

Guidelines on exempting from the penalty payment and reducing the penalty payment in cartel cases

Guidelines on the application of the Competition Act (2022)

Finnish Competition and Consumer Authority

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1 Introduction

Sanctions for restrictions on competition may be significant for undertakings. The provisions of the Competition Act on immunity from the penalty payment and the reduction of the penalty payment allow undertakings participating in secret cartels to leave the cartel and, if the conditions laid down in the Act are met, to either obtain immunity from or a reduction of the penalty payment imposed for a restraint on competition.

Immunity from the penalty payment and the reduction of the penalty payment are referred to as leniency. These guidelines describe the conditions for immunity from the penalty payment and the reduction of the penalty payment, the procedure of the Finnish Competition and Consumer Authority in leniency matters and the general operation of the leniency system. The guidelines also provide more detailed instructions on the application of the leniency provisions. The guidelines have been updated to correspond to the amendments made to the leniency sections of the Competition Act in connection with the implementation of the ECN+ Directive^{1, 2}.

The guidelines will begin with a separate review of the conditions for immunity from the penalty payment and the reduction of the penalty payment specific to the provisions. The general conditions on immunity and reduction, the practical aspects of the leniency procedure and the different application types will then be discussed. Finally, the submission of applications to the Finnish Competition and Consumer Authority will be discussed.

¹ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

² In connection with the amendment, Section 38a, applicable to certain documents, was also added to the Competition Act.

2 Immunity from penalty payment in cartel cases

2.1 General

The Competition Act provides undertakings participating in secret cartels with an opportunity obtain immunity from or a reduction of the penalty payment. 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 of the Competition Act or Article 101 of the Treaty on the Functioning of the European Union, if an undertaking involved in such a restraint on competition:

1. submits a corporate statement and information or evidence, on the grounds of which the Finnish Competition and Consumer Authority may conduct an inspection referred to in Section 35 or 36; or
2. following an inspection referred to in Section 35 or 36, submits a corporate statement and information or evidence, on the grounds of which the Finnish Competition and Consumer 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 corporate statement and information and evidence referred to in (1)(1) and (1)(2) prior to the Finnish Competition and Consumer 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 two or more competitors, the purpose of which is to reconcile competitors' competitive behaviour on the market and/or to affect relevant competitive factors such as:

- fixing or coordinating purchase or selling prices or other trading conditions;
- allocating production or sales quotas;
- sharing markets or customers;
- restricting imports or exports; and/or
- engaging in anti-competitive behaviour against other competitors.

A secret cartel refers to a cartel whose existence is partly or fully withheld. The provision is not applicable to other types of cooperation between competitors.³ The provision therefore does not apply to agreements concerning e.g. production cooperation between competitors, whose purpose⁴ cannot be deemed to be the restricting of competition, and which are not serious or confidential by nature.

Immunity from the penalty payment is not possible in all situations. An undertaking that has coerced another undertaking to participate in a cartel cannot be exempted from the penalty payment.

At the request of the applicant, the Finnish Competition and Consumer Authority may process an application for immunity from the penalty payment that it has rejected as an application for a reduction of the penalty payment. This requires an explicit request from the applicant.

2.2 Information to be provided by the undertaking in order to be exempted from the penalty payment

2.2.1 General

Immunity from the penalty payment is possible in two different situations. Immunity is possible when the undertaking submits a corporate statement and information and evidence:

1. before the Finnish Competition and Consumer Authority has carried out the inspection referred to in Section 35 (inspections in the business premises of the undertaking) or Section 36 (inspections in other premises) of the Competition Act; or
2. the Finnish Competition and Consumer Authority has already carried out an inspection.

³ Immunity or reduction of the penalty payment may also apply to restrictions of competition other than secret cartels, for example in connection with vertical competition violations, if the undertaking has significantly assisted the Finnish Competition and Consumer Authority in investigating the restriction of competition. In such cases, however, the leniency procedure described in these guidelines does not apply; instead, Section 18 of the Competition Act will apply, though it is not discussed in more detail in these guidelines.

⁴ Cf. The distinction made in Article 5 of the Competition Act between restrictions on competition that are intended to significantly prevent, restrict or distort competition, on the one hand, and restrictions on competition that result in a significant impediment, restriction or distortion of competition, on the other hand.

The conditions for immunity from the penalty payment differ depending on whether the undertaking provides the information before an inspection or after the inspection has been launched or completed. It should also be noted that immunity from the penalty payment is always possible for one cartel member only. An undertaking wishing to be exempted should thus act before the others.

