



ANTITRUST WRITING AWARDS 2021

**BEST SOFT LAWS: INFORMANT REWARD SCHEME
POLICY GUIDELINES**

**CONTRIBUTION BY THE COMPETITION
AUTHORITY OF KENYA**

A. The Competition Authority

1. The Authority is established under Section 7 of the Competition Act No. 12 of 2010 (the Act) and is charged with, inter alia, promoting and enforcing compliance with the Competition Act. The objective of the Act is promoting and protecting competition in markets and preventing unfair and misleading market conduct throughout Kenya.
2. It is in a bid to effectively execute its enforcement mandate that the Authority developed and operationalized the Informant Reward Scheme Policy Guidelines.

B. Background of the Informant Reward Scheme Policy

3. The role of informants in cartel enforcement is an emerging area in the competition sphere. The use of informants allows competition agencies access to pertinent evidentiary information regarding various violations. One such information would be on cartels where the question on how cartels can be detected and investigated remains one of the biggest challenges facing many jurisdictions.
4. Detection of cartels remains tricky given their secrecy. Hence the assistance of insiders would be ideal in a cartel investigation to assist with the collection of evidentiary information. Any such insiders who provide information on cartel activities (informants) largely risk their employment/ investment and their life. It is in the recognition of this risk that the reward scheme is put in place to incentivize would be informants to come forward with the information in their possession.
5. The informant reward scheme is premised on the principle of disclosure of impropriety. That the Authority is able to obtain secret or confidential information that otherwise would not be available to it if it were not for the informant and the informant receives compensation for the same. Impropriety in this case encompasses any violation of the Act.
6. With the establishment of an informant reward scheme, insiders have an incentive to provide any relevant information. Some of these insiders may have had some friction with cartel members and hence are motivated to provide information. This poses a challenge to cartels as it raises the cost of collusion, enhances cartel ineffectiveness and eventual cartel instability.
7. The informant reward scheme complements the leniency program by providing an avenue for neutral third parties, privy to information on violations of the Act, to offer up



such information to the Authority. This can be contrasted against the leniency program which involves granting amnesty (full/partial) to a colluding corporation, therefore excluding neutral third parties.

8. While the leniency program, which is designed to give incentives to cartel members to take the initiative to approach the Authority, confess their participation in a cartel and cooperate with the competition law enforcers in exchange for total or partial immunity from sanctions, has been fairly successful in Kenya; the informant reward scheme is anticipated to increase the detection and sanction of various violations of the Act in addition to cartels.

C. The Informant Reward Scheme Policy

9. The Informant Reward Scheme Policy Guidelines came into force on 1st January 2021. They set out the policy regarding the role of informants, the applicable procedure or process when approaching the Authority to disclose information, the nature of cooperation expected between informant and the Authority, the principles which govern reward payments and the types of persons eligible for obtaining rewards.

- **The Scope**

10. The guidelines target neutral third parties or those playing a peripheral role within cartels or any other conduct violating the Act. For instance, an employee who, under the direction of their superiors, attends a meeting but did not actively participate in the decision making of a cartel is considered eligible for reward scheme.

- **Obligations of the Informant and the Authority**

11. The informant is required to provide truthful information to the Authority at all times and will be only be rewarded if the information provided is credible, relevant and authentic to the process of investigation and led to a negative finding in case.
12. The informant's assistance is presumed to be entirely voluntary. The reward scheme does not provide immunity or protection from investigation, arrest or prosecution to the informant if they engage in any criminal activity.





13. The Authority shall conduct initial suitability tests on potential informants before on-boarding them as such and commits to take utmost care to ensure that the identity of the informant is not disclosed both during and after the process of the investigation.

- **Monetary Compensation**

14. Monetary compensation shall be a one-off sum at the end of an investigation computed by the Authority in consideration of the material value of the information (its relevance, credibility and authenticity) provided by the informant.

15. The amount shall be up-to one percent of the administrative penalty imposed in a matter and in any event not more than one (1) million Kenyan shillings.

- **Deactivation of an Informant**

16. Deactivation, which means that the informant may no longer be required to provide further information or assistance to the Authority in regards to a matter, shall disqualify an informant from benefiting from the reward scheme.

17. An informant may be deactivated: if they are no longer cooperative or providing information or assistance to the Authority; if they engage in a conduct that violates their Agreement with the Authority; upon the finalisation of the investigation for which they were engaged by the Authority or for any other viable reason that the Authority deems fit.

D. Challenges Foreseen in the Implementing the Informant Reward Scheme

18. Kenya has no individual law on the protection of informants or whistle blowers. Protection for the informants, outside the jurisdiction of the Act, once their identity is discovered therefore, may not be guarantee. Nonetheless, this presents an opportunity to establish new and strengthen existing memoranda of understanding with relevant agencies to ensure the protection of the rights of informants.

E. Conclusion

19. Informant reward scheme in an opportunity to not only strengthen cartel detection and spur viable investigation but also an avenue to detect and sanction other violations of the Act.





20. It is envisaged that the informants reward scheme shall complement the leniency program and increase the detection and sanction of various violations of the Act in addition to cartels.