

The International Comparative Legal Guide to:

Cartels & Leniency 2008

A practical insight to cross-border Cartels & Leniency



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THE CARTEL PROHIBITION

1 The Legislation

1.1 What is the basis and general nature of the cartel prohibition?

The statutory basis for the cartel prohibition is the Competition Protection Act (1998, as amended, “the CA”). Most of the provisions of the CA are taken directly (sometimes literally translated) from the respective EU legislation or incorporate basic principles of EU competition legislation and practice.

Section 9 CA is the main provision with regard to the prohibition of cartels in Bulgarian law and it uses almost the same wording as Article 81, paragraphs 1 and 2 of the EC Treaty (see question 1.2).

The CA would rather qualify as administrative law with commercial law implications and liability thereunder is generally administrative liability (monetary fines) on top of civil law invalidity of cartel agreements.

There is no specific criminal liability for breach of cartel prohibition, but it is possible to trigger cartel prohibition by committing a crime, which then would be separately punished. Administrative liability under the CA is both for companies and individuals. There is no criminal liability for companies under Bulgarian law. If an individual, however, commits a crime which at the same time could be qualified as prohibited cartel-related behaviour, the individual may only be punished for the crime (which is highly unlikely, as cartels are not criminalised).

A prohibited cartel may also give rise to civil liability issues - i.e. claims for damages from the interested parties (mostly competitors) which might have sustained damages as a result of the existence of the cartel.

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

The CA does not have a flat definition of “cartel” and does not even use this term. However, the CA (in its Section 9) prohibits all kinds of agreements between undertakings, decisions by associations of undertakings and concerted practices of two or more undertakings which have as their object or effect the prevention, restriction or distortion of competition within the relevant market. Further, the CA provides a non-exclusive listing of such prohibited agreements, decisions and concerted practices, which:

1. directly or indirectly fix prices or any other trading conditions;

2. share markets or sources of supply;
3. limit or control production, markets, technical development, or investment;
4. apply dissimilar conditions to equivalent transactions with respect to specific trading parties, thereby placing them at unequal position as competitors; or
5. make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations or conclusion of supplementary contracts, which, by their nature or according to commercial usage, have no connection with the subject or the performance of the main contracts.

In addition the CA provides that any prohibited agreements or decisions are automatically null and void.

1.3 Who enforces the cartel prohibition?

Under the CA the Competition Protection Commission (the CPC) is established as an independent agency to administer competition law issues. It is a panel of 7 members, which acts as an independent forum and issues decisions to impose monetary fines. Its decisions are subject to judicial control directly before the Supreme Administrative Court of Bulgaria. The CPC is entitled to conduct investigations itself. Therefore the CPC is both an investigating and a decision-making body with respect to cartel prohibitions and sanctions.

The law reads that cartel agreements are null and void. However, the CPC does not have the power to declare that a prohibited cartel agreement is null and void - this may only be done by the court in separate civil proceedings or as a prejudicial matter in proceedings where the prohibited agreement is used (the court, in theory at least, should apply this validity test *ex officio*).

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

The basic steps are:

- opening of a procedure (as a rule by way of *ex officio* started procedure, less usual on complaints or on request by the public prosecutor); the complaints have to be in writing and signed (not anonymous) and filed by interested parties only (these are mainly competitors or their associations);
- appointment of a rapporteur (one of the CPC members), who is the investigating body for the specific case and prepares the draft CPC decision;
- conducting the investigation (including by way of coercive measures - seizure, interrogations, etc.);
- forming a paper file with the CPC (it has “open” and “secret” parts, the parties can only have access to the “open” part,

which has not been designated as classified information by the parties that have submitted the respective evidence);

- hearings with the participation of the alleged cartel participants and the interested parties that have sustained damages; in this stage new written evidence may be submitted; and
- issuance of a decision, which is subject to appeal.

1.5 Are there any sector-specific offences or exemptions?

In line with the EU Commission block exemption regulations the CPC has issued several block exemption decisions, which basically repeat the exemptions, contained in the EU Commission regulations. Besides the general block exemption regarding vertical agreements and concerted practices, there are also block exemptions with respect to specialisation agreements, research and development agreements and vertical agreements in the motor vehicles sector.

