

COMPETITION AUTHORITY

Fine Leniency Programme

1. Introduction

The Competition Authority is the institution that protects free and effective competition in the market pursuant to Law No. 9121 of 28 July 2003 “On Competition Protection”. The activity of the Law is based on three main pillars defining competition protection: (i) abuse of a dominant position; (ii) prohibited agreements in the form of cartels; and (iii) mergers or concentrations of undertakings; as well as the entire legal framework governing the activity of an independent institution in the Republic of Albania. This institution understands its function as a promoter and advocate of consumers’ interests, with the ultimate goal to ensure that the market generates development.

Prohibited agreements, also known as cartels, are the most serious form of breaches of the competition law and principles. They harm competition and, especially, consumers, by way of price increases in the market.

The undertakings involved in such illegal activities that intend to get away from them and inform the Competition Authorities should not hesitate to do so because of the heavy fines they are exposed to. For those undertakings full or partial immunity from fines is envisaged, as provided for in the Fine Leniency Programme.

The purpose of the Fine Leniency Programme is to provide immunity for the undertakings that cooperate with the Competition Authority and help it detect and disrupt prohibited agreements/cartels and punish the participants in those cartels.

The Authority considers voluntary cooperation to be a factor for economic development for undertakings, and will provide (full or partial) immunity for the undertakings from the imposing of high sanctions.

2. What is an agreement?

“Agreements” means binding or nonbinding agreements of all forms concluded between undertakings, decisions or recommendations of associations of undertakings, and concerted practices of undertakings operating at the same level (horizontal agreements) or at different levels (vertical agreements).

2. Types of agreements

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Horizontal agreements are agreements between competing undertakings (between manufacturers or wholesalers) operating at the same market level.

Vertical agreements are agreements between undertakings operating at different market levels.

3. Which agreements are prohibited?

Article 4 of the Law sets a prohibition on all agreements which have as their subject-matter, or result in, the prevention, restriction or distortion of competition in the market, and in particular those which:

directly or indirectly fix purchase or selling prices or any other trading conditions;
restrict or control production, markets, technical development, or investment;
divide markets or sources of supply;
apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

4. Prohibited agreements: cartels—the most serious anticompetitive behaviour

Investigation and punishment of actual or potential anticompetitive behaviour are two priorities for the Competition Authority. Examples of anticompetitive behaviour include price fixing, sharing of important business information among competitors, price discrimination, refusal to negotiate, bid rigging, etc.

Among other completion violations, prohibited agreements—the so-called “cartels”—are the most serious violations of the Competition Protection Law.

A cartel is an agreement between competitors intended first of all to fix prices, share customers and market, and reduce production. Cartels seriously harm consumers through increased prices and restricted supplies, and make products and services unaffordable for some consumers and expensive for some others.

OECD has reached the conclusion that prices in a cartel industry are 10-20% higher than in the absence of a cartel. Recently a great number of Authorities have increased their efforts for detecting and punishing with heavy administrative fines law violations related to cartel agreements.

I. Fine Leniency Programme

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Secret agreements (cartels) are difficult to detect and investigate without the cooperation of one of the parties to a cartel, by their very nature. As a result, a significant number of Authorities have applied fine leniency programmes to detect such anticompetitive behaviours. Such a programme has been implemented extensively by the German Competition Authority, the Australian Competition Authority, the Portuguese Competition Authority, the Spanish Competition Authority, and the competition authorities in many EU Member States.

Pursuant to Law No. 9121 of 28 July 2003 “On Competition Protection,” (the Law) the Competition Authority considers that it is in the Albanian consumers’ interest to provide some immunity from fines to participants in prohibited cartel agreements, which are willing to put an end to the anticompetitive behaviour and fully co-operate with the Competition Authority in order to detect all the participants of the prohibited cartel agreement, by contributing to the prohibition of this anticompetitive behaviour.

The Competition Authority goal to detect and punish cartels goes beyond the interest in punishing an undertaking or an individual that has enabled the identification and punishment of the whole cartel, since prohibited agreements/cartels are a serious violation of the Competition Law. They harm consumers through their policies. In the long term, they lead to a loss of competitiveness and reduced employment opportunities. Undertakings involved in this type activities which are willing to not be part in these agreements anymore and inform the Authority of their existence will benefit from this fine leniency programme, which is based on legal provisions.

From the perspective of the Law, the Authority considers that it is in the public interest to provide favourable treatment for the undertakings co-operating with it. The purpose of the leniency programme is not only to assist the Authority in its efforts for fighting and prohibiting such agreements and punish their participants, but also to reward those undertakings that cooperate with the Authority.

