



社会经济研究中心
**SOCIO-ECONOMIC
RESEARCH CENTRE**

3rd MyCC Competition Law Conference 2022

Promoting an Effective Leniency Regime

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The Act to Disband Cartels



The Leniency Regime in Malaysia



Key Points for Consideration

Malaysia's Competition Act 2010 (Act 712) ...

MyCC is tasked to detect and prevent cartels ...



“Cartel” refers to a **horizontal agreement between enterprises** with the object of significantly **preventing, restricting or distorting competition** in any market for goods or services infringing the prohibition under Section 4(2).

Some established competition agencies that detect, investigate and prosecute hard-core cartels:



European Commission



Competition and Consumer Commission of Singapore (CCCS)



Japan Fair Trade Commission (JFTC)



- Cartels create **market power**, harm consumers, waste and inefficiency in markets
- Secret cartels are often **difficult to detect and investigate** without the cooperation of undertakings or individuals implicated in them
- Competition agencies worldwide rely on **LENIENCY POLICIES/PROGRAMS**

The Leniency Regime in Malaysia

Section 41: Leniency Regime

- The **leniency regime** is incorporated in **Section 41** of the Competition Act 2010 (CA 2010):
 - Admit to an infringement to Section 4(2) which prohibits against a horizontal agreement; and
 - Extend **significant cooperation** and assistance to MyCC
- * *Significant cooperation will depend on specific circumstances of the case, facts of the case, stage of investigation or MyCC's state of knowledge about the cartel conduct in question.*

Aspects of Infringement

- Fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- Share market or sources of supply;
- Limit or control production, market outlets or market access, technical or technological development or investment; or
- Perform an act of bid rigging.

! The leniency regime does not apply to cases of abuse of dominance

Features

- (a) The enterprise who **initiated the cartel (ring leader) or coerced other enterprises to participate in the cartel is not eligible for 100% reduction in financial penalties.**
- (b) **Maximum reduction in penalty is up to 100%.** The differing percentage of reductions is within the discretion of MyCC – **the order of applicant, stage in the investigation and others deemed appropriate.**
- (c) **MyCC retains flexibility in interpreting the scope of cooperation** that would enhance a success in investigation and prosecution.
- (d) **Financial penalty is 10% of worldwide revenue over the period during which an infringement occurred.** The 10% threshold of the financial penalty is as prescribed under EU's competition regime. – **SUFFICIENT AND SIGNIFICANT.**
- (e) **No immunity from civil proceedings under Section 64 of Act 712,** namely rights of private action for an enterprise that was granted of leniency.

Cases with decision under Section 4(2) of CA 2010

Finding of Infringement to Section 4(2) under Section 40 of the Competition Act 2010:

Decision date	Involved party(ies)	Detected/Initiated through/Status
6 Dec 2012	Cameron Highlands Floriculturist Association	Statement issued to media by involved party / Decision issued
31 Mar 2014	Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn.Bhd.	Public outcry over the Collaboration Agreement / Decision issued
30 Jan 2015	24 Ice Manufacturers	Announcement made to media by involved parties/Decision issued
12 Feb 2015	15 Members of the Sibü Confectionery and Bakery Association	Based on an article published by Borneo Post Online/Decision issued
1 Jun 2016	Container Depot Operators	Complaints received on notices and flyers to customers/Decision issued
26 Oct 2018	7 Tuition and Daycare Centres	Complaint received by MyCC / Decision issued
25 Sep 2020	General Insurance Association of Malaysia and its 22 members	Complaint received by MyCC / Oral representation
6 Aug 2021	7 Warehouse Operators	Information received by MyCC
29 Dec 2021	Langkawi Ro-Ro Operators	Ministerial direction

Leniency applications to-date : 4

- This goes to show that the leniency program has not been utilised much in Malaysia.
- Cartel cases were not detected by the use of leniency regime.
- Most of the cases investigated were initiated by media reports, complaints by customers and one case under a Minister’s instruction.

What causes the underutilisation?

Deterrence effect; deficiencies in the program design or other factors

What constitutes an effective leniency program as outlined in the ICN manual?

1

Credibility of the competition in its commitment and ability to detect and prosecute cartels

MyCC has demonstrated its credibility and capability to detect and prosecute the cartel cases though the financial penalties were relatively small.

