FINNISH COMMISSION AUTHORITY (FCA) GUIDELINES

GUIDELINES ON THE APPLICATION OF THE COMPETITION ACT • 2/2011

Finnish Competition Authority (FCA) Guidelines

IMMUNITY FROM AND REDUCTION OF FINES IN CARTELS CASES
Finnish Competition Authority (FCA) guidelines

*immunity from and reduction of fines*

*In cartels cases*
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1 Introduction

The new Competition Act entered into force on 1 November 2011. These Guidelines replace the previous Guidelines by the Finnish Competition Authority on the application of Sections 8 and 9 of the Act on Competition Restrictions from 2004. The objective of the Guidelines is to describe the conditions for immunity from and reduction of fines (so-called leniency), the functioning of the leniency system and the leniency procedure applied by the Finnish Competition Authority, and to provide more detailed information on the application of the provisions.

The provisions on immunity from and reduction of fines provide the business undertakings involved in secret cartels the opportunity to disengage from them, and upon the fulfilment of the conditions referred to in the Competition Act to either obtain immunity from or a reduction of the penalty payment imposed for a restraint on competition.
2 Immunity from fines in cartel cases

2.1 General

Under Section 14 of the Competition Act, a penalty payment shall not be imposed on an undertaking in the case of a secret restraint on competition between competitors, referred to in Section 5 or Article 101 of the Treaty on the Functioning of the European Union, whereby purchase or selling prices or other trading conditions are fixed; production or sales is limited; or markets, customers or sources of supply are shared, if an undertaking involved in such a restraint on competition:

1. produces information or evidence, on the grounds of which the Finnish Competition Authority may conduct an inspection referred to in Section 35 or 36; or

2. following an inspection referred to in Section 35 or 36, delivers information or evidence, on the grounds of which the Finnish Competition Authority can establish that Section 5 or Article 101 of the Treaty on the Functioning of the European Union has been violated.

It is a further condition of immunity that the undertaking has provided the information and evidence referred to in (1)(1) and (1)(2) prior to the Finnish Competition Authority obtaining it from some other source.

The field of application of the provision has been limited to secret cartels, i.e. agreements and concerted practices between competitors, the purpose of which is the fixing of purchase or selling prices or other trading conditions; the limiting of production or sales or the sharing of markets, customers or sources of supply and which are serious and confidential by nature. The provision is not applicable to other type of cooperation between competitors. The provision does not hence apply to agreements concerning e.g. production cooperation between competitors, the purpose of which cannot be deemed to be the restricting of competition and which are not serious or confidential by nature.

An undertaking who has pressurised another undertaking to participate in a cartel cannot obtain immunity.

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1 Cf. the division of Section 5 of the Competition Act into restraints on competition, the purpose of which is to significantly prevent, restrict or distort competition, and into restraints on competition, the result of which is that competition is significantly prevented, restricted or distorted.
2.2 Information an undertaking must submit to obtain immunity

2.2.1 General

Immunity from the penalty payment is possible both in situations in which the undertaking delivers the information and evidence before the Finnish Competition Authority has conducted an inspection referred to in Section 35 (inspections on the business premises of an undertaking) or 36 (inspections of other premises) and in situations in which the Finnish Competition Authority has already conducted an inspection. The conditions set on immunity differ from each other, however, depending on whether the undertaking submits the information before the inspection or after the inspection has begun.

However, obtaining immunity is always possible for one cartel member only.

2.2.2 Prior to an inspection by the Finnish Competition Authority

A penalty payment shall not be imposed on an undertaking if it is the first one to submit information and evidence to the Finnish Competition Authority which allow the Finnish Competition Authority to perform an inspection referred to in Sections 35 or 36.

The information and evidence referred to in these sections may consist of corporate statements, written documents, IT records or data, or oral statements by representatives of the undertaking or the employees.

The undertaking obtains immunity on the basis of Section 14(1)(1) if the Finnish Competition Authority did not have sufficient information and evidence when the application for immunity was lodged which would have permitted it to intervene with the restraint and make a targeted inspection referred to in Sections 35 or 36. If the Finnish Competition Authority has obtained this kind of information from some other source, immunity from fines under 14(1)(1) is no longer possible.

