

ECONOMICS WORKING PAPER

The Leniency Programme in Malaysia's Competition Regime: A Critical Evaluation

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Abstract

Malaysia's competition law came into force in January 2012. Detailed guidelines on a leniency programme were published in October 2014. Despite the leniency programme being designed based on best-practices found in more mature competition regimes and ICN, it has been under-utilised in the cartel cases investigated in Malaysia. This under-utilisation of the programme could be due to the enforcement agency having too much discretionary powers. Another reason could be the lack of immunization from civil proceedings. De-facto government oversight and spillover from deterioration in the country's state of governance in the past could also have affected the public's perception of quasi-independent commissions. This is reflected in the perceptions of the business community on courts and corruption in the country.

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1. Introduction

Cartel activities - which include coordinated efforts to restrict competition by fixing prices, allocating market share and preventing market entry - are legally prohibited in many competition law regimes. Historically, such activities can be very difficult to detect and prosecute. Due to their illegality and the harsh sanctions against them, cartel activities are often undertaken in secrecy to avoid any public scrutiny and attention from competition authorities. Since the 1990s, leniency programmes have become an important tool for competition agencies to tackle cartel activities. Such programmes have proven to be effective in some countries that have implemented them. However, a leniency programme is, in itself, not a sufficiently effective tool to combat cartel activities. A number of factors could affect the efficacy of such a programme. These may include the internal design of the leniency programme *per se* such as the incentives offered to participants. External factors such as the sanctions on cartel activities, the independence of competition agency and the political climate could also affect the utilization of a leniency programme.

For a relatively newly-established competition regime, such as the one in Malaysia, being a latecomer in competition law implementation can be advantageous due to the opportunities to learn from the experiences of more mature competition agencies. This includes the design of leniency programmes. However, there might be other factors that could diminish the efficacy of its leniency programme due to its domestic institutional environment. Malaysia's competition law was gazetted in 2010 and the country's competition agency began implementing its leniency programme in 2014. Even though the guidelines have been in existence for close to four years, there is little information and study on whether the leniency programme in Malaysia's competition regime has been effective or not. This study aims to fill this knowledge gap by examining and critically evaluating the programme in Malaysia.

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The outline of this study is as follows. Section 2 will provide a background on the cartel provisions and leniency programme in Malaysia's competition regime. Section 3 will examine the design of the country's leniency programme by comparing it with best-practice standards and research literature. Section 4 will look at how politics and institutions can affect the effectiveness of the programme. Section 5 provides some evidence on the business community's perception of the quality of institutions in Malaysia in terms of courts and corruption. Section 6 concludes.

2. Cartel Provisions and Guidelines on Leniency in CA2010

Malaysia is, relatively, a newcomer to competition law.² The country's competition law, the Competition Act 2010 (CA2010), was gazetted in June 2010 and came into force in January 2012. The enforcement agency for the CA2010 is the Malaysia Competition Commission (MyCC) which was established with the enactment of the Competition Commission Act 2010 (CCA2010). The MyCC began its operations in June 2011.

2.1 Cartel Provisions in the Competition Act

Cartel activities are prohibited under Section 4 of the CA2010. The section states that a horizontal agreement between enterprises that has "the goal or effect significantly preventing, restricting or distorting competition" is legally prohibited (see **Box 1**). The list of cartel activities that are prohibited under the Section 4(2) includes price fixing and allocation of market shares. In addition, Section 4(2) also covers activities that limit or control other aspects of business activities such as production, market access, technological development, investment and bid rigging.

The prohibition against cartel activities is not *per se* in nature. Section 5 of the CA2010 provides circumstances in the infringement of the prohibition can be relieved. These include: (i) the existence of significant identifiable technological, efficiency or social benefits; (ii) benefits that could not reasonably have been provided by the parties to the agreement without the agreement; (iii) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and (iv) agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services. In addition,

² For a history of competition law and policy in Malaysia, see Lee (2005) and Lee (2014).

the circumstances stated in Section 5 can also lead to individual exemption (Section 6) or block exemption (Section 8).

