



Research Article

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The Use of Leniency Programme in Detecting Cartels in Malaysia

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Abstract

The cartel is regarded as a disease that inflicts on the open market economy. Whilst its presence is detrimental to the public, the most serious issue is its secrecy, which has posed a major problem to competition authorities all over the world. To address this, many countries including Malaysia have introduced a leniency programme for the detection of cartels by persuading their members to approach the authorities to admit involvement in the cartel activities and assist the authorities to expose other cartel participants. The objective of this paper is to conduct a study on the legal framework of the cartel and Malaysia's leniency programme. The paper contains a detailed analysis of the Competition Act 2010 (Act 712) (CA 2010), the Guidelines on Leniency Regime (Leniency Guidelines) by the Malaysian Competition Commission (MyCC) and academic research in this area. The findings show that while the leniency programme is available under the Leniency Guidelines, data on leniency applications made to date are not available on the MyCC's website. In addition, the MyCC's decisions published on its website revealed that of six cartels that were found to have committed infringement, none had been first detected through the leniency programme. Therefore, the effectiveness of the programme has yet to be proven.

Keywords: Cartel, Competition Act 2010, leniency programme, Malaysian Competition Commission

1. Introduction

Connor (2008) defined a cartel as "an association of two or more legally independent firms that explicitly agree to coordinate their prices or output for the purpose of increasing their collective profits." Based on this definition, the purpose of a cartel is to control the market with the aim of

restricting competition. The reason for restricting competition is to maximise their profits collectively (Jasper, 2017). A cartel weakens an economic system that is based on an open market (Whelan, 2007). Among the adverse effects of the cartel is that other businesses that are not in favour of anti-competitive agreements have to cease operations because they cannot compete on prices or they are kept out of the market. Therefore, consumers will lose because they have fewer choices, face higher prices, and get products or services of lower quality. In addition, the economy will not grow as new businesses are unable to penetrate the market and existing businesses have no incentive to become more innovative and efficient (MyCC, 2012). Hence, cartels are likened to cancer in an open economic system, and it only works to rob consumers' money (Monti, 2000). Cartels were also described as the "supreme evil of antitrust" by the US Supreme Court in *Verizons Communications v Law Offices of Curtis v Trinko, 540 US 398, 408 (2004)*. They are seen as the most heinous competition violator and one of the most damaging to the economy (Rodger & Macculloch, 2015). Hence, cartel detection and deterrence are among the highest priorities of competition authorities (Chen & Rey, 2013). However, fighting the cartel is not an easy task (Monti, 2000). Among the critical challenges faced by competing authorities around the world is in exposing the existence of cartels. This is because the cartel exists in secrecy (Chen & Harrington, 2007). In general, cartel participants are aware that their cartel activities are in violation of competition law. As such, they will work hard to ensure that their activities are not sniffed and detected by the competition authorities. This has resulted in the authorities encountering difficulties in detecting and gathering sufficient evidence to prove the violation committed by the cartel (Jones & Sufrin, 2016). Research by Pavlov and Shastiitko (2016) showed that in order to make detecting cartels easier, leniency programmes have been introduced in many countries around the world. The programme is designed to encourage cartel participants to come forward not only to confess their involvement in cartel activities but also to collaborate with the competition authorities in leading for discovery of the cartel. In return, the participants of the cartel will be immunised or offered reduced penalties (Middleton, Rodger & MacCulloch, 2009). Likewise, in Malaysia, the leniency programme has been employed by the MyCC to detect cartels. The programme can be found in section 41 of the CA 2010.¹

2. Methodology

A qualitative approach was employed for this paper which consisting of a detailed analysis of the CA 2010, Leniency Guidelines, other related guidelines issued by the MyCC and academic research in this area.

3. The legal framework on the prohibition of cartels in Malaysia

The CA 2010 governs the laws on competition in Malaysia. In general, the CA 2010 aims to promote economic development by promoting and protecting the process of competition, thereby protecting the interests of consumers and to provide for matters connected therewith. To achieve this aim, several practices are prohibited due to their anti-competition nature. Among these prohibitions are enterprises are not allowed to enter into any horizontal or vertical agreement with the objective of or giving effect to preventing and restricting the competitive processes as stated in section 4(1) of the CA 2010. The term 'enterprises' is used to denote "any entity carrying on commercial activities relating to goods or services." The full text of the section reads as follows:

1. A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.
2. Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to:

¹ The CA 2010 was passed by the Parliament and came into force on 1st January 2012.

- 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
 - v. 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.

3. Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

With reference to the above section, there are two types of agreements, namely the horizontal agreement and the vertical agreement. A horizontal agreement refers to an agreement between enterprises operating at the same level (business competitors) in the production or distribution chain (Section 2 of the CA 2010). Meanwhile, a vertical agreement refers to the agreement between enterprises operating at different levels in the production or distribution chain (Section 2 of the CA 2010). In the context of the CA 2010, the agreement is not restricted to a written agreement only but also includes oral agreements whether through telephone or in meetings either in private or in social settings (Paragraph 2.1 of the MyCC Guidelines on Chapter 1 Prohibition, Anti-Competitive Agreements (Guidelines of Chapter 1). Based on the reading of section 4 of the CA 2010, the word 'cartel' is not found or defined in the CA 2010. However, it has been defined by the MyCC in Paragraph 1.1 of the Leniency Guidelines as "*a horizontal agreement between enterprises with the object of significantly preventing, restricting or distorting competition in any market for goods or services*". With reference to the definition provided, it can be inferred that the cartel is prohibited under section 4(1) and is read together with section 4(2) of the CA 2010. Section 4(2) of the CA 2010 is a deeming provision where a horizontal agreement between enterprises that has the object to fix prices, divide the market, agree to restrict production, investment and technological advancement, as well as bid rigging is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services. The word 'deeming' means that the MyCC will not have to conduct a detailed analysis, including taking into consideration the marketing aspect of an enterprise because it is considered as restricting competition. In other words, the MyCC only needs to prove the existence of the cartel. The reason is that the existence of the cartel itself is sufficient to prove the existence of the object of significantly preventing, restricting, or distorting competition in any market for goods or services. The position on this matter is further elaborated in paragraph 3.25 of the Guidelines on Chapter 1 relating to the prohibition under section 4 of the CA 2010 which states that:

It is important to note that section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In these situations, the agreements are deemed to "have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."

Therefore, section 4(2) of the CA 2010 and paragraph 3.25 of the Guidelines on Chapter 1 indicate that the MyCC has a strong stance and disapproval against the cartel and therefore, the cartel should be prohibited on the grounds that the agreement has a clear object to prevent and restrict the process of competition. Among the examples of cartel agreements are price fixing, market sharing and bid rigging.

3.1 Price fixing

Price fixing means an agreement among competitors to increase, fix, or maintain the price at which they sell their goods or services (The United States Department of Justice, n.d).

3.2 Market sharing

Market sharing refers to an agreement between competitors to split the market by location and allocate each area to a specific participant, effectively creating a monopoly in each area. This practice has the effect of limiting the options available to consumers, resulting in increased prices or lower outputs (Dabbah, 2004).

3.3 Bid rigging

An agreement is made between two bidders in a tender exercise, effectively distorting the normal conditions of competition. The agreement includes who should win the tender at the agreed price (MyCC, 2014).²

Above are examples of restriction of competition by object. If one of them is present in the agreement, then the agreement is deemed to have violated the CA 2010.

4. Enforcement against cartels in Malaysia

The MyCC is an independent body incorporated under the Competition Commission Act 2010 to enforce the CA 2010 (MyCC, n.d). The MyCC was established with the aim of protecting and maintaining the competition process for the benefit of businesses, customers, and the economy (Safinaz, Ahmad Azam, Nazura, Ramalinggam, & Mazliza, 2014). Among the duties of the MyCC is to enforce the provisions of the CA 2010 to ensure compliance with its provisions. The enforcement duty is crucial for protecting the competition process for the benefit of businesses, customers, and the economy (MyCC, n.d.). The MyCC's power to carry out the enforcement action is apparent under section 14 of the CA 2010 which provides for the MyCC to carry out any investigation if it has any reason to suspect that any business has infringed or is infringing any prohibition under the CA 2010. The CA 2010 grants the power to the MyCC to investigate and take action against any company involved in anti-competition practices including the cartel. Generally, the MyCC may conduct the investigation when it is suspected that there is an infringement by any enterprise or arising from complaints made by the public as well as upon instruction by the Minister charged with the responsibility for domestic trade and consumer affairs (Section 14 of the CA 2010). To ensure that the investigation can be carried out efficiently and effectively, the MyCC is armed with wide investigative powers, namely the power to inquire information (Section 18 of the CA 2010), the power to retain documents (Section 19 of the CA 2010), the power to access records (Section 20 of the CA 2010), as well as the power to search and seize with or without a warrant (Sections 25 and 26 of the CA 2010). Of the many anti-competition agreements, the MyCC stresses upon the enforcement towards the cartel because it is deemed as the most serious infringement of the CA 2010 and gives an adverse impact on the country's economy (MyCC, n.d). Section 4(2) of the CA 2010 lists down examples of agreements that are deemed as a cartel and considered as having the object to limit or restrict competition that is against section 4(1) of the CA 2010. In terms of the enforcement method, there are various methods which have been made available for the MyCC in enforcing the cartel. Among these methods is the leniency programme as embodied in section 41 of the CA 2010, which will be explained in the next paragraph.

