



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2016

9th Edition

A practical cross-border insight into cartels and leniency

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1 The Legislative Framework of the Cartel Prohibition

1.1 What is the legal basis and general nature of the cartel prohibition, e.g. is it civil and/or criminal?

The legal basis of the cartel prohibition in Macedonia is the Law on the Protection of Competition and the Criminal Law. The Law on the Protection of Competition regulates prohibited forms of prevention, restriction or distortion of competition, and measures and procedures regarding the restrictions of competition. The Law on the Protection of Competition contains only administrative fines for entities that break the cartel prohibitions.

The Criminal Law provides a provision that anticipates criminal responsibility for the authorised person of a company who concludes a cartel agreement or participates in such agreement or practice, and as a result of these activities, the company achieves large profits or causes great damages. The criminal penalty may vary from one to 10 years' imprisonment.

1.2 What are the specific substantive provisions for the cartel prohibition?

The specific substantive regulation of cartel prohibition is given in the Law on the Protection of Competition. Article 7 paragraph 1 of the Law on the Protection of Competition prohibits all agreements concluded between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the distortion of competition, such as:

1. directly or indirectly fixing purchase or selling prices or any other trading conditions;
2. limiting or controlling production, markets, technical development or investments;
3. sharing markets or sources of supply;
4. applying dissimilar conditions to equivalent or similar transactions with other trading parties, thereby placing them at a competitive disadvantage; and
5. making the conclusion of contracts with other parties conditioned by the acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such agreements.

1.3 Who enforces the cartel prohibition?

The national competition authority for enforcing the cartel prohibition and other provisions of the Competition Law in Macedonia is the Commission for Protection of Competition. The Commission is independent in the proceeding and decision-making activities related to the sanctioning of offences related to the disturbance of competition.

1.4 What are the basic procedural steps between the opening of an investigation and the imposition of sanctions?

The misdemeanour procedure before the Commission for misdemeanour matters shall be initiated *ex officio*, at the request of the Secretary General of the Commission or at the request of a natural or legal person having a legitimate interest in determining the existence of a misdemeanour. The Commission for misdemeanour matters shall initiate the misdemeanour procedure with a procedural order against which no appeal or legal action instituting an administrative dispute shall be allowed.

Parties who take part in the misdemeanour procedure are:

- the person against whom the misdemeanour procedure has been initiated; and
- the submitter of the request for the initiation of a misdemeanour procedure referred to in article 34 of the Law (a natural or legal person who has a legitimate interest in determining the existence of a misdemeanour).

For the purposes of exercising the authorisations determined in the Law, the Commission for misdemeanour matters may, by means of a procedural order, request from the undertakings the submission of data regarding their economic-financial condition, their business relations, data regarding their statutes and decisions, and the number and identity of the persons affected by such decisions, as well as other data necessary for conducting the procedure. But, if there is a justified suspicion that a certain undertaking owns documents or other objects or information that could be relevant to prove the existence of a misdemeanour, the Commission for misdemeanour matters may, by means of a procedural order, order the said undertaking to provide the authorised persons of the Commission with evidence on the spot.

With regards to providing the participants to the procedure with the possibility of stating their opinion regarding the facts and circumstances relevant for establishing the actual state of affairs, the

Commission for misdemeanour matters, prior to scheduling an oral hearing, shall submit to the participants a preliminary statement of objections. After the initiation of the procedure, and by the delivery of the final statement of objections at the latest, the person (the undertaking) against whom a procedure has been initiated may offer commitments before the Commission for misdemeanour matters by which the distortion of the competition caused by actions or failure to take action by the person against whom the procedure has been initiated shall be overcome. The Commission for misdemeanour matters shall decide to hold an oral hearing if it is necessary for the establishment of the actual state of affairs.

After the Commission for misdemeanour matters fully establishes the actual state of affairs relevant for correct decision-making, it shall adopt:

1. a decision whereby it shall establish that the person against whom the procedure has been initiated has committed a misdemeanour stipulated by the provisions of the Law and shall impose an appropriate misdemeanour sanction; or
2. a decision whereby it shall establish that the person against whom the procedure has been initiated has not committed an offence stipulated by the provisions of the Law.

1.5 Are there any sector-specific offences or exemptions?

The Law on the Protection of Competition provides for the possibility for certain agreements to be exempt from prohibition under certain terms and conditions.

