

CCCS GUIDELINES ON LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION ON CARTEL ACTIVITY 2016

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INTRODUCTION

- 1.1 Under section 34 of the Competition Act (Chapter 50B) (“the Act”), agreements between undertakings, decisions by associations of undertakings or concerted practices, which have as their object or effect the prevention, restriction or distortion of competition within Singapore are prohibited.
- 1.2 Section 34 extends to prohibit cartel activities.¹ Cartel activities include, amongst other things, the following:
- Price-Fixing:
E.g. where parties agree, directly or indirectly, on the prices;
 - Establishment of Restrictions / Quotas on Output:
E.g. agreements which restrict output or production;
 - Bid-Rigging:
E.g. arrangements where parties collude when submitting their tenders;
 - Market Sharing Agreements.
- Further information on the section 34 prohibition can be found in the *CCCS Guidelines on the Section 34 Prohibition 2016*.
- 1.3 Cartels hurt consumers because they restrict or remove competition between market players and thereby remove the incentive for market players to be efficient or to innovate.
- 1.4 As cartel activities infringe the section 34 prohibition, undertakings participating or which have participated in them are liable under section 69 of the Act to a financial penalty. Such undertakings may wish to inform the Competition and Consumer Commission of Singapore (“CCCS”) of the existence of the cartel activity but might be deterred from doing so because of the risk of incurring large financial penalties.
- 1.5 Due to the secret nature of cartels, undertakings participating or which have participated in them should be given an incentive to come forward and inform CCCS of the cartel’s activities. The policy of granting lenient treatment to these undertakings which co-operate with CCCS outweighs the policy objectives of imposing financial penalties on such cartel participants.
- 1.6 As leniency programmes have been found to be effective in other competition law regimes, a similar programme forms part of Singapore’s enforcement strategy.
- 1.7 These guidelines are not a substitute for the Act, the regulations and orders. They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of CCCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

¹ Cartel activities refer to agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object, the prevention, restriction or distortion of competition within Singapore.

2 TOTAL IMMUNITY FOR THE FIRST TO COME FORWARD BEFORE AN INVESTIGATION HAS COMMENCED

- 2.1 Under section 69(4) of the Act, an undertaking which has intentionally or negligently infringed the Act's prohibitions faces a financial penalty of up to 10% of its business turnover for each year of infringement (up to a maximum of three (3) years).
- 2.2 CCCS will nevertheless grant an undertaking/leniency applicant the benefit of total immunity from financial penalties if all of the following conditions are satisfied:
- The undertaking is the first to provide CCCS with evidence of the cartel activity before an investigation² has commenced, provided that CCCS does not already have sufficient information to establish the existence of the alleged cartel activity;
 - The undertaking:
 - provides CCCS with all the information, documents and evidence available to it regarding the cartel activity; immediately.³ Such information, documents and evidence must provide CCCS with sufficient basis to commence an investigation;⁴
 - grants an appropriate waiver of confidentiality to CCCS in respect of any jurisdiction where the applicant has also applied for leniency or any other regulatory authority for which it has informed of the conduct;
 - unconditionally admits to the conduct for which leniency is sought and details the extent to which this had an impact in Singapore by preventing, restricting or distorting competition within Singapore;
 - maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by CCCS arising as a result of the investigation; and
 - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to CCCS (except as may be directed by CCCS).
- 2.3 If an undertaking does not qualify for total immunity under paragraph 2.2, it may still benefit from a reduction in the financial penalty of up to 100% under paragraphs 3.1 and 3.2.
- 2.4 An undertaking which has initiated or coerced another undertaking to participate in the cartel will not be eligible for total immunity or receive a reduction in the financial penalty of up to 100% under paragraphs 3.1 and 3.2. However, such an undertaking can still apply for leniency and benefit from a reduction in the financial penalty of up to 50% subject to the conditions set out in paragraphs 4.1 and 4.2. In determining whether an undertaking has initiated or coerced another undertaking to participate in the cartel, CCCS would consider the surrounding circumstances of each case carefully, including but not limited to whether the undertaking took positive and successful steps to either initiate a cartel (in the case of an initiator) or pressurised an unwilling participant to take part in the cartel (in the case of a coercer).

² Section 62 of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that, *inter alia*, the section 34 prohibition has been infringed by any agreement. A formal investigation may include the exercise of any of CCCS's investigatory powers under sections 63 to 65 of the Act.

