S.I. 96 of 2022

FAIR TRADING ACT, 2022

(Act 12 of 2022)

Fair Trading (Corporate Immunity) Policy 2022

In exercise of the powers conferred by section 55(2) of the Fair Trading Act, 2022, the Commission, hereby makes the following policy —

FAIR TRADING COMMISSION OF SEYCHELLES POLICY ON CORPORATE IMMUNITY

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1. INTRODUCTION

The Commission recognizes that it is in the interest of all Seychellois consumers to grant benefits to a given cartel member who wishes to put an end to its illegal conduct and fully cooperate with the Commission ensuring the prosecution of other cartel participants.

These restrictive business practices or cartel activities are secretive by nature and are often difficult to detect. A Corporate Immunity Policy, together with significant penalties for violators, provides an incentive for a cartel participant to provide information about the cartel to the Commission. It is an effective tool for detecting and furthering investigation into cartel conduct.

2. WHAT IS THE CORPORATE IMMUNITY POLICY?

The Corporate Immunity Policy is an investigation tool devised to encourage cartel participants to disclose to the Commission a cartel activity to discourage or prevent the formation of cartels, and to eradicate this harmful conduct.

Immunity in this context means that the Commission would not subject the successful applicant to adjudication before the Tribunal for its involvement in the cartel activity, which is part of the application under consideration. Furthermore, the Commission would not recommend having any fines imposed to that successful applicant. Granting of immunity under the Corporate Immunity Policy is not based on the fact that the applicant is viewed as less guilty than the other cartel members, but on the fact that the applicant is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in connection with an alleged cartel; or the applicant is the first to submit evidence which in the Commission's view may enable it to find an infringement in connection with an alleged cartel.

The Corporate Immunity Policy, therefore, serves as an aid for the efficient detection and investigation of cartels, as well as effective prosecution of enterprises involved in cartel operations. It envisages not only a situation that the applicant alerts the Commission of the existence of cartel activity, but also one that would culminate in a referral of, and

ultimately in a final determination made by the Tribunal, of such reported cartel activity, with the applicant cooperating against other members of the cartel.

The Corporate Immunity Policy has the objective of improving the level of compliance with the Fair Trading Act 2022, through the increased detection of cartels. This is with the objective of benefiting consumers through the increase in competition, leading to lower prices and better services.

3. SCOPE OF APPLICABILITY FOR CORPORATE IMMUNITY

The Corporate Immunity Policy is only applicable to section 126(1) (a) of the Fair Trading Act 2022 which reads as follows:

"Restrictive horizontal practices:

126.(1) An agreement between, or decision or concerted practice by, enterprises in a horizontal relationship, or an association of enterprises, in the same market is prohibited —

(a) if it involves any of the following practices —

(i) directly or indirectly fixing a purchase or selling price or any other trading condition;

(ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;

(iii) collusive tendering or bid-rigging;

(iv) limiting or controlling production, market outlets or access, technical development or investment...".

4. NON-APPLICABILITY OF CORPORATE IMMUNITY

There are various instances in which the Corporate Immunity Policy is non-applicable; for example:

- where the cartel conduct in respect of which immunity is sought falls outside the ambit of the Fair Trading Act 2022;

- where the applicant fails to meet any other requirement and condition set out in the Corporate Immunity Policy;

- where the enterprise was the initiator/ringleader of the secret cartel.

It is the approach of the Commission that unsuccessful applicants if they so wish, be encouraged to cooperate with the Commission and attempt negotiations to settle the matter with the Commission.

Where an enterprise is unsure as to whether the Corporate Immunity Policy would apply to a particular conduct, it may approach the Commission to get clarity. This may be done orally or in writing. An enterprise concerned may choose to remain anonymous if it wishes to. The Commission will protect the information submitted by applicants and treat it with the utmost confidentiality.

Any clarification provided will not have a binding effect on the Commission. It is merely issued to guide the would-be applicant as to whether a conduct would be considered for immunity under the Corporate Immunity Policy.

5. SCOPE OF THE CORPORATE IMMUNITY

Total Immunity:

An enterprise that has engaged in cartel conduct may apply for full immunity from fines that may otherwise have been imposed by the Tribunal for such conduct under Section 126 (1) (a) of the Fair Trading Act 2022.

To be eligible for full immunity, the applicant must be deemed the first to submit information to the Commission which in the Commission's view would give it a sufficient basis to presume the existence of a cartel and therefore to launch a substantiated investigation where there is no pre-existing investigation, or, would provide significant additional information about the cartel conduct to significantly advance its investigation where it has a pre-existing investigation.

Once the Commission, as thc case may be, has reached a final decision in respect of the alleged cartel, total immunity is granted to

a successful applicant who has fully met all the conditions and requirements under the Corporate Immunity Policy.