The first case investigated and taken action by the MyCC since the enforcement of the CA 2010 on January 1, 2012 was the case of the Cameron Highlands Floriculturist Association (CHFA) (Shila & Burgess, 2016). In this case, the CHFA was investigated under section 4(2)(a) CA 2010 for agreeing to increase the price of flowers sold to distributors and wholesalers by 10% in Malaysia. The MyCC found the existence of infringement under the said section whereby members of the CHFA through the CHFA had entered into a horizontal agreement between enterprises to fix, directly or indirectly, the purchase or selling price. The MyCC ordered the CHFA to carry out the

² MyCC's Handbook in Help Us Detect Bid Rigging which was published in June 2014.

followings: to cease and desist from the act of price fixing of flowers; to provide an undertaking that the members will refrain from anti-competitive practices in the market; and to issue the remedial actions that they have undertaken in the mainstream newspapers. Since then, the MyCC has increased its efforts in eradicating anti-competition agreements particularly cartels in Malaysia. Based on the statement by a Member of the MyCC, Datin Seri Ruzaina Wan Hanif, the MyCC has investigated 80 cases involving cartel activities for the past seven years (Zanariah Abd Mutalib, 2018). However, there is a big difference between the number of cartel cases investigated and the number of infringements found by the MyCC under section 40 of the CA 2010. Based on the decisions published by the MyCC on its website, from 2012 until 2018, six cases involved cartels whereby the MyCC had found infringement of section 40 of the CA 2010 (MyCC, n.d). A list of the cases is provided below:

No.	Facts	Decision	Order
1.	CHFA was investigated under section 4(2)(a) of CA 2010 for agreeing to increase the price of flowers sold to distributors and wholesalers by 10% in Malaysia effective from 16 March 2012. [Case Number: MyCC/0003/2012(ACA)].	On 6 th December 2012, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(2)(a) of the CA 2010.	The MyCC instructed the CHFA to: (i) cease and desist the infringing act of fixing prices of flowers; (ii) provide an undertaking that its members shall refrain from any anti-competitive practices in the relevant market; and (iii) issue a statement on the above mentioned remedial actions in the mainstream newspapers.
2.	Malaysian Airline System Berhad (MAS), AirAsia Berhad (Air Asia), and AirAsia X Sdn. Bhd. were investigated under section 4(2)(b) of the CA 2010 for agreeing to share the Malaysian air transport services market. In this case, the three said companies had entered into a Comprehensive Collaboration Framework on 9 th August 2011 to refine their emphasis on core competencies as well as provide enhanced offerings and options to their clients, thereby increasing stakeholders' value. [Case Number: No. MyCC.0001.2012].	On 31 st March 2014, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(2)(b) of the CA 2010.	The MyCC imposed a financial penalty of RM10 million on MAS and AirAsia respectively. AirAsia and MAS had appealed against the decision. On 4 th February 2016, the Competition Appeal Tribunal set aside the penalty of RM10 million imposed on MAS and AirAsia, which were found to have infringed the prohibition against market sharing. On 25 th July 2016, the High Court granted leave to the MyCC to challenge the decision by the Competition Appeal Tribunal. On 20 th December 2018, the High Court set aside the Competition Appeal Tribunal's decision and upheld the MyCC's decision imposing a fine of RM10 million on MAS and AirAsia.
3.	The MyCC investigated twenty-six ice manufacturers with business operations primarily in Kuala Lumpur, Selangor, and Putrajaya under section 4(2)(a) of the CA 2010 for collectively increasing the price of edible tube ice and block ice by RM0.50 per bag and RM2.50 per big block, respectively from 1 st January 2014. [Case Number: No. MyCC.700.2.0001.2014].	On 30 th January 2015, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(2)(a) of the CA 2010.	The MyCC imposed a financial penalty of RM283,600.
4.	The MyCC investigated fifteen enterprises under section 4(2)(a) of the CA 2010 for entering into a horizontal agreement with the aim of fixing the selling price of confectionery and bakery products in Sibul, Sarawak, either directly or indirectly. [Case Number: No. MyCC.0045.2013].	On 12 th February 2015, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(2)(a) of the CA 2010.	The MyCC imposed a financial penalty of RM247,730.

