



## **Guidelines**

# **CC 3 - COLLUSIVE AGREEMENTS**

*November 2009*

*[Amended in October 2011; November 2011; May 2012; March 2017; June 2017; October 2017; December 2017]*

1. Introduction.....	3
2. Horizontal agreements under Section 41 of the Act .....	5
Fixing the selling or purchase prices of the goods or services .....	5
Sharing markets or sources of the supply of the goods or services .....	6
Restricting the supply of goods or services to, or the acquisition of them from, any person .....	6
Significant prevention, restriction or distortion of competition .....	6
3. Bid rigging under Section 42 of the Act .....	8
Forms of bid rigging .....	8
Exemption .....	9
Price fixing and bid-rigging.....	9
4. Resale Price Maintenance.....	11
5. Leniency.....	12
Total immunity for the first to come forward before an investigation has commenced .....	12
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.....	15
Subsequent leniency applicants: reduction of up to 50 per cent in the level of financial penalties .....	15
Leniency for cartel initiators or coercers: up to 50 per cent in the level of financial penalties .....	15
Procedure for requesting immunity or a reduction in the level of penalties .....	16
Additional reduction in financial penalties (leniency plus) .....	17
Quality of information provided by an enterprise.....	18
Confidentiality .....	19
Effects of leniency .....	19

## 1. Introduction

- 1.1. Sections 41 to 43 of the Competition Act (“the Act”) prohibit agreements between enterprises, which are considered collusive within the definition of these sections, unless they are excluded as per the Schedule to the Act. These sections define the most serious restrictive practices in the Act. The Competition Commission is not allowed some of the discretion in interpreting conduct under these sections that it is allowed under other provisions of the Act, and these are the only breaches for which financial penalties can be levied. Various forms of agreement are covered in the three sections, but all essentially amount to agreements that directly prevent competition, thus eliminating the benefits that free competition provides to consumers and the economy more generally. In common with competition agencies world-wide, therefore, the Competition Commission sets a very high priority on enforcement of the prohibition on collusive agreements.
- 1.2. Enterprises in Mauritius are therefore strongly recommended to avoid intentional breaches of these sections of the Act, and to seek legal or other expert guidance on any aspects of their business that might inadvertently breach the provisions. The Competition Commission will expect businesses to have reviewed their practices to ensure compliance with the law in this regard. Enterprises engaged in collusive agreements are encouraged to come forward with information to enable the Competition Commission to enforce the prohibition. The ‘leniency’ programme, described in Chapter 5 of these guidelines, provides substantial financial incentives to do so.
- 1.3. These guidelines set out some of the factors and circumstances which the Competition Commission may consider in determining whether agreements are collusive. They indicate the manner in which it will interpret and give effect to the provisions of the Act when assessing agreements between enterprises.
- 1.4. These guidelines should be read in conjunction with CC 6: Remedies and Penalties.
- 1.5. These guidelines are not a substitute for the Act, the regulations or rules. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

### *Interpretation of ‘agreements’*

- 1.6. The Act defines “agreements” very broadly:

“[A]greement” means any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in

Mauritius or in a part of Mauritius, and includes an oral agreement, a decision by an association of enterprises, and any concerted practice.”

- 1.7. The term “concerted practice,” which is included within the term “agreement,” is also defined in the Act:

“[C]oncerted practice’ means a practice involving contacts or communications between competitors falling short of an actual agreement but which nonetheless restricts competition between them.”

- 1.8. These agreements are prohibited in the law and the Competition Commission may impose a financial penalty, issue a direction, or both. However, it will not impose a financial penalty unless it is satisfied that the breach of the prohibition was intentional or negligent.
- 1.9. ‘Agreement’ has wide meaning and includes both legally enforceable and non-enforceable agreements, whether written or oral; it includes so-called gentlemen’s agreements. An agreement may be reached via a physical meeting or the parties or through an exchange of letters or telephone calls or any other means. All that is required is that parties arrive at a consensus, an understanding, on the actions each party will, or will not take.
- 1.10. The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these factors may be taken into account in deciding on the level of financial penalty).
- 1.11. An agreement made outside Mauritius, an agreement where any party to the agreement is outside Mauritius or any other matter, practice or action arising out of such agreement outside Mauritius is also prohibited provided the agreement has the effect of significantly preventing, restricting or distorting competition within Mauritius.
- 1.12. The prohibition of collusive agreements applies equally to agreements between sellers to fix prices to customers, and agreements between buyers to fix prices at which they purchase from suppliers.

