

Cartel Regulation

Contributing editor
A Neil Campbell



2017

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Cartel Regulation 2017

Contributing editor
A Neil Campbell
McMillan LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

© Law Business Research Ltd 2016
No photocopying without a CLA licence.
First published 2001
Seventeenth edition
ISSN 1473-3420

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between September and November 2016. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Editor's foreword	7	Finland	96
A Neil Campbell McMillan LLP		Mikael Wahlbeck and Antti Järvinen Hannes Snellman Attorneys Ltd	
Global overview	8	France	103
Peter K Huston, Ken Daly and Lei Li Sidley Austin LLP		Jacques-Philippe Gunther, Faustine Viala and Sara Ortoli Willkie Farr & Gallagher LLP	
Brexit	12	Germany	111
Anna Lyle-Smythe and Chad de Souza Slaughter and May		Thorsten Mäger and Florian von Schreitter Hengeler Mueller	
Hans-Jörg Niemeyer and Christian Kovács Hengeler Mueller		Greece	119
ICN	15	Marina Stavropoulou DRAS-IS	
John Terzaken and Jana Steenholdt Allen & Overy		Hong Kong	125
Australia	18	Natalie Yeung Slaughter and May	
Michael Corrigan, Ian Reynolds and Matthew Evans Clayton Utz		India	131
Austria	27	Suchitra Chitale C&C Partners (Chitale & Chitale)	
Astrid Ablasser-Neuhuber and Florian Neumayr bvv Hügel Rechtsanwälte		Indonesia	137
Brazil	34	HMBC Rikrik Rizkiyana, Albert Boy Situmorang and Anastasia P R Daniyati Assegaf Hamzah and Partners	
Onofre Carlos de Arruda Sampaio and André Cutait de Arruda Sampaio O C Arruda Sampaio		Israel	143
Bulgaria	40	Eytan Epstein, Tamar Dolev-Green and Eti Portook M Firon & Co Law Offices	
Anna Rizova and Dessislava Iordanova Wolf Theiss		Italy	151
Canada	47	Rino Caiazza and Francesca Costantini Caiazza Donnini Pappalardo & Associati	
A Neil Campbell, Casey W Halladay and Guy Pinsonnault McMillan LLP		Japan	160
China	56	Eriko Watanabe Nagashima Ohno & Tsunematsu	
Susan Ning and Hazel Yin King & Wood Mallesons		Korea	167
Cyprus	65	Hoil Yoon, Sinsung (Sean) Yun and Kenneth T Kim Yoon & Yang LLC	
Pantelis Christofides L Papaphilippou & Co LLC Advocates & Legal Consultants		Macedonia	175
Denmark	72	Tatjana Popovski Buloski and Metodija Velkov Polenak Law Firm	
Olaf Koktvedgaard, Søren Zinck and Frederik André Bork Bruun & Hjejle		Malaysia	183
Ecuador	79	Sharon Tan Suyin and Nadarashnaraj Sargunraj Zaid Ibrahim & Co	
Daniel Robalino-Orellana, Alberto Brown and José Urizar Ferrere Abogados		Malta	191
European Union	84	Mark Refalo Refalo & Zammit Pace Advocates	
Anna Lyle-Smythe and Murray Reeve Slaughter and May		Mexico	196
Hans-Jörg Niemeyer and Hannah Ehlers Hengeler Mueller		Rafael Valdés-Abascal and José Ángel Santiago-Ábreo Valdes Abascal Abogados SC	

Netherlands	203	Sweden	256
Jolling K de Pree and Stefan Molin De Brauw Blackstone Westbroek NV		Tommy Pettersson, Johan Carle and Stefan Perván Lindeborg Mannheimer Swartling	
Nigeria	212	Switzerland	265
Babatunde Irukera and Ikem Isiekwena SimmonsCooper Partners		Marcel Meinhardt, Benoît Merkt and Astrid Waser Lenz & Staehelin	
Norway	218	Taiwan	273
Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA		Mark Ohlson, Anthony Lo and Felix Wang Yangming Partners	
Portugal	225	Turkey	280
Mário Marques Mendes and Alexandra Dias Henriques Gómez-Acebo & Pombo		Gönenç Gürkaynak and K Korhan Yıldırım ELIG, Attorneys-at-Law	
Russia	235	United Kingdom	288
Evgeniya Rakhmanina Linklaters CIS		Lisa Wright and Shruti Hiremath Slaughter and May	
Singapore	241	United States	301
Lim Chong Kin and Scott Clements Drew & Napier LLC		Martin M Toto White & Case LLP	
Spain	249	Ukraine	310
Juan Jiménez-Laiglesia, Alfonso Ois and Arturo Lacave EY Abogados, SLP		Nataliia Isakhanova, Ivan Podpalov and Igor Kabanov Sergii Koziakov & Partners	
		Quick reference tables	318

Macedonia

Tatjana Popovski Buloski and Metodija Velkov

Polenak Law Firm

Legislation and institutions

1 Relevant legislation

What is the relevant legislation?

The relevant legislation is the Law on Protection of Competition published in the Official Gazette of the Republic of Macedonia No. 145/2010 in November 2010. This law has been amended and changed a few times. However, such amendments and changes do not affect the relevant provisions regarding cartels in the basic wording of the cited law.

General rules on misdemeanours and misdemeanour liability are regulated in the Law on Misdemeanours published in the Official Gazette of the Republic of Macedonia No. 124/2015.

More detailed rules about leniency are provided in the Decree on Further Conditions for Release from or Decrease of a Fine and on the Procedure in which the Misdemeanour Commission shall Render a Decision, which was adopted by the Commission for Protection of Competition in 2012.