5.	<p>The MyCC investigated two cases, namely:</p> <p>i. Containerchain (M) Sdn. Bhd. and four companies, which are Ayza Industries Sdn. Bhd./Ayza Logistics Sdn. Bhd., ICS Depot Services Sdn. Bhd., E.A.E. Depot & Freight Forwarding Sdn. Bhd., and Prompt Dynamics Sdn. Bhd. ("Container Depot Operators") under section 4(1) of the CA 2010 for acting in concert by entering into vertical agreements to enable the Container Depot Operators to raise the Depot Gate Charges to RM25 from RM5 previously to the customers and to offer a fixed rebate of RM5 to hauliers in respect of the Depot Gate Charges.</p> <p>ii. The Container Depot Operators under section 4(2)(a) of the CA 2010 for entering into a horizontal agreement to fix the RM25 Depot Gate Charges and the RM5 rebate as stated above, deemed as purposely preventing, restricting or distorting market competition in a significant manner for the provision of empty container storage together with services for maintenance and handling within a radius of five to fifteen kilometres from the Penang Port. [Case Number: No. 700.2.005.2013]</p>	<p>On 1st June 2016, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(1) and 4(2)(a) of the CA 2010.</p>	<p>The MyCC imposed a total financial penalty of RM645,774 and an additional penalty of RM7,000 for each day should they fail to comply with the remedial actions within thirty (30) days from the date of the MyCC's decision.</p>
6.	<p>The MyCC investigated seven tuition and day-care centres for agreeing to fix and standardise the tuition and day-care services' fees in the SS19 area of Subang Jaya, Selangor. [Case Number: No. 700.1.1.43.2017].</p>	<p>On 26th October 2018, the MyCC issued a decision finding that there is an infringement under section 40 of the CA 2010 for violating section 4(2) read with section 4(3) of the CA 2010.</p>	<p>The MyCC imposed a financial penalty of RM33,068.85</p>

Based on the statistics shown above, from 2012 until 2018, the number of cartel infringements found by the MyCC is about six cases which means, on average, not even one case per year.

The cases involve floriculture, aviation, ice production, confectionary and bakery, depot industries and tuition and day-care services. A thorough examination of the cases indicate that five cartel activities as listed from 1 to 5 in the table above were sniffed by the MyCC when those activities were exposed by the cartel participants themselves through various media including the newspapers, notices, and flyers. This can be seen from the following explanation:

1. The President of the CHFA issued a statement published in the online portal of The Star that the CHFA will increase the prices of flowers by 10%.
2. The collaborative agreement between MAS and Air Asia was reported in the mass media including The Star newspaper and Utusan Malaysia.
3. Local newspapers including The Sun, Harian Metro, Malaysia Nanban and Sin Chew Daily reported on the increase in the price of ice.
4. The Borneo Post published an article on 20th November 2013 carrying the title of "Announcement of price hike draws the attention of MyCC."
5. The Container Depot Operators in Penang had issued notices and distributed flyers to their customers at roughly the same time to notify them about the hike in Depot Gate Charges to RM25 from RM5 previously.

On the other hand, for the last cartel listed in table, the first information received by the MyCC about the alleged cartel was through complaint made by a complainant alleging adjustment and standardisation of fees.

Therefore, it can be concluded that of six cartel cases whereby the MyCC found the infringements, five of them were initially detected through exposure by the cartel participants themselves which are subsequently followed by enforcement actions by the MyCC and one through complaint lodged by a complainant. The concern is what will happen when enterprises no longer expose their activities openly, and they carry out their cartel activities in secrecy. In other words, there will no longer be any exposure through the mass media, notices, or any other medium. If this were to happen, the MyCC might have difficulty in detecting and obtaining strong evidence to prove the existence of cartel activities unless public come forward and lodge complain about the existence of cartel. Thus, to overcome this difficulty, MyCC must make leniency programme more attractive to persuade more cartel participants to come forward with information leading to the

breakdown of the cartels. Notably, the MyCC needs to play its role in spreading information about the leniency programme, the conditions that must be complied with, and the benefits that will be gained upon successful application to the enterprises that are running their business in Malaysia. Sufficient and accurate information can bring a positive impact on the number of whistleblowers as intended when section 41 was included in the CA 2010.

