



LENIENCY PROGRAM GUIDELINES

(Under Section 89A of the Competition Act No 12 of 2010)

Glossary of terms

Conditional Leniency: This is provisional immunity granted in writing to an applicant initially upon successful application for Leniency once the Authority is satisfied that the applicant is providing material evidence and information that will aid in its investigations, findings, decisions and or subsequent proceedings. The conditional leniency requires the applicant to cooperate with the Authority as well as to respect the other conditions specified in the Leniency Programme Guidelines.

First through the door: The first person to qualify for conditional immunity with regard to participation in a certain cartel, after the Authority is satisfied that the person qualifies for Leniency and has provided sufficient evidence.

Full/Total/Permanent leniency: This succeeds the conditional leniency and is given to an applicant upon the completion of the entire investigation process, when a determination is issued.

Immunity: refers to total or 100% reduction in administrative financial penalty, pursuant to section 89A of the Competition Act on an undertaking found to have committed an offence amounting to horizontal restrictive agreements prohibited under section 21 and 22 of the Act. In addition, the applicant will not be subject to prosecution for the criminal aspects of the offence, subject to the concurrence of the Director of Public Prosecution.

Marker: A formal acknowledgement by the Authority of a leniency application intent which records the timing of the application and priority relative to other applicants and reserves a place for an applicant for a period of twenty eight (28) days in the queue whilst it conducts further internal investigation and attempts to perfect its application for leniency.

A. Introduction

1. These Guidelines shall be known as the **Leniency Programme Guidelines** ('LPG'); they contain the collection of principles and conditions adopted by the Competition Authority of Kenya (the Authority) that govern the processing and granting of leniency to undertakings as defined in the Act. The Guidelines have been prepared to inform parties to horizontal agreements and practices prohibited under sections 21 and 22 and the Act, legal practitioners, and the general public on how the Authority will handle applications for leniency as provided for in section 89A (1) of the Competition Act No. 12 of 2010 (hereinafter "the Act").
2. Section 89A (1) of the Act gives the Authority the power to operate a Leniency Programme. It states that; " an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under the Act and cooperates with the Authority in the investigation of the agreement or practice, may not be subjected to all or part of a fine that could otherwise be imposed under this Act"
3. The operative sections of the Act for the purpose of these Guidelines are Section 21 and 22 which deal with prohibited restrictive agreements between undertakings, decisions by association of undertakings and practices of trade associations. However, it is restricted to horizontal agreements, decisions by association of undertakings and concerted practices entered into by competitors.

B. Aim of the Leniency Programme Guidelines

4. The overall objective of LPG is to improve the level of compliance with the Act. It enhances and facilitates investigations and enforcement actions within the economy by encouraging undertakings that have been engaging in wrong doing to provide direct evidence and proactively cooperate in bringing successful enforcement action in return of full or partial immunity.

C. Eligibility criteria for the Leniency Programme Guidelines

5. An undertaking or a division of an undertaking would be eligible for leniency through the legal entity which it formed and which controls its decision-making process. A leniency agreement will cover the applicant's directors and employees as long as they respect the obligation to cooperate with the Authority.

6. The leniency applicant has not coerced others or instigated others to operationalize the agreement. Any claim that the applicant coerced or instigated others needs to be substantiated with irrefutable and direct evidence. The burden of proof for any such claim will lie with the undertaking or person alleging these grounds for disqualification.
7. If a subsidiary applies, it would be eligible for leniency in relation to its participation in prohibited conduct but not in relation to its parent's participation in the prohibited conduct (as the parent undertaking is not under the control of the subsidiary).
8. A parent undertaking of a subsidiary would be eligible for leniency in relation to its own participation in a prohibited conduct as well as its subsidiary's participation in prohibited the conduct (as the subsidiary is under the control of the parent).
9. Leniency can only be granted to one of the legal entities involved in a joint venture. However, a joint venture constituted as a separate legal entity under the joint control of two parent companies is eligible for leniency. Nonetheless, the direct involvement of the parent companies in a prohibited conduct would not be eligible for leniency since the joint venture does not exercise control over its parents.
10. Generally, the involvement of the joint venture in a prohibited conduct is not covered by one of the parent's application because control over the joint venture does not rest solely with the parent applicant.

D. Scope of the Leniency Programme Guidelines

11. . Applications for leniency will be accepted in the following circumstances;
 - i. When the Authority has no knowledge of the contravention; or
 - ii. When the Authority has knowledge of the contravention but lacks sufficient information to start an investigation; or
 - iii. When the Authority has commenced investigations but requires additional evidence to penalize the offenders. In this case, applications may be received for as long as new evidence can be introduced in the file.