Also, there are several by-laws made in 2012 that regulate relevant aspects related to prohibited agreements and potential exemptions. These are: Regulation on Group Exemption of Certain Agreements for Research and Development; Regulation on Group Exemption of Certain Agreements for Distribution and Servicing of Motor Vehicles; Regulation on Group Exemption of Certain Vertical Agreements; Regulation on Group Exemption of Transfer Technology Agreements, Licence Agreements and Know-how Agreements; Regulation on Group Exemption of Certain Horizontal Agreements for Specialisation; Regulation on Group Exemption of Certain Insurance Agreements; and Regulation on Agreements of Minor Importance.

In January 2015, the Commission for Protection of Competition, together with the Agency for Public Procurement published the Guide on Discovering of Illegal Agreements in Procedures of Awarding of Public Procurement Contracts. This guide provides explanations addressed to the governmental authorities and institutions and others which are obliged to apply public procurement rules on how to recognise cartels and related aspects in public tendering.

Aspects of incrimination of cartel activities are regulated by the Criminal Code of the Republic of Macedonia published in the Official Gazette of the Republic of Macedonia No. 37/1996, article 283 ('Preventing, limiting or causing distortion of competition'). This law is the subject of permanent changes and amendments. However, the relevant provisions of the Criminal Code for cartels were introduced from the very beginning of the implementation of this law in 1996. The last change of this law with regard to cartels was made in 2014.

2 Relevant institutions

Which authority investigates cartel matters? Is there a separate prosecution authority? Are cartel matters adjudicated or determined by the enforcement agency, a separate tribunal or the courts?

The Commission for Protection of Competition through the Misdemeanour Commission within the Commission for Protection of Competition investigates cartel matters as matter of competition law. It is in charge of investigation of the companies and issuing monetary fines. The Commission for Protection of Competition also applies relevant criteria arising from the competition rules in the EU in assessment

of the forms of distortion of competition that may affect the trade between the Republic of Macedonia and the EU, in accordance with article 69 of the Stabilisation and Association Agreement concluded between the Republic of Macedonia and the EU and its member states.

The right to judicial protection against decisions of the Commission for Protection of Competition, including decisions of its Misdemeanour Commission, is possible by filing an administrative lawsuit to the Administrative Court of the Republic of Macedonia. Further appeal is allowed against decisions of the Administrative Court of the Republic of Macedonia before the Higher the Administrative Court of the Republic of Macedonia.

In the case of criminal liability, the public prosecutor's office is in charge. The competent courts would be the authorised forum for deciding upon indictments in cartel cases.

3 Changes

Have there been any recent changes, or proposals for change, to the regime?

The last changes to the cartel regime were made in 2014 by amending the Criminal Code of the Republic of Macedonia. This amendment was caused by a collision between the provisions of the Law on Protection of Competition and the Criminal Code from the aspect of application of leniency. This issue was resolved by amending the Criminal Code provisions related to cartels as a criminal offence. At the time of writing and pursuant to the publicly available sources, there is no current proposal to change the cartel regime.

4 Substantive law

What is the substantive law on cartels in the jurisdiction?

The Law on Protection of Competition is the substantive law on cartels.

Cartels are defined as agreements and decisions and/or concerted practices between two or more undertakings intended to coordinate their competitive behaviour on the market and/or influence the relevant parameters of competition, especially by fixing the purchase or selling prices or other trading conditions, limit the production or establish sales quotas, share the markets, make arrangements for participation in tenders, limit the import or export, and/or anticompetitive behaviour towards other undertakings – competitors to the cartel participants.

As a general legal frame, this law further determines which agreements concluded between undertakings, decisions of associations of undertakings and concerted practices in particular would be prohibited as follows:

- directly or indirectly fix the purchase or selling prices or any other trading conditions;
- limit or control the production, market, technical development or investments;
- share the market or the sources of supply;
- apply dissimilar conditions to equivalent or similar transactions with other trading partners, thereby placing them in less favourable competitive position; or
- make the conclusion of the agreements subject to acceptance of supplementary obligations by the other contractual parties, which

by their nature or according to the commercial customs are not connected with the subject of the agreement.

As a legal consequence of such acts, the Law on Protection of Competition provides that such agreements or decisions or certain provisions thereto are null and void. However, any determination that a prohibited agreement and/or decision or practice is in place and that, therefore, a misdemeanour has been committed, would be subject to prior investigation of the market and other relevant data by the Commission for Protection of Competition and a determination of the effects of such provisions on the market.

Under the Law on Misdemeanours, a legal entity shall be liable for a misdemeanour, where the law so provides, if the misdemeanour has been committed by an action, an omission or a failure to exercise due supervision by the competent body or by the responsible person in the legal entity, or by an action or an omission of another person authorised to act on behalf of the legal entity, within the scope of its supervision, or when such person has overstepped its authorisations in order to achieve a benefit for the legal entity. Negligence on part of the responsible person in the legal entity shall be sufficient to establish misdemeanour liability for the legal entity. A foreign legal entity shall be liable for a misdemeanour if the misdemeanour was committed on the territory of the Republic of Macedonia or if the misdemeanour caused effects on the territory of the Republic of Macedonia.

The Criminal Code of the Republic of Macedonia provides for general determination, ie, it refers to agreement or participation in the concluding of an agreement, decision or agreed behaviour, prohibited by law, and aiming to prevent, limit or cause competition disorder.

Application of the law and jurisdictional reach

5 Industry-specific provisions

Are there any industry-specific infringements? Are there any industry-specific defences or antitrust exemptions? Is there a defence or exemption for government-sanctioned activity or regulated conduct?

Applicable competition legislation does not deal with specific industries. However, clear rules are established in functioning of the regulated sectors such as banking, insurance, energy and telecommunications by relevant laws and regulations.

