



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2019

12th Edition

A practical cross-border insight into cartels and leniency

Published by Global Legal Group, with contributions from:

AGON PARTNERS

AKD

Aramis

Arnold Porter Kaye Scholer LLP

Bán, S. Szabó & Partners

Borenus Attorneys Ltd

Cassels Brock and Blackwell LLP

Crowell & Moring

Cyril Amarchand Mangaldas

Debarliev Dameski & Kelesoska, Attorneys at Law

Drew & Napier LLC

ELIG Gürkaynak Attorneys-at-Law

Hannes Snellman

King & Wood Mallesons

Mamo TCV Advocates

MinterEllisonRuddWatts

ML Abogados

Morais Leitão, Galvão Teles, Soares da Silva & Associados, R. L.

Nagashima Ohno & Tsunematsu

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Preslmayr Rechtsanwälte OG

Rahmat Lim & Partners

Shearman & Sterling LLP

Skadden, Arps, Slate, Meagher & Flom LLP

Wilmer Cutler Pickering Hale and Dorr LLP



Contributing Editors
Geert Goeteyn, Matthew Readings & Elvira Aliende Rodriguez, Shearman & Sterling LLP

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Sales Support Manager
Toni Hayward

Sub Editor
Oliver Chang

Senior Editors
Suzie Levy
Caroline Collingwood

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
October 2018

Copyright © 2018
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-39-3
ISSN 1756-1027

Strategic Partners



General Chapters:

1	Cartel Updates: Recent Trends in Fine Calculations and Cartel Liability – Elvira Aliende Rodriguez & Geert Goeteyn, Shearman & Sterling LLP	1
2	The Proposed Whistleblowers Directive – Ingrid Vandenborre & Thorsten Goetz, Skadden, Arps, Slate, Meagher & Flom LLP	6
3	Navigating the Tensions Between Leniency Cooperation and the Risk of Private Follow-On Damage Claims in Cartel Cases – Niels Ersbøll & Jane Wessel, Arnold Porter Kaye Scholer LLP	12
4	Disincentives to Leniency: Expect Fewer Golden Eggs if You Harass the Goose – Frédéric Louis, Wilmer Cutler Pickering Hale and Dorr LLP	18

Country Question and Answer Chapters:

5	Australia	King & Wood Mallesons: Sharon Henrick & Wayne Leach	23
6	Austria	Preslmayr Rechtsanwälte OG: Dieter Hauck	33
7	Belgium	Crowell & Moring: Thomas De Meese	40
8	Canada	Cassels Brock and Blackwell LLP: W. Michael G. Osborne & Chris Hersh	46
9	China	King & Wood Mallesons: Susan Ning & Kate Peng	53
10	Ecuador	ML Abogados: María Teresa Lara & Ricardo Montalvo	62
11	European Union	Shearman & Sterling LLP: Elvira Aliende Rodriguez & Geert Goeteyn	70
12	Finland	Borenus Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi	80
13	France	Aramis: Aurélien Condomines & Pierre Galmiche	87
14	Germany	Shearman & Sterling LLP: Mathias Stöcker	94
15	Hungary	Bán, S. Szabó & Partners: Chrysta Bán & Álmos Papp	102
16	India	Cyril Amarchand Mangaldas: Avaantika Kakkar & Bharat Budholia	109
17	Italy	Shearman & Sterling LLP: Paolisa Nebbia	116
18	Japan	Nagashima Ohno & Tsunematsu: Yusuke Kaeriyama & Takayuki Nakata	123
19	Macedonia	Debarliev Dameski & Kelesoska, Attorneys at Law: Dragan Dameski & Jasmina Ilieva Jovanovik	128
20	Malaysia	Rahmat Lim & Partners: Raymond Yong & Penny Wong	136
21	Malta	Mamo TCV Advocates: Annalies Muscat & Laura Spiteri	142
22	Netherlands	AKD: Joost Houdijk & Robbert Jaspers	150
23	New Zealand	MinterEllisonRuddWatts: Jennifer Hambleton & Alisaundre van Ammers	157
24	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados, R. L.: Luís do Nascimento Ferreira & Inês Gouveia	164
25	Singapore	Drew & Napier LLC: Chong Kin Lim & Dr. Corinne Chew	176
26	Spain	King & Wood Mallesons: Ramón García-Gallardo	183
27	Sweden	Hannes Snellman: Peter Forsberg & Haris Catovic	199
28	Switzerland	AGON PARTNERS: Patrick L. Krauskopf & Fabio Babey	206
29	Turkey	ELIG Gürkaynak Attorneys-at-Law: Gönenç Gürkaynak & Öznur İnamlır	212
30	United Kingdom	Shearman & Sterling LLP: Matthew Readings & Ruba Noorali	221
31	USA	Paul, Weiss, Rifkind, Wharton & Garrison LLP: Charles F. (Rick) Rule & Joseph J. Bial	229