## 2. Horizontal agreements under Section 41 of the Act

- 2.1. Section 41 prohibits agreements or a provision of such agreements between enterprises that supply goods or services of the same description, or acquire goods or services of the same description, which have the object or effect of significantly preventing, restricting or distorting competition.
- 2.2. Section 41(1) (b) of the Act provides an illustrative list of such agreements which have the object or effect of:
  - fixing the selling or purchase prices of the goods or services;
  - (a) sharing markets or sources of the supply of the goods or services; or
  - (b) restricting the supply of goods or services to, or the acquisition of them from, any person.

### *Fixing the selling or purchase prices of the goods or services*

- 2.3. There are many ways in which prices can be fixed. For example, the agreement may involve either the price itself or the components of a price such as a discount, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.
- 2.4. Price-fixing might also take the form of an agreement to restrict price competition. This may include, for example, an agreement to adhere to published price lists or not to quote a price without consulting potential competitors, or not to charge less than any other price in the market. An agreement might restrict price competition even if it does not entirely eliminate it. Competition might, for example, be restricted despite the ability to grant discounts or special deals on a published list price or ruling price.
- 2.5. Recommendations of a trade association in relation to price, or collective price-fixing or price co-ordination of any product might be considered to be price-fixing, regardless of the form it takes. This could include a decision that requires members to post their prices at the association's premises or on the association's website etc. as well as any recommendation on prices and charges, including discounts and allowances. Contacts or communications between competitors which restrict competition between them is prohibited.
- 2.6. An agreement might also fix prices by indirectly affecting the prices to be charged. It may cover the discounts or allowances to be granted, transport charges, payment for additional services, credit terms or the terms of guarantees, for example. The agreement might relate to specific charges or allowances or to the ranges within which they fall or to the formulae by which prices or ancillary terms are to be calculated.

### ***Sharing markets or sources of the supply of the goods or services***

- 2.7. Enterprises might agree to share markets for goods or services, whether by territory, type or size of customer, or in some other ways. Such agreements are collusive if they restrict, prevent or distort competition significantly. This prohibition applies equally to agreements between sellers to share markets and agreements between buyers to share sources.

### ***Restricting the supply of goods or services to, or the acquisition of them from, any person***

- 2.8. An agreement which restrict the supply or acquisition of goods or services in the form of fixing production levels or quotas or dealing with structural overcapacity will be regarded as collusive if it restricts, prevents or distorts competition significantly. If two enterprises were, for example, to agree to restrict their production capacities, or to refrain from producing as much as they would independently, or to divert production into other markets (for example, overseas), such an agreement might be considered collusive, creating an artificial scarcity of the goods and driving up price<sup>1</sup>. The Competition Commission does not need to observe price effects to form a view that such a restriction of supply constitutes a prohibited collusive agreement.
- 2.9. Such a restriction of supply might emerge only over the long term, and still be regarded as prohibited collusive agreement. For example, agreements to limit technical development would normally be considered collusive, as would agreements to limit capacity or otherwise restrict investment.
- 2.10. Similarly, agreements between *buyers* to keep prices down by restricting purchases can also be regarded as collusive if they restrict, prevent or distort competition significantly.

### ***Significant prevention, restriction or distortion of competition***

- 2.11. Horizontal agreements can only be found collusive if The Competition Commission believes that they 'significantly prevent, restrict or distort competition'. This phrase should not be interpreted to mean that the magnitude of any price increases or other damage to other persons' interests will be assessed and measured against some standard. In common with other competition agencies, The Competition Commission will interpret 'significant' in this phrase to be 'of significance' or 'not insignificant'.

---

<sup>1</sup> For example, agreements between retailers to restrict opening hours would be prohibited, as would agreements between taxi drivers to work shifts that do not overlap.

