



COMPETITION AND CONSUMER PROTECTION COMMISSION

LENIENCY PROGRAMME

1.0 Leniency for Enterprises Volunteering Information about Prohibited Agreements

- 1.1 Unless otherwise indicated in this Programme, the definitions and interpretation of words or phrases used in this entire document will be those given in section 2 of the Competition and Consumer Protection Act, No 24 of 2010 (hereinafter ‘the Act’).
- 1.2 The term leniency as used in this Programme refers to a system of partial or total exemption from any prescribed penalties that would otherwise be applicable to a participant of a prohibited agreement which provides enough evidence to prove the existence of the prohibited agreement and self-reports its participation therein to the Competition and Consumer Protection Commission (hereinafter ‘the Commission’).
- 1.3 The term prohibited agreements refers to any agreements deemed as anti-competitive or restrictive of competition under the Act, covering both horizontal and vertical agreements prohibited per se, as provided for under sections 9 and 10 of the Act.
- 1.4 The term significant added value in relation to information submitted by a leniency applicant means that the information should be of such a quality and degree of detail that it increases the chances of proving the existence of the prohibited agreement.
- 1.5 Any reference to a number of days in this Programme refers to working days.

Policy on Leniency

- 1.6 In line with section 79 of the Act, the Commission will, through this programme encourage enterprises and natural persons to come forward to the Commission with information that helps to demonstrate the existence of a prohibited agreement or that represents significant added value relative to the information already in the hands of the Commission.
- 1.7 To this end, persons/enterprises which are first in line to self-confess will be guaranteed immunity from prosecution and imposition of full fine/s. Where the information provided by such person/enterprises require further investigation to reasonably conclude the case, immunity from prosecution will be coupled with imposition of partial payment of a fine/s.
- 1.8 A person/enterprise that is second in line and provides corroborative evidence that significantly adds value or exhausts the need for further investigation in circumstances referred at 1.6 above will receive leniency from prosecution but will

be partially fined. Provided that no leniency shall be given to a person/enterprise that is considered as leader of the cartel.

- 1.9 In case of criminal acts, plea negotiations with the leniency applicant will be undertaken, in consultation with the office of the Director of Public Prosecutions; pursuant to the Plea Negotiations and Agreements Act, No. 20 of 2010. The essence is to give undue favourable treatment to enterprises that have self-reported being party to and benefiting from prohibited agreements. This is done so as to uncover such agreements which the Commission may never have discovered at all. In addition, self-reporting in itself is a useful tool for destabilisation as well as fostering suspicion and mistrust among parties to a prohibited agreement.

Legal Basis for providing leniency

- 1.10 Section 79(1) of the Competition and Consumer Protection Act, No. 24 of 2010 (“the Act”) provides that:

“The Commission may operate a leniency programme where an enterprise that voluntarily discloses the existence of an agreement that is prohibited under this Act, and co-operates with the Commission in the investigation of the practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.”

Aim of leniency

- 1.11 The aim of offering leniency is both to make it easier to expose cartels and other prohibited agreements and to reduce the desire to participate in prohibited agreements at all.

Types of agreements to be addressed under the leniency programme

- 1.12 The leniency programme shall cover both same level agreements between competitors (i.e. horizontal agreements), as well as those between entities operating at different levels of the production or distribution chain of the market (i.e. vertical agreements) provided they are prohibited per se.

Enumeration of Prohibited Conduct

1.13 Sections 8 and 10 of the Act prohibit anti-competitive agreements that have as their object or effect, the prevention, restriction or distortion of competition to an appreciable extent in Zambia.

1.14 Section 9(1) of the Act provides that:

“A horizontal agreement between enterprises is prohibited per se, and void, if the agreement-

- (a) Fixes, directly or indirectly, a purchase or selling price or any other trading conditions;*
- (b) Divides markets by allocating customers, suppliers or territories, specific types of goods or services;*
- (c) Involves bid-rigging, unless the person requesting the bid is informed of the terms of the agreement prior to the making of the bid;*
- (d) Sets production quotas; or*
- (e) Provides for collective refusal to deal in, or supply, goods or services.*

1.15 Section 10 of the Act states that *“a vertical agreement between enterprises is prohibited per se, and void, to the extent that it involves re-sale price maintenance.”*

How does leniency work?

1.16 Leniency for participation in a prohibited agreement is an overarching term covering both criminal and civil sanctions. In the case of conduct warranting criminal sanctions under the Act, immunity from prosecution. In case of prohibited conduct of a civil nature, a successful leniency applicant may receive exemption from part or all of applicable fines.

