

NOTICE 628 OF 2008

*Corporate Leniency Policy*competition commission
south africa**1. Preface**

- 1.1 This Policy is prepared and issued by the Competition Commission (hereinafter "the Commission") pursuant to the Competition Act, Act 89 of 1998 (hereinafter "the Act") to clarify the Commission's policy approach on matters falling within its jurisdiction in terms of the Act.
- 1.2 This Policy becomes effective on the date of publication in the Government Gazette and may be amended by the Commission as the need arises. From the date of publication in the Government Gazette, this Policy replaces the previous Corporate Leniency Policy for all applications not yet made under this Policy. Nevertheless, section 15 of this Policy will be applicable also to pending applications from the date of publication in the Government Gazette.

2. Introduction

- 2.1 The Commission was established in terms of the Act to, inter alia, investigate, control and evaluate restrictive practices and abuse of dominant position¹. The overriding purpose of the Act is to promote and maintain competition in the economy, and to prevent any form of anti-competitive conduct by a firm or a group of firms arising from agreements.
- 2.2 The relevant section of the Act for the purpose of this policy is section 4(1)(b), which reads as follows:

"4. Restrictive horizontal practices prohibited

- (1) An *agreement* between, or *concerted practice* by, firms, or a decision by an association of firms, is prohibited if it is between parties in a *horizontal relationship* and if-
- (b) it involves any of the following *restrictive horizontal practices*:
- (i) directly or indirectly fixing a purchase or selling price or any other trading condition;
 - (ii) dividing markets by allocating customers, suppliers, territories, or specific types of *goods or services*; or

¹ See sections 4, 5, 8 and 9 of the Act.

(iii) collusive tendering.”

- 2.3 The above provision of the Act is particularly aimed at eradicating and preventing cartel activity as it harms the economy at large. Cartels are particularly a damaging form of anticompetitive agreement often resulting in price increases that are harmful to consumers of goods or services concerned. Not only does such activity affect consumer welfare, but it also hinders development and innovation in the industries within which this activity occurs.
- 2.4 Cartel operation is often collusive, deceptive and secretive, and is conducted through a conspiracy among a group of firms, with the result that it becomes difficult to detect or prove without the assistance of a member who is part of it.
- 2.5 In its endeavours to detect, stop, and prevent cartel behaviour, the Commission has, in line with other international jurisdictions, developed this policy to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution.
- 2.6 The policy sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for immunity. The granting of immunity becomes an incentive for a firm that participates in a cartel activity to terminate its participation, and inform the Commission accordingly.
- 2.7 This policy shall be known as the **Corporate Leniency Policy** (“CLP”).

3. What is the CLP?

- 3.1 The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity² upon the cartel member fulfilling specific requirements and conditions set out under the CLP.
- 3.2 It is a compliance mechanism devised to encourage cartel participants to disclose to the Commission a cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct.

² The Commission is empowered to, inter alia, investigate alleged contraventions of Chapter 2 (s.21(c)), refer matters to the Competition Tribunal (s. 21(g)) and appear before Tribunal, as required by the Act. By virtue of these provisions the Commission has powers to prosecute cartel activities.

- 3.3 Immunity in this context means that the Commission would not subject the successful applicant³ to adjudication⁴ before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not propose to have any fines imposed to that successful applicant.
- 3.4 It is a lenient process in that a cartel member that approaches the Commission of its own accord, and provides information that would result in the institution of proceedings against a cartel, will not be subjected to prosecution in relation to the alleged cartel which forms part of the application under the CLP.
- 3.5 Thus, a firm involved, implicated or suspecting that it is involved in cartel activity would be able to come forward of its own accord and confess to the Commission in return for immunity. In other words, if a cartel member realises that such conduct may be a contravention of the Act, it could of its own free will without waiting for the Commission to investigate them, report the cartel activity to the Commission under the CLP.
- 3.6 The CLP therefore serves as an aid for the efficient detection and investigation of cartels, as well as effective prosecution of firms involved in cartel operations. It envisages not only a situation that the applicant alerts the Commission of the existence of cartel activity, but also one that would culminate in a referral of, and ultimately in a final determination made by the Tribunal, of such reported cartel activity, with the applicant co-operating against other members of the cartel.
- 3.7 The CLP is also adopted in recognition of the fact that not all firms engaging in anticompetitive conduct are aware that such conduct is illegal. In some sectors some conduct may be so prevalent that market players assume it is legal. Even those firms that become aware of the illegal nature of their conduct may fear disclosing the conduct for fear of severe consequences flowing from the Act or from other cartel members.
- 3.8 In short, the CLP is designed to uncover cartels that would otherwise go undetected and to also make the ensuing investigations more efficient. It is for this reason that the benefits of immunity are spelt out from the outset to serve as an incentive for the applicant to come forward.