- 2.12. By definition, any agreement that has as its object or effect, price-fixing, market sharing or the restriction of supply, will be considered significantly to restrict, distort or prevent competition.
- 2.13. This approach reflects the absolute prohibition on such agreements in the Act. Unlike other restrictive practices as described in sub-parts II, III and IV, it is not open to the Competition Commission to set any anticompetitive effects of collusive agreements against any benefits. Any agreement with an anticompetitive effect in the sense arising out of 41(1)(a) and (b), which is not insignificant, will be considered collusive.
- 2.14. Note that Section 41 defines agreements as collusive if they have the object *or effect, in any way*, of restricting competition in the manner described in Section 41(1)(b). The Competition Commission will, if necessary, carry out analysis to determine the effects of agreements and may find them to be collusive if it determines that the effect is anticompetitive in this manner. Evidence that an agreement did not have an anticompetitive object will not therefore necessarily serve to prevent the agreement being found to be in breach of the Act, although it may have a bearing on the penalty, if any, that the Competition Commission imposes. Certain types of restrictive agreements are regarded as having an object which is so manifestly anticompetitive that consideration of their effects is unnecessary. These include horizontal restrictions to fix prices, share markets (territories or customers), quotas or limitation on production or sale, minimum RPM and vertical customer allocation clauses.

### 3. Bid rigging under Section 42 of the Act

- 3.1. One form of collusive agreement is bid rigging. An agreement or a provision thereof, shall be considered collusive, if one party agrees:
- (a) Not to submit a bid or tender; or
  - (b) Agrees upon the price, terms or conditions of a bid or tender.
- 3.2. Bid rigging is the way that conspiring competitors effectively raise prices where purchasers – often but not necessarily government – acquire goods or services by soliciting competing bids. Essentially competitors agree in advance who will submit the winning bid on a contract being let through the competitive bid process. It is not necessary for all bidders to participate in the conspiracy.
- 3.3. This prohibition relates to agreements between competitors. Agreements between bidders and employees at the purchasing body are unlikely to be regarded as breaches of the Competition Act, although they may well be offences under other statutes (especially those dealing with corruption). For example, it would not normally be a matter for the Competition Commission if a more expensive bid was selected in a tendering process, over an apparently more attractive lower bid, or if some bidders have more information from the buyer than others.<sup>2</sup>

#### Forms of bid rigging

- 3.4. Bid rigging can take many forms, such as bid suppression, complementary bidding, bid rotation or subcontracting. Competition Commission will not necessarily always classify any bid-rigging scheme it finds into these forms, but describes them briefly in order to explain what form of evidence it might seek when investigating bid-rigging.

##### *Bid Suppression*

- 3.5. In bid suppression schemes, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

---

<sup>2</sup> The Competition Commission has signed a memorandum of understanding with the Independent Commission Against Corruption (ICAC) and is obliged to pass on any material relating to suspected corruption to ICAC.



### ***Complementary Bidding***

- 3.6. Complementary bidding (also known as cover or courtesy bidding) occurs when some competitors agree to submit bids that either are too high to be accepted or contain special terms that will not be acceptable to the buyer. Such bids are not intended to secure the buyer's acceptance, but are merely designed to give the appearance of genuine competitive bidding. Complementary bidding schemes are the most frequently occurring forms of bid rigging and they defraud purchasers by creating the appearance of competition to conceal secretly inflated prices.

### ***Bid Rotation***

- 3.7. In bid rotation schemes, all conspirators submit bids to take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turn on contracts according to the size of the contract, allocating equal amounts to each conspirator company. A strict bid rotation pattern suggests collusion is taking place.

### ***Subcontracting***

- 3.8. Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favour of the second lowest bidder, in exchange for a lucrative subcontract that divides illegally obtained higher prices.

### ***Exemption***

- 3.9. An agreement or term of an agreement involving bid rigging shall not be considered collusive within the definition of section 42, if the agreement or the term of the agreement is made known to a the person inviting for bids or tenders at the time or before the time such invitation is made.

### ***Price fixing and bid-rigging***

- 3.10. Some forms of bid-rigging investigated under Section 42 could also breach the prohibition on horizontal collusive agreements in Section 41. For example, bid-rigging agreements might fix the prices at which bids are made, or specify a restriction of supply through not bidding. The two sections differ – such as the exemption described above (which has no parallel in Section 41) or the requirement in Section 41 that the Competition Commission consider whether the agreement significantly restricts, prevents or distorts competition (which has no parallel in Section 42).