The Fine Leniency Programme is based on Article 77 of Law No. 9121 of 28 July 2003 “On Competition Protection”, and Chapter III of the Regulation on fines and their leniency,

“Leniency” means immunity as well as a reduction of any fine which would otherwise have been imposed on a participant in a prohibited agreement, in exchange for the voluntary disclosure of information regarding the cartel prior to or during the investigative stage of the case.

The Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within the scope of the Law.

The Fine Leniency Programme is an important tool in the fight against prohibited agreements, since it encourages undertakings to provide the Competition Authority with information on potential competition violations. The Fine Leniency Programme allows

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the Competition Authority to provide full immunity or reduction of fines which would otherwise have been imposed on a participant in a prohibited agreement, in exchange for the voluntary disclosure of information regarding that prohibited agreement and cooperation with the Competition Authority. Given the “secret” nature of prohibited agreements, this fine leniency policy aims to detect cartels and strengthen competition rules.

2. What does the Fine Leniency Programme contain for cartel members?

Where a violation of the Law involves cartel activities, the respective fines may be as high as 10% of the annual turnover of an undertaking.

Under the Leniency Programme, cartel members may reduce their financial fines or be granted immunity from them altogether. In this way the Leniency Programme offers real incentives to disclose information.

The Fine Leniency Programme concerns agreements and concerted practices between two or more competitors aimed at restricting competition through, for example, the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.

The Programme is applied to undertakings operating in the market, which are or have been parties to prohibited agreements. In order to ensure that the Leniency Programme works efficiently, it is however important to protect to the greatest extent possible employees and directors of the undertakings, applying immunity from, and protection against, individual penalties.

The Programme also offers protection of the information disclosed to receive leniency. In order to ensure the mechanisms of cooperation and encourage applicants to report prohibited agreements and related activities voluntarily, it is necessary to provide protection for the disclosed information. Information related to a leniency case may not be used by any other authorities. Such information may only be exchanged between institutions/homologue authorities when the applicant consents to the exchange, or the receiving authority provides a written commitment not to use the information transmitted or any information it may obtain after the date of the transmission to impose sanctions on the applicant, its subsidiaries or its employees.

3. What form does fine leniency take?

Fine leniency may be full or partial.

4. What types of activity are included?

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For the purposes of the Fine Leniency Programme, the terms “cartel” or “cartel activity” refers to agreements between undertakings, decisions of associations of undertakings or concerted practices of undertakings in violation of the Law, including:

- (i) price fixing;
- (ii) production restriction or the allocation of quotas;
- (iii) the sharing of markets;
- (iv) bid-rigging.

5. Conditions attached to fine leniency

In order to qualify for fine leniency, the undertaking must:

1). end its involvement in the alleged cartel following its application save to the extent that its continued involvement would be reasonably necessary to preserve the integrity of the Authority’s inspections;

2). cooperate fully and on a continuous basis with the Competition Authority from the time of its application until the conclusion of the case; this includes in particular:

providing the Authority with all relevant information and data that comes into the applicant’s possession or under its control;
remaining at the disposal of the Authority to reply to any requests that, in the Authority’s view, may contribute to the creation of relevant facts;
making current and, to the extent possible, former employees and directors available for interviews with the Authority;
not destroying, falsifying or concealing relevant information or data; and
not disclosing the fact or any of the content of the leniency application at least before the Authority has notified its investigation report/objections to the parties.

3). prior to making a fine leniency application it must not have:
destroyed evidence which falls within the scope of the application; or
disclosed, directly or indirectly, the fact or any of the content of the application it is contemplating except to other competition authorities.

II. Immunity from fines

1. Condition

Under Law No. 9121 of 28 July 2003 “On Competition Protection” and the Regulation on fines and their leniency, for an undertaking to benefit full leniency (immunity) under the fine leniency programme, the following criteria must be met:

The Competition Commission may grant an undertaking immunity from any fine which would otherwise have been imposed provided the undertaking is the first to contribute to the detection and punishment of the prohibited agreement, and to the establishment of the

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responsible persons, by submitting evidence which were not previously held by the Authority and which will enable the Authority:

- (a) to conduct an investigation into the prohibited agreement;
- (b) to detect a violation pursuant to Article 4 of the Law.