E. Conditions, Obligations and requirements under LPG

12. The applicant will qualify for leniency provided it meets the following conditions and requirements on a continuous basis throughout the Authority's investigations until determination:
 - i. **Provide full, timely and truthful information:** The applicant must honestly provide the Authority with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any restrictive agreements, practices and decisions. This also implies not destroying, falsifying or concealing information nor misrepresenting any material facts of **any** restrictive trade practice it is involved in.
 - ii. **Total Cooperation:** The applicant must offer full and expeditious co-operation to the Authority concerning the reported restrictive agreements, practices or decisions.
 - iii. **Keep the application process confidential.** The applicant must not alert other cartel members or any third party that it has applied for leniency.
 - iv. **Must immediately stop the conduct unless otherwise directed by the Authority.**

F. Principles of the Leniency Programme Guidelines

13. The LPG strives to ensure certainty, transparency and predictability for potential applicants. Consequently, eligible applicants who qualify for leniency as per the conditions set in the LPG will be awarded leniency as per the following;
 - i. First through the door applicant: Will be granted 100% percent reduction in penalties, also termed as immunity,
 - ii. Second through the door applicant may be granted up to 50% percent reduction in penalties,
 - iii. Third through the door may be granted up to 30% percent reduction in penalties, and

- iv. Any subsequent applicant who approaches the Authority before investigations are completed and provides useful information that significantly contributes to success of the investigations may be given up to 20% percent reduction in penalties.
14. The identity of the leniency applicant will be kept confidential throughout all stages of the procedure. The identity of the leniency applicant will not be disclosed to anyone outside the Authority during the investigation or once a decision has been taken. To this end, the Authority will undertake all necessary steps to preserve the identity of the leniency applicant.
15. Conditional leniency, which precedes permanent leniency, shall be provisionally granted at the initial stage of the investigation pending final determination by the Authority.
16. In order to obtain permanent leniency the applicant has the obligation to co-operate with the Authority and fulfill any other condition or requirement set out in the LPG. Only a serious breach of these obligations can preclude an applicant from obtaining permanent leniency.
17. If permanent leniency is not granted, the Authority would be at liberty to deal with the applicant as provided for in the Act. In the same breath the Authority may consider a settlement agreement usually initiated by the undertaking concerned.

G. Procedure to be followed in LPG

18. *First contact with the authority*; where a firm is unsure whether or not the LPG would apply to a particular conduct, it may approach the Authority to seek clarity. This may be done through telephone or in writing. A firm may choose to remain anonymous if it wishes to. Once a firm is satisfied that it can apply for leniency, it can go ahead and apply for a marker.
19. For the purposes of Marker and Leniency application, applicants will contact Manager Enforcement and Compliance in person or via a designated email (leniency@cak.go.ke) or phone (+254 202628233 between 8.00 am and 5.00 pm Monday to Friday).

20. ***Marker Application***; The application must contain information substantial enough to enable the Authority to identify the conduct and its participants in order to determine whether or not an application for leniency has been made in respect of the same conduct. The applicant is given an initial period of 28 days to submit relevant documentation information either orally or inwriting.
21. ***Marker extension***; An applicant may seek an extension of its marker after the expiry of the 28 days if due to unavoidable circumstances, that will be reviewed on a case by case basis, it is unable to perfect its application.
22. ***Initial meeting with the authority after the marker has been perfected***; The applicant should bring any information or evidence it deems relevant and answer the questions posed by the authority in relation to the conduct being reported or matters relating thereto. The Authority may only have sight of and peruse all the documents brought by the applicant but will not make copies.
23. ***Communication for qualification for Leniency***; The Authority must within fourteen (14) days , after the date of the first meeting make a decision on whether or not the applicant's case qualifies for leniency and inform the applicant accordingly in writing within fourteen (14) days.
24. ***Meeting with the Authority after the applicant has qualified for leniency***; The aim of this meeting is to discuss and grant conditional leniency to the applicant pending finalization of any further investigations and determination by the Authority in the matter. At this stage, the Authority would be able to make copies of all documents provided.
25. ***Grant of Conditional Leniency***; A written agreement between the applicant and the Authority, otherwise known as the conditional leniency agreement, which will be granted subject to the conditions and requirements under the LPG. The conditional leniency agreement shall explicitly cover also directors and employees of the applicant undertaking. The Authority will engage with the office of the Director of Public Prosecution to forgo prosecution of the criminal aspects of the contravention.
26. ***Confidentiality claim***; Any applicant who gives or discloses any material to the Authority, may claim confidentiality in respect of the whole or any part of the material as per Section 20 of the Act. The applicant may grant a waiver so that the

Authority may disclose necessary information for enabling coordination of leniency applications presented in other jurisdictions.

27. *Investigation, analysis and verification*; After the granting of conditional leniency, the Authority will move forward with its investigations relating to the prohibited conduct. The applicant granted conditional leniency is expected to cooperate fully and in good faith with the Authority throughout this stage.
28. *Subsequent meeting(s) with the authority*; Should the Authority wish to communicate in matter concerning the investigation to the applicant, it is at liberty to contact the applicant through any mode of communication it deems fit or even convene a meeting if and when needed during the process.
29. *Final meeting with the Authority*; The purpose of this meeting between the Authority and the applicant is to give the applicant a Leniency Certificate or sign the Leniency Contract. This only happens when the applicant has met all the conditions set out in this LPG and when the Authority has completed its investigation.

H. Revocation of a conditional Leniency Contract

30. Only a serious breach of the cooperation obligation might result in revocation of the conditional leniency by the Authority. Before the Authority makes a decision to revoke the conditional leniency, it will inform the applicant in writing and provide an opportunity to meet with the Authority and make good the breach. While the Authority is considering revoking the conditional leniency, it will suspend the obligation of the applicant to cooperate. The Authority will revoke a conditional leniency in writing
31. Where conditional leniency is revoked, the Authority may decide to pursue the matter in terms of the relevant provisions of the Act. The undertaking involved may also initiate a settlement process as per section 38 of the Act.