Under article 7 paragraph 3, the provisions for prohibited agreements between undertakings shall not apply to agreements, decisions of associations of undertakings and concerted practices that contribute to promoting the production or distribution of goods and services or to promoting technical or economic development, provided that the consumers have a proportionate share of the resulting benefit, and which:

1. do not impose restrictions on the concerned undertakings which are not indispensable to the attainment of these contributions; and
2. do not impose on such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

These exemptions shall apply especially on the following types of contracts:

- vertical contracts for exclusive right of distribution, selective right of distribution, exclusive right of purchase and franchising;
- horizontal contracts for research and development or specialisation;
- contracts for technology transfer, licence or know-how;
- contracts for distribution or servicing vehicles;
- insurance contracts; and
- contracts in the transportation sector.

As an exception and when necessary for protecting the public interest relating to the application of the provisions for competition protection, the Commission for Protection of Competition may, acting on its own initiative, establish by means of a decision that the provisions for competition protection are not applicable to a certain agreement, a decision of an association of undertakings or a concerted practice.

Also the provisions for prohibited agreements between undertakings shall not apply to an “agreement of minor importance”, i.e. any agreement in which the joint market share of the parties to the agreement and undertakings under their control on the market does

not exceed the threshold of 10% where the agreement is horizontal or the threshold of 15% where the agreement is vertical. In cases where it is not possible to classify the agreement as either horizontal or vertical, the 10% threshold shall apply. This exemption shall also apply if the market share of the undertakings has not increased by more than 2% in the last two consecutive business years.

1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The Law on the Protection of Competition shall apply to all forms of prevention, restriction or distortion of competition that have an effect on the territory of the Republic of Macedonia, even if they result from acts and actions carried out or undertaken outside of the territory of the Republic of Macedonia.

2 Investigative Powers

2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

Investigatory power	Civil / administrative	Criminal
Order the production of specific documents or information	Yes	Yes *
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	No	Yes *
Carry out an unannounced search of residential premises	No	Yes *
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes	Yes *
■ Right to retain original documents	Yes	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	Yes *

Please Note: * indicates that the investigatory measure requires authorisation by a court or another body independent of the competition authority.

2.2 Please list specific or unusual features of the investigatory powers referred to in the summary table.

The Law on the Protection of Competition provides that if some of the data or documentation which are taken or kept by the authorised persons of the Commission for Protection of Competition are a business or professional secret, the undertaking which is under

investigation may, within eight days as of the day of performing the actions, inspect the taken or kept data and documentation, clearly mark the data and documentation which are a business secret and indicate the legal basis for their classification as such. If the undertaking fails to act, it shall be considered that the collected data and documentation do not contain data which are a business secret.

If, during the course of investigating, there is a probability of hiding, changing or destroying certain data, documents and/or objects which might be crucial for ascertaining an offence, the Commission for Protection of Competition may require assistance from the relevant authorities for keeping public order (police).

This assistance can also be required in case the investigated undertaking/subject does not allow the authorised personnel from the Commission for Protection of Competition to conduct the investigating activities.

2.3 Are there general surveillance powers (e.g. bugging)?

Competition authorities do not have general surveillance powers. The use of bugging is restricted to the most serious criminal offences only, and the cartel prohibition does not fall into this category.

2.4 Are there any other significant powers of investigation?

In case of an emergency, when there is a risk of the occurrence of serious and irreparable damage for competition, the Commission for Protection of Competition can, with a decision, bring temporary measures against the person and/or undertaking. As a temporary measure, the Commission for Protection of Competition may order the cessation of certain actions, fulfilment of certain conditions or other measures necessary for preventing the distortion of the competition and shall determine the duration of the measures. The duration of the measures shall be proportionate and suitable for the goal that has to be attained by the ordered interim measure. The conditions for implementing the measures (types of measures, duration of such) shall be determined in the decision of the Commission.

2.5 Who will carry out searches of business and/or residential premises and will they wait for legal advisors to arrive?

Investigative actions are carried out by authorised personnel from the Commission for Protection of Competition. The authorised persons from the Commission for Protection of Competition shall perform the necessary actions even against their will with the assistance of the relevant authorities for keeping public order. The Law on the Protection of Competition does not provide for any obligation of authorised persons to wait for legal advisors to arrive.

