

The International Comparative Legal Guide to:

Cartels & Leniency 2009

A practical insight to cross-border Cartels & Leniency



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Advokatfirmaet Selmer DA

Allende & Brea

Allens Arthur Robinson

Andreas Neocleous & Co. LLC

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Estonia

Kaja Leiger



Kätlin Kiudsoo



Attorneys at law Luiga Mody Hääl Borenius

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?

In general, the cartel prohibition is criminal. Punishment for a cartel is stated in Article 400 of Estonian Penal Code (hereinafter “Penal Code”). However, the legal definition and prohibition of a “cartel” is stated in Estonian Competition Act (hereinafter “Competition Act”) Article 4.

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

Competition Act Article 4 states the following - Agreements between undertakings, concerted practices and decisions by associations of undertakings which have as their object or affect the restriction of competition are prohibited, including those which:

- 1) directly or indirectly fix prices or any other trading conditions, including prices of goods, tariffs, fees, mark-ups, discounts, rebates, basic fees, premiums, additional fees, interest rates, rent or lease payments applicable to third parties;
- 2) limit production, service, goods markets, technical development or investment;
- 3) share goods markets or sources of supply, including restriction of access by a third party to a goods market or any attempt to exclude the person from the market;
- 4) exchange information which restricts competition;
- 5) agree on the application of dissimilar conditions to equivalent agreements, thereby placing other trading parties at a competitive disadvantage; and
- 6) make entry into an agreement subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such agreement.

Penal Code Article 400 states the following - Agreements, decisions and concerted practices prejudicing free competition, which directly or indirectly determine price or other trading terms with respect to third persons, or restrict production, provision of services, the goods market, technical progress or investment, divide a goods market or source of supply, as well as other agreements, decisions and concerted practices which damage competition, are punishable by a pecuniary punishment or up to three years of imprisonment. The same act, if committed by a legal person, is punishable by a pecuniary punishment.

1.3 Who enforces the cartel prohibition?

The cartel prohibition is enforced by the court.

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

First of all, the Competition Board starts an administrative procedure on its own initiative or by an application from a third party. The Competition Board may ask for documents from the concerned parties, ask the representatives for an interview, and/or search through the place of business. In case the Competition Board comes to a conclusion that there are aspects of a cartel, then the information is forwarded to the Prosecutor’s Office who then starts a criminal procedure. However, in the criminal procedure, the Prosecutor leads the procedure while the Competition Board is still the body conducting the procedure. When the Prosecutor has come to a conclusion that there are traces of a cartel and it has evidences to prove it, it shall forward the file to the court and the criminal court procedure shall be commenced. The court procedure ends with a criminal conviction or with a judgment of acquittal.

1.5 Are there any sector-specific offences or exemptions?

There are no sector-specific offences or exemptions.

1.6 Is cartel conduct outside Estonia covered by the prohibition?

In case a cartel conduct affects competition in Estonia, it shall be covered by the Estonian cartel prohibition.

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	Yes
Carry out compulsory interviews with individuals	Yes	Yes
Carry out an unannounced search of business premises	Yes	Yes

Investigatory power	Civil / administrative	Criminal
Carry out an unannounced search of residential premises	No	Yes
■ Right to 'image' computer hard drives using forensic IT tools	Yes	Yes
■ Right to retain original documents	No	Yes
■ Right to require an explanation of documents or information supplied	Yes	Yes
■ Right to secure premises overnight (e.g. by seal)	No	No

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

There are no specific or unusual features of the investigatory powers referred to in the summary table.

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

The Prosecutor may use certain surveillance powers (bugging, overhearing phone conversations, imitation of a crime) by court authorisation.

2.4 Are there any other significant powers of investigation?

There are no other significant powers of authorisation.

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

An official or representative of the Competition Board has the right to inspect the seat and place of business of an undertaking, including the enterprises, territory, buildings, rooms and means of transport of the undertaking, both during working hours and at any time the place of business is used. With the consent of the undertaking, the seat, place of business or enterprises of the undertaking may also be inspected at any other time.

An inspection shall be conducted with the knowledge of the undertaking, or a representative or employee thereof, and they have the right to be present during the inspection. Although a company may have a legal counsel during the inspection, there is no requirement by law that a Competition Board's official must wait for the legal counsel of the company to arrive.

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

In-house legal advice is not protected by the rules of privilege.

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

The Competition Board does not have the power to investigate private residential places or other private entities of employees of a company under investigation.

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

The Competition Board may prescribe an injunction for the obstruction of investigations. In case the injunction is not followed, the Competition Board has a right to impose a penalty payment for a physical person in the sum of up to EEK 50,000 (approx. EUR 3,196) and for a legal person up to EEK 100,000 (approx. EUR 6,391).

However, it has not been reported that such sanction possibilities have been used by the Competition Board so far.

