

COLLUSIVE AGREEMENTS (CARTEL)

LENIENCY



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IMMUNITY FROM FINES OR UP TO 100% REDUCTION
FOR ENTERPRISES WHICH **VOLUNTARILY DISCLOSE ITS**
PARTICIPATION IN A CARTEL

WHAT IS LENIENCY IN COMPETITION LAW

The Competition Commission's ('CC') Leniency programme provides cartel participants with an opportunity to disclose the cartel to the CC and in return benefit from either full immunity against fines or up to 100% reduction in financial penalty.

Apart from the reward (in terms of no fines or up to 100% reduction), leniency also provides an opportunity for enterprises to unshackle itself from a cartel. In so doing, the enterprise will effectively bring an end to the restriction of competition caused by the cartel, restore competition and start competing freely on the market.

The best practice to be adopted by any enterprise which is or has been party to a collusive agreement is to apply for leniency. It is also a best practice for lawyers to advise their clients to apply for leniency.

WHAT IS A CARTEL

Cartel is a prohibited business practice under section 41 and section 42 the Competition Act 2007 and referred to as "*collusive agreements*". The term cartel is used to refer to agreements between rival businesses to collude instead of competing.

Thus, arrangements, understandings, communications between rival businesses which have as object the fixing of prices, sharing of markets or restriction of output are illegal under the Competition Act in Mauritius. Cartel also refers to agreements between rival business regarding a call for bids (tenders) e.g. who would respond and who would not (bid suppression), or what price or terms to offer in response to the call for bid. Consult the CC 3 Guidelines on Collusive Agreements for more details on collusive agreements.

The best practice for any business operating in any market in Mauritius is to internally review all your business dealings for any such agreement with any competitor and to report any such collusive agreement right away.

FINANCIAL PENALTIES

Financial penalty for firms having breached the prohibition against cartel is provided in section 59 of the Competition Act.

If a business has participated in a cartel, it will be liable to a financial penalty of up to 10% of its annual turnover multiply by the number of years the cartel has been in operation.

The sanction is however limited to a maximum number of 5 years. As a result, the total maximum imposable fine can therefore amount to **50% of the firm's latest annual turnover.**

The best practice to be adopted by a business caught up in cartel is to stop its participation in the cartel right away and to report the conduct in exchange of leniency.

THE LENIENCY PROGRAMME

Leniency is provided in the Competition Act under section 59 (7) of the Competition Act. The CC's leniency framework is provided in Chapter 5 of CC3 Guidelines on Collusive Agreements.

Enterprises which come forward with information that enables or assists the CC to determine that a breach of Sections 41 or 42, or Section 43 where RPM facilitates a cartel, may receive substantial reductions in, or complete immunity from, financial penalties levied by the CC for that cartel.

FULL IMMUNITY AGAINST FINES

An enterprise which is a member of a cartel will be granted full immunity from any financial penalty when the enterprise satisfies the conditions -

- The enterprise is the first to disclose the cartel and provide the CC with evidence of the cartel activity,
- The application for leniency is made before the CC has started an investigation,
- The enterprise did not initiate the cartel, or take steps to coerce other enterprises into participating in the cartel, and
- the CC does not already have sufficient information to establish the existence of the alleged cartel activity.

The best practice that can be adopted by an enterprise is to disclose the cartel and apply for leniency. If an enterprise is entitled to immunity, the CC will see to it that the enterprise is granted immunity. Even if the CC has already started an investigation and this is unknown to the enterprise, it may still be granted up to 100% reduction in fines as explained below.

REDUCTION OF UP TO 100% IN FINES

In the case where the CC has already started an investigation, the enterprise which is first to provide the CC with evidence of the cartel activity may still benefit from a reduction in the financial penalty of up to 100% (therefore a reduction of the fines to nil). This is irrespective of whether the enterprise is aware of the CC's investigation or not.

The best practice to be adopted by enterprises is to disclose the cartel and apply for immunity as early as possible. Being first in the leniency line is the primary condition to be satisfied. Even if the CC

has already started an investigation and this is unknown to the enterprise, it may still be granted up to 100% reduction in fines.

REDUCTION OF UP TO 50% IN FINES

An enterprise may still benefit from leniency with a reduction of up to 50% even if it is not the first to apply for leniency. Thus, enterprises which provide evidence of cartel activity before the completion of the investigation process by the Executive Director 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.