2.6 Is in-house legal advice protected by the rules of privilege?

No, there are no provisions in this respect in the applicable law. According to the Law on Advocacy, the legal advice that an outside lawyer provides to a company must be given with consciousness and expertise, in accordance with the laws and the lawyers' codex, and they must keep secret and privileged the information at their disposal given by the company.

2.7 Please list other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals under investigation.

There are no explicit material limitations. During the investigation, the company and the individuals concerned are protected by their fundamental rights of defence.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The Commission for Offence Matters shall, by means of a decision, impose a fine on the undertaking or association of undertakings, in the amount of up to 1% of the value of the total annual turnover calculated in the absolute and nominal amount earned in the last business year for which the undertaking or association of undertakings has compiled an annual account if there is any obstruction of an investigation.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to the Law on the Protection of Competition, if the Commission concludes a prohibited agreement or otherwise participates in an agreement, decision or concerted practice leading to the distortion of competition within the meaning of article 7 of the Law on the Protection of Competition, if a person (an undertaking) fails to act pursuant to the decision of the Commission for Protection of Competition for temporary measures, or if an undertaking fails to act pursuant to the decision of the Commission for Protection of Competition for offence matters, the Commission shall impose a fine in the amount of up to 10% of the value of the total annual turnover earned in the last business year, calculated in the absolute and nominal amount for which the undertaking or association of undertakings has compiled an annual account.

Regarding the offence sanction described above, the Commission for Offence Matters may impose on the legal person, in addition to the fine, a temporary ban on the performance of a specific activity for the duration of three to 30 days.

3.2 What are the sanctions for individuals?

The monetary sanctions for individuals are the same as monetary sanctions for legal entities under the Law on the Protection of Competition. As an exception to the rule, regarding the offences, the Commission for offence matters may impose on the natural person, in addition to the fine, a ban on the performance of an occupation, activity or duty for a duration of three to 15 days.

3.3 Can fines be reduced on the basis of 'financial hardship' or 'inability to pay' grounds? If so, by how much?

The Commission for offence matters may, at the request of the perpetrator of the offence and when determining the fine, take into account its payment incapability against a specific social and economic background. The fine may not be reduced due to this

reason should it concern financial losses of the perpetrator of the offence committed for the purpose of avoiding the payment of a fine. The fine may be reduced solely if the perpetrator presents evidence that the fine, determined in line with the provisions of the Law, would jeopardise the economic capability of the perpetrator and would cause their assets to lose their value.

3.4 What are the applicable limitation periods?

Generally, the offence procedure may not be initiated or conducted after the expiry of three years regarding offences referred to as procedural offences, and five years regarding offences referred to as serious offences to provisions such as the cartel prohibition provisions. The deadlines for limitation shall begin to run as of the day of committing the offence. Should it concern an extended or repeated offence, the deadlines for limitation shall begin to run as of the day when the offence was terminated. The imposed offence sanction may not be enforced if two years have elapsed as of the day of the effectiveness of the decision establishing the existence of an offence. The limitation of the offence prosecution and the limitation of the enforcement of the offence sanction shall occur in any case when twice the time legally required for the limitation of the offence prosecution or for the execution of the offence sanction elapse.

3.5 Can a company pay the legal costs and/or financial penalties imposed on a former or current employee?

There is no explicit legal provision and the applicable legislation does not contain an express prohibition in this respect. Thus, the company is free to compensate the former or current employee for the legal costs and/or penalties imposed on a former or current employee.

3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

An offence committed by the legal person does not exclude the responsibility of the perpetrator.

The responsible person in a legal entity or sole proprietor will be fined for an offence when the offence resulted from his actions or from his failure to supervise. Also, if a company/employer suffers damages as a direct result of the employee's actions (in this case the imposed penalties), the company can request compensation of such damages from the employee in a civil procedure.

4 Leniency for Companies

4.1 Is there a leniency programme for companies? If so, please provide brief details.

According to the Law on Protection of Competition, there is a leniency programme for companies. With a view of discovering cartels which constitute misdemeanours, the Commission for misdemeanour matters, acting upon the request from an undertaking that has admitted to its participation in a cartel, will grant full immunity from the fine which should be, as per the decision, imposed on the said undertaking.