- 3.11. The Executive Director's preliminary report, and the Competition Commission's published decision, will clearly identify under which of the two sections (or both) the agreement is being assessed.

## 4. Resale Price Maintenance

- 4.1. In the Competition Act, Resale Price Maintenance (RPM) is described as “an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to his customers”. RPM is prohibited under Section 43 of the Act, and penalties may be applied for an intentional or negligent breach.
- 4.2. Thus, enterprises are prohibited from forcing resellers of their products to sell them at or above a certain price. Suppliers may not require resellers to stick to an agreed price, or to any prices printed on the product. Similarly, the prohibition extends beyond ‘headline’ prices to discounts or other special offers that might have the effect of changing the effective price that customers pay. Thus, suppliers may not impose conditions preventing their resellers from discounting, for example.
- 4.3. RPM within *bona fide* ‘agency’ arrangements, in which one enterprise acts on behalf of another but does not take title of the goods or services, may be permissible. However, the Competition Commission will examine any such arrangements and would expect to take action under Section 43 if it believed that the agency arrangement aimed at evading the Section 43 prohibition. Factors that may be considered include the purpose of the agency arrangement, the extent to which the supplying enterprise retains control over the goods or services, and whether the supplying enterprise assumes the risk of loss.
- 4.4. A supplier can however recommend a minimum resale price to a reseller, provided that the recommendation is not binding. Where a resale price appears on a good whereby the supplier or producer has recommended a minimum resale price, the reseller shall ensure that the words “recommended price” appear next to the resale price.
- 4.5. Agreements setting a price ceiling, preventing resellers from raising prices, are permitted under Section 43 of the Act.
- 4.6. More generally, vertical agreements (contracts or less formal arrangements between suppliers and their resellers) can be reviewed under Section 45 of the Act. These arrangements are treated similarly to monopoly situations, in that the Competition Commission might remedy anticompetitive arrangements but cannot levy penalties. The Competition Commission might hold an investigation into a vertical agreement and produce a single report, dealing with RPM under Section 43 and other matters under Section 45.

## 5. Leniency

- 5.1. Under sections 41, 42 and 43 of the Competition Act, collusive agreements are prohibited. In addition, enterprises participating or which have participated in them are liable under section 59 to a financial penalty. Violations of the section 41 or 42 prohibitions are, by their nature, secret and difficult for Competition Commission to discover. The same is also true for cartels that use RPM as a means to facilitate the cartel.
- 5.2. 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 Competition Commission of the cartel's activities. The benefits of granting lenient treatment to enterprises which cooperate with the Competition Commission outweigh the benefits arising from fully enforcing financial penalties on those enterprises.
- 5.3. As leniency programmes have found to be effective in other competition regimes, a similar programme will form part of Mauritius's enforcement strategy. Enterprises which come forward with information that enables or assists the Competition Commission to determine that a breach of Sections 41 or 42, or Section 43 where RPM facilitates a cartel<sup>3</sup> (subject to paragraph 5.6A), may receive substantial reductions in, or complete immunity from, financial penalties levied by the Competition Commission for that cartel. **[Amended 5<sup>th</sup> June 2017]**

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

- 5.4. Under section 59(2) and (3) of the Act, any enterprise which has intentionally or negligently infringed sections 41, 42 or 43 of the Act faces a financial penalty of up to a maximum of 10% of its business turnover for each year of infringement (up to a maximum of 5 years).<sup>4</sup>
- 5.5. The Competition Commission will nevertheless grant an enterprise the benefit of total immunity from such financial penalties for a given infringement where the following conditions are met:
  - (a) The enterprise is the first to provide the Competition Commission with evidence of the cartel activity before an investigation has commenced, provided that the Competition Commission does not already have sufficient information to establish the existence of the alleged cartel activity<sup>5</sup>;

---

<sup>3</sup> But not where RPM has simply been imposed by an upstream supplier, as only the supplier would be liable for a fine in such a case.

<sup>4</sup> See CC 6: Remedies and Penalties.