Conditional immunity:

This is given to an applicant at the initial stage of the application to create a good atmosphere and trust between the applicant and the Commission pending the finalisation of the infringement proceedings. This is done in writing between the applicant and the Commission signaling that immunity has been provisionally granted.

Conditional immunity, therefore, precedes total immunity or no immunity. The Commission will give the applicant total immunity after it has completed its investigation, provided the applicant has met the conditions and requirements set out in the Corporate Immunity Policy continuously throughout the proceedings.

At any point in time, until total immunity is granted, the Commission reserves the right to revoke the conditional immunity if, at any stage, the applicant does not co-operate or fails to fulfill any other condition or requirement set out in the Corporate Immunity Policy.

No immunity:

This applies in those cases where the applicant fails to meet the conditions and requirements under the Corporate Immunity Policy.

If immunity is not granted, the Commission is at liberty to deal with the applicant as provided for in the Act, or the Commission may consider a settlement agreement usually initiated by the enterprise concerned.

Eligibility for reductions of fines:

An enterprise that has engaged in cartel conduct but is not deemed the first to submit information to the Commission and is therefore unable to meet the eligibility requirements for full immunity from fines, may be eligible for a reduction of any fines upon the recommendation of the Commission for such conduct under Section 126 (1) (a) of the Fair Trading Act 2022. To be eligible for such reduction of fines, the

applicant must submit information to the Commission which, in the Commission's view, adds significant value to information already in the Commission's possession.

The range of the reduction in fines to be granted will be set by the order in which applicants are deemed to have submitted information that adds significant value, such that:

(a) the first enterprise deemed to have submitted information that adds significant value to information already in the Commission's possession will be eligible for a reduction of fines of 40-60 %;

(b) the next enterprise deemed to have submitted information that adds significant value to information already in the Commission's possession will be eligible for a reduction of fines of 30-40 %; and

(c) the enterprise that subsequently submits information that adds significant value to information already in the Commission's possession will be eligible for a reduction of fines of up to 30 %.

The Commission will determine the amount of the reduction of fines within the ranges set out in the aforementioned taking into account:

(a) the extent to which the information submitted adds significant value, with greater value meriting a greater reduction of fines: and

(b) the stage of the Commissions investigation when the information was submitted, with earlier submission meriting a greater reduction of fines.

6. CONFIDENTIALITY

Any applicant who gives or discloses any information to the Commission may claim confidentiality in respect to the whole or part of the material as per section 44 of the Fair Trading Act 2022. The applicant may grant a waiver so that the Commission may disclose necessary information for enabling coordination of Corporate Immunity application presented in other jurisdiction or authorities.

7. THE REQUIREMENTS AND CONDITIONS FOR IMMUNITY UNDER THE CORPORATE IMMUNITY POLICY

The conditions and requirements for an applicant to qualify for immunity are as follows:

(a) The applicant must provide the Commission with complete disclosure of all evidence, information, and documents in its possession or under its control relating to any cartel activity;

(b) The applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised;

(c) The applicant must immediately stop the cartel activity or act as directed by the Commission;

(d) The applicant must not alert other cartel members or any other third party that it has applied for immunity;

(e) The applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly;

(f) The information provided must be sufficient to allow the Commission to either initiate or genuinely advance an investigation.

To be eligible for full immunity, the applicant must be the **first applicant** to provide the Commission with information, evidence and documents, sufficient to allow the Commission in its view, to institute proceedings or to successfully conclude an investigation concerning a cartel activity.

8. ORDER OF SUBMISSION

The deemed order of submission of the applicant's qualifying information will be based on the date and time at which the applicant:

(a) submits a complete application for an immunity or requests a marker (see the below section 10-13 on marker system) or

(b) if the applicant does not apply for a marker or their marker application is incomplete, the date and time at which the applicant submits a complete application.

Directors, officers, managers, and employees

An enterprise's current or former directors, officers, managers, and employees will have the same immunity or reduction of fines from any order for payment of compensation to third parties by the Commission in respect of their involvement in the cartel unless such directors, officers, managers or employees fails to cooperate with the Commission's investigation. Upon written request, the Commission will issue a letter to any such individual confirming the grant of such immunity.

9. PROCEDURE FOR IMMUNITY UNDER THE CORPORATE IMMUNITY POLICY

The enterprise wishing to take advantage of the Corporate Immunity Policy should contact the Commission either in person, over the phone, or by email. The procedure for obtaining Corporate Immunity can begin with an anonymous initial contact by the enterprise or its lawyers to determine whether Corporate Immunity is still available and whether there are already prior immunity applicants. Any person providing information for Corporate Immunity on behalf of an enterprise must have the authority to do so.

The enterprise may apply directly for immunity or an immunity marker.