Box 1: Section 4 of the Competition Act 2010 - Prohibited Horizontal and Vertical Agreement

4. (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 -
- (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.
- (3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

2.2 Cartel Procedures

The investigation and enforcement procedures for cartel activities are similar to those found in other competition regimes. It begins with an investigation by the MyCC. If MyCC is convinced that a case can be made, it issues a proposed decision. The targeted enterprises are then given time to make written representation to MyCC. The MyCC then follows this up with an invitation to the targeted firms to make an oral representation. Once this stage is completed, the MyCC issues a decision which includes sanctions. The targeted enterprise can make an

appeal to the Competition Appeal Tribunal, which will then conclude the process by making a judicial review.

2.3 Sanctions on Cartels

Sections 40 and 61 of the CA2010 provide the general sanctions for the infringement of the Act (including cartel activities).

Section 40(4) states that the financial penalty imposed on enterprises that have infringed the Act should not exceed ten per cent (10%) of its worldwide turnover over the period during which an infringement occurred. The ceiling for financial penalties are provided in Section 61 of the Act which states that if the offender is a corporate body, the fine is:

- (i) For the first instance – a fine of up to but not exceeding five million ringgit (about US\$1.2 million), and
- (ii) For subsequent offences - a fine up to but not exceeding ten million ringgit (US\$2.4 million).

The corresponding fines for non-corporate bodies are:

- (i) For the first instance - a fine up to but not exceeding one million ringgit or to imprisonment for a term not exceeding five years or to both, and
- (ii) For subsequent offence - a fine not exceeding two million ringgit or to imprisonment for a term not exceeding five years or to both.

The financial sanctions were further clarified with the publication of the *Guidelines on Financial Penalties* in November 2014. In the Guidelines, two key objectives guide the determination of financial penalties, namely: (i) the seriousness of the infringement; and (ii) deterrence of anti-competitive act. The computation of the financial penalty is determined by nine factors, namely: (i) seriousness of infringement; (ii) turnover; (iii) duration of infringement; (iv) impact of infringement; (v) degree of fault; (vi) role of enterprise; (vii) recidivism; (viii) existence of compliance programme; and (ix) penalties imposed in similar cases. Finally, the amount of financial penalty paid by enterprises can be reduced if they are granted leniency for cooperating with MyCC. This is discussed next.

2.4 Leniency Programme

The leniency programme in Malaysia's competition regime is incorporated in Section 41 of the Competition Act 2010 (see **Box 2**). The two key features of the provisions on leniency are:

(i) the maximum reduction of any penalties is one hundred per cent (100%), and (ii) there are no limits on the number of enterprises that can be granted leniency. The actual percentage of penalty reduction depends on the enterprise(s) – the order in which an enterprise comes forward to cooperate with MyCC, and the stage of the investigations. Section 41(2)(c) provides further flexibility to MyCC on what other circumstances are relevant – which certainly can include bringing to its attention infringement that were not previously detected.

The Guidelines on Leniency Regime was published by MyCC in October 2014 to provide further clarification and guidance on its leniency programme. A key emphasis of the Guidelines is that the enterprise(s) seeking leniency can only do so after it has admitted infringement of the Act. It also emphasized on the importance of the significance of assistance provided by the enterprise(s) seeking leniency. The MyCC retains flexibility in interpreting the significance of the cooperation. Another key feature of the leniency regime programme highlighted in the Guidelines is that enterprises that initiated the cartel (i.e. ring leaders) or/and coerce other enterprises to participate in the cartel activity are not eligible for 100% reduction in financial penalties (item 2.7). The Guidelines also provides detailed information on the marker system used.

In terms of reduction in financial penalties, the Guidelines provides a clearer picture of who is eligible for such leniency. Such an enterprise would be one that has admitted involvement in a cartel that MyCC has no knowledge of (item 3.4). However, the Guidelines does indicate that MyCC can give 100% penalty reduction in other circumstances (item 3.7) – which can be interpreted to include cases under investigation (rather than unknown cartels), especially at the early stages (item 3.9). “Other circumstances” could also involve cooperation that would enhance successful investigation and prosecution. This is clarified in item 8.1 which states that the granting of leniency is initially of a “conditional” nature. The grant of leniency become unconditional only if all the conditions of the conditional grant of leniency are met and infringement decision is made. The conditions for the grant of conditional leniency is fairly exhaustive (item 8.4 of the Guidelines). These include: admission of involvement in infringement; provision of significant assistance; cease and desist of infringing activities; full-disclosure of cartel participation; continuing cooperation with MyCC; cease from destroying relevant documents; non-harassment and non-intimidation of others to participate in cartel; and non-disclosure of leniency grant.