<sup>5</sup> The Competition Commission keeps a careful record of evidence received, with dates, enabling a clear assessment of whether the additional information contributed substantially to the case. Such evidence would be referenced in the published report, where that is not impossible due to confidentiality obligations.

- (b) The enterprise:
- i. Provides the Competition Commission with all the information, documents and evidence available to it regarding the cartel activity, as required by the letter;
  - ii. Maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by the Competition Commission as a result of the investigation; and
- i. Refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the Competition Commission (except as may be directed by the latter).
  - ii. The enterprise did not initiate the cartel or take steps to coerce other enterprises into participating in the cartel, subject to paragraph 5.10A below.

**[Amended December 2017]**

5.6. With effect as from 1<sup>st</sup> March 2017, and for a period of six months, ending 31<sup>st</sup> August 2017, the Competition Commission is providing amnesty to cartel initiators, and consequently will waive condition iv, in Paragraph 5.5 above, for all leniency application made during that six months period including application for leniency made by a cartel initiator. The Competition Commission may therefore grant immunity and leniency even for the initiators of cartels upon application for leniency in relation to prohibitions of the kind mentioned in Sections 41, 42 and 43 of the Competition Act 2007. However, leniency will be denied to cartel initiators after the 31<sup>st</sup> August 2017 when the waiver for condition iv, in paragraph 5.5 above and the amnesty set out in this paragraph will expire.

**[Amended in 16<sup>th</sup> November 2011]; [Amended 24<sup>th</sup> May 2012]; [Amended 1<sup>st</sup> March 2017]**

- 5.6A With effect from 5<sup>th</sup> June 2017 and ending on 20<sup>th</sup> October 2017, the Competition Commission is providing amnesty for any enterprise involved in a vertical agreement involving RPM by:
- (a) waiving the restriction at paragraph 5.3 of this guideline, that only RPM which facilitates a cartel can benefit from leniency and the associated footnote 3 thereof; and
  - (b) providing immunity from financial penalties for RPM to enterprises applying for RPM Amnesty under this paragraph on the condition that the applicant –
    - i. admits its participation in an agreement involving RPM,
    - ii. provides the Competition Commission with all the information, documents and evidence available to it regarding the RPM, and as required by the latter,

- iii. maintains continuous and complete co-operation until the conclusion of any action by the Competition Commission in relation to the matter, and
- iv. offers undertakings that satisfactorily address the competition concerns of the Competition Commission.

**[Amended 5<sup>th</sup> June 2017] [Amended 3<sup>rd</sup> October 2017]**

- 5.7. If an enterprise does not qualify for total immunity under paragraph 5.5, it may still benefit from a reduction in the financial penalty up to 100% under paragraphs 5.8 and 5.9.

### **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**

- 5.8. 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 Competition Commission with evidence of the cartel activity;
  - (b) This information is given to the Competition Commission after the Executive Director has started an investigation but before the Executive Director has submitted his report to the Commission (which the latter considers a final report from the Executive Director) for breach of section 41, 42; and
  - (c) The conditions under sub-paragraph 5.5(b), above, are satisfied.
- 5.9. Any reduction in the level of financial penalty under these circumstances is discretionary. In exercising this discretion, the Competition Commission will take into account:
- (a) The stage at which the enterprise comes forward;
  - (b) The evidence already in the Competition Commission possession; and
  - (c) The quality of information provided by the enterprise.

### **Subsequent leniency applicants: reduction of up to 50 per cent in the level of financial penalties**

- 5.10. Enterprises which provide evidence of cartel activity before The Competition Commission makes an order under section 59(3) or before the Executive Director submits his report of investigation to The Commissioners but are not the first to come forward may be granted a reduction of up to 50% in the amount of the financial penalty which would otherwise be imposed, if the conditions under sub-paragraph 5.5(b), above, are satisfied. **[Amended October 2011]**

### **Leniency for cartel initiators or coercers: up to 50 per cent in the level of financial penalties**

- 5.11. A Notwithstanding paragraph 5.5 (b) (iv) by virtue of which an enterprise which has initiated a cartel or which has coerced other enterprises to participate in a collusive agreement cannot benefit from the aforementioned forms of leniency, the initiator of a cartel or coercer may apply for leniency under this paragraph. Subject to fulfilling the first three conditions set out under paragraph 5.5 (b), the cartel initiator or coercer:

- (a) will be granted a 50 per cent reduction in financial penalty if it is first to provide the Competition Commission with evidence of the cartel activity before an investigation has commenced, provided that the Competition Commission does not already have sufficient information to establish the existence of the alleged cartel activity, or
- (b) may benefit up to 50 per cent reduction in financial penalty if it comes forward after the start of an investigation.

