INTERNATIONAL BAR ASSOCIATION ANTITRUST COMMITTEE WORKING GROUP ON THE PROPOSALS TO AMEND THE LENIENCY PROGRAMME OF THE COMPETITION COMMISSION OF SINGAPORE

3 OCTOBER 2008

Comments on the proposed amendments to the Leniency Guidelines of the Competition Commission of Singapore

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1 Introduction

Purpose of submission

1.1 The Working Group of the Antitrust Committee of the International Bar Association ("**IBA**") sets out below its response to the Consultation Documents on the proposed amendments to the *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases* ("**Leniency Guidelines**") issued by the Competition Commission of Singapore ("**CCS**") on 3 September 2008.

1.2 The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA's 30,000 individual lawyers from across the globe, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide analysis in this area. Further information on the IBA is available at http://www.ibanet.org.

1.3 The IBA appreciates the opportunity to provide its comments on the proposed amendments to the Leniency Guidelines and commends the CCS for submitting the proposed amendments for wide-ranging consultation and engaging in ongoing dialogue with private sector representatives. The Working Group hopes to contribute constructively to this important issue.

Leniency policies - the critical importance of predictability and certainty

1.4 The IBA has had the opportunity to comment on similar draft policies of other agencies in relation to cartel enforcement in recent times. The IBA's consistent view has been that, to be effective, a leniency policy must provide certainty and predictability, clarity of policy and process, and clear and strong incentives for parties to come forward at the earliest possible time to resolve their liability in a fair and foreseeable manner on a consensual and co-operative, not a contested, basis.

1.5 In particular, the importance of transparency and predictability cannot be underestimated. Putting in place a transparent and predictable cartel leniency

programme will allow parties to "*predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not*"[1].

1.6 In this regard, Mr Scott Hammond, Director of Criminal Enforcement in the Antitrust Division of the US Department of Justice made the following pertinent remarks in a speech delivered four years ago:

> "*Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program*"[2].

1.7 The Working Group therefore considers that it is critical that the Leniency Guidelines, including the proposed marker system and "leniency plus" arrangements, are sufficiently certain and predictable in order for Singapore's cartel leniency programme to be truly effective.

2 Summary of major points

2.1 The proposed amendments to the Leniency Guidelines which introduce a marker system and leniency plus arrangements are a welcome development and represent an important step in further developing an effective cartel leniency programme in Singapore.

2.2 However, consistent with international practice and the importance of certainty and predictability in any leniency program, the Working Group considers that certain elements of the Leniency Guidelines would benefit from further clarification. These areas include:

The marker system

(a) providing further guidance as to the extent of the CCS's discretion in granting markers to leniency applicants, and how that discretion will be exercised;

(b) clarifying the level of information that must be provided to the CCS when seeking to secure a "marker" -- in order to encourage and facilitate

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1 Scott Hammond, 'Cornerstones of an Effective Leniency Program', speech presented before the ICN Workshop on Leniency Programmes, Sydney, Australia (22 to 23 November 2004).

2 Ibid. See also the following papers presented by Mr Hammond: 'Detecting and Deterring Cartel Activity through an Effective Leniency Program' (presented before the International Workshop on Cartels, Brighton, England, 21 to 22 November 2000), available at http://www.usdoj.gov/atr/public/speeches/9928.htm; 'Fighting Cartels - Why and How? Lessons Common to Detecting and Deterring Cartel Activity' (presented before the 3rd Nordic Competition Policy Conference, Stockholm, Sweden, 12 September 2000), available at http://www.usdoj.gov/atr/public/speeches/6487.htm.

applicants coming forward, the Working Group considers that the information requirements at the marker stage should be very low (e.g. a description of the product or industry in respect of which the cartel in question relates). This facilitates early applications therefore bringing a matter to the attention of the agency and is reflective of the quite often international nature of cartels where, at an initial stage, advisers may have only limited details in relation to some jurisdictions;

