

## **COMPETITION COMMISSION OF SINGAPORE GUIDELINES**

### **INTRODUCTION**

1. On 26 May 2005, the Competition Commission of Singapore ('CCS') launched the public consultation on the second set of draft guidelines to the Competition Act 2004 ('the Act') on (i) Powers of Investigation, (ii) Enforcement, (iii) Filing of Notification for Guidance and Decisions, and (iv) Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases. Besides posting the consultation documents on its website, the CCS also wrote to about 150 business chambers and trade associations to inform them about the public consultation. In conjunction with the Singapore Business Federation ('SBF'), 2 briefings on the draft guidelines were conducted for the business community. We received a total of 15 submissions at the end of the public consultation exercise on 30 June 2005.

2. On 17 August 2005, CCS launched the public consultation on the third set of draft guidelines to the Act on (i) The Appropriate Amount of Penalty, and (ii) Transitional Arrangements. Besides posting the consultation documents on its website, the CCS also wrote to about 150 business chambers and trade associations to inform them about the public consultation. In conjunction with the SBF, 2 briefings on the draft guidelines were conducted for the business community. We received a total of 10 submissions at the end of the public consultation exercise on 16 September 2005.

3. We thank all the contributors for their comments. Most were supportive of the draft guidelines, with many offering suggestions on how the draft guidelines could be improved. The CCS has reviewed the submissions carefully and made the appropriate changes to the second and third set of draft guidelines. This paper outlines the major changes made, as well as the reasons why some suggestions have not been adopted.

### **GUIDING PRINCIPLES AND FRAMEWORK OF THE DRAFT GUIDELINES**

4. In reviewing the submissions and proposed changes to the draft guidelines, the CCS is guided by the principle that the guidelines, instead of being prescriptive and detailed, should outline the conceptual, analytical and procedural framework within which the CCS will deal with cases, assess and investigate complaints and undertake enforcement.

5. The framework of the guidelines remains unchanged. However, specific sections of the guidelines have been revised, taking into account the comments received.

## **GUIDELINE ON POWERS OF INVESTIGATION**

6. Access to legal representation and advice: A number of commentators raised concerns on the extent of access to legal representation and advice, when the CCS exercises its powers of investigation under the Guideline. It has always been the intention of the CCS to allow for such access and the CCS has amended the Guideline to clarify the access available when exercising its powers of investigations.

7. Objective test under section 62 and list of documents/things taken during inspection/search: The CCS has considered the comments in these areas and will be amending the Guideline to clarify a) the adoption of an objective test for commencing investigation where there are reasonable grounds for suspecting that a section 34 and/or 47 prohibition has been infringed, and b) providing a list of the documents/things removed during an inspection/search either at the end of an inspection, if practically possible or no later than 3 working days.

8. Time taken to investigate: Some commentators noted that the CCS should give a rough time frame within which it will complete investigations. This would not be feasible. The length of any investigation is very much dependent on the facts and complexity of each case.

9. Costs of providing information: One commentator opined that the CCS should take into account the costs implications to an undertaking when it requests for the production of information, in particular, those for which detailed analysis or research is required. When making a request for specified information or documents, the CCS will be mindful of the costs implications for the party.

10. Stating the legal and factual basis for exercise of powers under sections 63 to 65: Some commentators asked for the legal and factual basis for the exercise of powers under sections 63 to 65<sup>1</sup> to be stated in the documentation issued. The CCS will ensure that sufficient information is given within the requirements of the Act.

11. Others: There were other comments on the criteria for assessment of credibility of complainants such as disgruntled ex-employees, conduct of informal inquiries, rectification of explanations given by employees, verification of accuracy of information provided, extension of time for replying to a request for information or production of documents, safeguards for search of homes and persons, disclosure of confidential information and principle of proportionality when exercising investigation powers. The CCS is grateful for the comments and appreciates that there are concerns about the exercise of its investigation powers. The CCS will bear these comments in mind when setting up its internal

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<sup>1</sup> Section 63 sets out the CCS' general powers of investigation. Section 64 sets out the powers of entry into premises without warrant, while s.64 sets out the power of entry under warrant.

procedures. As these are matters of internal procedure, it would not be appropriate to deal with them in the Guideline.

