



## **LENIENCY POLICY**

## **1. Introduction**

- 1.1. Under section 25 of the Competition Act of 2018, collusive agreements are prohibited. In addition, enterprises participating or which have participated in them are liable under section 76 to a financial penalty. Violations of section 25 prohibitions are, by their nature, secret and difficult for the Competition & Consumer Authority to discover.
- 1.2. Due to the secret nature of cartels, enterprises participating or which have participated in them should be given an incentive to come forward and inform the Authority of the cartel's activities. The benefits of granting lenient treatment to enterprises which cooperate with the Authority outweigh the benefits arising from fully enforcing financial penalties on those enterprises and the costs of conducting a full hearing.
- 1.3. As leniency programmes have been found to be effective in other competition regimes, a similar programme forms part of Botswana's enforcement strategy. Enterprises which come forward with information that enables or assists the Authority to determine that a breach of section 25 of the Act has occurred, may receive substantial reductions in, or complete immunity from, financial penalties levied by the Competition Tribunal for that cartel. Regulation 13 of the Competition Regulations of 2018, compels the Competition Tribunal to take cognisance of an enterprise's cooperation with the Authority's investigations and utilise the leniency policy in order to mitigate the financial penalty or not to impose the financial penalty.

## **2. Total immunity for the first to come forward before an investigation has commenced**

- 2.1. Under section 76(2) and (3) of the Act, any enterprise which has intentionally or negligently infringed section 25 of the Act faces a financial penalty of up to a maximum of 10% of its turnover during the breach of the prohibition up to a maximum of three (3) years.
- 2.2. The Authority will nevertheless grant an enterprise the benefit of total immunity from such financial penalties for a given infringement if the following conditions are met:
  - a. the enterprise is the first to provide the Authority with evidence of the cartel activity before an investigation has commenced, provided that the Authority does not already have sufficient information to establish the existence of the alleged cartel activity;
  - b. the enterprise:

- i) provides the Authority with all the information, documents, evidence available and produces witnesses to it regarding the cartel activity, as required by the Authority;
- ii) maintains continuous and complete co-operation throughout the investigation and up to the conclusion of any action by the Competition Tribunal as a result of the investigation; and
- iii) refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the Authority (except as may be directed by the Authority).

2.3. If an enterprise does not qualify for total immunity under paragraph 2.2, it may still benefit from a reduction in the financial penalty up to 100% under paragraphs 3.1 and 3.2.

### **3. Reduction of up to 100 per cent in the level of financial penalties where the enterprise is the first to come forward but which does so only after an investigation has commenced**

3.1 An enterprise may benefit from a reduction in the financial penalty of up to 100% if:

- a. the enterprise seeking immunity is the first to provide the Authority with evidence of the cartel activity;
- b. this information is given to the Authority after it has started an investigation but before the Competition Tribunal gives an order for breach of section 25 of the Act; and
- c. the conditions under sub-paragraph 2.2 (b), above, are satisfied.

3.2 Any reduction in the level of financial penalty under these circumstances is discretionary. In exercising this discretion, the Competition Tribunal will take into account:

- a. the stage at which the enterprise comes forward;
- b. the evidence already in the Authority's possession; and

- c. the quality of information provided by the enterprise.

#### **4. Subsequent leniency applicants: reduction of up to 30 per cent in the level of financial penalties**

- 4.1. Enterprises which provide evidence of cartel activity before the Competition Tribunal makes an order under section 76 of the Act but are not the first to come forward may be granted a reduction of up to 30% in the amount of the financial penalty which would otherwise be imposed, if the conditions under sub-paragraph 2.2(b) above, are satisfied.
- 4.2. Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the Competition Tribunal will take into account:
  - a. the stage at which the enterprise comes forward;
  - b. the evidence already in the Authority's possession; and
  - c. the quality of information provided by the enterprise.

#### **5. Procedure for requesting immunity or a reduction in the level of penalties**

- 5.1. An enterprise which wishes to take advantage of the lenient treatment detailed in this Policy must contact the Authority using the legal means of communication such as corporate email, fax, letter, in person, by agent, etc. Anyone contacting the Authority on the enterprise's behalf must have power to represent the enterprise.

##### *5.2 Application for Leniency*

- a. Application for leniency may be made either orally or in writing at the premises of the Authority. Initial contact can be made by telephone to secure a place in the marker queue, provided the Authority is provided with the name of the applicant and a description of the cartel conduct including the market. Upon such application, the Authority shall respond in writing, within three (3) days after the application was made, acknowledging receipt of such application for leniency, specifying the way the application has been received by the Authority. In the event of a dispute as to whether an application for leniency was made, the

acknowledgement letter of the Authority shall be conclusive evidence of such application.

- b. The enterprise making a leniency application should immediately provide the Authority with all the evidence relating to the suspected breach available to it at the time of application for leniency.

### 5.3 *The Marker*

- a. A "marker" is the acknowledgement given by the Authority to a leniency applicant that records the time of an applicant's application to the leniency program. It establishes an applicant's position in line in relation to other individuals or business organisations seeking to participate in the program.<sup>1</sup> The marker guarantees the applicant's place in line subject to the applicant meeting all other criteria of the leniency program. Once a marker is recorded, the applicant has a limited period of time, to provide the Authority with a detailed statement describing the illegal activity, its effects in Botswana and the supporting evidence.
- b. The Authority will provide a marker system for leniency applications under paragraphs 5.2.1 and 5.2.2 above. If the enterprise is unable to satisfy paragraph 5.2.2 above, the enterprise may alternatively apply for a marker to secure a position in the queue and discuss the timing and process of perfecting the marker by the prompt provision of relevant information. For an enterprise to secure a marker, the enterprise must provide its name and a description of the cartel conduct in sufficient detail to allow the Authority to determine that no other enterprise has applied for immunity or a reduction of up to 100%, for such similar conduct.
- c. A marker protects an enterprise's place in the queue for a given limited period of time and allows it to gather the necessary information and evidence in order to perfect the marker. The Authority will, give a marker between one to six months within which to perfect its marker.
- d. To perfect a marker, the enterprise must provide all the evidence relating to the suspected breach available to it at the time of the application for leniency.

