



ICLG

The International Comparative Legal Guide to:

Cartels & Leniency 2014

7th Edition

A practical cross-border insight into cartels and leniency

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Bulgaria

Georgiev, Todorov & Co.

Ilian Beslemeshki



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 and general nature of the cartel prohibition is *quasi* administrative-penal. The legal institute is regulated by a special normative act – Competition Protection Act (“CPA”) – envisaging procedures deviating from the provisions of the general Administrative Offences and Sanctions Act. The regulatory authority – Competition Protection Commission (“CPC”) – could initiate investigation procedures *ex officio* or upon approach by affected legal entities/individuals or other authorities.

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

Article 15, para. 1 of the CPA prohibits all kinds of agreements between undertakings, decisions of associations of undertakings, as well as concerted practices of two or more undertakings, aimed at or with an intended result to prevent, restrict or breach competition on the relevant market, such as, for example:

1. direct or indirect fixing of prices or other trading conditions;
2. sharing of markets or sources of supply;
3. limiting or controlling of production, trade, technical development or investment;
4. application of dissimilar conditions for the same type of contracts in respect of certain partners, whereas they are placed in competitive disadvantage; and
5. setting the conclusion of contracts under a condition for undertaking additional obligations or the conclusion of additional contracts by the counterparty, which, by their nature or according to commercial usage, have no connection with the subject of the main contract or the execution thereof.

Pursuant to para. 2 of the same Article, all of the above agreements or decisions are null and void.

1.3 Who enforces the cartel prohibition?

The regulatory authority – Competition Protection Commission (“CPC”).

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

- Opening of an investigation procedure – legal ground for the opening could be: decision of the CPC; request by a prosecutor; written request by an affected legal entity/individual; leniency request; request by another national competition protection authority of a European Union Member State; or by the European Commission.
- The investigation procedure (case file) is formally opened with a ruling of the Chairman of the CPC, which also appoints a supervising Member of the CPC. The Chairman also issues an order for appointing a working team to conduct the investigation.
- The appointed working team conducts the investigation (*no terms envisaged*).
- Upon judgment of the working team that enough and sufficient evidence has been collected, the working team prepares a report which is presented to the supervising Member of the CPC.
- The supervising Member of the CPC notifies the Chairman of the CPC on the presented report and the Chairman of the CPC schedules a closed session of the CPC within a 14-day term.
- During the closed session the CPC reviews the report and issues: 1) a decision for lack of violation; 2) a ruling to return the case to the working team for additional investigation with mandatory instructions; or 3) a ruling for serving a statement of objection on the respondent.
- In case of a served statement of objection, each party to the case file (respondent/claimant/ interested third parties) has at least 30 (or more) days term to present his position in writing (object or support the statement of objection) to the CPC.
- Not earlier than 14 days after the expiration of the aforementioned term, the Chairman of the CPC schedules an open session of the CPC.
- After the hearing of the parties, the Chairman of the CPC schedules a closed session and the CPC issues: 1) a final decision (establishing violation and imposing sanctions); 2) a ruling for serving new statement of objection; or 3) a ruling for returning the case to the working team for additional investigation.

1.5 Are there any sector-specific offences or exemptions?

The currently valid sector-specific exemptions were introduced with Decision No. 55/20.01.2011 of the CPC – a decision for block exemption under Article 18 of the CPA concerning:

- vertical agreements within the meaning of the Regulation (EC) No 330/2010;

- vertical agreements within the meaning of the Regulation (EC) No 1400/2002 and the Regulation 461/2010 in the sphere of motor vehicles;
- agreements within the meaning of the Regulation (EC) No 1218/2010 for some specialisation agreements;
- agreements within the meaning of the Regulation (EC) No 1217/2010 for some research and development agreements;
- agreements within the meaning of the Regulation (EC) No 267/2010 for some agreements in the insurance sphere; and
- agreements within the meaning of the Regulation (EC) No 772/2004 for some agreements for transfer of technologies.

1.6 Is cartel conduct outside Bulgaria covered by the prohibition?

As long as the cartel does not affect the competition in Bulgaria in any way, the CPA does not apply. If the cartel has some negative impact on the market/competition in Bulgaria, the CPC can investigate it and impose sanctions or refer it to the EC, depending on the specifics of the respective case.

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	No	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: * Preliminary permission by the Administrative Court Sofia City, issued upon request by the Chairman of the CPC, is necessary.

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

The CPC can retain original documents, if permitted in advance by the Administrative Court Sofia City, during compulsory searches only in the case it is objectively impossible to make a copy of the document during the compulsory search.

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

No, there are no general surveillance powers.

2.4 Are there any other significant powers of investigation?

The CPC can use external experts, if necessary, by issuing a ruling determining the external expert, the specific task and the deadline for completion of the task.

The CPC can impose temporary measures (at any moment during the pending investigation procedure) by issuing a ruling, provided there is: sufficient evidence for violation; or pressing need and risk of significant or unrecoverable damage for the competition. The temporary measures are with a term of three months as of the date of the ruling, but the CPC can prolong the term with new ruling.

