

Unclassified

English - Or. English

25 May 2020

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

Criminalisation of cartels and bid rigging conspiracies – Note by Finland

9 June 2020

This document reproduces a written contribution from Finland submitted for Item 1 of the 131st OECD Working Party 3 meeting on 9 June 2020.
More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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JT03462055

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1. Introduction¹

1. In Finland, the current model is administrative in nature, and cartels are not criminalised in the current Competition Act. However, the approach adopted in the legislation, in terms of criminalisation of cartels, has varied over the years. In addition, there have been discussions on whether other sanctions or ramifications could also be incorporated into the current enforcement system.
2. The first act concerning competition infringements came into force in 1958. At that time, infringements were notified in a public register. Bid-rigging cartels were prohibited from the start, but it was possible to obtain an exemption. The act was amended in 1964. According to the new provisions, apart from bid-rigging and retail price maintenance, competition infringements were not prohibited as such, and they should have harmful effects before intervention pursuant to the Competition Act was possible. Some further legislative updates were made in 1973, 1977 and 1985. With these additions, the at the time Competition Council, as the first instance appellate body was known at the time, received more powers and the procedure for appeals was renewed.
3. In 1988, the law was still mostly based on the abuse principle (*rule of reason*), but resale price maintenance and bid-rigging cartels were criminalized. The provision on punishment was however separated into two parts: the first concerned the actual competition infringement violations and included a penalty of fines or maximum one year of imprisonment. The second covered e.g. procedural violations, such as breach of the obligation to present documents or intentionally submitting a false statement or false information. A penalty of a fine or maximum 6 months of imprisonment could be imposed pursuant to the provision.
4. In 1992, the Finnish competition legislation was completely renewed; the Finnish Competition Act was built on the prohibition principle, including the area of cartel enforcement. In addition to bid-rigging, other forms of cartels were now also prohibited. The legislative reform also moved away from the criminal sanctions that had been applied since 1988. According to the Government proposal at the time, within the criminal system, only a few cases were processed in the courts, leading only to low fines without imprisonment. Criminal sanctions imposed had mostly been rather lenient; therefore, they couldn't be seen to have a significant deterrent effect.² An administrative sanction was seen as a more effective and appropriate procedure as the assessment requires special expertise.³ Also, in many cases during 1988–1992, neither the threshold for prosecution was exceeded

¹ This contribution deals with sanctions that can be imposed when substantive competition rules have been infringed. In addition, the Finnish Criminal Act contains provisions on certain procedural violations like obstructing the Competition Authority to carry out its duties, providing either false documents or oral information to the Competition Authority, or breaking the seal installed by the Competition Authority.

² The views in this paper, unless otherwise stated, are the FCCA's own, and therefore they do not necessarily represent, for example, the official view the Government of Finland or any Ministry of the Government. The history of the regulation is compiled based on the report the FCCA requested from the University of Helsinki in 2014, full text available only in Finnish: <https://www.kkv.fi/globalassets/kkv-suomi/ajankohtaista/tiedotteet/2014/hy-selvitys-27-5-2014.pdf>

³ HE 162/1991 vp, p. 5 (Government proposal).

nor were the courts actively imposing criminal penalties in cartels cases, as they were not considered as severely reprehensible as other economic crimes. As the system was not considered to work optimally, criminal sanctions were replaced with an administrative penalty payment.⁴

5. After 1992, the Competition Act developments have mostly been connected to European Union (EU) legislation and its enforcement, as the goal was to harmonise the competition law with it. The harmonisation was finalised in 2004, when the provisions were written to be in line with EU Regulation No 1/2003. Some further harmonisation was carried out in 2011.

2. Availability and scope of criminal sanctions

6. As described, criminal sanctions cannot be currently imposed pursuant to the Competition Act, as the system is based on administrative fines. According to Section 12 of the Finnish Competition Act⁵, a penalty payment shall be imposed on an undertaking or association of undertakings that infringes on the competition provisions. This penalty payment is of an administrative nature and is imposed by the Market Court of Finland based on the proposal submitted by the FCCA.
7. However, the Finnish Criminal Code⁶ includes an offence that could – at least in principle – be applicable in some bid-rigging cases. According to Section 1(1) of Chapter 36 in the Criminal Code

*“[a] person who, in order to obtain unlawful financial benefit for himself or herself or another or in order to harm another, deceives another or takes advantage of an error of another so as to have this person do something or refrain from doing something and in this way causes economic loss to the deceived person or to the person over whose benefits this person is able to dispose, shall be sentenced for **fraud** to a fine or to imprisonment for at most two years.”⁷*

8. Given this background of the Criminal Act, the relationship between competition rules and criminal sanctions was assessed again in a Working Group which published its report in 2010. According to this report, the prosecutor has, in a few cartel cases, assessed the possibility of bringing a fraud charge against a potential bid-rigging offender, but neither preliminary investigations were carried out by the police in the end nor were any criminal sanctions imposed in bid-rigging cases. According to the Working Group, it seemed that the said provision in the Criminal Act was not meant to be used in cartel cases, but most importantly, it still stated that the possibility to apply it remains.⁸ The very same conclusion was reached also by the Government itself later the same year when it published a Government proposal amending the Competition Act.⁹ However, according to some academics, the applicability of this particular provision in the Criminal Act can be difficult

⁴ HE 162/1991 vp, p. 6 (Government proposal).

