

CARTEL ENFORCEMENT: ADOPTION OF LENIENCY PROGRAMME IN KENYA

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ABSTRACT

Cartels are considered by many to be the most egregious competition law contraventions, of which leniency programs have proved to be an effective tool of breaking them, especially in jurisdictions which have achieved visibility through hard enforcement. Young competition agencies, especially in developing countries are adopting use of leniency in cartel enforcement through development of the relevant guidelines. This case holds for Kenya which amended its Law to cater for leniency programmes. Leniency programmes are effective only if cartelists not seeking leniency perceive significant punishment to be sufficiently likely. The programmes involve a commitment to a pattern of penalties designed to increase incentives of cartelists to self-report to the competition law enforcer. Jurisprudence provides a methodology of essential ingredients required to run an effective leniency programme, however, this is based on markets where these programmes have been effective which are likely to be different with markets in developing nations. The markets in developing countries, particularly Kenya are peculiar in terms of information asymmetry, competition law awareness, and general business culture, among others. Further, it is noted that the Competition Authority of Kenya is a relatively young organization still building visibility through hard and soft enforcement. This therefore begs the question whether replicating the already tested leniency guidelines, will achieve much success in Kenya or require to be modified significantly to reflect and appeal to the local business community. This study presents the cornerstone and benefits of an effective leniency program, the procedural aspects of a leniency program possible challenges of running a leniency program in the Kenyan context and possible mitigating actions.

Introduction

Cartels are considered to be the most outrageous contraventions of competition laws worldwide. Cartels occurs when competing firms agree, directly or indirectly agree to cooperate and coordinate with the aim of controlling/fixing prices, output, allocating markets or excluding entry into a market. Competition agencies use a number of hard and soft enforcements tools/initiatives in fighting cartels. These include financial sanctions and prosecutions of the directors of the concerned undertakings and a self-reporting mechanism in exchange for amnesty otherwise known as leniency. Leniency has been argued to be one of the effective tools in cartel enforcement.

A leniency programme is a system, publicly announced, of, “partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency”. The overall objective of a leniency program therefore is to improve the level of compliance with Competition laws through increased detection of cartels.

Leniency programs have been gradually introduced over the last two decades for fighting more effectively against cartels. These antitrust enforcement programs secure lenient treatment for early confessors and conspirators who supply information that it is helpful to the antitrust authorities. Under the terms governing a leniency program, a firm or individual that first confesses involvement in a cartel supplying details of meeting dates and the timing of the price agreements may avoid criminal conviction, fines, or a custodial sentence.

In Kenya the Leniency Programs is still underway and currently Guidelines are being prepared by the Competition Authority of Kenya (the Authority) pursuant to Section 89(A) of the Competition Act, No 10 of 2012 (the Act), which provides that the Authority may run a leniency program whereby an undertaking that discloses the existence of an agreement that is prohibited under the Act and co-operates with the Authority in the investigation, may not be subjected to all or part of the penalty that can be imposed under the Act.

The leniency is applicable only in respect of alleged the restrictive agreements, practices and decisions under Sections 21 and 22 of the Competition Act. A restrictive trade practice refers to an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their practices, in such a way that it leads to the prevention, distortion or lessening of competition.

These restrictive agreements, practices and decisions need not have been entered into in Kenya. For as long as a restrictive agreement, practice and decision has an effect in Kenya, the LPG would apply irrespective of the fact that the activity takes place outside Kenya pursuant to the provisions of Section 6 of the Act.

To further buttress the main issues in this study, the paper has been divided into four Sections. The first Section shows the cornerstones of a leniency program in Kenya and the benefits that would arise from having a leniency program in Kenya. The second Section discusses the challenges that arise from the Competition Act when it comes to leniency and the challenges the

guidelines bring forth. The third Section discusses on the mitigating factors that the Authority is doing and can be taken up to address the challenges that the study brings. In conclusion, the fourth Section will highlight the way forward for Kenya and what other developing countries can learn from the experiences of Kenya when it comes to an effective leniency program.