Making a full application means that the undertaking immediately submits to the Finnish Competition and Consumer Authority all the information required by the Competition Act, i.e. a corporate statement and information and evidence. When applying for immunity from the penalty payment, it is also possible to request a marker procedure, i.e. additional time for collecting the required information (corporate statement, information and evidence). This is called a marker application (discussed below in section 6). If, on the other hand, a full application has been submitted to another competition authority in the European Union (the so-called main application), it is possible to apply for immunity from the penalty payment or the reduction of the penalty payment in a Finnish Competition and Consumer Authority procedure by submitting a summary application (discussed below in section 7).

Full application	Marker application	Summary application
<ul style="list-style-type: none"> • For immunity from or reduction of penalty payments • The corporate statement, information and evidence shall be submitted in full to the FCCA. 	<ul style="list-style-type: none"> • Possible only when applying for immunity from the penalty payment. • Additional time to collect a corporate statement, information and evidence • The FCCA sets a deadline • Secures priority during the deadline 	<ul style="list-style-type: none"> • Limited information content • Main application to another competition authority • Summary application to the FCCA • Secures priority in the FCCA procedure.

A full leniency application comprises both the corporate statement and the supporting information and evidence. A corporate statement refers to an own-initiative oral or written report or a record thereof⁵ drawn up by or on behalf of a company or natural person addressed to a competition authority and prepared in accordance with the leniency programme to be presented to the competition authority specifically for immunity from

⁵ Corporate statements may be written documents signed by or on behalf of the undertaking or they may also be presented orally (see section 5.2 below).

or reduction of the penalty payment.⁶ The corporate statement indicates the information on the cartel which is in the possession of the company or natural person concerned, and their involvement in the cartel. In connection with a full application, a corporate statement should contain the following information:

- The applicant's name and address,
- The parties to the cartel,
- A detailed description of the functioning of the cartel, including the products targeted by the cartel, the geographic coverage of the cartel, the 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 made to other competent authorities concerning the same cartel conduct and
- Information on whether the applicant intends to make an application concerning immunity from or the reduction of the fines to other competent authorities.

Information and evidence, on the other hand, refers to evidence whose existence is not linked to the procedure of the competition authority, whether or not this information is included in the file of the competition authority.⁷ In practice, these refer to the evidence of the cartel submitted by the applicant to the Finnish Competition and Consumer Authority in support of the corporate statement. Such evidence includes, in particular, documents generated during the infringement or other data (e.g. e-mails) that have not been specifically prepared for the application but that have been generated in the course of the business activities.

2.2.2 *Before inspection*

A penalty payment is not imposed on the undertaking if it is the first to submit a corporate statement to the Finnish Competition and Consumer Authority, and information and evidence based on which the Finnish Competition and Consumer Authority can carry out an inspection as referred to in Section 35 or 36. The undertaking is exempted from the

⁶ In the Competition Act, the term corporate statement corresponds to the term 'leniency statements and settlement submissions' used in the Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union) and the term 'leniency statement' used in the ECN+ Directive.

⁷ The term 'information and evidence' used in the Competition Act corresponds to the term 'existing information' in the Damages Directive.

penalty payment in accordance with Section 14(1)(1), if the Finnish Competition and Consumer Authority did not yet have sufficient information at the time of submitting the application for immunity from the penalty payment, based on which it could intervene in the restriction and carry out the targeted inspection referred to in Section 35 or 36.

If the Finnish Competition and Consumer Authority has obtained such information through other means, immunity from the penalty payment on the basis of Section 14(1)(1) is no longer possible. Even when the Finnish Competition and Consumer Authority has started carrying out the inspection referred to in Section 35 or 36 of the Competition Act, immunity from the penalty payment on the basis of Section 14(1)(1) is no longer possible. However, in both situations described above, immunity from the penalty payment may be possible under Section 14(1)(2).

2.2.3 *After inspection*

Pursuant to Section 14(1)(2), an undertaking may also be exempted from the penalty payment after the Finnish Competition and Consumer Authority has carried out the inspection. The provision is suitable for situations where the Finnish Competition and Consumer Authority has information based on which it has carried out or could have carried out an inspection, but the information in its possession is not yet sufficient as evidence for cartel activities. In this case, an undertaking involved in a cartel will be exempt from the penalty payment if it first submits a corporate statement to the Finnish Competition and Consumer Authority, together with information and evidence based on which the Finnish Competition and Consumer Authority can establish that a breach of Section 5 or Article 101 of the Treaty on the Functioning of the European Union has been committed. Immunity from the penalty payment is not possible after the inspection if another cartel member has already provided the Finnish Competition and Consumer Authority with the information referred to in Section 14(1)(1) before the inspection.