3 Sanctions on Companies and Individuals

3.1 What are the sanctions for companies?

The sanction for a legal person for concluding/participating in a cartel is a pecuniary punishment in the sum of up to EEK 250,000,000 (approx. EUR 15,977,912).

3.2 What are the sanctions for individuals?

The sanction for an individual for concluding/participating in a cartel is either a pecuniary punishment of up to 500 daily rates or up to three years of imprisonment. The court shall calculate the daily rate of a pecuniary punishment on the basis of the average daily income of the convicted offender. Please note that the court may reduce the daily rate due to special circumstances or increase it on the basis of the standard of living of the convicted offender.

3.3 What are the applicable limitation periods?

The general rule is that no one shall be convicted of or punished for the commission of a criminal offence of the second degree if the term of five years has expired between the commission of the criminal offence and the entry into force of the corresponding court judgment. However, the term may be prolonged in case the limitation is interrupted. In case the basis of interruption of the limitation period falls off, the limitation period starts again with an exception that not more than 10 years have passed between the commission of the offence and the entry into force of the corresponding court judgment.

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

A company may pay the legal costs and/or financial penalties imposed on a former or current employee in case such an action is acquired to the company itself, not only to the employee as a physical person.

4 Leniency for Companies

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

First of all, conclusion of/participation in a cartel is punishable under criminal law in Estonia, and there is no such leniency programme as known in European Commission's practice and in some other European Union Member States. Thus, the Estonian Competition Board has not developed a clearly defined leniency policy with regard to information provided by participants of cartels.

However, Estonian Code of Criminal Procedure (hereinafter “CCP”) contains provisions allowing the Prosecutor’s Office, the Public Prosecutor’s Office or the court (at the application of the Prosecutor’s Office) to terminate the criminal proceedings initiated against the suspect (this procedure is hereinafter also referred to as the “so-called ‘leniency’”).

Under Article 202 CCP, the Prosecutor’s Office or the court at the request of the Prosecutor’s Office (depending on the gravity of the violation) may terminate the criminal proceedings regarding a crime of the second degree against the suspect provided that:

- i) the guilt of the suspect is negligible;
- ii) the suspect has remedied/started to remedy the damage caused by the offence and has paid/assumed an obligation to pay the costs relating to the criminal proceedings;
- iii) there is no public interest in the continuation of the criminal proceedings; and
- iv) the suspect consents to the termination.

Alternatively, under Article 205 CCP, the Public Prosecutor’s Office may terminate the criminal proceedings if the suspect has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence which is important from the point of view of public interest in the proceedings and if, without the assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated.

There is also a Chief Public Prosecutor’s formal guidance nr RP-1-4/05/8 dated 20 December 2005 (hereinafter the “Guidance”) on how to apply Articles 202 and 205 CCP.

At present there are no articles or guidelines which state clearly that a suspect who is first to turn in a cartel receives immunity or the criminal proceeding in terms of the suspect are terminated. The Guidance only states that there is no public interest if the suspect informs the authorities of the other participants of a cartel, but it does not say explicitly that the criminal proceeding towards that person is terminated.

Under Article 205 CCP, a suspect reporting the cartel to the authorities after the initiation of an investigation is eligible, at the discretion of the Prosecutor, for termination of criminal proceedings if the suspect has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence, which is important from the point of view of public interest in the proceedings and if, without his/her assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated. Under Article 205 CCP, the content and quality of the information provided is more important than the time of its delivery.

One of the conditions for the so-called “leniency” as per the Guidance (i.e., relating to Article 205 CCP), is that the suspect is the first to come forward to the authorities, thus providing the authorities with information not previously obtained from other sources. “Other sources” implies also information obtained through the authorities’ own investigation. Under Article 205 CCP, the content and quality of the information provided and the extent of the suspect’s cooperation is more important than the time of the initial contact with the authorities.

It is important to note one more time that the so-called “leniency” programme offered by the Estonian legislation is not the same as practiced in other Member States of the European Union because Estonia has not incorporated the European Union leniency programme into its legislation. In fact, the above-mentioned possibilities of termination of criminal proceedings have, to date, never been used by participants of a cartel to inform the authorities in exchange for termination of criminal proceedings, making the practicalities of obtaining the so-called “leniency” in Estonia quite unclear.

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

There is no “marker” system in Estonia.

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

No formalities are required for the application for the so-called “leniency”, except that the application must be in Estonian.

At present, the Estonian law does not provide for any security that if the application for the so-called “leniency” is filed, then the suspect shall receive it. It remains in the discretion of the Prosecutor whether he decides to give “leniency” by terminating the criminal proceeding against the suspect or not. While in the European Union leniency programme, the applicant is insured that if he fulfils the leniency conditions, he receives the immunity or reduction of fines, then the Estonian law does not give any such securities to the suspect. Thus, it is difficult to give any informal guidance on submitting the application as it is not guaranteed that the “leniency” is applied by the Prosecutor.