³ Where an undertaking is not immediately able to provide all the information, documents and evidence available to it regarding the cartel activity, a reasonable time frame for the provision of this information can be agreed by CCCS.

⁴ Section 62 of the Act provides that CCCS may conduct an investigation if there are reasonable grounds for suspecting that, *inter alia*, the section 34 prohibition has been infringed by any agreement.

3 REDUCTION OF UP TO 100% IN THE LEVEL OF FINANCIAL PENALTIES WHERE THE UNDERTAKING IS THE FIRST TO COME FORWARD BUT WHICH DOES SO ONLY AFTER AN INVESTIGATION HAS COMMENCED

- 3.1 An undertaking may benefit from a reduction in the financial penalty of up to 100% if:
- the undertaking seeking immunity is the first to provide CCCS with evidence of the cartel activity;
 - this information is given to CCCS after CCCS has started an investigation but before CCCS has sufficient information to issue a written notice under section 68(1) that it proposes to make a decision that the section 34 prohibition has been infringed;
 - the conditions under the second bullet in paragraph 2.2 are satisfied;
 - the information adds significant value to CCCS's investigation (i.e. it genuinely advances the investigation);
 - the undertaking was not the one to initiate the cartel; and
 - the undertaking must not have coerced another undertaking to participate in the cartel.
- 3.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, CCCS will take into account:
- the stage at which the undertaking comes forward;
 - the evidence already in CCCS's possession; and
 - the quality of the information provided by the undertaking.

4 SUBSEQUENT LENIENCY APPLICANTS: REDUCTION OF UP TO 50% IN THE LEVEL OF FINANCIAL PENALTIES

- 4.1 Undertakings which provide evidence of cartel activity before CCCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed, but are not the first to come forward, may be granted a reduction of up to 50% in the amount of the financial penalty which would otherwise be imposed, if the conditions under the second bullet in paragraph 2.2 are satisfied and the information adds significant value to CCCS's investigation.
- 4.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, CCCS will take into account:
- the stage at which the undertaking comes forward;
 - the evidence already in CCCS's possession; and
 - the quality of the information provided by the undertaking.

5 PROCEDURE FOR REQUESTING IMMUNITY OR A REDUCTION IN THE LEVEL OF PENALTIES

- 5.1 An undertaking that wishes to take advantage of the lenient treatment detailed in these guidelines must contact CCCS. Anyone contacting CCCS on the undertaking's behalf must have power to represent the undertaking.
- 5.2 Applications for leniency may be made either orally or in writing, through the online form available on CCCS's website, by electronic mail to cccs_leniency@cccs.gov.sg, or by telephone to the Assistant Chief Executive (Legal, Enforcement & Consumer Protection) or the Directors of the Legal and Enforcement Divisions of CCCS. Telephone calls should be made to the CCCS hotline 1800-325-8282 (or for calls overseas (65) 6325 8206) and a request should be made that the call be routed to the Assistant Chief Executive (Legal, Enforcement & Consumer Protection) or the Directors of the Legal and Enforcement Divisions of CCCS. Although CCCS is of the view that correspondence between CCCS and the applicant and/or its legal representatives should be in writing for administrative matters, CCCS is prepared to consider conducting the communications between the applicant and CCCS orally, whether by way of meeting or telephone conferences.
- 5.3 Initial contact with or "feelers" to CCCS may be made anonymously. However, for the leniency application to be properly recorded and proceeded with, the undertaking's name must be given to CCCS.
- 5.4 CCCS will provide a marker system for leniency applications under paragraphs 2 and 3 above where an undertaking is not able to immediately provide all the information, documents and evidence available to it regarding the cartel activity. A marker secures an undertaking's position in the queue for immunity under paragraph 2 or a reduction in the financial penalty of up to 100% under paragraph 3 for a period to be specified by CCCS on a case-by-case basis in order to allow the undertaking to gather the necessary information, documents and evidence.
- 5.5 To secure a marker, an applicant must specify the name of the undertaking(s) for which the marker is sought and provide a description of the cartel activity. The applicant is also expected to define the market(s) in which the cartel activity occurred and detail the impact of the conduct on the identified relevant markets in Singapore. Sufficient details of the cartel activity, including the estimated duration of the cartel activity and the parties to the cartel, must be given to allow CCCS to determine that no other undertaking has applied for leniency for such similar conduct.
- 5.6 A marker will be granted by way of a letter (unless an alternative mode of communication is agreed to by CCCS) setting out the date on which the marker was granted, the undertaking(s) to which the marker applies, the subject matter and scope of the conduct for which the marker was sought.
- 5.7 The grant of a marker is discretionary. However, its grant is expected to be the norm rather than the exception. An applicant will only be informed whether it has been the first to come forward.
- 5.8 To perfect a marker, the undertaking must, within the period specified by CCCS, provide information, documents and evidence which meet the requirements for a grant of conditional immunity or leniency (see paragraph 5.11 below). Where an extension of time is required by the undertaking for the perfection of the marker, this will be considered by CCCS on a case-by-case basis. Applications for an extension of time should be made at least five working days before the expiry of the deadline set. If the undertaking fails to perfect the marker, the next undertaking in the marker queue will be eligible to obtain immunity or a reduction in the financial penalty of up to 100%.

