

An agency under



MINISTRY OF DOMESTIC TRADE AND
CONSUMER AFFAIRS



GUIDELINES ON

LENIENCY REGIME

Malaysia Competition Commission

A decorative border of various business and financial icons in shades of purple and white, including charts, documents, people icons, and currency symbols, surrounds the central text.

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These Guidelines are not a substitute for the **Competition Act 2010 ("the Act")** or any Regulations made under thereto. These Guidelines may be revised should the need arises. The examples given in these Guidelines are for illustrative purposes only. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the MyCC. In applying these Guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice. The MyCC would advise enterprises to conduct a self-assessment exercise of their businesses in respect of their conduct, procedures, management and control. They should also have competition compliance procedures in place for all their employees at all levels, including the Board of Directors. The leniency regime established under the Act shall only be applicable for admission of infringements of prohibitions stipulated under **Subsection 4(2)**.

1. INTRODUCTION



1.1. In these Guidelines, the MyCC uses the term **“Cartel”** to refer 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 in **Subsection 4(2)**.

1.2. Cartel activities may also be caught under **Section 4(1)** of the Act if such activities have significant effect in the market.

1.3. Identifying and breaking up cartel practices are an important goal pursued by most competition authorities around the world as cartel practices are very damaging to consumers. Sharing the views of competition authorities around the world, the MyCC has made the **“fighting of cartels”** its highest priority. Cartel activities are the core prohibited conduct of section 4 of the Act.

1.4. Under **Section 40** of the Act, the MyCC may impose a financial penalty that shall not exceed 10 percent of the worldwide turnover of an enterprise which is found to have infringed any prohibition under the Act.

- 1.5.** MyCC intends to impose a high financial penalty on any enterprise found to have engaged in harmful cartel activities.
- 1.6. Section 41** of the Act is the specific provision to assist the MyCC in dealing with cartel activities. This is a leniency provision only available for a breach of **Section 4** and specifically **Section 4(2)** of the Act wherein an enterprise may seek leniency.
- 1.7.** The leniency regime established under **Section 41** is available only to an enterprise which admits to an infringement of the prohibition against a horizontal agreement with an anti-competitive object as outlined in **Subsection 4(2)** of the Act.
- 1.8. Section 41** allows the MyCC to grant differing percentages of reductions of financial penalties that could otherwise be imposed on infringing enterprises. The MyCC may take into consideration any circumstances including the fact that the enterprise was the first enterprise to come forward to the MyCC about an infringement, the stage in the investigation, if any, the information or other form of co-operation to be provided and the information already in possession of the MyCC.

2.

STATUTORY FRAMEWORK FOR LENIENCY REGIME

- 2.1.** In order to qualify under a leniency regime pursuant to **Section 41**, an applicant shall comply with the conditions outlined under **Section 41(a)** and **(b)**.
- 2.2. Section 41** provides:
- 41. (1)** There shall be a leniency regime, with a reduction of up to a maximum of one hundred percent of any penalties which would otherwise have been imposed, which may be available in the cases of any enterprise which has—

- (a) admitted its involvement in an infringement of any prohibition under **Subsection 4(2)**; and
- (b) provided information or other form of co-operation to the Commission which significantly assisted, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises.

First Condition: Admission to an Infringement of the Prohibition against a Horizontal Agreement under subsection 4(2)

2.3. The leniency regime under **Section 41** is only applicable for the admission of an infringement of a prohibition under **Subsection 4(2)**.

Please refer to the Guidelines on Chapter 1 Prohibitions issued by the MyCC.

2.4. A horizontal agreement which infringes the prohibition in **Subsection 4(2)** includes :

- 4. (2)** Without prejudice to the generality of **Subsection (1)**, a horizontal agreement between enterprises which has the object to—
 - (a) fix, directly or indirectly, a purchase or selling price or any other trading conditions;
 - (b) share market or sources of supply;
 - (c) limit or control—
 - (i) production;
 - (ii) market outlets or market access;
 - (iii) technical or technological development; or
 - (iv) investment; or
 - (d) perform an act of bid rigging,

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.