If the Finnish Competition Authority has already begun an inspection referred to in Section 35 or 36 of the Competition Act, obtaining immunity under Article 14(1)(1) is no longer possible.

2.2.3 Following an inspection

On the basis of 14(1)(2), an undertaking may obtain immunity also after the Finnish Competition Authority has conducted an inspection in the premises of an undertaking or in some other premises on the basis of Section 35 or 36. The provision is applicable to situations in which the
Finnish Competition Authority has evidence or information, on the basis of which it has made or could have made an inspection referred to in Section 35 or 36 but this information and evidence are not enough to prove cartel activities. In that case, an undertaking party to the cartel obtains immunity if it is the first one to deliver information or evidence to the Finnish Competition Authority, on the basis of which the Finnish Competition Authority may find an infringement of Section 5 or Article 101 of the Treaty on the Functioning of the European Union.

The application for immunity shall always be made in the Finnish Competition Authority’s premises or be delivered following the procedure described in Chapter 6. Applications for immunity for fines cannot hence be made to officials of the Finnish Competition Authority or the Regional State Administrative Agency during an inspection referred to in Sections 35 or 36 of the Competition Act, in a situation in which the inspection referred to in Section 35 or 36 has begun.

Immunity for fines on the basis of 14(i)(2) is not possible if some other cartel member has already submitted to the Finnish Competition Authority the information referred to in 14(i)(1).

2.3 Undertaking shall be the first one to submit information

It is a condition of immunity that the undertaking submits the information and evidence referred to in Section 14(i)(1) and (2) prior to the Finnish Competition Authority obtaining them from somewhere else. Hence only one cartel member may obtain immunity. An undertaking cannot obtain immunity if some other cartel member has already submitted to the Finnish Competition Authority the information and evidence referred to in Section 14. Nor is immunity possible if the Finnish Competition Authority has obtained the information and evidence referred to in Section 14 e.g. in the course of its own investigations or from an external source prior to an undertaking party to a cartel having applied for immunity.

Immunity is hence not possible based on Section 14(i)(1) if the Finnish Competition Authority already has the information and evidence referred to in Section 14 prior to the undertaking applying for immunity.

Immunity is not possible under 14(i)(2) if the Finnish Competition Authority already has the information and evidence referred to in (i)(2) prior to the undertaking applying for immunity.

Nor is immunity possible under under 14(i)(2) in situations in which another cartel member has, prior to the inspections referred to in Sec-
tions 35 or 36, submitted the information referred to in 14(i)(i). Immunity is hence only possible for one cartel member.

However, under 14(i)(2), an undertaking may obtain immunity if it is the first one to submit to the Finnish Competition Authority the information referred to in 14(i)(2), even if the Finnish Competition Authority already has the information and evidence referred to in 14(i)(i), if the Finnish Competition Authority has obtained them in the course of its own investigations and not from another cartel member.

2.4 Pressurising prevents immunity

An undertaking cannot obtain immunity if it has pressurised another undertaking to participate in a cartel. The mere leading role of an undertaking or initiative in forming and maintaining a cartel does not prevent immunity, however.

An undertaking that has pressurised another undertaking to participate in a cartel can still obtain a reduction from the penalty payment, if the undertaking fulfils the conditions for a reduction of the penalty payment referred to in Sections 15 and 16[^2], described in more detail below.

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[^2]: However, an undertaking that has been awarded conditional immunity referred to in Section 17(2) and that is later found to have pressurised another undertaking to participate in a cartel, cannot obtain immunity. See section 3.4.
3 Reduction of penalty payment in cartel cases

3.1 General

On the basis of Section 15 of the Competition Act, a member of a secret cartel who cannot obtain immunity may be granted a reduction from the penalty payment. Under the provision, other cartel members than the first one to disclose the cartel to the Finnish Competition Authority may also benefit from cooperation with the Finnish Competition Authority. The amount of the reduction will be determined in the manner described below on the basis of the date the information and evidence were submitted.