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<sup>1</sup> Leniency Program Frequently Asked Questions, 2003, Competition Bureau of Canada, see (<http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03289.html>)

- e. If the enterprise fails to perfect the marker, the next enterprise in the marker queue will be allowed to perfect its marker, to obtain immunity or a reduction of up to 100 per cent in financial penalties. If the marker is perfected, the other enterprises in the marker queue will be informed so that they can decide whether to submit leniency applications for consideration under paragraph 4.1 of this Policy. The marker system will not apply to a leniency application under paragraph 4.2 and such applicants should immediately provide the Authority with all evidence relating to the suspected breach available to them at the time of submission.
- f. The granting of a marker is discretionary. However, its granting is expected to be the norm rather than the exception - and the Authority shall endeavour to be transparent, consistent, procedurally fair and non-discriminatory in this regard. An applicant will only be informed whether it has been the first to come forward.

#### *5.4 Disclosure of Information to local and foreign agencies*

Where a marker has been granted and/or where an application for leniency has been received, the Authority may, at the request of a relevant local investigating authority or foreign Competition and Consumer Authority, provide under confidential cover, the following information:

- a. market shares;
- b. name of cartel members;
- c. the annual turnovers of the cartelists; and
- d. whether there are other cases pending against the cartelists, etc.

## **6. Additional reduction in financial penalties (leniency plus)**

- 6.1. An enterprise cooperating with an investigation by the Authority in relation to cartel activity in respect of one market (the first market) may also be involved in a completely separate cartel activity in respect of another market (the second market) which also infringes the prohibitions in section 25 of the Act.
- 6.2. To qualify for leniency plus, the Authority would have to be satisfied that:

- a. the evidence provided by the enterprise relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
  - b. the enterprise would qualify for total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial penalty in relation to its activities in the second market, provided the enterprise makes an application for that market as well.
- 6.3. If the Authority is satisfied with the above, the enterprise will receive a reduction in the financial penalties imposed on it in relation to the first market, which is additional to the reduction which it would have received for its co-operation in the first market alone. For the avoidance of doubt, the enterprise does not need to have had its application for leniency in market A granted at the time of making disclosure about market B to receive this reduction. It is sufficient for the enterprise to be receiving a reduction, by way of mitigation, for co-operation, in the first market.
- 6.4. For example, as a result of an investigation by the Authority of manufacturers including ABC (Pty) Ltd, in market A, ABC (Pty) Ltd carries out an internal investigation and discovers that, as well as having participated in cartel activity in market A, one of its divisions or subsidiary has participated in separate cartel activity in respect of market B. ABC (Pty) Ltd has been co-operating with the Authority's investigation in market A and is interested in seeking lenient treatment by disclosing its participation in cartel activity in market B.
- 6.5. Assuming ABC (Pty) Ltd qualifies for total immunity in relation to market A, it can also obtain a reduction in financial penalty in relation to market A in addition to the reduction it would have received for co-operation in the investigation in market A alone i.e. an additional reduction in respect of market A as a result of its co-operation in the investigation in market B.
- 6.6. In this context the term 'market' should not be interpreted narrowly to mean 'relevant market' as defined under section 2 of the Act, but may be more broadly defined. Leniency plus will be available for information that enables the Authority to launch a new cartel investigation, or substantially broaden its existing investigation, not merely for information relating to markets that will naturally be examined in the course of the existing investigation.

## **7. Quality of information provided by an enterprise**

As a minimum to meet the conditions for lenient treatment by the Authority, the information provided by the enterprise under this Policy must be such as to provide the Authority with sufficient basis for taking forward a credible investigation or to add significant value to the Authority investigation. In practice this means that the information is sufficient to allow the Authority to exercise its formal powers of investigation or genuinely advances the investigation.

## **8. Confidentiality**

An enterprise coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an enterprise which has volunteered information. The Authority will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such enterprise confidential throughout the course of its investigation, until the Competition Tribunal issues a written direction under section 76(1) of the Act or a written order under section 76(2) thereof for the payment of a penalty, for a breach of section 25.

## **9. Effects of leniency**

9.1. Leniency does not protect the enterprise from the other consequences of breaching the law which include:

- a. the fact that the agreement which breached section 25 of the Act is void and therefore cannot be enforced; and
- b. the possibility that third parties who consider themselves as having been harmed by the cartel may have a claim under a private right of action.

9.2. Leniency also does not provide immunity from any penalty that may be imposed on the enterprise under any other laws in or outside Botswana.

## **10. Directors and Officers of Enterprises Involved in Cartels**

10.1 Officers and directors of enterprises that contravene section 25 are liable to a fine not exceeding P100 000 or a term of imprisonment not exceeding five years, or both.



- 10.2 Officers and directors of enterprises that contravene section 25 can report the indiscretions of the enterprises as whistle-blowers under the Whistleblowing Act of 2016.
- 10.3 The Act of 2016, describes a whistle-blower as someone who makes a disclosure of impropriety, either orally or in writing, in good faith, which disclosure the whistle blower believes to be true.<sup>1</sup> The disclosure has to be made to an authorised person. The Authority has been listed as one of the institutions a whistle blower can report acts of impropriety to.
- 10.4 The officers or directors have to make the disclosures in good faith and believe the disclosure to be true in order to be afforded protection under the Act.

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<sup>1</sup> Section 2 of the Whistleblowing Act