ANNEX A

PROPOSED CHANGES TO THE CCCS GUIDELINES ON THE APPROPRIATE AMOUNT OF PENALTY IN COMPETITION CASES

Overview

1. The *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016* (the "**Penalty Guidelines**") describes the approach by which CCCS will calculate financial penalties for infringements of the Competition Act (Cap. 50B) (the "**Act**").[1] To calculate financial penalties, CCCS utilises the six steps set out below:

Step	Details
1.	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[2] in Singapore for the relevant products and relevant geographic markets affected by the infringement in the undertaking's last business year.
2.	Adjustment for the duration of the infringement.
3.	Adjustment for aggravating or mitigating factors.
4.	Adjustment for other relevant factors, e.g. deterrent value.
5.	Adjustment if the statutory maximum penalty under section 69(4) of the Act is exceeded.
6.	Adjustment for immunity, leniency reductions and/or fast-track procedure discounts.

2. The proposed amendments to the Penalty Guidelines centre around Step 3 of the process; in particular, the situations in which the role of an undertaking in an infringement of section 34 of the Act (relating to anti-competitive agreements, decisions of associations of undertakings, and concerted practices) may be considered a mitigating factor when calculating financial penalties. Key changes include:

   (i) A further example at paragraph 2.15 of the Penalty Guidelines (which sets out a non-exhaustive list of mitigating factors) to illustrate when "*substantially limited involvement*" by an undertaking in an infringement of section 34 of the Act would amount to a mitigating factor.

   (ii) Introducing a new paragraph 2.16 in the Penalty Guidelines, which further clarifies CCCS's policy position on the treatment of undertakings that did not play a leader, instigator or pro-active participant role in an infringement.

[1] The Act gives CCCS the power to impose financial penalties on undertakings for infringing the section 34 prohibition against anti-competitive agreements, the section 47 prohibition against abuses of dominance and the section 54 prohibition against mergers that substantially lessen competition.

[2] An "undertaking" means 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.

3. The proposed amendments to the Penalty Guidelines are highlighted in yellow in the amended draft that can be accessed via the following hyperlink:

CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases

Rationale for Proposed Changes

CCCS's position on conduct that infringes section 34 of the Act and when involvement in a section 34 infringement might be deserving of a mitigating discount

4. As a starting point, CCCS takes the position that an undertaking's mere presence at a meeting where anti-competitive discussions are carried out amounts to behaviour that infringes section 34 of the Act.[3] This is so even if the undertaking does not participate or contribute in any way to the discussions, and does not act on any information shared during the meeting or anti-competitive strategy agreed upon during the meeting.[4] This is because such participation emboldens the other members of the cartel by giving them the perception of solidarity. Undertakings that find themselves embroiled in anti-competitive arrangements (whether inadvertently or otherwise) should publicly distance themselves. Undertakings can bring the anti-competitive arrangements to CCCS's attention by lodging a complaint or, if they are involved, may consider applying for leniency.

5. CCCS notes that the kinds of involvement set out in the preceding paragraph, which may be perceived as passive behaviour, are not uncommon in cartel cases. Given the secretive nature of cartels, any form of conduct which lends strength to a cartel is infringing conduct and ought not, without more, to be accorded a mitigating discount. CCCS notes that there are other forms of conduct that also lend strength to a cartel, such as where (i) undertakings freely participate in cartel meeting discussions and implement the anti-competitive strategy agreed upon during such meetings, or (ii) undertakings take in the information shared during the meetings which is then used to formulate their own commercial decisions.[5] For these reasons, CCCS considers that the examples of conduct set out in paragraphs 4 and 5 of this Annex A should be regarded as a non-exhaustive list of conduct which, once proved against an undertaking, would result in its liability for the section 34 infringement.

6. Nevertheless, CCCS accepts that there exist certain situations where an undertaking found liable for infringing section 34 of the Act may be less culpable and therefore

[3] See for example: ***Fixing of monthly salaries of new Indonesian Foreign Domestic Workers in Singapore – Infringement Decision*** (CCS 500/001/11) at paragraph 52; ***Infringement of the section 34 Prohibition in relation to the price of ferry tickets between Singapore and Batam*** (CCS 500/006/09) at paragraphs 61, 145.
[4] ***Aalborg Portland A/S and Others v Commission Joined Cases*** C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P at paragraphs 82, 84 – 85.
[5] ***SCA Holding v Commission*** (Case T-327/94) at paragraphs 142 – 144.

qualify for a mitigating discount. Such situations ought, however, to be narrowly circumscribed. For example, a cartel member cannot rely on the fact that it had merely gone along with the rest of the cartel to implement the anti-competitive plan to contend that it qualifies for a mitigating discount under the Penalty Guidelines, as its participation adds to the cartel's strength. To qualify for a mitigating discount, the undertaking has to provide evidence showing that its conduct had clearly and substantially departed from the understanding or consensus relating to the implementation of the cartel or anti-competitive agreement/arrangement to the point of disrupting its very operation.[6][7]

7. CCCS has observed from past cases that it is not uncommon for undertakings to ask for mitigating discounts based on their relative roles in the infringement. Currently, the Penalty Guidelines recognise that the role of an undertaking in an infringement may have an aggravating or mitigating effect when adjusting financial penalties under Step 3 of CCCS's six-step approach. Paragraph 2.14 provides that the role of an undertaking as a leader in, or an instigator of, the infringement is an aggravating factor. Paragraph 2.15, on the other hand, only lists severe duress or pressure on an undertaking as an example where the undertaking's role in the infringement amounts to a mitigating factor.

