



# ICLG

The International Comparative Legal Guide to:

## Cartels & Leniency 2016

**9th Edition**

A practical cross-border insight into cartels and leniency

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# Albania

Gjika & Associates Attorneys at Law

Oltion Toro & Silvi Tola

## 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?

By virtue of Article 4 of the Law 9121/2003 “On the Protection of Competition” (the “Law on Competition”), all agreements having as their object or effect the prevention, restriction or distortion of competition within the Republic of Albania are prohibited. Agreements providing clauses that may restrict or distort competition are null and void.

Such prohibition is of a civil nature, as Albanian law provides only for administrative fines and civil actions. So, the Law on Competition provides administrative fines imposed by the Competition Authority to any company involved in the prohibited agreements, as well as to individuals that intentionally or by negligence, action or omission do not cooperate with the Competition Authority and do not provide the information required by the latter.

Furthermore, the Albanian Civil Code provides for legal civil action against any third party causing damages due to execution of prohibited agreements.

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

By virtue of Article 4 of the Law on Competition, agreements are prohibited, in particular, that:

- directly or indirectly fix purchase or selling prices or any other trading condition;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- provide dissimilar conditions to equivalent transactions with different parties, thereby placing them at a competitive disadvantage; and
- render the conclusion of agreements subject to the acceptance by other contracting parties of additional obligations that, due to their nature or their commercial use, are not related to the object of such agreements.

By virtue of the decision of the Competition Authority following the notification of any interested party, the following agreements may be exempted from such prohibition:

- agreements that contribute towards improving the production or distribution of goods or promote technical or economic

progress, in the case that a substantial part of the benefits goes in favour of clients and consumers and which:

- i. do not impose additional obligations which are not indispensable to the fulfilment of the main objectives; and
  - ii. do not considerably restrict the competition in relation to the products or services, or object of the relevant agreement.
- agreements in some specific sectors such as: specialisations, research and development and technological transfers; and
  - agreements of minor importance which meet the following conditions:
    - i. the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors); and
    - ii. the aggregate market share held by the parties to the agreement does not exceed 15% on any of the relevant markets, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors).

### 1.3 Who enforces the cartel prohibition?

By virtue of the Law on Competition, the Competition Authority (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, which is entitled to carry out investigations in relation to competition, provide to the Commission the relevant investigation reports, and follow up the implementation of the decisions of the Commission.

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

An investigation may be initiated either *ex officio* by the Competition Authority or upon a request filed with the Authority by: (i) the Parliament; (ii) any regulatory institution of a specific sector; or (iii) any interested party.

Following a complaint from one of the above parties, and upon approval of the Commission, the Secretariat may initiate preliminary investigation procedures. The Secretariat carries out the investigation procedures whenever requested by the Commission.

In a case where there are grounds to believe the existence of distortion or restriction of the competition, the Commission decides on the performance of a thorough investigation, and how it will be executed.

Such thorough investigation should be completed within six months from the date the Commission initiates such investigation. Following completion of the investigation, the Commission issues a decision on its findings and the relevant measures to be performed by the infringer in order to remedy the breach.

In a case where there is a risk of serious and irreparable damage to competition and there are grounds to believe the existence of prohibited agreements, the Commission, *ex officio* or upon a request from the interested parties, may decide on the adoption of preliminary measures such as to require the relevant parties to terminate or execute certain contracts, or to undertake specific actions.

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

The Law on Competition does not provide for sector-specific offences, but does provide for some exemptions in specific sectors. The following agreements are exempted from the prohibition:

- specialisation agreements;
- research and development agreements; and
- technological transfer agreements, including licensing agreements where one party (the licensor) authorises another party or parties (the licensee(s)) to use its technology (patent, know-how, software license) for the production of goods and services.

The exemption shall apply to the extent that such agreements do not contain provisions on restrictions of competition.

### 1.6 Is cartel conduct outside your jurisdiction covered by the prohibition?

The prohibition applies both to agreements concluded between companies operating within Albania as well as to agreements concluded between companies operating outside Albania, as long as the effects are felt within the Albanian market.

## 2 Investigative Powers

### 2.1 Summary of general investigatory powers.

Table of General Investigatory Powers

| Investigatory power                                       | Civil / administrative | Criminal |
|---|------------------------|----------|
| Order the production of specific documents or information | Yes                    | N/A      |
| Carry out compulsory interviews with individuals          | Yes                    | N/A      |
| Carry out an unannounced search of business premises      | Yes                    | N/A      |
| Carry out an unannounced search of residential premises   | Yes*                   | N/A      |

| Investigatory power  | Civil / administrative | Criminal |
|--|------------------------|----------|
| ■ 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 authorisation by a court or another body independent of the competition authority.

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

The premises may not be securely sealed for longer than 72 hours.

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

Albanian law does not provide for any surveillance powers.

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

The Law on Competition provides for the right of the inspector to secure all of the objects considered as evidence necessary for the investigation, for a period no longer than 72 hours. Such deadline may be extended up to six months by virtue of a court decision.