On the other hand, the Law on Protection of Competition implies certain exceptions to the general rules on prohibited agreements.

The provisions on prohibited agreements shall not apply to agreements, decisions of associations of undertakings and concerted practices that contribute to the improvement of the production or distribution of goods or services or to the promoting technical or economic development, while allowing consumers a fair share of the resulting benefit, and which do not impose on the undertakings concerned restrictions, which are not indispensable to the attainment of these objectives and afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products or services in question.

Furthermore, as an exception and when necessary for the purpose of protecting the public interest, the Commission for Protection of Competition may ex officio by a decision determine that the prohibition is not to be applied on a particular agreement, decision of association or concerted practice under the terms and conditions provided by the law.

Also, in general, provisions on prohibition shall not apply to the agreements of minor importance (ie, any agreement wherein the joint market share of the parties in the agreement and the undertakings under their control on the market does not exceed the threshold of 10 per cent in the case of horizontal agreement or the threshold of 15 per cent in the case of vertical agreements). Where it is not possible to determine whether the agreement is horizontal or vertical, the threshold of 10 per cent shall apply. This exception also applies if the market share of the undertaking has not increased by more than 2 per cent in the previous two business years.

'Block exemptions' apply to: (i) vertical agreements on exclusive distribution right, selective distribution right, exclusive purchase and franchise right; (ii) horizontal agreements on research and development, or specialisation; (iii) agreements on transfer of technology, licence or know-how; (iv) agreements on distribution and repair of motor vehicles; (v) insurance agreements; and (vi) agreements in the

transport sector. The relevant by-laws cited in question 1 determine the conditions that the agreement must contain, as well as the limitations or conditions that such agreements are not allowed to contain and the other conditions that have to be met.

6 Application of the law

Does the law apply to individuals or corporations or both?

The Law on Protection of Competition applies to 'undertakings' – defined as any type of business venture, regardless of the manner of organisation and form of management (trade company, sole proprietor, cooperative society, association of undertakings, etc), freelance professions (lawyers, doctors, architects, accountants, notaries, etc), public undertakings established for the purpose of carrying out activities of public interest, as well as any other legal entity or natural person, institution, and other legal entity and natural person having public powers or any state administrative body engaged in conducting an economic activity, no matter if they are deemed commercial entities or not.

The Criminal Code applies to individuals.

7 Extraterritoriality

Does the regime extend to conduct that takes place outside the jurisdiction? If so, on what jurisdictional basis?

The extraterritoriality principle applies in Macedonian legislation. The Law applies to agreements, decisions and concerted practices that produce effects on the territory of the country, even if they are caused with acts and actions carried out or undertaken by the undertakings outside of the territory of the Republic of Macedonia.

It further provides that the assessment of various forms of prevention, restriction or distortion of competition, that may affect the trading between the Republic of Macedonia and the EU, in accordance with article 69 of the Stabilisation and Association Agreement, concluded between the Republic of Macedonia and the EU and its member states, the criteria arising from the proper application of the rules regulating competition in the EU shall be accordingly applied.

Investigations

8 Steps in an investigation

What are the typical steps in an investigation?

The procedure against cartels would be initiated as a misdemeanour procedure at the Misdemeanour Commission within the Commission for Protection of Competition.

It may be initiated ex officio, on a request of the secretary general of the Commission for Protection of Competition or on a request of a natural person or legal entity having a legitimate interest in determining the existence of a misdemeanour. If the natural person or legal entity having a legitimate interest wishes to remain anonymous or a request which does not contain data on its submitter is submitted, the Misdemeanour Commission shall conduct a procedure ex officio, provided that it determines that a significant distortion of competition may occur.

The Misdemeanour Commission shall initiate the misdemeanour procedure by a conclusion against which no appeal or lawsuit for initiation of an administrative dispute shall be allowed.

The Misdemeanour Commission shall mandatorily initiate a procedure, provided that it determines that a significant distortion of competition may occur.

The criminal proceeding would be initiated either by the public prosecutor's office or on the basis of a reporting by any third party.

9 Investigative powers of the authorities

What investigative powers do the authorities have? Is court approval required to invoke these powers?

The Law on Protection of Competition provides the Misdemeanour Commission with wide powers in the process of investigation of misdemeanour and collection of evidence and therefore court approval for the actions cited below is not required.

The Misdemeanour Commission can by a conclusion request from the undertakings to submit data regarding their economic and financial status, their business relations and connections, data regarding

their statutes and decisions, the number and identity of the persons concerned by such decisions, as well as other data necessary for conducting the procedure. Failure to submit the data within the requested deadline, the submission of false, incomplete data or data that may mislead the Misdemeanour Commission shall constitute a misdemeanour.

If any of the data constitutes a business secret, the undertakings shall be obliged to clearly mark such data and to indicate the legal basis for their classification as business secret. When submitting data that constitute a business secret, the undertakings shall be obliged to deliver to the Misdemeanour Commission one copy where the data that constitutes a business secret are included (confidential version) and one copy where the data that constitutes a business secret (non-confidential version) are deleted. If the undertakings deliver only the confidential version of the requested data, by marking the data that constitutes a business secret, the Misdemeanour Commission shall request delivery of the non-confidential version of the requested data within a time period of three days as of the day of receipt of the request. If the undertakings fail to deliver the non-confidential version of the requested data within that time period, the Misdemeanour Commission shall deem that the delivered data does not contain data that constitutes a business secret.