GENERAL CONDITIONS TO BE MET BY ALL APPLICANTS

When applying for leniency whether full immunity, up to 100% or 50%, the applicant enterprise must satisfy the following conditions. The enterprise must -

- immediately submit to the CC, all information, documents and the evidence relating to the suspected breach available to it at the time of application for leniency,
- maintain continuous and complete co-operation throughout the investigation and until the conclusion of any action by the CC as a result of the investigation; and
- Refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CC.

LENIENCY FOR CARTEL INITIATORS/COERCERS: UP TO 50 %

It must be noted that an enterprise which has initiated a cartel (the ring leader, the one which has a leading role) or which has coerced other enterprises to participate in a collusive agreement cannot benefit from the aforementioned forms of leniency i.e. full immunity and up to 100% reduction.

However, since December 2017, the CC has extended its leniency programme so that even an enterprise which is the initiator of a cartel or which has coerced other businesses to take part in the cartel may be granted a reduction in fines.

Such an applicant must observe the general conditions for leniency. It will be granted a 50% reduction in fines if the applicant enterprise is first to apply for leniency with respect to the reported cartel activity, the application is made before an investigation has commenced, and provided that the CC does not already have sufficient information to establish the existence of the alleged cartel activity.

If the application by an initiator or coercer is made after an investigation has already been initiated then it may be granted up to 50% reduction.

ASSESSMENT OF LEVEL OF REDUCTION TO BE GRANTED

Apart from an applicant which qualifies for immunity (i.e. applied first before an investigation has started and it is not a cartel initiator) for which full immunity will be granted, for all other leniency applicants the CC will determine the level of reduction to be granted by taking into account:

- The stage at which the enterprise comes forward;
- The evidence already in the CC possession; and
- The quality of information provided by the enterprise, in terms of proving the breach.

LENIENCY PLUS

An enterprise may benefit from a further reduction in its leniency grant if it also submits information and evidence of a completely separate cartel activity than the one which is being investigated.

The specific conditions to be met is that the enterprise is the first to disclose the second cartel conduct to the CC and the CC does not already have sufficient evidence of the cartel. 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 initial cartel conduct for it to receive full immunity or up to 100% reduction in fines for the second reported conduct.

PROCEDURE FOR REQUESTING IMMUNITY OR A REDUCTION IN THE LEVEL OF PENALTIES

The procedure for applying for leniency is simple. Enterprises are encouraged to contact the CC and submit relevant information and evidence of the reported cartel. Contact can be made by phone, email, letter or even walk-in the office of the CC (no need for appointment).


MARKER SYSTEM - SECURE YOUR RANK IN THE LENIENCY QUEUE AND THEN SUBMIT EVIDENCE


If the enterprise is unable to immediately provide all information to the CC, the enterprise may alternatively apply for a marker. A marker will secure a position in the leniency queue for that enterprise and the CC will grant that enterprise a delay within which it must submit the relevant evidence of the disclosed cartel failing which it loses its leniency rank.

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 CC to determine that no other enterprise has applied for immunity or a reduction of up to 100%, for such similar conduct.


HOW TO CONTACT THE CC

An enterprise or its legal representative may contact the CC for any information regarding the CC's leniency programme as well as any form of assistance that may be required by an enterprise intending to apply for leniency. The following means may be used to contact us :

 : +(230) 211-2005

 : +(230) 211-3107

@ : leniency@competitioncommission.mu

 : Level 10, Hennessy Court, Corner Suffren Road and Pope Hennessy Street, Port Louis

CHECKLIST FOR BUSINESSES



ACT FAST
BE FIRST TO APPLY
SUBMIT ALL EVIDENCE
END YOUR PARTICIPATION
COOPERATE FULLY WITH THE CC



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Disclaimer : This document has been prepared as an aid to complement the 'CC 3 Guidelines – Collusive agreements' and to assist enterprises to understand the terms, conditions and implementation of the CC's Leniency programme. It is not intended to be directional in nature but informative.

This document does not represent legal advice. Sole reliance on this document does not necessarily guarantee successful outcome of a leniency application made to the CC in respect of an alleged cartel conduct. Specialist legal or other professional advice may be sought by enterprises considering applying for the CC's Leniency Programme.