

**Comments to the
Competition Commission of Singapore
on proposed amendments to
Guideline On Lenient Treatment For
Undertakings Coming Forward With
Information In Cartel Activity Cases**

From:

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A. INTRODUCTION

1. This submission is made in response to the proposed changes to the Guideline On Lenient Treatment For Undertakings Coming Forward With Information In Cartel Activity Cases released by the CCS for public consultation by:

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2. In this submission:

“**Act**” refers to the Competition Act 2004.

“**Amended Leniency Guidelines**” refer to the amended Guideline On Lenient Treatment For Undertakings Coming Forward With Information In Cartel Activity Cases issued by the CCS for public consultation on 3 September 2008.

3. We find that the Amended Leniency Guidelines do, in general, create a greater incentive to undertakings to self-report on cartel behaviour and may encourage cartel members to take advantage of CCS’ leniency policy.
4. Our comments are primarily directed towards obtaining further clarification as to how the CCS would exercise its discretion in operating the marker system and the leniency plus system as uncertainties in such systems are likely to translate into a disincentive to cartel members to use the leniency program.

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C. SUMMARY OF MAJOR POINTS

1. Application for Marker

It is not clear from the Amended Leniency Guidelines whether an undertaking wishing to apply for leniency must at the same time apply for a marker, or whether the CCS will automatically allocate a marker to such an undertaking.

2. Time Period for Perfecting Marker

The Guidelines states that an undertaking wishing to take advantage of the lenient treatment will be given a "limited period" to collect necessary information and evidences to perfect the marker. However there is no stipulated time frame for perfecting the marker,

3. Subsequent undertakings with more complete information

According to the Guidelines, an undertaking which is first to disclose cartel activity is given time for collecting information. But if another undertaking comes with more complete information it will have to proceed for leniency under paragraph 4 and be granted at most a 50% reduction in penalties if the first undertaking did manage to perfect its marker, which appears unfair.

4. Confidentiality obligation of the applicant

The Guidelines are not clear regarding the whistleblower's duty of secrecy to prevent other cartel members from being alerted, and possibly taking action to distort or tamper with evidence.

5. Failure to perfect the marker

The Guidelines fail to define the term "Failure". If the first undertaking fails to perfect a marker & there is no second undertaking in line, will the first undertaking be able to "reapply" for a marker?

6. Ring leader in another market

If an undertaking which is given total immunity or 100% reduction in financial penalty in a specific market, but has initiated a cartel or coerced others to be a part of cartel in another market. Would it affect the incentives given in the other market?

7. First to come forward to qualify for leniency plus

We would like to know whether an undertaking which is second in line to disclose information about cartel activity in the second market will at all qualify for a reduction in financial penalty in the first market, or if only an undertaking which is first in line to come forward will qualify for a reduction in financial penalty in the first market.

8. Increased penalty if cooperation is withdrawn

We ask whether the CCS would consider reducing the gaming element by giving a reduction in financial penalties in the decision pertaining to the first market, and thereafter clawing back the reduction if the undertaking ceases to cooperate in investigations pertaining to the second market.

D. STATEMENT OF INTEREST

ATMD LLP (“ATMD”) is a Singapore law firm which provides legal services to both local and foreign clients.

ATMD’s legal services include advising on commercial transactions, mergers & acquisitions, intellectual property and competition law. ATMD also assists various conferences in filings for block exemptions under the Act.

ATMD’s Competition Law Practice Group comprise of members with expertise in various fields who have been working on competition law matters and compliance issues. The Competition Law Practice Group has advised on competition law matters in various industries including, energy, pharmaceuticals and information technology.

In this response, we have focused our comments on the practical issues which may confront undertakings if they wish to report to, or cooperate with, CCS under the amended leniency program. Improving the clarity and certainty of the leniency program is likely to encourage undertakings to report cartel activities early.

E. COMMENTS

I. MARKER SYSTEM

In general, we appreciate that the implementation of the marker system would encourage undertaking involved in cartel activities to report to CCS early in order to benefit from the lenient treatment.

(1) Application for Marker

It is not clear from the Amended Leniency Guidelines whether an undertaking wishing to apply for leniency must at the same time apply for a marker, or whether the CCS will automatically allocate a marker to such an undertaking.

