

The International Comparative Legal Guide to:

Cartels & Leniency 2010

A practical insight to cross-border Cartels & Leniency



Published by Global Legal Group with contributions from:

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The national cartel prohibition is prescribed in law. The statutory basis for the prohibition is Article 4 of the Act on Competition Restrictions (*laki kilpailunrajoituksista* 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 connection with the subject matter 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

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).

The FCA can carry out an unannounced search of residential premises only when it is assisting the European Commission. An advance authorisation by the Market Court is required.

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

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

2.4 Are there any other significant 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 out 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*; appeal pending in the Court of Justice of the European Communities, Case C-550/07 P). 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 under investigation.

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?

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 turnover of the preceding year. If the fine is proposed to be imposed on the group parent company, the relevant turnover is the total turnover of the group. If the fine is proposed to be imposed on a subsidiary only, the relevant turnover is the total turnover of the subsidiary. The Supreme Administrative Court ruled in its judgment in the asphalt cartel case on 29 September 2009 that the “turnover of the preceding year” primarily means the turnover of the year preceding the judgment of the Market Court (the first instance empowered to impose fines).

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.

At the time of writing (early November 2009), the highest total fine imposed in Finland in a cartel case is EUR 82.55 million and the highest individual fine imposed in Finland in a cartel case is EUR 68 million. Both of these fines were imposed by the Supreme Administrative Court in the asphalt cartel case on 29 September 2009.

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?

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.

Despite these alternatives, the Supreme Administrative Court ruled in its judgment in the asphalt cartel case on 29 September 2009 that Article 22 should be interpreted so that a proposal for the imposition of fines should not be made with regard to an undertaking which has ceased its cartel conduct if five years have elapsed from the cessation.

3.4 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.

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 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 a leniency 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 no access to applications will be granted (except to other implicated parties). 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.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

There is no "leniency plus" policy, which allows a company, under investigation for one cartel, to potentially gain substantial leniency as to that cartel if it uncovers a second cartel. Neither is there a "penalty plus" policy, where companies that do not uncover a second cartel they know of, risk possible harsh sanctions if the other cartel is discovered and prosecuted.

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 any early resolution, settlement or plea bargaining procedures (other than leniency)?

No, there are no such procedures at the moment in Finland.

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 Does the appeal process allow for the cross-examination of witnesses?

The Market Court and the Supreme Administrative Court proceedings in competition cases are generally conducted in writing, but the courts can hold an oral hearing if necessary in order to clarify the case. The oral hearing can be limited e.g. to hearing witnesses. The Supreme Administrative Court held its first ever oral hearing in a competition case in 2009 (in the asphalt cartel case).

As a general rule, the examination of a witness is started by the party who named the witness. Following this, the opposing party has the right to examine the witness. Subsequently, the court and the parties concerned may put questions to the witness.

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 on the basis of national law 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 try to bring a damages action e.g. on the basis of the general act on damages (*vahingonkorvauslaki* 31.5.1974/412, as amended), the conditions of which are stricter.

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 What are the applicable limitation periods?

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.

8.4 What are the cost rules for civil damages follow-on claims in cartel cases?

According to the Code of Judicial Procedure (*Oikeudenkäymiskaari*), as a principal rule, the unsuccessful party is liable to compensate all reasonable legal costs incurred by the necessary measures of the successful party.

The Code of Judicial Procedure lists as compensable legal costs the costs of the preparation for the trial, the costs of the participation in the proceedings, the fees of an attorney, compensation for the work caused by the trial to the party concerned, and compensation for the loss directly linked to the trial.

8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?

So far civil damages claims for cartel conduct have been very rare in Finland. 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 and White Papers "Damages actions for breach of the EC antitrust rules", dated 19 December 2005 and 2 April 2008 respectively, and Commission Staff Working Papers accompanying the Green and White Papers (see: http://ec.europa.eu/comm/competition/antitrust/actions_damages/documents.html).

However, as a result of the asphalt cartel case, several civil damages claims have been initiated in the Helsinki District Court since June 2008. These cases are at their early stages.

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 been no 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 asphalt cartel case (judgment of the Supreme Administrative Court on 29 September 2009) and the wood procurement cartel case - have contributed to the application of the Act in many ways, although the latter is still pending in the Market Court at the time of writing. See also the answer to question 8.2 above regarding the relatively new act on class-actions.

Looking ahead, it is worth knowing that the government's working group, which was set up in 2007 to review the need for amendments to the Act, has proposed in its January 2009 proposal that the current Act be repealed and replaced by a new act - the Competition Act.

The working group has proposed, for example, the following with regard to cartels and leniency:

First, the FCA would be given power to conduct inspections also in private premises.

Second, the rules regarding the notion of undertaking, parent company liability and succession of liability would be clarified and converged with EU law.

Third, the rules on leniency would be made more foreseeable and transparent, and amended to correspond to the leniency programme of the European Commission and the model leniency programme of the European Competition Network (ECN).

Fourth, the limitation regarding those entitled to damages would be removed (currently limited to undertakings in Article 18a of the Act; see also the answer to question 8.1 above). Also the limitation periods regarding damages actions would be made clearer: 10 years from the day on which the infringement is committed; or, in the case of continuing infringements, 10 years from the day on which the infringement ceases; however, in case of follow-on actions, 2 years from the day on which a decision of the FCA or a judgment of the court became final.

Fifth, the working group proposes amendments also to an act governing access to documents in the possession of a public authority. These amendments would restrict access to documents in the FCA's case file during the FCA's investigation, and even thereafter with regard to leniency documents submitted by the leniency applicant. In the Competition Act itself, the purposes to which leniency documents can be used would be restricted.

At the time of writing (early November 2009), the government bill on the new act is in preparation and it is expected to be submitted in the spring of 2010. The new act is expected to enter into force sometime later in 2010.

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 practice of Ilkka Leppihalme focuses on EU and Finnish competition law. In addition, he represents clients in litigation and arbitration procedures and advises on mergers and acquisitions and various commercial contracts. His competition law work covers the full spectrum of competition law (merger control, cartel investigations, horizontal and vertical agreements, abuses of dominance, litigation/damages cases, compliance programmes and training, etc.) across a wide range of industries.

Leppihalme has been involved in various leading cases, including e.g. the above-mentioned asphalt cartel case and the wood procurement cartel case, so far the largest cartel cases in Finland. He has also submitted the first ever leniency application in Finland. Leppihalme has advised e.g. UPM-Kymmene Corporation, NCC, The Nielsen Company, Viasat/Modern Times Group, Powerwave Technologies, Inc., Outokumpu, SOK, VR Group (National Railways), Luvata, Amer Sports Corporation and Danisco.

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 over 11-year long career includes also a year as a trainee judge in a District Court in the Helsinki Metropolitan area. He has taken part (by invitation) in the work of the working group of the Ministry of Employment and the Economy on amendments needed to the Act on Competition Restrictions.

Leppihalme is a regular speaker at competition law conferences and seminars. He is listed as a leading Competition/European Law expert in *Chambers Europe - Europe's Leading Lawyers for Business* (2009) and highly appraised in *The Legal 500 EMEA* (2008 & 2009). Leppihalme speaks Finnish, English, French and Swedish.

LMR

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