

South-East Asia - client alert

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DANGLING THE CARROT The Leniency Regime in Malaysia

INTRODUCTION

Cartels are the mother of all anti-competitive conduct. They are agreements between competing businesses not to compete with each other which may lead to price increases, lessen the competitive pressure among market players and ultimately harm consumers and the economy itself. As such, similar to the competition authorities in other countries, the Malaysia Competition Commission (“MyCC”) regards its battle against cartels as its highest priority.

As cartels are typically sophisticated and difficult to discover and deter, competition authorities throughout the world have introduced or adopted a leniency regime, a regime which is universally regarded as the most effective way to investigate cartels. Following its counterparts in other jurisdictions, the MyCC proposes to introduce a leniency regime, and has, to this end, issued the draft Guidelines on Leniency Regime (“Draft Guidelines”) on 15 January 2014.

CHARACTERISTICS OF THE LENIENCY REGIME

In the context of competition law, a leniency regime is, in essence, an arrangement whereby an enterprise is granted a reduction of financial penalties that would be imposed on that enterprise in return for its admission of complicity in a cartel and the provision of co-operation by supplying information on the cartel, its activities and members to the authority.

Similar to leniency regimes around the world, the Draft Guidelines only apply to horizontal agreements, i.e. cartels. Section 41(1) of the Competition Act 2010 (“CA”) lays down two conditions that have to be satisfied in order for an enterprise to qualify under the leniency regime. First, the enterprise must admit to an infringement of the prohibition against horizontal agreements under section 4(2) of the CA. Secondly, it must provide “significant assistance” to the MyCC in identifying or investigating any finding of an infringement of a prohibition under the CA.

The CA and the Draft Guidelines do not define the term “significant assistance”. The latter confers discretion on the MyCC to determine what would be considered as “significant assistance” on a case-by-case basis and sets out a list of information which is to be provided when making an application for leniency. These include, amongst others, a detailed description of the infringement to which the applicant is admitting involvement (“Admitted Infringement”), copies of documents such as minutes or notes of meetings, and the names and contact details of all enterprises involved in the Admitted Infringement.

The MyCC has stated in the Draft Guidelines that assistance may be in the form of information or co-operation relating to another infringement of a prohibition under Part II of the CA, such as an infringement of the prohibition against horizontal agreements by another cartel or an abuse of dominant position by an enterprise.

PERCENTAGES OF REDUCTION

The leniency regime under Section 41 of the CA permits different percentages of reduction to be granted to an enterprise that makes a leniency application (“Applicant”). The provision also sets out the factors to be considered by the MyCC in determining the percentage of reduction to be granted to a successful Applicant, namely:

- whether the Applicant was the first person from the cartel to bring the Admitted Infringement to the attention of the MyCC;
- the stage in the investigation at which an involvement in the Admitted Infringement was admitted or any information or other co-operation was provided; or
- any other circumstances which the MyCC deems appropriate to consider.

The Draft Guidelines provide that the amount of reduction will generally depend on the stage of investigation, the nature and value of the information and other co-operation to be provided by the Applicant. For example, an Applicant is likely to receive a greater reduction if an application is made at the early stages of an investigation.

The MyCC has also stated in the Draft Guidelines that it is their policy to grant a 100% reduction in the financial penalty to a successful Applicant if it is the first to apply and has admitted its involvement and provided information or other form of co-operation in relation to the cartel in which the MyCC has no knowledge. The Draft Guidelines also confer discretion on the MyCC to grant a reduction of up to 100% in other circumstances.

APPLYING FOR LENIENCY

Preliminary Step

An enterprise intending to apply for leniency is required to contact the Leniency Officer appointed by the MyCC through the Leniency Hotline. The Applicant can then enquire as to the availability of leniency and the requirements for making a leniency application.

The Applicant may also request for a ‘marker’ to preserve its priority in receiving leniency over other potential applicants. An Applicant who has been granted a marker must complete its application within 30 days from the marker being granted, failing which it will lose its position of priority.

Making the Application

An Applicant is required to submit its application in writing (unless otherwise authorised by the MyCC). The application should include the information listed in the Draft Guidelines, such as a detailed description of the Admitted Infringement (including the objectives, activities and modus operandi of the cartel), the names and contact details of all other enterprises which are involved in or have knowledge of the cartel and copies of documents such as minutes or notes of meetings, conversations and price lists relating to the Admitted Infringement.

The Draft Guidelines require an Applicant to maintain confidentiality in relation to its Application.

Leniency Agreement

An Applicant is required to enter into an agreement with the MyCC which sets out the conditions that have to be satisfied by the Applicant for the grant of leniency. The standard conditions include, amongst others, an admission of the infringement, the provision of “significant” assistance, a commitment to cease and desist from further infringement (unless authorised by the MyCC for the purposes of its investigations), and undertakings not to destroy relevant documents or harass or intimidate others to participate in the cartel.

Decision by MyCC

It is worth noting that a grant of leniency is conditional until such time that the Applicant has fulfilled all conditions imposed by the MyCC for the grant of leniency and the MyCC has made an infringement decision with respect to the cartel concerned. The formal grant of leniency will only be made in the infringement decision.

Revocation of Grant

A grant of leniency, whether before or after it has become unconditional, may be revoked by the MyCC if it discovers that the Applicant has not fulfilled any of the conditions imposed in the grant. Before doing so, the MyCC is required under the Draft Guidelines to notify the Applicant in writing and to give the Applicant an opportunity to submit written representations within 14 days from service of the notice by the MyCC.

If a grant of leniency is revoked, the MyCC may take appropriate action against the Applicant under the CA.

THE CARROT AND THE STICK

In 2005, the European Commission (“EC”) granted a full reduction of penalty to British Polythene Industries PLC and one of its subsidiaries, Combipac BV (collectively “BPI”) on cartel infringements relating to the agricultural and industrial plastic film market under its leniency regime (which is similar to the proposed leniency regime in Malaysia).

According to the EC, BPI was the first of the undertakings involved in the cartel to contact the EC in November 2001 and had voluntarily provided evidence of the infringement and continuous co-operation throughout the investigation. This had contributed substantially to the EC’s investigation which led to fines in excess of €290 million being imposed on 23 entities.

Eight other entities were awarded reductions that ranged from 10% to 30% based on the level of assistance provided to the EC during the investigations. The applications for leniency by several other members of the cartel were rejected by the EC.

According to a media report by BPI on 30 November 2005, it had conducted a comprehensive competition compliance audit following the initiation of the inquiry by the EC. The audit led to BPI uncovering anti-competitive practices which it then disclosed to the EC as part of its application for leniency.

CLOSING REMARKS

It is important to note that the grant of leniency under the leniency regime only operates to reduce the financial penalty which may otherwise be imposed on an enterprise for the infringement under the CA. A successful Applicant can still be subjected to civil proceedings by aggrieved parties under Section 64 of the CA despite any grant of leniency by the MyCC.

As advised by the MyCC in the preface to the Draft Guidelines, enterprises should conduct a self-assessment exercise in respect of their business conduct and put in place competition compliance procedures throughout all levels of their operations. By doing so, they would avoid having to seek leniency from the MyCC as the risk of being anti-competitive is minimized through proper internal procedures. As the saying goes, prevention is better than cure!

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