

**COMPETITION COMMISSION OF SINGAPORE
GUIDELINES ON LENIENT TREATMENT FOR
UNDERTAKINGS COMING FORWARD WITH INFORMATION
IN CARTEL ACTIVITY CASES**

INTRODUCTION

1. On 3 September 2008, the Competition Commission of Singapore (“CCS”) launched a month-long public consultation on the draft revised CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information in Cartel Activity Cases (“Guidelines”). CCS issued a media release and posted the Consultation Document and the Guidelines on its website as well as the Government online consultation Portal. CCS received 3 submissions.

2. We thank all the respondents for their feedback and comments on how the Guidelines can be improved. CCS has reviewed the submissions carefully and made the appropriate changes to the Guidelines. The framework of the Guidelines remains unchanged. This paper clarifies some of the issues raised and sets out CCS’ responses.

SUBMISSIONS ON THE GUIDELINES

3. *Issue: The Guidelines do not provide details on what anonymous initial contact with or ‘feelers’ to the CCS entails (see paragraph 5.3 of Guidelines).* The Guidelines will be amended to clarify that initial contact with or ‘feelers’ to CCS may be made anonymously to ascertain if leniency is available. However, for a marker or leniency application proper to be proceeded with, the undertaking’s name must be given.

4. *Issue: Would disqualification of cartel participants, who initiate cartels, undermine the effectiveness of the leniency system (see paragraph 2.2 of Guidelines)?* As a matter of policy, anyone who starts a cartel should not be eligible for leniency. As the aim of a leniency programme is to provide maximum incentives and opportunities for undertakings to come forward and report cartels, CCS will ensure that there is evidence that a potential leniency applicant initiated a cartel before denying leniency.

5. *Issue: Whether CCS will give clear guidance on the level of reduction for financial penalties, available to different undertakings, who are not first in the leniency queue?* CCS is of the view that the current approach of stating the criteria in paragraph 4.2 of the Guidelines suffices to give sufficient guidance to potential applicants, whilst providing flexibility to CCS to give second or subsequent applicants, whose evidence provide significant added value, a reduction in penalty of up to 50%, appropriate to their circumstances and not limited by any prescribed or indicated level.

MARKER SYSTEM

6. *Issue: Whether an undertaking wishing to apply for leniency must at the same time apply for a marker, or whether CCS will automatically allocate a marker to such an undertaking?* The first undertaking to come forward to CCS, whether by way of a leniency application or an application for a marker (see paragraph 5.4 and 5.5 of Guidelines), will be treated as first in line. An undertaking applying for leniency will not lose its place in the queue if another undertaking were to subsequently apply for a marker.

7. *Issue: What information must be provided when applying for a marker (see paragraph 5.5 of Guidelines)?* An undertaking applying for a marker must provide its name to CCS. It must also provide sufficient information for CCS to ascertain whether any other undertaking has applied for immunity or a reduction of up to 100%, for the suspected infringement.

8. *Issue: That information provided under a marker approach should not be used against an applicant if the applicant fails to qualify for leniency or made available to competition authorities or courts overseas unless the applicant consents.* CCS will return the information submitted to CCS under the marker approach if the applicant fails to qualify for leniency. However, this will not preclude CCS from obtaining evidence against the cartel in question by its own independent investigations. CCS would not use or disclose information provided by the applicant to private parties or to competition authorities or courts overseas, except within the bounds of the law.

9. *Issue: Whether a marker should be made available to subsequent applicants (see paragraph 5.8 of Guidelines)?* A marker system will apply as long as total immunity or a reduction of up to 100% in financial penalties is available. Once a marker has been perfected, it would mean that CCS will have information, which can be used by CCS to take forward a credible investigation, or which adds significant value to CCS' investigations. Subsequent applicants should be encouraged to gather information and approach CCS as quickly as possible to qualify for leniency, i.e. a reduction of up to 50% of the financial penalty.

Paragraph 4.2 of the Guidelines provides that in deciding on the level of reduction, CCS will take into account, the stage at which the undertaking comes forward, the evidence already in CCS' possession and the quality of the information provided by the undertaking.

10. *Issue: What is the time period for perfecting the marker (see paragraphs 5.5 and 5.6 of Guidelines)?* Stipulating a time frame for perfection of a marker will not be meaningful because the time required is likely to vary from case to case. CCS will work with leniency applicants, who genuinely co-operate with CCS, to set reasonable timeframes for providing information and evidence in relation to the reported cartel.

11. *Issue: Whether the Guidelines should clearly establish the evidential threshold for perfecting a marker?* CCS will work with leniency applicants, who genuinely co-operate with CCS, on a case-by-case basis, for them to provide the necessary information to perfect the marker. An applicant seeking to perfect a marker must provide CCS with all the evidence relating to the suspected infringement available to it at the time of the submission. This is consistent with the information to be provided for a leniency application (see paragraphs 5.4 and 5.7 of Guidelines). A leniency applicant should provide information meeting the quality specified in paragraph 7 of the Guidelines i.e. to provide the CCS with a sufficient basis for taking forward a credible investigation or to add significant value to CCS' investigations.

