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FINNISH WATER FORUM

SUOMEN VESIFOORUMI RY - FINNISH WATER FORUM COMPETITION LAW CHARTER 2022

[free English translation from original Finnish document]

Table of contents

Competition law charter

Suomen vesifoorumi ry – Finnish Water Forum (hereinafter 'FWF') board has approved this competition law charter at its meeting on June 16, 2022. Participation in the association's activities, such as meetings and working groups, requires compliance with the charter.

1) The principles and regulations of competition law are followed in all FWF's activities. Members must intervene in any kind of anti-competitive activity and, if necessary, report anti-competitive activity to the Finnish Competition and Consumer Authority (hereinafter FCCA).
2) All types of procedures and information exchange between competitors that prevent, limit or distort competition on the market are prohibited. The exchange of information may concern, for example, prices or their formation, sales areas, important plans, production or customers.
3) In any case, competitors may not coordinate their business operations, even in informal discussions, so that they no longer make their decisions completely independently, and competitors' uncertainty regarding normal price and market behavior may not be reduced.
4) Exchange and disclosure of confidential information is prohibited.
5) In all meetings of the association, the agenda submitted in advance is accepted as the agenda of the meeting and must be kept to for the duration of the meeting. These instructions are reminded at the beginning of the meeting. Minutes are kept of the meetings.
6) The meetings do not discuss subjects prohibited by competition law, and all participants have the obligation to object to and interrupt such discussion, as well as to leave the meeting if necessary.
7) General protection of the industry's interests, training, general and open to all industry standards and quality control, work and product safety, environmental protection, publishing activities and legal advice of the members are permitted, as long as the activity does not have anti-competitive effects.
8) Cooperation between competitors, for example in research and development matters or in the establishment of a tender group, requires great care so that the cooperation would be permitted under competition law.

Detailed justifications

1) FWF, as an association of actors in the water sector, can in certain situations be possibly considered an industry organization and an association of business actors within the meaning of the competition regulations.
2) The purpose of FWF is to convey information between Finnish and international water sector actors and to promote cooperation and general business opportunities between the public and private sectors operating in the water sector in Finland. The purpose is also to strengthen the Finnish water sector and improve its competitiveness on the national and international markets. In addition, the association supports the achieving of Finnish water-related strategies and goals by promoting the creation of development cooperation projects and other international activities.
3) Industry associations play an important role, for example, in corporate advocacy and influence cooperation. FCCA has stated (FCCA's instructions for industry associations 7 December 2021) that "however, the nature of industry associations also results in the fact that they are risky environments from the perspective of competition law, as companies competing in the same industry and often on the same market strive together to drive their own interests. Due to the nature of their activities, industry associations and their various committees or sub-associations can therefore also provide an environment for cooperation between competitors that is against competition law, such as a cartel. Although the industry association's aim is to act in accordance with the law, the threshold for anti-competitive activity may be lowered and crossed more easily when competitors cooperate in association activities".
4) According to section 5 of the Competition Act (948/2011), agreements between businesses, decisions of business associations and coordinated procedures of businesses, the purpose of which is to significantly prevent, limit or distort competition, or which as a consequence significantly prevent, limit or distort competition, are prohibited. In particular, such agreements, decisions and procedures are prohibited:
    1) which directly or indirectly confirm purchase or sale prices or other trading conditions;
    2) which limit or control production, markets, technical development or investments;

3) with which markets or procurement sources are shared;
4) according to which different conditions are applied to similar performances by different business partners, so that the business partners are placed at a competitive disadvantage; or
5) according to which the condition for the creation of the contract is that the contracting party accepts additional services, which, due to their nature or according to the trading method, have no connection with the object of the contract.

5) Correspondingly, in cross-border situations, i.e. when the restriction of competition is likely to affect trade between the member states of the European Union, Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) apply. Competition legislation does not apply to labor market matters.

6) Considering the purpose of FWF, it is therefore important for the membership to identify prohibited and permitted topics in the association's activities. In addition, in international activities, it must be noted that sanctions for violating competition law can be imposed in the country to which the activity's impact extends.

7) Violations of the Competition Act or the European Union's competition regulations can result in significant fines, up to ten percent of the total global turnover of the business or e.g. industry association participating in the restriction of competition. With the recent change in the law (Section 13 b and § 47 a of the Competition Act), the number of possible fines imposed on trade associations practically increased tenfold, because now when assessing the amount of the trade association's fine, the turnover of the trade association's members can be taken into account, and members may, under certain conditions, also be obliged to pay the fine imposed on the trade association if the organization is not able to pay for it.

8) In addition, liability for damages for violation of competition law can be significant. According to section 2 subsection 3 of the Competition Law Damages Act (1077/2016), a cartel is assumed to cause damage, unless the perpetrator of the violation proves otherwise.