³ Successful applicant means a firm that meets all the conditions and requirements under the CLP.

⁴ Adjudication means a referral of a contravention of chapter 2 to the Tribunal by the Commission with a view of getting a prescribed fine imposed on the wrongdoer. Prosecution has a similar import to adjudication herein.

3.9 Granting of immunity under the CLP is not based on the fact that the applicant is viewed as less of a cartel member than the other cartel members, but on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel.

3.10 Subject to relevant provisions of the CLP, the existence of the CLP shall, however, not preclude the Commission from deciding to exercise its powers to investigate a cartel in terms of the Act.

4. How should the CLP be interpreted?

4.1 Unless otherwise indicated in the CLP, the definitions and interpretation of words or phrases used in this entire document will be those given in section 1 of the Act.

4.2 The term immunity as used in the CLP refers to immunity from prosecution before the Tribunal in relation to the alleged cartel which forms part of the application under the CLP.

4.3 Any reference to a number of days in the CLP refers to business days.

5. Where is the CLP applicable?

5.1 The CLP is applicable only in respect of alleged *cartels*. A cartel refers to an agreement or concerted practice among competing firms or a decision by an association of firms, to coordinate their competitive behaviour, for instance through conduct such as price fixing, division or allocation of markets, and/or collusive tendering. This conduct typically constitutes a *per se* prohibition in terms of section 4(1)(b) of the Act.

5.2 These cartel activities need not have been entered into in South Africa. For as long as a cartel activity has an effect in South Africa, the CLP would apply irrespective of the fact that the activity takes place outside South Africa.

5.3 Immunity granted by another competition authority would not automatically qualify the applicant for immunity by the Commission under the CLP. The applicant must submit to the Commission a separate application which meets the conditions and requirements set out under the CLP.

5.4 Immunity will be granted in respect of separate and various cartel activities provided the applicant meets the requirements for each contravention reported. Thus, there will be no blanket immunity. For instance, if an applicant is granted immunity in respect of one contravention out of the three

that were committed at a certain given time, the applicant is not provided with immunity in respect of the other two contraventions. The only exception would be in respect of contraventions that cannot be severed, and therefore may be considered as one contravention.

5.5 The CLP is aimed at cartel activity:

5.5.1 which the Commission is not aware of; or

5.5.2 which the Commission is aware of but in relation to which it has insufficient information, and no investigation has been initiated yet; or

5.5.3 in respect of pending investigations and investigations already initiated by the Commission but, having assessed the matter, the Commission is of the view that it has insufficient evidence to prosecute the firms involved in the cartel activity.

5.6 Only a firm that is *'first to the door'* to confess and provide information in accordance with the CLP to the Commission in respect of cartel activity would qualify for immunity under the CLP. If other members of the cartel wish to come clean on their involvement in a cartel to which the applicant has already confessed, the Commission may explore other processes outside the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order. In the event that the matter is referred for adjudication to the Tribunal, the Commission may consider at its discretion asking the Tribunal for favourable treatment⁵ of the applicants who were not the first to apply for immunity pursuant to the CLP.

5.7 The CLP applies to a firm, which includes a person, partnership or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person to an extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership. Furthermore, it is important that a person making the application be the person authorised to act for a firm in question.

5.8 Reporting of cartel activity by individual employees of a firm or by a person not authorised to act for such firm will only amount to whistle blowing and not to an application for immunity under the CLP. The Commission also encourages whistle blowing, as such would also assist the Commission in detecting anticompetitive behaviour.

5.9 The immunity granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.

⁵ Favourable treatment implies substantial or minimum reduced fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given.

6. What is the nature of the CLP process?

- 6.1 The CLP is a compliance tool that serves as an aid in the investigation of cartels.
- 6.2 It is a process that is undertaken on a confidential basis. Disclosure of any information submitted by the applicant prior to immunity being granted during this process would be made with the consent of the applicant, provided such consent will not be unreasonably withheld by the applicant.
- 6.3 Fair and proper administration of the Act underlies the CLP. It is for this reason that honesty and cooperation are paramount for the effective implementation of the CLP.
- 6.4 Nothing in the CLP shall limit the rights of any person who has been injured by cartel activity in respect of which the Commission has granted immunity under the CLP to seek civil ⁶ or criminal remedies.