It appears that an application for a marker must be made by the undertaking, and a marker will be granted only if the undertaking meets certain criteria. However, there is no reason why an undertaking which meets all the criteria for a marker as set out in paragraph 5.5 should not be allocated with a marker even if it did not apply for the same. It may be fairer if all applicants for leniency which come forward be automatically allocated a marker if they disclose an adequate amount of detail / meet certain thresholds, and be given the opportunity to perfect the marker.

(2) Time Period for Perfecting Marker

The Amended Leniency Guidelines states that an undertaking wishing to take advantage of the lenient treatment will be given a "limited period" to collect necessary information and evidences to perfect the marker. However there is no stipulated time frame for perfecting the marker, and undertakings may either fear being caught out if the CCS grants too short a time frame or undertakings may take their time to furnish the information even if they have all information in hand if CCS grants a longer time frame.

For greater certainty, it may be useful for CCS to provide an indicative time frame of say 30 days for a marker holder to provide the information to perfect the marker. CCS may opt to impose a shorter time frame if CCS has already started an investigation and gathered some evidence.

(3) Subsequent undertakings with more complete information

The marker system is meant to spark a "race to the door". It is therefore quite conceivable that an undertaking that is in the second spot in the marker queue may have more comprehensive information than the undertaking that is first in line in the marker queue as the second undertaking has devoted more time to information gathering.

If the information from the second undertaking can immediately be used by CCS to start an investigation while the first undertaking is still collating information and evidence, it does appear unfair that the second undertaking will have to proceed for leniency under paragraph 4 and be granted at most a 50% reduction in penalties if the first undertaking did manage to perfect its marker.

(4) Confidentiality obligation of the applicant

According to the Amended Leniency Guidelines paragraph 8.1, CCS will endeavour to keep the identity of the “whistleblower” confidential.

However, perhaps what is more critical is that the “whistleblower” itself be bound by a duty of secrecy to prevent other cartel members from being alerted, and possibly taking action to distort or tamper with evidence or otherwise hamper CCS’ investigations. CCS may wish to consider incorporating specific duties of secrecy on the undertakings coming forward until such time when CCS’ investigations are complete.

(5) Failure to perfect the marker

What is the definition of “failure” to perfect the marker? It appears to be a quantitative rather than a qualitative standard as perfecting a marker merely requires the undertaking to provide “all information available to it in relation to the cartel activity.”

The Amended Leniency Guidelines states if an undertaking does not perfect the marker within the specific time period, the second undertaking in line will be given a chance to perfect the marker. Assuming there is no second undertaking in line, will the first undertaking be able to “reapply” for a marker?

(6) Ring leader in another market

If an undertaking which is given total immunity or 100% reduction in financial penalty in a specific Market A, but has initiated a cartel or coerced others to be a part of cartel in another Market B which was subsequently discovered, would this affect the immunity or levels of financial penalty in Market A?

II. LENIENCY PLUS

The Leniency Plus system appears to be a useful tool to assist the CC in uncovering other cartel activities.

(1) First to come forward to qualify for leniency plus

The Amended Leniency Guidelines at paragraph 6.2 provide that to qualify for Leniency Plus, CCS would have to be satisfied that the undertaking would qualify for total immunity from financial penalties or a reduction of up to 100 per cent in the amount of the financial

penalty in the second market. This suggests that should an undertaking not be the first to provide information to CCS in the second market, it does not at all qualify for a reduction of financial penalties in the first market.

To encourage undertakings to come forward with information on hidden cartels, it is suggested that a reduction in the financial penalty in the first market be still given to the undertaking who is not the first in time in the second market. The reduction can be pegged to specified criteria such as that in paragraph 4.2.

(2) Increased penalty if cooperation is withdrawn

Paragraph 14 of the Consultation Document states that "if XYZ Ltd subsequently withdraws its cooperation for the investigation in Market B, CCS will increase its penalty computation for the financial penalty for XYZ Ltd in Market B to prevent leniency applicants from gaming and benefiting from the 'leniency plus' uplift".

It is suggested that a possible method to reduce the gaming element would be to give for CCS to clawback the amount reduced in Market A under 'leniency plus' rather than to increase the penalty in Market B. The prospect of increased penalties may well act as a disincentive to XYZ Ltd to reveal any information about Market B.

F. CONCLUSION

Thank you for this opportunity to comment on the Amended Leniency Guidelines.