(c) providing further guidance in relation to the allotted timeframes within which leniency applicants are required to perfect their markers (including providing further guidance as to what factors the CCS will take into account in determining whether any extension of time will be granted);

(d) amending the Leniency Guidelines to make it clear that, during the timeframe within which the first applicant is to perfect their marker, no other applicant will be able to "jump the queue", even if such applicants meet the evidential threshold for immunity prior to the first applicant doing so. This facilitates certainty for first applicants and therefore promotes the initial application in the first place. If the original marker is not perfected, then the original applicant loses its position;

(e) finally, providing further guidance as to what information and evidence applicants are required to provide to the CCS in order to perfect their markers;

The Leniency Plus system

(f) providing further guidance as to the considerations the CCS will take into account in exercising its discretion in relation to the Leniency Plus scheme -- the Working Group also recommends that, in the interests of providing greater certainty and predictability, the CCS should consider abandoning qualitative assessments in determining whether an applicant qualifies under Leniency Plus;

(g) providing further guidance as to when an activity will constitute a "completely separate cartel activity" for the purposes of the Leniency Plus scheme; and

(h) providing further guidance in relation to how the CCS will manage timing issues associated with the requirement to provide information concerning a second cartel activity, while the CCS continues to consider the potential leniency plus uplift on the discount of the financial penalty for the first cartel activity.

3 Statement of interest

3.1 Please refer to paragraphs 1.2 and 1.3.

4 The proposed amendments

Background

4.1 The CCS has rightly recognised that cartels -- that is, agreements between competitors to fix prices, share markets or control output -- inhibit competition, since there is little or no incentive for cartel members to lower prices or provide better quality goods and services through innovation and efficiency. This has a clear adverse effect on consumers and therefore any economy, including that of Singapore.

4.2 Cartel agreements are generally informal, verbal and secret, often making them hard to detect and police. In addition, given the substantial financial penalties imposed on undertakings that breach section 34 of the *Competition Act* 2004 ("**Act**")[3], organisations and individuals involved in cartel conduct may, in the absence of a leniency programme, be deterred from coming forward to provide evidence about the cartel.

4.3 Accordingly, to give undertakings and individuals an incentive to disclose, and therefore bring to an end, the activities of illegal cartels, the CCS, like other jurisdictions, has introduced a cartel leniency policy. In this regard, the CCS has recognised that:

> "*[t]he benefits of granting lenient treatment to undertakings who cooperate with CCS outweigh the need to impose financial penalties on these undertakings*"[4].

4.4 In the Consultation Documents, the CCS has proposed to amend its Leniency Guidelines in two ways.

The "marker" system

4.5 The CCS is proposing to introduce a "marker" system for cartel members who are first in line to apply for leniency in respect of their involvement in a cartel. If an undertaking informs the CCS of a cartel prior to the commencement of an investigation, that undertaking may qualify for full immunity from liability. In addition, if an undertaking informs the CCS of a cartel following the commencement of an investigation, that undertaking may qualify for a reduction of up to 100 per cent in the level of financial penalty.

4.6 Under the proposed amendments, an applicant must, in order to secure a marker, provide:

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[3] Under sub-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 per cent of its business turnover for each year of infringement (up to a maximum of three years).

[4] Competition Commission of Singapore, *CCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases* (draft amended version, 2008) at paragraph 1.5.

> *"... 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].

4.7 Applicants will be given a marker for a certain period of time (such time to be determined by the CCS based on the circumstances of the case), so as to protect the applicant's place in the queue. During that period, the applicant will be required to gather the necessary information and evidence to meet the evidential threshold for immunity and to "perfect" the marker.

4.8 The Working Group understands the proposal to be that, even if a second or subsequent applicant satisfies the evidential threshold prior to the first applicant, the CCS will not replace the first applicant (i.e. allow the first applicant's marker to be "queue-jumped"), until the relevant timeframe has passed.

