

The International Comparative Legal Guide to:

# Cartels & Leniency 2010

A practical insight to cross-border Cartels & Leniency



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### 1 The Legislative Framework of the Cartel Prohibition

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

The legal basis and general nature of the cartel prohibition is actually neither civil nor criminal. The prohibition is administrative, i.e. the regulatory authority initiates investigation procedures *ex officio* or if approached by affected persons or other authorities. The same regulatory authority is entitled to impose the envisaged sanctions which in their part have also an administrative or administrative-penal nature.

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

The specific substantive regulation of cartel prohibition is in the Protection of Competition Act (PCA). Article 15 of the PCA mirrors Article 81(1) of the Treaty establishing the European Community (the EC Treaty), and 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 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 control 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 condition for undertaking of additional obligations or 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.

#### 1.3 Who enforces the cartel prohibition?

The competent authority is the Commission for Protection of Competition (“CPC” and/or “the Commission”).

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

An investigation procedure is opened on the grounds of a decision

of the CPC, request by the prosecutor, written application by the affected person or a leniency request. The Chair of the CPC shall open a case, appoint a supervising Member of the Commission and specify a working team to conduct the investigation. The CPC shall perform the investigation using its investigative powers. Upon the collection of sufficient evidence the working team shall report to the supervising Member of Commission. Within 14 days as of the conclusion of the investigation the Chair shall appoint a closed session of the CPC. Upon reviewing the report the CPC shall either issue a decision for lack of violation, or rule to return the case to the working party for additional investigation, or rule for serving a statement of objection to the respondent. The respondent, the claimant, and eventually third parties involved shall object the statement of objection within a deadline determined by the CPC but not shorter than 30 days. The parties shall be provided with a redacted version of the statement of objection ruling, where the information specified by the parties as a commercial or other secret shall be deleted. The parties shall be entitled to get acquainted with the materials collected on the case, except for such that are specified as confidential by the providing party. The Chair of the CPC shall appoint a hearing by camera to hear the parties not earlier than 14 days after the expiry of the deadline for objections against the CPC’s statement of objection. After hearing the parties the CPC shall sit in a closed session and issue a final decision, or issue a new statement of objection, or return the case for additional investigation.

#### 1.5 Are there any sector-specific offences or exemptions?

The PCA provides for the possibility for certain agreements to be exempt from prohibition under certain terms and conditions. Along with the general possibility for exemption, there are some sector-specific exemptions which are established in the practice of the CPC and are applicable under certain terms and conditions specified in the respective decision for exemption. Such exemptions concern agreements with the following subjects: 1) research and development of products or processes and joint exploitation of the results of that research and development; and 2) distribution of new motor vehicles, spare parts for motor vehicles and provision of services for warranty and service maintenance of motor vehicles.

#### 1.6 Is cartel conduct outside Bulgaria covered by the prohibition?

The cartel prohibition by the Bulgarian PCA is applicable to agreements which affect or might affect the competition in

Bulgaria. In this respect, the activity of companies within or outside the country is covered by the prohibition only if this activity explicitly or tacitly prevents, restricts, breaches, or may prevent, restrict or breach the competition in Bulgaria, except for cases where extraterritorial applicability is provided for in an effective international agreement to which Bulgaria is a party.

## 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:** \* indicates that the investigatory measure requires the authorisation by a Court or another body independent of the competition authority.

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

The PCA provides that no commercial, industrial, or other legally protected secret or confidentiality can be opposed to the CPC when the latter requires cooperation in the course of investigation. This broad definition raises a number of issues related to human rights such as the right of privacy, attorney-client privilege, etc. In fact, when conducting compulsory search and collection of documents the CPC would respect the attorney-client privilege. The PCA provides that the CPC can assume as proven, the facts of which the parties concerned have gathered during the collection of evidence.

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

The applicable legislation does not entitle the CPC with surveillance powers, including requesting phone tapping or printouts or recordings of phone conversations of employees of the enterprise investigated.