By virtue of a court decision, inspectors are entitled to search and investigate the business premises of companies in charge of the administration, commercial management and accounting of the company under investigation, which may be conducted between 07:00 and 20:00.

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

The inspectors of the Authority are entitled to carry out searches of business premises, provided that they are duly authorised by the Commission. In relation to searches within residential premises, the authorisation of the court is required.

In the case of investigations conducted following a court decision, the person under investigation is entitled to request the presence of a reliable person (not obligatory legal advisor) before the search starts. The inspectors should wait for such person before starting the search, provided that such person is available in a short period of time.

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

According to the Law on Legal Professions, only communications between attorneys and clients are protected. However, the confidentiality obligation of an in-house lawyer may be stipulated in the employment contract with the relevant company.

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

The investigation of residential premises may be performed by virtue of a court decision.

The inspectors of the Authority are entitled to secure all of the objects considered as necessary evidence for the investigation, for a period no longer than 72 hours. This deadline may be extended up to six months by virtue of a court decision.

### 2.8 Are there sanctions for the obstruction of investigations? If so, have these ever been used? Has the authorities' approach to this changed, e.g. become stricter, recently?

The obstruction of investigations, such as the refusal to provide the required information within the required deadline or the provision of misleading, incomplete or false information, is punished by the Authority by a fine amounting up to 1% of the general turnover realised by the company during the last financial year.

Moreover, individuals that intentionally or by negligence perform the aforementioned acts, or cooperate in relation to the above acts are subject to fines amounting up to 5 million Albanian Lek ("ALL") (approx. EUR 3,600).

Such fines have been applied by the Authorities in several cases, and there has been a tendency for stricter penalties. For example, by virtue of decision No. 318, dated 02.06.2014, the Commission set a fine amounting to 100,000 ALL (approx. EUR 720) to a company for not providing data within the deadline determined by the Commission.

## 3 Sanctions on Companies and Individuals

### 3.1 What are the sanctions for companies?

The sanctions imposed by the Authority are as follows:

- a fine amounting to up to 1% of the general turnover realised by the concerned company during the last financial year in the case of obstruction of investigations, such as refusal to provide the required information within the required deadline, provision of misleading, incomplete or false information, provision of misleading, incomplete or false registers during the inspection, refusal to accept the inspection that is designated to be carried out based on the relevant decision of the Commission, refusal to reply or provision of misleading, incomplete or false answers, and removal of seals as well; and
- a fine amounting up to 10% of the general turnover realised by the concerned company in the case of infringement of provision of cartel prohibitions and failure to comply with Commission decisions.

### 3.2 What are the sanctions for individuals?

The Authority may impose a fine amounting up to 5 million ALL (approx. EUR 3,600) to individuals that intentionally or by negligence, action or omission do not cooperate with the Authority and do not provide the information required by the latter.

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

The Authority may consider financial hardship or inability to pay as grounds for reduction of fines only in particular cases and provided that such inability is duly evidenced.

### 3.4 What are the applicable limitation periods?

There are no statutory limitation periods in relation to the payment of penalties for companies or individuals involved in cartels. However, in practice the deadline for payment of the penalties is defined on a case-by-case basis by the Commission and depends on the amount of penalty.

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

A company is liable for the damages caused by its employees, therefore the employer is liable for the legal costs and/or financial penalties imposed on a former or current employee.

### 3.6 Can an implicated employee be held liable by his/her employer for the legal costs and/or financial penalties imposed on the employer?

By virtue of the Civil Code, an employee may be held liable for all of the damages suffered by the employer due to their acts or omissions by violating the applicable law.

## 4 Leniency for Companies

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

The Law on Competition provides for full or partial leniency programmes for the companies which provide important information to the Authority for the identification and prevention of prohibited agreements, or the identification of the responsible persons.

Full leniency may be granted to the first company which provides to the Authority information in relation to the identification and prevention of a cartel, the identification of the responsible persons, and submits new evidence for which the Authority was not aware, enabling the latter to initiate an investigation in relation to a prohibited agreement and to identify such violation of the law.

In order to benefit from the full leniency programme a company should provide to the Authority:

- a copy of the prohibited agreement, or a description of such agreement including: the subject; the products; the relevant market; the duration; the signing date; the location; and any other detail that may help the Competition Authority;
- the names and addresses of the companies/parties in the agreement; and
- the name and address of the premises of the business and, if necessary, the names of the persons involved in such prohibited agreement.

Furthermore, the company should:

- be available to answer the questions of the Authority;

- not destroy, falsify or alter the relevant information in relation to the prohibited agreements; and
- provide any other information related to the prohibited agreement.

Partial leniency may be granted to the companies which do not meet the requirements for benefiting from full leniency and which provide to the Authority evidence on the suspected infringement which represents significant added-value to the evidence already in the possession of the Authority. The level of leniency may be:

- for the first company: 30-50% of the fine;
- for the second company: 20-30% of the fine; and
- for the following companies: up to 20% of the fine.

In all cases, in order to benefit from the leniency programme companies should cooperate with the Authority on a continuous basis throughout the investigation procedure and should not be involved in prohibited agreements as from the moment of providing information to the Authority.