2

Sanctions imposed must be significant to make leniency attractive to cartel members

MyCC's guideline is 10% of worldwide revenue over the period during which an infringement occurred. The 10% threshold is similar to the financial penalty under EU's competition regime.

3

Transparency and certainty in the operation

MyCC retains substantial discretion in implementing its leniency regime. While the discretionary power provides some flexibility, it may create uncertainties.

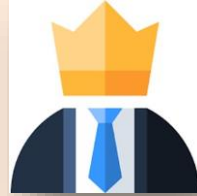
*Credible and effective enforcement to earn trust and confidence – **REPUTATION** as a respectable competition authority to detect and prosecute **CARTELS**.*

Points for consideration to enhance the Leniency Regime



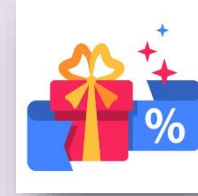
Improve legal certainty and predictability

- Discretionary power vested with MyCC
- First applicant be granted IMMUNITY from fine. If not fulfilled conditions for immunity, provides the fine reduction
- For subsequent applicants, the rate reductions should be clearly specified



Wider scope of immunity eligibility

- Ringleaders are not eligible. They have the most information
- Instigator and coercer are excluded currently
- The lack of immunization from civil proceedings reduce the incentives for enterprises to come forward
- Amnesty Plus – subsequent applicant received higher reduction



Enhance reward system

- Establish a Cartel Informant Reward Program
- Offer cash rewards for disclosing of cartels' information
- Increase the fear of discovery; race to apply for the immunity program



Harsher sanction imposed

- Create the fear of sanction
- Severe enough to deter cartels
- Sending a strong message to public that the authorities will not tolerate infringements

Proposed amendments to Section 41 of the Act

EXISTING ACT 712	PROPOSED AMENDMENTS
<p>A. Up to a maximum of 100% reduction of financial penalty for enterprises which:</p> <ul style="list-style-type: none"> i. Admits involvement in an infringement of any prohibition under subsection 4(2); and ii. Provides information or other form of co-operation to MyCC which significantly assists in the investigation of the infringement. <p>B. MyCC may permit differing % of reduction depending on:</p> <ul style="list-style-type: none"> i. Whether the enterprise was the first person to bring the suspected infringement to the attention of MyCC; ii. The stage in the investigation at which involvement was admitted or any information or co-operation provided; or iii. Any other circumstances which MyCC considers appropriate to have regard to. 	<p>A. Up to a maximum of 100% reduction in the financial penalty:</p> <ul style="list-style-type: none"> i. First enterprise that admits its involvement in the infringement before commencement of an investigation; ii. Not a coercer; <p>B. Reduction in the financial penalties:</p> <ul style="list-style-type: none"> - Second or subsequent enterprise that admits its involvement in the infringement before commencement of an investigation; <p>C. Reduction in the financial penalties:</p> <ul style="list-style-type: none"> - Enterprise that admits its involvement in the infringement after commencement of an investigation; <p>D. Up to 50% reduction in the financial penalty:</p> <ul style="list-style-type: none"> i. Is a coercer; ii. First enterprise that admits its involvement in the infringement before commencement of an investigation; <p>PROVIDED THAT the enterprise applying leniency:</p> <ul style="list-style-type: none"> i. Provides information or other form of co-operation to MyCC which significantly assists in the investigation of the infringement; and ii. Satisfies any other requirements which MyCC considers appropriate to have regard to.

EXISTING ACT 712	PROPOSED AMENDMENTS
<p>Only available to infringements of any prohibition under section 4(2) in relation to any horizontal agreement/ cartel.</p>	<p>New S. 41(3) provides for the discretion of MyCC to extend the application of the leniency regime to an infringement under section 4 other than the infringement referred to in section 4(2).</p>
<p>Not applicable.</p>	<p>New S. 41(4) provides for the circumstances in which MyCC is considered to have commenced its investigation.</p>

