



14 June 2019

FIVA 4/02.05.05/2019

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Danko Koncar

Subject
Ordering payment of supplementary amounts of conditional fine

Unofficial translation

1. Decision

The FIN-FSA orders Danko Koncar (hereinafter Koncar) to pay the supplementary amounts accrued by the date of this decision, amounting to a hundred and ten million (110,000,000) euro, of the conditional fine imposed in the FIN-FSA decision of 21 February 2018 (Reg. no. FIVA 17/02.05.05/2017, hereinafter the FIN-FSA decision or the decision imposing the conditional fine). The conditional fine is payable to the state of Finland.

Koncar has failed to comply with the obligation imposed on him in the FIN-FSA decision to publish a mandatory bid referred to in chapter 6, section 10 of the Securities Markets Act (495/1989, hereinafter the SMA)¹ for shares issued by Afarak Group Plc (hereinafter Afarak) and securities issued by Afarak carrying entitlement to its shares as provided in the SMA within a month of being served the FIN-FSA decision. In its decision of 1 March 2019 (02810/18/7201), the Helsinki Administrative Court considered that the date of service of the decision imposing the conditional fine shall be the date when Koncar's appeal was received by the Administrative Court, i.e. 16 May 2018. Koncar has not published a bid required by the decision imposing the conditional fine within a month of service of the decision, i.e., by 16 June 2018. Koncar has not presented a valid reason for his failure to comply with the obligation.

The obligations and the running conditional fines imposed in the FIN-FSA decision to enforce them remain in force.

The Board of the FIN-FSA has made this decision regarding the ordering of payment of the supplementary amounts of the conditional fine in its meeting on 14 June 2019.

¹ In accordance with chapter 19, section 6, subsection 1 of the Securities Markets Act (746/2012) that replaced the Securities Markets Act (495/1989), if the bid threshold has been exceeded prior to the entry into force of the Act, the provisions of the Act to be repealed shall be applied. Hence, this decision refers to the provisions of the repealed Securities Markets Act.

2. Hearing

In its letter dated 25 April 2019 (Reg. no. FIVA 4/02.05.05/2019), pursuant to section 22 of the Act on Conditional Fines (1113/1990) and section 34 of the Administrative Procedure Act (434/2003) referred to therein, the FIN-FSA provided, prior to decision-making, Koncar an opportunity to express his opinion on the matter and to submit an explanation on such demands and information which may have an effect on the resolution of the matter. Koncar responded to the FIN-FSA by a letter dated 16 May 2019.

3. Justifications for the decision

3.1 Background

The FIN-FSA has, by its decision issued on 21 February 2018, obliged Koncar on the basis of section 33 a of the Act on the Financial Supervisory Authority (878/2008, hereinafter the FIN-FSA Act) to:

1. publish a mandatory bid referred to in chapter 6, section 10 of the SMA) for Afarak shares and securities issued by Afarak carrying entitlement to its shares as provided in the SMA within a month of being served the FIN-FSA's decision;
2. after the obligation under paragraph 1 has been filled, to launch a bid procedure as provided by the SMA within a month of publishing the mandatory bid; and
3. after the obligation under paragraph 2 has been filled, to execute the bid in accordance with its terms and conditions.

In order to enforce the abovementioned obligations 1–3, the FIN-FSA has imposed, on the basis of section 33 a of the FIN-FSA Act, a conditional fine referred to in section 9 of the Act on Conditional Fines as follows:

- 1) as regards the obligation to publish a mandatory bid referred to above in paragraph 1, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which the obligation was not complied with;
- 2) as regards the obligation to launch a mandatory bid procedure referred to above in paragraph 2, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million (10,000,000) euro per each full month during which the obligation was not complied with; and
- 3) as regards the obligation to execute a bid referred to above in paragraph 3, the base amount of the conditional fine is forty million (40,000,000) euro and supplementary amount ten million

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(10,000,000) euro per each full month during which the obligation was not complied with.

