Competition & Antitrust and Trade

Leniency Applications – Important Dos and Don'ts

Introduction

Cartel conduct or anti-competitive agreements in general remain in focus as enforcement priorities for competition regulators around the world. The Australian Competition & Consumer Commission's ("**ACCC**") set of 'enduring priorities' includes cartel conduct and anti-competitive agreements, and the UK Competition and Markets Authority ("**CMA**") stated in its Annual Plan for 2020/2021 that priority compliance issues include the prevention of business cartels. Closer to home, the Competition & Consumer Commission of Singapore ("**CCCS**") (or Competition Commission of Singapore, as it then was) had stated since 2014 that its enforcement priority is clear and consistent – it focuses on anti-competitive practices and takes an especially strict stance against collusive activities such as price fixing and price recommendations.

Despite the continued spotlight on cartels and regulators' increasing tendency to impose large fines, there was a period when leniency applications dropped. One reason for this could be the dreaded third-party actions that are subsequently commenced again cartel participants. Slowly but surely leniency applications appear to be creeping back in with businesses involved in cartel activities inclined to submit leniency applications. This is particularly so where a competition commission commences or is on the verge of commencing investigations.

The rationale for submitting a leniency application and why businesses may be persuaded to do so even by a competition regulator is because leniency programmes run by competition regulators offer potential immunity against financial penalties and even criminal liability in certain jurisdictions for cartel behaviour and/or other competition violations.

Given the potential benefits of a leniency application, it is highly recommended whether a business is small or large. A review of just Singapore cases reflects that apart from international cartels, the CCCS has penalised a number of small business, be it in electrical works, maintenance, swimming pools, and more. Yet, businesses should not treat leniency applications as a default solution without carefully weighing its pros and cons. Some critical questions which are often left unanswered by leniency applicants include whether there is truly a cartel in place, the chances of securing immunity as the first leniency applicant (or one of the first leniency applicants), the indirect costs of exposing a cartel in favour for leniency, and the alternative options to leniency.

In this Update, we highlight some hidden pitfalls and identify specific dos and don'ts that businesses must keep in mind before proceeding with leniency applications.

Do – Undertake careful legal analysis to determine if there is a cartel

Cartel conduct such as agreements to fix prices must be distinguished from regular business association meetings. While businesses should always avoid discussing commercially sensitive information at such meetings, they should not be hasty in concluding that a violation has occurred and submit leniency applications on that basis without first undertaking a careful legal analysis.

Often, the line between the two can be very fine as the alleged cartel conduct are concerted practices arising from informal co-operation and silent understanding, rather than express agreement to coordinate market behaviour. Where no meeting minutes are kept, which is often the case for informal business meetings, regulators may rely on post-meeting market behaviour and other indirect evidence to prove that discussions during such meetings led to the participants' coordinated behaviour.

If it is unclear whether certain discussions amounted to or led to cartel behaviour, it is not advisable to submit a leniency application with vague or general information simply for the purpose of reserving a marker in the leniency queue. Such information can cause other evidence to be (perhaps wrongly) interpreted as proof of cartel conduct and contribute to the finding of a violation that otherwise would not have been proven based on the regulator's self-initiated investigations. As explained by the CCCS in its *Infringement Decision on Section 34 Prohibition in relation to the sale and distribution of fresh chicken products in Singapore* (CCCS 500/7002/14) and subsequently by the Competition Appeal Board ("**CAB**") on appeal in *Re Market-Sharing and Price-Fixing in Sale and Distribution of Fresh Chicken Products in Singapore: Gold Chic Poultry Supply Pte. Ltd. and others* [2020] SGCAB 1 (the "**Chicken Cartel Case**"), even vague and unparticularised statements can in certain cases tip the balance of probabilities towards finding a violation depending on the nature of investigations and circumstantial evidence.

Given the complexity of the legal principles involved in establishing cartel conduct, businesses are encouraged to consult legal counsel before deciding whether to proceed with a leniency application.