It further empowers the Misdemeanour Commission in the case of justified suspicion that a particular undertaking possesses documents or other items or knowledge that could be of importance for proving the existence of a misdemeanour, to be granted by the concerned undertaking to:

- unhindered access to any business premises, land or means of transportation of the undertaking being of importance for determining the existence of a misdemeanour;
- unhindered examination of the books or other documents being of importance for determining the existence of a misdemeanour, regardless of the medium where these are stored;
- unhindered taking or keeping copies or extracts from those books or documents in any form;
- unhindered temporary taking and keeping of the books or the other documents being of importance for determining the existence of a misdemeanour for a period necessary for their copying, provided that they cannot be copied on the spot;
- unhindered temporary taking and keeping of items, books or other documents being of importance for determining the existence of a misdemeanour for a period necessary for determining the relevant facts and evidence arising from such items, books and documents, but not longer than the legally valid conclusion of the procedure;
- unhindered sealing of the business premises and the books or the other documents for a period and to the extent necessary for the examination, but not for longer than seven days;
- an authorised person or other employee in the undertaking who is to explain the facts or documents being of importance for determining the existence of a misdemeanour in minutes; and
- an authorised person or other employee in the undertaking who is to give a written explanation about the facts or documents being of importance for determining the existence of a misdemeanour within a determined time period.

However, the law provides the Misdemeanour Commission with the general right to unhindered carrying out of the other activities being of importance for determining the existence of a misdemeanour.

The public prosecutor's office has all the powers to legally investigate any justified suspicion for committed crime. During the investigation, the Public Prosecutor shall collect evidence and data which are needed in order for the Public Prosecutor to decide whether or not a charge will be brought against a suspect. The Public Prosecutor is required to collect evidence that go against the suspect, but also evidence that are in favour of the suspect. For the purposes of the investigation, the Public Prosecutor may order the following actions to be taken: search of premises or person, temporary securing or confiscation of possessions and property; examination of the suspect and of witnesses, collecting forensic evidence, inspection of sites, reconstructing events, and special investigation measures (such as wiretapping).

International cooperation

10 Inter-agency cooperation

Is there cooperation with authorities in other jurisdictions? If so, what is the legal basis for, and extent of, cooperation?

Under the Law on Protection of Competition, the Commission for Protection of Competition shall carry out the activities of international cooperation related to the implementation of international obligations of the Republic of Macedonia transferred within the competence of the Commission for Protection of Competition, shall participate in the implementation of projects of international bodies and bodies of the EU, and shall cooperate with the bodies of the other countries and institutions in the field of competition.

The Commission for Protection of Competition has developed cooperation with regional competition authorities, especially through holding international conferences and working group meetings.

Furthermore, under the Law on Protection of Competition, in the performance of its responsibilities, the Commission for Protection of Competition shall cooperate with other state bodies and organs regarding issues related to the protection of competition. The Commission for Protection of Competition and the state bodies and organs shall be obliged to exchange data and information necessary for discharging their responsibilities, the scope of which is limited to data and information appropriate and proportionate to the purposes for which they are exchanged.

In this regard, the Commission for Protection of Competition has entered into the Memorandums of Understanding with several regulatory agencies in the Republic of Macedonia such as the Audio-Visual Agency, Agency for Electronic Communications, Agency for Regulation of Railway Sector and the Regulatory Energy Commission. The most recent Memorandum of Understanding was signed in May 2015 with the Ministry of Interior for exchange of data, experiences, knowledge, education and improvement of experts.

11 Interplay between jurisdictions

Which jurisdictions have significant interplay with your jurisdiction in cross-border cases? If so, how does this affect the investigation, prosecution and penalising of cartel activity in cross-border cases in your jurisdiction?

There are no publicly available data on such interplay with the Macedonian jurisdiction in cross-border cases.

Cartel proceedings

12 Decisions

How is a cartel proceeding adjudicated or determined?

The Misdemeanour Commission is tasked with establishing the facts in the reported case and has powers to collect evidence in this regard, including by holding oral hearings.

For the purpose of providing the participants in the procedure with the possibility to state their opinion on the relevant facts and circumstances, the Misdemeanour Commission, prior to scheduling the oral hearing, submits to the participants a preliminary statement of objections raised against them. The participants in the procedure shall have the right to state their views in writing regarding the findings contained in the statement of objections, to give comments and to propose new evidence that they have at their disposal and that, in their opinion, are relevant for proper determination of the facts within a period of 15 days as of the day of receipt of the statement of objections.

Prior to the adoption of the final decision in the procedure, the Misdemeanour Commission shall deliver a final statement of objections to the participants in the procedure.

If the facts determined in the course of the procedure show that a misdemeanour foreseen by the provisions of the Law on Protection of Competition has been committed, the final statement of objections shall also contain a statement about the type and the amount of the misdemeanour sanction to be pronounced, as well as explanation of the circumstance taken into consideration in the process of determination of the sanction.

The participants in the procedure shall have the right to state their views in writing about the objections contained in the final statement

of objections within a period of eight days as of the day of its receipt. The participants in the procedure shall have the right to propose new evidence, provided that they have not been at their disposal at the moment when stating their views to the preliminary statement of objections.

Note, however, that following the initiation of the procedure by the Misdemeanour Commission, and until the delivery of the final statement of objections at the latest, the person against whom a procedure is initiated may propose to the Misdemeanour Commission to undertake commitments by which the distortion of competition caused by actions or omissions by the person against whom the procedure is initiated shall be overcome.

The Misdemeanour Commission by a conclusion shall not accept the proposed commitments in case of a significant distortion of competition. No appeal or lawsuit for initiation of an administrative dispute shall be allowed against the conclusion. The Misdemeanour Commission shall by a conclusion accept the proposed commitments, provided that they are sufficient for overcoming the distortion of competition caused by actions or omissions by the person against whom the procedure is initiated. The conclusion whereby the proposed commitments are accepted shall contain a description of the commitments, deadline for their fulfilment, and commitment for the person against whom the procedure is initiated to provide evidence that the commitments are fulfilled. No appeal or lawsuit for initiation of an administrative dispute shall be allowed against the conclusion.