In its decision of 1 March 2019 (02810/18/7201), the Helsinki Administrative Court considered that the date of service of the FIN-FSA decision shall be the date when Koncar's appeal was received by the Administrative Court, i.e. 16 May 2018.

3.2 Service of the hearing letter

Koncar's view

Koncar considers that information on the hearing was not served to him in accordance with the procedure prescribed by law. Hence, the FIN-FSA has not served the hearing letter properly to Koncar, and the deadline to provide a statement has not begun to lapse yet. Koncar deems that the notice shall be served in accordance with the law, considering that he does not have a domicile or address in Finland.

In his statement, Koncar's attorney-at-law Kai Kotiranta (hereinafter Kotiranta) refers to section 56, subsection 3 of the Administrative Procedure Act and states that his assignment does not include taking receipt of services of notices on behalf of the principal, and that his powers of attorney have been restricted in this respect. Therefore, according to Kotiranta, all official notices must be served personally to Koncar in accordance with the provisions on the service of notices.

According to the statement, it is unknown whether the notice has been served to Koncar. Therefore, it is also unknown whether any deadline has begun to lapse in the matter. The statement is given on the basis that the FIN-FSA submitted a hearing letter concerning Koncar to the undersigned. Since the FIN-FSA's interpretation in the matter is unknown, a statement must be made in order to avoid any loss of rights. However, it cannot be deducted on the basis that a statement is made, that Koncar approves the method of service or considers the service to have taken place in accordance with the law.

Koncar requires that actions by authorities concerning himself are made in accordance with the law, and that the authority must take precautions at its own initiative to ensure that the law is complied with.

The FIN-FSA's view

The FIN-FSA considers that the hearing concerning ordering the payment of the supplementary amounts of the conditional fine was conducted in compliance with the Act on Conditional Fines and the Administrative Procedure Act.

In accordance with section 22 of the Act on Conditional Fines, before the imposition or ordering the payment of a conditional fine or the imposition or enforcement of enforced compliance or enforced suspension, the party concerned shall be provided an opportunity to provide an explanation in accordance with the provisions of section 34 of the Administrative Procedure Act. A hearing referred to in section 34 of the Administrative Procedure Act does not require verifiable service of the hearing letter. The FIN-FSA states that no particular reasons have arisen in the case to use other than standard service.

In accordance with section 12, subsection 1 of the Administrative Procedure Act, the services of an attorney or a counsel may be used in an administrative matter. In accordance with section 56, subsection 3 of the Administrative Procedure Act, service on a private individual may be effected on a person authorised by the party, unless the right of the authorised person to receive service has been specifically restricted or unless the service is to be effected on the party personally.

On 21 September 2017, Kotiranta notified to the FIN-FSA that he acts as an attorney for Koncar and requested that any notices and other communications pertaining to the matter be submitted to him as the attorney. The letter concerning the ordering of the supplementary amounts of the conditional fine payable was submitted to Kotiranta as standard service by email and a letter. Kotiranta submitted Koncar's response to the FIN-FSA by the deadline. In addition, Koncar's statement dated 16 May 2019 concerning the hearing letter specifies Koncar as the attorney of the person subject to the hearing, and Kotiranta's address and contact details were indicated as the process address. The FIN-FSA states that Kotiranta has acted as the attorney of the person subject to the hearing throughout the process concerning the bid obligation and the conditional fine, and that the facts presented above demonstrate that Kotiranta is factually authorised to represent his principal and receive service of a hearing letter. The FIN-FSA has acted in accordance with the law in the hearing, since it is possible to use an attorney in an administrative matter, and a hearing letter is not a document whose service should be made against proof of receipt.

3.3 Language of hearing letter

Koncar's view

Koncar states that the hearing letter was not provided to him in his native language. According to Koncar, he does not understand Finnish at all and understands English only slightly. Confidential 24 (1) 3
[REDACTED] on the Administrative Court, Koncar was heard in his native language, Croatian. In Koncar's view, he has the right to use his native language also in other proceedings with authorities, particularly when the matter or matters concern are of considerable importance with respect to his rights or obligations. Koncar deems that in this administrative matter, his linguistic rights should be honoured and he

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should have the right to receive notices, other letters and decisions concerning himself in his native language, that is in Croatian.

