

THE COMPETITION AUTHORITY OF KENYA LENIENCY PROGRAMME GUIDELINES

Section 89A of the Competition Act, 2010 (“Act”) empowers the Competition Authority of Kenya (“Authority”) to operate a leniency programme, offering full or partial immunity to an entity in respect of certain restrictive practices under the Act, where the entity (i) voluntarily discloses its involvement in a prohibited practice and (ii) cooperates with the Authority in investigating the alleged practice.

Through Kenya Gazette No. 4736, published on 19 May 2017, the Authority issued the Leniency Programme Guidelines (“Guidelines”) to govern the processing and granting of leniency by the Authority.

Scope

The Guidelines apply in relation to restricted trade practices (including price fixing, market-sharing cartels, collusive tendering, fixing of purchase or selling prices, resale price maintenance or limits or control production, market outlets and access) by companies and trade associations prohibited under sections 21 and 22 of the Act. However, the Guidelines only apply to horizontal agreements (i.e. agreement between competitors), decisions by trade associations and concerted practices by competitors. They do not seem to capture or address restrictive trade practices between entities in a vertical relationship (i.e. an undertaking and its suppliers or customers or both). It is not clear why the Guidelines do not apply to this category.

Under the Act, a person who is guilty of a restrictive trade practice is, if not forgiven, liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million shillings, or both. The Authority may also impose a financial penalty of up to ten per cent of the immediately preceding year’s gross annual turnover in Kenya of the undertaking.

A leniency application will be accepted in circumstances where the Authority (i) has no knowledge of the contravention; (ii) has knowledge but lacks sufficient information to start an investigation; or (iii) has commenced investigations but requires additional evidence to penalize the offenders.

Conditions

To qualify for leniency, the applicant is required to:

- provide full and truthful information;
- provide total and expeditious co-operation;
- keep the application process confidential and not alert cartel members or third parties that it has applied for leniency; and
- immediately cease the prohibited conduct.

The identity of the applicant for leniency shall be kept confidential throughout all stages of the procedure.

Procedure

An entity seeking leniency must apply to the Authority in the format provided in the Guidelines. The application must contain enough information to identify the applicant and other participants involved in the prohibited conduct.

The applicant is then granted 28 days to submit the relevant documentation and information to the Authority. An initial meeting with the Authority follows pursuant to which the Authority determines whether the applicant’s case qualifies for leniency.

If the Authority determines that the application qualifies for leniency, conditional leniency is granted. Conditional leniency, which precedes permanent leniency, is provisionally granted at the initial stages of the application, pending the Authority's final determination.

Once the Authority has finalized its investigations, it will determine whether full, total or permanent leniency is granted upon conclusion of the investigation and a leniency agreement may be entered into between the parties. A leniency agreement shall cover the applicant's directors and employees as long as they respect the obligations to co-operate with the Authority.

Leniency is granted on a first-come basis, with the first-through-the-door applicant obtaining a 100% reduction in penalties and immunity from prosecution for the offending conduct. Subsequent applicants may be granted reduced penalties on a sliding scale, at the Authority's discretion. The sliding scale works as follows: second-through-the door may be given up to 50% reduction in penalties; third-through-the door up to 30% reduction in penalties; and any subsequent applicant who provides useful information up to 20% reduction on penalties.

In relation to the imprisonment punishment, the Guidelines provide that the Authority shall engage with the Director of Public Prosecutions accordingly. This is designed to ensure that an applicant does not suffer double jeopardy. It is expected that, as part of the leniency application or discussions process, an applicant should aim to obtain appropriate assurances from the Authority that it shall procure the Director of Public Prosecutions not to take any further adverse action or prosecution against the applicant if it complies with the leniency terms.

If permanent leniency is not granted, the Authority is at liberty to impose penalties against the applicant in accordance with the Act. However, according to the Guidelines, the Authority may also consider a settlement agreement (if any) proposed by the undertaking concerned. Under the Act, the Authority is authorized to enter into a settlement agreement with an undertaking in relation to a prohibited activity which agreement may include (a) damages to the complainant or (ii) an agreed pecuniary penalty.

Where a party is not sure whether the Guidelines apply to particular conduct, it may make an anonymous enquiry, seeking clarity from the Authority.

Additional comments

We expect that the Guidelines will enhance and facilitate investigations and enforcement actions by encouraging companies that have been engaged in prohibited practices under the Act to co-operate with the Authority in bringing successful enforcement action in exchange for full or partial immunity from financial penalties and prosecution.

It will be interesting to see to what extent the Guidelines will in fact encourage Kenyan companies to report their own breaches of the Act and whether we are likely to see an increase in successful enforcement actions by the Authority.

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