Applications for immunity from the penalty payment may not be submitted to officials carrying out an inspection. The application must be submitted to the Finnish Competition and Consumer Authority as described in section 8.

2.3 The undertaking must be the first to submit the information

It is a further condition of immunity that the undertaking provides the corporate statement and information and evidence prior to the Finnish Competition and Consumer Authority obtaining it from some other source. An undertaking cannot be exempted from the penalty payment if another cartel member has already submitted a corporate statement and information and evidence to the Finnish Competition and Consumer Authority.

Thus, immunity from the penalty payment cannot be considered based on Section 14(1)(1) if the Finnish Competition and Consumer Authority already has the information referred to in Section 14 (sufficient information for carrying out the inspection) before the undertaking has applied for immunity from the penalty payment. Immunity from the penalty payment is not possible based on Section 14(1)(2), if the Finnish Competition and Consumer Authority has the information referred to in Section 14(1)(2) (sufficient information to establish an infringement) even before the undertaking has applied for immunity from the penalty payment.

Immunity from the penalty payment is also not possible based on Section 14(1)(2) in situations where another cartel member has provided the Finnish Competition and Consumer Authority with the information referred to in Section 14(1)(1) before the inspections referred to in Section 35 or 36. Thus, immunity from the penalty payment is only possible for a single cartel member. On the other hand, an undertaking may be exempted from the penalty payment based on Section 14(1)(2) if the undertaking is the first to submit to the Finnish Competition and Consumer Authority the corporate statement as well as the information and evidence referred to in Section 14(1)(2), even though the Finnish Competition and Consumer Authority already has the information referred to in Section 14(1)(1), if the Finnish Competition and Consumer Authority has received these through its own investigation activities or an external source of information and not from another cartel member.

2.4 Coercion prevents immunity from penalty payment

An undertaking cannot be exempted from the penalty payment if it has coerced another undertaking to participate in a cartel. However, only the undertaking's leading role or initiative in forming and maintaining the cartel does not prevent immunity from the penalty payment.

However, an undertaking which has coerced another undertaking to participate in a cartel may benefit from a reduced penalty payment if the undertaking fulfils the conditions for reducing the penalty payment described below.⁸

⁸ However, an undertaking that has been granted a conditional immunity from the penalty payment and subsequently found to have coerced another undertaking to participate in a cartel can no longer benefit from a reduced penalty payment. See section 3.4.

3 Reduction of the penalty payment in cartel cases

3.1 General

Under Section 15 of the Competition Act, a member of a secret cartel who cannot be exempted from the penalty payment may benefit from a reduced penalty payment. Thus, members of the cartel other than the undertaking that first exposed the cartel to the Finnish Competition and Consumer Authority can also benefit from their cooperation with the Finnish Competition and Consumer Authority. The amount of the reduction will be determined on the basis of the corporate statement, the significance of the information and evidence and the date of submission, as described below.

Based on Section 15 of the Competition Act, a penalty payment to be imposed on an undertaking that is party to a cartel which has not been exempted from the penalty payment shall be reduced if it submits to the Finnish Competition and Consumer Authority a corporate statement and information and evidence that is relevant for establishing the restriction of competition or its full extent or nature, before the Finnish Competition and Consumer Authority has received the information through other means.

3.2 Information to be provided by the undertaking for a reduced penalty payment

The corporate statement, information and evidence are deemed relevant for establishing the full extent or nature of the restriction of competition if they can be used to establish that a breach of Article 5 or Article 101 of the Treaty on the Functioning of the European Union has been committed. The prerequisites for reducing the penalty payment are also met when the corporate statement and the information and evidence submitted by the undertaking support the evidence already in the possession of the Finnish Competition and Consumer Authority, so that the Finnish Competition and Consumer Authority can determine the existence of a cartel on the basis of the information provided by the undertaking applying for the reduction and the other evidence in its possession.

In addition, the corporate statement and the information and evidence are considered relevant for determining the full extent or nature of the restriction of competition if, on the basis of the corporate statement and the information and evidence submitted by the applicant, it can be established that the information previously held by the Finnish Competition and Consumer Authority did not provide a true picture of the duration of the cartel, its geographical scope, the sector or product market covered by the cartel activity or the severity of the cartel activity.

In addition, it is relevant, *inter alia*, whether the information is directly aggravating or only indirect for demonstrating a violation and whether its reliability must be verified from other sources. In any case, the corporate statement, information and evidence must be of

significant help in establishing the extent or nature of the restriction of competition. Providing the Finnish Competition and Consumer Authority with material in some way related to a cartel matter is not sufficient for a reduced penalty payment.