Requirements of the programme

i. Full immunity

CCPC and DPP will grant Applicant immunity from any fine or criminal sanction which would otherwise have been imposed provided:

- a) The applicant is the first to submit evidence which in CCPC’s view, at the time it evaluates the application, will enable CCPC to carry out targeted inspections in connection with an alleged cartel;

- b) CCPC and DPP did not, at the time of the application, already have sufficient evidence to undertake an inspection, arrive at a decision, seek a court warrant for an inspection or find an infringement of the CPC Act;
- c) The Applicant shall have brought his participation in the prohibited agreement to an end at the time of application for leniency unless the Commission deems it beneficial for the Applicant to continue being part of the agreement for the sake of a successful outcome to the investigation;
- d) The Applicant agrees to fully cooperate with the investigation until the Commission's investigations are finalized and the proceedings in the Commission are completed;
- e) The Applicant must not alert other cartel members or any other third party that it has applied for immunity;
- f) The Applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and
- g) The Applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

ii. *Partial Immunity*

- a) Where the Applicant is second to approach the Commission about a prohibited agreement for which sanctions are of a criminal nature;
- b) The applicant shall provide information about the prohibited agreement that represents significant added value relative to the information already in the hands of the Commission;
- c) This information shall give the Commission occasion to undertake an inspection, a search or inform other relevant authorities;
- d) The applicant shall cooperate with the authorities throughout the process and act as a principal witness in case of a hearing or trial when requested to do so
- e) The applicant shall have brought his participation in the prohibited agreement to an end at the time of application for leniency unless the Commission deems it beneficial for the applicant to continue being part of the agreement for the sake of a successful outcome to the investigation

f) The applicant must not have taken steps to coerce one other enterprises to be party to the prohibited agreement.

1.17 The most important point is that the applicant is the first to approach the Commission among other potential applicants, and that the applicant provides the Commission with information about a prohibited agreement which was not previously known. If the Applicant is second in line, they should provide corroborative information that significantly adds value so as to *fill in the blanks* left by incomplete information provided by a first in line Applicant; provided that where the Applicant is the leader of a cartel, they shall not be eligible for leniency under any circumstances.

1.18 On the basis of the applicant's information, the Commission will undertake an inspection which may involve a search at the premises of the participants to a prohibited agreement. It may also be the case that the information is so detailed that the Commission may immediately proceed with prosecution or any other appropriate enforcement action. At this point, the Commission submits details of the case and evidence to the office of the Director for Public Prosecutions for consultations on the possibility of granting the applicant immunity from prosecution.

iii. Immunity from fines

1.19 Immunity from fines means that the leniency applicant does not get penalized for engaging in a prohibited agreement through payment of an applicable financial penalty, as in situations covered under Section 58 of the Act, which cover civil sanctions, as well as those of a criminal nature but also carrying imposition of a fine. Granting of immunity from fines will be dealt with under either of the applications for full or partial immunity specified above, dependent on which conditions are met. It will consist of full immunity from criminal charges and fines or partial immunity from fines.

Reduction of Fines

1.20 An Applicant that does not qualify for full immunity as provided for at clause 1.16 above may have the fine imposed upon them reduced by up to 50% provided that:

(a) The information provided constitutes significant added value as compared to the information that the Commission already has;

- (b) The applicant must not alert other cartel members or any other third party that it has applied for immunity;
- (c) The applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and
- (d) The applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.
- (e) It should be noted that reduction of fines may be considered beyond the second Applicant provided such Applicant provides further valuable information that was not in possession of the Commission and the Applicant played no leading role in the prohibited Agreement.
- (f) In determining the level of reduction of the fine, the Commission will consider various factors; including the time at which the evidence was submitted (including whether the applicant was the first, second or third, etc. to self-report and apply). The overall value added to the successful conclusion of the case by the information presented will also be of utmost importance.

Application for a Marker

- 1.21 A prospective Applicant may make a marker application to the Commission in writing. An oral application may also be made, which will be evidenced in writing by the Commission, for purposes of record keeping.
- 1.22 The aim of the marker application is to protect the prospective Applicant's place in queue of applications for immunity. It should therefore clearly state the Applicant's name, address, and the alleged cartel conduct with its participants, as well as the justification for placement of the marker.
- 1.23 Granting a marker will be at the Commission's discretion making due consideration to the fulfilment of the requirements at clause 1.16, as well as adherence to deadlines communicated by the Commission as pre-requisite to qualification for a marker. Where an Applicant meets the set bench marks, the application for a marker, as well as the information provided, will be deemed to have been provided on the date when the marker application was received by the Commission.