### 2.4 Are there any other significant powers of investigation?

The PCA envisages the opportunity for the CPC to impose *provisional measures* provided that there is sufficient information for a violation

of the competition law and serious damages to the competition are possible to occur. Such measures may include ceasing the practices that are the subject of investigation. Further, the persons authorised to carry out the investigation shall be entitled to assign conduct of expert appraisals to external experts as well as to *request information and assistance from other national bodies* for protection of competition from EU Member States and the European Commission.

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

The investigation shall be performed by a working team and supervised by a member of the CPC, appointed by the Chairman of the CPC. The investigators shall be aided 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, there is no provision in this respect in the applicable law. In fact, there is no provision of privilege of legal documentation. However, as mentioned above, the CPC would respect the attorney-client privilege as regards documents and information exchange with external counsel.

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

The search and collection of evidence are carried out in the presence of a representative of the legal entity under investigation, or its employees, or a person that is entitled to be present in the premises, or a person that was found in the premises.

### 2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used?

A sanction in the amount of 1% of the total turnover for the preceding financial year of the company or the group of companies is envisaged for the cases of non-performance of an obligation to render assistance to the CPC; breaking the integrity or destruction of seals affixed during on-the-spot inspections; untimely submissions or supply of incomplete, imprecise, untrue or misleading information to the CPC in the process of investigation. Natural persons who do not provide any required evidence or do not provide complete, accurate, true and not-misleading information shall be subject to a fine within BGN 500 (ca. EUR 250) to BGN 25,000 (ca. EUR 12,500).

The CPC in its practice has imposed such sanctions in cases of established violations.

## 3 Sanctions on Companies and Individuals

### 3.1 What are the sanctions for companies?

The amount of the sanction for offences related to the existence of prohibited agreements would be up to 10% of the total turnover for the preceding financial year of the company or the grouping of companies.

### 3.2 What are the sanctions for individuals?

The general sanction pointed in the previous answer shall be applicable.

According to the new PCA, as of 02 December 2008 natural persons who have cooperated in the breach of the PCA, if their actions do not represent a crime, shall be subject to a fine in the range of BGN 500 (ca. EUR 250) to BGN 50,000 (ca. EUR 25,000).

### 3.3 What are the applicable limitation periods?

The PCA differentiates the limitation periods: the legal prescription term for violation of the provisions, related to requests for providing information or to conducting inspections, is set at three years, while for all other types of offences a five-year term is envisaged.

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

There is no explicit legal provision in this respect. The financial penalties may be imposed to and collected only from the persons (individuals) who have committed the respective violation. There is no particular prohibition for a company to pay the penalties on behalf of an employee; however, taxation issues may arise.

## 4 Leniency for Companies

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

A Leniency Programme and Rules for its application were adopted by Decision No. 112 of 10.02.2009 of the CPC.

The release from a sanction and the reduction of a sanction shall only be applicable in case of a secret cartel of undertakings. The Programme shall be applicable in proceedings for the establishment of violations under Art. 15(1) PCA and Art. 81(1) ECT. The final release from a sanction or the reduction of a sanction shall be ordered by the final decision of the CPC in the respective investigation. Non-performance of the rules of the Programme excludes the applicability of leniency.

Release from a fine is applicable under the following conditions: prior to other cartel members, the undertaking submits evidence, enabling the CPC to carry out an inspection in connection with the alleged cartel; and at the time of the submission of such evidence the CPC did not have sufficient information and evidence, in order to request a court authorisation to carry out inspection; and at the time of submission of the application the undertaking has ended its involvement in the secret cartel, unless the CPC estimates that the continuation of its involvement will be necessary for the investigation; and the undertaking fulfils, throughout the proceedings, all other conditions required for granting immunity from fines as specified in section V of this Programme.