When assessing the relevance of a corporate statement and information and evidence in investigating a restriction of competition, the material that the Finnish Competition and Consumer Authority already possesses should also be taken into account. The corporate statement, information and evidence will not be considered relevant for the purpose of determining the full extent or nature of the restriction of competition if they merely repeat or confirm matters on which the Finnish Competition and Consumer Authority has already received sufficient evidence from other members of the cartel or otherwise during the investigation. Thus, an undertaking may not benefit from the reduced penalty payment referred to in this Section if the information it provides is apparent from the material already in the possession of the Finnish Competition and Consumer Authority or if the information cannot be considered directly related to the investigation of a cartel matter.

3.3 Determining the amount of the reduction

The amount of the reduction from the penalty payment depends on when the undertaking involved in the cartel applies for a reduction in the penalty payment compared to other undertakings involved in the cartel. Under Section 15(1)(1–3), the penalty payment is reduced as follows:

- 30% to 50% if the undertaking is the first to provide the information;
- 20% to 30% if the undertaking is the second to provide the information;
- The penalty payment for other undertakings is reduced by no more than 20%.

The amount of the reduction from the penalty payment depends on the relevance of the information provided by the undertaking for determining the restriction of competition.

Under Section 15 of the Competition Act, the amount of the penalty payment to be imposed on an undertaking applying for a reduction in the penalty payment does not take into account the additional elements increasing the amount of the penalty payment that could be proven based on the decisive evidence provided by the undertaking applying for a reduction in the penalty payment. The prolonged duration of the violation or the increased severity of the violation may be an additional factor that increases the amount of the penalty payment. For example, the prolonged duration of the demonstrated violation does not affect the amount of the penalty payment for the undertaking applying for a reduction of the penalty payment, but it affects the amount of the penalty payment for other undertakings involved in the cartel conduct.

3.4 The importance of conditional immunity and coercion for the reduction of the penalty payment

Under Section 15(2) of the Competition Act, an undertaking which has a conditional immunity from the penalty payment cannot benefit from a reduction in a case concerning the same restriction of competition. Consequently, an undertaking which first disclosed the cartel to the Finnish Competition and Consumer Authority and which has a conditional immunity from the penalty payment cannot benefit from a reduction on the same restriction of competition.

Undertakings must also take into account the importance of complying with all the conditions set for the exemption and of coercing competitors to join a cartel for the possibility of reducing the penalty payment. If, during the investigations of the Finnish Competition and Consumer Authority or after their completion, it is found that an undertaking which has been granted a conditional immunity from the penalty payment does not meet the requirements of Section 16 or that it has coerced another undertaking to participate in a cartel, it will also lose the opportunity of benefiting from a reduced penalty payment. An undertaking which has coerced other undertakings may benefit from a reduced penalty payment if it applies for this directly and meets all the conditions for the reduction.

4 Conditions for immunity from the penalty payment and the reduction of the penalty payment

4.1 General

Under Section 16 of the Competition Act, immunity from the penalty payment and the reduction of the penalty payment are also subject to the condition that the undertaking:

1. end their participation in the cartel no later than immediately after submitting the application referred to in Section 17(1) to the Finnish Competition and Consumer Authority, with the exception of participation that, according to the Finnish Competition and Consumer Authority, is necessary to preserve the reliability of the investigation;
2. engage in genuine, comprehensive, continuous and rapid cooperation with the Finnish Competition and Consumer Authority from the time of submitting an application until the Finnish Competition and Consumer Authority has completed the investigation for all investigated parties by issuing a decision or a proposal to the Market Court; and
3. has not destroyed, falsified or concealed any evidence relating to the alleged secret cartel or revealed that it is considering submitting an application or revealed the content of the application to parties other than other competition authorities.

The applicant's obligation to cooperate includes several features. It should be noted that these are the prerequisites for the ultimate immunity from or reduction of the penalty payment. Firstly, cooperation requires that the undertaking immediately submits to the Finnish Competition and Consumer Authority all corporate statements that come into its possession or are available to it, including the following information:

- The name and address of the applicant;
- The names of the other undertakings involved in the cartel;
- A detailed description of the cartel, including the products targeted by the cartel, the target regions and the duration and nature of the alleged secret cartel activity;
- Information on previous or potential future applications to other competition authorities relating to the alleged secret cartel;