Box 2: Section 41 of the Competition Act 2010 - Leniency Regime

41. (1) There shall be a leniency regime, with a reduction of up to a maximum of one hundred per cent 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.

(2) 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;
- (c) any other circumstances which the Commission considers appropriate to have regard to.

Finally, it should be noted that the granting of leniency to an enterprise does not immunise the enterprise from civil proceedings by parties which suffered from the act of infringement. This implies that any admission of infringement and cooperation may reduce financial penalties, but this may be off-set by losses from civil proceedings. Thus, the lack of immunization from civil proceedings for enterprises involved in leniency programme may deter enterprises from participating in the programme.

2.5 Cartel Cases and the Operation of Leniency Programme in Malaysia

Since the CA2010 came into force in January 2012, there have been a total of seven cases involving the infringement of Section 4(2) with proposed decision and decision (see **Table 1**).

As mentioned earlier, detailed guidelines on MyCC's leniency programme were only published in October 2014, more than two and a half years after CA2010 came into force.

Thus, the first two cartel cases are unlikely to involve the use of the leniency programme. For the remaining five cases, based on publicly available information, leniency application was noted in only one case involving price fixing by seven tuition and day-care centres. The utilisation of leniency programme for each of these five cases are discussed based on public documents from MyCC.

- (i) Price fixing by ice manufacturers (2015). A total of 24 enterprises were involved. Of these, reduction on financial penalties were given to 11 enterprises for cooperating with MyCC by providing additional information. There is, however, no indication that the reductions in financial penalties were due to leniency.
- (ii) Price fixing by Sibu Confectionery and Bakery Association. Fifteen firms were involved but no reductions due to leniency were documented. There were reductions in penalties for a few enterprises, but those were due to enterprises not increasing their prices.
- (iii) Price fixing by an information technology service provider and four container depot operators. No reductions in financial penalties by MyCC were documented in this case. This implies that leniency was not granted to any of the firms.
- (iv) Price fixing by 22 enterprises in the insurance industry. This case is pending decision by MyCC. As the infringement decision has not been issued, there is no information on whether conditional leniency was granted.
- (v) Price fixing by seven tuition and day-care centres. The final infringement decision has been issued. One of enterprises did apply for leniency. However, this application was rejected by MyCC on two grounds: (i) the leniency application took place at the advanced stage of investigations and made no significant contribution to the investigations; and (ii) the applicant was an instigator to the price fixing agreement.

To sum-up, based on the available information, the leniency programme has not been utilized much in cartel cases in Malaysia. There is only one recorded case of leniency application in the cartel cases and that, too, was rejected. The under-utilization of the leniency programme in cartel cases in Malaysia leads to the question of whether this is due to the deterrence effect or whether there are any deficiencies in the design of the programme or other external factors that compromise its efficacy. Deterrence reduces the number of cartel activities (see Frederic Jenny's foreword in Beaton-Wells and Tran, 2015). Most of the cases investigated under Section 4(2) were initiated by media reports. In the case involving leniency application, investigations were initiated by complaints by a customer (buyer). Given that all

the cartel cases were not detected by the use of leniency programme, it is unlikely that the leniency programme has had a deterrence effect on cartel activities. The issue of design of leniency programme is examined in the next two sections.