12. Amendments to the Act: The Act has been amended to:
- i) provide that a person or undertaking is not excused from disclosing information or documents to the CCS under a requirement made of him pursuant to the Act on the ground that the disclosure of the information or documents might tend to incriminate him. Where a person claims before making a statement disclosing information that the statement might tend to incriminate him, that statement shall be admissible in evidence against him in civil proceedings including proceedings under the Act but shall not be admissible in evidence against him in criminal proceedings other than proceedings under Part V of the Act relating to ancillary offences such as providing false or misleading information; and
  - ii) allow the CCS to take any steps which appear to be necessary for the purpose of preserving or preventing interference with any document which the investigating officer or inspector considers relates to any matter relevant to the investigation, when entering premises without a warrant.

Following from the amendments to the Act, the Guideline has been updated accordingly. The right to legal professional and litigation privilege remains.

### **GUIDELINE ON ENFORCEMENT**

13. Parent-subsidiary relationship and single economic entity: A number of contributors felt that the CCS should only issue directions to a parent company to ensure compliance of the Act by its subsidiary when the parent and subsidiary are found to be a single economic entity. Some felt that this should also apply where a parent company is required to pay a financial penalty. In exercising its discretion to impose directions and penalties, the CCS will consider, amongst other things, whether the parent and subsidiary are a single economic entity.

14. Appeal by parties other than the infringing undertaking: A person or undertaking to whom a direction has been issued or on whom a financial penalty had been imposed will have a right of appeal under the Act.

15. Time taken to render a decision and time given to comply with a direction: Some commentators asked the CCS to give an estimated time, within which it will render its decision after investigations. This would not be feasible as the length of any investigation and the time when a decision can be made depend very much on the facts of a case. The CCS is also not able to state the time that will be given to an infringing undertaking to comply with a direction as this too, is dependant on the facts of the case.

16. Definition of turnover, definition of internal documents and imposition of financial penalty in a trade association case: These will be dealt with in the Competition Regulations to be issued later in the year. The turnover, upon which a penalty is calculated when a trade association is involved, is dealt with in the CCS' draft Guideline on the Appropriate Amount of Penalty.

17. Undertakings/Commitments: There were some calls for the acceptance of undertakings and commitments in lieu of decisions of infringement. Depending on the fact and circumstances of a case, the CCS may consider whether to accept an undertaking or commitment to conclude an investigation.

18. Others: Some commentators called for a more detailed write-up on the use of structural remedies, whilst some others inquired if they could ask for a direction to be suspended. While the CCS appreciates the need for certainty, these are matters which are case specific. The CCS is grateful for the comments and will bear them in mind when exercising its powers of enforcement under the Act.

#### **GUIDELINE ON FILING OF NOTIFICATION FOR GUIDANCE AND DECISIONS**

19. The CCS' discretion to decline giving guidance/decision for agreements/conduct failing to raise real concerns of infringement: Some commentators wanted to know how this discretion will be exercised. Should the CCS receive an application which fails to raise real concerns of infringement, it will send the applicant a notice that the application has been determined by the CCS exercising its discretion not to give guidance/ decision. Given the wide range of situations which may arise, it is difficult to attempt any meaningful definition of when agreements/conduct will fail to raise real concerns of infringement. As every case will depend on its facts, the CCS would encourage applicants to assess their own agreements/conduct in the light of the Guidelines on the sections 34 and 47 prohibitions. If the agreement/conduct raises no real concerns of infringement, the CCS will not take enforcement action. Should enforcement action subsequently be warranted, e.g. if there has been a material change of circumstance or if the application was incomplete, false or misleading in a material particular, the CCS will give notice prior to taking action.

20. Prospective agreements or conduct: Some commentators wanted to know why the CCS will not deal with notifications involving prospective agreements or conduct. Unlike ex ante regulators, the CCS is an ex post regulator. Undertakings are strongly encouraged to hire their own legal advisers to assist them in formulating their agreements.

