

# CCCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY IN COMPETITION CASES 2016

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# 1 INTRODUCTION

- 1.1 The Competition Act (Chapter 50B) (“the Act”) gives the Competition and Consumer Commission of Singapore (“CCCS”) the power to issue directions<sup>1</sup> and impose financial penalties<sup>2</sup> on undertakings for infringing the section 34<sup>3</sup> prohibition, the section 47<sup>4</sup> prohibition and the section 54 prohibition<sup>5</sup> under the Act.
- 1.2 CCCS’s powers to issue directions and impose financial penalties are described in the *CCCS Guidelines on Enforcement of Competition Cases 2016*.
- 1.3 These guidelines provide general guidance and information about the basis on which CCCS will calculate financial penalties for infringements of the section 34, section 47 and section 54 prohibitions.
- 1.4 The *CCCS Guidelines on Merger Procedures 2012* has set out some key considerations in the calibration of penalties for the infringement of the section 54 prohibition. These considerations may be applied in accordance with the six-step process set out in paragraphs 2.1 to 2.22 below.

## Statutory Background

- 1.5 The Act provides that CCCS may impose a financial penalty only if it is satisfied that an undertaking, which has committed an infringement of the section 34 prohibition, section 47 prohibition or section 54 prohibition has done so intentionally or negligently.<sup>6</sup>
- 1.6 The financial penalty may not exceed 10% of such applicable turnover of the business of the undertaking in Singapore for each year of infringement, as defined in the *Competition (Financial Penalties) Order 2007*, up to a maximum of three (3) years.<sup>7</sup>

## Policy Objectives

- 1.7 In imposing any financial penalty, CCCS has the following twin objectives:
  - to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
  - to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings from engaging in anti-competitive practices.
- 1.8 The imposition of a financial penalty is discretionary and is aimed at deterring not only the infringing undertaking but also other like-minded undertakings which might be considering activities contrary to the section 34, section 47 or section 54 prohibitions.<sup>8</sup>

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<sup>1</sup> Section 69(1) of the Act.

<sup>2</sup> Section 69(2)(d) of the Act.

<sup>3</sup> 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. Further information can be found in the *CCCS Guidelines on the Section 34 Prohibition 2016*.

<sup>4</sup> Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position. Further information can be found in the *CCCS Guidelines on the Section 47 Prohibition 2016*.

<sup>5</sup> Mergers that have resulted or may be expected to result in a substantial lessening of competition within any market in Singapore for goods or services are prohibited. Further information can be found in the *CCCS Guidelines on Merger Procedures 2012* and the *CCCS Guidelines on Substantive Assessment of Mergers 2016*.

<sup>6</sup> Section 69(3) of the Act.

<sup>7</sup> Section 69(4) of the Act.

<sup>8</sup> In respect of an infringement of the section 54 prohibition, CCCS may impose financial penalties where the merger parties were aware, or could not have been unaware that the merger infringed the section 54 prohibition, or where the merger parties ought to have known that the merger would, or was reasonably likely to infringe the section 54 prohibition. An example is where the merger parties, after having received an unfavourable decision from CCCS in respect of an anticipated merger, proceed with an allegedly different merger which is simply a sham restructuring of the anticipated merger: Paragraph 6.27 of the *CCCS Guidelines on Merger Procedures 2012*.

- 1.9 The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.
- 1.10 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.
- 1.11 A glossary of terms used in these guidelines is attached.

## 2

## DETERMINING THE AMOUNT OF PENALTY

- 2.1 A financial penalty imposed by CCCS under section 69 of the Act will be calculated following a six-step approach:
- calculation of the base penalty having regard to the seriousness of the infringement (expressed as a percentage rate) and the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year. In this context, an undertaking's last business year is the financial year preceding the year when the infringement ended ("relevant turnover");
  - adjustment for the duration of the infringement;
  - adjustment for other relevant factors, e.g. deterrent value;
  - adjustment for aggravating or mitigating factors;
  - adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded; and
  - adjustment for immunity, leniency reductions and/or fast-track procedure discounts.

