

**CCS GUIDELINES ON LENIENT
TREATMENT FOR UNDERTAKINGS
COMING FORWARD WITH
INFORMATION ON CARTEL ACTIVITY
CASES**

LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION ON CARTEL ACTIVITY CASES**CONTENTS****PART**

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1 INTRODUCTION

1.1 Under section 34 of the Competition Act (Chapter 50B) (“the Act”), 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 within Singapore are prohibited.

1.2 Section 34 extends to prohibit cartel activities. Cartel activities include, amongst other things, the following:

- Price-Fixing:

E.g. where parties agree, directly or indirectly, on the prices;

- Establishment of Restrictions / Quotas on Output:

E.g. agreements which restrict output or production;

- Bid Rigging:

E.g. arrangements where parties collude when submitting their tenders;

- Market Sharing Agreements.

Further information on the section 34 prohibition can be found in the *CCS Guidelines on the Section 34 Prohibition*.

1.3 Cartels hurt consumers because they restrict or remove competition between market players and thereby remove the incentive for market players to be efficient or to innovate.

1.4 As cartel activities infringe the section 34 prohibition, undertakings participating or which have participated in them are liable under section 69 of the Act to a financial penalty. Such undertakings may wish to inform the CCS of the existence of the cartel activity but might be deterred from doing so because of the risk of incurring large financial penalties.

1.5 Due to the secret nature of cartels, undertakings participating or which have participated in them should be given an incentive to come forward and inform the CCS of the cartel’s activities. ~~The policy of granting lenient treatment to these undertakings which cooperate with the CCS outweighs the policy objectives of imposing financial penalties on such cartel participants.~~ The benefits of granting lenient treatment to undertakings who cooperate with CCS outweigh the need to impose financial penalties on these undertakings.

1.6 As leniency programmes have been found to be effective in other competition law regimes, a similar programme will form part of Singapore’s enforcement strategy.

1.7 These guidelines are not a substitute for the Act, the regulations and orders.

They may be revised should the need arise. The examples in these guidelines are for illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the CCS. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act may wish to seek legal advice.

2 TOTAL IMMUNITY FOR THE FIRST TO COME FORWARD BEFORE AN INVESTIGATION HAS COMMENCED

2.1 Under section 69(4) of the Act, an undertaking which has intentionally or negligently infringed the Act's prohibitions faces a financial penalty of up to 10% of its business turnover for each year of infringement (up to a maximum of 3 years).

2.2 The CCS will nevertheless grant an undertaking the benefit of total immunity from financial penalties if all of the following 2 conditions are satisfied:

- The undertaking is the first to provide the CCS with evidence of the cartel activity before an investigation¹ has commenced, *provided that* the CCS does not already have sufficient information to establish the existence of the alleged cartel activity;
- The undertaking:
 - provides the CCS with all the information, documents and evidence available to it regarding the cartel activity;
 - maintains continuous and complete co-operation throughout the investigation and until the conclusion of any action by the CCS arising as a result of the investigation;
 - refrains from further participation in the cartel activity from the time of disclosure of the cartel activity to the CCS (except as may be directed by the CCS);
 - must not have been the one to initiate the cartel; and
 - must not have taken any steps to coerce another undertaking to take part in the cartel activity.

2.3 If an undertaking does not qualify for total immunity under paragraph 2.2, it may still benefit from a reduction in the financial penalty of up to 100% under paragraphs 3.1 and 3.2.

¹ By the exercise of powers under sections 63 to 65 of the Act.

3 REDUCTION OF UP TO 100 PER CENT IN THE LEVEL OF FINANCIAL PENALTIES WHERE THE UNDERTAKING IS THE FIRST TO COME FORWARD BUT WHICH DOES SO ONLY AFTER AN INVESTIGATION HAS COMMENCED

3.1 An undertaking may benefit from a reduction in the financial penalty of up to 100% if:

- the undertaking seeking immunity is the first to provide the CCS with evidence of the cartel activity;
- this information is given to the CCS after the CCS has started an investigation but before the CCS has sufficient information to issue a written notice under section 68(1) that it proposes to make a decision that the section 34 prohibition has been infringed; and
- the conditions under the second bullet in paragraph 2.2 are satisfied.

3.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the CCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCS' possession; and
- the quality of the information provided by the undertaking.

4 SUBSEQUENT LENIENCY APPLICANTS: REDUCTION OF UP TO 50 PER CENT IN THE LEVEL OF FINANCIAL PENALTIES

4.1 Undertakings which provide evidence of cartel activity before the CCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed but are not the first to come forward may be granted a reduction of up to 50 per cent in the amount of the financial penalty which would otherwise be imposed, if the conditions under the second bullet in paragraph 2.2 are satisfied.

4.2 Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the CCS will take into account:

- the stage at which the undertaking comes forward;
- the evidence already in the CCS' possession; and
- the quality of the information provided by the undertaking.

