



**Malaysian
Aviation Commission**
Suruhanjaya Penerbangan Malaysia

Guidelines On
LENIENCY REGIME

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**Malaysian
Aviation Commission**
Suruhanjaya Penerbangan Malaysia

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1. Background

1.1 These Guidelines are issued by the Commission in the exercise of its power pursuant to section 65 of the Act to provide explanation on the leniency regime under section 60 of the Act.

1.2 The factors which may be considered by the Commission in implementing the leniency regime in these Guidelines are not exhaustive and the examples are for illustrative purposes only. The Commission will consider the specific facts and circumstances of each case and may take into account any other factor that the Commission deems relevant in the implementation of section 60 of the Act.

1.3 These Guidelines serve to supplement Part VII of the Act or any regulation relating to the same. These Guidelines should be read together with all other guidelines issued by the Commission pursuant to section 65 of the Act.

1.4 The concepts and principles in these Guidelines are based on the domestic and international best practices relating to competition law.

1.5 The Commission may revise these Guidelines from time to time taking into account developments in competition law and the civil aviation industry.

1.6 Enterprises providing aviation services are advised to conduct self-assessment exercises of their businesses in respect of their conduct, procedures, management and control. Enterprises are also advised to have competition compliance procedures in place for their employees at all levels including the top management and the governing body, where applicable.

1.7 Any enterprise in doubt about how its commercial activities may be affected by Part VII of the Act may wish to seek independent legal advice.

2. The Leniency Regime under Section 60 of the Act

2.1 Pursuant to paragraph 59(1)(c) of the Act, if the Commission determines that an enterprise has infringed a prohibition under Part VII of the Act, the enterprise may be liable to a financial penalty up to ten percent of the worldwide turnover of the enterprise over the period during which an infringement occurred.

2.2 However, Section 60 of the Act provides for a leniency regime which allows the Commission to reduce any financial penalties which would otherwise have been imposed. This leniency regime is only available in cases where an enterprise –

- (a) admits its involvement in an infringement of any prohibition under subsection 49(2) of the Act¹; and
- (b) provides information or other form of co-operation to the Commission which would significantly assist, or is likely to significantly assist, in the identification or investigation of any finding of an infringement of any prohibition by any other enterprise².

Admission of Involvement in an Infringement of any Prohibition under subsection 49(2) of the Act

2.3 In order to qualify for leniency under section 60 of the Act, an enterprise has to admit to its involvement in an infringement of any prohibition under subsection 49(2) of the Act. Subsection 49(2) of the Act provides that if a horizontal agreement is found to have any object listed³ under the said subsection, there would be a legal

¹ Paragraph 60(1)(a) of the Act.

² Paragraph 60(1)(b) of the Act.

³ Horizontal agreements which are deemed to have the object of significantly preventing, restricting or distorting competition in any aviation service market pursuant to subsection 49(2) of the Act are as follows:

- (a) horizontal agreements that have the object to fix, directly or indirectly, a purchase or selling price or any other trading conditions;
- (b) horizontal agreements that have the object to share the aviation service market or sources of supply;

presumption that such agreement has the object of significantly preventing, restricting or distorting competition in any aviation service market⁴.

Provision of Information or Other Form of Co-operation to the Commission

2.4 In order to qualify for leniency under section 60 of the Act, an enterprise shall also provide information or other form of co-operation that would significantly assist or would likely to significantly assist the Commission in the identification or investigation of any finding of an infringement of any prohibition by any other enterprise.

2.5 The information or other form of co-operation provided by the enterprise may relate to —

- (a) the same infringement as the enterprise's admission; or
- (b) any other infringement of any prohibition by any other enterprise.

2.6 "Significant assistance" as per paragraph 60(1)(b) of the Act would be determined based on the specific circumstances of the case under consideration, having regard to all relevant factors such as —

- (a) the facts of the case in question;
- (b) the stage of investigation being conducted by the Commission; and
- (c) the state of knowledge of the Commission about the cartel in question.