4.9 The Working Group understands that, if a marker is perfected, the remaining undertakings in the queue will be informed so as to permit them to decide whether to submit leniency applications for a reduction of up to 50 per cent in the financial penalty. The marker system will not apply to those applicants, in which case they will be required to provide all evidence to the CCS upon applying for leniency.

The "Leniency Plus" system

4.10 The second proposal is to implement a "Leniency Plus" system so as to encourage cartel participants who may be involved in a separate cartel in a separate market to come forward.

4.11 The Working Group understands that, to qualify under the leniency plus scheme, the following requirements must be met:

(a) the applicant must already be under investigation for cartel conduct in one market;

(b) the applicant does not have to be in receipt of leniency in respect of its cartel activities in the first market; it is sufficient that it is receiving a reduction, by way of mitigation, for co-operation in relation to the cartel conduct in the first market;

(c) the CCS must be satisfied that the evidence provided by the applicant relates to a "completely separate cartel activity"; and

(d) the CCS must be satisfied that the applicant would qualify for total immunity or a reduction of up to 100 per cent in the amount of the relevant financial penalty in relation to its activities in the second market.

4.12 If the CCS is satisfied that these criteria have been met, the applicant may receive a reduction in the financial penalties that would otherwise be imposed on it in relation

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[5] Leniency Guidelines, paragraph 5.5.

to the first market over and above the reduction it would have received for its co-operation with respect to its activities in the first market alone.

4.13 The Working Group understands from the Consultation Documents that the actual reduction in financial penalty for the first cartel activity would be decided on a case-by-case basis and is discretionary, depending on, amongst other things:

(a) the stage at which the applicant comes forward with evidence of the second cartel activity; and

(b) the evidence that the applicant provides and the evidence that the CCS already has in relation to the second cartel.

5 Issues raised by the proposed marker system

The introduction of a marker system is a welcome development

5.1 The Working Group considers that the proposed introduction of a "marker" system is a positive development which will enhance the effectiveness of Singapore's leniency programme. The marker system will further encourage applicants to come forward early, even if they require additional time to investigate and provide full information to the CCS in order to benefit from the leniency programme. The marker system will, in this sense, promote a "race to the door" and, therefore, the earlier end to conduct which is harmful to the Singaporean economy.

5.2 In the Working Group's view, the main conditions for an effective marker procedure are:

(a) for the CCS to give a high degree of certainty to the applicant, in particular that its place in the queue is secure;

(b) to establish a low initial threshold for the applicant to secure a marker; and

(c) not to impose timelines that may be difficult to meet, or generate conflicts with other agencies,

in each case, to encourage applicants to come forward early.

5.3 The Working Group, while commending the CCS on its proposed amendments to the Leniency Guidelines, believes that the Leniency Guidelines would benefit from further clarity in a number of areas in order to promote the satisfaction of these conditions.

The level of discretion retained by the CCS

5.4 The Leniency Guidelines (paragraph 5.9) provide that "*[t]he grant of a marker is discretionary*". However, the Leniency Guidelines do not provide any substantive guidance as to how that discretion is to be exercised by the CCS and the factors that the CCS will take into account. The Working Group believes that the retention of

discretion is quite undesirable, and the experience in other jurisdictions suggests that certainty of application is a condition for effectiveness.

5.5 Unlike the situation in other jurisdictions, where the granting of markers is, in essence, automatic, the Leniency Guidelines provide that the CCS may grant a marker if certain conditions are met. The lack of certainty or predictability as to how this discretion will be exercised has two main disadvantages:

(a) first, it may undermine the marker system entirely, since potential applicants will not have any certainty that they will be able to secure a marker even if they are the first to report a cartel; and

(b) second, undertakings may be reluctant to report a cartel to the CCS if, indeed, they may be worse off by doing so than if they were not to make contact with the CCS (e.g. if the undertaking is required to divulge potentially self-incriminating information about itself and evidence of the suspected infringement before knowing whether or not a marker will be granted).