2. In order to qualify for immunity from fines, an undertaking must:

- (a) provide the Authority with a copy or description of the prohibited agreement, including: its aims, activities and functioning, the product(s) concerned, relevant market, the duration and the estimated market volumes affected by the prohibited agreement, the dates, locations, content and participants of the agreement, and other explanations that will help the Authority detect the violation;
- (b) provide the name and address of the undertaking submitting the immunity application, as well as the names and addresses of all the undertakings participating in the agreement;
- (c) the names, positions, office locations and, where necessary, addresses of all the individuals who, to the applicant's knowledge, are or have been involved in the prohibited agreement, including those individuals who have been involved on its behalf;
- (d) inform the Authority whether the undertaking has withdrawn from its participation in the prohibited agreement;
- (e) remain at the disposal of the Authority to reply to any requests that may contribute to the case;
- (f) not destroy, falsify or correct the relevant information or data that is related to the prohibited agreement;
- (g) provide other data related to the prohibited agreement.

3. Important

No fine leniency shall be approved if, at the time application, the Authority:

- (a) had sufficient evidence to conduct an investigation into the prohibited agreement;
- (b) had undertaken such an investigation;
- (c) had sufficient evidence for the Commission to make a decision.

4. Granting immunity

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Immunity from fines shall be granted if the Authority, at the time of application, did not have sufficient data to detect a violation pursuant to Article 4 of the Law.

An undertaking which took the initiative to coerce another undertaking to participate in the agreement will not be eligible for immunity from fines.

5. How to apply for fine leniency? Procedure for immunity applications

An undertaking wishing to benefit from immunity from fines must submit to the Authority an application for being considered fully or partially immune from fines. The Authority shall not accept a fine leniency application if it is submitted after completion of the investigation report.

The applicant shall inform the Authority on any other past leniency applications or benefits.

Once the documentation has been submitted, the Commission shall verify whether the documentation submitted is sufficient for the leniency to be granted, and shall make a decision to grant the undertaking conditional immunity from fines in writing.

The Commission shall set a time-limit by which the applicants must submit the requested information and data in the context of meeting the fine leniency requirements. If the criteria above are not met, the applicant shall not be granted fine leniency.

If the undertaking has not met the set criteria and time-limits, the Authority will inform it in writing. In that case the undertaking may withdraw its leniency application, or request the Authority to consider its application for a reduction of the fine.

If the submitted evidence is not considered as sufficient by the Commission, it will inform the undertaking in writing that its application for immunity is rejected. The undertaking may in any case request the Commission to consider its application for a reduction of the fine (leniency in part).

The Authority will take its final position on the granting of immunity at the end of the procedure. If the Commission, having granted conditional immunity, ultimately finds that the immunity applicant acted as a coercer or that the applicant has not fulfilled all of the conditions attached to leniency, the Commission will inform the applicant of this promptly.

The Commission shall not take into consideration any other fine leniency applications before taking a position on an existing application in relation to the same violation.

III. Reduction of fines

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An undertaking reporting participation in a prohibited agreement and failing to meet the conditions for immunity from fines may apply for reduction of fines.

1. In order to qualify for a reduction of fines, an undertaking must:

provide the Authority with added value in relation to the prohibited agreement. In order to determine the appropriate level of reduction of the fine, the Authority will take into account the evidence related to the violation and time at which it was committed. Such evidence has more value than any evidence created later. Similarly, the evidence directly related to the facts concerned will be considered as having a higher value than indirect one.

The concept of ‘added value’ refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Authority’s ability to prove the alleged violation by ensuring additional arguments as evidence of that violation.

2. The level of the fine reduction

In order to determine the appropriate level of reduction of the fine, the Commission will take into account the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc. undertaking to apply). In its final decision, the Commission sets the level of reduction of the fines, as per the following:

- (a) for the first undertaking, 30-50%;
- (b) for the second undertaking, 20-30%;
- (c) for the other undertakings after them, 20%.

In order to determine the level of reduction of the fine, the Authority will take into account the time at which the evidence was submitted and the overall value added to its case by that evidence. The Commission may also take into account the level and continuity of any cooperation in behalf of the undertaking.

3. How to apply for a fine reduction? Procedure for reductions of fines applications

An undertaking wishing a reduction of fines shall submit an application in writing to the Authority, by also submitting sufficient data on the agreement in question. The application must clearly indicate the time of submission.

Upon receiving an undertaking’s application, the Authority shall issue a certificate in writing to that undertaking as a confirmation of the date of receipt of evidence.