Prior to making a decision to accept, that is, refuse the proposed commitments, the Misdemeanour Commission shall publish a short description of the case and the proposed commitments on the website of the Commission. All interested parties shall have the right to submit written comments to the Misdemeanour Commission within 15 days as of the day of publication.

If commitments are proposed, the procedure before the Misdemeanour Commission shall be in abeyance until the expiry of the period determined in the conclusion by which the Misdemeanour Commission has accepted such commitments. If no evidence is submitted that the commitments are fulfilled after the expiry of that period, the procedure before the Misdemeanour Commission shall continue.

If the Misdemeanour Commission determines that there are no legal conditions for conducting a procedure due to fulfilment of the undertaken commitments, it shall by a conclusion terminate the procedure against which no appeal is allowed. A lawsuit for initiation of an administrative dispute with a competent court may be filed against this conclusion within eight days as of the day of receipt of the conclusion.

If no commitments have been proposed, then, after the Misdemeanour Commission fully establishes the factual condition being of importance for proper making of the decision, it shall adopt: a decision whereby it shall establish that the person against whom the procedure is initiated has committed a misdemeanour provided for by the provisions of the Law on Protection of Competition and shall impose a corresponding misdemeanour sanction; or a decision whereby it shall establish that the person against whom the procedure is initiated has not committed a misdemeanour provided for by the provisions of the Law on Protection of Competition.

Within a period of 30 days as of the day of receipt of the final decision of the Commission for Protection of Competition may order to the perpetrator of the misdemeanour necessary behavioural and structural measures for elimination of the harmful effects from the distortion of competition which have occurred due to the misdemeanour and to determine deadlines for their implementation. Prior to the adoption of such decision, the Commission for Protection of Competition shall provide the perpetrator of the misdemeanour with the opportunity to state its opinion in writing regarding the measures and the deadlines within eight days as of the day of receipt of the request for an opinion.

13 Burden of proof

Which party has the burden of proof? What is the level of proof required?

The Commission for Protection of Competition has the burden of proof to evidence the existence of cartel misdemeanour. The law does not specify the level of proof required.

14 Appeal process

What is the appeal process?

The decisions of the Misdemeanour Commission within the Commission for Protection of Competition are final. A lawsuit for initiation of an administrative dispute with the Administrative Court of the Republic of Macedonia may be submitted against such decisions. Such lawsuit should be submitted within a preclusive period of eight calendar days as of the day of receipt of the decision and it shall postpone the enforcement of the decision.

In the case of a court judgment finding that the criminal offence 'Preventing, limiting or causing distortion of competition' has been committed, the defendant has the right to file an appeal to the competent appellate court in term of 15 calendar days as of the day of receipt of the judgment. Extraordinary legal remedies against the final judgment are also available under certain conditions before the Supreme Court of the Republic of Macedonia.

Sanctions

15 Criminal sanctions

What, if any, criminal sanctions are there for cartel activity?

The Criminal Code of the Republic of Macedonia provides criminal liability for cartels for individuals only. Namely, pursuant to the wording of the criminal offence incriminated by article 283 of the Criminal Code, the responsible person in the legal entity who shall conclude an agreement or shall participate in the concluding of an agreement, decision or agreed behaviour, prohibited by law, and aiming to prevent, limit or cause competition disorder, and thus the legal entity obtains property benefit of greater extent or causes damage of greater extent, shall be sentenced to imprisonment of one to 10 years. However, the responsible person in the legal entity shall be released from the punishment, provided that he or she has discovered or has contributed considerably in the discovery of the conclusion of the agreement, the adopted decision or the agreed behaviour prohibited by law, resulting in determination, that is, reduction of the fine for the legal entity by the competent body for protection of competition in the procedure for determination of cartel existence, in accordance with the rules for protection of competition.

Based on the publicly available information, there is no practice with regard to this particular criminal offence in order to provide relevant analysis with regard to differences in sentencing.

16 Civil and administrative sanctions

What civil or administrative sanctions are there for cartel activity?

Regarding the civil sanctions, the Law on Protection of Competition provides as legal consequence for prohibited agreements, decision and concerted practice their absolute invalidity. In addition, this Law provides for a right to be compensated to any person that has suffered damages as result of any action prohibited by the provisions of the Law on Protection of Competition. The damages will be determined and assessed in accordance with the rules of the civil law. Maximum or minimum limits to such damages are not prescribed by law.

As consequence of determined misdemeanour in case of cartels, a fine in an amount of up to 10 per cent of the value of the total annual income of the undertaking realised in the business year preceding the year of the misdemeanour, shall be imposed against the legal entity, it has concluded prohibited agreement or has in other manner taken part in an agreement, decision or concerted practice which prevents, restricts or distorts competition. The Law also provides that besides the imposed fines, a misdemeanour sanction in a form of a temporary ban for performing certain business activity in duration between three to 30 calendar days may also be imposed against a legal entity that committed a misdemeanour. The same ban also applies to the individual with a capacity of an undertaking, but with duration of such sanction between three to 15 calendar days.

17 Sentencing guidelines

Do fining or sentencing principles or guidelines exist? If yes, are they binding on the adjudicator? If no, how are penalty levels normally established?

The basic criteria for setting the fine are gravity and duration of misdemeanour and degree of distortion of competition and the effects caused by the misdemeanour.

When setting the fine, the Misdemeanour Commission shall first determine a basic amount of the fine and shall then adjust it taking into consideration the mitigating or aggravating circumstances.