The procedures surrounding the current so-called “leniency” programme under Estonian law have not been described in detail by the authorities. However, it appears as if once the authorities have been approached by the suspect, full cooperation must be provided, starting with the suspect revealing the identity of the other participants of the cartel and including handing over of all information at his disposal.

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

Principally, cooperating suspects can demand confidentiality with regard to their cooperation. However, since the suspect has committed the same criminal offence as the offence that is being reported, procedures for protecting the identity of the witness would not be applicable until the suspect has had the criminal proceedings against him terminated. Also, since involvement in a cartel is a criminal offence in Estonia, other suspects would have the right to access the evidence provided against them.

However, as the procedures surrounding the current so-called “leniency” programme under Estonian law have not been described in detail by the authorities, it is not stated explicitly in any legal act that there is an obligation to treat a so-called “leniency” application confidentially.

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

According to the Guidance, as part of one of the requirements for obtaining the so-called “leniency” on the grounds of Article 202 CCP, the suspect must deliver all available information to the authorities and cooperate fully during the entire proceedings of the cartel.

The requirement of “full co-operation” under Article 205 CCP is thought to be even more demanding for the suspect. Provided information must have significantly assisted the authorities, meaning that without the help of the suspect the criminal offence as well as the collection of evidence would have been made impossible or significantly more difficult.

According to the Guidance, under Article 205 CCP the suspect must immediately cease with any involvement in the cartel, unless it is required by the interest of the proceedings and then only with the

permission of the authorities. Since the conditions for the so-called “leniency” under Article 205 CCP are much more difficult to satisfy, as part of the cooperation requirement, one is led to believe that the suspect must end any involvement in the cartel immediately as a sign of good faith and willingness to cooperate with the authorities.

However, it appears as if once the authorities have been approached by the suspect, full cooperation must be provided, starting with the suspect revealing the identity of the other participants of the cartel and including the handing over of all information at his disposal.

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

There is no “leniency plus” or “penalty plus” policy in Estonia.

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.

In general, the employees or the company could benefit from the application for the so-called “leniency” in terms of termination of the criminal proceeding against the employee/company. Still, it has to be kept in mind that at present the Estonian law does not provide for any security that if the application for “leniency” (termination of criminal proceedings) is filed, then the employee/company shall receive it. It remains in the discretion of the Prosecutor whether he decides to give “leniency” by terminating the criminal proceeding against the suspect or not. While in the European Union leniency programme, the applicant is ensured that if he fulfils the leniency conditions, he receives the immunity or reduction of fines, then the Estonian law does not give any such securities to the suspect.

Under Penal Code, both legal and natural persons may be subject to criminal sanctions for their involvement in a cartel. The termination of criminal proceedings against a legal person does not result in the termination of criminal proceedings for a natural persons connected to it and vice versa.

Since the so-called Estonian “leniency” policy does not distinguish between legal and natural persons, under Penal Code both groups may be subject to sanctions and the process for termination of criminal proceedings is the same with regard to both. In order for the application provided by a natural person to cover also the legal person to which he is connected, he/she must apply on behalf of himself as well as on the behalf of the legal person.

6 Plea Bargaining Arrangements

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

Article 203¹ CCP states that if facts relating to a criminal offence in the second degree which is the object of criminal proceedings are obvious and there is no public interest in the continuation of the criminal proceedings and the suspect or the accused has reconciled with the victim pursuant to the procedure provided for in Article 203² CCP, the Prosecutor’s Office may request termination of the criminal proceedings by a court with the consent of the suspect or accused and the victim. Article 203² CCP stated that the Prosecutor’s Office or court may, on the basis provided for in 203¹

CCP, send the suspect or accused and the victim to conciliation proceedings with the objective of achieving conciliation between the suspect or accused and the victim and remedying of the damage caused by the criminal offence. The consent of the suspect or accused and the victim is necessary for application of conciliation proceedings.

There are no rules stating when the authorities should terminate the criminal proceedings against the suspect who has satisfied the conditions under Article 202 or 205 CCP. The decision on the termination of criminal proceedings with regard to the involvement in a cartel lies within the discretionary power of the relevant Prosecutor.

7 Appeal Process

7.1 What is the appeal process?

In criminal proceedings, if a party does not consent to the judgment of the court of first instance, he has the right to file an appeal to the circuit court (court of second instance).

It is arguable whether it is possible to appeal the Prosecutor’s discretion not to terminate the criminal proceeding even though the suspect has presented to the Prosecutor the necessary information, because the Prosecutor does not issue a special regulation for continuing the criminal proceeding, it only does a regulation for commencing/terminating the criminal proceeding.