CHAPTER 1: BENEFITS AND CORNERSTONES OF AN EFFECTIVE LENIENCY PROGRAM

Benefits of implementing an effective Leniency Program

The overall objective of an effective leniency program is to improve the level of compliance with Competition laws through increased detection of cartels. The benefits of running an effective leniency program can be summarized as:-

a) Deterrence

Deterrence is achieved when a leniency program makes cartel membership less attractive as there is an increased risk that one of the cartel participants will report the existence of the cartel. Cartels are founded on mutual consent and trust but when there is a livelihood or suspicion of one of the cartel members selling out the rest, then cartel formation or continued existence is undermined which is beneficial overall to consumers and the competition agencies. The Leniency program has a preventive dimension in that it implants mistrust within cartels that a member will report it to the authorities. Enforcement of the Leniency program is therefore a cost effective investigation tool although it supplements and is not a replacement for ex officio investigations.

b) Detection

An effective leniency program will enable the discovery of cartels, as there is an increased likelihood of the cartel being reported, and thereafter appropriate remedies imposed by the competition agency, it will lead cartel members, in some cases, to confess their conduct even before an investigation is opened. In other cases, it will induce organizations already under investigation to abandon the cartel stonewall, race to the government, and provide evidence against the other cartel members. While the availability of some investigative techniques, such as consensual monitoring or the compulsion of sworn testimony, may be limited or nonexistent in jurisdictions where hardcore cartel activity is not a criminal offense, Leniency Programs can potentially be utilized in any jurisdiction where such conduct is treated as a criminal, civil or administrative offense.

c) Sanctioning

Leniency programs are useful in getting the ‘smoking gun’ or first-hand direct ‘insider’ information or evidence that might otherwise be difficult to obtain. With this piece of evidence, competition agencies are likely to punish co-conspirators in a cartel. The evidence is essential in calculating the appropriate financial penalties as competition agencies are in a better position to estimate the overcharge or consumer harm.

d) Cessation

Leniency programs cause cartels to cease operation because one or more of the participants terminates their participation, either because they have applied for leniency or because they are concerned that one or more of their co-conspirators has or will apply for leniency.

e) Cooperation

Leniency programs facilitates international cooperation in cartel investigations as many leniency programs require the leniency applicant to state in which other jurisdictions leniency has been sought and provide a waiver allowing communication between those competition agencies.

When the above highlighted benefits are achieved, it is argued that the consumers are the ultimate beneficiaries as markets are allowed to operate and react to the forces of demand and supply which translates to achievement of various efficiencies including allocative and dynamic efficiencies.

Cornerstones of an Effective Leniency Program

Adopting and implementing of an effective leniency program is founded on three prerequisites which are essential and must be in place before a jurisdiction can successfully implement a leniency program. First, the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not.

These three major cornerstones – severe sanctions, heightened fear of detection, and transparency in enforcement policies – are the indispensable components of every effective leniency program (Scott. D, 2004).

(a) Sanctions imposed are significant

The jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. Cartel activity is a balance of probabilities therefore a leniency program is likely to be successful if penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. If sanctions are inadequate, cartel participants will not come forward as the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants must be less than the cost of getting caught.

Since cartel activity is treated as a criminal, civil, and/or administrative offense depending on the jurisdiction, authorities around the world rely on a range of sanctions and then apply these sanctions with varying degrees of severity.

For countries which have cartels as criminal offenses, criminal prosecutions of directors of the cartelists' undertakings is always considered to be severe enough. However, there are other jurisdictions which do not have individual liabilities and criminal sanctions against the directors of firms participating in a cartels. These jurisdictions will solely rely on financial penalties alone to sanction cartel conduct, then the financial penalties must be severely punitive if they have to attract leniency applicants.

For sanctions to be considered to be severe, the perceived risks of the cartel activity must outweigh the potential rewards. Regardless of whether a cartel is subject to criminal or administrative sanctions, it is obvious that cartel activity will not be adequately deterred nor reported if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. For jurisdictions with no financial penalties, the penalties must be sufficiently punitive that they will not be viewed simply as a tax or a cost of doing business. America and Canada for example have fines up to 30 percent or more of the revenue generated by the sale of the price-fixed product or service during the entire duration of the conspiracy.

It is further noted that a jurisdiction without individual liability and criminal sanctions is likely not to be as effective at inducing leniency applications compared to one that has the sanctions as criminal sanctions provide the greatest inducement to cooperation. Individuals stand the most to lose and so avoiding jail sentences is the greatest incentive for seeking amnesty. Common sense suggests that the threat of individual exposure will tilt the balance at the margins such that some companies will report violations that they would not otherwise have reported if they were only facing financial penalties.