To enable the CPC to perform an inspection the undertaking has to provide at least the following information supported by evidence: confession of participation in the cartel; individualising data of the applicant; information of the individuals that carried on the cartel activities on behalf of the undertaking; individualisation data of the other participants in the cartel; information on the individuals who carried on the cartel activities on behalf of the other participants; detailed description of the alleged cartel; evidence of the organisation and activity of the alleged cartel; information about all other preceding or possible subsequent leniency applications to any other competition authority (within or out of the EU) related to the same alleged cartel.

In these cases leniency shall not be applicable if the CPC has

already performed an inspection of premises or if the CPC already has sufficient data to apply for a court permission of such inspection.

Leniency shall also be applicable under the following conditions: prior to other cartel members, the undertaking submits evidence that will enable the CPC to prove the alleged infringement; and at the time of the submission of the evidence the CPC has not granted to another undertaking conditional immunity from fines in connection with the alleged infringement in a hypothesis as described above; and at the time of the submission of the evidence the CPC did not have sufficient evidence, in order to prove the infringement; and the undertaking ends its involvement in the secret cartel at the time of its application, unless the CPC estimates that the continuation of its involvement will be necessary for the investigation; and the undertaking fulfils, throughout the procedure, all other conditions required for granting immunity from fines as specified in the Programme.

Leniency under these conditions shall not be applicable where another undertaking has already been released from sanctions based on the same conditions.

In any case release from sanctions shall not be applicable for an undertaking that had acted so as to force other undertakings into the alleged cartel.

Reduction of sanctions shall be applicable under the following conditions: the undertaking voluntarily, prior to the termination of the proceedings before the CPC submits evidence, which is of significant importance to prove the infringement; the undertaking ends its involvement in the secret cartel at the time of its application, unless the CPC estimates that the continuation of its involvement will be necessary for the investigation; and the undertaking fulfils, throughout the procedure, all other conditions outlined in the Programme.

Reduction can be in an amount up to 50% of the fine due for the particular violation. The CPC shall take into account the importance of the provided evidence and the time of provision of the evidence compared to other leniency applicants. The first to provide evidence can be granted reduction of 30% to 50%, the second - 20% to 30%, and any subsequent - 10% to 20%.

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

Subject to the CPC's discretion, the Commission may grant a period of time to the undertaking to complete the leniency application with the required information and evidence. The assessment shall be made by the CPC on the basis of an application by the undertaking, justifying the reasons for the necessity of granting the period of time and the goals that it intends to attain during that period of time. During that period the position of the undertaking in the consecutive order of submission of information and evidence to the Commission relating to the implementation of the Programme for the specific case, shall be preserved. If before the expiration of the set period of time the undertaking submits all information and evidence required for immunity from fines, they will be deemed to have been submitted on the date when the period of time (the marker) was granted.

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

Applications can be made orally subject to certain conditions. The oral application, however, shall be recorded by appropriate

technical means and a protocol is drafted for it that shall be signed by contact persons at the CPC and the representative of the applicant.

#### 4.4 To what extent will a leniency application be treated confidentially and for how long?

The Rules for the application of the Leniency Programme subject “all information and evidence in relation to the application of Art. 101 PCA [*i.e. leniency*] as well as the contents of discussions with undertakings in this regard” to the general obligation of the CPC officers to keep professional secrets. The Rules state that the identity of the applicant shall be kept secret until the serving by the CPC of the statement of objection to the respondents in investigation.

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

Pursuant to the PCA, the undertaking applying for leniency has to cooperate effectively with the Commission throughout “the entire proceedings”. This means until the issuing of the final decision of the CPC as long as this act finalises the administrative proceedings.

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

No, there is not.

## 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, there are not.

## 6 Plea Bargaining Arrangements

#### 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)?

In case the Commission presents the investigated party with a statement of objection, the party could propose to undertake certain obligations through which the behaviour in relation to which the investigation has been started is to be suspended. The Commission could approve through a decision the obligation in which case the procedure shall be terminated without the establishment of a violation. In this case the Commission in addition could determine a term in which the obligations have to be observed. However, the Commission could not adopt a decision allowing the undertaking of certain obligations in case of hardcore violation of the law.