Under Section 15 of the Competition Act, the penalty payment imposed on an undertaking that participated in a restraint on competition other than the undertaking referred to in Section 14(1) that obtained immunity under Section 14, shall be reduced if the undertaking submits information and evidence to the Finnish Competition Authority that is significant for establishing a restraint on competition or its entire extent or nature, and prior to the Finnish Competition Authority receiving the information from some other source. The penalty payment shall be reduced in the following way:

1. 30–50 per cent if the undertaking is the first one to submit the information;
2. 20–30 per cent if the undertaking is the second one to submit the information;
3. 20 per cent at most in any other situation than the ones referred to in Section 15(1)(1) and 15(1)(2).

3.2 Information to be delivered by the undertaking in order to obtain a reduction

The information and evidence shall be deemed to be significant for the finding of the entire extent and nature of a competition restraint if it can be confirmed on the basis of them that Section 5 or Article 101 on the Functioning of the Treaty on the European Union has been infringed. The conditions for a reduction of the penalty payment are also fulfilled when the information and evidence obtained by the undertaking support the evidence already possessed by the Finnish Competition Authority so as to allow the Finnish Competition Authority to find the existence of a cartel on the basis of the information and evidence delivered by the undertaking.
In addition, the information and evidence are considered significant for finding the entire extent and nature of the restraint on competition if it can be stated on the basis of the information and evidence submitted by the applicant that the information and evidence previously held by the Finnish Competition Authority did not provide an exact picture of the duration and geographical extent of the cartel, the branch of industry or product markets covered by the cartel activities or the gravity of the cartel activities.

The above-mentioned information may e.g. consist of corporate statements, written documents, IT records or data, or oral statements by representatives of undertakings or employees. It is also significant whether the information and evidence are written or oral, directly aggravating for demonstrating the violation or only indirect, and whether the reliability thereof should be ascertained from other sources. In any event, the information and evidence shall materially assist in the finding of the extent and nature of a restraint on competition. The mere submission of material somehow related to a cartel case is not enough to obtain a reduction.

When the significance of the information and evidence referred to in Section 15(1) is assessed in the investigation of a restraint on competition, it should also be considered what kind of material the Finnish Competition Authority already has in its possession. The information and evidence is not considered necessary for finding the entire duration and nature of the restraint on competition if they only repeat or confirm aspects of which the Finnish Competition Authority has already obtained a sufficient amount of evidence from other cartel members or other sources in the course of the investigation. The undertaking hence cannot obtain a reduction from the penalty payment referred to in this section, if the information and evidence supplied by it are already evident from the material in the possession of the Finnish Competition Authority, or if the information and evidence cannot be deemed to be directly related to the investigation of the cartel case.

3.3 Determining the amount of the reduction

The amount of the reduction obtained from the penalty payment is determined according to how quickly the undertaking involved makes the application for immunity from and reduction of the penalty payment referred to in Section 17(1) compared with other undertakings involved
in the cartel. Under Section 15(i)(i)-(3), the penalty payment shall be reduced in the following way:

- 30–50 per cent if the undertaking is the first one to submit the information
- 20–30 per cent if the undertaking is the second one to submit the information;
- 20 per cent at most for other undertakings.

The amount of the reduction obtained from the penalty payment depends on how significant the information submitted by the undertaking is in establishing the restraint on competition.

3.4 An undertaking who has obtained conditional immunity cannot obtain a reduction in a case involving the same restraint on competition

Under Section 15(2) of the Competition Act, an undertaking who has obtained conditional immunity from the penalty payment as referred to in Section 17(2) cannot obtain a reduction in a case involving the same restraint on competition. Hence an undertaking who has been the first one to disclose a cartel to the Finnish Competition Authority and who has obtained a conditional immunity referred to in Section 17(2), cannot obtain a reduction of the penalty payment in a case involving the same restraint on competition. If it is found during the procedure or at the end of it that the undertaking who has obtained conditional immunity does not fulfil the conditions cited in Section 16, or if it has pressurised another undertaking to participate in a cartel, it cannot obtain a reduction from the penalty payment referred to in this Section.
4 Conditions for immunity from fines and a reduction of the penalty payment

4.1 General

Under Section 16 of the Competition Act, immunity from or reduction of the penalty payment is further conditional upon the undertaking:

1. immediately ceasing participation in the restraint on competition once it has delivered to the Finnish Competition Authority the application referred to in Section 17(i);
2. cooperating with the Finnish Competition Authority during the entire investigation of the restraint on competition;
3. not destroying the evidence covered by the application prior to or following the submission of the application referred to in Section 17(i); and
4. keeping confidential the content of the application referred to in Section 17(i) and the fact of having made an application or considering making an application.