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication. This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Macedonia

Debarliev Dameski & Kelesoska,
Attorneys at Law

Dragan Dameski



Jasmina Ilieva Jovanovik



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 for cartel prohibition in Macedonia is the Law on the Protection of Competition (the “Competition Law”) and the Criminal Law (the “Criminal Law”). The Competition Law prohibits forms of prevention, restriction or distortion of competition, measures and procedures regarding the restriction of competition with the purpose to ensure free competition on the domestic market. The Competition Law prescribes only monetary fines for undertakings that break the cartel prohibitions.

Additionally, the Criminal Law prescribes individual 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.

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

The specific substantive regulation of cartel prohibition is given in the Competition Law. Article 7 paragraph 1 of the Competition Law 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.

When it comes to criminal liability, in accordance with the Criminal Law, the responsible person in the legal entity who concludes an agreement or participates in the conclusion of an agreement, decision or concerted practice prohibited by law, and aims to prevent, limit

or disorder competition, and thus the legal entity obtains property benefits in greater extent or causes damage in greater extent, shall be sentenced to imprisonment with a duration from one up to 10 years.

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 the Protection of Competition (“the Commission”). The Commission is independent in the proceeding and decision-making activities related to the sanctioning of offences related to the disturbance of competition.

However, when it comes to individual criminal liability of the responsible person in the legal entity that has participated in a cartel, the competent authority is the Basic Public Prosecution Office.

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

The 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 Competition 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 regard to providing the participants in the procedure with the possibility of stating their opinion regarding the facts and circumstances relevant to 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 Competition 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 Competition Law.

On the other hand, in case a criminal procedure has been initiated against the responsible person of a legal entity that has participated in a cartel, the procedure contains the following phases:

1. Pre-investigation procedure – initiation of the criminal procedure.
2. Investigation procedure.
3. Indictment.
4. Court procedure.
5. Verdict.

The criminal procedure is initiated by submission of a criminal charge by the police *ex officio* or at the request of any person. The procedure is public in all phases, except the pre-investigation phase, whereby the police or the public prosecutor informally collect evidence. As soon as there is reasonable doubt as to a committed crime, the public prosecutor adopts an order and initiates an investigation procedure. The criminal procedure is no longer secret and the prosecutor and the police have broad investigation authorisations for the purpose of determination of the facts, including: search (of premises and persons); temporary provision and seizure of objects or property; examination of the suspect; examination of witnesses; determination of expertise by expert witnesses; insight and reconstruction; and other special investigative measures. In the case that there is enough evidence for a committed crime, the public prosecutor adopts an indictment, by which a court procedure is initiated and a judge is authorised to decide whether the indictment and the evidence proposed by the public prosecutor are sufficient to reach a conviction.

1.5 Are there any sector-specific offences or exemptions?

Under article 7 paragraph 3 of the Competition Law, the provisions for prohibited agreements between undertakings shall not apply to contracts, 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 especially apply to 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 related to the application of the provisions for competition protection, the Commission 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.

Furthermore, 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.

Specific conditions for exemptions from the cartel prohibition are prescribed with by-laws for each sector.

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

The Competition Law 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)	Yes	Yes*

Please Note: * indicates that the investigatory measure requires the 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.

As it can be seen from the table above, it is clear that investigatory powers of the Commission are quite broad, and their exercise does not require any other prior warrant or court authorisation; they are done on the basis of an internal procedural order of the Commission. Furthermore, the participant in the misdemeanour procedure has no right to appeal, oppose, or engage in any kind of other legal action against such procedural order of the Commission.

The Competition Law prescribes that if some of the data or documentation which are taken or kept by the authorised persons of the Commission 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 may require assistance from the relevant authorities for keeping public order (e.g. the police).

This assistance can also be required in cases where the investigated undertaking/subject does not allow the authorised personnel from the Commission to conduct investigation activities.