7. When would the CLP not apply?

- 7.1 There are various instances in which the CLP would not be applicable, namely:
- 7.1.1 where the cartel conduct in respect of which immunity is sought falls outside the ambit of the Act;
- 7.1.2 where another firm has already made a successful application for immunity under the CLP in respect of the same conduct; or
- 7.1.3 where the applicant fails to meet any other requirement and condition set out in the CLP.
- 7.2 It is the approach of the Commission that unsuccessful applicants, if they so wish, be encouraged to cooperate with the Commission and attempt negotiations to settle the matter with the Commission through a settlement agreement or a consent order, which may result in a reduced fine.

⁶ A right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the Tribunal made a determination in respect of a matter that affects that person, or in case of an appeal, on the date that the appeal process in respect of that matter is concluded (see s. 65(9) of the Act).

- 7.3 The Commission may, on its own initiation in deserving cases, explore other lenient approaches outside the CLP in respect of unsuccessful applicants.

8. How to ascertain if the CLP will be applicable?

- 8.1 Where a firm is unsure whether or not the CLP would apply to a particular conduct, it may approach the Commission on a hypothetical basis to get clarity. This may be done telephonically or in writing. A firm concerned may choose to remain anonymous if it wishes to.
- 8.2 A firm that chooses to disclose its identity or any relevant information at this stage does so at its own risk because it would not be protected by the CLP at this stage. However, the Commission will protect information submitted by applicants and treat it with utmost confidentiality.
- 8.3 Any clarification provided pursuant to section 8 of the CLP will not have a binding effect on the Commission, the Tribunal or the Appeal Court. It is merely issued to guide the would-be applicant as to whether a conduct would be considered for immunity under the CLP.

9. What forms of immunity are applicable in the CLP?

- 9.1 Applicants for immunity may expect the following result(s) to their applications:

9.1.1 Conditional immunity

- 9.1.1.1 This is given to an applicant at the initial stage of the application so as to create a good atmosphere and trust between the applicant and the Commission pending the finalisation of the infringement proceedings. This is done in writing between the applicant and the Commission signalling that immunity has been provisionally granted.
- 9.1.1.2 Conditional immunity therefore precedes total immunity or no immunity. The Commission will give the applicant total immunity after it has completed its investigation and referred the matter to the Tribunal and once a final determination has been made by the Tribunal or the Appeal Court, as the case may be, provided the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.
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9.1.1.3 At any point in time until total immunity is granted, the Commission reserves the right to revoke the conditional immunity if, at any stage, the applicant does not co-operate or fails to fulfil any other condition or requirement set out in the CLP.

9.1.2 Total immunity

9.1.2.1 Once the Tribunal or the Appeal Court, as the case may be, has reached a final decision in respect of the alleged cartel, total immunity is granted to a successful applicant who has fully met all the conditions and requirements under the CLP.

9.1.3 No immunity

9.1.3.1 This applies in those cases where the applicant fails to meet the conditions and requirements under the CLP.

9.1.3.2 If immunity is not granted, the Commission would be at liberty to deal with the applicant as provided for in the Act. In the same breath the Commission may consider a settlement agreement or a consent order, or where a matter is referred, asking the Tribunal for a reduction of fine in respect of the unsuccessful applicant.

9.1.3.3 An applicant that does not meet all the requirements but wishes to be considered for some form of favourable treatment may also approach the Commission for a possible settlement of the matter.

10. What are the requirements and conditions for immunity under the CLP?

10.1 The applicant for immunity under the CLP will qualify for immunity provided it meets the following conditions and requirements:

- (a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;
 - (b) the applicant must be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view, to institute proceedings in relation to a cartel activity;
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- (c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the Appeal Court are completed;
- (d) the applicant must immediately stop the cartel activity or act as directed by the Commission;
- (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.

11. What is the procedure to be followed in the CLP?

- 11.1 The procedure outlined herein is aimed at ensuring efficient facilitation of the CLP, and the Commission may exercise some flexibility where necessary to achieve the desired outcome. For instance, where the process refers to a meeting, the Commission may in certain circumstances choose to use other forms of communicating with the applicant without having a meeting. The procedure is as follows:

11.1.1 First Contact with the Commission

- 11.1.1.1 The applicant must make an application for immunity in writing to the Manager of the Enforcement and Exemptions Division of the Commission by one of the following means:

- (i) Facsimile: +27 12 394 0166
- (ii) Electronic Mail: ccsa@compcom.co.za
- (iii) Hand Delivery: The DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Republic of South Africa.

