

# FCCA brochure on the inspection of business premises under Section 35 of the Competition Act

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## **1 Introduction**

The Finnish Competition and Consumer Authority (FCCA) conducts surprise inspections in the business premises of undertakings or associations of undertakings under Section 35 of the Competition Act for the purpose of monitoring compliance with the provisions of the Competition Act, and to assess mergers and acquisitions. The FCCA may also carry out inspections upon request of the European Commission in order to monitor compliance with European Union competition rules.

The agency may continue to check the temporary copies of electronic material on its own premises. This is called a continued inspection.

The reason for the inspection is stated in the FCCA's inspection decision. Most often, the FCCA carries out inspections based on a reasonable suspicion that the undertaking or industry association being inspected has committed an infringement such as participating in a restriction of competition agreed upon with competitors (such as price-fixing, price recommendations or market sharing) or excluding competition from the market abusing its dominant position.

An inspection may also be carried out for other reasons. In order to investigate a suspected restriction of competition, the FCCA has the right to carry out an inspection on the premises of an undertaking or an industry association, which itself is not suspected of illegal activities, but which can be expected to have material related to a restriction of competition in its possession. The FCCA may also conduct an inspection in order to assess a merger notified to it.

An inspection is one of the investigative measures used by an authority. Becoming subject to an inspection is not an indication of being guilty of illegal practices.

This brochure describes the typical process of an inspection of business premises. The purpose of the brochure is to increase the awareness of companies and their legal counsel of the process and practices of inspections of business premises under Section 35 of the Competition Act. The brochure is not an exhaustive description of the situations that arise during inspections nor of the FCCA's corresponding procedures.

## **2 The powers of the FCCA and the rights of the company in brief**

The right of the FCCA to carry out inspections is based on the Competition Act. In addition to the Competition Act, the contents of the inspection as well as the rights and responsibilities of the FCCA and the company are also provided for in the Administrative Procedure Act.

Under Section 37 of the Competition Act, a company is obliged to allow the inspectors of the FCCA to enter its premises, including its land and means of transport, and to provide access for the inspectors to its business data and documents.

The agency has the right to carry out an inspection of the company's electronic material on the agency's premises. In a continued inspection, the agency's inspection focuses on temporary copies of the company's electronic material, in which case the original material remains in the company's possession and use. The agency shall decide whether the inspection of electronic material is carried out on the premises of the company or on its own premises.

During the inspection, the FCCA has the right to examine the physical documents and electronic material related to the company's business, make copies of these and request explanations from representatives of the company.

The FCCA's powers of inspection apply to all information that may be relevant for investigating the subject matter as set out in the inspection decision. The official leading the inspection (team leader) decides whether documents and data are within the powers of inspection.

The company is obliged to contribute to the inspection. The company must provide the agency with all documents and information concerning the subject matter of the inspection.

The FCCA is also empowered to inspect data sets of the subject of the inspection held by an external IT service provider, and to obtain the data covered by the inspection decision directly from the service provider. The agency may request the service provider to submit the data sets directly to the agency's premises for further inspection in accordance with the agency's instructions. The FCCA is not responsible for any costs that may be incurred by searching for the information or delivering it for inspection. Unless otherwise agreed by the service provider and the company, the company subjected to the inspection is responsible for the costs.

The FCCA may seal any premises and material for the period and to the extent necessary for the inspection. Affixing seals may, for example be necessary to secure the IT inspection described hereinafter.

The FCCA has the right to receive executive assistance from the police under the provisions of the Police Act. Executive assistance is requested if the subject of the inspection prevents the FCCA from carrying out the inspection by means such as not allowing the inspectors to enter the business premises or to inspect the documents and data covered by the powers of inspection, or if it delays or hinders the work of the inspectors unduly.

Representatives of the company have the right to be present during the inspection. The company also has the right to use an external legal counsel and to invite them to be present. Similar rights to attendance and for a legal counsel also apply to the continued inspection. However, the presence of external counsel is not a requirement for starting and carrying out an inspection.

