



Cartels

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Albania

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Overview of the law and enforcement regime relating to cartels

The law no 9121/2003 “On the protection of competition” (the Competition Law) covers, *inter alia*, collusive agreements between undertakings. Similarly to article 101 (1) TFEU, Article 4 of the Competition Law provides a general prohibition for all agreements between undertakings having as their object or effect the prevention, restriction or distortion of competition. A non-exhaustive list of the prohibited conducts is set out in the law and includes agreements related to:

- (a) directly or indirectly fixing prices or other trading conditions;
- (b) sharing markets or sources of supply;
- (c) limiting or controlling production, trade, technical development or investment;
- (d) applying to some parties dissimilar conditions for equivalent transactions, thereby placing them at a competitive disadvantage; and
- (e) making the conclusion of contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts that, by their nature or in accordance with commercial usage, have no connection with the subject of the main contract or to its performance.

The meaning of ‘agreement’ is very broad and it covers any kind of the agreements and/or concerted practices of two or more undertakings, and decisions or recommendations of associations of undertakings, regardless of their form, written or not, or binding force. Agreements are ‘horizontal’, meaning agreements between competing undertakings operating in the same market or ‘vertical’, meaning between undertakings operating in different market levels. Given the very broad definition of ‘agreement’, the legislator has not seen it necessary to introduce a special legal notion for ‘cartels’. Indeed, cartels fall under the regime of all other types of collusive agreements under the Albanian Competition Law.

Similar to all other breaches under Article 4 of the law, participation in a cartel constitutes a serious administrative infringement subject to a pecuniary sanction of up to 10% of the annual turnover of the cartel member. On the other hand, the Competition Authority (Authority) may impose, for less serious infringements, fines amounting up to 1% of the turnover of a cartel member during the last financial year in case it obstructs cartels investigations such as when it does not provide the required information within the required deadline, refuses to allow access to investigation, provides misleading, incomplete or false information, provides misleading, incomplete or false records during the inspection, refuses to accept authorised inspections, refuses to respond or provides misleading, incomplete or false answers, removes seals, etc.

Fines for individuals who either with intent or out of negligence participate in a cartel, cannot exceed 5 million LEK (approx. 35,000 EUR).

The Authority is the competent authority for the enforcement of cartel prohibition. The Authority is composed of the Commission, which is the decision-making body and the Secretariat that in turn conducts the investigations in relation to potential infringements, provides to the Commission the relevant investigation reports and monitors the implementation of the decisions of the Commission.

Overview of investigative powers in Albania

According to the Competition Law, the officials of the Authority have all the following investigation rights in place in relation to alleged cartel behaviour:

Request for information: The Authority can request information from any third party, person or undertaking information that is necessary for its investigation, including information containing business secrets. If the required parties do not provide the information within the set timeframe, the Commission may adopt a decision to demand the required information from the relevant parties. This decision must provide the deadline for the submission of information, legal bases for the request and fines in case of failure to respond.

Information from public bodies: The Authority may request all necessary information from state authorities and public bodies which have a duty to cooperate with the Authority.

Dawn raids: The Authority may conduct dawn raids in cases of suspected cartel and abuse of dominance cases. Dawn raids at business premises require a prior decision of the Commission while inspection of non-business premises requires the prior authorisation of the relevant administrative court having jurisdiction over the location of the inspection.

During a non-business premises inspection, the inspectors of the Authority may enter the residence of the administrators, managers, directors and other staff members and other premises similar to residence, as well as residence and business premises of persons and entities, in house or external, in charge of financial, accounting, tax or administrative activities of the undertakings concerned, only between 7:00 and 18:00 hours.

During unalerted inspections, the inspectors of the Authority may:

- inspect books and records of the economic activity of the undertaking, in hard or electronic copy;
- seize documents, records, registers or obtain copies thereof;
- seal premises, records or books for not more 72 hours if necessary for the inspection; and/or
- conduct interviews with representatives or employees of the undertaking with respect.

Regarding inspections at non-business premises, seizure of evidence may be made upon prior court decision and may be extended up to six months from the original 72 hours. The person affected by the seizure must be notified through minutes and has the right to appeal the seizure with the relevant court.

The Authority's inspectors are usually accompanied by IT specialists, who can search the entire IT environment and storage media, running key-word searches on stored files and emails.