⁵ The legislation reform was also assessed in the case of the Finnish Supreme Administrative Court’s case concerning the Finnish asphalt cartel KHO:2009:83, see e.g. Sections 932,936,947,958–959, 1157 of the case (available only in Finnish).

⁶ Kilpailulaki (12.8.2011/948) (Competition Act).

⁷ Bold added here

⁸ Report by the Working Group on Competition Act 2010, s. 47.

⁹ HE 88/2010 vp, p. 8 (Government proposal).

to apply in bid-rigging cases, as the systematic of the offence is closely linked to an identifiable target.¹⁰

9. In the Finnish debate, another ramification linked to cartel cases in the discussions is the so-called **business prohibition**. According to the Act on business prohibition¹¹, in order to prevent inappropriate and harmful business practices and to maintain trust towards business operations, it is possible to disqualify company directors from doing business. This prohibition could therefore technically be imposed also on individuals that have participated, for instance, in cartel activities. The process before ordering the prohibition is largely the same as in other criminal proceedings.
10. The reasoning behind the Act on business prohibition does not include any specific mention on Competition Act provisions as a base for imposing the prohibition; but according to the report of the Working Group from 2010, this is to be interpreted that it in fact remains technically a possibility. According to the Working Group, application of business prohibition in cartel cases would most likely increase the deterrent effect of competition rules, but it would also be rather complicated to enforce in practice. According to the Working Group, more research would therefore be required before introducing it inside the Competition Law framework, and therefore it was not recommended in the end.¹² However, the prohibition was still in force in the special statute outside the Competition Act.
11. In terms of **criminal sanctions**, the view of the Working Group 2010 was that re-introducing them could be harmful to the effectiveness of the administrative enforcement process. It was also thought to be potentially hindering to the effective application of the leniency procedure as it would not necessarily free the management from criminal liability. Therefore, the Working Group did not recommend re-criminalisation of cartels to amend the sanction system of the Competition Act.¹³ As earlier, one of the key arguments for remaining in the administrative sanction system was to ensure that the national system is as consistent as possible with EU competition rules.
12. Despite all the legislative developments earlier, the issue of criminal liability in cartel cases was brought up once again in the Programme of the Finnish Government in 2011. The programme laid out e.g. the legislative goals of the then government during its term of office. It was stated that the Government would examine possibilities of criminal liability in cartel cases.¹⁴ As a result, the Government commissioned external studies on the matter. In 2014, these reports on criminalisation of cartels were presented to the Ministry of Employment and the Economy (MEE).¹⁵

¹⁰ Report of the University of Helsinki, p. 17 and 19. This means that deceiving or exploitation of an error (fraudulent behaviour) must be directed to a certain party. Additionally, the target must be pre-selected and for instance the bid-rigging must be done with exploitation in mind for it to be assessed as fraud pursuant to the Criminal Act.

¹¹ Laki liiketoimintakiellosta (13.12.1985/1059) (Act on business prohibition).

¹² Report by the Working Group on Competition Act 2010, s. 53.

¹³ Report by the Working Group on Competition Act 2010, s. 51.

¹⁴ Programme of the Government 2011, p. 39.

¹⁵ Press release: Report on the Criminalisation of Cartels was Presented to Stakeholders <https://www.kkv.fi/en/current-issues/press-releases/2014/report-on-the-criminalisation-of-cartels-was-presented-to-stakeholders/>. Reports presented: Report of the University of Helsinki: Kartellien kriminalisointi Suomessa: Hallintomenettelyyn perustuvan järjestelmän ja rikosoikeudellisen järjestelmäyhteensovittamisen tarkoituksenmukaisuus, toteutettavuus ja edellytykset (April 2014) and Peter Whelan: Report Examining the Desirability of Introducing Criminal Sanctions for Cartel Activity, Submitted to the Finnish Competition and Consumer Authority (April 2014).