Evidence necessary for proving cartel or other prohibited agreements

1.24 Evidence that will be required to prove a cartel or other prohibited agreements includes that falling within the paragraphs below:

1.24.1 Data and/or material that can directly verify the existence of agreement such as document on the agreement, minutes of the meeting, etc, as generated among the enterprises who participated in the cartel. This evidence is not just confined to documents, recordings, or computer files. It may take any form or type, including viva voce.

1.24.2 Data and/or material describing the fact of discussion or implementation of cartels detailing who, what, when, where, why and how, such as the confirmation, statement, etc., of employees who participated in the cartel. The Commission will also accept orally submitted information or audio recordings.

Applicant's options and rights

1.25 A party is entitled to access the documents in the case, though this does not apply to the Commission's internal working documents. Furthermore, verification and prosecution of a breach of the law may involve certain documents that the applicant is not entitled to see.

The applicant MUST:

- Have ceased to participate in the cartel or other prohibited agreement when the application for leniency is submitted; unless the Commission deemed it beneficial for the Applicant to continue being part of the agreement for the sake of a successful outcome to the investigation;
- Cooperate faithfully, fully and effectively throughout the case
- Present all information and all evidence about the cartel to which the applicant has access, comes into possession of and by reasonable means can obtain
- At any time be available to give a prompt answer to questions from the authorities.

The applicant must NOT:

- Give incorrect or misleading information, suppress factual details or distort the information given
- Draw the attention of the other participants to the cartel or other prohibited agreements to the fact that an application has been submitted (e.g. by approaching the other participants or through a press statement).

The applicant may IF HE WISHES:

- Submit an application for leniency to the competition authorities in other countries (this is not a breach of his duty to cooperate).

Application at investigation Stage

1.25 It is possible to apply for leniency during an inspection or search. In such a case, the Applicant should provide information that should substantially reduce the time the Commission would ordinarily spend on collecting information. Where this happens, the leniency form will be signed and time entered to register a marker.

i. Confidentiality

1.26 The Commission will pay the necessary consideration to discretion. Furthermore, the Commission's staff is subject to the duty of confidentiality and is therefore under obligation to treat an application accordingly.

1.27 However, it should be noted that it is impossible to preserve complete anonymity especially at the point when a matter is presented in court for prosecution and gets in the public domain.

Application Process

1.28 The application process involves a number of practical aspects and the following Questions and Answers assist in outlining the said process.

(1) Who is covered by an application?

- 1.29 An application for leniency applies to an enterprise. This includes a person, partnership or trust; a person referring to both a natural and juristic person. The leniency program will apply to a natural person to the extent that such person is involved in economic activities; for instance, a sole trader or partner in a business partnership.
- 1.30 If an application applies to an enterprise, it must be submitted by a person authorized to sign for the enterprise (such as a CEO or Executive Director, Company Secretary), and this authorized person must expressly state that it is the enterprise that is applying for leniency.
- 1.31 An application from an enterprise automatically covers all present and previous members of the board, managing directors and other employees who served in the period under investigation. If an application is to cover several companies within a group, this should be explicitly stated in the application.
- 1.32 Where information concerning involvement in a prohibited agreement by an Enterprise is given by personnel that have no authority bind the enterprise, their information will amount to whistle blowing and not application for leniency.

(2) *Can a lawyer apply for leniency on behalf of a client?*

Leniency from Prosecution

- 1.33 The application form will be drawn up in such a way that a lawyer may apply for leniency on behalf of a person or an enterprise.

(3) *What should the application contain?*

- 1.34 It is not a requirement that the application form be used in application for leniency. Oral applications will also be acceptable. Both oral and written applications will demand the following minimum information:
- Name and address of the applicant
 - Names and addresses of the enterprises that have participated in the cartel
 - The products with which the cartel has been concerned
 - The geographical markets in which the cartel has operated
 - How long the cartel has been in existence
 - What the cartel has been aiming at (e.g. price agreement or market sharing)
 - Whether the conduct in question is also being investigated in other jurisdictions
 - Evidence and list of evidence necessary to prove the cartel

- Statement that the applicant will give the Commission full cooperation in good faith until the determination on the cartel is completed by the Commission
- Whether the applicant ceased from participating in the cartel.

(4) Who should the application be directed to?

1.35 An application should be submitted to the Executive Director of the Commission. The application is not valid until the time its reception is recorded by the Commission. An oral submission will be evidence by a confirmatory note in writing or audio recording. The safest course is therefore to submit applications to the Commission and obtain a marker indicating reservation but not confirmation for the position of first applicant. The time and date should therefore be indicated on the application form, confirmatory note or audio recording.