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- 5.9 The marker system will not apply to leniency applications under paragraph 4 and such applicants should immediately provide CCCS with all the evidence relating to the cartel activity. Where an undertaking is not immediately able to provide all the information, documents and evidence available to it regarding the cartel activity, a reasonable time frame for the provision of this information can be agreed by CCCS. An applicant will be required when applying for leniency to provide its name and a description of the cartel activity. The applicant is also expected to define the market(s) in which the infringing conduct occurred and detail the impact of the conduct on the identified relevant markets in Singapore. This will assist CCCS in determining a reasonable time-frame for furnishing all information, documents and evidence to CCCS.
- 5.10 Undertakings may provide information relating to a suspected infringement by way of an oral corporate statement. Information that is public or is general market information should be provided in a document. Oral corporate statements will be recorded and transcribed at CCCS's premises. CCCS may request for the applicant or the applicant's legal representatives to provide secretarial and/or administrative support, where appropriate. Where an oral corporate statement is made, the applicant and/or its legal representatives will be given the opportunity to verify the accuracy of the CCCS's transcript.

Grant of Conditional Immunity or Leniency

- 5.11 For the grant of conditional immunity or leniency, an applicant must provide CCCS with all the information, documents and evidence available to it regarding the cartel activity, and such information, documents and evidence must provide CCCS with a sufficient basis for commencing an investigation or add significant value to CCCS's investigation. In practice, this means that the information is sufficient to allow CCCS to exercise its formal powers of investigation or advance the investigation. Examples of the types of information and documents required by CCCS would include documentary records evidencing the existence of cartel activity, the identification of personnel formerly and currently employed by the undertaking who had engaged in the conduct for which leniency is sought and the provision of information by these personnel about the cartel activity in an interview with CCCS.
- 5.12 When CCCS considers that the conditions for conditional immunity or leniency have been met, CCCS will issue a letter to the applicant confirming the grant of conditional immunity or leniency. The letter will state the conditions and continuing obligations that the applicant has to meet to maintain its conditional immunity or leniency. Failure to abide with the conditions and obligations may lead to CCCS revoking the grant of conditional immunity or leniency.

Grant of Immunity or Leniency

- 5.13 When issuing a Proposed Infringement Decision, CCCS will inform an applicant in writing whether immunity or leniency will be granted. The letter will record the scope of the immunity or leniency to be granted. An Infringement Decision shall set out the grant of immunity or leniency and its scope.

6 ADDITIONAL REDUCTION IN FINANCIAL PENALTIES (LENIENCY PLUS)

- 6.1 An undertaking co-operating with an investigation by CCCS in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market) which also infringes the section 34 prohibition.
- 6.2 To qualify for leniency plus, CCCS would have to be satisfied that:
- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
 - the undertaking would qualify for total immunity from financial penalties or a reduction of up to 100% in the amount of the financial penalty, under paragraphs 2 and 3 in relation to its activities in the second market.
- 6.3 If CCCS is satisfied with the above, the undertaking will receive a reduction in the financial penalties imposed on it in relation to the first market, which is additional to the reduction which it would have received for its co-operation in the first market alone. For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for co-operation, in the first market.
- 6.4 For example, as a result of an investigation by CCCS of manufacturers, including XYZ Ltd, in Market A, XYZ Ltd carries out an internal investigation and discovers that it has participated in cartel activity in Market B. XYZ Ltd has been co-operating with CCCS's investigation in Market A and is interested in seeking lenient treatment by disclosing its participation in cartel activity in Market B.
- 6.5 Assuming XYZ Ltd qualifies for total immunity in relation to Market B, it can also obtain a reduction in financial penalty in relation to Market A in addition to the reduction it would have received for co-operation in the investigation in Market A alone, i.e. an additional reduction in respect of Market A as a result of its co-operation in the investigation into Market B.

