

Competition Alert - News Bulletin

8 March 2010

The Commission releases its Updated Leniency Policy

On 1 March 2010 the Commerce Commission ("**Commission**") released its updated leniency policy ("**Updated Policy**").¹ The Updated Policy differs little from the initial draft which the Commission circulated for submission in September 2009 ("**Draft Policy**").² The most notable changes from the Commission's first policy introduced in 2004 are:

- » The introduction of a marker system. A marker system allows a 'first in' applicant to receive the security of a place holder while it compiles sufficient evidence necessary to secure immunity; and
- » An 'Amnesty Plus' scheme. 'Amnesty Plus' allows a party to a cartel who is not otherwise eligible for immunity to receive a reduction in the penalty for involvement in that cartel by informing the Commission of the existence of a second cartel.

The Commission's Draft Policy was considered in our October 2009 Alert ("**October Alert**").³ This Alert considers changes between the Draft Policy and the Updated Policy, as well as issues with the Commission's leniency approach that remain unresolved.

Key Changes

The central change introduced in the Updated Policy is an expansion in the criteria for parties to be eligible for conditional immunity. In the Draft Policy, conditional immunity was only available in situations where the Commission was previously unaware of the existence of a cartel. In contrast, the Updated Policy allows the

Commission to offer conditional immunity in circumstances when the Commission may be aware of a cartel "but does not yet have evidence that is likely to warrant issuing proceedings against a cartel member," a position that mirrors the approach of the United States Department of Justice.⁴ The Updated Policy similarly extends the availability of 'Amnesty Plus'.⁵

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This is a sensible extension of the leniency policy, as it recognises the resource constraints faced by the Commission and the value of 'insider' cooperation in establishing the existence of a cartel. Usefully, and in contrast to the European approach, the Updated Policy is clear and unambiguous as to when conditional immunity will bite, and does not require a participant to provide "decisive evidence" or satisfy a similar subjective standard.

Remaining Concerns

In our October Alert we expressed concern that, while it was encouraging to see the Commission introduce two useful elements from foreign leniency processes, the Draft Policy lacked sufficient clarity over the extent to which incriminating evidence would be utilised by the Commission and exchanged with or made available to other competition regulators pursuant to cooperation policies. In the Updated Policy, the Commission has helpfully acknowledged that it will not share information with other competition authorities without the consent of the applicant.

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At the same time, however, the Updated Policy provides that the Commission may disclose confidential information “where it considers this necessary for the purposes of the investigation or proceedings.”⁶ Despite the Commission stating that an obligation of confidence may be imposed on the recipient of the information, it is of concern that the Commission regards itself as able to decide when and to what extent it will pass on confidential material to third parties. This is particularly so as this exchange may take place without the agreement and/or knowledge of the party who provided the confidential information to the Commission. In order to minimise the risk of broader disclosure, parties may wish to consider whether it might be possible to conduct their discussions with the Commission on a “without prejudice” basis. If this is possible - and it should be where a party is genuinely discussing the scope of possible admissions and penalty - then the privilege can only be waived by mutual consent.

There are likely to be further developments in this area during the course of 2010. The Commerce Minister has given strong indications that the Government intends to enact the Commerce Commission (International Cooperation and Fees) Bill (“**Cooperation Bill**”) during the second half of 2010. The Cooperation Bill proposes to allow the Commission to provide investigative assistance and compulsorily acquired information to overseas regulators with whom formal cooperation agreements are in place.

Information provided by leniency applicants is typically provided on a voluntary basis and would therefore require a waiver from the Commission in order to be shared. However, all parties engaging with the Commission in the context of cartel investigations need to be conscious that the Commission retains the ability to compulsorily request information. Information acquired in this manner could potentially be released to a foreign regulator and hence subject to the domestic rules of the foreign regulator’s regime. This may reduce the readiness of local parties receiving vague or ambiguous section 98 notices to provide information outside the scope of the request in order to act cooperatively and may also result in non-cooperative parties being more ready to challenge the validity of notices. International applicants will be rightfully wary of the potential for the Commission to provide incriminating evidence to regulators in jurisdictions that have criminal sanctions.

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1. Commerce Commission, *Cartel Leniency Policy and Process Guidelines*, 1 March 2010.
2. Commerce Commission, *Draft Leniency Policy and Process Guidelines*, 3 September 2009.
3. Russell McVeagh Competition Alert, *The Commission’s Revised Leniency Policy: Changing the Rules of the Rat Race*, 19 October 2009 available at http://www.russellmcveagh.com/docs/CompAlert19Oct2009_256.pdf.
4. Commerce Commission, *Cartel Leniency Policy and Process Guidelines*, 1 March 2010, [3.07].
5. *Ibid.*, [3.59].
6. *Ibid.*, [3.54].

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