The above-mentioned conditions are cumulative, i.e. the undertaking must fulfil all the conditions set in this section. The fulfilment of the conditions can only be found at the end of proceedings in a case.

4.2 Participation in a restraint on competition to be terminated immediately

An undertaking shall cease participation in a restraint immediately after it has delivered to the Finnish Competition Authority the application for immunity from or reduction of the penalty payment referred to in Section 17(i).

However, the undertaking may, under the direction of the Finnish Competition Authority, continue participation in the infringement to the extent it is necessary to secure the success of the inspections referred to in Sections 35 and 36. Continuing participation in a cartel does not usually mean, however, that the applicant would be advised to continue the application of a restraint on competition unchanged. The purpose is solely to secure the success of the inspections referred to in Sections 35 and 36.

The Finnish Competition Authority can advise the applicants for example not to suddenly change their conduct thus allowing other cartel members to deduce that the applicant has contacted the Finnish Competition Authority. Continued participation always requires advice from
the Finnish Competition Authority. Without such guidance, the undertaking shall not continue its participation in a restraint on competition.

4.3 **Undertaking shall cooperate with the Finnish Competition Authority**

The undertaking shall cooperate with the Finnish Competition Authority during the entire investigation of the restraint on competition. The cooperation shall be genuine, extensive and continuous. The undertaking shall submit all the information and evidence in its possession to the Finnish Competition Authority without delay. The undertaking shall make its representatives and employees, and if possible also its former representatives and employees, available to the Finnish Competition Authority for the investigation of the matter. The undertaking and its representatives and employees shall answer the requests and queries of the Finnish Competition Authority without delay. The cooperation shall take place on the undertaking’s own initiative and be sincere, and the undertaking shall provide the Finnish Competition Authority with a correct and undistorted picture of the cartel, its operations and the role and initiative of the undertaking and its representatives and employees in the cartel.

The undertaking cannot be deemed to fulfil its cooperation obligation, if a major part of the undertaking’s employees or the main employees from the point of view of investigating the restraint on competition do not cooperate with the Finnish Competition Authority. The undertaking shall not complicate the investigation of the matter by its own activities. The cooperation obligation begins from the lodging of the application for immunity from or reduction of the penalty payment and lasts until the Finnish Competition Authority has terminated its proceedings in the case.

4.4 **Evidence must not be destroyed**

The undertaking shall not destroy the evidence covered by the application prior to, or following, the submission of the application referred to in Section 17(1) to the Finnish Competition Authority. The prohibition concerns both the time preceding the lodging of the application, i.e. the time during which the undertaking considers leaving the application, and the time following the lodging of the application.
4.5 Keeping the information confidential

The undertaking shall keep confidential the content of the application referred to in Section 17(i) and the fact of having made an application or considering making an application. The obligation on confidentiality concerns both the time preceding the lodging of the application and the time following it.

Notwithstanding the confidentiality obligation, the undertaking may provide the Commission or a competition authority of another state with information on the application. Submitting information may become relevant in a situation in which a cartel extends to several states and may hence be under investigation by the competition authorities of several countries or the European Commission. The undertaking seeking immunity from or reduction of the penalty payment may hence have to lodge an application in the same matter before more than one competition authority.
5 Procedure on immunity from and reduction of fines in cartel cases (Section 17)

5.1 *Making the application and the information to be submitted*

Immunity from fines referred to in Section 14 and reduction of fines referred to in Section 15 shall be applied from the Finnish Competition Authority. In the application, the undertaking shall identify the information which it wants to be considered in the handling of the case. The application shall contain:

- the applicant’s name and address;
- parties to the cartel;
- a detailed description of the functioning of the cartel including the products targeted by the cartel, the regional extent of the cartel, the temporal duration of the cartel, and the nature of the cartel activities;
- a description of how the restraint on competition has been implemented and how it has been maintained;
- applications in the same cartel case made to other competent authorities in the same cartel issue and
- information on whether the applicant intends to make an application concerning immunity from fines or the reduction of the penalty payment to other competent authorities.