Overview of cartel enforcement activity during the last 12 months

The cartel enforcement practice of the Competition Authority is not very rich, although a positive trend has been observed in terms of the number of third parties' complaints

received by the Authority regarding alleged cartel behaviour. Most of the alleged cartels investigated during 2017 (some six cases) were closed after preliminary investigation procedures with the Authority concluding that during the inspections no evidence of direct or indirect communication between the investigated undertakings were found and that economic evidence based on OECD methodology did not point to a potential collusive behaviour between the parties. As a result, all the investigations were closed mainly with recommendations from the Authority for the investigated undertakings or the regulatory authorities, where relevant.

Investigated markets during 2017 included the telecommunications market, market for the distribution of movies in cinemas, market for the production and sale of milk, liquid gas market, market for the production of bread, etc.

Key issues in relation to enforcement policy

One of the most important factors of an effective anti-cartel practice in Albania is the full implementation of a leniency programme, which gives incentives for the members of a cartel to voluntarily disclose their conduct to the Authority. The effectiveness of the leniency programme, however, has not been yet tested and applied in Albania.

Further, the success of cartel enforcement depends on strong sanctioning policies by the Authority which in turn should provide for sufficient preventive effect for cartel members.

Public awareness and competition advocacy is also important. It is not exaggerated to say that many undertakings in Albania are still ignorant of the fact that price-fixing practices are illegal and are unaware that dawn raids and investigative powers of the Authority in their business premises are all in accordance with the Competition Law and cannot be obstructed.

Leniency/amnesty regime

A leniency regime has been in place in Albania since 2004 but to the best of our knowledge, no applications for leniency had been received by the Albanian Competition Authority due to the fact that companies in Albania are still not very familiar with the Competition Law.

Article 77 of the Competition Law provides the possibility for a cartel member to obtain total or partial relief from financial penalties should it meet certain criteria. Further, the Regulation ‘On Fines and Leniency Policy’ (the Regulation) details the leniency policy in full.

The leniency policy is drafted along the lines of the European Commission’s leniency regime. To the extent an undertaking helps to establish cartel behaviour and identify its members by providing items of information not previously available to the Authority, the Commission may grant total or partial relief from the financial penalties. Such relief will be granted in proportion to the contribution made to identify and prohibit the infringement. The first undertaking that submits sufficient evidence to the Authority is eligible to receive immunity from any fine which would otherwise have been imposed. Other undertakings that do not meet the conditions for immunity from any fine can benefit from a fine reduction up to 50%, the exact percentage depending on the value of the contribution to exposing the cartel and the order of the applications where several cartel members have applied for leniency.

Administrative settlement of cases

There is no legal framework or case law with respect to settlement procedures outside the leniency policy.

Third-party complaints

The Competition Law sets out the right of any interest party to report on an alleged cartel or other Competition Law infringements by submitting a complaint to the Authority. The complainant may reserve the right of its anonymity. The Authority has approved a complaint form but complaining parties are free to supplement the form with additional information and also request confidentiality of certain information submitted. When the Commission deems that the information submitted by the complaining party is not sufficient to prompt an inspection, it authorises the Secretariat to inform the complaining party on its decision and to set a deadline for the complainant to make its observations regarding the decision not to open an investigation. If the observations of the complaining party do not convince the Commission to alter its decision, it will inform the complainant accordingly. The complainant may appeal the decision of the Commission not to act with the relevant court.

A crucial right of a complaining party is the right to obtain a copy of the in-depth investigation report of the Authority (the equivalent of the Statement of Objections) in relation to a cartel investigation where confidential information is omitted. The complainant is given a deadline to submit its written observations on the report and also a request to participate in a hearing session.

Lastly, the complainant has the right to access information where the Commission supports its decision not to start an investigation. Such information can be used by the complainant only for the purpose of court procedures.

Civil penalties and sanctions

As noted above, participation in a cartel constitutes a serious administrative infringement subject to a pecuniary sanction of up to 10% of the annual turnover of the cartel member. On the other hand, the Authority may impose for less serious infringements fines amounting up to 1% of the turnover of a cartel member during the last financial year.

Fines for individuals who either with intent or out of negligence participate in a cartel, cannot exceed 5 million LEK (approx. 35,000 EUR).