**[Amended December 2017]**

- 5.12. Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the Competition Commission will take into account:
- (a) The stage at which the enterprise comes forward;
  - (b) The evidence already in the Competition Commission's possession; and
  - (c) The quality of information provided by the enterprise.

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

- 5.13. An enterprise which wishes to take advantage of the lenient treatment detailed in these guidelines must contact the Competition Commission. Anyone contacting Competition Commission on the enterprise's behalf must have power to represent the enterprise.
- 5.14. Application for leniency may be made either orally or in writing. Initial contact can be made by telephone. Upon such application, the Executive Director shall respond in writing, within [3] days the application was made, acknowledging the receipt of such application for leniency, specifying the way the application has been received by The Competition Commission. In the event of a dispute as to whether an application for leniency was made, the acknowledgement letter of the Executive Director shall be conclusive evidence of such application.
- 5.15. The enterprise making a leniency application should immediately provide the Competition Commission with all the evidence relating to the suspected breach available to it at the time of application for leniency.
- 5.16. The Competition Commission will provide a marker system for leniency applications under paragraphs 5.13 and 5.14 above. If the enterprise is unable to satisfy paragraph 5.14 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 Competition Commission to determine that no other enterprise has applied for immunity or a reduction of up to 100%, for such similar conduct.

- 5.17. 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.
- 5.18. 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.
- 5.19. 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 5.10 of these guidelines. The marker system will not apply to leniency application for reduction in financial penalties of up to 50% and such applicants should immediately provide the Competition Commission with all evidence relating to the suspected breach available to them at the time of submission.
- 5.20. The grant of a marker is discretionary. However its grant is expected to be the norm rather than the exception. An applicant will only be informed whether it has been the first to come forward.

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

- 5.21. An enterprise cooperating with an investigation by the Competition Commission 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 prohibition in section 41 or 42.
- 5.22. To qualify for leniency plus, the Competition Commission 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 percent 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.
- 5.23. If the Competition Commission 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 be in receipt of leniency in the first market 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.

- 5.24. For example, as a result of an investigation by the Competition Commission of manufacturers including XYZ Ltd, in market A, XYZ 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. XYZ Ltd has been co-operating with the Competition Commission's investigation in Market A and is interested in seeking lenient treatment by disclosing its participation in cartel activity in Market B.
- 5.25. Assuming XYZ 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.
- 5.26. In this context the term 'market' should not be interpreted narrowly to mean 'relevant market' as defined according to the Competition Commission Guidelines on market definition but may be more broadly defined. Leniency plus will be available for information that enables the Competition Commission 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.<sup>6</sup>

### Quality of information provided by an enterprise

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

---

<sup>6</sup> For example, in an investigation of local cartels (for example in the taxi business), leniency plus would not be available for enterprises adding new locations to their existing leniency application, even though those new locations might well be considered to be separate markets. The incentive to widen the scope of the leniency application in this way is provided by 'normal' leniency provisions, as market-by-market the enterprise might be the first or only applicant.

## Confidentiality

5.28. 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 Competition Commission 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 Commission issues a written direction under section 58 or an written order under section 59(1) for the payment of a penalty, for a breach of section 41 or 42.

## Effects of leniency

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

- (a) The fact the agreement which breached sections 41, 42 or 43 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.<sup>7</sup>

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

---

<sup>7</sup> The Competition Commission takes no position on whether private actions for damages of this sort are possible under the Competition Act

## **Competition Commission**

**10<sup>th</sup> Floor, Hennessy Court  
Pope Hennessy Street, Port Louis  
Republic of Mauritius**

**Tel: (230) 211 2005**

**Fax: (230) 211 3107**

**Inquiries: [info@competitioncommission.mu](mailto:info@competitioncommission.mu)**

**[www.competitioncommission.mu](http://www.competitioncommission.mu)**