitors. The Market court agreed with the FCCA on some findings but disagreed on some, most notably on the FCCA's finding that the companies had engaged in restriction of competition in the context of discussions relating to the representation of interests conducted by the Bus Association, and ultimately imposed fines of only EUR 100 000 on each undertaking, or EUR 1.1 million in total. The FCCA has appealed the decision to the Supreme Administrative Court, where the case is pending.

On 4 December 2018, the Finnish Competition and Consumer Authority ("FCCA") proposed that the Finnish Market Court impose a fine of EUR 4.3 million on two companies manufacturing EPS insulation, ThermiSol Oy and UK-Muovi Oy, for their participation in a cartel on the market for EPS insulation in Finland. A third company,

Styroplast, was granted immunity from a fine as it was the first to reveal the existence of the cartel and provided additional information to the FCCA. According to the FCCA, the three largest manufacturers of EPS insulation in Finland had operated an illegal nationwide price cartel during the years 2012–2014. The manufacturers allegedly agreed on, inter alia, amounts and timing of price increases, thus restricting competition on the market. The case is pending before the Market Court.

25. **What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?**

The FCCA has recently focused on several formerly tightly regulated markets.

The taxi industry became a focus area for the FCCA after the taxi market was opened to competition in July 2018. During the late 2018, the FCCA watched with increasing interest the interplay of individual taxi entrepreneurs and dispatch service centers on the taxi market and consequently, initiated a survey to examine especially the conduct and market position of dispatch service centers. The FCCA has since initiated several enforcement actions regarding the taxi market.

In addition, there has been a long and volatile discussion on opening the pharmacy sector to competition. Ministry of Social Affairs and Health issued two Government proposals in 2018 to reform the pharmacy sector but as of now, the proposals are more of a technical nature and would not appear to change the dynamics of competition in the pharmacy sector greatly. However, the discussion on the final form of the legislative changes envisaged remains open.

26. **What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**



A government bill regarding the Competition Act reform was submitted to the Parliament in May 2018 and finally approved in March 2019. The amendment is expected to enter into force during the year 2019. Amendments to the FCCA's inspection rights and rules on prioritizing, information exchange between competition authorities as well as amendments to merger control investigation deadlines, among others, are expected to enter into force during 2019. Furthermore, after the ECN+ Directive (2019/1/EU) was approved in December 2018, the second phase of the Finnish Competition Act reform is expected to be commenced during 2019.

New Director General of the FCCA, Kirsi Leivo, took office in September. Since then, Ms Leivo has been explicit that the FCCA will be focusing its attention and resources increasingly towards cartel enforcement and merger control. In addition to expressing the need for more stringent sanctions for cartels on several occasions, Ms Leivo has stated her concern for the current turnover thresholds in merger control being too high and many potentially problematic concentrations going uninvestigated because of this. For this reason, Director General Leivo has suggested that the FCCA should have a right to investigate, on its own initiative, even those mergers which do not exceed the turnover thresholds but might, in the FCCA's opinion, have potentially harmful effects on competition in Finland.