The basic amount of the fine shall as a rule amount up to 30 per cent of the revenue of the perpetrator of the misdemeanour generated from the activity carried out at the relevant market where the misdemeanour has been committed in the last complete business year in which the perpetrator of the misdemeanour participated therein. The amount determined in such a manner shall be multiplied by the number of years during which the misdemeanour lasted.

Such determined amount shall be adjusted by taking into consideration the mitigating or aggravating circumstances, as a result of which it may be reduced or increased.

Mitigating circumstances that are taken into consideration when setting the fine shall in particular include the cases when:

- the perpetrator of the misdemeanour has submitted evidence that its involvement in the misdemeanour is minimal and it proves that while being a participant in a prohibited agreement, it actually has avoided its application acting in a competitive manner on the relevant market; and
- the perpetrator of the misdemeanour has effectively cooperated with the Commission for Protection of Competition or the Misdemeanour Commission, regardless of the application of leniency.

Aggravating circumstances that are taken into consideration when setting the fine shall in particular include the cases when:

- the Misdemeanour Commission determines that a misdemeanour foreseen by the provisions of the law has been committed and the perpetrator of the misdemeanour continues to commit the misdemeanour or repeats the same or similar misdemeanour. In such a case, the basic amount may be increased by up to 100 per cent for each misdemeanour determined in such a manner;
- the perpetrator of the misdemeanour has refused to cooperate or has obstructed the Commission for Protection of Competition or the Misdemeanour Commission from conducting the procedure; and
- the perpetrator of the misdemeanour has had the role of a leader or instigator of the misdemeanour. The Misdemeanour Commission shall in particular take into consideration whether the perpetrator of the misdemeanour has taken activities directed at instigating other undertakings to take part in the misdemeanour and/or has taken any vindictive measures against other undertakings with the aim of forcing them to take activities that constitute a misdemeanour.

The Misdemeanour Commission may increase the basic amount of the fine to a perpetrator of a misdemeanour having particularly high revenues generated from other activities, and not only from the activity carried out on the relevant market where the misdemeanour has been committed in order to reach a deterrent effect of the fine.

The Misdemeanour Commission may increase the basic amount of the fine to a perpetrator of a misdemeanour in order for the fine to exceed the amount related with unfounded enrichment arising as an effect of the misdemeanour, provided that such an amount may be calculated.

The Misdemeanour Commission, on a request of the perpetrator of the misdemeanour, and when setting the fine, may take into consideration its insolvency in a specific social and economic context. The decrease of the fine on this ground cannot be made where the perpetrator of the misdemeanour has financial losses incurred for the purpose of avoiding the payment of the fine. The decrease of the fine can be made only if the perpetrator of the misdemeanour presents evidence that the fine set in accordance with these provisions could endanger

the financial power of the perpetrator and could cause loss in value of its assets.

18 Debarment

Is debarment from government procurement procedures automatic, available as a discretionary sanction, or not available in response to cartel infringements? If so, who is the decision-making authority and what is the usual time period?

Debarment from government procurement procedures is not provided as automatic or available as a discretionary sanction for cartels constituting a misdemeanour under the Law on Protection of Competition or the criminal offence of 'Preventing, limiting or causing distortion of competition' under the Criminal Code of the Republic of Macedonia. However, the Commission for Protection of Competition has the right to impose against the perpetrator certain structural or behavioural remedies in certain period of time.

19 Parallel proceedings

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions, can they be pursued in respect of the same conduct? If not, how is the choice of which sanction to pursue made?

Where possible sanctions for cartel activity include criminal and civil or administrative sanctions may be pursued in respect of the same conduct.

Private rights of action

20 Private damage claims

Are private damage claims available? What level of damages and cost awards can be recovered?

Any party that has suffered damages caused by illegal act, ie, under the prohibited agreement, decision or concerted practice may claim damages in a civil proceeding at the relevant court. Such damages may include cost awards as damages.

21 Class actions

Are class actions possible? If yes, what is the process for such cases? If not, what is the scope for representative or group actions and what is the process for such cases?

No specific provisions have been implemented with regard to the class actions. Therefore, the same rule as under question 20 would apply.

Cooperating parties

22 Immunity

Is there an immunity programme? What are the basic elements of the programme? What is the importance of being 'first in' to cooperate?

The Misdemeanour Commission can grant leniency under certain terms and conditions.

Misdemeanour Commission on a request of the undertaking having admitted its participation in a cartel shall grant full immunity from the fine which, as a rule, would otherwise be imposed on that undertaking if it:

- first presents evidence enabling the Misdemeanour Commission to initiate a misdemeanour procedure; or
- first presents evidence enabling the Misdemeanour Commission to complete the already initiated misdemeanour procedure with a decision establishing the existence of a misdemeanour if the existence of the misdemeanour could not be established without such evidence.

If the undertaking that has admitted its participation in a cartel that constitutes a misdemeanour fails to meet the requirements for full immunity from the fine, then there is a possibility for a fine to be reduced if it submits additional relevant evidence being of decisive

importance for adoption of a decision establishing the existence of a misdemeanour to the Misdemeanour Commission.

The immunity, ie, the reduction of the fine shall apply if the undertaking requesting immunity cumulatively meets the following requirements:

- terminates its participation in the cartel immediately after the submission of the request for immunity from a fine;
- cooperates with the Misdemeanour Commission fully, on a continuous basis, and submits the necessary data in the shortest possible time;
- does not notify the other participants in the cartel about the submission of the request for immunity from a fine;
- prior to the submission of the request for immunity from a fine, does not disclose the existence or content of the request, except to bodies responsible for sanctioning the cartel outside the Republic of Macedonia; and
- does not destroy, conceal or falsify relevant evidence used to establish facts being of importance for making a decision by the Misdemeanour Commission.