The FIN-FSA's view

In accordance with section 26, subsection 2 of the Administrative Procedure Act, the matter may be interpreted or translated into a language that the party can be considered to understand sufficiently in view of the nature of the matter. The FIN-FSA deems that Koncar understands English sufficiently, and therefore the provision of section 26 of the Administrative Procedure Act has not required translating the hearing letter or decision into Croatian (Koncar's native language).

The FIN-FSA's view of Koncar's language skills is based on the fact that, [REDACTED] Koncar has used English as his working language, his emails are in English and he has made appearances in English. [REDACTED]

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3.4 Substantive prerequisites for ordering the supplementary amounts of the conditional fine payable

Content of the hearing letter

Koncar has not published a bid required by the FIN-FSA's decision within a month of service of the decision.

The FIN-FSA is considering taking measures to order the supplementary amounts accrued by the date of this decision payable, since the main obligation under paragraph 1 of the FIN-FSA's decision has not been complied with, and, in the FIN-FSA's view, no valid reason has been stated for the non-compliance. The supplementary amount of the conditional fine is ten million (10,000,000) euro per each full month during which the obligation is not complied with.

The FIN-FSA considers that the preconditions for ordering the supplementary amounts of the conditional fine payable have been met.

Koncar's view

In accordance with section 10, subsection 1 of the Act on Conditional Fines, an authority which has imposed a conditional fine may order it payable if the main obligation has not been complied with and no valid reason has been stated for the non-compliance.

Koncar considers that it is undisputed in this matter that Koncar has not launched a public bid to Afarak shareholders. No public bid has been launched, because in Koncar's view, he is not under the obligation to launch a bid under the Securities Markets Act. Koncar does not own any shares in Afarak. Koncar considers that he does not have control over such shareholders that alone or together exceed the threshold of ownership in Afarak shares required for the obligation to launch a bid. An application for permission to appeal concerning the matter is pending on the Supreme Administrative Court.

Hence, Koncar has appealed the decision of the Helsinki Administrative Court. Koncar considers that the resolution of the matter of the conditional fine should be suspended until the Supreme Administrative Court has given its ruling on the matter.

Koncar considers that there are no grounds in the matter to order the supplementary amounts of the conditional fine to be payable by Koncar. In Koncar's view, the matter should not be resolved until the matter concerning Koncar's claimed bid obligation has been resolved in a legally binding manner.

The FIN-FSA's view

It is undisputed in the matter that Koncar has not launched a mandatory bid for Afarak shares and securities issued by Afarak carrying entitlement to its shares. Hence, the obligation 1 imposed in the FIN-FSA decision has not been complied with.

In his response, Koncar has mainly repeated the claims he made in the hearings concerning the imposition of the obligation to launch a bid and the imposition of the conditional fine as well as the ordering the conditional fine payable in 2018. As to the claims made by Koncar on deeming Koncar comparable to a shareholder, on control over Kermas Limited (hereinafter Kermas) and Kermas Resources Limited, on acting in concert and on the arising and the assignment of the obligation to launch a bid, more extensive arguments are presented in sections 3.2.2–3.2.8 of the FIN-FSA decision.

The FIN-FSA considers that Koncar and entities under his control³ have acted in concert as referred to in the SMA at least with Hino Resources Co. Ltd (hereinafter Hino), Finaline Business Limited (hereinafter Finaline) and his spouse Jelena Manojlovic to exercise control in Afarak. The FIN-FSA emphasises that acting in concert does not necessitate the exercise of control in another entity, but it may also consist of cooperation among shareholders based on an agreement or other kind of common understanding. This is explained in more detail in sections 3.2.3–3.2.6 of the FIN-FSA decision and Appendix 2 thereto.

³ Kermas, Kermas Resources Limited and RCS Trading Corporation Ltd.



