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Cartel leniency programmes in ASEAN: practical implications of seeking leniency



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To facilitate cartel prosecution, enforcement agencies have implemented leniency programmes that offer immunity or reduced penalties to cartel members that voluntarily admit their involvement and sufficiently cooperate with investigations.

This article provides an overview of the available leniency programmes in the member states of the Association of Southeast Asian Nations (ASEAN), and discusses the practical implications for companies seeking leniency from the region's competition authorities.

Four of the 10 ASEAN member states, namely Cambodia, Indonesia, Laos and Thailand, do not have formal leniency frameworks. While Indonesia and Thailand have mulled over reforms to introduce

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leniency programmes, the status of those proposals remains unclear. Cambodia has yet to pass its draft law on competition.

Two of the remaining six ASEAN member states with leniency frameworks disqualify a cartel's most active participants from leniency. In Myanmar, cartel ringleaders cannot benefit from leniency while Vietnam denies leniency to any member that coerced or arranged for others to participate in the cartels.

In Brunei, Malaysia, Philippines and Singapore, the 'marker system' is a common feature. Marker systems allow cartel members to apply for leniency before they have all the evidence necessary for a successful application. Such informants will receive markers that reserve their priority in the leniency queue while they gather information. Upon sufficient cooperation within a certain deadline, the marker will be perfected. Priority is significant as it determines whether leniency may be granted and the level of penalty reduction.

A summary of the leniency frameworks adopted by the six ASEAN member states below shows the nuances and varying levels of clarity surrounding their operation.

Brunei

The Competition Commission Brunei Darussalam (CCBD) retains broad discretion to decide on an applicant's appropriate penalty discount under its issued guidelines. Beyond stating that a successful applicant that brings an anticompetitive agreement or cartel to the attention of the CCBD can be eligible for 100 percent immunity, guidance on any reduction below 100 percent or varying tiers of discounts remains limited.

Malaysia

The Malaysia Competition Commission's (MyCC) policy is to grant 100 percent immunity to the first successful applicant, although applicants that initiated the cartel or coerced others to take part, while eligible for leniency, are not eligible for full immunity. For any reduction less than full immunity, the MyCC has not discussed specific tiers or percentages, choosing to reserve its discretion to broadly consider factors such as the stage of investigation, the informant's marker priority and the value of the information provided.

Myanmar

Myanmar's competition rules provide that the courts will only afford leniency to five companies in a single case. If information is provided before an investigation, the rules clearly indicate that the first company may receive a 100 percent reduction if it provides sufficiently complete evidence or an 80 percent reduction if it only supplies supporting proof. The second company is eligible for up to a 50 percent reduction and the cap for the third, fourth and fifth companies is 30 percent. However, if information is only offered during investigations, a maximum of three companies are eligible and each may only receive a reduction of up to 30 percent. In all cases, leniency cannot be offered to a cartel's ringleader or to companies that only cooperate after the investigation.

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While Myanmar's rules offer a degree of clarity on paper, it is unclear how the rules will be enforced in practice considering the Myanmar Competition Commission's relatively limited track record of enforcement since its establishment in 2018.

Philippines

Under the Philippine Competition Commission's (PCC) leniency rules and guidelines, leniency applicants can fall into one of eight categories, based on the following three factors: (i) the applicant's role in the cartel; (ii) the company's marker priority; and (iii) the stage of investigation when the applicant requested a 'marker'. For example, an applicant will only be eligible for up to a 25 percent reduction of fines if it was a leader in the cartel, holds the second marker and where it only submitted its marker request after the start of a preliminary inquiry. In contrast, a mere participant in a cartel can be entitled to full immunity if it has the first marker and submits its marker request before the start of a preliminary inquiry.

While leniency is limited to fines and penalties in Brunei, Malaysia, Myanmar, Singapore and Vietnam, full immunity in the Philippines can also mean immunity from criminal liability and civil suits initiated by the PCC on behalf of affected third parties.

Singapore

Under Singapore's marker system, the first company that comes forward before an investigation has commenced is conditionally entitled to full immunity; all subsequent applicants may only receive up to a 50 percent reduction. Full immunity is strictly discretionary if an investigation had already commenced. Regardless of priority, companies that initiated the cartel or coerced others to participate may only reduce their penalties by up to 50 percent.

The Competition and Consumer Commission of Singapore (CCCS) is the only ASEAN authority that has published cases illustrating the operation of its leniency framework. Unique to Singapore is the 'leniency plus' programme where an informant can obtain a reduction in penalties for participating in one cartel by supplying information on an entirely separate cartel, which incentivises leniency applicants to surface other cartels in which they are involved.

Vietnam

Under Vietnam's Law on Competition, leniency only applies to the first three successful applicants that, in order of priority, may receive up to a 100 percent, 60 percent and 40 percent reduction in penalties. Cartel members that coerced or arranged other firms to participate cannot receive any leniency. It remains to be seen how Vietnam's leniency framework would operate as the authority taking over the Vietnam Competition and Consumer Authority, the National Competition Commission, has yet to be fully established.

Practical implications

Apart from timing leniency applications across relevant jurisdictions (as often the first applicant enjoys full immunity or a 100 percent reduction in penalties), businesses involved in multinational cartels which are considering applying for leniency should be mindful that

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choosing to blow the whistle in jurisdictions which have leniency programmes may result in them being penalised in jurisdictions without leniency programmes, especially when decisions on the cartel conduct are published eventually.

As leniency programmes differ across jurisdictions, leniency applicants may face different levels of exposure to penalty in various jurisdictions. Apart from considering the availability of leniency programmes and possible reduction in penalties in affected jurisdictions, businesses should also consider whether oral proffers are accepted by the relevant competition authorities to limit the production of documents to the authorities and, correspondingly, discovery of certain information or documents by private litigants. Immunity from penalties does not confer upon applicants an immunity from private actions by persons who suffer loss or damage from the cartel.

Similarly, businesses considering applying for leniency should also take into account the availability of legal privilege protection in the relevant jurisdictions to assess the information they would need to produce to the authorities, as such documents may eventually be subject to discovery in a private claim.

Finally, it is important to note that leniency applicants may be required to grant a confidentiality waiver to authorities to share information and documents with other authorities to which the conduct has been reported. The exchange of information and documents between authorities, especially where physical documentation or legally privileged documents must be produced, may increase the risk of discovery of the documents and information in private claims.

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