

Cartel conduct under investigation in Kenya

Cartel conduct is in the cross-hairs of the Competition Authority of Kenya (CAK), whose new leniency programme has some unique aspects.



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“It’s clear that the CAK is gearing up to pursue cartel conduct in earnest. Now that the leniency programme guidelines have been published, companies have an incentive to approach the CAK to confess their participation in cartel conduct and ask for immunity,” says Joyce Karanja-Ng’ang’a, partner at pan-African law firm Bowmans’ Nairobi office.

Already known as one of the best-performing competition authorities on the continent, the CAK’s leniency programme, announced in May this year, appears to have drawn from best practices globally - while introducing some elements unique to Kenya.

“Ordinarily, regulators first try to investigate and prosecute cartel conduct on their own, but given that cartels are secretive by nature it is quite difficult to find evidence,” she says. “The CAK, which is less than six years old, appears to have taken lessons from jurisdictions such as South Africa, which have identified that leniency is the most effective tool against cartel conduct because whoever reports it first has the incentive of 100% immunity.”

Leniency for employees and directors too

A major departure from conventional leniency practice is that the Kenyan programme offers leniency not just to companies, but also to their directors and employees, says Xolani Nyali, Cape Town-based senior associate at Bowmans. This is in contrast to many other jurisdictions, including South Africa.

“Countries usually have two completely separate regimes, one for corporate leniency and the other for whistle blowing. In South Africa, for example, if a company goes and applies for leniency, it is the company that receives leniency, not its officers and employees, who can have criminal sanctions imposed on them.”

Kenya’s decision to include company directors and employees in a leniency agreement (as long as they cooperate with the CAK) may prove to be a drawcard in encouraging individuals and companies to come forward, particularly insofar as cartel conduct carries criminal sanctions.

“According to the leniency programme guidelines, a leniency applicant who has received immunity will also not be subject to any criminal prosecution - subject to the concurrence of the Director of Public Prosecutions,” says Karanja-Ng’ang’a.

However, it is not clear how the CAK and the Director of Public Prosecutions will work together.

Clarity needed on criminal liability

“The civil liability side of immunity is clear because that is in the hands of the CAK. The criminal side is less clear-cut because it is in the hands of the Director of Public Prosecutions,” says Karanja-Ng’ang’a. “Cooperation between the two would be necessary to avoid the potential chilling effect of personal criminal liability on the success of the leniency programme, for instance by leading company executives to avoid authorising their companies from applying for leniency. This would be a great pity.”

Nyali agrees that the issue of criminal sanctions is less clear-cut - which is also the case in South Africa, where criminal sanctions for cartel conduct were promulgated as recently as 2016. “No regulator in Africa has experience yet in criminally prosecuting alleged cartellists and it will be interesting to see how the issue is handled both in Kenya and in South Africa,” he says.

“Kenya’s leniency programme is one step ahead as it at least deals with aspects of criminal prosecution – albeit not completely. It remains to be seen how the CAK and the Director of Public Prosecutions cooperate.”

Says Karanja-Ng’ang’a: “The leniency guidelines are in place, which is positive and to be welcomed. The sooner there is certainty over the issue of criminal sanctions, the more likely it is that companies engaging in cartel conduct will come forward. The CAK has demonstrated its willingness to learn from its peers, as well as to fashion approaches unique to Kenya, so it is likely that this aspect will be tackled soon.”

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