

CCS DRAFT GUIDELINE ON THE APPROPRIATE AMOUNT OF PENALTY

THE APPROPRIATE AMOUNT OF PENALTY

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INTRODUCTION

- 1.1 The Competition Act 2004¹ ('Act') gives the Competition Commission of Singapore ('CCS') the power to issue directions² and impose financial penalties³ on undertakings for infringing the sections 34⁴ and/or 47⁵ prohibitions under the Act ('Section 34 or 47 prohibition' respectively).
- 1.2 The CCS' powers to issue directions and impose financial penalties are described in the CCS Guidelines on *Enforcement*.
- 1.3 This guideline provides general advice and information about the basis on which the CCS will calculate financial penalties for infringements of the section 34 and/or 47 prohibitions.

Statutory background

- 1.4 The Act provides that the CCS may impose a financial penalty only if it is satisfied that an undertaking which has committed an infringement of the section 34 and/or 47 prohibitions has done so intentionally or negligently⁶.
- 1.5 The financial penalty may not exceed ten (10) per cent of such turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of three (3) years⁷.

Policy objectives

- 1.6 In imposing any financial penalty, the CCS has the following twin objectives:
- to reflect the seriousness of the infringement, and
 - to deter undertakings from engaging in anticompetitive practices.
- 1.7 The imposition of a financial penalty is discretionary. The CCS will, where appropriate, impose financial penalties which are severe, particularly, in respect of cartel activities, for example, in price-fixing, market sharing, bid-rigging (collusive tendering) or, limiting or controlling production or investment arrangements, and serious abuses of a dominance as they are among the most serious infringements of competition law. This is aimed at deterring not only the infringing undertaking but also other like-minded

¹ Cap. 46/2004.

² Section 69(2) of the Act.

³ Section 69(2)(d)(iii) of the Act.

⁴ 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.

⁵ Conduct on the part of one or more undertakings which amounts to the abuse of a dominant position.

⁶ Section 69(3) of the Act.

⁷ Section 69(4) of the Act.

- undertakings which might be considering activities contrary to the section 34 and/or 47 prohibitions.
- 1.8 The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.
 - 1.9 This guideline is not a substitute for the Act and the regulations. It may be revised should the need arise. The examples in this guideline are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. In applying this guideline, the facts and circumstances of each case will be considered. A person in doubt about how he and his undertaking may be affected by the Act may wish to seek legal advice.
 - 1.10 A glossary of terms used in this guideline is attached.

2 DETERMINING THE AMOUNT OF PENALTY

Calculation of financial penalty

- 2.1 A financial penalty imposed by the CCS under section 69 of the Act will be calculated taking into consideration the following:
- the seriousness of the infringement;
 - the turnover of the business of the undertaking in Singapore;
 - the duration of the infringement;
 - other relevant factors, eg. deterrent value; and
 - any further aggravating or mitigating factors.

Seriousness of infringement

- 2.2 The amount of the financial penalty to be imposed will depend in particular upon the nature of the infringement and how serious and widespread the infringement is. Serious infringements include, for example, price-fixing, market sharing, bid-rigging (collusive tendering) and limiting or controlling production or investment arrangements.
- 2.3 In assessing the seriousness of the infringement, the CCS will consider a number of 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.
- 2.4 In assessing the impact and effect of the infringement on the market, direct or indirect, the CCS will take into consideration, among other things, the turnover of the business of the undertaking in Singapore for the undertaking's last business year.
- 2.5 The business year, for this purpose, will be the one preceding the date on which the decision of the CCS is taken or, if figures are not available for that business year, the one immediately preceding it.
- 2.6 Where an infringement involves several undertakings, the turnover of the business of each of the undertakings concerned in Singapore for the undertaking's last business year will be considered in order to take account of the real impact of the infringing activity of each undertaking on competition.

Duration of infringement

- 2.7 The amount of financial penalty to be imposed will also depend on the duration of the infringement.
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- 2.8 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.

Other relevant factors

- 2.9 The amount of financial penalty to be imposed may be adjusted, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph 1.6 above, in particular, to deter undertakings from engaging in anticompetitive practices. Other considerations may include, 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.

Aggravating and mitigating factors

- 2.10 In assessing the amount of financial penalty to be imposed, the CCS will consider any aggravating or mitigating factors.

- 2.11 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;
- infringements which are committed intentionally rather than negligently; and
- retaliatory measures taken or commercial reprisal sought by the undertaking against a leniency applicant.

- 2.12 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 and/or 47 prohibitions, for example, existence of any compliance programme;
- termination of the infringement as soon as the CCS intervenes; and

- co-operation which enables the enforcement process to be concluded more effectively and/or speedily.
- 2.13 In considering how much mitigating value to be accorded to the existence of any compliance programme, the CCS 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.

The maximum penalty

- 2.14 The amount of the financial penalty to be imposed may not exceed 10 per cent of such turnover of the business of the undertaking in Singapore for each year of infringement, up to a maximum of 3 years.
- 2.15 The involvement of an association of undertakings (e.g. a trade association) in an infringement of the section 34 and/or 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 per cent 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 3 years.

Immunity or reduction from penalty

- 2.16 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 lenient treatment set out in the CCS guideline on *Lenient treatment for undertakings coming forward with information in cartel activity cases*.

3 GLOSSARY

Business year	Refers to a period of more than six months in respect of which an undertaking publishes accounts or, if no such accounts have been published for the period, prepares accounts.
Turnover	Refers to the turnover of an undertaking for the business year preceding the date on which the decision of the CCS is taken or, if figures are not available for that business year, the one immediately preceding it.
Undertaking	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 organizations