



Amar Grewal-Thethy

Partner, Commercial
AmarGT@kapstrat.com



Ciru Longden

Head of Knowledge Management
CLongden@kapstrat.com

Incidents of this kind have raised the public profile of the CAK's investigatory and enforcement powers. We believe that this has, in turn, prompted the promulgation of a leniency programme in Kenya, the Leniency Programme Guidelines (Guidelines) in line with international best practice.

The primary objective of the programme is to encourage market players to comply with the law and to curb restrictive trade practices in particular i.e. agreements or practices by businesses that have as their object or effect the prevention distortion or lessening of competition of the trade of any goods or services in Kenya. It is recognised that to achieve greater compliance within the market there needs to be a leniency programme where entities can come forward and receive leniency in return for the self disclosure.

Who benefits?

The Guidelines contain eligibility criteria for applications. Broadly, eligibility works on the basis of a control concept. For example, a parent undertaking of a subsidiary would be eligible to apply for leniency both for its own and its subsidiary's participation in prohibited conduct (as the subsidiary is under the control of the parent). If a subsidiary applies for leniency, it would only be eligible for its own participation, not its parent. Assessing joint ventures is more difficult. Essentially, a joint venture is eligible to apply for leniency so long as it is considered as a separate legal entity from its parent companies.

Leniency agreements cover the applicant's directors and employees but they must co-operate with CAK.

Conditions for applications

An application will only be accepted where:

- (a) the CAK has no knowledge of the contravention; or
- (b) the CAK is aware of the contravention but either lacks enough information to start the investigation or enough evidence to penalise the offenders.

Throughout the investigation process and until a determination is made by the CAK, applicants must:

- (a) provide full, timely and truthful information to the CAK. The obligation extends to not destroying, falsifying or concealing information or misrepresenting material facts;
- (b) co-operate fully with the CAK;
- (c) keep the application process confidential; and
- (d) immediately stop the prohibited conduct unless ordered otherwise by the CAK.

How the programme works

If an applicant is unsure as to whether or not the Guidelines apply, they may call or write to the CAK. Applicants may choose to remain anonymous at this stage.

If the Guidelines do apply, the applicant may then formally apply. A 'marker', an acknowledgement by the CAK, is issued upon receipt to confirm priority.

If an applicant is first through the door i.e. first to obtain a marker, it will be granted 100% reduction of the penalty i.e. immunity. The second through the door, may be granted a reduction of up to 50%; the third through the door may be granted a reduction up to 30%; subsequent applicants could receive up to a 20% reduction but this is also dependent on timing and significance of the contribution.

Applications must contain information substantial enough to enable the CAK to identify the conduct and participants. Applicants are given an initial period of 28 days to submit relevant information. The period may be extended.

An initial meeting is then held with the CAK after which it then has 14 days to confirm whether or not the application qualifies for leniency. Successful applications are followed by a conditional leniency agreement at which point the CAK moves forward with its investigations into prohibited conduct.

A leniency certificate is issued or a leniency contract is entered into at the conclusion of the investigation. If leniency is not granted, the applicant may seek a settlement agreement with the CAK.

If you require any further information or clarification on the contents of this note, please contact:

Amar Grewal-Thethy AmarGT@Kapstrat.com

Introduction

Since its inception in 2010 the Competition Authority of Kenya (CAK) has been going through the process of sensitising the public as well as businesses on their role in the market and the provisions of the Competition Act. In some instances this has led to headline grabbing decisions such as the first dawn raids conducted last year by the CAK on fertiliser companies Mea Ltd and Yara East Africa Ltd over allegations of price fixing. Also in 2014, the CAK fined Ukwala and Tusksys supermarkets KES 5.3 million for collusion in price fixing. In this case, the supermarkets had entered into a 'proof of concept' agreement where Tusksys would manage some of Ukwala's stores to confirm if purchasing them was viable. They had however failed to obtain CAK approval.

This bulletin is not intended to offer professional advice and you should not act upon the matters referred to in it without taking specific advice. It is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. These regular bulletins provide incisive commentary on recent legal developments. If you have any comments on the bulletin, would like to receive further details on the subject matter or would like to stop receiving such communications from us, please send an email to KS@kapstrat.com or call your usual point of contact at Kaplan & Stratton.