Initial Contact

The initial contact made may be anonymous if the enterprise wishes for more information on the immunity available for instance, if the enterprise provides a general description of the industry or market, officers at the Commission may advise the enterprise on whether it is the first enterprise to approach the Commission concerning the matter. However, for the Corporate Immunity application to be properly recorded and processed, the enterprise must provide its name and a clear description of the cartel conduct (involved market, involved

enterprises). Upon such application, the Commission within 7 days of the application having been made, shall respond in writing and acknowledge the receipt of the application for Corporate Immunity and shall specify the manner in which the application has been received by the Commission. In the event of a dispute as to whether a Corporate Immunity application was made, the acknowledgment letter of the Commission shall be conclusive evidence of such application.

For the Corporate Immunity to be granted, enterprises must provide:

(a) The identity of the enterprise providing information;

(b) Details of other enterprise(es) or person(s) involved in the cartel.

(c) Description of cartel activities and all other information and evidence relating to the cartel that the enterprise has in its possession at the time of the application.

Upon receipt of the Corporate Immunity application, the Commission shall review the application submitted to assess the enterprise's eligibility to the Corporate Immunity. Depending on the information provided, the Commission may schedule additional meetings to get more information on the cartel, and the list of evidence that is available.

In instances where enterprises do not have all the information or evidence in regards to the alleged cartel, it may make use of the marker system.

10. APPLICATION PROCEDURES: THE MARKER SYSTEM

The Commission will issue markers to those who apply for them before the submission of a Corporate Immunity application. The marker will note the date and time of receipt of a complete marker application.

Markers will serve as a basis for determining the deemed order of submission of the applicant's qualifying information for its eligibility for total immunity from fines or the extent of available reductions of fines.

11. MARKER APPLICATION CONTENTS

An applicant may apply for a marker by submitting to the Commission with the following information without evidence on the cartel at the time of the application is made:

(a) the identity of the enterprise, including entity type, address, country of establishment, contact information, and contact information of legal representatives, if any;

(b) a general description of the cartel activity, including the affected products or services, the nature of the conduct in broad terms, the approximate duration of the conduct, and admission to having participated in the cartel as so described; and the identities of other known or suspected participants in the cartel conduct.

12. THRESHOLD FOR A SUCCESSFUL MARKER

To obtain a marker, the applicant must provide the Commission with a reasonable basis for suspecting the applicant's participation in cartel activity.

13. MARKER APPLICATION REVIEW

The Commission will review the marker application and notify the applicant that:

(a) the Commission is reasonably certain that the conduct either would not constitute a violation of section 126 (1) (a) of the Fair Trading Act 2022 and therefore not within the scope of the Corporate Immunity Policy;

(b) the marker application is deficient, identifying the deficiencies and permitting the applicant to complete the marker application; or the marker application is complete.

If the Commission informs an applicant that it is reasonably certain that the conduct is beyond the scope of the Corporate Immunity Policy, the application is deficient or if the Commission for any reason does not

subsequently grant conditional immunity, then the Commission will not use the information received in the marker application against the applicant in any proceeding. Nothing will prevent the Commission from using its investigative powers to obtain such or any similar information from other sources. If the Commission determines that the marker application is complete, it will issue the applicants a marker identifying the date and time at which the complete application was received.

The Commission intends where possible to grant markers on the next business day after the complete application is received.

The applicant must submit a complete Corporate Immunity application within two weeks after the date of the issuance of the marker. The Commission may extend this timeframe upon written request from the applicant for an additional two weeks.

If the applicant fails to submit a complete Corporate Immunity Application by the required date, the marker will automatically expire. The applicant may apply for a new marker and the date and time of receipt of the new complete marker application will serve as a basis for determining the order of submission of a Corporate Immunity applicant(s) qualifying information for purposes of eligibility for total immunity from fines or the extent of available reductions of fines.

14. REVOCATION OF IMMUNITY

A revocation may occur at any time in respect of immunity. The Commission will revoke immunity in writing. Revocation will occur if the applicant fails to meet the conditions and requirements of the Corporate Immunity Policy, including in the event of lack of cooperation by the applicant, provision of false or insufficient information, misrepresentation of facts, and dishonesty.

15. HOW TO CONTACT THE COMMISSION

Enterprises seeking to make general enquiries on the Corporate Immunity Policy or seeking clarification on whether or not immunity would be considered may contact:

- The Competition Department
  Fair Trading Commission
  Unity House, Block B. 3rd Floor
  Victoria
  Seychelles

- Telephone: 4325250
- Website: www.ftc.sc
- Email: info@ftc.sc

MADE this 15th day of September, 2022.

NAADIR HASSAN
MINISTER OF FINANCE,
NATIONAL PLANNING AND TRADE