5.2 *Determination of priority order*

The priority order between the undertakings that have applied for immunity from or reduction of the penalty payment is determined according to the date that the undertaking has delivered the information referred to in Section 14(1) or 15(1) to the Finnish Competition Authority.

5.3 *Extension of time limit for the gathering of information in connection with the application for immunity (so-called marker procedure)*

An undertaking who applies for immunity from the penalty payment can request that the Finnish Competition Authority extend the time limit for the gathering of the information in Section 14(1). The Finnish Competition Authority can set a date for the applicant during which the information referred to in Section 14 shall be delivered to the Finnish Competition Authority. The applicant’s priority order with
respect to other cartel members seeking immunity under Section 14 is secure if the applicant submits the information to the Finnish Competition Authority within the time limit imposed by the Finnish Competition Authority.

The Finnish Competition Authority may impose a time limit for the delivering of the information by the applicant of immunity (Section 14), but not for obtaining the reduction referred to in Section 15.

In order to obtain a time limit for the gathering of the information referred to in Section 14, the undertaking shall provide the Finnish Competition Authority with:

- its name and address;
- its justification for making an application for immunity;
- the cartel parties;
- description of the products targeted by the cartel, its geographical extent, temporal duration and the nature of the cartel activities;
- estimates of the time needed for the gathering of information and the type of information the applicant shall deliver;
- the applications made to other competent authorities in the same cartel case and
- information on whether the applicant intends to make an application for immunity or reduction of fines to other competent authorities.

If the applicant submits the information referred to in Section 14(1) within the time limit, the information is considered to have been submitted at the date the Finnish Competition Authority imposed a time limit for the gathering of information and evidence.

5.3.1 Anonymous contact

Prior to submitting an application for immunity referred to in Section 14, the undertaking may contact the Finnish Competition Authority anonymously for example through a lawyer. On the basis of such an anonymous contact, the undertaking can find out whether immunity is possible and receive guidance on the procedure.

The Finnish Competition Authority does not set a time limit for the gathering of information referred to in Section 14 on the basis of an anonymous contact.
5.4 Granting conditional immunity

The Finnish Competition Authority grants the applicant a conditional immunity from the penalty payment, when the undertaking has submitted to the Finnish Competition Authority the information and evidence referred to in Section 14(1). Having obtained the information and evidence referred to in Section 14(1) and having made sure that it is sufficient to grant immunity, the Finnish Competition Authority provides the undertaking with a conditional immunity from the penalty payment in writing.

The final decision cannot be given at this stage of the investigation because the fulfilment of the criteria referred to in Section 16 can only be found after the investigation has finished. If it turns out during the investigations that the undertaking does not fulfil the criteria in Sections 14, 15 or 16, the Finnish Competition Authority shall make a written decision on dismissing the application without delay.

The Finnish Competition Authority shall not proceed to investigate other applications for immunity relating to the same cartel before it has taken a position as to whether immunity may be granted to the first undertaking who has applied for immunity.

5.4.1 Shortened application

If the undertaking applying for immunity under 14(1) has submitted or is about to submit an application for immunity in the same case to the European Commission or another competent authority of the member states, conditional immunity may be granted on the basis of a shortened application. Lodging the application with several competition authorities is necessary particularly with regard to cartels exceeding boundaries, because the application made to one competent authority does not benefit the applicant in the other countries.

In the shortened application, applicants shall submit:

• their name and address;
• parties to the cartel;
• the products targeted by the cartel;
• the geographical extent of the cartel;
• the temporal duration of the cartel;
• the nature of the cartel;
• the member states in which the information and evidence referred to in 14(1) are located and
• information of the previous and possible future applications for immunity from and reduction of the penalty payment relating to the cartel.