(5) What is the best way in which to submit an application?

1.36 The best way to submit an application is by a personal visit to the Commission. At the reception, the applicant should ask to speak to duty officers. Personal attendance allows the applicant to pass on the necessary information in a safe and rapid manner. A record confirming the evidence obtained from the Applicant, date and time of receipt of the application will also be issued.

1.37 However, a personal attendance at the Commission does not prevent the applicant arranging an appointment by telephone in advance and obtaining a marker subsequent to which full information may be availed by the Applicant.

(6) Is it possible to apply via phone, e-mail, fax or letter?

1.38 It is possible to apply for leniency by ringing; sending an e-mail, a fax or a letter to the Commission, or orally. An application given over the phone or orally will be recorded in writing and duly confirmed by the Applicant. For such application to be considered, it must contain information about the cartel that is of sufficient quality.

1.39 By sufficient quality is meant that:

- (i) The information puts the Commission in a position to consider whether to carry out inspections searches

Or

(ii) Inspections or searches have already been carried out, but the information puts the Commission in a position to verify an infringement of Commission Act as a consequence of the cartel activities.

- 1.40 If an application is sent by ordinary post to the Commission, it should be directed to the “Executive Director”.
- 1.41 An application delivered on a working day (at the Commission’s business premises) to the Commission before 08:00 a.m. is considered to have been received on that day at 08:00 a.m.
- 1.42 An application that is delivered to the Commission on a working day after 08:00 a.m. and before 5:00 p.m. is considered to have been received at the actual time when an officer of the Commission receives it.
- 1.43 An application that is delivered to the Commission on a Saturday, Sunday, holiday or a day on which the Commission is closed is considered to have been delivered on the first working day thereafter. Applicants should be aware that there may be special non-working days, e.g. in connection with special holiday.

Contact Details:

The Executive Director
The Competition and Consumer Protection Commission
4th Floor Main Post Office
Cairo Road
P.O Box 34919
Tel: +260-211-222787/+260-211-222775
Fax: +260-211-222789
Email: zcomp@zamtel.zm

The rights of an applicant

Is it possible for an applicant to have a lawyer in meetings with the Commission?

- 1.44 It is recommended that those applying for leniency are accompanied by a lawyer at meetings with Commission.

Further clarifications about leniency

1.45 Below are answers to some questions that may still need to be clarified. The Commission will be willing to answer any additional questions that may not be answered in this guide.

(1) *Is it only “new” cartels and other prohibited agreements that are covered under leniency?*

1.46 **No.** It is possible to receive leniency for cartel activities or other prohibited agreements that existed before the guide came into force in 2013. It is also possible to receive leniency for cartel activities and other prohibited agreements that had ceased prior to 2013.

(2) *Are there times when it is particularly appropriate to apply for leniency?*

1.47 Any party who has participated in a cartel or other prohibited agreement should always consider applying for leniency. If as the purchaser of an enterprise a party comes into possession of information that may indicate that the enterprise being purchased has participated in cartel activities or other prohibited agreements, there may be occasion to apply for leniency. The same may apply if a new manager, board member or employee becomes aware of activities indicating that the enterprise has participated in a cartel or other prohibited agreement.

1.48 If the Commission is engaged in an inspection of search of an enterprise, it may be appropriate to apply for leniency – provided, of course, that the enterprise has participated in a cartel or prohibited agreement.

1.49 If the board of an enterprise becomes aware that a previous manager has participated in a cartel or been a party to a prohibited agreement, it will also be appropriate to apply for leniency.

(3) *Is it still possible to obtain leniency if an enterprise has been the initiator of a cartel or other prohibited agreement?*

1.50 **No,** leniency may not be obtained by an enterprise that has initiated the cartel or other prohibited agreement or played a leading part in it.

(4) *Can an enterprise also obtain leniency for having entered into other types of agreements, e.g., binding resale prices or abused a dominant position?*

Yes. Leniency may be obtained for other forms of prohibited agreements apart from cartel agreements, however, such agreements ought to be prohibited per se.

(5) *Is the option of leniency forfeited if a previous employee attempts to thwart the investigations?*

1.51 **No.** An enterprise that has applied for leniency does not forfeit that option if a previous employee attempts to thwart the authorities' investigations, since the enterprise no longer has authority to instruct the person concerned.