9) *Cartel* means an agreement or a harmonized procedure between two or more companies, the purpose of which is to coordinate their

competitive behavior on the market or to influence relevant competition parameters. Examples of a cartel are the fixing or matching of purchase or sale prices (price cartel) or other trade terms (conditional cartel), sharing production or sales quotas (production restriction cartel), sharing markets, customers or sources of supply (marketing sharing cartel) and limiting imports or exports. If you discover that you are involved in a cartel, you can avoid the fine imposed by the cartel if you notify FCCA of your involvement. The company that was the first to report the cartel is completely exempt from the fine.

10) In an *information exchange cartel* competing companies exchange confidential material with each other about, for example, market shares, prices or customers, and exchanging such information through a trade association does not make the exchange of information permissible. According to jurisprudence, the exchange of confidential information about current and future purchase prices and quantities between competitors is *in itself* a prohibited restriction of competition (Campine and Campine Recycling T-240/17 para. 305).

11) Prohibited exchange of information increases the risk of a *collusive outcome*, i.e. uniform anti-competitive behavior in the market. Furthermore, the exchange of information can give an unfair competitive advantage to those involved in the exchange of information and cause a competitive disadvantage to companies not participating in the exchange of information, i.e. lead to the *exclusion from the market* of competitors or companies at a later stage of the production chain, contrary to competition regulations. (cf. Communication from the Commission 19 April 2022 – *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, draft pp. 99–100)

12) Certain trade associations may exceptionally also have a *dominant market position* as defined by the competition regulations, for example if the association grants business licenses. Achieving a dominant market position is not prohibited, but according to Section 7 of the Competition Act, abuse of a dominant market position is prohibited.

Prohibited price collusion

13) Based on legal practice, the most significant risks in industry associations, even if they try to operate in accordance with the law, are related to possible prohibited information exchange and uniform procedures, especially in relation to prices and their increases or harmonization. You have to be especially careful in a situation where an employee of the organization is also an employee of one of the member companies.

14) Price cooperation between companies is prohibited. In competition that operates in accordance with the provisions of the Competition Act (repealed Anti-Competition Act HE 162/1991 vp s 1, 10-), price formation in the market is based on the independent pricing of traders and the price mechanism that guides it, and there are no artificial barriers to entering the industry. Entrepreneurs are free to decide on the use of their means of competition guided by economic facts. On the other hand, socially desirable economic competition must be based on competitive means in accordance with the law and good practice. The price of commodities is a key factor guiding production and consumption decisions in the market. Consumers make their purchase decisions based on their needs and the price and quality ratios of the goods on offer. Companies, on the other hand, make their business decisions guided by consumer demand and market prices and profits. If the company's pricing is independent, entrepreneurs can charge different prices for their goods based on their own costs and competitive situation. This enables price competition to arise and goods and services at different prices. The buyer's choice is likely to focus on the product or service with the best price/quality ratio, and the company that offers this will be successful. Competitors must then be able to offer similar goods at least under similar conditions in order to stay on the market. As a result, they have to improve their production and operations and reduce their costs. On the other hand, they also have to develop new and even better supply options with which they can take over the market and earn profits. The overall result is an increase in the company's performance and the directing of production efforts to efficient use. If price competition is prevented, the self-control of the market will be disturbed. If there is a consensus among entrepreneurs about following the same prices, consumers' options for choice will be limited. Since the costs of the traders are different and the prices charged within the scope of cooperation are usually determined by the trader operating with the highest costs, some entrepreneurs may have unreasonably large profits. Such companies would have the opportunity to sell cheaper, but they do not do so because of price cooperation, which

of course harms consumers. The lack of price competition also reduces the need to make operations more efficient.

15) Prohibited price cooperation may also apply to discounts or different delivery fees and similar delivery conditions. Recommendations and instructions regarding prices, as well as different common pricing bases or calculation formulas, harmonize companies' pricing and hinder the self-regulation of the market. Issuing and applying recommended pricing guidelines almost always leads to the same result as an explicit price agreement, and the industry association should not issue such.

16) Industry associations sometimes draw up industry standard conditions. Such conditions must be equitable and non-discriminatory and also fair to consumers, and they should not have a guiding effect on the pricing of companies in the sector.

17) Individually published public tenders and especially contractual conditions set for procurement should no longer be dealt with in the industry association, even though lobbying activities in relation to public procurers is permitted in itself.

18) The organization's communications and minutes must not use expressions that are subject to competition law interpretation or that are unjustified, such as (according to FCCA's example) "Cheaper price means lower quality".