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Fulfilment of prerequisites to order the supplementary amounts of the conditional fine payable

Koncar has not published a bid required by the FIN-FSA's decision within a month of service of the decision, that is, by 16 June 2018⁴. Hence, Koncar has not complied with obligation 1 imposed on him in the FIN-FSA decision. No valid grounds for failure to comply with the obligation have been presented.

The supplementary amount of the running conditional fine imposed in the FIN-FSA decision is ten million (10,000,000) euro per each full month during which the obligation is not complied with. Since the obligation has not been fulfilled for the time being, the first supplementary amount accrued on 16 July 2018.⁵ By the time of ordering of the supplementary amounts payable on 14 June 2019, supplementary amounts have accrued from 11 conditional fine periods, totalling 110,000,000 euro. The FIN-FSA considers that the preconditions for ordering 11 supplementary amount payable have been met.

The obligations and the running conditional fines imposed in the FIN-FSA decision to enforce them remain in force.

3.5 Amount of conditional fine

Content of the hearing letter

In his responses concerning the imposition of the conditional fine or ordering the conditional fine payable, Koncar has not presented any evidence of

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The market value of Afarak shares held by Koncar through an entity controlled by him is approximately 59 million euro.

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Koncar may also fulfil the obligations imposed in the FIN-FSA decision so that the mandatory bid is made in his stead by an entity fully owned and controlled by him.

⁴ In its decision of 1 March 2019 (02810/18/7201), the Helsinki Administrative Court considered that the date of service of the decision imposing the conditional fine shall be the date when Koncar's appeal was received by the Administrative Court, i.e. 16 May 2018. As a result, the bid should have been published at the latest on 16 June 2018 and the first supplementary amount accrued on 16 July 2018.

⁵ On 9 July 2018, the FIN-FSA ordered Danko Koncar to pay the base amount of the running conditional fine, 40,000,000 euros, and the supplementary amount of 10,000,000 euros accrued by that date. On 1 March 2019, the Helsinki Administrative Court repealed the FIN-FSA's decision regarding the supplementary amount, since it deemed that the first supplementary amount had not yet accrued at the time the decision was made.

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Koncar's view

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Koncar considers that he does not exercise, and has not exercised, control in Afarak's shareholders in a manner claimed by the FIN-FSA.

Koncar also notes that, according to the hearing letter, Koncar could also fulfil the obligations imposed in the FIN-FSA decision so that the mandatory bid were made in his stead by an entity fully owned and controlled by him. However, the FIN-FSA does not specify such a controlled company. According to Koncar, there is no such company. Therefore, among other reasons, he is unable to comply with the procedure suggested by the FIN-FSA.

The FIN-FSA's view

In accordance with section 11 of the Act on Conditional Fines, a conditional fine may be ordered payable at a lower amount than that imposed if the main obligation has been fulfilled in material respects, the payment capacity of the obligor has been significantly impaired or there are other justified grounds to reduce the amount of the conditional fine.

In his response dated 16 May 2019 to the hearing letter concerning ordering the payment of the supplementary amounts of the conditional fine, Koncar did not demand reduction of the amount of the conditional fine. However, in a previous hearing concerning the imposition of the conditional fine and in his previous appeal to the Administrative Court concerning the imposition of the conditional fine, he stated that if there were legal grounds to impose a conditional fine in the matter, its base amount should not be any more than 50,000 euro and supplementary amount no more than 10,000 euro.

The FIN-FSA states that the justifications to the amount of the conditional fine are presented in section 3.3.3 of the FIN-FSA decision.

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Koncar has claimed that he does not have such an entity fully under his control that could launch the mandatory bid. The FIN-FSA considers that the FIN-FSA decision does not oblige one to make a mandatory bid through a fully-owned controlled company, but only provides the possibility to do so.

Koncar has not fulfilled the main obligation imposed to him in any respect. Koncar has not presented any clarification of his payment

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capacity being significantly impaired after the imposition of the conditional fine. Neither has he presented any clarification of him or the entities controlled by him having even sought to raise funding in order to publish and execute a bid. Koncar has, by particularly reprehensible conduct, failed to comply with the provisions on the obligation to launch a bid. Koncar's misconduct has served to undermine confidence in the securities markets. Therefore, the FIN-FSA considers that there are no other justified grounds referred to in section 11 of the Act on Conditional Fines to reduce the amount of the supplementary amounts of the conditional fine.