(b) High risk detection

Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency. Competition agencies therefore have to demonstrate a commitment to vigorous investigation of cartels using robust investigatory powers. Those participating in cartels must perceive that there is a real risk of detection. This will encourage cartel participants to come forward before they are caught. There are further benefits if a leniency program can create a race between cartel participants to be “first through the door” and/or ahead of others that may be eligible for lenient treatment (including between a company and its employee).

The competition agencies should therefore create an environment where business executives perceive a high risk of being detected and prosecuted if they enter into or continue to participate in cartel activity.

(c) Transparency and Certainty

There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their legal representatives by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicized, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted. The leniency programme should therefore be sufficiently transparent and predictable to enable potential applicants to predict how they would be treated.

CHAPTER 2: CHALLENGES WITH IMPLEMENTATION OF A LENIENCY PROGRAM IN KENYA

The above identified cornerstones are a prerequisite for implementation of an effective leniency program. However, there are challenges which might be jurisdiction specific which might undermine these cornerstones and in essence the effective implementation of an effective leniency program. Kenya is in the process of developing leniency program guidelines which will guide the process of application for leniency and other processes thereafter but there are some challenges which have been identified that may work to the disadvantage of the authority in achieving effective leniency programs. These are;

(a) Weaknesses in the legal framework

Antitrust laws in Kenya are anchored on the Competition act No. 12 of 2010 which was promulgated in August 2011. The Act forms the basis for anti-cartel enforcement and anti-competitive market conduct. The subsequent amendment of the act in 2014 provided for leniency in Section 89A. It has been identified that the Act has two major weaknesses in regard to sanctions and coverage of the leniency program which are likely to undermine the effective implementation of a leniency program.

Sanctions

Part III of the Act prohibits restrictive trade practices with Section 21 specifically prohibiting by object or effect agreements, concerted practices and decisions by trade Associations which prevent, distort or lessen competition in trade in any goods in Kenya or a part of Kenya. The sanctions for contravening the provisions of Section 21 of the Act are captured under Sections 21 (9) (criminal sanctions) and 36 of the Act (administrative sanctions).

The criminal sanctions under Section 21(9) are specified a fine not exceeding 10 million Kenyan shillings, a jail term of 5 years or both. It is noted that the Authority does not have prosecutorial powers and therefore to actualize these provisions, it requires a cooperation with the Office of the Director of Public Prosecutions.

The absence of a specialized competition court and the need to pursue the matter through cooperation with the ODPP heightens the threshold on the type of admissible evidence required to sustain the criminal proceedings. Further, the absence of a clear cooperation framework between these agencies complicates the matrix as the rules of engagement have to be defined at each and every case.

The other challenge presented by this arrangement is whether the leniency framework will offer immunity to criminal prosecutions to a leniency applicant when clearly the mandate of prosecutions is not with the Authority.

Section 36 of the Act offers the administrative sanctions that may be imposed by the Authority which include a financial penalty. The Section is however silent in the amount of financial penalty to be imposed. The legal interpretation of the reading of this Section of the Act together with Section 21 (9) of the Act is that 10 million Kenyan shillings is the maximum financial penalty the Authority can impose to cartel activity.

In view of the level of commerce in the country and amounts of profits that can be generated from cartel conduct, 10 million Kenyan shillings might not be deterrent enough and therefore cannot incentivize cartel members to come forth to self-report so as to benefit from leniency as obviously the gains from cartelization outweigh the supposed financial pinch.

Scope of leniency

The scope of leniency as provided for by the Act is very wide and may be subject to misinterpretation. Section 89A of the Act reads that the Authority may operate a leniency program where an undertaking that voluntarily discloses the exercise of an agreement or practice that is prohibited under this Act and cooperates with the Authority in the investigations of the conduct.

The interpretation of this Section is that an undertaking which contravenes any Section of the Act can apply for leniency. Prohibitions under the Act cover consummation of a merger without approval, restrictive business practices, abuse of dominance, misleading and misrepresentations among others considering the expansive coverage of the Act which incorporates provisions for consumer protection.