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

The compulsory searches of business premises (residential premises cannot be subject to a compulsory search) are carried out by officers of the CPC (in most of the cases these will be the supervising member of the CPC and the working team), supported by the police authorities. There is no legal obligation to wait for legal advisors to arrive.

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

No, the CPA does not envisage such protection. The CPA does not envisage any privilege of legal documentation, however the client-attorney documentation is protected by the Constitution of the Republic of Bulgaria.

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

All evidence collected within the compulsory search which was not permitted in advance by the Administrative Court Sofia City should be excluded from the case file.

The compulsory search and collection of evidence is carried out in the presence of a representative of the undertaking under investigation, or its employees, or a person who is entitled to be present in the premises, or that was found in the premises. All seized copies of documents must be certified by the CPC officer and representative of the undertaking under investigation, except when the representative of the undertaking explicitly refuses to do so. All digital, electronic and forensic evidence must be sealed in a proper manner.

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?

A sanction can be imposed on the undertaking under investigation in the amount of 1% of the total turnover for the preceding financial year in the following cases:

- non-performance of the obligation for rendering assistance to the CPC;
- breaking the integrity or destruction of seals affixed during the compulsory search; or
- untimely submission or submission of incomplete, imprecise, untrue or misleading information to the CPC in the process of investigation misleading information to the CPC.

The above sanction is imposed by a decision from the CPC, which

also sets out an explicit term for rectifying the respective breached obligation. In case the undertaking under investigation does not perform its obligations in the term as per the decision, periodical sanctions could be imposed of up to 1% of the average daily turnover for the previous financial year for every day until complete performance of the obligation.

Any individual who does not provide to the CPC the requested evidence in time or does not provide complete, accurate, true and straightforward information could be imposed a fine of BGN 500 (approx. EUR 250) to BGN 25,000 (approx. EUR 12,500).

The above fine is imposed by a decision from the CPC, which also sets out an explicit term for rectifying the respective breached obligation. In case the individual does not perform its obligations in the term as per the decision, the individual could be imposed with a periodical fine in the amount of BGN 500 for every day until complete performance of the obligation, but not more than BGN 20,000.

Both sanctions to undertakings and fines to individuals have been used by the CPC. There are no official statistics in this respect, but our practice shows that the approach of the CPC is “very harsh” with regard to the big players on socially sensitive markets (electricity, gas, retail, etc.), “medium” in the other cases and “gentle” to individuals. The approach has not changed since the end of 2008 (entry into force of the CPA) until now.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The sanction to undertakings/associations of undertakings is up to 10% of the total turnover for the preceding financial year of the undertaking/association of undertakings. The sole proprietors are considered to be undertakings under the CPA; respectively the mentioned sanction is applicable to them as well.

3.2 What are the sanctions for individuals?

Individuals who have assisted the violation of the CPA are subject to fines in the amount of BGN 500 (approx. EUR 250) to BGN 50,000 (approx. EUR 25,000).

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

No, fines cannot be reduced on the basis of financial hardship in Bulgaria.

3.4 What are the applicable limitation periods?

A limitation period of three years is applicable to all violations of obligations for rendering assistance to the CPA and submission of documents/information. A limitation period of five years is applicable to all other violations of the CPA.

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

The CPA does not regulate this issue. Based on the general rules of the Bulgarian Obligations and Contracts Act, the company could execute such payment to the CPA, but this expenditure will not be recognised by the tax authorities.

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?

The CPA does not regulate this issue. The employee can be held liable as per the provisions of the Labour Code or the general rules of the Bulgarian Civil Law, depending whether the violation was negligent or intentional.

4 Leniency for Companies

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

The issue is regulated in Art. 101 of the CPA and Decision No. 274/08.03.2011 of the CPC for introduction of a Leniency Programme and Rules for its application.

An undertaking could be released from sanction if:

- 1) An undertaking/cartel member, prior to any other cartel member, by its own initiative, discloses the existence of the cartel to the CPC by submitting sufficient information and evidence, on the ground of which the CPC could request to the Administrative Court Sofia City permission for compulsory searches.
- 2) In case release from sanction as per the aforementioned is not applicable, the CPC could release an undertaking/cartel member from sanction if the following three cumulative conditions are met:
 - an undertaking/cartel member, prior to any other cartel member, submits evidence, based on which the CPC could prove the alleged violation;
 - the CPC has not granted to any other undertaking a conditional release towards the moment of submission of the evidence; and
 - the CPC has not gathered sufficient and/or enough evidence to issue a decision establishing the violation.

Release from sanctions is not applicable to an undertaking which has undertaken any actions to force other undertakings to enter into or continue to be a member of the cartel. Such an undertaking could be subject only to sanction reduction.

An undertaking could be subject to sanction reduction provided that this undertaking voluntarily, prior to the completion of the proceedings before the CPC, submits “evidence of significant importance” (the qualification of the evidence as such is subject to the discretion of the CPC) or discloses to the CPC the existence of another cartel. The reduction can be in an amount of up to 50% of the sanction. The first to provide evidence can be granted a reduction from 30% to 50%; the second, from 20% to 30%; and any subsequent undertakings, from 10% to 20%.