Based on the grounds presented above, the FIN-FSA considers that the supplementary amounts of the conditional fine accrued by the time of ordering shall be ordered payable at the amount imposed.

3.6 Ordering payment of supplementary amounts of the conditional fine without legal validity of the FIN-FSA decision imposing them

Content of the hearing letter

In accordance with section 73, subsection 3 of the FIN-FSA Act, the FIN-FSA decision is enforceable despite an appeal, unless the administrative court separately forbids or suspends the enforcement of the decision. By its interim decision of 21 June 2018, the Helsinki Administrative Court rejected Koncar's appeal for a prohibition of enforcement in the matter concerning the imposition of an obligation to launch a bid and the imposition of a conditional fine. On 3 September 2019, the Supreme Administrative Court rejected Koncar's plea to appeal the interim decision.

Koncar's view

Koncar has appealed the decision of the Helsinki Administrative Court. Koncar considers that the resolution of the matter of the conditional fine should be suspended until the Supreme Administrative Court has given its ruling on the matter.

The FIN-FSA's view

On 1 March 2019, the Helsinki Administrative Court repealed Koncar's appeal to repeal the decision imposing the conditional fine. The decision of the Administrative Court is not yet legally binding. Koncar has appealed the decision of the Helsinki Administrative Court and applied for a permission to appeal from the Supreme Administrative Court.

The FIN-FSA considers, that even if the FIN-FSA decision concerning the imposition of the conditional fine is not legally valid, ordering the payment of the supplementary amounts of the conditional fine is

required by the importance of public interest, urgency of fulfilling the main obligation and severity of Koncar's misconduct. Koncar has, by particularly reprehensible conduct, neglected the provisions on the obligation to launch a bid. Koncar's misconduct has served to undermine confidence in the securities markets. The combined portion of ownership in Afarak held by Koncar, entities under his control and persons acting in concert still continues to exceed the bid obligation threshold. Hence, the 11 accrued supplementary amounts shall be ordered payable even though the FIN-FSA decision on the imposition of the conditional fine is not legally valid.

4. Applicable provisions

In accordance with section 33, subsection 1 of the FIN-FSA Act:

If a supervised entity or other financial market participant has in its activities failed to comply with the provisions governing financial markets, or the regulations issued thereunder [--], the Financial Supervisory Authority may, under a conditional fine, order the supervised entity or other financial market participant to fulfil its obligations, provided that the negligence is not negligible. The conditional fine may also be targeted, subject to special grounds, at a person employed by a supervised entity or by another financial market participant or at anyone else acting on behalf of such person. The provisions of this subsection shall also apply to such other undertaking belonging to a conglomerate as referred to in the Act on the Supervision of Financial and Insurance Conglomerates that fails to meet its responsibilities under the said Act or the regulations issued thereunder.

In accordance with section 33 a, subsection 4 of the FIN-FSA Act:

Unless otherwise provided in other acts, the Financial Supervisory Authority shall decide on ordering payment of a conditional fine. The provisions of the Act on Conditional Fines shall otherwise apply to the imposition and ordering payment of conditional fines.

In accordance with section 73, subsection 3 of the FIN-FSA Act:

Decisions of the Financial Supervisory Authority may be enforced prior to gaining legal effect. The decision shall remain in force until further notice, regardless of appeal, unless otherwise provided by the appellate authorities or elsewhere in law.

In accordance with section 10, subsections 1 and 2 of the Act on Conditional Fines:

An authority which has imposed a conditional fine may order it payable if the main obligation has not been complied with and no valid reason has been stated for the non-compliance. A conditional

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fine may be ordered payable once the decision on its imposition has gained legal effect, unless the decision has been provided as valid regardless of any appeal.