5.6 These factors, in turn, may deter organisations and individuals from reporting cartel activity to the CCS. Accordingly, it would, in the Working Group's view, be preferable if the Leniency Guidelines set out:

(a) firm criteria for assessing whether a marker *will* (as distinct from *may*) be available for the reporting of cartel conduct; and

(b) clear details as to what information is required in order for potential applicants to be granted such markers.

5.7 However, if the CCS wishes to retain its discretion in granting markers (which, as outlined above, does not necessarily conform with other international approaches), the Working Group believes that both the extent of that discretion and the objective factors or criteria that will be taken into account by the CCS in applying that discretion must be made clear in the Leniency Guidelines. The Working Group considers this to be a critical issue, given the fundamental importance of predictability and certainty to the effectiveness of any leniency programme.

The level of information to be provided at the marker stage

5.8 As set out above, one of the key conditions for an effective marker system is to avoid setting a high threshold for the applicant to secure a marker. The purpose of this low threshold is to encourage applicants to come forward early and create the impetus for a "race to the door". Establishing a low threshold is also consistent with the "prize" provided if an applicant wins the race -- namely, a position as the first undertaking in the queue to cooperate and, ultimately, to obtain immunity.

5.9 The Working Group considers that the Leniency Guidelines would benefit from further clarity that the only information required by the CCS in order to grant a marker is the minimum information which would enable it to determine whether a

marker has already been granted in respect of that cartel conduct (i.e. and therefore whether a marker is available).

5.10 The Leniency Guidelines (paragraph 5.5) provide that:

> "*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*".

5.11 However, the Leniency Guidelines (paragraphs 5.3 and 5.4) also provide that:

(a) "*for the leniency application proper to be recorded and proceeded with, the undertaking's name must be given to the CCS*"; and

(b) "*[t]he undertaking should immediately provide the CCS with all the evidence relating to the suspected infringement available to it at the time of the submission*".

5.12 In addition, the Consultation Documents provide (at paragraph 4) that:

> "*To secure a marker, the applicant must provide the name of his undertaking and a description of the cartel conduct in sufficient detail to allow CCS to ensure that no other undertaking has applied for leniency for such similar conduct*".

5.13 Consistent with practice in other jurisdictions (including the United States, Canada and Australia), the Working Group considers that, in most cases, the only information required by the relevant regulator to determine whether or not a marker has already been granted (and whether or not it has already commenced an investigation) is a description of the product in respect of which the cartel in question operates. The Working Group acknowledges that, in some cases, further "basic level" information may be required (e.g. if the description of the product provided by the applicant is insufficient for the regulator to determine whether it has already granted a marker to another applicant in relation to the relevant activity). However, this should not require either the applicant to provide its name, a full description of the cartel conduct, or "*all the evidence relating to the suspected infringement*" that is available to the applicant, as potentially suggested under paragraphs 5.3 and 5.4 of the Leniency Guidelines and paragraph 4 of the Consultation Documents.

5.14 Any requirement to provide details of both the applicant's name and the industry in which they operate at the marker stage is likely to operate as a substantial disincentive for undertakings coming forward, as it would effectively require the applicant to provide information to the CCS about its involvement in a potential contravention of the Act, without having any certainty as to whether or not it would qualify for leniency or any reduction in penalty. This uncertainty has the potential to undermine the effective operation of the entire leniency programme.

5.15 Once a marker has been granted, the CCS should then be in a position to obtain the information it currently requests (that is, the name of the applicant and a detailed description of the cartel conduct) which would, in any event, have to be provided to the CCS for a marker to be perfected.

5.16 The Working Group is mindful that, if the information requirements at the marker application stage are too onerous, or if an applicant is required to disclose facts that may be self-incriminating or prejudice their legal position if a marker were not available, it may lead to a situation where potential applicants would refrain from making applications altogether.