5 PROCEDURE FOR REQUESTING IMMUNITY OR A REDUCTION IN THE LEVEL OF PENALTIES

- 5.1 An undertaking which wishes to take advantage of the lenient treatment detailed in these guidelines must contact the CCS. Anyone contacting the CCS on the undertaking's behalf must have power to represent the undertaking.
- 5.2 Applications for leniency may be made either orally or in writing. Initial contact can be made by telephone.
- 5.3 Initial contact with or 'feelers' to the CCS may be made anonymously. However, for the leniency application proper to be recorded and proceeded with, the undertaking's name must be given to the CCS.
- 5.4 The undertaking should immediately provide the CCS with all the evidence relating to the suspected infringement available to it at the time of the submission. ~~Alternatively, the undertaking may present a list of the evidence that it proposes to disclose at a specified later date and provide a description of the nature and contents of this evidence.~~
- 5.5 The CCS will provide a marker system for leniency applications under paragraphs 2 and 3 above. The undertaking may apply for a marker to secure a position in the queue and discuss the timing and process of perfecting the marker by the prompt provision of relevant information. For an undertaking to secure a marker, the undertaking must provide a description of the cartel conduct in sufficient detail to allow the CCS to determine that no other undertaking has applied for immunity or a reduction of up to 100 per cent, for such similar conduct.
- 5.6 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.
- 5.7 To perfect a marker, the undertaking must provide all information available to it in relation to the cartel activity.
- 5.8 If the undertaking fails to perfect the marker, the next undertaking in the marker queue will be allowed to perfect their marker, to obtain immunity or a reduction of up to 100 per cent in financial penalties. If the marker is perfected, the other undertakings in the marker queue will be informed so that they can decide whether to submit leniency applications for consideration under paragraph 4 of these guidelines. The marker system will not apply to leniency applications under paragraph 4 and such applicants should immediately provide the CCS with all the evidence relating to the suspected infringement available to it at the time of the submission.
- 5.9 The grant of a marker is discretionary. The applicant will be informed whether it is the first to come forward but the applicant's position in the queue would not

otherwise be revealed.

6 ADDITIONAL REDUCTION IN FINANCIAL PENALTIES (LENIENCY PLUS)

6.1 An undertaking co-operating with an investigation by the CCS in relation to cartel activity in one market (the first market) may also be involved in a completely separate cartel activity in another market (the second market) which also infringes the section 34 prohibition.

6.2 To qualify for leniency plus, the CCS would have to be satisfied that:

- the evidence provided by the undertaking relates to a completely separate cartel activity. The fact that the activity is in a separate market is a good indicator, but not always decisive; and
- 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, under paragraphs 2 and 3 in relation to its activities in the second market.

6.3 If the CCS is satisfied with the above, the undertaking will receive a reduction in the financial penalties imposed on it in relation to the first market, which is additional to the reduction which it would have received for its co-operation in the first market alone. For the avoidance of doubt, the undertaking does not need to be in receipt of leniency in respect of the first market to receive this reduction. It is sufficient for the undertaking to be receiving a reduction, by way of mitigation, for co-operation, in the first market.

6.4 For example, as a result of an investigation by the CCS of manufacturers, including XYZ Ltd, in Market A, XYZ Ltd carries out an internal investigation and discovers that, as well as having participated in cartel activity in Market A, one of its divisions has participated in separate cartel activity in Market B. XYZ Ltd has been co-operating with the CCS' investigation in Market A and is interested in seeking lenient treatment by disclosing its participation in cartel activity in Market B.

6.5 Assuming XYZ Ltd qualifies for total immunity in relation to Market B, it can also obtain a reduction in financial penalty in relation to Market A in addition to the reduction it would have received for co-operation in the investigation in Market A alone, i.e. an additional reduction in respect of Market A as a result of its co-operation in the investigation into Market B.

7 QUALITY OF INFORMATION PROVIDED BY UNDERTAKING

7.1 As a minimum to meet the conditions for lenient treatment by the CCS, the information provided by the undertaking under these guidelines must be such as to provide the CCS with a sufficient basis for taking forward a credible investigation or to add significant value to the CCS' investigations. In practice, this means that the information is sufficient to allow the CCS to exercise its formal powers of investigations or genuinely advances the investigation.

8 CONFIDENTIALITY

- 8.1 An undertaking coming forward with evidence of cartel activity may be concerned about the disclosure of its identity as an undertaking which has volunteered information. The CCS will therefore endeavour, to the extent that is consistent with its obligations to disclose or exchange information, to keep the identity of such undertakings confidential throughout the course of its investigation, until the CCS issues a written notice under section 68(1) of its intention to make a decision that the section 34 prohibition has been infringed.

9 EFFECT OF LENIENCY

- 9.1 Leniency does *not* protect the undertaking from the other consequences of infringing the law, which include:
- the fact that the infringing provision is void and therefore cannot be enforced; and
 - the possibility that third parties who consider themselves as having been harmed by the cartel may have a claim under a private right of action.

Leniency also does not provide immunity from any penalty that may be imposed on the undertaking by other competition authorities outside of Singapore.