There is also a general “*de minimis*” exemption for cartel agreements of minor importance, where the combined market share of the participants on the relevant market is less than 5% between competitors and less than 10% between non-competing undertakings. Similar to the hardcore restrictions in EU competition law there are such restrictions in Bulgarian law - no exemption is granted to cartels, where the object of such cartels is fixing of prices or other trading conditions, allocation of markets or of sources of supplies, etc.

1.6 Is cartel conduct outside Bulgaria covered by the prohibition?

Yes, provided that there is effect on the Bulgarian market. However, within the EU regard has to be taken to the distribution of powers between the EU Commission and the national competition authorities. As a point of interest, the CA is also applicable to any resolutions of the governmental administration and the municipalities, at least in theory.

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	n.a.
Carry out compulsory interviews with individuals	Yes*	n.a.
Carry out an unannounced search of business premises	Yes*	n.a.
Carry out an unannounced search of residential premises	Yes*	n.a.
■ Right to ‘image’ computer hard drives using forensic IT tools	Yes*	n.a.
■ Right to retain original documents	Yes*	n.a.
■ Right to require an explanation of documents or information supplied	Yes	n.a.
■ Right to secure premises overnight (e.g. by seal)	Yes*	n.a.

Please Note: * indicates that the investigatory measure requires the authorisation by a judge from the respective District Court where the seat of the investigated undertaking is situated.

2.2 Specific or unusual features of the investigatory powers referred to in the summary table.

The specific investigation powers of the CPC were introduced in 2003 and the CPC has issued Guidelines on their implementation. The Guidelines are not binding, but the CPC is supposed to adhere to them. The Guidelines mostly repeat the applicable provisions of the Criminal Procedure Code with respect to collecting evidence.

The prerequisites for the CPC to carry out coercive searches and seizures of evidence are:

- the evidence should be substantial - i.e. without it the alleged violation would be very difficult or impossible to be established; this will apply only to direct evidence and not to circumstantial;
- the evidence could be concealed or the undertaking has rejected to provide it;
- sufficient data to make a reasonable assumption that the evidence is located at the respective place;
- court order from a judge in the respective District Court (at the seat of the investigated undertaking), which is issued on application made by the Chairman of the CPC; the order may be appealed within 3 days, but appeal does not suspend the execution of the order; and
- order of the Chairman of the CPC (on the basis of the court order), which gives the details for the conduction of the search and seizure.

The provisions of the Criminal Procedure Code are applicable by default to the coercive investigation measures. There are also at least two “appointed witnesses” to observe and guarantee for the lawful performance of the searches and the seizures. The police may, on request, assist in the investigation procedures.

The powers to search premises (vehicles) are not based on the division business/residential and they do not depend on whether the premises are owned/rented by the undertaking, but the premises are “functionally” defined, i.e. whether there may be evidence (accountancy and commercial documentation) therein, or not. However, the CPC admits that it has no specific powers to search residential premises, so it is hard to predict whether in an attempt to make such search in the future, the court would not find this to be outside the powers of the CPC, which is not a criminal investigating body. Bulgarian courts are rather inclined to apply directly the European Convention on Human Rights and Fundamental Freedoms and to limit unnecessary interventions and restrictions on such rights and freedoms.

It is worth mentioning that the Guidelines predetermine the value as evidence of the explanations of state and municipal authorities in cartel investigations by providing that they are deemed correct until proven otherwise. This contradicts one of the main principles of criminal procedure (applicable by default) and consequently the said provision in the Guidelines should not be applicable as being unlawful.

The powers to seal premises are not expressly provided for in the law, but it is understood as part of the search powers (there is no duty to close searches within one day or so). The Guidelines also provide for securing the premises and appointing guards.

The principle is that the CPC collects copies of the respective documents and originals are collected only where it is not possible to make copies. The CA provides that only documents, and no other material evidence, can be seized (though the Guidelines provide

otherwise, which should be considered unlawful).