Table 1: Cases with Decision under Section 4(2) of Competition Act 2010

Date of Decision	Section	Case	Status
6 Dec 2012	4(2)(a)	Cameron Highlands Floriculturist Association Penalty: RM20,000 if CHFA fail to undertake remedial actions	Decision issued
31 Mac 2014	4(2)(b)	Malaysian Airline System Berhad, AirAsia Berhad and AirAsia X Sdn.Bhd. Penalty: RM10 million (The Competition Appeal Tribunal set aside the penalty on 5 Feb 2016)	Decision issued but appeal successful
30 Jan 2015	4(2)(a)	Twenty four ice manufacturers in Kuala Lumpur, Selangor, and Putrajaya Penalty: RM283,600	Decision issued
12 Feb 2015	4(2)(a)	Fifteen members of the Sibiu Confectionery and Bakery Association Penalty: RM247,730	Decision issued
1 June 2016	4(1), 4(2)(a)	One IT service provider and four container depot operators Penalty: RM645,774 (Note: Appeal by Prompt Dynamics Sdn Bhd was dismissed on 3 March 2017)	Decision issued
16 Oct 2017	4(2)(a)	General Insurance Association of Malaysia and its 22 members. Penalty: RM213.45 million	Oral representation
8 Feb 2018	4(2)(a)	Seven tuition and day-care centres Penalty: RM33,068.85	Decision issued

Source: Author's compilation based on MyCC public statements.

3. Analysing the Design of Malaysia's Leniency Programme

In the literature on leniency policy, the two developments that are generally regarded as significant advancements in leniency policy implementation are: the US Department of Justice's revision of its leniency programme in 1993; and the European Commission's introduction of its leniency programme in 1996. The EC's programme was subsequently revised in 2002. Both these two developments provided the momentum for other countries to adopt their own leniency programmes. The work of the International Competition Network (ICN) was also crucial in assisting competition agencies in designing their leniency

programmes. ICN, for example, came up with the Anti-Cartel Enforcement Manual in 2009 (revised, 2014) with a chapter on best practices in the drafting and implementation of leniency policy. These developments, without doubt, influenced the design of Malaysia's leniency programme. This is clear from a comparison between ICN's (2014) recommendations and MyCC's leniency programme. One example is the best practices on the marker system in the ICN Manual. Most of these best practices are found in MyCC's leniency programme.

It might, therefore, be useful to perhaps analyse MyCC's leniency programme from the perspectives of ICN's Manual. The ICN Manual (2014, sub-section 2.3, pp.5-6) lists out three elements that are important prerequisites for an effective leniency policy. How does MyCC's leniency programme compare with the best practices outlined by ICN (2014)?

The first prerequisite relates to the credibility of the competition agency in terms of its commitment and ability to detect and prosecute cartels. However, there is some endogeneity here as the performance of a competition agency in terms of detecting and prosecuting cartels depends partly on the efficacy of leniency policy. MyCC has clearly developed some credibility in enforcement as it has issued decisions in six cartel cases in the past six years. However, most of these cases have involved relatively small financial penalties – with the exception of the MAS case (which was reversed by the Tribunal) and the insurance case (which is still pending).

The second prerequisite is that the sanctions imposed must be substantial enough (ICN uses the term significant) to make leniency attractive to cartel members. The financial penalty for infringement under the CA2016 and MyCC's Guidelines is 10% of total revenues up to a maximum of RM5 million. The 10% threshold is similar to the financial penalty under EU's competition regime. However, given that the size of Malaysia's domestic market is smaller than that of the EU and the US, the RM5 million ceiling could be significant and sufficient.

Finally, the third prerequisite is transparency and certainty in the operation of the leniency policy. The degree of transparency and certainty of MyCC's leniency programme is unclear. The procedures as outlined by its Guidelines are fairly detailed but the agency retains substantial discretion in implementing its leniency programme (see earlier discussion). Such discretionary powers, whilst providing some flexibility, may create uncertainties. However, such uncertainties can be reduced over time if MyCC is able to demonstrate – through effective enforcement - the value of the leniency programme. Thus, building-up a credible enforcement reputation is absolutely essential.

Beyond these broad assessments of Malaysia's leniency programme, there are other more specific elements of the programme that might be compared to findings from the theoretical and empirical research literature on optimal leniency programme. However, as noted by Spagnolo (2008), the theoretical literature does have limitations that arise from the need to make restrictive assumptions for tractable models of optimal leniency policy. Nevertheless, such models are still useful to highlight how specific elements of leniency programme work. These elements are discussed below.