If the Finnish Competition Authority requests further information from the applicant, the applicant shall deliver it without delay. In such instances, the FCA provides a time limit for delivering the information. If the applicant delivers the information within the time limit, the information is deemed to be delivered at a date the shortened application was delivered to the Finnish Competition Authority.

5.5 Finnish Competition Authority’s decision on the fulfillment of the necessary criteria

At the end of the procedure, the Finnish Competition Authority shall issue a decision on whether the undertaking fulfils all the criteria set in Sections 14, 15 and 16. If the undertaking does not fulfil the criteria set in Sections 14, 15 and 16, the Finnish Competition Authority shall make a written decision on dismissing the application without delay.

The Finnish Competition Authority may attach the decision on the reduction of the penalty payment granted to an undertaking referred to in Section 15 in the penalty payment proposal on the matter.

The Finnish Competition Authority’s decision issued at the end of the procedure on the basis of Section 17(3) cannot be separately appealed. The claims connected to the Finnish Competition Authority’s decision may, however, be presented to the Market Court in the context of the handling of the primary matter concerning a penalty payment.

5.6 Subsequent use of the information and evidence submitted to the Finnish Competition Authority

The information and evidence submitted to the Finnish Competition Authority to obtain immunity referred to in Section 14 or reduction referred to in Section 15 cannot be used for any other purpose than the order to terminate a restraint on competition or the order to deliver a product referred to in Section 9, the commitment decision referred to in Section 10, the withdrawal of a Block Exemption referred to in Section 11, or the review of a penalty payment proposal at the Finnish Competition Authority, the Market Court or the Supreme Administrative Court. The information and evidence submitted by the applicant such as cor-
porate statements that equal the confession of cartel activities cannot be used for example in the review of a damages claim relating to a cartel.

The above-mentioned does not prevent the Finnish Competition Authority from using the information and evidence submitted by the applicant from starting proceedings or from issuing an order to terminate a prohibited restraint on competition, from making a commitment decision or a proposal on a penalty payment or the withdrawal of a Block Exemption if the information and evidence contain information on other restraints on competition than the restraint on competition which is the basis of the application referred to in Section 14(i). The Finnish Competition Authority may use the documents submitted by the applicant for example to start proceedings in situations in which the documents show that the applicant has abused its dominant position in a manner referred to in Section 7. The provision does not prevent the Finnish Competition Authority from delivering documents to other competent authorities in the network of competition authorities\(^3\), even though the documents had been delivered to the Finnish Competition Authority to resolve the restraint on competition referred to in Section 5.

\(^3\) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427%2802%29:EN:HTML.
6 Submitting information to the Finnish Competition Authority

Since the date of submitting the information referred to in 14(1) and 15(1) is decisive for the forming of the priority order between undertakings, it is important that the undertaking exposing the cartel delivers the information to the Finnish Competition Authority in a manner which allows the authority to indisputably show the date of submission. The undertaking may confirm the registering of the date by delivering the information personally or via a lawyer to the Industries 1 unit of the Finnish Competition Authority or by sending the information to the fax number serving this purpose only (see the contact information below).

Submitting the information personally or via a lawyer is recommended. The undertaking shall then contact the Head of the Industries 1 unit or his or her deputy and to agree a date for the meeting with the Finnish Competition Authority. If the information is delivered outside office hours or the undertaking is not able to contact the Head of the Industries 1 unit or his or her deputy for some other reason, the information may be delivered using the fax number listed below. If the fax number is used, the exact date of submitting the information is automatically recorded. Despite this, the undertaking shall contact the Industries 1 unit of the Finnish Competition Authority for example via a lawyer prior to sending the fax or immediately after it in order for the undertaking to confirm that the submitted information is sufficiently accurate for the creation of the first place in line.

Submitting the information by post is not recommended, as the date of submission is unlikely to be recorded with sufficient accuracy for the undertaking. Prior to submitting the information, undertakings shall make sure that the contact information below has not changed.

Contact information

Finnish Competition Authority, Industries 1 unit,
Pitkänsillanranta 3 A, Helsinki, Finland

Telephone for Head of Unit (extension):
+358 9 73141 / Head of Unit for Industries 1

The fax number for providing information in cases involving immunity/reduction of the penalty payment: +358 9 7314 3400