The company cannot be compelled to admit that it has committed an infringement of the Competition Act. Nevertheless, the company has an obligation to answer factual questions and to deliver documents even in a situation where such information may be used against it or another undertaking in order to establish an infringement.

During the inspection, the following practices are punishable under the Criminal Code of Finland:

- providing false evidence, such as a false, legally relevant oral information to an authority (Competition Act, Section 48, Criminal Code, Chapter 16, Section 8)
- preventing an official act or making it more difficult to carry out (Criminal Code, Chapter 16, Section 3)
- breaking a seal without the permission of the FCCA (Criminal Code, Chapter 16, Section 10)

## **2.1 Restrictions on the powers of the FCCA**

Contents of the inspection decision: The inspection applies to the business, and its geographic and possible temporal scope, as specified in the inspection decision. The FCCA has the right to inspect and copy documents and files (including all types of data) that may be relevant to investigating a matter arising from the inspection decision. The official leading the inspection (team leader) decides whether the material is within the scope of the right to inspect.

Protection of privacy: Material within the scope of protection of privacy includes, for example, email messages related to private life. The FCCA has the right to confirm if the material is within the scope of its authority to carry out inspections, but the inspectors' official duty includes refraining from inspecting documents and data found to be private in any more detail. The inspectors are bound by the obligation of confidentiality concerning the contents of private documents and data.

LPP material: The inspection does not target confidential correspondence between the company's external legal adviser and the company, exchanged for the purpose of defending the company in relation to the investigated restriction of competition. Such material is often referred to as LPP material (*Legal Professional Privilege*). In its activities, the FCCA takes into account the guidelines set by the decisional practice of the courts of the European Union, concerning the protection of material within the scope of LPP.

During the inspection, the FCCA, in cooperation with representatives of the company, aims to identify and separate LPP material from other documents and data. A company may, for example, be asked to state the name of an external legal adviser or law firm and to state which representative of the company or its employee is likely to possess material under LPP protection.

The FCCA has the right to ensure that the document is under LPP protection by way of a cursory examination. A document will not be handled as being under LPP protection due to the name of an adviser, the email address or the subject alone. The FCCA may, at its discretion, exclude a document from the material to be inspected, or set it aside temporarily, or place it under a seal and resolve the issue later.

## **2.2 Protection of privacy in working life**

The Act on the Protection of Privacy in Working Life will also be applied during unannounced inspections by the agency. Under the Act, the employer is responsible for ensuring that its representative or a member of its personnel shall not view the documents and data of an employee, during or after an inspection, without proper authorisation.

### **2.3 Penalty payments for breaches of procedural rules**

A penalty payment may be imposed upon an undertaking or an association of undertakings for breaches of procedural rules pertaining to an inspection of business premises under Section 35 of the Competition Act. The Market Court may impose a penalty payment in relation to inspection procedure for obstructing an inspection, for breaking a seal referred to in Section 37, Subsection 3 of the Act, or for failing to provide the explanations requested. A penalty payment may also be imposed should an erroneous, incomplete or misleading explanation not be corrected or completed.

As per Section 37 a of the Competition Act, the Finnish Competition and Consumer Authority is empowered to make a penalty payment proposal to the Market Court in order to impose a penalty payment upon an undertaking or an association of undertakings for breaches of procedural rules. The penalty payment may amount to a maximum of one percent of the global turnover of the entity responsible for the breach. The amount of the penalty payment is calculated based on the turnover for the accounting period immediately preceding the proposal.

## **3 Key points of the inspection process**

The inspection starts by notifying the undertaking of the FCCA's inspection decision. The decision states the reason for the inspection, i.e. the suspected restriction of competition or the merger being investigated by the FCCA, as well as the provisions of law applicable to rights of inspection.

The officials ordered by the FCCA to carry out the inspection are named in the inspection decision. The FCCA may also authorise external persons to assist in the inspection.