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

The issue is regulated in para. 21-24 and para. 29 of Decision No. 274/08.03.2011 of the CPC for introduction of a Leniency Programme and Rules for its application.

In order for a marker to be obtained, the following conditions should be met:

- an application in this respect, containing information for the cartel, should be filed with the CPC;
- the CPC, at its own discretion, sets a term for submission of all information and evidence; and

- the undertaking submits to the CPC in the set term all information and evidence necessary for release of sanction, mentioned above.

If the above conditions are met, the CPC will consider that the information and evidence have been submitted on the date of filing of the marker application.

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

No. The application must be in the standard form adopted with Decision No. 274/08.03.2011 of the CPC for introduction of a Leniency Programme and Rules for its application, but the applicant will be kept secret (Art. 38, para. 3 of the CPA).

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?

The applicant will be kept secret until the CPC issues a statement of objections. The applicant could be disclosed before that moment only to the Administrative Court Sofia City (and eventually the Supreme Administrative Court). The application itself, as well as all documents provided by the leniency applicant, are considered “professional secrets” as per Decision No. 274/08.03.2011 of the CPC for introduction of a Leniency Programme and Rules for its application. Such documents are accessible only to the CPC, the Administrative Court Sofia City and the Supreme Administrative Court, and could be disclosed (including to all parties to the case file before the CPC) only in cases where the CPC decides that the disclosure is of material importance for proving the violation or for the right of defence of the undertaking under investigation.

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

The undertaking is obliged to cooperate through the “entire proceedings”, i.e. until a final decision is issued by the CPC.

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

If, in the course of investigation, an undertaking/member of the cartel discloses to the CPC information in respect to its participation in a second cartel, the undertaking could be subject to a reduction of the sanction of up to 10% (for the investigated cartel). If, in the course of investigation, an undertaking/member of the cartel discloses to the CPC information concerning the existence of more than one cartel (in addition to the cartel already subject to investigation), the CPC may reduce the sanction for the first cartel up to 10% for any subsequent cartel but not more than 30% in aggregate.

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.

No, this is not applicable in Bulgaria.

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?

Upon the undertaking under investigation being served the statement of objection, the undertaking can propose to undertake respective obligations resulting in the suspension of the actions/omissions subject to the investigation. The CPC can issue a decision approving the proposed obligations, in which case no violation will be established and the procedure will be terminated (the decision could envisage a time period for the obligations).

The above approach is not applicable to “heavy violations” within the meaning of the CPA (cartel or abuse of monopoly or dominant positions which affects or could affect substantially and for a long period of time the competition on a significant part of the national market).

The above institute was introduced at the end of 2008 and so far we are aware of just one case where it has been applied.

7 Appeal Process

7.1 What is the appeal process?

Even though the CPC acts as a *quasi* administrative-penal jurisdiction, the decision of the CPC is subject to appeal before the Supreme Administrative Court according to the provisions of the Administrative Procedure Code, applicable in general to the appeal of individual administrative acts.

The decisions of the CPC could be appealed before a three-member panel of the Supreme Administrative Court by the parties to the case file before the CPC (within 14 days as of receipt of notification) or by any interested third party (within 14 days as of the publishing of the decision in the electronic registry of the CPC).

The decision of the three-member panel of the Supreme Administrative Court is subject to cassation appeal before a five-member panel of the Supreme Administrative Court within 14 days as of the date of receipt of notification.

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

Yes, an appeal does suspend a company’s requirement to pay the fine.

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

Yes, but only in the appeal procedure before the three-member panel of the Supreme 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?

The CPC is the one and only competent authority to establish cartel violations and for this reason only "follow on" actions are applicable in principle (theoretically the court could award compensation for loss suffered as a result of a cartel conduct even in cases where the cartel violation has not been established with a decision of the CPC, but in such cases the legal qualification of the violation would refer to the general rules of Civil Law/tort).

The procedure for civil damages is the general procedure under the Civil Procedure Code with the specification that the decision of the CPC establishing the cartel violation, respectively the decision of the Supreme Administrative Court leaving such decision of the CPC in force, is mandatory for the civil court (i.e. the civil court is obliged to accept that there is a cartel violation and could not decide otherwise).

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

Yes, but the institutes introduced in March 2008 and their legal regulation in the Civil Procedure Code are too general and non-comprehensive, and for this reason the current court practice is extremely scarce and contradicting.

8.3 What are the applicable limitation periods?

The limitation period is five years as of the date of entry into force of the decision of the CPC, respectively the decision of the Supreme Administrative Court.

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

No, this is not recognised in Bulgaria.

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

There is no specific legal regulation and the general rules concerning litigation procedures court fees apply – the plaintiff must pay in advance a court fee of 4% of the value of the claim, but not less than BGN 50 (approx. EUR 25).

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?

There are no official statistics in this respect. So far, we are not aware of any such cases.

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.

There is nothing significant to report.

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

There is nothing to report.

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