The factors listed above are not exhaustive. These factors may be considered by the Commission in determining whether an enterprise would qualify for leniency under

(c) horizontal agreements that have the object to limit or control, production, market outlets or market access, technical or technological development, or investment; or

(d) horizontal agreements that have the object to perform an act of bid rigging.

⁴ Horizontal agreements that are prohibited under subsection 49(2) of the Act is further elaborated in the Guidelines on Anti-Competitive Agreements.

section 60 of the Act. These factors may also be used to consider the amount of reduction of financial penalty that would be imposed on that enterprise.

Reduction of Financial Penalty

2.7 If an enterprise qualifies for leniency pursuant to paragraphs 60(1)(a) and (b) of the Act, subsection 60(1) of the Act provides that the Commission may grant a reduction of financial penalty up to a maximum of one hundred percent which would otherwise have been imposed on that enterprise.

2.8 Subsection 60(2) of the Act further provides that the amount of reduction of financial penalty imposed by the Commission under a leniency regime would depend on the following factors:

- (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 an involvement in the infringement was admitted, or any information or other cooperation was provided
 - An enterprise is more likely to benefit from a greater percentage of reduction of financial penalty if the admission or leniency application is made during the early stages of an investigation.
- (c) Any other circumstances which the Commission considers appropriate to have regard to
 - The amount of reduction of financial penalty may also depend on the nature and the value of the information and other cooperation provided by the enterprise applying for leniency compared to what has already been received by or known to the Commission.

2.9 Since the leniency regime is based on the application by enterprises⁵, the Commission may provide markers to rank the order of the applicants. In the event that several enterprises apply for leniency regarding the same cartel, the Commission may take into account the priority of the markers in determining the percentage of reduction, if any, of financial penalty for each enterprise.

2.10 An earlier applicant is more likely to receive a greater reduction than subsequent applicants. A leniency application would be assessed in light of the information that the Commission would already have in its possession including the information received from an earlier applicant.

2.11 In general, the Commission may grant a hundred percent reduction of financial penalty to the first successful applicant for leniency in situations where the applicant —

- (a) has admitted its involvement in a cartel;
- (b) did not initiate the cartel;
- (c) did not take any step to coerce another enterprise to take part in the cartel;
and
- (d) has provided information or other form of co-operation about an infringement that was not within the knowledge of the Commission prior to that leniency application.

2.12 However, the Commission also has discretion to give a reduction of financial penalty up to one hundred percent in situations other than the above.

⁵ Will be further explained in Part 3 of these Guidelines.

3. Leniency Procedure

Communicating with the Commission on Leniency Regime or Leniency Application

3.1 Any enterprise who wishes to apply for leniency may contact a Leniency Officer through a designated leniency hotline telephone number or an email to leniency@mavcom.my to enquire more about the leniency regime or the leniency application.

3.2 The Leniency Officer shall be responsible in handling any leniency enquiry or facilitating the leniency application process. Enterprises shall only communicate with the Leniency Officer regarding any leniency enquiry or application unless otherwise directed by the Commission. This is important in order to protect the confidentiality of any confidential or sensitive information.

- 3.3 Through the communication with the Leniency Officer, an enterprise may —
- (a) enquire about the availability of leniency in relation to a certain situation;
 - (b) request a marker for the purpose of establishing priority over other potential applicants; or
 - (c) enquire about the requirements for a leniency application.

Marker

3.4 Where an enterprise intends to apply for leniency regarding a cartel, the enterprise may make a request to the Leniency Officer for a marker in order to preserve its priority in obtaining leniency while the enterprise prepares its leniency application.

3.5 The request for a marker shall be made in the form and manner determined by the Commission and shall be accompanied by the relevant information such as the name of the enterprise applying for leniency and the description of the cartel in which the enterprise was or is involved.

3.6 Upon receiving the full information, the Leniency Officer may grant a marker in writing to the enterprise containing the following details:

- (a) the priority of the enterprise⁶;
- (b) the date and time of the marker;
- (c) the subject matter of the intended leniency application; and
- (d) the date by which the enterprise must complete and submit its leniency application.