## 7 Appeal Process

#### 7.1 What is the appeal process?

The decisions of the Commission shall be subject to appeal before the Supreme Administrative Court within 14 days following their notification to the parties under the terms of the Code of Civil Procedure. The decisions can also be appealed by any affected third

party within 14 days as of the publishing of the decision in the electronic registry of the CPC.

The appeal process is two instances - intermediate appellate review and cassation appellate review.

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

Examination of witnesses is possible, but only before the intermediate appellate instance. Before the cassation appellate instance, only written evidence is admissible. Witness examination in the Bulgarian administrative process, however, does not coincide with the concept and structure of “cross-examination” in common law systems.

## 8 Damages Actions

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

The plaintiff has to file a claim before the competent civil court. The plaintiff has to prove that he has suffered damages, that the damages result from cartel conduct (the violation has to be established through a decision that has come into force), the direct connection between the cartel conduct and the damages and the amount of the damages. The Commission’s decision establishing the violation which has come into force, respectively in case of appeal - the decision of the Supreme Administrative Court confirming the Commission’s decision, is binding on the civil court before which the civil damages action is filed.

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

Yes. However, the concept has been introduced only recently and there is no precedent whatsoever.

#### 8.3 What are the applicable limitation periods?

The limitation period is five years.

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

There are no particular cost rules for civil damages follow-on claims in cartel cases and thus the general cost rules shall be applicable. For each litigation procedure, state fees and court costs are collected. The state fee shall be calculated in the amount of 4% of the value of the claim but shall not be less than BGN 50 (EUR 25). This state fee shall be paid by the plaintiff upon submission of the claim. With respect to the court costs, each party shall pay in advance the costs for the court actions which the said party has asked for. The amounts for costs for actions requested by both parties or initiated by the court shall be deposited by both parties or by one party depending on the circumstances. In the course of the litigation procedure, each party shall bear its costs for attorney remuneration, experts’ appraisals it has moved for, etc. At the end of the court proceedings, in its decision the court shall award the court costs and state fees to the parties in accordance with the outcome of the case. Thus, the losing party shall be obliged to pay the court costs and the state fee. In case of partial satisfaction of the claim, the court costs shall be awarded to both parties accordingly,

depending on the satisfied/rejected part of the claim. Should the dispute be solved and the case concluded by a settlement, half of the state fee initially paid shall be refunded to the plaintiff. The costs of the proceeding and of the settlement shall be borne by the parties who incurred the said costs, unless otherwise agreed.

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**8.5 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct?**

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There is no official statistic available in this regard; however, to the best of our knowledge, there are no such cases.

## 9 Miscellaneous

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

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The new Protection of Competition Act is purposed to ensure the application of the European law and the possibility for the Bulgarian CPC to take an active part in the decentralised application of the competition rules within the European Union.

In the field of cartels, the new act follows very closely the provisions of Regulation of the Council No. 1/2003, namely: determination of prohibited agreements and concerted practices; the share markets defining the agreements with insignificant effect; terms and conditions for block exemption; procedures related to the investigation in case of cartel conduct, including a settlement procedure; the amount of the sanctions in case of established cartel agreements; and civil damages claims for cartel conduct.

In the field of leniency, the new PCA introduces a Leniency Programme regulating in detail the conditions and the procedure for release of administrative responsibility or reduction of the sanctions in case of cartel conduct.

The CPC has been very active in the course of 2009 and is currently running a number of cartel investigations among which are an investigation against the association of commercial banks and an investigation against the major consumer retail chains. Leniency, however, does not seem to be a popular instrument.

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

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The new law adopted in 2008, besides the more active introduction of a leniency programme, introduced a new and very uncommon, so far, structure of fines (up to 10% of preceding year's turnover) for any violation of the PCA, not only cartels, which lead to an immediate drastic increase of the fines imposed by the CPC for competition violations. So far there is a negative reaction on the new policy on the side of the business, but there are no final court decisions yet on appeals against fines imposed.



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