At the beginning of the inspection, a discussion to support the smooth implementation of the inspection is conducted with a representative of the company. The discussion helps the FCCA to focus the inspection on the persons and data relevant to the investigation, and its purpose is to speed up the inspection and reduce the burden caused by the inspection on the company. In the discussion, the undertaking is also informed of the rights and responsibilities related to the inspection, and given an outline of the inspection process. The discussion is not a prerequisite for initiating the inspection.

After the inspection has begun, representatives of the company do not have the right to destroy documents or data in possession of the company. Moreover, materials may not be removed from the company's premises without the permission of the FCCA. Should a representative of the company need to take material with them for work purposes, the FCCA has the right to ascertain the nature of the material to be removed and, if necessary, inspect the material and make copies of it before it is taken away.

After notice of the inspection decision has been served, the FCCA's inspectors move on to the premises they consider of relevance for the inspection. If it is possible to do so without compromising the investigation, the FCCA may wait for the arrival of an external adviser of the company for a reasonable time before beginning to investigate the company's documents and data or interviewing its representatives. However, there is no obligation to wait for the company's adviser.

Locked spaces, cupboards and similar enclosures must be opened upon the request of the inspectors. The FCCA may request executive assistance from the police to open locks.

After the inspection has begun, the team carrying out the inspection examines material in paper and electronic form related to the company's business operations and makes copies of these into the case file. The inspection of electronic material may also be carried out on the agency's premises.

During the inspection, the agency is not required to make decisions on the precise importance of each document. For the inspector of the agency to copy documents and files into the case file, it suffices that they may be relevant to investigating the suspected restraint on competition described in the inspection decision. Material from other geographic areas may, for example, be of relevance as a reference when investigating a suspected regional competition restriction.

The FCCA makes copies of documents and data in a way that presents the material, relevant from the perspective of the inspection decision, in its full context. Information unrelated to the matter under investigation is therefore not removed from documents and data, such as business reports containing information relevant for the matter being investigated, if the removal would likely hinder proving the authenticity of the copied case file later on, or if the lack of full context would make it harder to assess the relevance of the information from the perspective of competition law.

Should disputes arise during the inspection on whether certain documents or other materials are within the powers of inspection from the perspective of the suspected restriction of competition being investigated, the FCCA may, at its discretion, set them apart from other documents and data and resolve the issue later, before the inspection ends. The FCCA decides, ultimately, whether to make a copy of a certain document or electronic material into the case file.

With regard to electronic material, the FCCA often aims to identify documents that may be under the scope of LPP protection using search terms, such as the name of a law firm. In principle, however, the inspectors of the FCCA have the right to briefly examine documents identified in this way and ascertain their LPP nature.



If the FCCA considers a document to be within the scope of its right to inspect, but the undertaking presents probable cause to indicate that the document contains correspondence under LPP protection, the FCCA seals a copy of the document. The document is delivered for assessment to an official of the FCCA assigned to assess LPP protection. The FCCA assigns to the task an official whose duties do not otherwise include dealing with the case in question. The official assesses the LPP nature of the document independently, without the presence of the FCCA inspection team or representatives of the company. If the official considers that the document is within the scope of protection of external legal advice, the document is returned to the undertaking immediately. If the official considers that the document is not within the scope of protection of external legal advice, the document is handed over to the team investigating the case in question. If, after the procedure described above, the undertaking and the FCCA still disagree on the LPP protection of the document that has been handed over to the FCCA investigation team, the matter shall ultimately be resolved by the court handling the main proceedings, e.g. prohibited restriction of competition.

The inspectors may request oral explanations from representatives of the company, and these explanations may be recorded.

The FCCA may seal such parts of premises and material to be inspected for such a time as is necessary for carrying out the inspection. Sealing may, for example, be used if the inspection needs to be continued on the following day. Sealing is carried out by using tape intended for the purpose. Affixing a seal is documented.

- It is recommendable for a representative of the company to be present when premises or materials are sealed, or when a seal is opened, because the company must ensure that the seal remains intact. Breaking the seal without permission from the FCCA is punishable.
- An official of the FCCA opens the seal. The FCCA official examines the integrity of the seal when opening it.