Full leniency is available to the first cartel member who produces evidence to the Commission for Protection of Competition of the existence of a cartel, which will enable the Agency to commence the proceeding in connection with the alleged anticompetitive practice

or, if the Commission has already initiated the proceeding, that will enable it to end the proceeding. In the case that an applicant is not eligible for full leniency, his fines may be reduced if he furnished additional evidence to the Commission, which will substantially contribute to the closure of the proceeding concerned. The following conditions must also be fulfilled in the case of both full leniency and reduction of a fine:

1. the applicant must cease his involvement immediately;
2. he must cooperate with the Commission throughout the proceeding;
3. he must keep his application a secret from other cartel members;
4. he must keep his application a secret from all others except from the competition authorities outside of Macedonia; and
5. the applicant must not destroy, conceal or forge the evidence relevant for the Commission's decision in the instant case.

The Commission for offence matters will not grant full immunity to an undertaking that, during the existence of the alleged cartel, has taken steps to coerce other undertakings to join the cartel or to remain in it, but it can grant a reduction of fines if the undertaking fulfils the relevant requirements and meets all the conditions mentioned above.

4.2 Is there a 'marker' system and, if so, what is required to obtain a marker?

No, there is no marker system provided in the Law by which a formal confirmation shall be given to an immunity applicant (company or individual) who is the first party to approach the Commission to request a grant of immunity with respect to a particular cartel. However, the Law on the Protection of Competition provides complete exemption from imposing a fine to leniency applicants that participate in a cartel in the following cases:

- if the person is first to provide evidence to the Commission for Protection of Competition that will enable the Commission to initiate and conduct an offence procedure; or
- if the person is first to provide evidence to the Commission that will enable the Commission to decide on an offence in an offence procedure that is already pending, if without such evidence the existence of the offence could not be ascertained.

The leniency to applicants shall be applicable to persons that fulfil the following conditions:

- the applicant stops his participation in the cartel immediately after the application submission;
- the applicant cooperates with the Commission completely, continuously and provides the requested info and data in a timely manner;
- the applicant does not inform the other participants in the cartel of the submitted application;
- prior to submitting the application, the applicant does not disclose the existence or the content of the application, except to authorised and relevant institutions for sanctioning cartels outside Macedonia; and
- the applicant does not destroy, hide, or falsify relevant documents by which the existence of the offence can be ascertained.

4.3 Can applications be made orally (to minimise any subsequent disclosure risks in the context of civil damages follow-on litigation)?

Leniency applications cannot be made orally, only in written form.

4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

There is no explicit legal provision in this respect.

4.5 At what point does the ‘continuous cooperation’ requirement cease to apply?

The applicant must cooperate with the Commission throughout the entire duration of the procedure within the Commission; therefore the finishing of the proceedings with a Decision by the Commission shall mean a cessation of the obligation for the cooperation in the particular matter.

4.6 Is there a ‘leniency plus’ or ‘penalty plus’ policy?

There is no “leniency plus” or “penalty plus” policy provided in the Law.

5 Whistle-blowing Procedures for Individuals

5.1 Are there procedures for individuals to report cartel conduct independently of their employer? If so, please specify.

Any individual who has any information or evidence about cartel conduct can report it to the Commission, therefore the general procedure for reporting a cartel shall apply.

6 Plea Bargaining Arrangements

6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities’ approach to settlements changed in recent years?

Yes, there is a settlement procedure outside of the leniency process. The purpose of the procedure is to attain the consent of the perpetrators of offences and the competent authorities for the elimination of harmful consequences of the committed offence and to prevent the perpetration of offences and therefore avoid running the offence proceedings before the competent court or offence authority. Recently there have not been any changes to the rules on the settlements approach.

7 Appeal Process

7.1 What is the appeal process?

The decisions of the Commission for misdemeanour matters as well as the decisions in an administrative procedure (for administrative matters) are final and the concerned undertaking has no right to appeal. Yet, the concerned entity may challenge the decision in an administrative court dispute in front of the Administrative Court. The legal action on instituting an administrative dispute against a decision brought in a misdemeanour procedure shall be brought

within eight days as of the day of receiving such decision, while for decisions brought in an administrative procedure the administrative dispute shall be initiated within 30 days as of the day of receiving the decision.

7.2 Does an appeal suspend a company’s requirement to pay the fine?

Challenging the Commission’s decision (in a manner as described in question 7.1 above) suspends the execution of the fine.