5. Leniency programme in Malaysia

Broadly stated, the aim of the leniency programme is to encourage cartel participants to take advantage of the leniency given by coming forward to the competition authority to admit their involvement in a cartel and collaborate with the authority to identify other cartel participants in exchange for partial or total immunity from the penalties (Frese, 2014). The leniency programme in Malaysia is explained under section 41 of the CA 2010 and further elaborated in the Leniency Guidelines issued by the MyCC. Section 41 of the CA 2010 is a specific provision to assist the MyCC in fighting cartel activities. The section expressly states that leniency is only available for a breach of section 4(2) of the CA 2010. Any enterprise wishing to apply for leniency should make a telephone call to the leniency hotline number posted on the MyCC's website (Paragraph 5.3 of the Leniency Guidelines). Through the leniency hotline, a potential cartel applicant may ask about the availability of leniency with regard to a certain situation; apply a 'marker' to mark priority over other applicants; and ask questions about conditions for making a leniency application (Paragraph 5.5 of the Leniency Guidelines). The completed leniency application should be made in writing unless dictated otherwise by the MyCC, and signed by an authorised senior officer of the applicant (Paragraph 6.3 of the Leniency Guidelines).

Generally, section 41 of the CA 2010 allows the MyCC to grant a reduction on the amount of financial penalty that could otherwise be imposed on the infringing enterprise up to 100% subject to the conditions specified. With reference to section 41(1) of the CA 2010, the conditions that must be fulfilled to obtain a reduction of up to 100% on the financial penalty requires the enterprise to confess about its involvement in an infringement of any prohibition under section 4(2) of the CA 2010, namely in a cartel, and to give information or cooperation that can significantly assist the MyCC in the identification or investigation of any finding of an infringement of any prohibition by any other enterprises. The issue arising is that what is meant by significant assistance? To answer this question, the MyCC has provided guidance as stated in paragraph 6.4 of the Leniency Guidelines which is the applicant has to provide a detailed description of the suspected infringement of a prohibition under subsection 4(2) of the CA 2010 about the cartel including:

- i. objectives, activities, and function of the cartel;
- ii. the products or services involved and their geographical scope; and
- iii. activities of the cartel with dates, times, places, purpose and content of any meetings, conversations, or another contact.

Paragraph 3.4 of the Leniency Guidelines clarifies that the 100% financial reduction will only be granted if the cartel participant is the first person to report to the MyCC and the information provided is not yet known to the MyCC. However, the 100% financial reduction will not be granted if the enterprise was the first to initiate the cartel activity (the ringleader) or the cartel participant was the one who forced other enterprises to join in the cartel activities (Paragraph 2.7 of the Leniency Guidelines).

Nevertheless, the first applicant who does not fulfil the conditions stated above, the second and subsequent applicants are still eligible for the reduction of less than 100% subject to the following (section 41 (2) of the CA 2010):

- a. whether the enterprise was the first person to inform the MyCC about the suspected infringement;
- b. at the juncture of the investigation when:
 - i. participation in the infringement was admitted; or
 - ii. any information or other assistance was given; or
- c. any other situations regarded as appropriate by the MyCC.

One of the elements in the application process of the leniency programme is the timing when

the decision on the application is made known to the applicant. To answer this question, reference can be made to paragraph 3.10 of the Leniency Guidelines which states that if the applicant satisfies all conditions of the conditional grant of leniency, section 36 of the CA 2010 provides that the applicant will be informed of the amount of the reduction through a written notice on the proposed decision. With reference to section 36 of the CA 2010, the status of the application will only be informed after the investigation has been completed. As a condition for granting the conditional leniency, the applicant will have to enter into an agreement to fulfil all the conditions imposed by the MyCC, which include:

- i. the applicant shall stop and discontinue the infringement activities that the applicant has confessed to being involved in, except in cases where the applicant has been granted expressed approval from the MyCC to carry on the activities in the cartel with the aim of assisting the MyCC in its investigation (Paragraph 8.4.b of the Leniency Guidelines);
- ii. the applicant shall give complete and truthful disclosure about its involvement in the cartel in which it has confessed to participate and furnish all the documentations and if the participation is pertaining to another infringement, the applicants' knowledge of that other infringement (Paragraph 8.4.c of the Leniency Guidelines);
- iii. the applicant shall give information or any other assistance required by the MyCC on a timely basis, including the assistance of any employee, officer or director regarding the cartel in which the participant has confessed to be involved in (Paragraph 8.4.d. of the Leniency Guidelines); and
- iv. the applicant shall not destroy any documentations related to the cartel and shall confirm that such documentations have not been destroyed prior to or during the period that leads to the conditional grant of leniency (Paragraph 8.4.e. of the Leniency Guidelines).

