

COME FORWARD SAYS THE COMPETITION AUTHORITY - (T. Dumba, Senior Associate)

In terms of our Competition Act, cartel activities, in which one or two or more enterprises enter into an arrangement or agreement which has the effect of preventing or lessening competition, is prohibited.

The financial penalty for participating in a cartel activity is hefty with the impact of diminishing the profits to be enjoyed by the stakeholders of the enterprise. In terms of section 43 of the Competition Act, the maximum amount that the Competition Authority may impose is 10% of the turnover of the enterprise during the breach of the prohibition over a maximum period of three years. Luckily, if the enterprise comes forward and informs the Competition Authority of the cartel's activities it may avoid the financial penalty in totality or it may be significantly reduced. The Competition Authority acknowledges that cartel activities are secretive in their nature and the aim of granting leniency is to encourage those participating in cartel activities to come forward. This seems to have been fruitful in other countries which have implemented the same leniency programme.

An enterprise can be given full immunity from a hefty financial penalty or it can be reduced to 30% of the 10% or even further by the Competition Authority or Competition Commission. However, what is fundamental is that, one can only benefit from this leniency programme if certain conditions are met. For instance, an enterprise can be granted full immunity only if it is the first to provide the Competition Authority with evidence of the cartel activity before an investigation has commenced; and provided that the Competition Authority does not already have sufficient information to establish the existence of the cartel activity.

In the event that the enterprise did not come forward and investigations have commenced, the enterprise may assist itself by providing evidence of the cartel activity and co-operating in respect of the investigation before the Competition Commission determines that the enterprise participated in the cartel activity. This may result in the financial penalty being reduced.

An important aspect to note is that the Competition Authority requires the enterprise to provide the Competition Authority with all the information, documents and evidence available as well as produce witnesses to it regarding the cartel activity. Furthermore, it requires continuous and complete co-operation throughout the investigation and confirmation that the enterprise did not initiate the cartel or take steps to coerce other enterprises into participating in the cartel. The enterprise should further refrain from participating in the cartel activity.

In terms of the Leniency Policy, an application for leniency may be made either orally or in writing at the premises of the Competition Authority. The Competition Authority is provided with the name of the applicant and a description of the cartel conduct including the marker. A "marker" is the acknowledgement given by the Competition Authority to a leniency applicant and records the time of an applicant's application to the leniency programme. It establishes an applicant's position in line in relation to other individuals or business organisations seeking to participate in the programme. The marker guarantees the applicant's place in the line subject to the applicant meeting all other criteria of the leniency programme. Once a marker is recorded, the applicant has a limited time period to provide the Competition Authority with a detailed statement describing the illegal activity, its effects in Botswana and the supporting evidence. Thereafter investigations are undertaken by the Competition Authority or the Competition Commission.