5.17 As set out above, if the "evidentiary threshold" or information requirements for obtaining a marker are set too high, this may also operate as a disincentive for an applicant to come forward at the earliest opportunity, and therefore undermine the goal of promoting a "race to the door". In this regard, the Working Group notes that a minimal information threshold for the marker system has been adopted and implemented successfully in a number of other jurisdictions, including the United States of America and Canada.

5.18 An alternate approach would be for the CCS to promote the "race to the door" by implementing a formal hypothetical application system. Although, at present applicants may anonymously make "*[i]nitial contact with or 'feelers' to*" the CCS (paragraph 5.3 of the Leniency Guidelines), the Leniency Guidelines do not provide any details as to what such contact or "feelers" would entail. In the United States of America, Canada and Australia, hypothetical application systems operate independently of marker systems and allow genuine prospective leniency applicants to enquire of the US Department of Justice, the Canadian Competition Bureau and the Australian Competition and Consumer Commission, respectively, whether leniency is available without disclosing details of conduct or the identity of the prospective applicant. In Australia, the United States and Canada specifically, only a minimum amount of information is required (such as market and product or service) for the respective authorities to determine and inform the applicant whether a marker is available for a particular cartel in a particular market.

5.19 The Working Group considers that the introduction of an hypothetical application system would provide an alternative method of encouraging potential applicants to come forward, as it would give applicants a certain degree of comfort that leniency is available before a formal marker request is made.

The allotted timeframe to perfect a marker

5.20 The Working Group notes that the Leniency Guidelines do not provide any guidance as to the timeframes which will be allotted to applicants in order to perfect a marker and, therefore, apply for leniency. In this regard, the Consultation Documents state that the timeframe "*would be decided based on the circumstances of the case and may be extended if required*" (paragraph 4).

5.21 The Working Group considers that the CCS's determination, as a matter of policy, that a time frame for perfecting a marker will be established upfront and that the

time frame may be subject to extension is commendable, and contrasts with the practice in certain other jurisdictions that set a fixed date which, in turn, often results in unproductive arguments over extensions of time. The Working Group suggests that the time frame should be set by agreement between the CCS and the applicant and that such approach should be confirmed in the Guidelines.

5.22 Once fixed by agreement, the applicant must retain its place as first applicant for the entire time period. In this respect, the Working Group questions the appropriateness of the statement at paragraph 5 of the Consultation Documents that:

> "*CCS will not replace the first applicant, even if a second applicant satisfies all conditions immediately, until the timeframe has passed for the first applicant.* ***However in such a situation, CCS will also assess if the first applicant genuinely requires the remaining time to satisfy the conditions to perfect the marker***" (emphasis added).

5.23 The actions of a second applicant should under no circumstances affect the position of the first applicant while it is working to satisfy all conditions to perfect its marker within a previously agreed timeframe (see also further below at paragraph 4.25.

5.24 The Working Group also notes the importance of the CCS setting reasonable timeframes for applicants to provide information. The setting of unreasonable timeframes, or failure to consider timeframes faced by undertakings also seeking leniency in other jurisdictions, has the potential to operate as a significant disincentive for undertakings to come forward in the first place.

The potential for applicants to be "queue-jumped" by a second applicant

5.25 The Consultation Documents provide (at paragraph 5) that the "*CCS will not replace the first applicant, even if a second applicant satisfies all conditions immediately, until the timeframe has passed for the first applicant*". This approach is to be commended as it prevents parties from trying to game the system, for example, by preparing in advance to move quickly if information about a covert cartel comes to light.

5.26 However, the Working Group notes that this guarantee has not been inserted in the Leniency Guidelines. The Working Group considers that this guarantee is vital to the predictable and certain application if the marker system (and therefore entire leniency programme) and should therefore also be included in the Leniency Guidelines. In this regard, what is provided for in the Leniency Guidelines is, almost always, a potential applicant's "first port of call" and the fundamental basis on which applicants will make a decision whether or not to come forward.