(6) *Can an application be withdrawn?*

1.52 **Yes.** It is possible for an applicant to inform the Commission that he/she no longer wishes to proceed with an application for leniency. In such a case, the Commission may use the information provided by the Applicant for further investigation and the Applicant will not have immunity if the Commission finds that there was infringement.

(7) *Will it become public knowledge that an enterprise has received leniency for having participated in a cartel or other prohibited agreements?*

1.53 At the conclusion of any case the Commission is obliged under the Act to publish its decision and at such a point the case would be in the public domain.

Annex

LENIENCY APPLICATION FORM

PART 1

INFORMATION ABOUT THE APPLICANT

1. Name, registration numbers and address of Applicant as they appear on official business registration records or other official records (if numerous, a list may be attached)

.....

2. Nature of business/es of parties to the conduct:

.....

3. Name, address, telephone number, fax number and position held by the appropriate contact person or joint representative of the applicant/s:

.....

4. Address to which all communications may be made and documents delivered.

.....

NB: Authorisation of representatives - Where applications are signed by a representative, such representative shall produce written proof that they are authorized to act e.g. power of attorney.

PART 2
DETAILS OF THE CONDUCT

5. Specify the details of the agreement, e.g. *'Agreed to increase the price by.....from.....to.....'*

6. Name, registration numbers and address of all parties to the agreement as they appear on official business registration records or other official records (if numerous, a list may be attached).
7. Write down the duration of the prohibited agreement, i.e. the period when it began, continued and time of termination if the agreement has been terminated. *E.g. from Jan.1 2000 to date.*
8. Write down why and when you disengaged from the participation in the prohibited agreement, such as breach of agreement, etc and list the evidence necessary to prove such.
9. Write down the method of contact with other operators (e.g. email, telephone, fax, etc.) to discuss issues related to the prohibited agreement.
10. Write down the number of gatherings of those participating in the prohibited agreement. *E.g. 10 times all in all from.....to....., or once a month.*
11. Indicate whether the details of the agreement were implemented and how they were implemented. *E.g. A price list was generated and implemented accordingly, and compliance was monitored regularly, penalties were imposed if the prices on the list were not observed.*
12. List the products or services or groups of products or services offered or supplied in Zambia to which the conduct applies or affects.
.....
13. Indicate the geographical extent of the sales of the products or services in Zambia covered by the application.
.....
14. Indicate the key features of the conduct in terms of benefits for the parties to the agreement
.....
15. Indicate horizontal, vertical or any overlapping provisions governing the conduct
.....

PART 3

MARKET STRUCTURE

Structure of Supply in affected Markets in Zambia

16. For each of the main products or services or product or service groups covered by the conduct, indicate any close substitutes or complementary products available on the market in Zambia and which ones are supplied by the parties to the conduct.

.....
17. Indicate the latest estimated market shares (nationally and/or regionally) for each of the parties in each of the main products or services or product/ services groups supplied in Zambia.

.....
18. Indicate the latest estimated market shares (nationally and/or regionally) of competing suppliers/manufacturers in Zambia that are not part of the conduct.

.....
19. Indicate estimates of imports into Zambia, if any, in each of the products or services.

.....
20. Indicate the basis for calculating the market shares held by the applicant/s in Zambia (e.g. turnover, asset, or production capacity, etc).

.....
Structure of Demand in affected Markets in Zambia.

21. Indicate whether customers or consumers or target beneficiaries are concentrated in a certain geographical location in Zambia, regionally or globally.

.....
22. List the five largest customers of the parties in each affected market in Zambia.

.....
23. State the name, address, fax, telephone numbers of the contact person for each of the large customers indicated above.

.....
24. Describe the distribution channels that operate in the relevant markets, (e.g. presence of small independent distributors, use of agents/distributors, direct sales, etc).

.....
Part 4

DECLARATION

I the undersigned declare that, as a participant to the aforesaid prohibited agreement, to the best of my knowledge and belief, the information given in this application is true, correct and complete, that all/some of the relevant evidence required for this application has been submitted and that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere. I hereby pledge to cooperate in good faith and earnest in the

investigation until the deliberation of the Commission is complete and submit this application pursuant to Section 79 of the Competition and Consumer Protection Act, No. 24 of 2010.

Dated at.....this.....day of.....year.....

Names(s):

Signature(s):

I attach the following evidence relevant & necessary to prove the prohibited agreement:

NB: Any other additional evidence can be submitted later

- 1)....
- 2)....
- 3)

EXECUTIVE DIRECTOR'S AUTHORITY

In terms of Section 79 of the Competition and Consumer Protection Act and facts as submitted this application is hereby -

Accepted

Rejected

DATED this day of year

.....
Executive Director