The lack of specificity of this part makes it awkward to implement a leniency program without narrowing the scope of coverage to cartels in line with best practice through the appropriate guidelines. Legal practitioners will always find fault why the Authority is limiting itself to cartels when the Act is broad on the contraventions covered as they can argue that a guideline cannot supersede a substantive law. It has been noted by the Authority that many legal practitioners have actually approached the Authority on leniency on matters such as mergers consummated without our approval, though leniency should only apply to cartels.

Settlements

The Act also empowers the authority to enter into settlement agreements with undertakings on the terms agreed upon by the parties under Section 38. There is a risk of undertakings confusing settlements with application for leniency as others will propose that by opting to settle with the Authority, the Authority should downgrade the applicable financial penalties considerably.

(b) Visibility

The Act was operationalized in August 2011 with the establishment of the Authority, which then had a skeleton staff and other challenges associated with new establishments including low visibility and material constraints. In the Authority's first strategic plan which runs from the financial year of 2013/14 to 2016/17, visibility was noted as one of the challenges. In fact visibility is one of the key areas the Authority is focusing on as there is need to continually enhance the corporate image and visibility of the Authority. The visibility is therefore to be achieved through a mix of hard and soft enforcement initiatives and advocacy.

From inception, the Authority has been successful in bursting cartels in the retail market, outdoor advertising and insurance sectors. All these cases were concluded through settlements.

with the parties agreeing to pay financial penalties among other conditions. The cumulative amount of all penalties imposed to the parties is approximately 12 million. Other cartel cases are at various stages of completion. Through this initiatives, the Authority has received some publicity as these decisions were gazetted and publicized in media and have also been discussed at various forums but the Authority still has not reached the level where this can be considered to be deterrent and also heighten the possibility of cartel members self-reporting as they still perceive that their chances of being busted are slim.

As noted earlier that in absence of a robust history of vigorous investigations and sanctioning of cartels, implementing leniency program might face challenges as the cartelists will weigh the chances of being detected against self-confessing. The cartelists may also elect to end the secret cooperation quietly and hope that it won't be detected in the short run. It can be argued that the Authority is relatively young and has not build enough history of bursting cartels to successfully implement a leniency program.

(c) Recidivism

Recidivism is a significant challenge in cartel enforcement. In the past 25 years, antitrust authorities have increasingly incorporated counts of corporate recidivism as an aggravating factor in their cartel-fining guidelines. Economic theory supports such policies because prior experience in cartelization is believed to enhance a participant's ability to negotiate and sustain future collusive agreements. However, these policies seem to have been implemented on the basis of the limited, perhaps anecdotal, experience of single agencies with defendants.

Companies can also be recidivists under the law. In the context of price-fixing, a company will be identified as a recidivist in the most general sense if it is convicted a second time for cartel conduct, no matter where or when the earlier violation took place. Cartels tend to be formed in narrowly defined product markets. Because many companies are large, diversified organizations, some might argue that corporate recidivism could be reserved in a more restricted sense to mean repeated violations in an identical market. However, criminal systems generally, and antitrust in particular, do not apply such a narrow definition. In antitrust enforcement; previous convictions for price-fixing in any line of business within a decade or so are cause to increase sentences for repeated price-fixing.

(d) Information Asymmetry

Leniency programs are effective when there is some degree of predictability of penalties to be imposed to enable potential applicants to roughly estimate the benefits and costs of seeking leniency. The Kenyan economy has the disadvantage of some parties having better or more information than the other thereby putting them at a disadvantage when it comes to matters negotiation and predicting outcomes.

It has been noted that the cost of accessing information, in regard to time involved is, enormous. This challenge is compounded by continuous dynamism in the market especially involving the new economy. This therefore requires continuous staff skills development to facilitate analysis

of competition cases and collection of information including adequate resources outlay to develop knowledge management systems.

The information asymmetry also undermines effective investigations and sanctioning of cartels as information in some industries may be scanty. In regulated sectors, the sector regulators which are government agencies such as the Registrar of Companies may be the custodian of vital data and information but with lack of clear rules of engagement regarding information exchange and confidentiality, access to this information might be tricky.

Information exchange will therefore affect the implementation of an effective leniency program as it undermines effective investigations and sanctioning of cartels and parties may not be privy to the existence of leniency programs as envisioned by the Act.

(e) General business culture

A leniency programme is ineffective unless cartels are actively and significantly punished. If that precondition is not met, then it is rational to forego a leniency programme. A 2004 survey of developing country competition agencies found that almost everyone felt the absence of a competition culture, both among other parts of government and the public at large. This is evident in Kenya as the law came into force in 2010, it is therefore is very new among the business community.