Nevertheless, the MyCC reserves its right to change the standard conditions or add other suitable conditions according to the specific situations of the application (Paragraph 8.5 of the Leniency Guidelines). The conditional grant of leniency shall become unconditional only upon fulfilment of all conditions by the applicant and after the MyCC has taken the infringement decision (Paragraph 9.1 of the Leniency Guidelines). Apart from that, among the appealing aspects of the offer in the leniency programme is that the potential applicant may ask for a 'marker' in order to preserve its priority in receiving leniency while an application is being prepared (Paragraph 5.6 of the Leniency Guidelines). The marker serves as a record of the priority, date and times, and the subject for which the enterprise plans to submit an application for leniency, and it shall stipulate the deadline for the enterprise to complete its application (Paragraph 5.8 of the Leniency Guidelines). The validity period of the marker is 30 days, effective from the date it is granted. Failure to complete the application by the deadline will cause the enterprise to lose the reserved priority (Paragraph 5.9 of the Leniency Guidelines). Nevertheless, the enterprise may ask for a new marker if it still plans to submit the application for leniency. Upon request, a marker will be issued for all subsequent applications for leniency. The MyCC reserves the right to extend the deadline provided that it is supported by a valid reason and such extension is up to the MyCC's discretion (Paragraph 5.10 of the Leniency Guidelines).

In summary, the leniency programme provides for a reduction of up to 100% of the fines and a marker for the purpose of reserving the priority for receiving leniency subject to certain conditions. The offers seem appealing and have the potential to reassure participants in the cartel to approach the competition authorities to admit and cooperate with the authorities in their effort to detect the existence of the cartel. However, there is no record of leniency applications made to date based on the MyCC's website. In addition, the data on the MyCC's website reveals that none of the six cartel cases which involved infringements was discovered through the leniency programme.

Referring the case number: No. 700.1.1.43.2017., leniency programme had been applied in the case by one of the cartel participants through section 41 of the CA 2010. The application was made on 19.12.2017. The application was presented before the MyCC but was dismissed because of the followings:

- a. the application was made at an advance stage of investigation and, by that time, the MyCC had already obtained most of the evidence required for investigation purposes; and
- b. the evidence shows that the applicant acts as an instigator thereby disqualifying from

immunity pursuant to paragraph 27 of the Leniency Guidelines.

This shows that the application for immunity from fines is subject to conditions as explained above. Nevertheless, it should be noted that in light of section 41(2) of the CA 2010, failure to get immunity does not deprive the applicant to apply for the reduction of less than 100% subject to the fulfilment of conditions as aforementioned.

6. Leniency Programme in the European Union

In the European Union (EU), matters concerning competition are dealt with by the EU Commission. The EU Commission is responsible for enforcing EU competition law which aims to make better EU markets, by ensuring that all business players compete fairly on their merits (EU Commission, 2017). Cartels are regarded as the barrier to competition and are therefore prohibited. This has been reflected in Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) in which it prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. In this paper, reference will be made to the practice of leniency programme in the EU. This is because the EU Commission has extensive experience in implementing the leniency programme. Notably, it has been described as a successful tool to discover and punish cartels (Jones & Sufrin, 2016). The EU Commission has firstly introduced the notice on the non-imposition or reduction of fines in cartel cases.³ Arbault & Pieró (2002) had described that 1996 Notice as an “*indisputable success*” and stated that the existence of a leniency policy has doubtless been a major contributor to increase of the Commission’s anti-cartel activity. It was reported that under the 1996 Notice, the EU Commission received 188 applications for non-imposition or reduction of fines and decided either not to impose fines or to grant a very substantial reduction (from 75% to 100%) or a significant reduction (50% to 75%) in 17 cases (Klimašauskienė & Giedraitis 2011). Despite its success, the 1996 Notice however, contained certain shortcomings that limited its effectiveness (Stephan, 2006). Having said that, it introduced some of the basic guidelines that would guide subsequent versions of the programme, such as the requirement for the cooperating company to cease its participation in the cartel, to maintain continuous and complete cooperation with the Commission (Borrell, Jiménez, & Ordóñez-de-Haro, 2015).