A comparison with other competition agencies on the rate of reduction in penalty

	Malaysia (Existing Scheme)	Malaysia (Proposed scheme)	EU Commission	CCCS (Singapore)	JFTC (Japan)																		
First applicant	<ul style="list-style-type: none"> Rate of reduction up to 100% but not specified 	<ul style="list-style-type: none"> Rate of reduction up to 100%; for coercer, up to 50% 	<ul style="list-style-type: none"> In enabling to carry out investigation, immunity from fine is granted (coercer not qualified) If not fulfilled conditions for immunity, reduction of 30%-50% 	<ul style="list-style-type: none"> In enabling to carry out investigation, immunity from fine is granted If not fulfilled conditions for immunity, reduction up to 100% Both instigator and coercer not qualified for the above 	<ul style="list-style-type: none"> Before investigation: Immunity After investigation: 10% + Up to 20% (based on degree of contribution) = Up to 30% 																		
Subsequent applicant		<ul style="list-style-type: none"> Rate of reduction not specified 	<ul style="list-style-type: none"> Second: Reduction of 20%-30% Third and subsequent: Reduction of up to 20% 	<ul style="list-style-type: none"> Reduction of up to 50% 	<table border="1"> <thead> <tr> <th>Before investigation</th> <th>After investigation</th> </tr> </thead> <tbody> <tr> <td colspan="2">Second</td> </tr> <tr> <td>20%+≤40% =Up to 60%</td> <td>10%*+≤20% =Up to 30%</td> </tr> <tr> <td colspan="2">Third</td> </tr> <tr> <td>10%+≤40% =Up to 50%</td> <td>10%*+≤20% =Up to 30%</td> </tr> <tr> <td colspan="2">4th and 5th</td> </tr> <tr> <td>10%+≤40% =Up to 50%</td> <td>10%+≤20% =Up to 30%</td> </tr> <tr> <td colspan="2">Subsequent</td> </tr> <tr> <td>5%+≤40% =Up to 45%</td> <td>5%+≤20% =Up to 25%</td> </tr> </tbody> </table>	Before investigation	After investigation	Second		20%+≤40% =Up to 60%	10%*+≤20% =Up to 30%	Third		10%+≤40% =Up to 50%	10%*+≤20% =Up to 30%	4th and 5th		10%+≤40% =Up to 50%	10%+≤20% =Up to 30%	Subsequent		5%+≤40% =Up to 45%	5%+≤20% =Up to 25%
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Instigator / Coercer treatment	<ul style="list-style-type: none"> Not qualified for reduction of up to 100% (<i>under one of the cases, instigation is part of the rejection reason for leniency application</i>) 	<p>Instigator:</p> <ul style="list-style-type: none"> For first tier (S41(1)(a) – reduction up to 100%), only coercer not allowed For S41(1)(b) & (c), not stated clearly whether instigator is included or not <p>Coercer:</p> <ul style="list-style-type: none"> As first applicant, not qualified for S41(1)(a) that up to 100%, but qualified under S41(1)(d) which up to 50% Not mentioned if not the first applicant 	<ul style="list-style-type: none"> Restriction for instigation (in 1996 Notice) was removed Coercer only can apply for reduction of fine but not immunity 	<ul style="list-style-type: none"> Both instigator and coercer are not qualified for immunity or reduction up to 100%, but allowed to apply for reduction up to 50%. 	<p>Second</p> <table border="1"> <tr> <td>20%+≤40% =Up to 60%</td> <td>10%*+≤20% =Up to 30%</td> </tr> </table> <p>Third</p> <table border="1"> <tr> <td>10%+≤40% =Up to 50%</td> <td>10%*+≤20% =Up to 30%</td> </tr> </table> <p>4th and 5th</p> <table border="1"> <tr> <td>10%+≤40% =Up to 50%</td> <td>10%+≤20% =Up to 30%</td> </tr> </table> <p>Subsequent</p> <table border="1"> <tr> <td>5%+≤40% =Up to 45%</td> <td>5%+≤20% =Up to 25%</td> </tr> </table> <p>* Up to 5 applicants including those applied before investigation.</p>	20%+≤40% =Up to 60%	10%*+≤20% =Up to 30%	10%+≤40% =Up to 50%	10%*+≤20% =Up to 30%	10%+≤40% =Up to 50%	10%+≤20% =Up to 30%	5%+≤40% =Up to 45%	5%+≤20% =Up to 25%										
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Others				<p>Leniency Plus</p> <p>Allow enterprise to seek leniency treatment for cartel activity, if any, in another market (second market), in order to reduce the financial penalty for the first market that under an investigation.</p>	<p>Group filing</p> <p>A single joint application enables all group companies named as one applicant to be granted the same leniency status.</p>																		



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THANK YOU

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