The business community already had an accustomed way of doing their affairs. There are therefore not aware of the law and may therefore be contravening the law knowingly and unknowingly. From the business community, such as the Kenya Association of Manufacturers they hope that the Authority would put more emphasis on supervision and compliance rather than investigation and compliance because of the level of ignorance among the business community regarding the law.

To further bolster on the challenge of the business culture there are already existing laws that have infringed the Competition Act this is quite evident in the Energy sector which have price formulas for petroleum products this consequently encourages price fixing and cartelization which is fundamentally anticompetitive.

CHAPTER 3: PROPOSED MEASURES ADDRESSING THE CHALLENGES

The challenges highlighted in chapter two may not be unique to Kenya as many young jurisdictions grapple with these challenges as they endeavor to strengthen their competition enforcement. The challenges can be mitigated by deliberate measures in the short and long run which are aimed at curing each of the challenges to achieve desirable goals. The mitigating measures in this instance will include but not limited to; amending the existing law, developing requisite guidelines and fostering cooperation agreements with government agencies and stakeholders.

a) Amendment of the Law

The Authority through engagement with the requisite Government agencies has initiated the process of amending the Act to address the identified areas of weaknesses. Among the Sections proposed for review is Section 36 which deals with administrative remedies. It has been proposed that financial penalties should be pegged at a percentage turnover of the infringing undertakings in line international best practice. The successful review of this Section 36 will remove the ceiling on the financial penalties to be imposed and make the process of determining financial penalties scientific and predictable. This is envisaged to achieve the deterrence effect as the financial penalties will be a proportion of the cartel turnovers.

The Authority has further developed a fining and settlement guideline which is aimed at achieving transparency, predictability and consistency to the process of arriving at financial penalties to be imposed. The amendment of Section 36 will further enhance the application of the fining and settlement guideline.

The guidelines adopts four stages of arriving at the appropriate financial penalty as;

- Determining the relevant (affected) turn over,
- Establishing the period of the contravention,
- Establishing the base percentage, and
- Adjusting the base percentage for aggravating and mitigating factors.

The aggravating factors identified in the guideline are recidivism, non-cooperation, period of contravention, the sector in which the contravention occurs especially if it involves vulnerable consumers, and type of agreement whether vertical or horizontal. The mitigating factors identified include cooperation, first time offenders, ability to pay the financial penalty. The aggravating and mitigating factors are scored and adjusted to the base percentage to arrive at the relevant percentage to be charged.

Development of requisite guidelines

A leniency program guideline is key in actualizing the provisions of Section 89A of the Act. The Authority thus in the process of developing these requisite guidelines. The proposed leniency program guidelines should endeavor to address some of the challenges that have been identified with the operationalization of leniency programs in other jurisdiction. Some of the areas which have been identified for attention in the proposed leniency guidelines are;

- **Relationship between administrative actions, criminal actions and civil actions**

A key concern for potential leniency applicants is the scope of application of the leniency program across different adjudicatory institutions. The question is whether the leniency agreement negotiated with the Authority can and will protect the applicant from administrative actions only or also from criminal actions initiated by the prosecutor and/or civil actions brought by affected customers.

The effectiveness of a leniency program depends to a large extent on the ability to offer the right coverage to leniency applicants so that the risks from using self-incriminatory evidence provided by the applicant as basis for other criminal/civil actions is minimized.

To that end the guidelines need to offer a clear position regarding the connection between administrative, criminal and civil proceeding as well as the use of evidence obtained through the leniency application in front of other adjudicatory institutions.

Potential coverage of physical persons by the leniency agreement (and individual leniency) to incentivize cooperation and potentially enable individuals to come forward if companies do not decide to approach the authority.

The introduction of an individual leniency program creates a race between the company and its employees especially in jurisdictions which have individual criminal liability. Some jurisdictions, most notably the US and the UK, operate leniency programs for individuals in addition to the corporate leniency programs. If the corporation is first to qualify, its employees and directors are covered under its immunity. However, if a company fails to report a cartel that an employee conveyed, only the employee will benefit from individual immunity.³

When criminal liability for cartel violations exists, including individuals as potential beneficiaries of the leniency program is a pre-requisite for an effective leniency policy. The issue of potential beneficiaries of leniency policy is closely linked to the question of sanctions, whether a given jurisdiction entails personal or only corporate liability in cartel cases.