The obligation to cooperate also requires the applicant to submit other relevant information and evidence to the Finnish Competition and Consumer Authority. The obligation to cooperate also requires that the applicant is available to the Finnish Competition and Consumer Authority to respond to all requests that can help to confirm the facts of the case. The applicant shall also ensure that its directors, board members and other personnel representatives are available to the Finnish Competition and Consumer Authority for consultations and shall make reasonable efforts to ensure that its former directors, board members and other personnel representatives are also available for consultations. Under the obligation to cooperate, the applicant may not destroy, falsify or conceal relevant information or evidence or disclose the submission or content of an application or its contents until the Finnish Competition and Consumer Authority has presented its draft decision or draft penalty payment proposal, unless another arrangement has been agreed between the applicant and the Finnish Competition and Consumer Authority. The applicant must also act in other ways to investigate the alleged secret cartel in cooperation with the Finnish Competition and Consumer Authority.

The above conditions are cumulative, i.e. the undertaking must meet all the conditions set out in the Section. Compliance with these conditions can only be established at the end of the relevant procedure by the Finnish Competition and Consumer Authority.

4.2 Participation in the restriction of competition must be terminated immediately

The undertaking must stop participating in the restriction of competition immediately after submitting an application to the Finnish Competition and Consumer Authority for an exemption from the penalty payment and for a reduction of the penalty payment.

However, under the guidance of the Finnish Competition and Consumer Authority, the undertaking may continue to participate in the restriction of competition to the extent necessary to ensure the success of the inspections referred to in Sections 35 and 36.

Continuing to participate in the cartel does not usually mean that the applicant would be instructed to continue to implement the restriction of competition unchanged. The only purpose is to ensure the success of the inspections referred to in Sections 35 and 36.

For example, the Finnish Competition and Consumer Authority may instruct the applicant not to change their behaviour suddenly such that other cartel members could conclude that the applicant has contacted the Finnish Competition and Consumer Authority. Continued participation always requires instructions from the Finnish Competition and Consumer Authority. Without such instructions from the Finnish Competition and Consumer Authority, the undertaking may not continue to participate in the restriction of competition.

4.3 The undertaking must cooperate with the Finnish Competition and Consumer Authority

The undertaking must cooperate with the Finnish Competition and Consumer Authority throughout the investigation of the restriction of competition. Cooperation must be real, comprehensive and continuous. The undertaking must immediately submit to the Finnish Competition and Consumer Authority any corporate statements, information and evidence received or already in its possession. Where possible, the undertaking must also make its representatives and employees available to the Finnish Competition and Consumer Authority for investigating the matter. The undertaking and its representatives and employees must respond promptly to the requests and questions of the Finnish Competition and Consumer Authority. Cooperation must be sincere and spontaneous, and the undertaking must provide the Finnish Competition and Consumer Authority with a true and undistorted image of the cartel, its activities and the role and initiative of the undertaking and its representatives and employees in the cartel.

An undertaking cannot be considered to meet its obligation of cooperation if a significant proportion of the undertaking's employees, or the undertaking's employees who are central to investigating the restriction of competition, do not cooperate with the Finnish Competition and Consumer Authority. The undertaking may also not make it more difficult to investigate the matter through its own actions. The obligation of cooperation begins with the submission of an application for immunity from the penalty payment and the reduction of the penalty payment and is valid until the relevant procedure of the Finnish Competition and Consumer Authority is completed.

4.4 Evidence must not be destroyed

The undertaking may not destroy, falsify or conceal the evidence covered by the application before submitting the application to the Finnish Competition and Consumer Authority, or after submitting the application. The prohibition applies both to the period prior

to submitting the application, i.e. when the undertaking is considering submitting the application, and to the period after submitting the application.

4.5 Confidentiality

The undertaking must keep secret the contents of the application as well as the fact that it has submitted the application or that it is considering submitting the application. The obligation of confidentiality applies both to the period before and after submitting the application.

Notwithstanding the obligation of confidentiality, the undertaking may provide information on the application to the Commission or the competition authority of another country. Information may be provided in a situation where the cartel extends to the territory of several countries and can therefore be examined simultaneously by the competition authorities of several countries or by the European Commission. In this case, an undertaking applying for immunity or reduction from the penalty payment may have to submit an application for the same case to several competition authorities.

5 Procedure for immunity from fines and the reduction of fines in cartel cases

5.1 Anonymous contact

Before submitting an application for immunity from the penalty payment and reduction of the penalty payment, the undertaking may contact the Finnish Competition and Consumer Authority anonymously, for example through an agent. Based on an anonymous contact, the undertaking can find out whether immunity from or reduction of the penalty payment is possible and obtain procedural advice.