### Step 1 – Calculation of the Base Penalty

- 2.2 The base penalty will be determined having regard to:
- the seriousness of the infringement (expressed as a percentage rate); and
  - the relevant turnover of the undertaking.

### Assessment of Seriousness of the Infringement

- 2.3 CCCS will consider the seriousness of the infringement and set a percentage starting point for calculating the base penalty. The more serious and widespread the infringement, the higher the starting percentage point is likely to be. Serious infringements of the section 34 prohibition include, for example, price-fixing, market-sharing, bid-rigging (collusive tendering) and limiting or controlling production or investment arrangements. Conduct which infringes the section 47 prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely to have, an adverse effect on the process of competition, for example, predatory pricing, is also considered to be a serious infringement. With respect to the section 54 prohibition, the seriousness of the substantial lessening of competition within the relevant market that has resulted, or which may be expected to result from the merger may be a factor used in assessing the percentage starting point.
- 2.4 In assessing the seriousness of the infringement, CCCS will consider a number of other factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) involved in the infringement, entry conditions and the effect on competitors and third parties. The impact and effect of the infringement on the market, direct or indirect, will also be an important consideration. The assessment will be made on a case-by-case basis for all types of infringements, taking into account all of the circumstances of the case.

### **Determination of Relevant Turnover**

- 2.5 An undertaking's relevant turnover is the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended.
- 2.6 CCCS will require undertakings to provide their relevant turnover pursuant to a section 63 request for information and, if necessary, to provide further evidence to substantiate the section 63 responses. Generally, CCCS will base relevant turnover on figures from the undertaking's audited accounts. The relevant turnover shall be limited to the amounts derived by the undertaking from the sale of relevant products and provision of relevant services falling within the undertaking's ordinary activities in Singapore after deduction of sales rebates, goods and services tax and other taxes directly related to turnover. However, CCCS retains the discretion to use different figures, for example, where the audited accounts are not available or where the audited accounts do not reflect the true scale of an undertaking's activities in the relevant market.
- 2.7 Where an undertaking is unable or refuses to provide CCCS with its relevant turnover or is suspected of providing CCCS with incomplete or very low relevant turnover, CCCS may attribute a relevant turnover to that undertaking.

### **Base Penalty – Application of Percentage Rate to Relevant Turnover**

- 2.8 The base penalty will be calculated by applying the percentage rate to the relevant turnover.

### **Step 2 – Adjustment for the Duration of Infringement**

- 2.9 The base penalty will be multiplied by the duration of the infringement.
- 2.10 An infringement over a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. Therefore, penalties for infringements that last more than one (1) year may be multiplied by the number of years of the infringement and a part of a year may be treated as a full year for the purpose of calculating the duration of the infringement. However, CCCS may, in cases involving duration over one (1) year, round down part years to the nearest month.
- 2.11 Where the total duration of an infringement is less than one year, CCCS will treat the duration as a full year for the purpose of calculating the number of years of the infringement. However, in exceptional circumstances, CCCS may round down the duration of the infringement to the nearest month subject to a minimum duration of one (1) month.
- 2.12 The effects of bid-rigging or collusive tendering are generally irreversible, cannot be easily rectified, and continue to be felt long after the duration where the bid-rigging or collusive tendering conduct occurred. For this reason, CCCS will generally not set a duration of infringement that is less than one (1) year.

### **Step 3 – Adjustment for Aggravating and Mitigating Factors**

- 2.13 The financial penalty, adjusted as appropriate at Step 2, may be increased where CCCS considers there are aggravating factors, or decreased where CCCS considers there are mitigating factors.