Cartel behavior is traditionally punished by pecuniary sanctions imposed on companies (corporate sanctions), however several jurisdictions also provide for criminal liability of individuals involved in a cartel conduct with corresponding sanctions (imprisonment and/or fines).⁴ Those include the United States, United Kingdom, Canada, Russia, Germany, New Zealand, Ireland, Mexico, Switzerland, Brazil, Netherlands and France.⁵

A jurisdiction with individual criminal liability must ensure that its leniency program also offers protection against criminal sanctions for the relevant personnel. Otherwise, a company, acting through its officers who may have been implicated in the cartel, would be much less likely to

³ OECD (2012), *Leniency for subsequent Applicants*, point 8, pages 16-17.

⁴ OECD (2009), *Latin American Competition Forum - Documentation*, point 55, p. 11-12.

⁵ ICN (2008), *Setting of Fines for Cartels in ICN Jurisdictions*, p.17.

come forward under leniency.⁶ A leniency policy in a jurisdiction with criminal liability is unlikely to work unless it provides for immunity/leniency for the applicant corporation's employees.

Given the potential exposure of natural persons to sanctions under 21 (9) of the Act, individuals should also be protected under the leniency program. Providing immunity for all relevant individuals of a corporation that receives leniency increases predictability as well as the likelihood that the management will approve the participation of the corporation in the leniency process, and fully participate in it.

- **Limitation of the right to revoke conditional leniency in order to enhance legal certainty.**

While the Authority should have the right to revoke the protection of the corporate conditional leniency, this shall be limited to serious cases of non-compliance with the cooperation requirement. Especially in the beginning of a leniency program, the Authority needs to build up credibility with potential applicants. The guidelines should refer to this possibility but limit it to serious breaches. Otherwise, potential applicants might

- **Extension of the period when leniency applications might be admissible.**

The guidelines should be flexible on the timelines of receiving applications. Authorities have an incentive to receive leniency applications until the moment the matter has been adjudicated. Even cases where the Authority has some evidence of collusion are susceptible to be lost. To that end, it would be better to explicitly enable applicants to apply for leniency for as long as new and valuable evidence can be introduced in the file.

- **The ability to of applicants to keep appearances with other cartel members (rather than cease all communication) under the direction of the authority.**

Some jurisdictions such as the EU, Mexico, the Netherlands, and the UK allow to keep up appearances vis-a-vis cartel co-conspirators as a sudden stop in cartel activities might alert them of the ongoing contact with the authority. The reasons for maintaining cartel participation mostly concern protecting 'the element of surprise of any forthcoming inspections'.

The guideline should therefore consider allowing leniency applicants to participate in cartel meetings, but only in exceptional situations and under the direction of the Authority.

- **Disqualification of coercers, cartel initiators or ringleaders from leniency applications**

While excluding coercers and others might have a deterrent impact on cartel formation, potential applicants might fear to be falsely accused by other cartel members, even by second applicants that want to benefit from a full exemption by disqualifying the first at the door. To that end, the

⁶ OECD (2009), point 58, p.12.

guideline should endeavor to clarify that only irrefutable evidence of these conducts will disqualify their application as well as the fact that the burden of proof will lie with whoever alleges such grounds for disqualification.

- **Potential disclosure of the identity of leniency applicants.**

To fully mitigate against the potential risk of disclosure of the identity of the leniency applicants, all aspects of confidentiality have to be considered in the guidelines.

Confidential handling of leniency applications is key to assure the success of the program as it strengthens the incentives for leniency applicants to come forward. An applicant may be concerned about disclosure of his identity or the information provided within the leniency application given (a) potential civil damage actions in Kenya and other countries and (b) “reputational damage” in the business community.