It is interesting that the interrogation of individuals is also considered a measure, which requires the authorisation of the court. Presumably this would be only when the individual refuses to appear and give testimony before the CPC voluntarily and has to be brought before the CPC, although unlike the Criminal Procedure Code the CA does not provide directly for such measure.

Curiously, the Guidelines provide for the possibility to protect certain witnesses in cartel investigation by keeping their identity secret, which is also provided for in the Criminal Procedure Code. However, it is unlikely that such protection could be applied in cartel cases where the CA lacks any specific provisions for that (these are not criminal proceedings per se).

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

The CPC has no power to use special methods of surveillance like bugging, tapping or so. The powers of the CPC are limited to collection of existing evidence (documents only) and questioning, and therefore these methods are inapplicable.

2.4 Other powers of investigation.

The respective officials have the obligation on request from CPC to present to it information, documents, computer files, to give written and oral explanations and to allow access to premises. "Officials" in the Guidelines (mentioned in question 2.2) and in the court practice are not only the government officials, but also the companies' officials - directors, procurators, receivers, etc.

The CPC uses all public sources of information. It may also require specific information to be provided by the National Statistics Institute.

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

Searches are headed by a member of the CPC (the rapporteur on the case). This member is assisted by employees of the CPC and technical (e.g. IT) specialists. It is possible to employ external experts (for the account of the CPC, but if searches are justified, costs are recharged on the accused parties), especially for technical tasks. Participants in searches are individually appointed by the Chairman of the CPC. Searches are performed in the presence of at least two uninterested persons to evidence legality of procedures undertaken, and these persons have to sign the protocol for the searches (including their right to make comments). Searches are carried out in the presence of the users of the premises (vehicles), who should also certify the copies made as true copies of the originals. These users may be represented by an attorney (including lawyers), but there is no special rule (in the CA and in the Criminal Procedure Code) to allow attendance of lawyers otherwise, therefore there is no reason to wait for legal advisors to arrive.

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

No. All employees are prohibited from refusal to cooperate on the basis of know-how, commercial secret or protected secret. Correspondence with an outside lawyer is protected, however (see question 2.7).

2.7 Other material limitations of the investigatory powers to safeguard the rights of defence of companies and/or individuals

The undertakings can mark the documents and information, submitted to the CPC as classified information. In this case the CPC may not provide access to this information to the other participants in the proceedings or to any third parties. Such classified information will normally be the commercial secrets of the undertaking, know-how, etc.

The CPC may not, under any conditions, seize the correspondence between an undertaking or any individual and their defence lawyers.

2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used in connection with a cartel investigation?

Obstruction of the investigation (i.e. not presenting the requested evidence or information or not appearing before the CPC for giving explanations) is penalised by a monetary fine (from BGN 500 to BGN 2,500), imposed by the Chairman of the CPC. If obstruction amounts to a crime, then the rules of the Criminal Code will apply.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

Sanctions for companies are monetary fines, varying from BGN 5,000 to BGN 300,000 (BGN is pegged to the Euro at the rate of BGN 1.95583 for Euro 1). The particular amount is set by the CPC depending on the gravity of the breach and according to its Guidelines for determining the amount of the sanctions.

Where there is a "repeated breach" (i.e. same type of breach within one year of the enforcement of the penalty), the amount is from BGN 100,000 to BGN 500,000. For failure to perform a decision of the CPC the penalty to the undertaking is also from BGN 100,000 to BGN 500,000.

3.2 What are the sanctions for individuals?

Individuals are to be penalised for a breach of the CA by monetary fines within the range of BGN 1,000 to BGN 10,000. In case of "repeated breach" the penalty is in the range of BGN 2,000 to BGN 20,000. It ought to be mentioned that, depending on the circumstances, an individual can be an undertaking himself (e.g. where he does business without incorporating a company - this may be with or without registration as a sole trader, depending on the circumstances).

3.3 What are the applicable limitation periods for the imposition of sanctions for cartel conduct?

The limitation period is 5 years from the date when the infringement was committed. After that period no penalties may be imposed. However in cartel cases the infringement is continuous and the 5-year period should start after the cartel ceases to exist.