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- 2.14 Aggravating factors include:
- role of the undertaking as a leader in, or an instigator of, the infringement;
  - involvement of directors or senior management;
  - retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
  - continuance of the infringement after the start of investigation;
  - repeated infringements by the same undertaking or other undertakings in the same group;
  - unreasonable failure by an undertaking to respond to a request for financial information on business turnover and/or relevant turnover;
  - in the case of bid-rigging or collusive tendering, CCCS may treat each infringement that an undertaking participates in, after the first infringement, as an aggravating factor and calibrate with a proportionate percentage increase in penalties;
  - infringements which are committed intentionally rather than negligently; and
  - retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.
- 2.15 Mitigating factors include:
- role of the undertaking, for example, that the undertaking was acting under severe duress or pressure;
  - genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
  - adequate steps taken with a view to ensuring compliance with the section 34 prohibition or section 47 prohibition, for example, existence of any compliance programme;
  - termination of the infringement as soon as CCCS intervenes; and
  - co-operation which enables the enforcement process to be concluded more effectively and/or speedily.
- 2.16 In considering how much mitigating value to be accorded to the existence of any compliance programme, CCCS will consider:
- whether there are appropriate compliance policies and procedures in place;
  - whether the programme has been actively implemented;
  - whether it has the support of, and is observed by, senior management;
  - whether there is active and ongoing training for employees at all levels who may be involved in activities that are touched by competition law; and
  - whether the programme is evaluated and reviewed at regular intervals.

### **Step 4 – Adjustment for Other Relevant Factors**

- 2.17 The amount of financial penalty to be imposed after Step 3 may be adjusted by CCCS applying an uplift, on a case by case basis, to achieve the policy objectives outlined in paragraph 1.7 above, in particular, to deter the undertakings concerned as well as other undertakings from engaging in anti-competitive practices.
- 2.18 In determining whether to impose an uplift, CCCS may take into account other considerations, including, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including the size and financial position of the undertaking in question. Where relevant, any gains which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

### **Step 5 – Adjustment if the Statutory Maximum Penalty is Exceeded**

- 2.19 The amount of the financial penalty to be imposed may not exceed the statutory maximum penalty under section 69(4) of the Act, i.e. 10% of the turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years (“total turnover”). The total turnover of the business of the undertaking in Singapore for the purposes of section 69(4) of the Act is defined in the *Competition (Financial Penalties) Order 2007* as the applicable turnover for the business year preceding the date on which the decision of the Commission is taken, or if figures are not available for that business year, the previous business year. The financial penalty will be adjusted if necessary to ensure that the statutory maximum is not exceeded.
- 2.20 The involvement of an association of undertakings (e.g. a trade association) in an infringement of the section 34 prohibition or section 47 prohibition may result in financial penalties being imposed on the association itself, its members or both. Where the infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% of the sum of the turnover of business of each member of the association of undertakings in Singapore active on the market affected by the infringement, for each year of infringement, up to a maximum of three (3) years.

### **Step 6 – Adjustment for Immunity, Leniency Reductions and/or Fast-track Procedure Discounts**

- 2.21 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for immunity or lenient treatment set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity 2016*. CCCS will make the necessary adjustments to the financial penalty calculated after Step 5 to take into account immunity or any leniency reductions conferred on an undertaking.
- 2.22 CCCS will also adjust the penalty to take into account the discount applicable for an undertaking that agrees to CCCS's fast-track procedure. The discount for the fast-track procedure will be in addition to any applicable leniency reductions.

### 3 GLOSSARY

<b>Business year</b>	Refers to a period of more than six (6) months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts.
<b>Relevant turnover</b>	Refers to the turnover of the business of the undertaking in Singapore for the relevant product and geographic markets affected by the infringement in the undertaking's last business year. In this context, the undertaking's last business year is the financial year preceding the date when the infringement ended.
<b>Total turnover</b>	Refers to the turnover of an undertaking for the business year preceding the date on which the decision of the CCCS is taken or, if figures are not available for that business year, the one immediately preceding it which is set out in the <i>Competition (Financial Penalties) Order 2007</i> .
<b>Undertaking</b>	Refers to any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods or services, as the context demands. Includes individuals operating as sole proprietorships, companies, firms, businesses, partnerships, co-operatives, societies, business chambers, trade associations and non-profit-making organisations.