The Misdemeanour Commission shall not grant full immunity from a fine to the undertaking that throughout the duration of the cartel has taken measures by which it has forced the other undertakings to participate or remain therein, but may determine a reduction of the fine if such undertaking meets the requirements.

23 Subsequent cooperating parties

Is there a formal partial leniency programme for parties that cooperate after the immunity application? If yes, what are the basic elements of the programme? If not, to what extent can subsequent cooperating parties expect to receive favourable treatment?

Subsequent cooperating parties would be undertakings that have admitted their participation in a cartel, but were not the first to present evidence enabling the Misdemeanour Commission to initiate a misdemeanour procedure or were not the first to present evidence enabling the Misdemeanour Commission to complete the already initiated misdemeanour procedure with a decision establishing the existence of a misdemeanour if the existence of the misdemeanour could not be established without such evidence. For such subsequent cooperating parties, fines which, as a rule, would otherwise be imposed on them will be reduced if they submit additional relevant evidence being of decisive importance for adoption of a decision establishing the existence of a misdemeanour to the Misdemeanour Commission. These subsequent cooperating parties must also comply with the cumulative requirements described above.

24 Going in second

What is the significance of being the second cooperating party? Is there an 'immunity plus' or 'amnesty plus' option?

Second and subsequent cooperating parties may benefit from a reduction of the fine that would otherwise be imposed on them, as follows:

- a reduction of such fine in amount from 30 per cent to 50 per cent shall be afforded to the first undertaking that shall provide evidence with significant added value;
- a reduction of such fine in amount from 20 per cent to 30 per cent shall be afforded to the second undertaking that shall provide evidence with significant added value; and
- a reduction of such fine in amount up to 20 per cent shall be afforded to each subsequent undertaking that shall provide evidence with significant added value.

Evidence with significant added value is a reference to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Misdemeanour Commission's ability to prove the alleged cartel. In this assessment, the Misdemeanour Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Incriminating evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of

corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that compelling evidence will be attributed a greater value than evidence (such as statements and the like) which require corroboration if contested.

25 Approaching the authorities

Are there deadlines for initiating or completing an application for immunity or partial leniency? Are markers available and what are the time limits and conditions applicable to them?

Prior to filing a request for initiating a procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels, the applicant may file to the Misdemeanour Commission a marker (ie, a notification may file a notification of the intention of filing a request for release from a fine).

For a filed marker, the Misdemeanour Commission shall issue a confirmation protecting the applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow the applicant to gather the necessary information and evidence.

In order to obtain such a confirmation, the applicant must state in the marker the following information: name and address of the person filing the marker; name and address of the parties to the alleged cartel; description of the goods and/or services affected by such cartel and of the territory where such cartel was active; estimate of the duration of the alleged cartel; description of the nature of the alleged cartel conduct; explanation on the reasons for filing the marker; information on other past or possible future requests to other authorities competent for sanctioning a cartel outside the Republic of Macedonia.

The Misdemeanour Commission shall determine in the confirmation the period within which the applicant must file a request for initiating a procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels (along with relevant information and evidence). If such request is filed within this period, it shall be deemed that the request has been filed on the date of issue of the confirmation. However, if such request has not been filed within this period, the Misdemeanour Commission may freely dispose with the data and evidence provided with the marker and shall notify the applicant thereof.

26 Cooperation

What is the nature, level and timing of cooperation that is required or expected from an immunity applicant? Is there any difference in the requirements or expectations for subsequent cooperating parties?

The first cooperating party, as well as subsequent cooperating parties, are required to fully cooperate with the Misdemeanour Commission, on a continuous basis, and to submit the necessary data in the shortest possible time.

27 Confidentiality

What confidentiality protection is afforded to the immunity applicant? Is the same level of confidentiality protection applicable to subsequent cooperating parties? What information will become public during the proceedings and when?

Under the Law on Protection of Competition, the President and the members of the Commission for Protection of Competition, the President and the members of the Misdemeanour Commission, and the employees shall be obliged to keep the business or the official secret regardless of the manner of its acquisition. The obligation for keeping the business or official secret shall last five years following the termination of the employment in the Commission for Protection of Competition or following the expiry of the term of office as President or member of the Commission for Protection of Competition.

The persons referred to above must not give statements to the public which could harm the reputation of the undertaking, as well as statements on the measures they have taken, that is, the procedures they have initiated while carrying out the activities within their competence until they are legally valid, unless in the case of general information announcement.

A 'business secret' is defined as something which by law or other regulations is determined as a business secret; and the undertaking determines that it constitutes a business secret if the Commission for Protection of Competition or the Misdemeanour Commission accepts such classification.

The Commission for Protection of Competition, that is, the Misdemeanour Commission shall accept the classification of data as a business secret, provided that the data have economic or market value and whose disclosure or use may lead to economic advantage of the other undertakings. The following criteria shall in particular apply to the evaluation of the data: the extent to which the data is known outside the undertaking; the extent to which measures for protection of data secrecy have been taken in the undertaking; and the value of the data for the undertaking and its competitors.

The following, as a rule, shall not be deemed a business secret in terms of the provisions of this law: publicly available data, that is, data which are publicly announced on the basis of another regulation or decision of the managing bodies of the undertaking; data older than five years, regardless of whether they have been considered a business secret; the revenues contained in the annual financial and statistical reports which do not constitute a business secret because they have been publicly announced; and data and documents being of decisive importance for the decisions of the Commission for Protection of Competition, that is, the Misdemeanour Commission. When submitting data classified as a business secret, the undertaking shall be obliged to justify such classification of the data as a business secret by giving objective reasons.