3.4 Is cartel conduct by individuals potentially an extraditable offence?

Cartel conduct per se is not criminal offence under Bulgarian law, and therefore there is no threat of extradition of an individual.

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

No, there is no legal way that the company directly indemnifies an employee for such costs or penalties. A company may wish to pay a bonus or so, which is taxable revenue for the individual, to achieve such indemnification.

LENIENCY / WHISTLE-BLOWING

4 Leniency for Companies

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

In 2003 some provisions were introduced allowing for decrease of monetary penalties or release from administrative sanctions. The available reductions in the amounts of the fines and the prerequisites differ from those in the EU Commission Leniency Notice, but the principles are the same. Thus the CA does not provide for reporting duty of undertakings, but allows for certain more favourable treatment. Leniency however is available only to companies and not to their employees.

In the case of full exemption from administrative sanctions the following prerequisites should be met:

- at the time of submission by the undertaking the CPC does not have sufficient information to start an *ex officio* investigation;
- the submitted evidence provides sufficient data for the CPC to start the investigation - normally this would be some written evidence directly linked to the existence of the cartel;
- there are no previous notifications by another participant in the same cartel;
- the undertaking effectively aids the CPC during the whole investigation procedure and provides all evidence and information available to it;
- by the time of submission, the undertaking has terminated its participation into the cartel; and
- the undertaking has not compelled other undertakings to participate in the cartel.

When an undertaking cannot benefit from the full exemption from administrative sanctions, it may benefit from a reduction in the amount of the fine under the following conditions:

- the undertaking voluntarily submits evidence during the investigation;
- such evidence is substantial - substantially adding value to the already collected evidence (direct evidence is preferred to circumstantial); and
- by the time of submission of such evidence, the undertaking has terminated its participation into the cartel.

In cases where decrease of penalty is applicable, the first eligible undertaking to cooperate gets 30 - 50% reduction in the penalty; the second eligible undertaking gets a reduction of 20 - 30%; and each following eligible undertaking gets a reduction of 10 - 20%.

The CPC decides on the exemption from liability and/or on the reduction of the penalties in its final decision on the cartel case, which ensures that the undertaking will continue to cooperate throughout the investigation. If during the procedure the undertaking fails to adhere to its obligations (which are prerequisites for the leniency) the CPC will not grant leniency in its final decision.

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

There is no "marker" system in Bulgaria in this sense.

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

There is no specific regulation to the way the submission has to be made. However, the CPC has to ensure the proper recordation of the order in which submissions have been made, if they are more than one, so there should be some written evidence about the application. After the CPC informs the undertaking whether it qualifies for leniency, the latter and the CPC sign a protocol, which both sets out the evidence the undertaking possesses or knows about and the obligations of the undertaking in the course of the investigation.

4.4 To what extent will the application be treated confidentially and for how long?

There is no duty of confidentiality for the CPC. Further, if the CPC ruling is subject to court appeal, the general procedure rules will not allow for such confidentiality. Besides, the CPC should describe in full detail the structure of the investigated cartel and the participation of all undertakings involved in it.

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

The Continuous cooperation requirement ceases to apply at the closing of the investigation procedures. However, the undertaking enjoying leniency will be interested in assisting the CPC in an appeal in order to sustain its leniency status.

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.

There are no such procedures. Individuals may report a cartel, but this will neither grant them immunity nor any award, as leniency is only applicable to companies.

6 Plea Bargaining Arrangements

6.1 Are there settlement or plea bargaining procedures (other than leniency)?

No, there are no such procedures in this kind of proceedings.

APPEALS AND DAMAGES ACTIONS

7 Appeal Process

7.1 What is the appeal process?

The decisions of the CPC are subject to judicial review by way of

appeal with the Supreme Administrative Court (a special court reviewing the acts of administration, "SAC"). Usually, these appeals are reviewed by a 3-member panel of the 5th college of SAC and their decision is subject to cassation appeal by a 5-member panel of SAC.