5.2 Submitting the application, the information to be submitted and determining the order of priority

Applications for immunity from and reduction of the penalty payment are submitted to the Finnish Competition and Consumer Authority. In the application, the undertaking must specify the information that it wishes to be considered in processing the matter. The information that must be included in a full application is specified in sections 2.2.1 and 4.1 above. The following, on the other hand, describes the information that a marker application (section 6) and a summary application (section 7) must contain.

A full application for immunity from or reduction of the penalty payment consists of a corporate statement and supporting information and evidence. A marker application

and a summary application may, on the other hand, contain much more limited information (the required information is described in 6 and 7 below).

The corporate statement included in a full application, a marker application and a summary application can be submitted to the Finnish Competition and Consumer Authority both in writing and orally. A corporate statement, a marker application and a summary application may be submitted in Finnish and Swedish or, when separately agreed with the Finnish Competition and Consumer Authority, in another official language of a Member State of the European Union. In practice, English is another accepted language.

If the applicant so requests, the Finnish Competition and Consumer Authority will provide written confirmation of the receipt of the application. The written confirmation should include the date and time of receipt of the application. Applicants may request confirmation at their discretion, and the nature of the confirmation is informative.

The order of priority between undertakings applying for immunity from and reduction of the penalty payment is determined based on the time when the undertaking submitted the information referred to in Section 14(1) or Section 15(1) to the Finnish Competition and Consumer Authority.

5.3 Granting conditional immunity

The Finnish Competition and Consumer Authority grants the applicant conditional immunity from the penalty payment once the undertaking has submitted to the Finnish Competition and Consumer Authority the corporate statement and information and evidence referred to in Section 14(1). Having obtained the required information and having made sure that it is sufficient for the purpose of granting immunity, the Finnish Competition and Consumer Authority provides the undertaking with a conditional immunity from the penalty payment in writing. If the applicant does not want the decision on conditional immunity in writing, the applicant may request that the content of the decision be read to them on the phone or through another secure messaging application.

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

The Finnish Competition and Consumer Authority will not investigate other applications for immunity from the penalty payment related to the same cartel until it has taken a position on whether a conditional immunity can be granted to the first undertaking applying for immunity.

5.4 Decision on immunity from or reduction of the penalty payment

At the end of the procedure, the Finnish Competition and Consumer Authority will issue a written decision on whether the undertaking fulfils all the criteria set for immunity from the penalty payment or reduction of the penalty payment (Sections 14 or 15 and 16). If the undertaking does not fulfil the criteria, the Finnish Competition and Consumer Authority shall make a written decision on dismissing the application without delay.

The Finnish Competition and Consumer Authority's written decision issued at the end of the procedure on the basis of Section 17(4) cannot be separately appealed. Claims connected to the decision may, however, be presented to the Market Court in the context of the handling of the primary matter concerning a penalty payment. The Finnish Competition and Consumer Authority may include 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.

5.5 Subsequent use of the information submitted to the Finnish Competition and Consumer Authority

According to Section 17(5) of the Competition Act, the corporate statement, information and evidence submitted to the Finnish Competition and Consumer Authority for obtaining the immunity referred to in Section 14 or reduction referred to in Section 15 cannot be used for any purpose other than:

- a decision referred to in Section 9 finding an infringement and ordering its termination or a remedy;
- a structural remedy referred to in Section 9a;
- a 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 and Consumer Authority, the Market Court or the Supreme Administrative Court referred to in Section 12.

However, the information and evidence referred to in Sections 14 and 15 of the Competition Act, or so-called pre-existing information, may also be used in the actions for damages under the Antitrust Damages Act.

According to Section 38a of the Competition Act, only a subject of an investigation has the right to be informed of the content of the corporate statement in order to exercise their rights of defence. The provisions of Section 24 of the Act on the Openness of Government Activities apply to the secrecy of a corporate statement, but the right of a party concerned to receive information has been restricted in a manner that differs from

Section 11 of the Act on the Openness of Government Activities, as a party can only be informed of the content of a corporate statement in order to exercise their rights of defence. In addition, the subject of the investigation has the right to use the information contained in the corporate statement to exercise their rights of defence before the courts only if the case before the court is directly related to the case for which the corporate statement was submitted and if the case concerns:

- the sharing of a penalty payment imposed jointly and severally based on a secret cartel among those involved in the violation;
- an appeal against a decision to establish a violation or a decision based on a violation in relation to a secret cartel;
- the Finnish Competition and Consumer Authority's proposal for a penalty payment.