In particular, within the framework of the procedure for release from a fine for a misdemeanour under the Law on Protection of Competition concerning cartels, access to the corporate statement (ie, the statement whereby the applicant admits its participation in the cartel and which is to be enclosed to the request) may be granted by the Misdemeanour Commission only to undertakings against which the procedure is initiated provided that they commit, together with the legal counsels getting access on their behalf, if any, not to make any copy by mechanical or electronic means of any information in the statement to which access is being granted. The corporate statement shall not enjoy special protection as from the moment when the applicant discloses to third parties the content thereof.

Information obtained from the corporate statement can be used only for the procedure in question. If the information is used for other purposes for the duration of the procedure, this can be deemed to be a lack of cooperation with the Misdemeanour Commission.

The Misdemeanour Commission will publish the decision finding that a misdemeanour has been committed once it is adopted. The decision will not include information that is deemed to be a 'business secret' as explained above.

28 Settlements

Does the investigating or prosecuting authority have the ability to enter into a plea bargain, settlement or other binding resolution with a party to resolve liability and penalty for alleged cartel activity?

The Misdemeanour Commission is not authorised to enter into plea bargains or settlements with respect to liability for misdemeanours under the Law on Protection of Competition concerning cartels.

29 Corporate defendant and employees

When immunity or leniency is granted to a corporate defendant, how will its current and former employees be treated?

Employees of the corporate defendant have no misdemeanour liability under the Law on Protection of Competition concerning cartels. However, responsible persons in the legal entity – corporate defendant may be criminally liable for the offence of 'Preventing, limiting or causing distortion of competition'. Full or partial leniency granted to the corporate defendant for a misdemeanour under the Law on Protection of Competition would not affect any criminal liability of the responsible person in such corporate defendant.

Update and trends

The practice with regard to cartels is developing. Certain cartels established by the Commission for Protection of Competition in 2014 as misdemeanours are under review by the Administrative Court.

30 Dealing with the enforcement agency

What are the practical steps for an immunity applicant or subsequent cooperating party in dealing with the enforcement agency?

As noted above, the first cooperating party, as well as subsequent cooperating parties, are required to fully cooperate with the Misdemeanour Commission, on a continuous basis, and to submit the necessary data in the shortest possible time.

31 Policy assessments and reviews

Are there any ongoing or anticipated assessments or reviews of the immunity/leniency regime?

Pursuant to the publicly available sources, there is no ongoing or anticipated assessments or reviews of the immunity or leniency regime.

Defending a case

32 Disclosure

What information or evidence is disclosed to a defendant by the enforcement authorities?

After the Misdemeanour Commission initiates the misdemeanour procedure by adopting a formal conclusion to that effect, the Misdemeanour Commission shall provide the defendant with its conclusion so that the defendant can reply to it. The conclusion shall contain a description of the facts and circumstances outlining why the Misdemeanour Commission initiated its procedure; including the supporting evidence, and may contain a request from the Misdemeanour Commission for the defendant to provide additional information.

During the course of the procedure, the Misdemeanour Commission shall, prior to scheduling the oral hearing, submit to the defendant a preliminary statement of objections raised against them and, prior to the adoption of the final decision, a final statement of objections to the participants in the procedure.

33 Representing employees

May counsel represent employees under investigation in addition to the corporation that employs them? When should a present or past employee be advised to seek independent legal advice?

In general, the same counsel may represent multiple defendants if there is no contradictory defence between them. Representation by an attorney-at-law in misdemeanour procedures is not obligatory.

34 Multiple corporate defendants

May counsel represent multiple corporate defendants? Does it depend on whether they are affiliated?

As already stated above, in general, the same counsel may represent multiple defendants if there is no contradictory defence between them.

35 Payment of penalties and legal costs

May a corporation pay the legal penalties imposed on its employees and their legal costs?

In the case of cartels, there are no administrative fines against the individuals. The Criminal Code provides imprisonment as a sanction against the individuals found guilty.

36 Taxes

Are fines or other penalties tax-deductible? Are private damages awards tax-deductible?

Fines and private damages awards are not tax-deductible with respect to profit tax raised on legal entities.

37 International double jeopardy

Do the sanctions imposed on corporations or individuals take into account any penalties imposed in other jurisdictions? In private damage claims, is overlapping liability for damages in other jurisdictions taken into account?

There is no such express rule with regard to taking into account any penalties imposed in other jurisdictions. The same type of damage for same actions cannot be claimed under Macedonian contractual law.

38 Getting the fine down

What is the optimal way in which to get the fine down? Does a pre-existing compliance programme, or compliance initiatives undertaken after the investigation has commenced, affect the level of the fine?

The value of the fine for misdemeanour depends on the assessment of the Misdemeanour Commission of all relevant criteria for determination of the fine such as the nature and duration of the misdemeanour are considered. Please see the analysis under question 17 with regard to mitigating circumstances. The existence of a compliance programme is not stipulated expressly as a circumstance for decreasing the amount of the fine. However, the practice is developing and it cannot be excluded that such a programme would be accepted as mitigating circumstance.



Tatjana Popovski Buloski
Metodija Velkov

tpopovski@polenak.com
mvelkov@polenak.com

Orce Nikolov 98
1000 Skopje
Macedonia

Tel: +389 2 3 114 737
Fax: +389 2 3 120 420
www.polenak.com

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Aviation Finance & Leasing
Banking Regulation
Cartel Regulation
Class Actions
Commercial Contracts
Construction
Copyright
Corporate Governance
Corporate Immigration
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gas Regulation
Government Investigations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally



Online

www.gettingthedealthrough.com



Cartel Regulation
ISSN 1473-3420



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association



Strategic Research Sponsor of the
ABA Section of International Law