The application must contain information substantial enough to enable the Commission to identify the cartel conduct and its participants in order to determine whether or not an application for immunity has been made in respect of the same conduct. It is not necessary for the applicant to disclose its identity at this stage.

11.1.1.2 If another firm has already made an application in respect of the same conduct, the Commission must advise the applicant accordingly in *writing or by telephone* within five (5) days, or within a reasonable period, after receipt of the application.

11.1.1.3 If no firm has made an application already, the Commission must advise the applicant accordingly in *writing or by telephone*. The applicant must thereafter within five (5) days, or within a reasonable period, after receipt of such advice from the Commission make an arrangement for the first meeting with the Commission.

11.1.2 First Meeting with the Commission

11.1.2.1 The applicant must bring all the relevant information, evidence and documents at its disposal, whether written or oral, relating to the cartel activity for consideration by the Commission. The applicant must reveal its full identity and answer all the questions that the Commission may ask in relation to conduct being reported or matters relating thereto.

11.1.2.2 The purpose of this meeting is to find out whether the applicant's case would qualify for immunity under the CLP. At this stage the Commission may only have sight of and peruse all the documents brought by the applicant but may not make copies. The Commission must within five (5) days, or within a reasonable time, after the date of the first meeting make a decision on whether or not the applicant's case qualifies for immunity and inform the applicant accordingly in *writing*.

11.1.2.3 If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, arrangements for a second meeting will be made.

11.1.2.4 If the Commission decides that the applicant does not qualify for immunity, the applicant will be advised so in writing. This would be regarded as "No Immunity".

11.1.3 Second meeting with the Commission

11.1.3.1 The aim of this meeting is to discuss and grant conditional immunity to the applicant pending finalisation of any further investigations by the Commission in the matter and final determination by the Tribunal or the Appeal Court, as the case may be. At this stage the applicant will be required to bring forward any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral. The Commission would be able to make copies of all documents provided.

11.1.3.2 A written agreement between the applicant and the Commission, otherwise known as the conditional immunity agreement, which will be granted subject to the conditions and requirements of the CLP, will be agreed upon between the applicant and the Commission.

11.1.3.3 The Commission shall maintain confidentiality on all information, evidence and documents given to it throughout the process. Use of documents and information obtained from the applicant at the Tribunal in terms of the Act shall not amount to the breach of confidentiality.

11.1.4 Investigations, Analysis and Verification

11.1.4.1 After the granting of conditional immunity, the Commission will move forward with its investigations relating to the cartel activity. The Commission will analyse and verify information or documents given by applicant against any existing or discovered information and/or documents. At this stage the Commission may use all methods and tools provided for in the Act, including interview, subpoena, search or summon any firm(s) whom it believes could assist in connection with the matter.

11.1.4.2 Once the Commission is through with this exercise and is satisfied that it has sufficient information to institute proceedings, it will inform the applicant in a final meeting. Similarly, should the Commission not be satisfied it can call a meeting with the applicant either to revoke the conditional immunity or to solicit further documents or information so as to enable the Commission to complete the exercise.

11.1.5 Final meeting

11.1.5.1 The purpose of this meeting between the Commission and the applicant is to inform the applicant that the Commission intends to institute proceedings in relation to the alleged cartel and to request the applicant to continue to cooperate fully and expeditiously in the proceedings. Conditional immunity will continue to apply until the Tribunal or the Appeal Court, as the case may be, has reached a final decision regarding the matter.

11.1.5.2 Should the applicant wish to withdraw its application, it runs the risk of being dealt with in terms of the Act.

12. Can a marker be placed?

12.1 Prior to making an application for immunity pursuant to section 11.1 of the CLP, a prospective applicant may choose to apply to the Commission for a marker (the "marker application"). The marker application is made in writing to the Manager of the Enforcement and Exemptions Division of the Commission by one of the following means:

(i) Facsimile: +27 12 394 0166

(ii) Electronic Mail: ccsa@compcom.co.za

(iii) Hand Delivery: The DTI Campus, Block C, Mulayo Building, 77 Meintjies Street, Sunnyside, Pretoria, Republic of South Africa.

The marker application must identify that it is being made to request a marker, the applicant's name and address, the alleged cartel conduct and its participants and justify the need for a marker.