8. CCCS considers that undertakings will benefit from greater clarity in the Penalty Guidelines as to the kind of conduct that CCCS considers sufficient to warrant a mitigating discount. In doing so, a balance will have to be struck between providing sufficient clarity and being overly prescriptive. Undertakings and their legal advisors should note that the Penalty Guidelines are not intended to be an exhaustive statement of CCCS's approach to all matters pertaining to the calculation of financial penalties. CCCS retains the discretion to assess the merits of a particular case as it deems appropriate, if the circumstances are not accounted for in the Penalty Guidelines.

Text of Proposed Changes to the Penalty Guidelines

9. With the foregoing considerations in mind, the amended paragraph 2.15 and the new paragraph 2.16 will read as follows:

"*2.15 Mitigating factors include:*

- *role of the undertaking, for example:*
  - *that the undertaking was acting under severe duress or pressure, or*

[6] CCCS considers that this should be a *bona fide* act to apply competitive conduct on the market, instead of conduct which simply aims to benefit from the knowledge of the anti-competitive arrangement at the expense of the other infringing undertakings – e.g. a situation where an undertaking decides to raise its prices at a lower quantum after agreeing to a higher level with the rest of the group. However, a decision by an undertaking not to increase its price at all despite an agreement to increase prices may constitute a *bona fide* act to apply competitive conduct, if the undertaking can demonstrate that its original price was competitive. The burden of proof lies with the undertaking that seeks the benefit of the mitigating factor to prove that the conduct it had adopted was in fact competitive in the context of that particular factual matrix.

[7] This approach is complementary to CCCS's leniency programme – where cartel members who come forward and disclose the cartel's activities to CCCS (and thereby disrupt or assist in the dismantling of the cartel) will potentially enjoy up to a 100% discount on any financial penalties that may be imposed.

- *in the context of a section 34 infringement, where the undertaking (a) provides evidence that its involvement in the infringement was substantially limited, and (b) demonstrates that, during the period in which it was party to the infringement, it actually avoided applying it by adopting competitive conduct in the market;*

- *genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;*
- *[…].*

2.16 For the avoidance of doubt, the fact that an undertaking did not play a leader or instigator role in the infringement or that it was not a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor. Furthermore, the fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating factor since this will already be reflected in the duration of the infringement at Step 2."

[Proposed amendments are underlined]

10. In making these proposed amendments, CCCS had regard to the mitigating factor of "*substantially limited involvement*" found in the European Commission's 2006 *Guidelines on the method of setting fines*[8] (the "**2006 EC Guidelines**"), as well as the decisions by the European Commission[9] and the European Courts[10] that have addressed this mitigating factor. These decisions establish a high threshold that an infringing undertaking will need to satisfy before it can have the benefit of a mitigating discount, which is reflective of CCCS's policy position. Specifically, an infringing undertaking that seeks a mitigating discount needs to show, cumulatively, that (i) not only was its involvement in the infringement substantially limited, but also that (ii) it avoided applying the anti-competitive agreement by adopting competitive conduct on the market. Further, the mere fact that an undertaking did not play a leader or instigator role or participate in the cartel in a pro-active way will not, without more, qualify for a mitigating discount.

Consultation Questions

11. In addition to inviting comments on the proposed amendments to the Penalty Guidelines, specific questions for the public consultation are set out below.

[8] See the third indent to paragraph 29 of the 2006 EC Guidelines.

[9] ***Case AT.39462 – Freight Forwarding***, where it was decided that simple non-implementation is not mitigating and that an undertaking must show that it actually avoided the anti-competitive agreement by applying competitive conduct in the market**.**

[10] ***Eni SpA v Commission*** (Case T-558/08) and ***Huhtamäki and Huhtamaki Flexible Packaging Germany v Commission*** (Case T-530/15).

(i) Do you consider the conduct in the proposed example to be included in paragraph 2.15 (i.e. where the undertaking (a) provides evidence that its involvement in the infringement was substantially limited and (b) demonstrates that, during the period in which it was party to the infringement, it actually avoided applying it by adopting competitive conduct in the market) to be an appropriate mitigating factor? If not, please explain why.

(ii) The objective of the proposed amendments to the Penalty Guidelines is to provide greater clarity to businesses and competition practitioners on the circumstances in which an undertaking's role in an infringement of section 34 of the Act may be deserving of a mitigating discount in the calculation of financial penalties. Do you consider that the stated objective will be met by the proposed amendments? If not, please explain why.

12. You may wish to submit your response in relation to the Penalty Guidelines via our Public Consultation Feedback Form accessible here.