5.27 Notwithstanding this apparent guarantee in the Consultation Documents, the Working Group is concerned that a degree of ambiguity is created by the statement in paragraph 5 of the Consultation Documents (quoted above at paragraph 4.22) that the CCS will not replace the first applicant when a second applicant satisfies all conditions immediately, but that it may assess whether the first applicant genuinely requires the remaining time initially granted to perfect the marker.

5.28 The Working Group has some concerns with respect to the CCS's language in this regard and how this power might be applied in practice. The Working Group also considers that the ambiguity created by this additional wording (and the potential suggestion that the benefit of a marker might be lost within the allocated timeframe) has a clear potential to undermine the very purpose of the marker system. Applicants who have won "the race to the door" should not find themselves in a position in which they may be "queue-jumped", as this undermines the basis for the introduction of the marker system. Moreover, to re-consider the allotted timeframe because a second applicant may be able to satisfy the evidential burden is not consistent with practice in other jurisdictions with marker systems (e.g. the United States of America, Canada, the European Union, Australia, and the United Kingdom).

5.29 As stated above, any amendments which have the potential to reduce the predictability and certainty as to how the Leniency Guidelines will be applied have the potential to undermine the incentives for applicants to come forward and therefore the effectiveness of the entire programme.

5.30 The Working Group recognises that, in establishing an effective marker system, the potential for it to be used by an applicant to create strategic delay should be taken into account - that is, once a party has qualified as the first leniency applicant, there may be circumstances in which it delays providing full details of the conduct or does not cooperate fully with the CCS. However, given that undertakings would have, in the first place, taken active steps to contact the CCS, the Working Group considers that these instances are likely to be highly infrequent and, in any event, should be adequately addressed by the CCS clearly specifying the period for which the marker is valid (and within which the applicant must provide full details of the conduct). The Working Group also notes that the Leniency Guidelines require undertakings to maintain continuous and complete cooperation throughout the investigation.

5.31 Additionally, international experience has shown that, while concerns about gaming by applicants are valid, any suggestion that another person may be able to "jump the queue" during the marker timeframe risks placing undue pressure on applicants that may be prejudicial to their ability to carry out an internal investigation in an appropriate and thorough manner, and to deal in a co-ordinated manner with all competition agencies that may be involved in investigating the cartel. In the Working Group's view, great care is needed to avoid such undue pressure, especially in international cases where the marker holder is also responding to the demands of other antitrust enforcement agencies. In this situation, careful coordination is required among the enforcement agencies about the demands on the marker holder, as well as close communication between the CCS and the marker holder about when it will perfect the application.

5.32 The Working Group also recommends that the CCS considers making it clear in the Leniency Guidelines that timeframes for providing information and evidence in relation to a cartel will not be enforced in such a way as to disadvantage applicants who seek to co-operate with the CCS in good faith.

5.33 The Working Group also considers that the Leniency Guidelines would benefit from providing greater clarity in relation to the protection against "queue jumping" to be provided to the second applicant to come forward. When a party understands that a marker has already been granted, they will usually ask to be treated as the party second in line, even though they may not, at that stage, have all information and evidence ready to be provided to the CCS. In this situation, the second party to come forward should get the greatest available credit if it requests (and qualifies for) leniency. If it is too late to request a marker for full immunity, but the second applicant offers to co-operate in return for the best leniency discount which remains available, then, for the same reasons as outlined in paragraphs 4.28 and 4.31 above, that second applicant should not be subject to "queue jumping" by a subsequent applicant (within the period agreed with the CCS) even if that subsequent applicant is able to satisfy the evidential burden earlier.

5.34 The Working Group recommends that the CCS considers addressing this issue in the Leniency Guidelines by providing a window of time within which second applicants may be permitted to gather information to support their application for leniency.

The requirements for perfecting a marker

5.35 The Working Group also considers that the Leniency Guidelines would benefit from providing further guidance in relation to the requirements for perfecting a marker.