7.3 Does the appeal process allow for the cross-examination of witnesses?

Cross-examination of witnesses shall be done in the procedure that is preceding the decision, while in the process of challenging the decision (in a manner as described in question 7.1 above). In front of an administrative court, it is usually not allowed.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for ‘follow on’ actions as opposed to ‘stand alone’ actions?

In case damage is caused by any action prohibited by the provisions of the Law on the Protection of Competition, the person who suffered the damage may request compensation from the sanctioned person through a lawsuit in a civil procedure according to the positive legislation of the Republic of Macedonia. The lawsuit submitted can be both a follow-on or stand-alone action, however, when initiating a damage compensation follow-on lawsuit with a prior decision for a conducted offence ascertained by the Commission for Protection of Competition, the plaintiff has greater chance of success in the dispute since the offensive action by the defendant has already been ascertained.

8.2 Do your procedural rules allow for class-action or representative claims?

Yes, according to Macedonian laws, class-actions are allowed. Damage claims may be consolidated in a single lawsuit by persons claiming to have suffered injury as a result of the same infringement, or proceedings may be joined after the submitting of different lawsuits.

8.3 What are the applicable limitation periods?

The limitation period for submitting damage actions is three years after the damaged party learned of the damage and of the person that caused it; there is a general damage limitation period of five years from the occurrence of damage.

8.4 Does the law recognise a “passing on” defence in civil damages claims?

Macedonian law does not recognise literally a “passing on” defence in civil damages claims but it is possible for a customer to be involved in a process started between the retailer claiming damages and the manufacturer who has participated in a price-

fixing agreement. The customer may also request damages from the manufacturer (as a direct victim of the price-fixing agreement) and by that effect, decrease the damage claim of the retailer against the manufacturer.

8.5 What are the cost rules for civil damages follow-on claims in cartel cases?

There are no particular cost rules for civil damages follow-on claims in cartel cases and thus the general cost rules for a civil damage compensation procedure shall be applicable.

8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

The publicly available court practice archive does not have any records of follow-on or stand-alone civil damages claims for cartel conduct. Also, out of court settlements, which we believe are rare in Macedonia, are not publicly available.

9 Miscellaneous

9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

The latest statutory developments in this regard were made in 2015 and they have already been mentioned in this chapter.

The most significant case which caused “waves” in the anti-cartel filed in Macedonia was the case of the Commission for Protection of the Competition against several companies active in energy sector in Macedonia which were imposed with fines of about 3 million EUR per their “cartel” behaviour and acts on the energy market in Macedonia. That was a serious warning that the Competition Commission in Macedonia is active and very carefully protecting competition on the Macedonian markets.

9.2 Please mention any other issues of particular interest in your jurisdiction not covered by the above.

Anti-cartel advising campaigns are more often in every market area and entities are more informed on their rights and the consequences in relation to and arising out of cartels and other activities of disturbance of competition.

The Commission for Protection of Competition issues guidelines in interpretation of articles from the Law on the Protection of Competition related to prohibited contracts and cartel identification. Recently, the Commission issued a guideline on discovering illegal contracts in public procurement procedures which are an important segment of the economic system and the competition in that segment is an essential principle.

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Jasmina I. Jovanovik joined Debarliev, Dameski & Kelesoska, Attorneys at Law in 2005. She passed the Bar exam and became a member of the Macedonian Bar Association in 2007.

Recently Jasmina was promoted into partner at DDK Attorneys at law and having an extensive experience in the spheres of competition and corporate law by participating in various projects including M&A, concentrations affecting the Macedonian market in the past 10 years, Jasmina is the leading lawyer in DDK for assessment of competition matters in commercial contracts and the merger filing procedures in front of the competition authorities in Macedonia.



DEBARLIEV, DAMESKI & KELESOSKA
attorneys at law

Accepting the premise that no one can be equally versed in all fields of law, Debarliev, Dameski & Kelesoska, Attorneys at Law (DDK) has been created as a company committed to being the leading business law firm in Macedonia.

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The quality of Debarliev, Dameski & Kelesoska, Attorneys at Law rests mainly upon the quality of its attorneys, their accessibility and efficiency. DDK's attorneys share outstanding academic backgrounds, as well as a strong commitment to legal perfection.

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