12.2 The Commission may grant, at its discretion and on a case-by-case basis, a marker to protect the applicant's place in the queue of applications for immunity. In granting the marker, the Commission will determine on a case-by-case basis the period of time within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in section 10 of the CLP. If the applicant submits at a later stage an application for immunity along with the necessary information, evidence and documents within the time limit determined by the Commission, such application for immunity and information, evidence and documents will

be deemed to have been provided on the date when the marker application was granted by the Commission.

13. When can immunity be revoked?

13.1 Revocation may occur at anytime in respect of conditional immunity.

13.2 The Commission will revoke a conditional immunity in writing.

13.3 Revocation will occur if the applicant fails to meet the conditions and requirements of the CLP, including in the event of lack of cooperation by the applicant, provision of false or insufficient information, misrepresentation of facts and dishonesty.

13.4 It must be noted that, in terms of section 73(2)(d) of the Act, a person commits an offence when s/he knowingly provides false information to the Commission. Thus, an applicant whose immunity has been revoked by the Commission based on the provision of false information, will be liable to penalties stipulated in section 74(1)(b) of the Act, if convicted of such an offence.

13.5 Where conditional immunity is revoked, the Commission may decide to pursue the matter in terms of the relevant provisions of the Act.

14. What is the effect of unsuccessful applications under the CLP?

14.1 Failure to meet the conditions and requirements set out in the CLP, including lack of cooperation, dishonesty, providing insufficient evidence or false information, will result in an unsuccessful application, the effect of which would include the following:

14.1.1 The Commission would be at liberty to investigate the matter and refer it for adjudication in terms of the provisions of the Act.

14.1.2 The Commission may, depending on the matter, ask for a lenient sanction when referring a matter to the Tribunal in respect of a firm whose application has been unsuccessful.

14.1.3 The Commission and/or the unsuccessful applicant may initiate negotiations for a settlement agreement or a consent order, which may also result in reduction of a fine that may be imposed in terms of the Act⁷.

15. Does the Commission accept oral statements under the CLP?

15.1 When submitting in writing its application for immunity or its marker application, the applicant may apply to the Commission to request that information regarding the alleged cartel be provided orally. The Commission may, at its discretion and on a case-by-case basis, accept such request from an applicant. Subject to section 12.1 above, the applicant will nevertheless be required to provide the Commission with all existing written information, evidence and documents in its possession regarding the alleged cartel.

15.2 Oral statements will be recorded and transcribed at the Commission's premises. The applicant may review the technical accuracy of the recording and transcript and correct the content of its oral statements within a reasonable time period to be determined at the discretion of the Commission. Upon expiry of the time period, the oral statements, corrected as the case may be, will be deemed to be approved and will amount to restricted information forming part of the Commission's records pursuant to section 14 of the Rules for the Conduct of Proceedings in the Competition Commission (published in Government Notice No. 22025 in Government Gazette Vol. 428 on 1 February 2001).

16. Conclusion

16.1 In developing the CLP, the Commission has done a review and comparison of leniency policies adopted by other competition authorities, including in the European Union (EU), Canada, Australia, United Kingdom (UK) and United States of America (USA).

16.2 After reviewing and comparing these policies and how they have been implemented, it appears that leniency policies in almost all jurisdictions concerned have proved to be one of the most effective tools to deal with cartels.

16.3 The CLP has been tailored to be consistent with the legal and regulatory framework that exists in South Africa.

⁷ The Tribunal has powers to order a fine of up to 10% of the firms' annual turnover in terms of the Act.

- 16.4 The general requirements for granting immunity also seem to be substantially the same and consistent in all the jurisdictions reviewed. The CLP is therefore based on those general requirements.
- 16.5 The effective implementation of the CLP will require dedicated resources in order to achieve the desirable outcome.
- 16.6 Making the CLP available to the public will create awareness of benefits that firms, big and small, may take advantage of. The CLP will, therefore, also be available in a booklet form and on the Commission's website.
- 16.7 It is envisaged that a leniency of the nature adopted by the Commission in the CLP would lead to detection and expeditious finalisation of cases that otherwise would have been difficult, if not impossible, to crack.

17. Whom to contact at the Commission regarding the CLP?

- 17.1 Firms seeking to make general enquiries on the CLP or seeking clarification on whether or not immunity would be considered may contact the Corporate Compliance Coordinator, Compliance Division at:

- Telephone number +27 12 394 3200
- Facsimile number: +27 12 394 0166
- e-mail address: ccsa@compcom.co.za

- 17.2 Firms may also visit the Commission's Website at www.compcom.co.za for further information.