3.7 An enterprise granted with a marker at an earlier date and time is given priority over another enterprise granted with a marker at a later date and time for the same matter provided that the former submits its leniency application by the specified date.

3.8 A marker is valid for thirty days from the date it is granted. If the enterprise granted with a marker finds that it could not submit its leniency application within the thirty-day period, the enterprise may apply for an extension of time before the expiry of the marker period. The Commission may grant an extension of time if it is satisfied that the enterprise is making a good faith effort to complete its application in a timely manner.

3.9 If an enterprise granted with a marker fails to complete its application within the thirty-day period and is not granted an extension of time by the Commission, the

⁶ Will be explained in paragraph 3.7 of these Guidelines.

enterprise would lose its market. The enterprise may wish to obtain a new market if it still wishes to make a leniency application.

Leniency Application

3.10 An enterprise may make a leniency application to the Commission in the form and manner determined by the Commission supported by the required documents and information.

3.11 A leniency application shall be made in writing containing, amongst others, the following:

- (a) An admission of the enterprise's involvement in a cartel
- (b) A full description of the cartel and the evidence including –
 - (i) the objectives, activities and operation of the cartel;
 - (ii) the aviation services involved in the cartel and their geographic scope;
 - (iii) the details of other enterprises participating in the cartel including those who may have knowledge of the cartel; and
 - (iv) the activities of the cartel with the dates, time, places, purpose and content of any meeting, conversations or other contact.
- (c) Any other information or form of co-operation that would significantly assist or would likely to significantly assist the Commission in identifying or investigating an infringement of any prohibition by any other enterprise

Confidentiality of a Leniency Application and Confidentiality of the Identity of the Applicant

3.12 A leniency application and the identity of the applicant are kept confidential by the Commission during the period of the application and the investigation. An applicant shall not disclose to any other person that it is making or has made a leniency application.

3.13 The leniency application and the identity of the applicant shall be confidential and shall not be disclosed in any way that could prejudice any investigation. In this regard, section 86 of the Act provides that tipping off is an offence which, on conviction, be liable to a fine not exceeding three million ringgit or imprisonment for a term not exceeding five years or both.

Decision on Leniency Application

Conditional Leniency

3.14 The Commission may, upon receiving a leniency application and being satisfied that the requirements under subsection 60(1) of the Act are fulfilled by such application, grant a conditional leniency that sets out the conditions to be fulfilled by the applicant.

3.15 The applicant will be required to enter into an agreement with the Commission. The agreement will set out the conditions that the applicant would need to fulfil in order to qualify for an unconditional leniency. The agreement may include the following conditions:

- (a) The requirements of subsection 60(1) of the Act
 - The applicant shall fulfil the two requirements as follows:

- (i) admission of involvement in an infringement pertaining to a cartel; and
 - (ii) provision of information or other form of co-operation to the Commission which would significantly assist or likely to significantly assist in the identification or investigation of any finding of an infringement of a prohibition by any other enterprise.
- (b) Engagement in the cartel
 - The applicant shall cease and desist from engaging in the cartel for which the applicant admitted its involvement unless the Commission expressly instructs the applicant's continued participation in the cartel for the purpose of assisting an investigation.
- (c) Full and truthful disclosure of participation in the cartel
 - The applicant shall provide full and truthful disclosure of its participation in the cartel in which the applicant has admitted its involvement including the submission of all information and documents and the applicant's knowledge about any infringement of any prohibition by any other enterprise.
- (d) Co-operation with the Commission
 - The applicant shall co-operate with the Commission and respond promptly to any request by the Commission for information or other assistance pertaining to the cartel in which the applicant has admitted its involvement and any other infringement.

- The applicant's co-operation with the Commission shall include the assistance by any of the applicant's personnel including its employees, officers or directors if requested by the Commission.
- Such co-operation shall be made at the applicant's own expense.

(e) Destruction of documents

- The applicant shall not destroy any relevant document pertaining to the leniency application.
- The applicant shall ensure that the relevant documents have not been destroyed before or during the period leading to the grant of conditional leniency.

(f) The applicant's role in the cartel

- The applicant shall confirm that it has not coerced other enterprises to participate in the cartel.