Do – Assess if the potential immunity or reduction in financial penalties outweigh the risks

A leniency application should be made on the basis that the expected immunity from or reduction in penalties outweighs the risks associated with revealing a cartel that may otherwise have avoided review. While businesses are often optimistic about the benefits of a leniency application, they will not reap the expected benefits unless, amongst others, the application is submitted in a timely manner with all necessary information provided.

Typically, leniency programmes only provide full immunity to the first applicant who provides evidence of cartel activity before any investigations have commenced, and on the condition that the regulator does not already have sufficient information to establish that cartel activity. Later applicants, or those

that initiated or coerced others into participating in the cartel, are not eligible for full immunity. This is the policy in Singapore, UK, Malaysia (policy to grant 100 percent reduction for first applicant) and Australia, amongst others.

Thus, when assessing the benefits of a leniency application, businesses must understand the role they play in the alleged cartel and whether it has or will have the information required to obtain leniency. In this regard, while most leniency programmes allow the applicant to obtain a marker in the leniency queue before submitting the relevant information, it must provide such information within the time stipulated by the regulator to secure its position in the queue. In Singapore, potential applicants should also consider sending anonymous "feelers" to CCCS to get an idea of their position in the leniency queue (the opportunity to do so is expressly provided under paragraph 5.3 of the CCCS Guidelines On Lenient Treatment For Undertakings Coming Forward With Information On Cartel Activity 2016). Of course, such preliminary contact with the CCCS must be carefully calibrated to avoid giving out too much information before making the final decision on whether to submit a leniency application.

Don't – Overlook the indirect costs of submitting a leniency application

Even assuming that the applicant is first in the leniency queue, it is important to understand that immunity from the regulator does not protect one from all forms of liability – there are indirect costs such as potential private litigation to recover losses suffered as a result of the cartel, compliance costs to meet the requirements of the leniency programme, and the risk of revealing cartels in other jurisdictions.

In Singapore, under Section 86 of the Competition Act (Cap. 50B), third-parties which have suffered direct losses as the result of a cartel (or prohibited abuse of dominance or merger) may obtain injunctions, declarations, damages and any other relief as the court deems fit after an infringement decision has been finalised. Under Section 6 of the Consumer Protection (Fair Trading) Act (Cap. 52A) ("**CPFTA**"), consumers may also sue for damages arising from unfair practices. Section 4 of the CPFTA explains that unfair practices include taking advantage of a consumer when the supplier knows or ought to know that the consumer is not in a position to protect its own interest. It is foreseeable that a private right of action under CPFTA can arise from facts revealed in cartel (or other competition law) infringement decisions, especially where price fixing or bid rigging is involved. As cartel infringements gain more press attention, the risk of private action increases and must be formulated into the potential applicant's decision-making process.

In addition, one common condition in cartel leniency programmes is for the applicant to maintain continuous and complete co-operation throughout the regulator's investigation. This may require the applicant to devote significant manpower and resources to obtain and submit information and documents to the regulator. To put this obligation into perspective, CCCS' investigations for the Chicken Cartel Case took over four years, and such durations are the norm rather than the exception for international cartel investigations. Where multiple countries are involved, the process can be longer. Business must consider whether the benefits justify the dedication of such resources.

Lastly and crucially, a leniency application made in one jurisdiction will inevitably reveal the same or associated cartel (if any) in other jurisdictions. Even as the assessment is made from a Singapore law perspective, it is necessary to also consider where the activities of business reach out to as the competition laws of other countries may potentially have been violated as well. In such instances, whilst being a first applicant in Singapore, the business may not have first priority in other countries, a factor that requires careful consideration and planning before a decision is made. Potential applicants must consider the cost of leniency applications in all affected jurisdictions, including possible implications on its parent, sister, or subsidiary companies in those jurisdictions. Discussions with experts on this front is highly recommended.

Don't – Neglect other alternatives

Leniency applications are not the only option when a business discovers that it could be involved in cartel behaviour. Depending on the risk of self-initiated investigations by the regulator, which can be influenced by many factors such as the number of participants in the alleged cartel and visibility of the industry (e.g. past enforcement decisions), it may be more cost effective to simply rectify any potential breaches of competition law internally and set up procedures to avoid violation in the future.