Assessing prohibited exchange of information

19) In addition to prices, other fundamentally prohibited topics of discussion in FWF's operations are, for example, purchase and sales areas, sales volumes, production and inventory data, market shares, detailed turnover data or information on costs, customer numbers or individual customers, technical and commercial trade secrets, offer information, and attitude towards third parties , such as a competitor, supplier or customer.

20) The jurisprudence of the Court of Justice of the European Union has specified the prohibited exchange of information. Each economic operator must decide independently on the operating method it intends to follow in the common market. The requirement of independence is therefore definitely an obstacle for such operators to be in any kind of direct or indirect contact with each other, if that contact either influences the market behavior of an actual or potential competitor or reveals to such a competitor how the operator himself has decided to behave or intends

to behave in the market, when the purpose of the contact or effect is the formation of competitive conditions that would not correspond to the usual conditions in the market in question. (T-Mobile Netherlands and others, C-8/08 paragraphs 32 and 33).

21) Information exchange between competitors can be bilateral or multilateral. The exchange of information can also be completely one-sided, for example a speech at a meeting or an article in a member magazine. Information exchange may also take place indirectly by or through a third party (such as a service provider, platform, online tool or algorithm), through a common representative (for example, an industry association), through a market research organization, or through suppliers or retailers. The platform for exchanging information is irrelevant (e.g. WhatsApp – chat platform, intranet or extranet, telephone conference). The main rule is that the competitor who has received the information cannot remain inactive after receiving the prohibited information, because then the competition authorities can consider the recipient to have tacitly accepted the anti-competitive behavior.

22) If it is a prohibited subject, the recipients of the information must, in order to avoid liability under competition law, publicly disclaim the subject, i.e. "condemn" and oppose the matter. Competition law is a very case-based, i.e. case-specific, area of law, so each individual situation and the correct course of action are evaluated separately.

23) For example, at the meeting of the association, a situation could arise where the participant starts talking about a new company in the market with very cheap prices. In principle, this is a prohibited topic of discussion, as a possible collective boycott of one competitor or other uniform procedure in this regard is prohibited under the competition regulations. A speech on such a topic should be immediately interrupted by others. The speaker can be informed that the topic is problematic under competition law and was not on the agenda, and that the topic can only be discussed at the next meeting, if and when it is permitted under competition law. If necessary, the chairman must ask the speaker to leave the meeting, or the other participants to leave the meeting themselves, and the departure must be recorded in the minutes.

24) A message about a prohibited matter sent by e-mail can be rejected by sending a clear and explicit objection to the sender of the message

(Compare Eturas et al. C-74/14 paragraphs 44 and 48). For example, you can reply to the sender "We have received the attached email. We have not read it and will not act on the information it contains. Please do not send similar emails again."

Examples of permitted exchange of confidential information

25) Statistics made by industry associations, based on data provided by member companies, should not reveal competitively sensitive information, which therefore requires planning of the compilation of statistics, adequate anonymization of information and confidentiality aspects. Historical information about companies' business solutions is usually not sensitive, especially if it is not possible to read or conclude from the information which individual company's information it is. According to FCCA's instructions, the fresher, more identifiable and more frequent the information exchanged through statistics and reporting is, the more strategic it is and the more likely it is that the exchange of information will have anti-competitive effects if member companies can harmonize their competitive behavior with the help of statistics.

26) In accordance with Section 6 of the Competition Act, prohibited restrictions on competition do not include agreements, procedures or decisions that meet all of the following conditions:

1) contribute to making production or product distribution more efficient or promote technical or economic development;
2) leave the consumers a reasonable share of the benefits consequently obtained;
3) do not impose restrictions on the concerned traders that are not necessary to achieve the stated goals; and
4) do not give these traders the opportunity to remove competition from a significant part of the goods in question.

27) According to Section 92 of the Procurement Act (Act on Public Procurement and Right-of-Use Agreements 1397/2016), suppliers may make bids or register as candidates as a group. In addition, a so-called resource subcontractor can be named in the offer, in which case, for example, the required reference or turnover requirements can be met together.

28) The members of the group naturally need information about each

other in order to submit an offer. In this case, non-disclosure agreements and other arrangements should be used to ensure that the exchange of information is limited to the information necessary for the joint offer. However, the offer should not be made with too large operators or too many partners, i.e. with companies that would be able to provide the required references on their own, as this may constitute a prohibited restriction of competition (cf.).

29) There are also special requirements set by competition law in many other special situations, such as business acquisitions or joint procurement arrangements.

Further references

1. Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance - available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011XC0114%2804%29

2. FCCA – Finnish Competition and Consumer Authority's instructions: How does competition legislation affect industry associations? available (only in Finnish) at https://www.kkv.fi/kilpailuasiat/toimialayhdistykset/