7 QUALITY OF INFORMATION PROVIDED BY UNDERTAKING

- 7.1 As a minimum to meet the conditions for lenient treatment by CCCS, the information, documents and evidence provided by the undertaking under these guidelines must be such as to provide CCCS with a sufficient basis for taking forward a credible investigation or to add significant value to CCCS's investigation. In practice, this means that the information is sufficient to allow CCCS to exercise its formal powers of investigation or genuinely advances CCCS's investigation.

8 CONFIDENTIALITY

- 8.1 An undertaking coming forward with evidence of cartel activity may in particular be concerned about the disclosure of its identity as an undertaking which has volunteered information. CCCS will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until CCCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed.
- 8.2 An applicant may submit a request for confidentiality in relation to information provided to CCCS. Part 9 of the *CCCS Guidelines on the Major Competition Provisions 2016* provides details on CCCS's obligations under section 89 and the exceptions under which disclosure is authorised.

9 DISCLOSURE AND USE OF INFORMATION

- 9.1 Information submitted or obtained from the applicant and its employees or former employees may be used by CCCS for its investigation and against the applicant or third parties in proceedings under the Act.
- 9.2 Subject to confidentiality, information that is in documentary form provided by the applicant will be disclosed to addressees of a Provisional Infringement Decision, during the course of access to CCCS's file after a Provisional Infringement Decision has been issued. This will include any corporate statement that is given as a document to CCCS. Access to any such corporate statement is only granted to addressees of a Provisional Infringement Decision, provided an addressee undertakes not to make any copy by mechanical or electronic means.
- 9.3 In the event that:
- an immunity or leniency application is rejected;
 - immunity or leniency is not granted;
 - immunity or leniency is revoked by CCCS; or
 - the applicant withdraws its application for immunity or leniency;
- the applicant may withdraw the information submitted for the purposes of its application or still provide the information to CCCS and request that CCCS consider a mitigating reduction in financial penalties in view of its co-operation. If information is withdrawn by the applicant, this does not prevent CCCS from using its formal powers of investigation under the Act to obtain the information. For the avoidance of doubt, records of the applicant's oral submissions made by CCCS are internal documents of CCCS. However, CCCS will not use the information unless it is subsequently submitted by the applicant or obtained by CCCS through the exercise of its formal powers of investigation under the Act.
- 9.4 In the event that CCCS discontinues its investigation without the issuance of an Infringement Decision, all information obtained from the applicant will be retained by CCCS.
- 9.5 The information obtained from the applicant may be used by CCCS if the investigation or part thereof is re-opened. For avoidance of doubt, the conditional immunity or leniency previously granted to the applicant will be available to that applicant in the event CCCS re-opens its investigation or part thereof.

10 EFFECT OF LENIENT TREATMENT

- 10.1 Lenient treatment does not protect the undertaking from the other consequences of infringing the law, which include:
- the fact that the infringing provision is void and therefore cannot be enforced; and
 - the possibility that third parties who consider themselves as having been harmed by the cartel may have a claim under a private right of action.
- 10.2 Lenient treatment also does not provide immunity from any penalty that may be imposed on the undertaking by other competition authorities outside of Singapore.

11 WITHDRAWAL OF LENIENCY MARKER/ REVOCATION OF CONDITIONAL IMMUNITY/ LENIENCY OR LENIENCY

- 11.1 If at any time after the grant of a leniency marker, CCCS has concerns that an applicant has acted or is acting in a way that puts its leniency status at risk, it will raise those concerns with the applicant and give the applicant an opportunity to respond, and if possible to address CCCS's concerns, prior to withdrawing the leniency marker.
- 11.2 In the event that the applicant has not complied with the terms on which conditional immunity/leniency or leniency has been granted or that the applicant has made a false declaration or given false information to CCCS at any point in time, CCCS may revoke the grant of conditional immunity/leniency or leniency. If CCCS is minded to revoke the grant of conditional immunity/leniency or leniency, the applicant will be notified in writing and given an opportunity to make representations.