The following were the examples of shortcomings of the 1996 Notice. Firstly, the 1996 Notice did not guarantee complete immunity for the first undertaking to come forward with information about the cartel before the EU Commission has undertaken an investigation, ordered by decision (Jones & Sufrin, 2016). The 1996 Notice gave a discretion to the EU Commission either not to impose fines or to grant a very substantial reduction (from 75 % to 100 %) that would have been imposed if the cartel participants had not cooperated. Such wide discretion has made it difficult for cartel applicants to predict with certainty whether or not they qualify for full immunity. Secondly, the 1996 Notice deprived undertaking that had acted as an ‘instigator’ or played a ‘determining role’ in the cartel activity of the opportunity to benefit from that notice (Hoang, Hüscherlath, Laitenberger, & Smuda, 2014). The exclusion had discouraged spontaneous and early applications by cartel members which had a significant role in the cartel and feared that they would ultimately be excluded from the benefit of the 1996 Notice (Arbault & Pieró, 2002). Thirdly, the leniency would only be granted if the applicant was the “*first to adduce decisive evidence of the cartel’s existence*” (Section B of the 1996 Notice). The definition of ‘decisive standard’ was however lack of clarifications on what type of information that could fall under its meaning (Jones & Sufrin, 2016). As a result, failure to meet the standard will deny the possibility of obtaining immunity from fines that otherwise would have been imposed.

The Commission then reviewed the 1996 Notice and replaced the 1996 Notice with the improved Leniency Notice [2002] OJ C45/3 (2002 Notice) on 19th February 2002 with the aim of

³ [1996] OJ C207/4 (1996 Notice).

providing greater transparency and certainty (Van Bael, 2011).

The following were the examples of improvements that had been incorporated in the 2002 Notice. Unlike the 1996 Notice, the EU Commission will grant full immunity from fines to a first company to submit evidence under the 2002 Notice, in two circumstances (Section A of the 2002 Notice):

- a. to the first member of the cartel to inform the Commission of an undetected cartel by providing sufficient information to allow the Commission to launch an inspection on the premises of the suspected companies; or
- b. to the first member of the cartel to provide evidence that enables the Commission to establish an infringement, when the Commission is already in possession of enough information to launch an inspection, but not to establish an infringement. This type of immunity is available only in cases where no other cartel member has qualified for immunity under the first scenario.

In addition, under the 2002 Notice, the uncertain wording of decisive evidence was removed as many applicants were not entitled to immunity for insufficient evidence and was replaced by another evidence test which, in the opinion of the Commission, will enable it to conduct a targeted investigation (Stephan, 2008). Furthermore, immunity would also be granted after the investigation has been initiated, provided that the information held by the EU Commission was insufficient to establish an infringement, and only in cases where no other cartel member had qualified for immunity in the first scenario (Section A of the 2002 Notice). Furthermore, under the 2002 Notice, it replaced 'instigator' and 'determining role' with 'coercer' (Van Uytsel, & Bi, 2016). This was to encourage more cartel participants to come forward even if they would have been considered as the previous two to apply for full immunity so long as they do not coerce other undertakings to participate in an infringement (Van Barlingen, 2003). Reduction in fine for leniency applicant that came later with evidence of significant added value with respect to the evidence already in the Commission's possession was made predictable. The first company which provided evidence of significant added value with respect to the evidence already in the Commission's possession received a 30-50 % reduction in the fine which would otherwise have been imposed, the second successful applicant 20-30% and subsequent successful applicants will receive a reduction of up to 20%. Besides, the new feature of the 2002 Notice was the EU Commission will grant a written conditional immunity from fines in writing if the undertaking meets the conditions as required by the Notice (Stephan, 2008).

Although several rules appear to be relaxed but not in any way to show that the EU Commission has adopted a lenient approach to cartels but instead offers greater clarity and predictability which can lead to further cartel detection. This was confirmed by the EU Commissioner, Monti as follows:

This new Notice should not, in any way, be understood as reflecting a more lenient approach in the fight against price-fixing and other anti-competitive practices. On the contrary, the new policy will increase the likelihood that cartels will be detected which, together with the Commission's determination to impose fines at dissuasive levels, should deter companies from entering into collusive behaviour in the first place.⁴

Then the EU Commission again replaced the 2002 Notice with 2006 Commission notice on immunity from fines and reduction of fines in cartel cases (2006 Notice) aiming to improve transparency and to provide more guidance to leniency applicants (Centella & Suurnakki, 2007). The EU Commission had noted that it was not clear under the 2002 Notice as to what evidence should be provided in order to meet the immunity and this resulted in legal uncertainty (Van Bael, 2011). As such, the current leniency notice sets out a detailed list of information and evidence that the applicant should provide in order to qualify for immunity. Having said that, the list is not exhaustive. The list was added to increase the clarity and transparency of the procedure. Besides, the EU Commission had introduced a marker system to enable a leniency applicant to preserve its

⁴ Press Release, European Commission, Commission Adopts New Leniency Policy for Companies Which Give Information on Cartels (2012, February 13) (Press Release-IP/02/247).

position in the queue to apply for leniency by initially providing only limited information (Jones & Sufrin, 2016). Moreover, in contrast to the earlier Notices, leniency applicants are no longer required to immediately terminate its involvement in the infringement that might jeopardize the investigations (Stephan, 2008).