Chen and Rey (2013) argue that it is optimal to offer leniency before and after investigations have begun (especially when the prospects of successful prosecution are significantly enhanced by it). In the latter case, the offer of leniency should only be made to the first informant. This is because the reductions in expected penalty for the first informant exceed any penalty reductions that can be secured before investigations begin. Subsequent informants – who will receive lower penalty reductions, may not be sufficiently incentivised to report. Malaysia's leniency programme departs from this theoretical finding as it offers leniency to not only the first reporter, but others as well. However, it is difficult to say whether doing so is sub-optimal because the value of subsequent leniency applications (to MyCC) may lie in the additional information that is needed to prosecute a cartel. This is covered in EU's leniency policy as well (Spagnolo, 2008, p.281).

Another element that is discussed in the theoretical literature is the treatment of ring-leaders. MyCC's guidelines on leniency state that cartel ring leaders are not eligible for 100% reduction in financial penalties. As noted by the ICN Manual (2014, p.9), this feature can be found in some leniency programmes in some countries. The theoretical literature on optimal leniency programme does not provide a definitive answer to the question of whether excluding the ring leader from 100% leniency is a good practice or not. Kobayashi (1992) work on plea bargaining imply that ring leaders tend to have the most information on cartels. Therefore, they should be incentivized to defect (apply for leniency) in order to maximize the probability of successful prosecution of cartels. However, as noted by Spagnolo (2008, p.282), ring leaders are also the parties that benefit from the cartel and lose the most from defecting. The cost-benefit calculus for ring leaders to defect is likely to be affected by at least a number of factors: (i) the share of gains enjoyed by the ring leader in the cartel; (ii) the distribution of information amongst cartel leaders; and (iii) the penalties incurred if prosecution is successful.

Finally, MyCC's leniency guideline specifically states that the leniency programme does not immunize a successful applicant of leniency from civil proceedings (under Section 64 of the CA2010) initiated by individuals who have suffered from the infringement. The lack of such immunization from civil proceedings could reduce the incentives for enterprises to participate in the leniency programme.

To sum-up, the leniency programme in Malaysia does not appear to be under-utilized in the cartel cases that have been investigated by MyCC. Drawing from best-practices as well as research literature, there could be a number of reasons underlying this situation. Another possibility that is important but often taken as exogenous in the research literature is the political and institutional environment. This is explored next.

4. Effectiveness Leniency Programme in Malaysia: The Role of Politics and Institutions

It is possible that the efficacy of a leniency programme may also depend on political and institutional environment. In the literature on the judiciary and politics, for example, there are links between politicians and judges. For example, politicians may be involved in the selection, promotion and disciplining of judges (Jacob, et. al. 1996).

From an institutional perspective, the MyCC is formally (de jure) an independent regulatory agency established through the Competition Commission Act 2010 (CCA2010). It is however de facto quasi-independent due to a number of factors. First, it receives an annual financial allocation from the Government of Malaysia. This allocation amounted to RM4.5 million or 75% of its total income in 2016. Second, under the CCA2010, all members of the Commission are appointed by the Prime Minister upon the recommendation of the Minister of Domestic Trade and Consumer Affairs. At present, four of the nine commissioners of MyCC are senior bureaucrats from ministries.

The influence of politics on independent regulatory commissions in Malaysia can be seen from how political changes can bring about changes in these regulatory commissions. Barisan Nasional (BN) – the ruling coalition party which has ruled since Malaysia achieved independence in 1957 was defeated in the country's general elections on 9th May 2018. This political change was to be followed by changes in the leadership of independent regulatory commissions or in some cases, the closure of such commissions. In the case of MyCC, its former commission chairman (appointed in April 2017 for a three-year term), who was a

member of parliament under the BN government, was replaced on 5 September 2018. There are also plans to abolish another regulatory commission, the Land Public Transport Commission. These developments do suggest that the appointment of regulatory commissions (at least in the past) are not politically-neutral. Otherwise such appointments would have been robust against changes in political regimes.

Has the quasi-independence of MyCC affected the design and implementation of its leniency programme? This is a difficult question to answer. The structure of its leniency programme does follow many of the best practices as encapsulated in the ICN Manual and the leniency programmes in other countries and regions (e.g. EU's leniency programme). Thus, it is unlikely that the MyCC's quasi-independent status has compromised the design of its leniency programme.