12. *Issue: Whether the grant of a marker should be discretionary (see paragraph 5.9 of Guidelines)?* CCS will amend the Guidelines to clarify that while the grant of a marker is discretionary, it is likely that a marker will be granted as a norm rather than an exception, once an undertaking provides the relevant information.

13. *Issue: Can holders of subsequent markers jump the queue and replace the holder of the first marker?* No. Paragraph 5.6 of the Guideline states: "A marker protects an undertaking's place in the queue for a given limited period of time and allows it to gather the necessary information and evidence in order to perfect the marker." A marker applicant, who is first-in-line, will not lose his position if a subsequent marker applicant satisfies all the conditions required for perfecting the marker before the first marker applicant. Although CCS has stated in paragraph 5 of the Consultation Document that it will also assess if the first applicant genuinely requires the remaining time to satisfy the conditions to perfect the marker, this is generally to give CCS the flexibility to check and ensure that the first marker applicant is taking appropriate steps to perfect the marker and is not jeopardizing CCS investigations by waiting out the marker period without any

intent to fulfill the conditions of the marker. Genuine applicants should thus not be concerned.

LENIENCY PLUS SYSTEM

14. *Issue: What constitutes a “completely separate cartel activity” under the leniency plus system (see paragraph 6.2 of Guidelines)?* There is an example of what would constitute a “completely separate cartel activity” in paragraph 6.4 of the Guidelines. The fact that the activity is in a separate market is a good indicator that it is a separate cartel activity.

15. *Issue: Can an applicant involved in investigations in relation to a cartel put out anonymous “feelers” to help itself in deciding whether to come forward with information in relation to a separate cartel activity?* Yes.

16. *Issue: Whether leniency plus could be extended to a leniency applicant, who is not the first undertaking to come forward in respect of another separate cartel activity, and, who would not therefore not qualify for leniency plus under paragraphs 2 and 3 of the Guidelines?* An undertaking, which is already under investigation for a cartel activity, should apply as soon as possible for leniency plus if it discovers that it was also involved in a separate cartel activity. The purpose of introducing leniency plus is to provide incentives to cartel participants, under investigation for one cartel, to surface other cartels in which they are involved. Undertakings, who are not first in line in reporting the second cartel activity, may, in accordance with the leniency guidelines, be granted a reduction of up to 50% in the financial penalty for the second cartel activity. Implementing a reduction for the second or subsequent applicants for the separate cartel activity would reduce the incentive for applicants to come forward as soon as possible.

17. *Issue: Whether the leniency plus credit could be quantified upon perfection of the marker in respect of the second cartel?* One of the conditions for leniency plus is that applicants must continue to cooperate with CCS in its investigations in the second cartel investigation. As such, it would not be practicable to quantify the leniency plus credit upon perfection of the marker in respect of the second cartel.

18. *Issue: Whether the reduction of penalty in respect of the first cartel for a successful leniency plus applicant can be spelt out in the Guidelines?* The extent of a reduction in penalty in respect of the first cartel for a successful leniency plus applicant would depend on the circumstances and merits of each case. Relevant factors include the stage where the applicant comes forward with evidence of the second cartel activity, the evidence that the applicant provides and the evidence that CCS already has in possession, in relation to the second cartel.

19. *Issue: Why should factors such as the stage, where an applicant comes forward with evidence of the second cartel activity, the evidence that the applicant provides and the evidence that CCS already has in possession, in relation to the second cartel, affect the leniency plus credit available in the first cartel investigation (see paragraph 9 of the Consultation Document)?* To qualify for leniency plus, the CCS would have to be satisfied that an undertaking would qualify for total immunity or a reduction of up to 100% in the amount of the financial penalty for the second cartel activity. The factors listed above in paragraph 18, influence the extent of an undertaking's penalty reduction for the second cartel activity. If a cartel participant, already under investigation by CCS, comes forward at a point, where CCS has already commenced investigations for the second cartel, CCS may decide, in light of the quality of information submitted, to grant e.g. a 70% reduction in financial penalty for the second cartel. In such a case, the amount of reduction in financial penalty for the first cartel is apt to be lower compared to a case where the information submitted by the applicant for the second cartel had merited a 100% reduction.

20. *Issue: Whether the leniency plus credit in the first cartel investigation could be "clawed back" instead of increasing the penalty for the second cartel investigation where an applicant withdraws co-operation in the second cartel investigation (see paragraph 14 of the Consultation Document)?* CCS will keep its option open. CCS will monitor the situation and adjust our procedures if necessary.

CONCLUSION

21. The introduction of the new marker system and leniency plus system in the CCS Leniency Programme is intended to encourage more leniency applicants to come forward to report cartel activities. The practical modalities of the new system will be further developed and refined as CCS deals with leniency applicants and their lawyers. CCS may issue Frequently Asked Questions ("FAQs") at a later date to provide more information on the CCS Leniency Programme.