Contrary to pre-existing information, Section 8(3) of the Antitrust Damages Act provides that the court may not use information submitted to the Commission or the competition authority of an EU Member State on the content of a leniency statement (corporate statement, 'leniency' equivalent to immunity from and the reduction of penalty payments in the wording of the Competition Act) as evidence in the proceedings. However, according to Section 8(5) of the Act, notwithstanding the provisions laid down in Section 8(3), a statement made by the party concerned on itself, which the party appeals to as evidence, may be used as evidence in the proceedings. In such a situation, according to Article 8(5) of the Act, the court must advise the Finnish Competition and Consumer Authority to state whether a corporate statement can be used as evidence in damages proceedings.

As a main rule, the Finnish Competition and Consumer Authority considers that, as long as the Finnish Competition and Consumer Authority has not issued a written decision referred to in Section 17(4) of the Competition Act, the corporate statement is confidential under Section 16(1)(3) of the Competition Act, and its disclosure could lead to the loss of the conditional immunity from the penalty payment or the reduction of the penalty payment. The use of the corporate statement as evidence in the damages proceedings and, at the same time, the disclosure of its contents could jeopardise the investigation of the restriction of competition and thus the effectiveness of public enforcement before a written decision referred to in Section 17(4) of the Competition Act is issued. For this reason, the Finnish Competition and Consumer Authority considers that before a written decision referred to in Section 17(4) of the Competition Act is issued, the corporate statement should not be used as evidence in damages proceedings. If a party wishes to invoke Section 8(5) of the Antitrust Damages Act before a written decision referred to in Section 17(4) of the Competition Act is issued, the party must contact the Finnish Competition and Consumer Authority. If the Finnish Competition and Consumer Authority considers that revealing the existence of an application or its contents in damages proceedings does not jeopardise the investigation of a restriction of competition, the Finnish Competition and

Consumer Authority may declare that there is no obstacle to appealing to a corporate statement.

The above-mentioned restriction of use laid down in Section 17(5) of the Competition Act does not prevent the Finnish Competition and Consumer Authority from using the information provided by the applicant to initiate an investigation, or for a decision to establish a violation and order its termination, to impose structural remedies or commitments, or for a penalty payment proposal, or to withdraw the benefit of a block immunity, if the corporate statement, information and evidence contain information on restrictions of competition other than the secret cartel on which the application is based. The Finnish Competition and Consumer Authority may use the information provided by the applicant to initiate proceedings, for example in situations where it indicates that the applicant has abused their dominant market position as referred to in Section 7. The provision also does not prevent the Finnish Competition and Consumer Authority from submitting information to other competent authorities in the competition authorities' network⁹, even if it had been submitted to the Finnish Competition and Consumer Authority to investigate the restriction of competition referred to in Section 5.

6 Marker application for leniency, i.e. request for additional time to collect the required information (so-called marker procedure)

A company applying for immunity from the penalty payment may request additional time from the Finnish Competition and Consumer Authority to collect the information referred to in Section 14(1). The Finnish Competition and Consumer Authority may set a deadline for the applicant for submitting the information referred to in Section 14 to the Finnish Competition and Consumer Authority. The applicant's priority over other possible cartel members applying for immunity from the penalty payment is secured when the applicant submits a corporate statement and information and evidence – in other words, a full application – within the deadline set by the Finnish Competition and Consumer Authority. The Finnish Competition and Consumer Authority may set a deadline for submitting the information only with regard to an application for immunity from the penalty payment, not for the reduction referred to in Section 15.

⁹ See Commission Notice on cooperation within the Network of Competition Authorities, OJ C 101. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004XC0427%2802%29:FI:HTML>

In order to be marked for collecting the information referred to in Section 14, the undertaking must, in accordance with Section 17a, provide the Finnish Competition and Consumer Authority with the following information:

- its name and address,
- grounds for submitting an application for immunity from the penalty payment,
- the parties to the cartel,
- a description of the products targeted by the cartel, the regional extent of the cartel, the duration of the cartel, and the nature of the cartel activities,
- estimates of the length of time required to collect the data and the kind of data provided by the applicant,
- applications made to other competent authorities concerning the same cartel conduct and
- information on whether the applicant intends to make an application concerning immunity from or the reduction of the fines to other competent authorities.

When the applicant submits the information referred to in Section 14(1) within the deadline, the information is considered submitted at the time when the Finnish Competition and Consumer Authority received the marker application. An undertaking cannot be marked based on an anonymous contact.