Given the close nexus between politics and regulatory commissions in the country, the public perception of the credibility of these commissions could be affected by the overall state of governance in the country. One related and important area of governance is anti-corruption. The Whistleblower Protection Act 2010 (WPA2010) plays a similar role as leniency in competition law. In the case of WPA2010, Section 7(1) of the Act provides immunity to whistleblowers from civil and criminal proceedings. The enforcement agency for anti-corruption in the country is the Malaysian Anti-Corruption Commission (MACC) which was established through the MACC Act 2009. The significance of whistleblowing can be seen in **Table 2** which provides a summary of MACC's enforcement statistics from 2013-2016.

The statistics in **Table 2** indicate that the number of whistleblowers in Malaysia is very small. The number of whistleblowers accounts for less than one per cent of the total information received on corruption. This could be attributed to at least two key weaknesses in the WPA2010 (Leong, 2017). This include the oversight role played by the minister and the potential for ministerial intervention in the implementation of the Act. In addition, the Act also applies to cases where the disclosure of improper conduct may be prohibited by other laws, such as the Official Secrets Act (for public agencies) and Financial Services Act 2013 (for financial institutions).

Table 2: Enforcement Statistics from Malaysian Anti-Corruption Commission

	2012	2013	2014	2015	2016
Information on corruption	5,496	4,027	2,954	2,892	3,417
Investigation papers opened	NA	976	919	982	985
Investigation papers completed (1 year)	35	796	781	NA	NA
Arrests	701	509	552	842	939
Total whistleblowers seeking protection	35	6	15	16	NA
Total whistleblowers protected	29	6	10	16	NA

Source: Annual Reports, 2013-2016, MACC

Aside from these weaknesses, the credibility of enforcement agencies could also be affected by the public's perception of the independence and fairness of the governance system in Malaysia. Two high profile cases could have damaged the credibility of enforcement agencies. The first is the case of the National Feedlot Corporation (NFC) scandal which involved misuse of funds in a government funded project. The whistleblower in this case was subsequently sentenced to jail for 30 months for exposing confidential banking information which is prohibited under the Banking and Financial Institutions Act (Bafia). The case against the NFC executive chairman was withdrawn by the then Attorney General Apandi Ali due to lack of strong evidence.

The second case is the alleged corruption involving the Malaysian state fund 1MDB. In June 2017, the US Department of Justice (USDOJ) filed civil forfeiture complaints to seek the forfeiture and recovery of about US\$540 million that were misappropriated from 1MDB. The Attorney General of Malaysia (Abdul Gani Patail) who led the investigation into 1MDB was replaced in July 2017. His replacement, Apandi Ali, subsequently cleared the then Prime Minister Najib Razak.

Both the NFC and 1MDB scandals attracted public attention. Though the investigations were terminated under the BN government, the two cases were subsequently re-visited after the ruling coalition BN lost the general elections in May 2018. The new government formed by the Pakatan Harapan (PH) coalition subsequently replaced a number of key high-level positions such as the Chief Justice, Attorney General, Commissioner of MACC, the Judicial Appointments Commissioners and the chairman for MyCC.

The political and institutional environment for competition agencies is most likely to be an important factor in assessing the efficacy of competition law enforcement in general and its leniency programme more specifically. However, it is challenging to find direct evidence on how the leniency programme in Malaysia's competition regime is affected by this factor. In other words, it is difficult to assess whether the deterioration in overall governance in Malaysia in the past has discouraged cartel members from using MyCC's leniency programme to defect. This is one area of research that requires further work.

5. Perceptions of Businesses on Courts and Corruption

The quality of institutional environment can determine the efficacy of a leniency programme. There is no publicly available information (based on surveys) on businesses' perceptions on the programme in Malaysia. However, there is information on businesses' perceptions on courts and corruption which can be an indirect measure of the quality of institutions in Malaysia. This is based on the World Bank's 2015 Enterprise Survey for Malaysia which covers 1,000 firms from the manufacturing and services sectors.