Leniency is not granted in cases where information is provided after the closure of the investigation.

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

A marker system is applicable. By virtue of this system, the first to submit information on prohibited agreements shall be considered the first for the purposes of calculating the level of leniency.

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

Applications for leniency should be made only in writing.

#### 4.4 To what extent will a leniency application be treated confidentially and for how long? To what extent will documents provided by leniency applicants be disclosed to private litigants?

By virtue of the Law on Competition, all of the employees of the Authority should keep all information, data and documents received during the exercise of their function secret and confidential, and such confidential clause should be observed even after the termination of their function.

They are entitled to disclose confidential information only if required by the court.

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

The continuous cooperation requirement ceases to apply at the end of the investigation procedure and/or the issuing of a decision by the Authority.

#### 4.6 Is there a 'leniency plus' or 'penalty plus' policy?

Albanian law does not provide for a 'leniency plus' or 'penalty plus' policy.

## 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.

The Law on Competition provides for the right of any interested individual to report any cartel, restrictions, distortions or obstructions of competition by submitting a complaint to the Authority, independently of their employer, requesting the initiation.

The Regulation on the Functioning of the Competition Authority and the Regulation on the Investigation Procedures provide for the possibility to submit verbal or written complaints by courier or email (electronically).

The Commission evaluates complaints within 15 days of receipt and informs the appellants accordingly. In the case where there are no grounds for initiating an investigation based on the information provided by the appellant, the Commission requires the appellant to submit its summons in writing within a defined period of time.

In the case where the submitted summons do not convince the Authority of any potential prohibited agreement, the latter may decide to refuse the claim. In case appellant fails to submit the summons within the deadline, the claim shall be considered as withdrawn.

## 6 Plea Bargaining Arrangements

### 6.1 Are there any early resolution, settlement or plea bargaining procedures (other than leniency)? Has the competition authorities' approach to settlements changed in recent years?

Albanian law does not provide for any other early resolution, settlement or plea bargaining procedures.

## 7 Appeal Process

### 7.1 What is the appeal process?

The decision of the Authority may be appealed with the Tirana Administrative Court within 30 days from the date of notification of the decision.

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

The appeal against a decision imposing a fine does not suspend the execution of the decision, meaning that a company's objection to the fine does not release it from the obligation to pay the fine.

A fine imposed by the Authority constitutes an executive title.

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

Albanian law allows for the cross-examination of witnesses during the appeal process.

## 8 Damages Actions

### 8.1 What are the procedures for civil damages actions for loss suffered as a result of cartel conduct? Is the position different (e.g. easier) for 'follow on' actions as opposed to 'stand alone' actions?

Any person who has suffered damages due to the execution of any prohibited agreement may submit a claim with the Tirana District Court despite a procedure initiated before the Authority and may request: (i) the cancellation of any restriction on competition; and/or (ii) compensation of damages.

The court may (i) decide the invalidity of the prohibited agreement, partially or entirely, and/or (ii) order the signature of the agreement between relevant companies in compliance with ordinary trade terms and conditions.

In the case that there are grounds to believe that potential damages may have been caused to the plaintiff, and when there are grounds to believe the existence of a prohibited agreement, the court may decide on preliminary measures, such as blocking the infringer's assets, or take other measures it deems necessary.

The procedure for a "follow on" action may result in a more straightforward case compared to a "stand alone" action, as in the first action the plaintiff is supported by the decision of the Competition Authority identifying prohibited agreements. In a "stand alone" action the plaintiff needs to prove the existence of a prohibited agreement and that the damage suffered by the plaintiff is due to such prohibited agreement.

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

Albanian law allows class-action or representative claims, provided that the claims have the same object and the plaintiffs or the defendants have the same rights and obligations in relation to the object of the claim.

### 8.3 What are the applicable limitation periods?

The prescription period for submitting a claim for civil damages suffered due to a prohibited agreement is three years from the moment of the identification of the damage.

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

Albanian law does not provide for "passing on" defence in civil damages claims in particular. However, it may be used by the members of cartels as an argument in their defence.

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

The court fee for submitting a claim for damages due to a cartel amounts to 1% of the value of the claim.

The bailiff fee for executing the final court decision depends on the value of the claim and varies from 2.4–5.8% of the value of the claim.

### 8.6 Have there been any successful follow-on or stand alone civil damages claims for cartel conduct? If there have not been many cases decided in court, have there been any substantial out of court settlements?

To date there have not been any follow-on or stand alone civil damages claims for cartel conduct.

## 9 Miscellaneous

### 9.1 Please provide brief details of significant recent or imminent statutory or other developments in the field of cartels, leniency and/or cartel damages claims.

In the sense of harmonisation of Albanian legislation with EU legislation a Regulation "On the categories of cartels, decisions and coordinated practices in the sector of maritime transport" has been approved by the Authority 03.11.2014.

By virtue of this Regulation some agreements of maritime transporters which offer international transport services, exclusively of cargos, provided that the price fixing by means of those agreements is not permitted, are exempted from the prohibition of Article 4 of Law on Competition.

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

Not applicable.

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- Trade Marks



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