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

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

However, in the case the crime is committed or has been committed by an organised group, the Public Prosecution Service can request the court to grant surveillance measures over the suspects, including:

- monitoring and recording of telephone and other electronic communications in a procedure determined by a special law;
- monitoring and recording in a home, office or enclosed space that belongs to that home or office space which is designated as private, or in a vehicle, and entry into those premises for the purpose of creating conditions for monitoring communications;
- secret surveillance and recording of persons and objects with technical means outside of the home or office space designated as private;
- gaining secret insight and carrying out a search within a computer system;
- automatically or otherwise, carrying out a search and comparison of personal data;

- inspection of realised telephone and other electronic communications;
- simulated purchase of objects;
- simulated giving and receiving of bribes;
- controlled delivery and transport of persons and objects;
- using persons with a hidden identity to monitor and collect information or data;
- opening a simulated bank account; and
- simulated registration of legal entities or use of existing legal entities for data collection.

2.4 Are there any other significant powers of investigation?

In the case of an emergency, when there is a risk of the occurrence of serious and irreparable damage for competition, the Commission can, with a decision, adopt temporary measures against the person and/or undertaking. As an interim measure, the Commission may order the cessation of certain actions, fulfilment of certain conditions or other measures necessary for preventing the distortion of competition, and shall determine the duration of the measures. The duration of the measures shall be proportionate and suitable to the goal that has to be attained by the ordered interim measure. The conditions for implementing the measures (e.g. the types of measures and 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. The authorised persons from the Commission shall perform the necessary actions even against the will with the assistance of the relevant authorities for keeping public order. The Competition Law does not prescribe for any obligation of authorised persons to wait for legal advisors to arrive.

When it comes to criminal procedures, the search is conducted on the basis of a court order and is performed by authorised persons appointed by the court – usually the public prosecutor with the assistance of police officers. The suspect can request his attorney-at-law to be present during the search, in which case the attorney-at-law must be awaited, but for no longer than two hours.

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. However, documentation that contains business secrets can be marked as such and the Commission is obliged to keep the information confidential and not disclose it to the public.

According to the Law on Advocacy, the legal advice that an outside lawyer provides to a company must be given in good conscience and with 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.

On the other hand, criminal procedure prescribes certain cases where rules of privilege are applied. Communication between the suspect and his attorney-at-law cannot be used as evidence in the criminal procedure. In cases where the evidence given in front of the court may present a possibility that an important business secret is going to be disclosed to the public during a court hearing, the public can be exempted from the hearing.

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

The Commission has a few limitations in exercising its investigatory powers, namely:

- temporary seizure of objects, books or other documentation which is relevant for the determination of an offence may not be held longer than the effective termination of the misdemeanour procedure; and
- sealing business premises for the purpose of examination of the books and documentation may not be longer than seven days.

Furthermore, during the misdemeanour procedure and prior to the oral hearing the Commission is obliged to deliver a preliminary statement whereby all the facts have been determined and give opportunity of the participants a right of defence.

Similarly, prior to the adoption of the final decision, the Commission is obliged to deliver the final statement whereby all the facts have been determined and give the participants the opportunity of a right of defence.

During the investigation, the company and the individuals concerned are protected by their fundamental rights of defence.

On the other hand, the investigatory powers of the police and the public prosecutor in criminal procedures include, in particular, the following limitations:

- the suspect has to be aware of his rights and has to be informed of his rights before every questioning, including the following information: the charge against him and the grounds for suspicion that stand against him; that he is not obliged to present his defence, nor to answer the questions asked, but if he makes a statement it can be used in the procedure against him; that he can take a counsel of his own choice with whom he can be independently advised and who can attend the questioning; that he can plead for the crime that he is charged for and present all the facts and evidence in his favour; that he has the right to inspect the records and to examine the objects that have been seized; that he has the right to the free assistance of an interpreter, if he does not understand or speak the language used in the questioning; and that he has the right to be examined by a doctor if he is in need of medical treatment or for the purpose of determining any possible police overdrafts;
- a witness cannot be a person who by his statement may disclose information he is aware of as a result of his professional interaction with the suspect (e.g. attorney-at-law, priest or doctor); and
- other limitations of the investigative powers.

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.

In criminal procedures, obstruction of the investigation procedure is considered as a crime and is severely sanctioned. In case there

is a reasonable doubt that the suspect will obstruct the investigation procedure, the public prosecutor can request alternative measures for identification and security to be imposed.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

According to the Competition Law, if an undertaking 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 Competition Law, if an undertaking fails to act pursuant to a decision of the Commission stipulating an interim measure, or if an undertaking fails to act pursuant to a decision adopted by the Commission 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 (e.g. criminal sanctions, director disqualification)?

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

On the other hand, according to the Criminal Law, criminal liability is intended only for individuals who are responsible in a legal entity which has participated in a cartel. The sanction is imprisonment of one to 10 years in duration.