(g) Confidentiality of leniency application and confidentiality of the grant of conditional leniency

- The applicant shall not disclose any aspect of the leniency application or the grant of conditional leniency. The applicant commits an offence under subsection 86(1) of the Act if the applicant makes such disclosure⁷.

⁷ As explained in paragraphs 3.12 and 3.13 of these Guidelines.

- (h) Withdrawal of conditional leniency
- Commission may, upon notice to the applicant, withdraw the conditional leniency if the applicant does not fulfil any of the conditions set out in the agreement.

The Commission may also impose any other condition as it deems appropriate given the particular circumstances of an application.

3.16 Any leniency granted by the Commission applies only to the financial penalty imposed by the Commission pursuant to paragraph 59(1)(c) of the Act. However, if the Commission determines that there is an infringement of a prohibition under Part VII of the Act, the Commission shall firstly, pursuant to paragraph 59(1)(a) of the Act, require the infringement to be ceased immediately. Subsequently, the Commission may also exercise its discretion pursuant to paragraph 59(1)(d) of the Act to impose any other direction as it deems appropriate.

Unconditional Leniency

3.17 The Commission may grant an unconditional leniency after the applicant has fulfilled all conditions of the conditional leniency and the Commission has made an infringement decision pertaining to the cartel to which the applicant had admitted its involvement.

3.18 If the Commission decides to grant an unconditional leniency to an applicant, the unconditional leniency will be recorded in the infringement decision⁸. In addition to the issuance of the infringement decision, the Commission will give notice to the applicant regarding —

- (a) the Commission's decision pertaining to its leniency application; and

⁸ The Commission may decide, on a case by case basis, not to publish the identity of the enterprise granted with a reduction of one hundred percent of financial penalty due to the enterprise's successful leniency application.

- (b) the percentage of reduction of financial penalty, in the event that an unconditional leniency is granted.

3.19 If the leniency applicant provides information or any other form of co-operation relating to an infringement of any prohibition other than the cartel to which the applicant had admitted its involvement, the Commission may grant an unconditional leniency upon concluding its investigation into the alleged infringement.

Revocation of Conditional or Unconditional Leniency

3.20 The Commission may revoke the conditional leniency if an applicant –

- (a) fails to fulfil all the conditions of the conditional leniency;
- (b) has provided false or misleading information; or
- (c) has made any material omission to the Commission.

3.21 The Commission may also revoke an unconditional leniency if the Commission subsequently discovers that the applicant has –

- (a) not fulfilled certain conditions of the conditional leniency;
- (b) provided false or misleading information; or
- (c) made any material omission to the Commission.

3.22 Before the Commission decides to revoke a conditional or unconditional leniency, the Commission shall serve a written notice on the applicant providing reasons for the proposed revocation. The applicant will be given the opportunity to submit a written representation to the Commission within fourteen days from the date the notice was served on the applicant.

3.23 In the event that the Commission revokes a conditional or unconditional leniency, the Commission may take the appropriate actions under the Act which include —

- (a) to continue with the investigation into the involvement of the enterprise in a cartel or any other enterprise pertaining to an infringement of any prohibition under Part VII of the Act; or
- (b) to recommend a prosecution under section 84 of the Act for the offence of giving false or misleading information.

Civil Proceedings Initiated Pursuant to Section 64 of the Act

3.24 An unconditional leniency only provides for the reduction of financial penalty imposed by the Commission pursuant to paragraph 59(1)(c) of the Act. The grant of conditional or unconditional leniency does not relieve the applicant from civil proceedings in a court initiated pursuant to section 64 of the Act by an aggrieved person who suffers loss or damage directly as a result of an infringement of a prohibition under Part VII of the Act.

4. Glossary

1. Act Malaysian Aviation Commission Act 2015 [Act 771].
2. applicant An enterprise who makes a leniency application to the Commission pursuant to section 60 of the Act.
3. cartel Horizontal agreements prohibited under subsection 49(2) of the Act.
4. Commission Malaysian Aviation Commission.
5. Guidelines Guidelines on Leniency Regime.