21. The time taken for the CCS to notify Applicants that Form 2 is required or that Form 1 / Form 2 is incomplete. Some commentators were of the view that the 3 month period, within which the CCS will notify applicants that Form 2 is required, or that the Form 1 / Form 2 submitted by the applicant is incomplete, is too long. This time period has been reduced to 2 months.

22. The time taken for the CCS to dispose of the application: Some commentators were of the view that the CCS should give an estimate of the time within which it will give its guidance or decision. This would not be feasible. The time taken is very much dependent on the facts and issues raised by the application. While straightforward cases may be disposed of relatively quickly, the careful consideration of complex cases will often require more time for investigation.

23. Joint representatives: a concern was raised on the requirement for a joint representative to be appointed where there is a joint application.. It was felt that there may be situations where the joint applicants may have a conflict of interest. The CCS had considered this. Joint representation is not required where such is not feasible.

#### **GUIDELINE ON LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION IN CARTEL ACTIVITY CASES**

24. Clarification on when an investigation is considered to have commenced for the purpose of qualifying for total immunity: The Guideline has been amended to clarify that 'investigations' here refers to formal investigations by the exercise of powers under sections 63 to 65 of the Act.

25. Informing a leniency applicant of its place in the queue: Some commentators suggested that the CCS should, upon initial contact with the leniency applicant, inform the latter of its place in the leniency queue. While the CCS understands that certainty is important to potential applicants, care should also be taken to obviate a situation where cartel participants having no genuine intention to apply for leniency abuse the system by making anonymous calls to the CCS to fish for information on whether any of their co-conspirators have already come forward with information on the cartel. The CCS will require evidence that the applicant is genuine in its intention to seek leniency, before the CCS discloses to the applicant its place in the queue.

26. Withdrawal of Leniency Application: It was suggested that a leniency applicant should be allowed to withdraw its application, whereupon the CCS should not use the information submitted. If an applicant decides to withdraw its application, e.g. because it discovers that it is not the first in the queue, the CCS will return the evidence that it has submitted to the CCS. However, this will not preclude the CCS from obtaining evidence against the cartel in question by its own independent investigations. It should also be noted that once an applicant has accepted a formal offer of leniency, setting out the obligations, it will *not* be allowed to withdraw any evidence that has already been submitted.

27. Sufficiency of the Evidence: Some commentators asked about the quality of the evidence that is required before full immunity will be granted. The nature and quality of the evidence will depend on the facts of each case.

28. Removing the requirement that a leniency applicant refrains from further participation in the cartel to increase the pool of potential applicants: Some felt that compliance with this requirement serves to alert other cartel participants that the applicant has come forward to the authorities. The CCS is of the view that this requirement should be maintained, as an applicant, that is genuine in its intention to seek leniency should not continue to participate in the very activity for which it is seeking lenient treatment. To avoid alerting other cartel participants, the applicant's cessation in the cartel activity need not be a conspicuous one. It was also suggested that an applicant should be required to cease participation from the time when it actually discovers that it has been party to a cartel and not from the time when it discloses the cartel to the CCS. As this approach may unduly restrict the pool of eligible leniency applicants, this suggestion will not be adopted at this point in time.

29. The requirement that a leniency applicant cannot have initiated the cartel or coerced anyone to participate in it: It was suggested that this requirement be removed, so as to increase the number of potential leniency applicants. The CCS has decided, as a matter of policy, that anyone who starts a cartel or who forces some other person to participate in it should not be eligible for leniency. The CCS will satisfy itself that there is evidence of such conduct, before it denies a leniency applicant, immunity on these grounds.

30. The option of either providing evidence of the cartel or a list of the evidence to be disclosed at a later stage: Some commentators asked if it was for the leniency applicant to decide how to present its evidence. This will depend on the facts of each case. However, leniency applicants should note that if they present a list of evidence (as opposed to the evidence itself), they must be prepared to make good their commitment to furnish all the evidence on the list at some later point in time. In other words, the leniency applicant will be required to produce the listed evidence at some point in time.