5.36 The Leniency Guidelines (paragraph 5.7) provide that, in order to perfect a marker, an undertaking "*must provide all information available to it in relation to the cartel activity*". However, it is not clear from the Leniency Guidelines what will constitute "*all information available to it*" and, in the Working Group's view, it is important that this standard is not set too high at this initial stage.

5.37 In this regard, the Working Group considers that it would be preferable that in order to perfect a marker, an applicant should be required to provide all relevant information to enable the authorities to determine whether there has been an offence with anti-competitive effects in Singapore and whether the applicant is eligible for immunity in Singapore.

Concluding remarks

5.38 Permitting cartel participants to "mark" their spot in a queue is not a new concept internationally. Marker systems are already in place in jurisdictions such as the United States of America[6], Canada, the United Kingdom[7], the European Union[8],

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[6] See United States Department of Justice, 'Corporate Leniency Policy' (10 August 1993), available at http://www.usdoj.gov/atr/public/guidelines/0091.htm; 'Individual Leniency Policy' (10 August 1994), available at http://www.usdoj.gov/atr/public/guidelines/0092.htm. See also Scott Hammond, 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', speech delivered to the National Institute on White Collar Crime, California (8 March 2001), available at http://www.usdoj.gov/atr/public/speeches/7647.htm.

and Australia[9], and have been highly successful. The Working Group considers that the use of a marker system underpins the importance of undertakings coming forward as soon as practicable, and commends the CCS for moving towards international best practice in this regard.

6 Issues raised by the proposed "Leniency Plus" system

6.1 The Working Group welcomes the proposed "Leniency Plus" system as a powerful investigative tool for exposing cartels which may have gone unnoticed. As with the marker system, the "Leniency Plus" scheme is a feature of leniency policies in other jurisdictions, including the United States of America, Canada, the United Kingdom and Australia. There are, however, a number of issues with the CCS's proposal in respect of which the Working Group wishes to comment.

The CCS's discretion and qualitative assessments

6.2 The Leniency Guidelines do not, at this stage, provide any guidance as to the value of the reduction in penalty to be granted under the leniency plus arrangements. The Consultation Documents suggest that a "significant discount" on the financial penalty for the first cartel activity may be available. However, they also indicate that:

> "*the actual reduction in financial penalty for the first cartel activity would be decided on a* ***case-by-case basis and is discretionary****, depending on, amongst other things, 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*" (emphasis added).

6.3 Having the decision whether or not to grant "leniency plus" depend on an exercise of discretion by the CCS (without any real guidance as to how that discretion may be exercised) creates a lack of predictability and certainty and is therefore likely to operate as a significant disincentive for undertakings to come forward. This level of uncertainty is heightened if the decision is based on an assessment of the stage at which the first investigation is positioned when an applicant provides information about the new cartel and a qualitative evaluation by the CCS of the evidence provided to it with respect to the second cartel. Moreover, this last criterion seems irrelevant considering that the leniency plus applicant must in any event qualify for

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7 Office of Fair Trading, 'Leniency and no-action: OFT's draft final guidance note on the handling of applications' (November 2006), available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft803a.pdf.

8 European Commission, 'Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases' (8 December 2006), at paragraphs 14 and 15, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT.

9 Australian Competition and Consumer Commission, 'ACCC Immunity Policy for Cartel Conduct' (26 August 2005), at paragraphs 5 and 12, available at http://www.accc.gov.au/content/item.phtml?itemId=708758&nodeId=b42265c7fbeee88cf1cd2851c337c446&fn=Immunity%20policy.pdf.

immunity or a 100% fine reduction in respect of the second market. In the Working Group's view, that should be sufficient for obtaining leniency plus.