Second Condition: *Provides Significant Assistance*

2.5. Second, the applicant must provide information or other form of co-operation that would **“significantly”** assist the MyCC in the identification or investigation of any finding of an infringement of a prohibition under the Act (**Section 41(1)(b)**). What would be considered as **“significant assistance”** will be determined by the MyCC on the specific circumstance of the case under consideration. However, paragraph 6.4 of these Guidelines provides guidance on this point having regard to the facts of the case in hand, the stage of investigation being conducted by the MyCC as well as the state of knowledge of the MyCC about the Cartel in question.

2.6. The information or other form of co-operation provided by the enterprise shall be on the infringement to which the applicant is admitting involvement or the leniency applicant may provide information on another cartel as provided under **Section 41(1)(b)** of the Act.

2.7. An enterprise would not qualify for a 100% reduction in financial penalties if the enterprise is the one that initiates the cartel or it has taken any steps to coerce another enterprise to take part in the cartel activity.

3. PERCENTAGE REDUCTION OF A FINANCIAL PENALTY

3.1. With respect to a leniency regime established under **Section 41**, the Act gives the MyCC broad discretion on the amount of reduction, if any, of the financial penalty that it would have otherwise imposed on the enterprise receiving leniency.

3.2. **Section 41(2)** provides that:

A leniency regime may permit different percentages of reductions to be available to an enterprise depending on—

- a.** whether the enterprise was the first person to bring the suspected infringement to the attention of the Commission;
- b.** the stage in the investigation at which—
 - i.** an involvement in the infringement was admitted; or
 - ii.** any information or other co-operation was provided; or
- c.** any other circumstances which the Commission considers appropriate to have regard to.

3.3. As noted above, the Act provides that the MyCC may grant a reduction of up to 100 percent of a financial penalty that would otherwise be imposed by the MyCC in respect of a prohibition.

Granting of 100 percent reduction of a Financial Penalty

3.4. The policy of the MyCC is to grant a 100 percent reduction in the financial penalty that would otherwise be imposed on the successful leniency applicant (for the first applicant) where:

- a. the applicant has admitted its involvement in a Cartel; and
- b. the applicant offers to provide information or other form of co-operation about the same Cartel in which the MyCC has no knowledge.

Illustration - An applicant admits involvement in a mango Cartel and provides information and other co-operation about the same mango Cartel.

3.5. The Act in requiring the MyCC to adopt a leniency regime in respect of Cartel behaviour reflects the view of the legislature that Cartel behaviour is a very serious infringement under the Act.

3.6. This intent as reflected in **Section 41** is the basis for the decision of the MyCC to provide 100 percent reduction of a financial penalty for the disclosure and information and other form of co-operation by a leniency applicant of a Cartel of which the MyCC has no knowledge.

3.7. Notwithstanding the above, the MyCC reserves the right to give reduction up to 100 per cent in other circumstances.

3.8. The MyCC may provide markers to the second, third or subsequent leniency applicants as the situation warrants and the penalty to be imposed shall take into account the priority of the markers.

Granting of a reduction of less than 100 percent

3.9. The amount of a reduction given will depend generally on the stage of the investigation, the nature and the **“value-added”** of the information and other co-operation to be provided by the applicant which has already been received by the MyCC. Other things being equal, an applicant is more likely to receive a greater reduction if the application is made during the early stages of an investigation. Furthermore, an applicant is more likely to receive a greater reduction than a subsequent applicant because an application by a subsequent applicant would be assessed in the light of the information that the MyCC has in its possession including that received from leniency applicants which have received leniency.

3.10. The successful leniency applicant, if it fulfills all conditions of the conditional grant of leniency will be informed of the amount of the reduction when it receives the written notice of any proposed decision under **Section 36**.