Information contained in documents and statements produced within a leniency application typically include evidence and admissions that would not have been obtained through a regular investigation. Since such admissions will not be available from the other cartel members, the leniency applicant may be disadvantaged, unless the information he supplies is treated confidentially. Therefore, Competition Agencies have generally argued in favor of protecting leniency applications against potential benefits of disclosure. Leniency applications bring many cases to light in the first place and enable Authorities to gather valuable information for private enforcement – even beyond the leniency statements themselves.⁷ Even when the EU decided to strengthen civil damage actions for antitrust infringements, the Commission maintained that leniency statements or verbatim quotations from leniency statements should be exempted from the disclosure of evidence.⁸ Confidentiality should therefore be considered at all levels during the process of application and the subsequent processes. These are;

- i. Confidentiality during the application and investigation stage*

During the application and investigation stage the identity of the leniency applicant should not be disclosed to anyone outside the Authority without prior consent. In practical terms, this implies that the leniency applicant might be subjected to the same investigation procedures than other cartel members.

- ii. Confidentiality during the prosecutorial stage*

The Authority may even aim at protecting the identity of the applicant during the prosecutorial stage. This approach would require the Authority to gather incriminating evidence from the applicant just as from any other cartel member. This would allow the Authority to avoid referring explicitly to the information provided in the leniency Application.

⁷ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice “*Dispelling the myths surrounding information sharing*” speech presented before the ICN Cartels Workshop Sydney, Australia November 20-21, 2004, available at: <http://www.justice.gov/atr/public/speeches/206610.htm>

⁸ See: Article 26 of the *Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of competition law*, OJ 2014 L 349/1.

Generally, jurisdictions struggle to balance due process against the protection of leniency applicants. For instance, the EU informs defendants of the applicant's identity at the statement of objections⁹ and follows regular access-to-file procedures (with possible confidential handling of business secrets and other confidential information). However, with views towards confidentiality of any self-incriminating evidence provided by the applicant, access to corporate statements submitted by leniency applicants is only available to defendants at the Commission's premises, without the possibility to make a copy of any sort.

The US Department of Justice (DoJ) will not disclose the identity of the applicant unless required to do so by court order in connection with litigations.¹⁰ In the past, the DoJ has been able to reach plea agreements on limited information thereby being able to protect the identity of the applicant. However, it has been forced to disclose more information to defendants in proceedings and even the applicant's identity in open court cases.¹¹

Finally, there might be a risk that other defendants could deliberately leak confidential information obtained during discovery to negatively affect the applicant. The authority could potentially address this concern by requiring defendants to sign a statement committing to use the information provided by the leniency applicant only for the exercise of its defense rights in connection with the investigation, and to treating all information confidentially. This statement could provide for a fine in case of non-compliance.

iii. Confidentiality after the cartel decision

Following the final court or administrative ruling some authorities such as the EU Competition Commission publish the identity of the applicant. However, they will continue to treat any self-incriminating evidence of the applicant confidential in order to seal them from subsequent civil action claims. In the US, proffers are protected only to a limited extent from disclosure in court ruling. The guidelines should therefore be clear on whether to conceal the identity of the applicant after all the processes are concluded or not.

- Ability and scope of cooperation with other Competition Authorities for the purpose of multi-jurisdictional cartels.

The guidelines should clarify whether the applicants can waive confidentiality for the purpose of enabling the Authority to coordinate with authorities from other jurisdictions. This is crucial since the first applicants to leniency programs may be international firms participating in multi-jurisdictional cartels and also in view of the regional integration and the need for cross border cooperation between various competition agencies.

A waiver of confidentiality in a cartel investigation constitutes a consent from a leniency applicant to waive the confidential protection of its application in order to allow the agency to share such information with other Competition agencies. As a general rule, Competition agencies would not disclose the identity or any other information obtained from the applicant

⁹ Point 34 Leniency Notice 2006.

¹⁰ US DoJ (2008), *"Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters"*, Point 32.

¹¹ *United States v. AU Optronics Corp., et al.*, 3:09-CR-0110-SI (N.D. Cal.) Doc. No. 502 at p. 2, filed Dec. 7, 2011.

with their counterparts. However, in multi-jurisdictional cartel investigations a waiver can be extremely helpful to obtain relevant evidence across jurisdictions and successfully prosecute all the cartel members.

The key element of waivers is that the receiving authority shall treat the information with the same level of confidentiality as the one providing it. The exchanged information cannot include privileged information such as information protected by attorney-client confidentiality. Finally, while the waiver must always be consensual on the side of the leniency applicant,¹² Competition agencies may strongly encourage or even require that a leniency applicant provides a waiver.

b) Cooperation framework with other government bodies

The Authority has developed a number of cooperation agreements with sector regulators including the Communication Authority of Kenya, Kenya civil Aviation Authority, and the Central Bank of Kenya and is in the process of developing memorandum of understanding with the Public Procurement Oversight Authority and the Office of the Director of Public Prosecutions among others.