7 Summary application

If the undertaking has applied to the Commission or the competent authority of another Member State of the European Union for leniency, either by applying to be marked or by submitting a full application on the same alleged secret cartel, the undertaking may submit a summary application to the Finnish Competition and Consumer Authority for immunity from the penalty payment pursuant to Section 14 or a reduction of the penalty payment pursuant to Section 15 in the same case. It may be necessary to submit applications to several competition authorities, in particular in cross-border cartels, since an application submitted to one competent authority is not considered to benefit the applicant in other countries. In the European Union, the summary application is designed precisely for these situations, on the one hand to safeguard the rights of the applicant, and on the other hand to reduce the administrative burden on both the applicant and the authorities.

The information content of the summary application is more limited than that of a full application, as it does not contain the full corporate statement required by the full application, as well as information and evidence. In the summary application, the applicant must, according to Section 17b, indicate:

- their name and address,

- the parties to the cartel,
- the products (or services) targeted by the cartel,
- the regional extent of the cartel,
- the duration of the cartel,
- the nature of the cartel,
- the Member States where evidence of the cartel is likely to be located; and
- information on previous and potential future applications submitted to other competition authorities in relation to the cartel.¹⁰

Where necessary, the Finnish Competition and Consumer Authority may request clarifications from the applicant on the matters listed above.

If the Commission declares that it does not intend to proceed with the cartel matter or part of the matter covered by the application, the Finnish Competition and Consumer Authority shall provide to the party submitting the summary application the opportunity to submit a full application. In practice, this means that the Finnish Competition and Consumer Authority sets a deadline for the submission of a full application.

The Finnish Competition and Consumer Authority may also request the applicant to submit a full application when it is necessary to limit the matter or for case allocation between competition authorities. In these situations, this is also possible before the Commission has notified that it does not intend to pursue the case in whole or in part, or when the application for leniency has been submitted only to the competent authority of another Member State of the European Union. In such a situation, the Finnish Competition and Consumer Authority sets a reasonable deadline within which the applicant must submit a full application.

However, the applicant always has the right to submit a full application on a voluntary basis at an earlier stage. However, it is worth carefully considering whether a full application should be submitted before the Finnish Competition and Consumer Authority's explicit request, as the benefits of the summary application to both the applicant and the authority regarding the required information and the amount of work will be lost.

If the Finnish Competition and Consumer Authority has not received an application from another undertaking concerning the same cartel, and the summary application meets the conditions set for it, the Finnish Competition and Consumer Authority will inform the

¹⁰ See the Template for the submission of a summary leniency application within the ECN (European Competition Network): https://ec.europa.eu/competition/ecn/mlp_revised_2012_annex_en.pdf.

undertaking of its secured priority. The priority of an application submitted by the undertaking in relation to the other parties to the cartel is determined based on the submission date of the summary application.

The summary application secures the applicant's position in the proceedings of the Finnish Competition and Consumer Authority. When the undertaking submits a full application within the prescribed time limit, if requested by the Finnish Competition and Consumer Authority or voluntarily before such a request, the full application shall be deemed to have been submitted at the time of submission of the summary application. In such cases, the summary application must cover the same commodities, geographic coverage and duration as the 'main application' (which may have been supplemented) submitted to the European Commission or the competent authority of another Member State of the European Union in relation to the cartel. Therefore, if the above-mentioned elements of the main application are supplemented, the details of the summary application should also be updated.

8 Submitting the application to the Finnish Competition and Consumer Authority

Inasmuch as the date and time of submitting the information referred to in Sections 14(1) and 15(1) is decisive for determining priority between undertakings in a competitive situation, it is important that the undertaking revealing the cartel delivers the information to the Finnish Competition and Consumer Authority in a manner which allows the authority to show indisputably the date and time of submission. The undertaking may submit the leniency application personally or through an agent to the Finnish Competition and Consumer Authority, for instance in the following ways:

- through an appointment;
- by telephone; or
- by e-mail.

It is a good idea to contact the Finnish Competition and Consumer Authority in advance about the submission of the application and the manner in which it is submitted. It is recommended that the application be submitted either at a pre-agreed meeting or by telephone as agreed. Submitting the application by post is not recommended, as the applicant cannot be certain of how quickly the application is received at the Finnish Competition and Consumer Authority. When the undertaking wishes to make an appointment for a visit or a telephone call for submitting an application, this must be agreed with the Head of Cartel Detection or the Head of Unit at Enforcement Unit 1. It is also possible to obtain practical advice on the application procedure through these individuals (see, for example, Section 5.1 above).

Prior to submitting the information, undertakings shall make sure that the contact information below has not changed.

Contact details

Finnish Competition and Consumer Authority
Lintulahdenkuja 2, 00530 Helsinki, Finland
Telephone exchange: + 358 29 505 3000

Additional information: kkv.fi/apply-for-leniency