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. However, it may not be reduced due to this reason if financial losses of the perpetrator of the offence were 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 Competition 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 misdemeanour procedure cannot be initiated or conducted after the expiry of three years regarding procedural offences, and five years regarding serious offences, such as those on cartel prohibition. The imposed sanctions cannot be enforced, if two years have elapsed as of the day of the effectiveness of the decision

establishing the existence of the misdemeanour. In any case, the misdemeanour is considered as absolutely obsolete and no actions with regard to it may be taken if twice the time legally required for the limitation of the offence prosecution or for the execution of the offence sanction has elapsed.

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.

With regard to criminal responsibility of individuals, criminal procedures cannot be initiated after the lapse of 10 years since the performance of the criminal offence. Sanctions imposed in a criminal procedure cannot be enforced: after the passing of three years, in cases where the imposed sanction is imprisonment of a duration of more than one year; after the passing of five years, in the case of imprisonment for more than three years; and after 10 years, in the case of imprisonment for over five years.

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 a legal person does not exclude the responsibility of the perpetrator.

The responsible person in a legal entity or its 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.

3.7 Can a parent company be held liable for cartel conduct of a subsidiary even if it is not itself involved in the cartel?

In accordance with the definition given in the Competition Law, cartels are "agreements and decisions and/or concerted practices between two or more undertakings aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition, especially through fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets, bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other undertakings-competitors to the cartel participants". Therefore, as a general rule, parent companies are not held liable for the cartel conduct of its subsidiary.

However, in case a parent company exercises its decisive influence over the subsidiary and is directly involved in the management of the subsidiary, both companies may be considered as one undertaking, taken in consideration that the definition of undertaking is not always the same as the corporate legal entity. Under this assumption, a parent company may be held liable if it is proven that the anti-competitive conduct of a subsidiary is a result of exercising decisive influence over the subsidiary.

4 Leniency for Companies

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

According to the Competition Law, there is a leniency programme for companies. With a view to 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 of the existence of a cartel, which will enable the Agency to commence the proceeding in connection with the alleged anti-competitive 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 furnishes 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 the competition authorities outside of Macedonia; and
5. he must not destroy, conceal or forge evidence relevant to 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?

A marker system for the leniency programme is available, in accordance with the Decree for leniency. In order to obtain a marker, it is necessary to notify the Commission of the intention of filing an application for leniency. Notice may be given either orally in minutes or in writing, and by submission of the notice the notifying undertaking must provide the following information:

- the name and head office of the person submitting the notice;
- the name and seat of the participants in the cartel;
- a description of the affected goods and/or services and the area in which the cartel would have an effect;
- an estimation of the duration of the cartel;
- a description of the actions that constitute a cartel;
- an explanation of the reasons for submitting the notice; and
- information about other previous or possible future release requests, or reductions in fines on other authorities that are responsible for sanctioning the cartel outside the Republic of Macedonia.

The Commission shall issue a certificate of the marker and determine a deadline for the provision of other necessary information and/or evidence in order to accept the application for leniency. In the case that the person notifying fulfils the conditions of the marker

and provides enough information and evidence for the cartel, it is considered that the application for leniency has been submitted on the day of the notification for the intention of application for leniency of the Commission.

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

The Competition Law permits an application for leniency to be submitted orally; however, the statement given orally must be recorded in minutes.

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.

However, the Commission can only allow the statement to be viewed by legal entities that are a subject to the misdemeanour procedure at hand and under the condition that they will not copy any of the information which it contains. This is considered special protection of the statement.

The statement is not under such special protection from the moment when the applicant for leniency has disclosed its content to third parties.

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 cooperation in the particular matter.

4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Macedonian legislation does not prescribe any "leniency plus" or "penalty plus" programmes or policies.

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.

Macedonian legislation prescribes a procedure for reporting in cases where a person has a reasonable suspicion or knowledge that an unlawful action or performance that violates or threatens the public interest has been performed, is being performed/executed, or is likely to be performed, all in accordance with the Law on Protection of Whistleblowers, adopted in 2015.

A whistleblower is considered a person who:

- has been an employee for a definite or indefinite period in the institution or legal person on which it is reporting;
- is a candidate for employment, voluntary work or an internship in the institution or the legal entity on which it is reporting;

- is either a volunteer or an intern in the institution, legal entity or legal person on which it is reporting;
- is or was engaged to perform the work of the institution, i.e. the legal entity on which it is reporting, on any ground;
- is or has been in a business relationship or another relationship of cooperation with the institution, that is, the legal entity on which it is reporting, for whatever reason; and/or
- uses or has used services in the institution or legal entity in the public or private sector on which it is reporting.

Whistleblowers are subject to special protection for reporting unlawful actions of their employers, in accordance with this law.