The amount of supplementary amounts of a conditional fine which can be ordered payable by one decision is limited to three times of the base amount. Any supplementary amounts exceeding this amount and concerning conditional fine periods which started before the decision was made to order the conditional fine payable will lapse.

Section 11 of the Act on Conditional Fines provides as follows:

A conditional fine may be enforced at a lower amount than that imposed if the main obligation has been fulfilled in material respects, the payment capacity of the obligor has been significantly impaired or there are other justified grounds to reduce the amount of the conditional fine.

5. Disclosure of the decision

The FIN-FSA states that, in accordance with section 43 of the FIN-FSA Act, the main rule is that the FIN-FSA shall disclose its decisions on ordering conditional fines payable. The FIN-FSA considers that, by virtue of section 43, subsection 2 of the FIN-FSA Act, there are no grounds to leave the ordering of the supplementary amounts of the conditional fine payable undisclosed.

FINANCIAL SUPERVISORY AUTHORITY

ANNELI TUOMINEN

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PIRJO KYRÖNEN

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Secretary to the Board

For further information,
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Enclosures

Appeal instructions

Appendix

Appeal instructions

Anyone wishing to lodge an appeal against the findings of the decision is requested to do so in writing to the Helsinki Administrative Court.

Appeal must be made within 30 days of notification of the decision. The appeal period excludes the day of notification of the decision.

If the decision has been posted in registered post (an advice of receipt), the date of notification is indicated in the receipt. The receipt is annexed to the appeal documents. If the decision has been posted as an ordinary letter it shall be considered to have been notified within seven (7) days of the dispatch date, unless otherwise indicated. If the decision has been notified in another manner, eg against receipt to a third party, other than the recipient of the decision (surrogate notification), the recipient of the decision shall be considered to have been notified of the decision on the third day from the date indicated in the receipt.

The appeal must be lodged in writing within the prescribed period to the Helsinki Administrative Court.

The petition for appeal, made to the Helsinki Administrative Court, must contain the following:

1. the decision to which the appeal relates
2. the aspects of the decision that should be amended and the changes being sought
3. the grounds for the changes
4. name and domicile of the appellant and
5. the address and telephone number through which the appellant can be contacted regarding the appeal.

If the right of attorney has been transferred to the appellant's legal representative or authorised proxy, or if the appeal is made by a third party, the name and domicile of such person is to be detailed in the appeal.

The petition must be signed by the appellant, or by his or her legal representative or proxy.

The petition must include the following annexes:

1. the decision to which the appeal relates, original or copy
2. proof of the date of service of the decision, or other proof of commencement of the period of appeal and
3. records relating to and supporting the grounds for the appeal, unless these have been delivered to the investigating authorities at the time of the initial hearing.

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The legal representative must attach the appellant's letter of attorney to the petition, unless the appellant has given verbal notice of the power of attorney to the Helsinki Administrative Court. Lawyers and other court officials are required to present a letter of attorney only if so requested by the Helsinki Administrative Court.

If electronic documents submitted to the authorities define the scope of powers of the legal representative, the legal representative is not required to present a letter of attorney. The Helsinki Administrative Court may, however, demand that a letter of attorney be presented, if it has reason to question the scope of powers.

Appeal may be submitted to the Helsinki Administrative Court personally, shipped by post or through an agent or courier. The delivery of the petition by post or courier service occurs at the appellant's own risk. The petition must arrive at the Helsinki Administrative Court at the latest on the last day of the appeal period, during its opening hours.

Appeal may also be lodged electronically, arriving at the Helsinki Administrative Court's reception facility or IT system in a fully accessible format prior to expiry of the prescribed appeal period. Electronic delivery of documents occurs at the appellant's own risk.

You may also lodge appeal using the electronic communication service of the administrative courts and courts of special jurisdiction, at <https://asiointi2.oikeus.fi/hallintotuomioistuimet>.

Information on current court costs charged by the Helsinki Administrative Court is available at the address www.oikeus.fi. The Act on Court Costs (1455/2015) contains separate provisions on cases when no costs are charged.

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