The Regulation on Fines and Leniency approved by the Authority is based on the 2006 European Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. As a rule, the Authority should first determine the basic amount for the fine that it will adjust upwards or downwards according to aggravating or mitigating circumstances of the infringement, by reference to the value of the specific sales of services to which the infringement relates in Albania. The basic amount of the fine will then be determined as a proportion of the value of sales, multiplied by the number of years of infringement. The proportion of the value of sales considered will be set at a level of up to 30% of the value of sales and, in the case of cartel behaviour, will have to be on the higher end. The Authority has the right to include in the basic amount a sum of between 15% and 25% of the value of sales in order to further discourage undertakings from cartel behaviour. The final amount of the fine cannot exceed 10% of the total turnover in the preceding financial year of the undertaking concerned.

There is lack of transparency on the methodology applied by the Authority in determining the fines for cartels or abuse of dominance infringements. In certain cases, the Authority will limit itself to proposing a fine that is equal to 10% of the turnover of the undertaking concerned in the previous financial year.

Right of appeal against civil liability and penalties

A decision of the Competition Authority at the end of the in-depth investigation to impose fines on the cartel members can be challenged within 30 days with Tirana's administrative court of first instance. The appeal of the decision does not automatically suspend the collection of fines as under the Competition Law, fines are considered as an 'executive title'. The undertaking concerned can request a freezing order from the court to suspend the collection of the fine until the dispute is trialled in the merits although is not very likely that administrative courts grant a freezing order when public institutions are involved. It is worth noting that the payment of the fine is not a condition for the filing of an appeal with Tirana's Administrative Court of first instance.

Criminal sanctions

There are no criminal sanctions for cartel infringement under the Albanian Criminal Code or the Competition Law.

Cross-border issues

As a rule, the Albanian Competition Law is applicable in all instances when the impact of behaviour is present in the local market, irrespective of the location of the undertakings concerned. In practice, however, the Authority has not asserted its extra-territorial jurisdiction to date and there is no clarity on the issues that the Authority may face in these cases.

Developments in private enforcement of antitrust laws

In addition to the public enforcement of competition rules, the Competition Law also provides for the right of any person to privately enforced competition infringements with the Albanian District Court. Hence, any person prevented in its activity due to alleged prohibited agreements or abusive practices may challenge such practice in court and demand (a) the cessation of illegal practice, and (b) damage compensation pursuant to the Albanian Civil Code provisions. Such actions are independent of the proceedings before the Authority or previous decisions on the same matter. As an exception, exemption of agreements from the general prohibition provided in the law cannot be applied by the court given that the Authority has exclusive rights to review applications for exemptions under the law. In practice, this means that if the defendant in private enforcement procedures invokes before the court conformity of the agreement or practice with the exemption rules, the court will have to suspend the process and wait for the Authority to decide whether to make an exemption.

The court will ultimately decide if an agreement is fully or partially invalid with retroactive effect and, where applicable, the obligation of the defendant to enter into an agreement with the plaintiff under usual commercial terms. Damage compensation claims, on the other hand, are strictly based on the Albanian Civil Code provisions according to which, any person who illegally and with fault causes damage to a person or his/her property, should compensate for the damage caused. The claimant in this case must prove the illegality of the conducts, the damages caused and the causal link between the illegal conduct and the damages. A decision of the Competition Authority finding that there is cartel behaviour will serve as direct evidence that there has been illegal conduct, i.e. in this case, the plaintiff will not have to prove the illegality of the behaviour.

Despite the existing legal framework, there are no cases of private litigation in Albania that seek to privately enforce the provisions of the Competition Law. According to the UNCTAD Voluntary Peer Review of Competition Law and Policy Report for Albania, this situation is mainly due to lack of public awareness for private enforcement possibility, lack of trust in Albanian Courts, length of civil proceedings and lack of procedural instruments for the private parties to secure evidence for the infringements.

Reform proposals

There are no reform proposals in the pipeline regarding cartel enforcement.

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Anisa Rrumbullaku is a Partner covering the Corporate and Competition practice of the firm. She is specialised in all aspects of competition practice, i.e. merger control, abuse of dominance, prohibited agreements and individual exemption filings, and has also participated as speaker regarding merger control procedures in workshops organised by the Albanian Competition Authority.

Before co-founding CR PARTNERS, she worked for another Albanian leading law firm where she was a partner in charge of the M&A/competition practice providing clients with legal advice across all sectors on M&As, contracts, PPPs, merger control, abuse of dominance and assisting them in dawn raids conducted by the competition authority. *Chambers Global 2017* acknowledges Anisa as a Leading Lawyer in the Corporate/Commercial field for Albania.

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