These cooperation are aimed at bridging the information asymmetry gap and defining the working relationships of these institutions especially in regard to information exchange and confidentiality so as to strengthen cartel investigations and sanctioning.

Cooperation with the Office of the Director of Public prosecutions is key in regard to speedy prosecution of cartel cases which will ultimately achieve the deterrence effect. Cooperation with the Public procurement Oversight Authority is vital in pursuing bid rigging cartels which milk the economy of millions of shillings.

The Authority has already secured the cooperation of the Directorate of Criminal Investigations with having criminal investigations officers from the police seconded to the Authority to strengthen it's the investigations capacity.

c) Cooperation with other stakeholders

The Authority is keen on building networks with other stakeholders especially the business community with the aim of sensitizing them on the Authority's mandate and processes. The cooperation is achieved through;

- Annual CAK symposium,
- Involvement of stakeholders in marking of key days on the competition calendar including the world's competition day and the world's consumer rights day,
- Press releases and interviews, and
- Trainings and capacity building

¹² ICN, *Waivers of Confidentiality in Cartel Investigations – Explanatory Note*, p. 3.

CHAPTER 4: CONCLUSIONS AND WAY FORWARD

Leniency programs have been identified as powerful tool for cartel enforcement. The implementation of a successful leniency program in Kenya will require achievement of the cornerstones for an effective leniency program and interaction of other factors. The proposed amendments to the Act is identified to be key to the effective implementation of the leniency program and should therefore be comprehensive to address all the weaknesses that might undermine the Authority's enforcement initiatives. A financial penalty based on the relevant turnover for the preceding years of an undertaking will be considered deterrent as the gains from the cartel activity will be less than the administrative fines if caught. The amendment will also work to complement the current fining and settlement guideline already developed and adopted by the Authority.

The Authority should also be seen to be aggressively engaged in pursuing and stopping cartels within the economy. This can be achieved through capacity building to strengthen the cartel detection, investigations and sanctioning. The Authority should further prioritize sectors which the aim of optimally utilizing resources to achieve the greatest impact.

Cooperation with sector regulators and other government bodies is equally key in achieving an effective leniency program. The cooperation will ensure that the various statutes are speaking to each other and work to bridge the information asymmetry that exists in the economy. The cooperation, especially with the Office of the Director of Public Prosecutions will ensure that cartel cases are prosecuted in the Kenyan law courts which is necessary to achieve deterrence especially with the criminal sanctions of which individual criminal liability is obvious.

Engagement with stakeholders will sell out the leniency programs guidelines to the business community, trade associations and other parties who may be the likely beneficiaries of the leniency program. The guidelines therefore should be comprehensive and simplified so that the predictability and transparency aspects are achieved. The guidelines should therefore be exposed to stakeholders for comments before adoption.

The Authority should also continue building visibility and credibility through both hard and soft enforcement initiatives. These include publishing the Authority's decisions in the Kenya gazette and daily publications and media briefs, aggressive pursuance of cartels, holding trainings and sensitization sessions with the consumers among others.

The Kenya competition market faces cross-border cartels which have a regional dimension, it is therefore essential that when formulating the guidelines, the Authority should be alive to this fact and propose guidelines which have a regional dimension.

A country cannot rely on others' anti-cartel actions or leniency programmes. Foreign countries' actions do not help against purely domestic cartels. International cartels can operate globally except for those jurisdictions where they perceive the antitrust risk to be too great, and there is evidence suggesting that their overcharges are larger in countries not actively fighting cartels. Thus, one country cannot rely on another's anti-cartel proceedings. With respect to leniency programmes, the trend is towards restricting information originating, ultimately, from leniency applicants. Thus one country cannot rely on another. The Authority therefore should however

borrow on best practice but domesticate it to for the local business environment for maximum gain.

It is thus concluded that the Authority should develop leniency programs guidelines that are reflective of the peculiar Kenyan market which is aware of the business culture and also cognizant of the fact that with the ignorance of the business community there are cases of repetitive cartels which is as opposed to adopting the would be globally accepted leniency guidelines.

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