5.1 Courts

In the Survey, firms were asked to indicate their response on the statement that "the court system is fair, impartial and uncorrupted". Close to one-third (32 per cent) of the respondents indicated that they disagree or strongly disagree with this statement (**Table 3**). About 61 per cent agreed or strongly agreed with the statement. Firms were also asked the extent to which courts are an obstacle to the current operations of this establishment (Table 3). The proportion of respondents indicating courts to be major and very severe obstacle to their business was 11 per cent.

5.2 Corruption

On the issue of corruption, firms were asked in the Survey about informal gift or payment were expected or requested when they apply for operating license (**Table 4**). Due to the sensitivity of the question, only a quarter of the firms surveyed responded. Of these, 22 per cent answered in the affirmative. When asked indirectly, whether corruption was an obstacle to the current operations of their business, about ten per cent of the respondents indicated that corruption was a major and very severe obstacle.

Table 3: Business Perception on Court System

“The court system is fair, impartial and uncorrupted”			
	Frequency	Percentage	Cumulative
Don't know (spontaneous)	15	1.5	1.5
Does not apply	57	5.7	7.2
Strongly disagree	67	6.7	13.9
Tend to disagree	250	25.0	38.9
Tend to agree	472	47.2	86.1
Strongly agree	139	13.9	100
Total	1,000	100.0	
To what degree are courts an obstacle to the current operations of this establishment?			
Don't know (spontaneous)	31	3.1	3.1
Does not apply	139	13.9	17
No obstacle	242	24.2	41.2
Minor obstacle	248	24.8	66
Moderate obstacle	230	23.0	89
Major obstacle	80	8.0	97
Very severe obstacle	30	3.0	100
Total	1,000	100	

Source: World Bank's Enterprise Survey 2015 - Malaysia

Table 4: Business Perception on Corruption

“In reference to application for an operating license, was an informal gift or payment expected or requested?”			
	Frequency	Percentage	Cumulative
Don't know (spontaneous)	13	5.00	5
Refusal (spontaneous)	16	6.15	11.15
Yes	57	21.92	33.08
No	174	66.92	100
	260	100.00	
“To what degree is corruption an obstacle to the current operations of this establishment?”			
Don't know (spontaneous)	35	3.5	3.5
Does not apply	63	6.3	9.8
No obstacle	250	25	34.8
Minor obstacle	294	29.4	64.2
Moderate obstacle	254	25.4	89.6
Major obstacle	75	7.5	97.1
Very severe obstacle	29	2.9	100
Total	1,000	100.0	

Source: World Bank's Enterprise Survey 2015 - Malaysia

Overall, a significant proportion of businesses surveyed do have negative perceptions on the quality of institutions in terms of courts and corruption. Whilst these findings cannot be used to argue that businesses have low trust in the leniency programme, it does provide an indication of the perception of businesses of the overall institutional environment within which the programme operates. The change in government following the general elections in May 2018 does provide an opportunity for institutional reforms (including the renewal of regulatory and legal reforms) that can further strengthen competition regulation and law.³

6. Conclusion

Malaysia's competition regime is fairly new. The CA2010 only came into force in January 2012 and MyCC's detailed guidelines on its leniency programme was only published in October 2014. Since then, only five cases have been investigated for cartel activities. To the author's knowledge and based on publicly available documents, only one cartel case investigated by MyCC involved leniency application. This is the cartel case involving price fixing by seven tuition and day-care centres in 2017. In this case, the leniency application was rejected. Overall, the leniency programme in Malaysia appears to be under-utilised despite the programme being carefully designed based on best-practices in other countries and ICN. That leaves the question of why the leniency programme for competition law has not been utilised more extensively. This could be due to design issues such as too much discretionary powers for MyCC and lack of immunization from civil proceedings in the leniency grant. It could also be due to political and institutional factors such as the de-facto oversight from the government and spillovers from deterioration in the country's state of governance. The perceptions of the business community on the quality of institutions in terms of courts and corruption do indicate that institutional reforms are needed to further enhance the environment within which competition law enforcement and more specifically, leniency programme, operates. The change of government following the general elections in May 2018 has provided an opportunity to undertake institutional reforms that can improve the quality of institutions in the country.

³ The reform processes began in 2010 but may have subsequently lost momentum. See OECD (2015) for a description of these early reforms.

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