31. Whether information provided by the leniency applicant will be disclosed to other private parties or to foreign regulatory bodies: Some commentators voiced concerns that the prospect of such disclosure would chill leniency applications. The CCS' position is that it will not disclose to any private party, information provided by a leniency applicant. Disclosure of information will not be made except within the bounds of the law

32. Ultimately, the goal of the CCS is to administer the leniency programme in a reasonable and commonsensical manner, that will further the objective of eradicating cartels.

#### **GUIDELINE ON THE APPROPRIATE AMOUNT OF PENALTY**

33. Consideration of the turnover of the business in the relevant product and geographic market affected by the infringement: Some commentators have sought clarification on whether the relevant turnover used in calculating the

appropriate amount of penalty will be the entire turnover of the undertaking or the turnover for the relevant product and geographic market affected by the infringement.. The Guideline has been amended to clarify that the maximum penalty under section 69(4) is based on the entire turnover of the business of the undertaking in Singapore. The turnover of the undertaking in the relevant product/geographic market is also a relevant consideration in assessing the effect or impact on the market and in calculating the appropriate amount of penalty to be imposed.

34. Approach in calculating the appropriate amount of penalty: Some commentators have suggested that we adopt the UK Office of Fair Trading (“OFT”) 5–step approach to calculate the appropriate amount of penalty. We had considered the OFT approach and understand that their 5-step approach was only issued after having acquired experience over a number of years. We are of the view that our approach at this stage, of specifying relevant criteria will suffice to give sufficient certainty to undertakings. We may consider issuing a more detailed step-by-step guideline in future after we have accumulated experience on a sufficient number of cases.

35. Limitation Period of Infringement: Some commentators have asked whether a limitation period should be set on CCS’ power to investigate and enforce infringement of the sections 34 or 47 prohibitions that have already stopped. There is no statutory limitation and our enforcement powers are not so limited. Whether the CCS will want to pursue an old case will depend very much on its administrative priorities and the facts of that case.

36. Duration of Infringement: There are some concerns on how CCS will assess the duration of an infringement, when deciding on the financial penalty. This will usually be the date of cessation of infringement and is very much dependent on the facts of each case.

37. Rounding up of the period of an infringement: There were some queries on the rationale for rounding up the period of an infringement which has continued for less than a year to a full year. This is in line with our twin policy objectives of reflecting the seriousness of any infringement of the prohibitions under the Act and deterring likeminded undertakings from engaging in anti-competitive practices. Much will depend on the facts of each case and in calculating the appropriate amount of penalty, the CCS will bear in mind the principle of proportionality.

38. Seriousness of Infringement: There was one comment that only the turnover of the undertakings involved in the infringement should be considered and not any related or parent company which was not involved in the infringement. The Guideline specifically provides that the turnover for the last business year for each infringing undertaking (where there is more than one undertaking) will be taken into account when assessing the real impact of that

undertaking's infringing activity. It is not the intention of the CCS to impose a penalty on a related or parent company that is not involved in an infringement.

39. Aggravating and Mitigating factors: It was also suggested that CCS should also consider other mitigating factors such as the role played by other parties to the infringement and that the damage was not a foreseeable result of the infringement and financial hardship. These factors can be taken into account as part of the existing circumstances that the CCS will consider when calculating an appropriate amount of penalty. Much will depend on the facts of each case.

40. Involvement of an association of undertakings: There was concern that the aggregate financial penalty imposed on an undertaking for the same infringement, whether on the undertaking itself or as a member of an association of undertakings, should be subject to the penalty limit set out in Section 69(4) of the Act only. Much will depend on the facts of each case and in calculating the appropriate amount of penalty, the CCS will bear in mind the principle of proportionality.

41. Others: Some commentators sought clarification on applicable case-law and availability of a CCS guidebook and information leaflets. CCS will, where relevant, have due regard to caselaw in other jurisdictions, when reviewing and deciding on its cases. Much will depend on the facts of the case. CCS will endeavour to update its website with frequently-asked-questions or any other information. The CCS is grateful for the comments and will bear them in mind when exercising its powers of enforcement under the Act.