13. According to these reports, the administrative procedure was seen as a more flexible solution in cartel cases and compatible with the model adopted in the EU. The preventive effect was however seen as stronger in criminal systems, as administrative sanctions are imposed only on businesses, not individuals. The reports also reminded that there are different kinds of cartels, and it should be taken into account should criminal responsibility in cartel cases be adopted. In addition, only some forms of cartels might be classified as fraud pursuant to the Criminal Act. Should a criminal liability be adopted, the uncertainty around the possibility of applying the fraud provision from the Criminal Code should also be cleared.¹⁶ All in all, the reports were slightly in favour of criminalisation of cartels, although with some caveats. Criminalisation of cartels was directly recommended at least in one of the reports. Despite the results presented in the reports, the administrative sanction model was not changed, and the legislative project mentioned in the Government Programme was closed.
14. Next, a new Working Group was established in 2017 to prepare the potential amendments to the Competition Act. The applicability of business prohibition as a sanction in cartel cases was assessed in more detail; but like its predecessor from 2010, the Working Group from 2017 did not recommend adding the business prohibition directly to the Competition Act either.¹⁷ This means that currently the potential prohibition is in force only in the special statute (*lex specialis*) as a provision of its own outside the Competition Act.

3. Leniency and corporate compliance programmes

15. The FCCA has constantly taken the view that cartels are the most serious form of antitrust infringements. They are highly detrimental to the economy, and the FCCA promotes self-reporting of illegal cartel activity. In specified circumstances, a cartel participant may receive either a full immunity or a discount of penalty payments. According to Section 14 of the Finnish Competition Act:

“[a] penalty payment shall not be imposed on an undertaking in the case of a secret re-straint 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, 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. submits a leniency 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 leniency 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.”*

¹⁶ See the Report of the University of Helsinki, p. 23, 24, 71 and the Report by Peter Whelan, p. 3.

¹⁷ Report by the Working Group on Competition Act 2017, p. 82.

16. The leniency statement and the information must be submitted to the FCCA prior to it obtaining the information about the cartel activity from some other source or *ex officio*.¹⁸
17. Leniency is indeed an important part of the legal framework for the FCCA, but for the time being, somewhat rarely used. In recent years, leniency applications have generated investigations in some cases, see e.g. the FCCA's decision on prohibited cooperation between competitors in the EPS insulation market from 2018.¹⁹
18. The Competition Act does not acknowledge the crediting of corporate compliance programmes as such. The FCCA is not aware that the lack of compliance credit programmes in Finland as such would have decreased an undertaking's incentives on self-reporting of antitrust infringements.
19. However, in addition to the leniency programme, an undertaking that submits information and evidence to the FCCA, and if the said information is significant for establishing a restraint on competition or its entire extent or nature, and such information is submitted prior to the FCCA receiving the information from another source, the penalty payment can be reduced according to Section 15 of the Competition Act. This reduction is possible whether a company has established a compliance programme or not.

4. International Cooperation

20. Finland is a member in the European Competition Network (ECN). Hence, in terms of any enforcement cooperation in the context of criminal cases, we are strongly linked to the principles of the network and to the mechanisms and processes set out by it. Given that the national sanction model is based on administrative sanctions, there are limitations to effectively cooperate with jurisdictions with criminal penalties. The provision of the Commission Notice on cooperation within the Network of Competition Authorities²⁰ “--precludes sanctions being imposed on individuals on the basis of information exchanged pursuant to the Council Regulation if the laws of the transmitting and the receiving authorities do not provide for sanctions of a similar kind in respect of individuals.”²¹ The cooperation agreement with other Nordic competition authorities includes a similar provision. According to the Article 3, “[i]nformation exchanged shall only be used in evidence and in respect of the subject matter for which it was collected by the transmitting authority.”
21. For the time being, the FCCA has not yet encountered situations where there has been a need to exchange confidential information in cartel investigations with non-EU jurisdictions with criminal liability in cartel cases.

¹⁸ For a full description of the national leniency system, see the FCCA's website: <https://www.kkv.fi/en/decisions-and-publications/publications/guidelines-on-the-application-of-the-competition-act/leniency/>.

¹⁹ See the FCCA's website <https://www.kkv.fi/en/current-issues/press-releases/2018/4.12.2018-the-fcca-proposes-cartel-penalty-fees-for-eps-insulation-producing-thermisol-and-uk-muovi/>. The case is currently in the Market Court and therefore the decision is not yet final (in May 2020). Some other cases where leniency programme has played a role include the car spare parts cartel from 12 September 2006, the raw wood cartel from 21 December 2006 and the power cable cartel case from 31 October 2014. The dates refer to the proposals submitted to the Market Court.

²⁰ Commission Notice (2004/C 101/03).

²¹ See article 12 of the Council Regulation No 1/2003 on exchange of information.