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 offence proceedings being brought before the competent court or offence authority.

There have not been any changes recently to the rules regarding the authorities' approach to settlements.

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 undertaking concerned has no right to appeal. Yet, the concerned entity may challenge the decision in front of the Administrative Court of the Republic of Macedonia. The lawsuit in front of the Administrative Court will suspend the enforcement of the Commission for Misdemeanour Matters' decision.

The legal action for challenging the decision adopted in a misdemeanour procedure must be brought within eight days as of the day of receipt of such decision.

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

Challenging the Commission's decision (in the manner 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 precedes the decision, while in the process of challenging the decision (in the manner described in question 7.1 above). It is usually not allowed in front of an administrative court.

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?

If damage is caused by any action prohibited by the provisions of the Competition Law, the entity who suffered the damage may request compensation from the sanctioned undertaking through a lawsuit in a civil procedure, according to the legislation of the Republic of Macedonia. The lawsuit submitted can be either 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, the plaintiff has a 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 law, 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.

On the other hand, representative actions are not recognised and regulated in Macedonian law.

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 thereby affect/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 occurred in 2015.

The most significant case to have made "waves" in the anti-cartel field in Macedonia was the case of the Commission for Protection of Competition against several companies active in the energy sector in Macedonia which had fines of about 3 million EUR imposed due to their "cartel" behaviour and acts on the energy market in Macedonia. This sent a serious warning that the Competition Commission in Macedonia is active and very carefully protecting competition in 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 being run increasingly often in every market area, and entities are becoming more informed of their rights and the consequences in relation to, and arising out of, cartels and other activities constituting disturbance of competition.

The Commission is issuing guidelines on the interpretation of articles of the Competition Law 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 competition in that segment is an essential principle.

**Dragan Dameski**

Debarliev Dameski & Kelesoska,
Attorneys at Law
Mirche Acev Street 2, 3rd floor
1000 Skopje
Macedonia

Tel: +389 2 3215 471
Email: dameski@ddklaw.com.mk
URL: www.ddklaw.com.mk

Dragan Dameski is one of the founders of Debarliev Dameski & Kelesoska, Attorneys at Law. He is the head of the corporate department of the company. Corporate law, M&A, competition, public procurement and direct foreign investments are his most valued areas of expertise.

Dragan graduated from Iustinianus Primus Faculty of Law in Skopje, the Republic of Macedonia in 1999. He continued his postgraduate studies in business law at the Law Faculty in Skopje, and in economics and business administration at Sheffield University in Thessaloniki, Greece.

In 2003, Dragan was admitted to the Macedonian Bar Association, and since 2005 he has been a member of the Management Board of the Association of Mediators of Macedonia. He is also a member of the International Association of Lawyers (UIA) and the International Bar Association (IBA).

He represents and advises clients on various competition matters in different markets in Macedonia, and also has extensive experience of representing domestic and foreign clients in administrative, infringement and court procedures in the area of competition.

**Jasmina Ilieva Jovanovik**

Debarliev Dameski & Kelesoska,
Attorneys at Law
Mirche Acev Street 2, 3rd floor
1000 Skopje
Macedonia

Tel: +389 2 3215 471
Email: ilieva@ddklaw.com.mk
URL: www.ddklaw.com.mk

Jasmina Ilieva Jovanovik joined Debarliev, Dameski & Kelesoska, Attorneys at Law in 2005. Jasmina graduated with a Degree in Law from Iustinianus Primus Faculty of Law in Skopje, the Republic of Macedonia in 2005 and continued her postgraduate studies in Business Law at the Law Faculty in Skopje. She passed the Bar exam and became a member of the Macedonian Bar Association in 2007.

Recently, Jasmina was promoted to partner at DDK in 2015. Having gained extensive experience in the spheres of competition and corporate law by participating in various projects including M&A and concentrations affecting the Macedonian market over the past 10 years, Jasmina is the leading lawyer in DDK for the assessment of competition matters in commercial contracts, and for 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) was created as a company committed to being the leading business law firm in Macedonia.

DDK was also the first law company established in the territory of the Republic of Macedonia, distinguishing itself on the market with a clear business and corporate law orientation, complemented by an excellent network of legal experts covering the complete territory of the Republic of Macedonia.

The quality of DDK 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.

The partners of DDK have more than 20 years' legal practice experience and exceed clients' expectations by providing sophisticated and efficiently managed legal services.

DDK offers excellent legal services to clients and has been engaged as counsel in numerous successful PPP projects, privatisations, M&A, capital markets transactions, banking, joint ventures, debt collection, tax disputes with authorities, disputes with the Commission for Competition, etc.