If a suspect applies for the applicability of Article 205 CCP, then the Prosecutor may do a written regulation for not applying Article 205 CCP. Thus, it could be a possibility to appeal that decision in procedural matters under Article 228 CCP.

If a suspect applies for the applicability of Article 202 CCP, then the Prosecutor may ask from the court to terminate the criminal proceedings under Article 202 CCP and, if the court then decides not to terminate the criminal proceeding, it could possibly appeal such a court decision under Article 383 CCP. However, as there have not been any Supreme Court decisions in regards of the above-mentioned situation, then it could be arguable whether it is possible in practice to appeal the non-termination decision of the court.

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

The appeal process mentioned in question 7.1 does not allow for the cross-examination of witnesses.

8 Damages Actions

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

A person suffering losses as a result of cartel conduct has a right to file a civil action before the termination of the examination by the court in the criminal procedure in the county court. If a court makes a judgment of conviction, the court shall satisfy the civil action in full or in part or dismiss or refuse to hear the action. If a court makes a judgment of acquittal, the court shall refuse to hear the civil action. If the hearing of a civil action is refused, the victim shall have a right to file the same action in the court in a civil procedure pursuant to Estonian Code of Civil Procedure.

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

The procedural rules do not allow for class action or representative claims.

8.3 What are the applicable limitation periods?

As for the civil action filed in a criminal procedure, the rule is that it has to be submitted before the termination of the examination by the court. In case the civil action is filed in a civil procedure, the limitation period is three years as of the moment the entitled person became or should have become aware of the damage and of the person obligated to compensate for the damage. However, a claim arising from unlawfully caused damage expires not later than 10 years after performance of the act or occurrence of the event which caused the damage.

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

In general, the rule of the criminal procedure is that the costs of filing a civil damages action shall be paid in accordance with Estonian Code of Civil Procedure (except that no state fee has to be paid on a civil action in criminal proceedings). According to Estonian Code of Civil Procedure, if the plaintiff's action is satisfied in full or partially, the defendant shall be obliged to pay for the plaintiff's costs either in full or partially.

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

No such cases in regards of cartel conduct have been reported.

9 Miscellaneous

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

It can be noted that there are no specific developments in the implementation of the European Union leniency programme in Estonia. Even more, the present so called "leniency" programme offered by the Estonian legislation is not used at all by the accused/suspects because it does not give clarity if upon co-operation with the authority, the person receives immunity or reduction of sanctions.

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

No one has been reported to have informed the authorities of the existence of a cartel in exchange for the so-called "leniency" (termination of criminal proceedings) under Estonian legislation.

However, there was a case where a person informed the authorities of a bribe offer which proceeding instead turned into an investigation of a cartel. In the end, only the other party to the accused cartel was accused of concluding a cartel while criminal proceedings were not started against the informer, another party of the accused cartel. Thus, it could be argued whether the informer was relieved from criminal proceedings under the so-called Estonian "leniency" policy or not or if the criminal proceedings against the informer were ever started.

**Kaja Leiger**

Attorneys at law Luiga Mody Hääl Borenius
Kawe Plaza, Pärnu mnt 15
Tallinn 10141
Estonia

Tel: +372 6651 888
Fax: +372 6651 899
Email: kaja.leiger@lmh.ee
URL: www.lmh.ee

Senior associate Kaja Leiger is an expert on Estonian and European competition law. She is heading the firm's Competition and Energy practice. Kaja Leiger has provided legal advice to various enterprises that have a dominant market position and has acted as a legal counsel to companies on their transactions from the competition law perspective. Kaja Leiger has been engaged in most of the well-known antitrust cases commenced and concluded in Estonia. In addition, she has organised competition compliance training programmes aimed at the firm's clients.

Kaja Leiger has also extensive expertise in counselling the clients on energy matters. She has participated in most of the leading and precedent renewable energy projects run in Estonia and acted as legal counsel to various energy projects in disputes. Kaja Leiger has been engaged in drafting legislation for regulating different aspects of energy generation.

**Kätlin Kiudsoo**

Attorneys at law Luiga Mody Hääl Borenius
Kawe Plaza, Pärnu mnt 15
Tallinn 10141
Estonia

Tel: +372 6651 888
Fax: +372 6651 899
Email: katlin.kiudsoo@lmh.ee
URL: www.lmh.ee

Associate of the Office's Transactions and Competition practice Kätlin Kiudsoo has specialised mainly in competition law, while also practicing corporate and contract law. She has acted as a legal counsel to transactions related to mergers, divisions and possible competition restricting. Kätlin Kiudsoo also advises renewable energy companies in issues related to construction permits and detail plans.

Kätlin Kiudsoo holds a Master's degree from University of Maastricht in European Law and, prior to joining the firm, practiced law in Ministry of Foreign Affairs and Ministry of Justice.



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