Concluding Words

All said, leniency applications are great risk mitigation tools for managing violations as they offer a myriad of benefits. Apart from corporate immunity, leniency applications can also help directors and officers isolate themselves from conduct which they did not sanction and do not wish to be personally liable for. In some jurisdictions such as UK and Australia, individual immunity against disqualifications or civil liability may also be granted under leniency programmes.

However, leniency applications must only be undertaken when there is sufficient confidence that the benefits will outweigh the costs. To do so, businesses must not only have a good grasp of competition law principles, but also the ability to craft a strategic approach based on ground knowledge of actual enforcement activities and priorities of competition regulators around the world. If your business is potentially involved in a cartel or is otherwise interested in making a leniency application, please do consult an experienced in-house or external counsel before doing so.

Should you have any concerns or questions on competition law or leniency applications, please feel free to reach out to our team below whether the issue is as regards Singapore or further afield.

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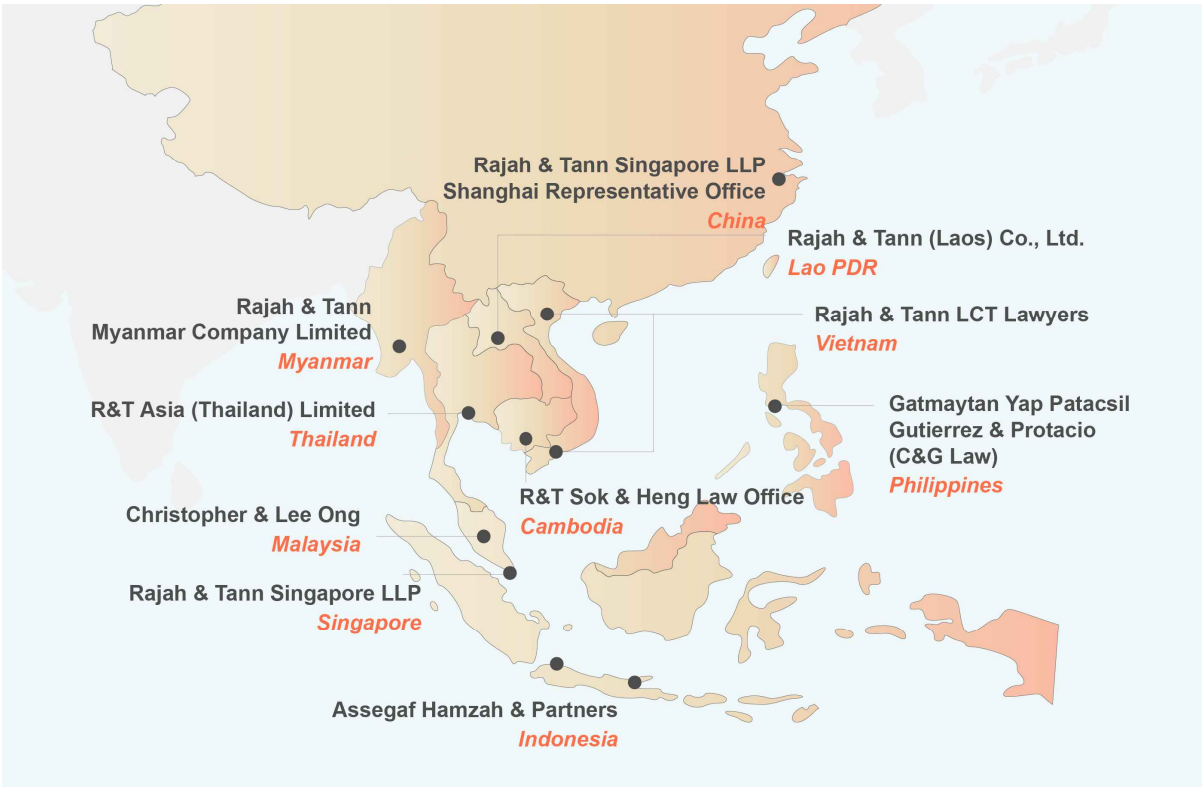

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