7.2 Do courts frequently adjust the level of penalty imposed by the competition authority? If so, on what grounds?

The usual practice is to challenge the grounds for penalisation (which may result in no fine at all) rather than challenging the amount of fine, but sometimes the amount of fine is also challenged and the court tends to decrease it. In fact, the good legal practice requires that even where the grounds are challenged, an "alternative" plea is made as well (i.e. where the court may agree with the CPC's finding on the grounds for liability, it still is asked to reduce the penalty amount). The amount of fine is determined on loose criteria basis and the CPC has adopted Guidelines for determining the amount of the fines (based on the undertaking's turnover, gravity of breach, cooperation in investigation, etc.), which criteria are also quite loose, so there is always room to challenge the amount of fine imposed. The court is not bound by said CPC's Guidelines.

8 Damages Actions

8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct?

The administrative proceedings are recharged by the CPC only if it issues a decision to penalise the participating undertakings. The penalty is fiscal collection and it is not linked to actual damages under civil law. These are enforceable only where the term for court appeal has expired without filing or where the court sustained the CPC decision (partially or in the whole).

Civil law damages claims are filed under the general rules of the Civil Procedure Code. A completed procedure under the CA (results are public) would be evidence to be used in support of a claim for damages. The court is not bound by the CPC decision and independently has to find whether there is a breach of civil law (most likely tort).

There are no "punitive damages" under Bulgarian law, and only the actual and proven amount of damages to the claimant will be reimbursed (possibly with default interest, if requested).

Unlike administrative litigation (where court fees are nominal), in a civil law claim (including for damages) a fee of 4% on the claimed amount (including interest until filing) will be collected prior to the start of the case. On top there will be legal fees (subject to a "floor" tariff of the Bar - generally within the range of 2 - 4% on the claimed amount) and potential court-appointed experts cost (varying on a case by case basis). A successful claimant will be awarded the costs (pro rata to the honoured part of the claim, i.e. 100% is a possible rate), but lawyers' fees exceeding 300% of the floor tariff will not be refunded due to being unreasonable.

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

Until recently there were class actions only in consumer protection cases. With the new Civil Procedure Code (to be effective from 1 March 2008) class actions are available generally for all damages from torts. Their basic characteristics are:

- the injured persons (could also be companies) should be a group, which is not defined but is definable according to certain criteria;
- the action may be launched by any members of the injured group or special organisations (of the members of the group or for protection in such cases);
- the actual claimants have to prove to the court that they are capable of defending the group interest in good will;
- once the court finds the action admissible, the court must announce it publicly, so that any potential members of the injured group could state their will to participate in the proceedings or to be excluded and file a separate claim;
- the court may order appropriate interim measures for protection of the group interest;
- the court (in deviation from the general civil procedure principles) is free to grant a form of relief different from the one sought by the claimants if it finds that such relief would better suit the interest of the injured group;
- the court decision (or any settlement reached in the course of the proceedings) is binding on all members of the group, except on the ones who have declared their will to be excluded from the proceedings; and
- the general meeting of members of the injured group, called and chaired by the first-instance judge, decides on how the compensation will be utilised.

8.3 Have there been successful civil damages claims in the past?

There is no centralised system for monitoring of such claims and results form litigation, so there is no reliable source of relevant information. There are no earmark cases of such indemnification.

OTHER MATTERS

9 Miscellaneous

9.1 Provide brief details of significant recent or imminent statutory or other developments in the field of cartels and leniency.

The CPC has prepared and presented to the public (on 17th October 2007) a bill for a wholly new Competition Protection Act, which is more in line with the EU *acquis communautaire*. It further expands the investigation powers of the CPC.

Within the period 28 September 2007 - 16 October 2007 the CPC completed searches in five industry sectors in an attempt to find evidence for cartel arrangements in the foods markets (milk and dairy products; chicken meat and eggs; vegetable oils; bread and pastry) as well as in the taxi services market. There are no officially announced results yet. The investigations were triggered by certain price increases for the consumers.

The CPC has recently announced that SAC has finally confirmed a 2003 decision to penalise a regional cartel of bakeries.

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

The CPC has its own Forensic Laboratory to perform technical analyses in its investigations.

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