If the Commission comes to the conclusion that the evidence submitted by an undertaking constitutes ‘significant added value’, it will inform the undertaking in writing of its intention to apply a reduction of fines, no later than the date when the investigation

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report has been sent to the undertaking. The total amount of the reduction of fines must be specified at the end of the investigation.

The Commission shall inform the undertaking in writing if it comes to the conclusion that the undertaking will not be granted a reduction.

IV. General questions

1. What are cartel agreements?

Pursuant to Article 4 of Law No. 9121 of 28 July 2003 “On Competition Protection,” all agreements which have as their subject-matter, or result in, the prevention, restriction or distortion of competition in the market are prohibited agreements.

Cartel agreements usually include: (i) price fixing, where parties directly or indirectly agree in relation to prices; (ii) agreements imposing restrictions, whereby the parties agree to limit or control production, markets, technical development, or investment; (iii) public procurement bid-rigging whereby the parties agree beforehand to coordinate their procurement bids; (iv) sharing of markets or sources of supply.

Cartel agreements usually require secrecy and slyness. Cooperation in secrecy often allows cartel agreement to go on without third parties coming to know about them. Therefore, the detection of cartels is more difficult than other forms of anticompetitive behaviour. The Fine Leniency Programme allows the Authority to penetrate the cartel veil of secrecy.

2. What should an undertaking or individual having being coerced by the competitors to take part in a cartel agreement do?

An undertaking or individual being coerced to take part in a cartel should report it to the Competition Authority. If an undertaking or individual has taken part in a cartel it or he still may apply for leniency under the Fine Leniency Programme, and, in exchange for immunity from fines or reduction of fines, it or she must cooperate with the Authority to comply with the rest of Programme requirements.

3. Who is the cartel ringleader¹?

An applicant for leniency under the Programme may not qualify if it is clear that its position is the cartel ringleader. In its determination, the Competition Commission shall focus on the role that each cartel participants played in the cartel. In many cartels it is not

¹ An undertaking which encourages/coerces one or more undertakings to take part in a prohibited agreement/cartel or plays a decisive role in the establishment of such an agreement. A person who leads others, especially in opposition to authority, law, etc.: (<http://dictionary.reference.com/browse/ringleader>)

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clear and not possible to determine who the cartel ringleader is. In addition, it is not clear who the leader is if two or more participants can be considered equals in an agreement. For instance, if in an agreement between two undertakings each undertaking plays the same role in the cartel, both undertakings may apply for leniency under the Programme. Finally, the fact that one undertaking is a market leader does not necessarily mean that it is a cartel ringleader.

4. What does full cooperation mean?

The Leniency Programme implies full and genuine representation of the facts by an applicant. In order to benefit from the Leniency Programme, applicants must provide the Competition Commission with all the data and information they possess in relation to the agreement violating the competition. They must cooperate fully and continuously with the Competition Commission during the investigation and in any further proceedings. After an application for leniency has been made, the Competition Authority will advise the applicant on the steps it should take to comply with the procedures and the time-limits for those steps. The Competition Authority will always try to ensure that the case will progress in the best manner and time possible. If a leniency applicant deliberately misleads the Competition Commission, submits false evidence, refuses to provide important records or destroys evidence or does not cooperate fully and efficiently, the Competition Commission will inform the applicant that it is not demonstrating the required willingness to benefit from the leniency programme and that no immunity can be ensured for the applicant.

5. What information may be exchanged with business associations?

Associations of trade and business can become meeting points for cartel participants. To that end, it is important to ensure that associations operate in full conformity with the law. Information in relation to common concerns or product or service safety is an example of information that may be exchanged without affecting competition. Information on prices, conditions of sales and customers is sensitive business information which should not be exchanged because it harms competition. If an association consolidates (updates) its data unit once a year, it is important for the information to be collected by an agent who does not work for any of the undertakings that are association members in order to observe data confidentiality.

6. Will my identity be disclosed to the other cartel members?

Each undertaking wishing to benefit from the Fine Leniency Programme can be worried that the other cartel members might suspect that it voluntarily disclosed information to the Competition Authority. To that end, the Competition Authority will, whenever possible, make efforts for preserving the confidentiality of the identity of that undertaking until the end of the investigation.

V. How to report a cartel?

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Information on the existence of a cartel can be sent to the:

Competition Authority
Rruga “Sami Frashri” Nr. 4
Kati 4
Tirana, Albania

Applications can also be submitted electronically to competition@caa.gov.al or can be provided by calling +355 4 22 34 504. (Fill in the Fine Leniency Application form on the official website www.caa.gov.al).