Due to the scope of the material, it may take several days for the inspection to be carried out, and in the case of electronic material, it may sometimes extend to a period of several weeks. An inspection at its fastest and simplest is carried out in good cooperation between the FCCA and the company being subjected to the inspection. Representatives of the company have the right to be present during the inspection, but it must be ensured that FCCA inspectors can work undisturbed.

The persons conducting the inspection will not give detailed information about the content of the investigation. Inspectors will not, for example, comment on questions about how the investigation was initiated or in which other companies the FCCA may carry out inspections.

The inspection team leader answers questions about inspection procedures and powers. At their discretion, the team leader may pass on a question to be answered by the official coordinating the inspection at the FCCA.

### **3.1 IT inspection and handling electronic material**

Most of companies' documentation is in electronic format, and the communication between and within companies takes place electronically. This means that extensive electronic materials are reviewed during an inspection.

The methods of implementing the FCCA's IT inspection may vary from one inspection to another. The IT specialist involved in the inspection cooperates with the company's IT staff to conduct the inspection as smoothly and efficiently as possible.

The agency may request the company to temporarily copy the material onto storage media so that the identification of the relevant files can be carried out in a centralised manner, with minimal burdens on the company's operations. The agency may also create temporary copies of electronic material on its own.

Temporary copies of electronic material may be inspected at the agency's premises with separate computers. The premises where the agency's continued inspection is to be carried out are protected and utilise access control. At the end of the inspection, the storage media onto which the company's electronic material has been temporarily copied will be overwritten appropriately. In this context, overwriting refers to a procedure designed to destroy all electronic material stored in the storage medium so that it is not possible to restore the material with any known methods.

During the investigation, the FCCA uses, for example, key words or other definitions which are used to restrict the material so that only documents and files that may be relevant to the matter under investigation and whose contents are not subject to LPP protection will be copied into the case file. In case of possible disputes, the process described on pages 7–9 is followed

## **4 Concluding the inspection**

At the end of the inspection, files identified as relevant to the investigation are copied onto a CD or other storage media. An identical copy of the contents of the storage medium is made for the target company.

Copies are taken of paper documents, of which an identical copy remains with the target company. The FCCA requires a copy machine for this purpose. If there is no copy machine on the company premises, the FCCA scans the paper documents and saves them

on a storage medium and an identical copy of its contents is made for the target company.

The FCCA draws up a list of the copied case file. Identifying information is marked on the list for each document or data set, with a description of its contents and information on the scope of the material (e.g. number of pages or amount of data).

Duplicates of the copied case file and the list of material are handed over to the company. The FCCA will not review the documents one by one with the company at the end of the inspection. The number of pages or amount of data may be used, if necessary, to help confirm the identity of the copied case file.

Any temporary copies used for the purpose of carrying out the inspection are destroyed. The agency does not retain any material other than the documents and files selected to be copied into the case file.

After the inspection is finished, an inspection report is delivered to the company subjected to the inspection (Administrative Procedure Act, Section 39.2). The course of the inspection and key observations made by the inspector shall be recorded in the inspection report.

### **Immunity from and reduction of penalty payments in cartel cases**

If the undertaking being subjected to the inspection is or has been a party to a cartel between competitors prohibited by Section 5 of the Competition Act or Article 101 of the Treaty on the Functioning of the European Union, it may be eligible for immunity from the penalty payment that would otherwise be imposed on it, upon application under the requirements specified in the Competition Act. Should the aforementioned immunity from penalty payment not be possible due to the provisions of law, the penalty payment that would otherwise be imposed on the undertaking may be reduced, upon application under the requirements specified in the Competition Act.

Immunity from and reduction of penalty payments shall be applied from the Finnish Competition and Consumer Authority.

More information about immunity from and reduction of penalty payments in cartel cases is available on the website of the Finnish Competition and Consumer Authority.

[kky.fi/en/reveal-a-cartel](https://kky.fi/en/reveal-a-cartel)