#### **GUIDELINE ON THE TRANSITIONAL ARRANGEMENTS**

42. Extension of financial penalty moratorium: One commentator suggested that the financial penalty moratorium should be extended to cover all other consequences of infringement under the Act. The policy intention is to grant only a financial penalty immunity to encourage undertakings with agreements that are likely to infringe or infringes the Act to renegotiate, amend or cease their agreements quickly to reduce their potential exposure to a 3<sup>rd</sup> party private right of action and the possibility that the relevant provisions of their agreements may be rendered void.

43. Rationale for making it mandatory for all parties to the agreement to jointly apply for a transitional period (now referred to as "an extension"): One commentator suggested that more could be done to explain the rationale for making it mandatory for all parties to the agreement to jointly apply. The proposed Competition (Transitional Provisions for Section 34 Prohibition) Regulations 2005 will provide for a 6-month period from 1 January 2006 to 30 June 2006, during which no financial penalty will be imposed in respect of any infringement of the section 34 prohibition by the agreement during this 6-month period (now referred to as the "transitional period"). The CCS wants all parties to agree to an application for an extension of the transitional period because they

must all want the agreement to continue. The CCS should not be involved in any internal disputes between the parties on whether to apply for an extension. If the parties cannot agree on whether their agreement infringes the Act, one or more of them can either get legal advice and assess whether they should continue with the agreement or apply for notification for guidance or decision.

44. Dissemination of application dates: One commentator wanted to know when the application process will come into force and how that information will be disseminated to the public. The application period will start on 1 January 2006 and end on 30 June 2006. The proposed Competition (Transitional Provisions for Section 34 Prohibition) Regulations 2005 will be gazetted in December 2005 to give businesses time to consider whether to make an application from 1 January 2006. The information will be disseminated through the CCS website, the Singapore Business Federation, press statements and various business chambers and trade associations.

45. CCS procedure on complaints after an extension is granted: One commentator wanted to know how the CCS would establish whether the complaint is genuine or frivolous before it decides to terminate an extension and if the CCS will take action against the complainant where the complaint is found to be unjustifiable and malicious. The CCS will examine any complaint carefully and will only terminate an extension if there is good reason to do so. The grantees of an extension will be given at least 14 days notice and the opportunity to make representations to the CCS before the CCS decides to terminate the extension. The action taken by the CCS will depend on the facts and circumstances of each case.

46. Another commentator suggested that the CCS should disclose the grounds, information and documents on which it arrives at a decision to terminate an extension. The CCS will give sufficient information in the termination notice to enable the grantees to submit their representations to CCS. The Guideline will be amended to clarify that the CCS will set out the grounds under which it proposes to terminate the extension.

47. Approach in dealing with materials submitted in support of an application: There was a suggestion that the extension should be accepted on a without prejudice basis, with all materials submitted in support of the application returned to the applicant, should the application be rejected, without follow-up CCS enforcement action. The policy intention is that if the extension application is rejected, the CCS may give the parties a period of time to cease the agreement or otherwise comply with the Act. If they do not do so, the CCS reserves the right to take enforcement action. In so doing, the CCS will use all the materials submitted in support of the application.

48. Publications: There were comments that the applications should be published for consultation and the CCS decisions should be published for transparency. The policy intention is that the applications will be treated

confidentially and the CCS will not publish the applications or its decisions, save that the CCS, may in its discretion publish a redacted version, to exclude information in accordance with section 89(6) of the Act, such as excluding information the disclosure of which will significantly harm the legitimate business interests of an undertaking(s) or the interests of an individual.

49. Treatment of categories of similar agreements: There was a comment on whether the CCS will grant an extension for categories of similar agreements instead of granting an extension singly for each agreement. The policy intention is that all agreements for which an extension is sought, should apply separately. However, the applicant should inform the CCS if there is a network of similar agreements so that the CCS can assess the effect of such agreements on the market.

### **NEXT STEPS**

50. Pursuant to section 61 of the Act, the CCS will publish the above guidelines in the *Gazette* before 1 January 2006, when the section 34 and section 47 prohibitions come into force.

51. The guidelines will be reviewed from time to time to ensure their continued relevance, taking into account relevant changes and the decisions of the Competition Appeal Board and the courts.