The revision of the Leniency Program in 2002 and 2006 showed an increase in the trend of applications for leniency. The EU Commission received 157 applications for immunity and 146 applications for reduction of fines from entry into force of the Notice on 14th February 2002 until the end of 2008. The policy to combat cartel through leniency programme in the European Union has, without doubt, been a great success. Evidently, the above statistics show that the leniency programme has been effective in making cartels more likely to be detected.

7. Recommendations

This paper recommends the following to ensure the attainment of the objective of the Leniency Programme. The recommendations will be discussed below.

7.1 *More certainty*

The MyCC may stipulate the fine reduction in percentages in exchange for the assistance provided by cartel applicants that do not qualify for 100% waiver. For instance, when the first, second and subsequent cartel applicants do not meet the criteria for immunity (EU Commission, 2016). This will provide more legal certainty and predictability. Therefore, the applicant can foresee the amount of fines that will be imposed by the MyCC after applying for the reduction.

7.2 *More flexibility*

Under the current scenario, the cartel member that introduces the cartel (the ring leader) is not eligible to apply for immunity from the fines. Similarly, the immunity from fines is not offered when the MyCC already has evidence in relation to the cartel. The paper recommends that the MyCC provides a wider scope for immunity eligibility so that the ringleader will also be eligible for the 100% fines waiver provided that it did not force others to participate in the cartel or even after the MyCC has commenced its investigation but has not found enough evidence of infringement (Uytzel & Ying, 2016; Oded, 2013). The justification is that the leniency programme was introduced to destabilise the cartel from within, and hence, application eligibility should be as wide as possible to encourage the cartel participants to approach the MyCC to inform about their activities, which will create strain and suspicion among the cartel participants.

7.3 *More incentive*

In order to ensure that the programme manages to entice the cartel participants, the MyCC may consider establishing a Cartel Informant Reward Programme to offer attractive cash rewards to any person who possesses information about cartels to pass the information to the authorities (Aubert, Rey, & Kovacic, 2006). The incentive will serve to increase the fear of discovery by the competition authorities and hence, there will be a race among the participants to apply for immunity offered under the leniency programme (Aubert, Rey, & Kovacic, 2006). This will increase the probability of cartel detection and help destabilising cartels (Miller, 2009).

7.4 *Zero Tolerance of accepting undertaking involving cartel cases*

The key success factor of the leniency programme is the fear of sanction (Stephan, 2008). The punishment against infringement must be severe enough to serve as an effective deterrence. The term 'deterrence', which means prevention, has both specific and general goals. The purpose of specific deterrence is to deter repeat offences by the participants in the future. Meanwhile, the general deterrence delivers the message to the public that the authorities will not tolerate

infringements and the participants will get harsh punishment. Therefore, it is recommended that the provision of section 43 of the CA 2010 in relation to the power to accept undertaking is not applied in cartel cases. This is because section 43 (2) of the CA 2010 allows the MyCC to close its investigation without making any finding of infringement and hence, the enterprise will not be subject to any fines (Haliza & Nazura, 2016).

8. Conclusion

Cartels are regarded as the most dangerous violators of competition and bring an adverse impact on the economy. Therefore, the authorities place high priorities on cartel detection and prevention. Nevertheless, it takes a lot of efforts to fight the cartels. One way to penetrate through the cartel is through the leniency programme, which extends benefits to both the cartel participants that obtain immunity against the fine and to the MyCC, which is able to penetrate through the secret cartels and gather proof regarding infringement. Therefore, the Leniency Programme has the primary aim of destabilising the cartel by giving incentives to enterprises to approach and collaborate with the competition authorities by giving them information about the cartel. Despite this, the MyCC's decisions which published on its website revealed that of the six cartels that were found to have committed infringement, none had been first detected through the leniency programme. Thus, it is hoped that the recommendations given above will make the leniency programme more attractive and can address the existing deficiencies in the programme so that it will attract the cartel participants in the future, leading to more cartel detection and better prevention. Through this way, it can promote better quality of goods and services, more choices and variety for consumers, more innovation as well as economic development and growth.

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