4. WHAT IS NOT COVERED BY A GRANT OF LENIENCY

4.1. Any leniency granted under **Section 41** of the Act would not, in and of itself, protect the successful applicant from other legal consequences, such as civil proceedings commenced under **Section 64** by an aggrieved person who has suffered loss or damage directly caused by an infringement.

5. INITIATING CONTACT WITH THE MyCC

Leniency Officer

5.1. The MyCC has appointed an official to serve as the Leniency Officer to facilitate the handling of inquiries about the availability of leniency under **Section 41** in specific circumstances. No other person at the MyCC should be contacted unless the MyCC directs otherwise.

5.2. The purpose of requiring a potential applicant to make initial contact to the MyCC through the Leniency Officer is to protect, to the extent possible, the disclosure of confidential or sensitive information, in the event the potential leniency applicant does not proceed to make an application or an application for leniency is refused.

Leniency Hotline

5.3. Any person or enterprise wishing to apply for leniency should call the Leniency Hotline telephone number which is posted on the MyCC's website at <http://www.myc.gov.my>.

5.4. The Leniency Officer will answer a call to the Leniency Hotline only during the **business hours of the MyCC: 8.30am to 5.30pm** Mondays to Fridays excluding public holidays. The Hotline number will not accept voicemail messages.

5.5. Through the Leniency Hotline, a potential applicant may do the following:

- a.** ask about the availability of leniency with respect to a certain situation;
- b.** request a 'marker' to establish priority over other potential applicants, in order to obtain sufficient time to prepare a leniency application; and
- c.** ask questions about requirements for making a leniency application.

Obtaining Priority (a "Marker")

5.6. If upon request, the Leniency Officer advises that leniency is available in respect of a situation, the potential applicant may ask for a **"marker"** in order to preserve its priority in receiving leniency while an application is being prepared.

5.7. The Leniency Officer is authorised by the MyCC to provide a marker to the applicant. In requesting a marker, the applicant shall provide the name of the enterprise(s) that will be covered by the leniency and sufficient details to identify the infringement. The Leniency Officer will consequently give a marker to the applicant. A written confirmation of the marker will be provided by the Leniency Officer thereafter.

5.8. The marker essentially records the priority, the date and time and matter for which an enterprise intends to submit an application for leniency and contains a stipulation of the date by which the enterprise must complete its application. In this way, an enterprise with a marker with an earlier date and time is given priority over another enterprise with a marker with a later date and time for the same matter provided the first enterprise submits its application by the date stipulated.

5.9. A marker is valid for **30 days** from the date it is granted. If the recipient of a marker fails to complete its applications by the end of the specified period, the enterprise will lose its priority position. It may wish to obtain a new marker if it wishes to make a leniency application. All subsequent leniency applicants will receive a marker upon request following the above mentioned process.

5.10. An extension of time shall be subject to valid grounds and it is up to the discretion of the MyCC.

6.

MAKING AN APPLICATION

6.1. An applicant for leniency is required to provide information and offer other forms of co-operation with respect to an alleged infringement of a prohibition under the Act.

6.2. Since a typical leniency applicant is likely to provide information or other form of co-operation about the *same alleged prohibited infringement in which the applicant is admitting involvement*, the following sets out the content of information that an applicant is asked to provide with respect to a prohibition under **Subsection 4(2)**. The list will be adjusted as appropriate for information and other co-operation about a prohibition of a cartel.

6.3. The completed leniency application should be submitted in writing, unless otherwise authorized by the MyCC, and signed by an authorised senior officer of the applicant.