6.4 The Working Group considers that, since the primary benefit for the CCS of the Leniency Plus scheme is the disclosure of a new cartel, it would be preferable to avoid any qualitative assessment. In addition, in order to give potential applicants an extra incentive to report new cartel activity, the CCS may wish to develop a system under which a substantial uplift in the discount factor would be provided - for example, at least 25 per cent (as distinct from the current system in which no minimum discount has been specified). The CCS may also wish to set a maximum limit, if it so chooses.

6.5 The Working Group also recommends that the CCS considers making it clear in the Leniency Guidelines that, if information disclosed in an attempt to qualify for leniency plus actually pertains to the first cartel, this may be considered as a mitigating factor in circumstances where the CCS does not already have access to that information.

Timing issues

6.6 As the CCS has acknowledged in paragraphs 13 and 14 of the Consultation Documents, there may be some difficult timing issues associated with the administration of the Leniency Plus scheme. In particular, the timing may result in an applicant being under pressure to substantiate the second cartel before a decision is made on the Leniency Plus uplift with respect to the first cartel activity.

6.7 If the expectation of the CCS involves no more than perfecting a marker in respect of the second cartel, it would appear to be unobjectionable. However, there remains a risk that the CCS's expectations of an evidential threshold could create difficulties of administration and hamper the ability of practitioners to advise potential applicants with confidence.

6.8 The Working Group does, nevertheless, welcome the fact that the CCS "*will speed up investigations into the separate product market (Market B) to keep it in pace with the investigations in the first market (Market A)*" and "*will endeavour to ensure that the time difference between both*" is not substantial.

Guidance in relation to the meaning of "a completely separate cartel activity"

6.9 In order to promote certainty in relation to the circumstances in which the leniency plus arrangement may be applicable, the Working Group considers that additional guidance should be provided in the Leniency Guidelines with respect to the concept of a "*completely separate cartel activity*".

6.10 The Leniency Guidelines (paragraphs 6.1-6.5) also refer to product "markets". The Working Group considers that it would be more appropriate for the Leniency Guidelines to refer simply to "products", rather than "markets", as this would avoid any difficult or technical arguments at the early marker or leniency plus application stage in relation to the precise scope of any product market definition (e.g. are

DRAM, SRAM and Flash products part of the same market?). The Working Group also considers that this is consistent with the objective of the Leniency Plus system of identifying cartel behaviour in relation to different products.

6.11 Finally, the Working Group also recommends that it be confirmed in the Leniency Guidelines that the fact that an applicant is involved in an investigation in relation to Product A does not prevent it from putting out anonymous "feelers" to help with its decision to come forward in relation to Product B.

Concluding remarks

6.12 The Working Group commends the CCS on its proposed introduction of a "Leniency Plus" scheme, in line with other jurisdictions. Since there is, in the experience of a number of jurisdictions, a propensity for cartel participants to be involved in multiple cartels, the Leniency Plus scheme will encourage cartel participants to report additional cartel activity. In this regard, the leniency plus arrangements create an "*attractive inducement for encouraging companies who are already under investigation to report the full extent of their [involvement in cartels] and begin to put the matters behind them*"[10].

7 Conclusion

7.1 The Working Group considers that the proposed amendments to the Leniency Guidelines represent a significant development in aligning Singapore's cartel leniency programme with foreign jurisdictions and international best practice and the CCS is to be commended for its initiative.

7.2 However, in the view of the Working Group, there remain a number of elements that would benefit from increased certainty both with respect to the proposed marker system and the Leniency Plus scheme. The Working Group considers that an evaluation of the issues set out in this submission would further assist the CCS to meet its intended aims of increased predictability and congruence with the cartel leniency policies of other competition agencies around the world.

7.3 The Working Group hopes that the above comments, that arise from a mutual goal of enhancing predictability, coherence and certainty, will be of assistance to the CCS.

[10] See Hammond, above n7, available at http://www.usdoj.gov/atr/public/speeches/7647.htm.

Annex A

Members of the Working Group on the proposals to amend the Leniency Programme of the Competition Commission of Singapore

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