6.4. The following information about a prohibition under **Subsection 4(2)** should be provided:

- a.** detailed description of the suspected infringement of a prohibition under **Subsection 4(2)** cartel including
 - i.** objectives, activities and functioning of the cartel,
 - ii.** the products or services involved and their geographic scope,
 - iii.** activities of the cartel with dates, times, places, purpose, and content of any meetings, conversations or other contact;
- b.** copies of documents such as minutes or notes of meetings or conversations, meeting agendas, price lists, etc.
- c.** if the applicant no longer has a copy of a relevant document, the names and persons who may have copies of the document;
- d.** name including full legal name, contact details and relevant office locations of the applicant and those of any subsidiary or related companies involved and names and positions of individuals of such enterprises who have participated in or have knowledge of the cartel activities;
- e.** names and contact details of all enterprises involved and names and positions of individuals of the enterprises involved who have participated in or have knowledge of the cartel activities;
- f.** name, contact details and relevant office locations of any trade association involved and names of employees and officers of the association who have participated in or have knowledge of the cartel activities;
- g.** names of competition agencies/authorities to which the applicant has or is contemplating making a leniency application; and
- h.** any other relevant information about the cartel and any other information that may assist the MyCC in reviewing the leniency application.

7. CONFIDENTIALITY OF APPLICATION AND DISCLOSURE OF IDENTITY OF APPLICANT

7.1. The MyCC requires a leniency applicant not to disclose to anyone that it has made an application for leniency.

7.2. Confidentiality including the identity of the applicant will be maintained subject to the following provisions of **Section 21** of the Act.

- 21. (1)** Any person who discloses or makes use of any confidential information with respect to a particular enterprise or the affairs of an individual obtained by virtue of any provision of this Act commits an offence.
- (2)** Nothing in subsection **(1)** shall operate to prevent the disclosure of information where—
- a.** the disclosure is made with the consent of the person from whom the information was obtained;
 - b.** the disclosure is necessary for the performance of the functions or powers of the Commission;
 - c.** the disclosure is reasonably made during any proceedings under this Act provided that such disclosure is not made against any direction by the Commission or the Competition Appeal Tribunal before which the proceedings are taking place;
 - d.** the disclosure is made in connection with an investigation of an infringement or an offence under this Act; or

- e. the disclosure is made with the authorization of the Commission to any competition authority of another country in connection with a request by that country's competition authority for assistance.

(3) For the purposes of this section, “**confidential information**” means trade, business or industrial information that belongs to any person, that has economic value and is not generally available to or known by others.

7.3. The MyCC shall not use any self-incriminatory information obtained by leniency applications against any unsuccessful leniency applicant.

8.

DECISION ON APPLICATION FOR LENIENCY

8.1. An application for leniency is, strictly speaking, an application for the grant of leniency provided the applicant fulfills all terms for the grant of leniency. In other words, the grant is initially for conditional leniency. The grant of leniency is made unconditional only after the applicant has fulfilled all conditions of the conditional grant of leniency and the MyCC has made an infringement decision.

8.2. In considering a leniency application, the MyCC will exercise its judgment on whether the applicant is likely to provide information or other co-operation that will provide significant benefit to any investigation by the MyCC. In this regard, the MyCC will consider the stage of its investigation and the additional benefit of the information and other co-operation to be provided by the applicant. For example, if an applicant is proposing to provide information or co-operation about a cartel of which the MyCC is unaware or has little information, the MyCC would be more favourably disposed to granting a (conditional) leniency.

8.3. In the granting of a conditional leniency, the MyCC will require the applicant to enter into an agreement to fulfill all the conditions imposed by the MyCC.

8.4. The grant of a conditional leniency shall include the following conditions (standard conditions):

- a. Requirements of Section 41:** admission of involvement in an infringement of a prohibition under **Subsection 4(2) (Section 41(1)(a))** and providing “**significant**” assistance as advised in the application process (**Section 41(1)(b)**);
- b. Cease and Desist:** the applicant ceases and desists from engaging in the infringing activities which are the subject of the cartel for which involvement is admitted unless the MyCC expressly authorises continued participation by the applicant in the cartel for the purpose of furthering the MyCC’s investigation;
- c. Full Disclosure:** the applicant provides full and truthful disclosure of its participation in the cartel for which it has admitted co-operation including the submission of all documents and if co-operation is about a different infringement, its knowledge about that other infringement;
- d. Continuing Co-operation:** the applicant provides promptly and at its own expense to any request for information or other assistance by the MyCC including, if requested, the assistance of any employee, officer or director with respect to the cartel for which involvement is admitted and, as well, if co-operation is provided about a different infringement, with respect to that other infringement;
- e. Documents:** the applicant agrees not to destroy any relevant documents and confirms that relevant documents have not been destroyed before or during the period leading to the conditional grant of leniency;
- f. Harassment or Intimidation:** the applicant confirms that it has not harassed or intimidated others to participate in the cartel for which it has admitted involvement;
- g. Confidentiality:** the applicant undertakes not to disclose to anyone, without the permission of the MyCC, about any aspect of the grant of leniency including the fact that it has applied for leniency and the grant of leniency or its terms except for the purpose of obtaining and receiving legal advice with respect to the cartel or in compliance with a court order, in which case, the applicant should promptly inform the MyCC of any application for such an order;

h. Withdrawal of Conditional Grant of Leniency: the MyCC may upon notice to the applicant withdraw the conditional grant of leniency if the applicant does not fulfill each and every one of the conditions of the conditional grant of leniency.

8.5. The MyCC reserves the right to amend any of the standard conditions or add other conditions as appropriate in the particular circumstances of an application.

8.6. In all leniency applications, the applicants are required to enter into a written conditional leniency agreement with the MyCC which contains all the conditions that the applicant is required to satisfy in order to receive (unconditional) leniency.

Any leniency granted by the MyCC applies only to the financial penalty that may otherwise be imposed by the MyCC under **Section 41(1)(c)**. First, the MyCC is required to order that the infringement be brought to an end under **Section 41(1)(a)**. Second, the MyCC may exercise its discretion under **Section 41(1)(d)** to impose other remedial relief.

9. UNCONDITIONAL GRANT OF LENIENCY



9.1. As noted above, a conditional grant of leniency is not made final or unconditional until the applicant has fulfilled all conditions of the conditional grant of leniency and this is unlikely to happen until the MyCC has concluded its investigation into the alleged infringement. Further, the grant of unconditional leniency is only made if the MyCC decides to make an infringement decision with respect to the cartel concerned.

9.2. The formal grant of leniency will be made in the infringement decision, if any. An enterprise which has received conditional leniency should expect to be informed on whether the MyCC has granted (unconditional) leniency on the date the MyCC delivers its written notice of a proposed decision, if any, under **Section 36** to each enterprise affected by the decision. Thus, an enterprise with a conditional grant of leniency would be informed by the **Section 36** written notice.

10.

REVOCACTION OF GRANT OF LENIENCY

- 10.1.** A leniency applicant is required to fulfill all conditions of any conditional grant of leniency. The MyCC may revoke a conditional grant of leniency if it concludes that the applicant has not fulfilled any condition such as by providing false or misleading information to the MyCC.
- 10.2.** The MyCC may also revoke a grant of leniency after an unconditional grant of leniency is made final (unconditional) if the MyCC discovers subsequently, the applicant has not fulfilled one or more conditions of the conditional grant of leniency.
- 10.3.** Before revoking the grant of leniency, the MyCC will serve a written notice on the enterprise concerned which provides an explanation for the proposed revocation and invites the enterprise, if it so wishes, to submit written representation to the MyCC within **14 days** from the date the notice was served.
- 10.4.** If the MyCC revokes a grant of leniency, whether conditional or unconditional, the MyCC reserves the right to take any appropriate action under the Act including continuing the investigation into the involvement of the enterprise concerned or recommending the prosecution of an offence under **Section 23** for failing to disclose or omitting to give any relevant information, or for providing false or misleading information.



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