

**Competition Commission of Singapore
Public Consultation
Changes to the Leniency Programme**

Response by Norton Rose Group

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Marc Waha

Partner (Registered Foreign Lawyer)

+852 3405 2508

marc.waha@nortonrose.com

Philip Monaghan

Registered Foreign Lawyer

+852 3405 2377

philip.monaghan@nortonrose.com

Norton Rose Hong Kong

38/F Jardine House

1 Connaught Place

Central

Hong Kong

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1 Summary of major points

- ***The grant of the marker should not be discretionary.*** Markers should be granted by the CCS more or less as a matter of course. There can be preconditions but these should be minimal, flexibly applied and capable of being easily satisfied by the applicant. Once these minimal preconditions are met the grant of the marker should be essentially automatic.
- ***Markers should be available for applicants who fail to qualify for immunity or a 100 percent reduction.*** Under the current proposal, subsequent applicants will see their markers fall away once the undertaking first in line perfects the marker it has been granted. In those circumstances the benefits of applying for a marker where one is already in existence are marginal. Extending the benefit of the marker to those who are not first in line would give the CCS a simple tool for determining which undertaking came through the door at which point in time and this could in turn feed in to the CCS' decision making as regards levels of leniency credit earned.
- ***The Guidelines should clearly establish the evidentiary threshold for perfecting a marker.*** Paragraph 5.7 of the Draft Guidelines states that "[t]o perfect a marker, the undertaking must provide all information available to it in relation to the cartel activity". While providing all evidence available might well be a condition for the perfection of a marker it is unlikely the CCS regards this as the only pre-condition to perfection. The Guidelines are in need of clarification in this respect.
- ***The proposed leniency plus system could be improved by clarifying for applicants the leniency benefit that might be earned in the context of the first cartel.*** The level of benefit capable of being earned in respect of the first cartel should ideally not be left entirely within the discretion of the CCS. Specific percentage benefits should be provided for in the Guidelines themselves.
- ***For leniency plus to apply it should be emphasised that what is required is that the applicant report separate cartel activity.*** Any emphasis on separate markets in the Guidelines is liable to mislead.
- ***It should be possible to qualify for leniency plus immediately the marker in respect of the second cartel is perfected.*** The leniency plus credit earned in respect of the first cartel should be quantified at that time.
- ***Disqualification of initiators may undermine the effectiveness of the leniency plus system.*** The bar on those who initiate cartels from qualifying for leniency may negatively impact on the success of the CCS' proposed leniency plus system. An undertaking involved in cartel A will be dissuaded from availing of leniency plus in circumstances where there is a risk that its role in relation to cartel B may be considered as that of initiator.
- ***The CCS should take a broad view of the changes that might be needed to improve the effectiveness of its leniency programme.*** In that regard changes may need to be envisaged outside the scope of the current consultation and in particular the CCS' *Guidelines on the Appropriate Amount of Penalty* may need to be reconsidered in certain respects.

2 Statement of interest

Norton Rose Group is a leading international legal practice with offices throughout Europe, the Middle East and Asia. The firm has had an office in Singapore since 1982.

We regularly act on behalf of companies facing multi-jurisdictional investigations into alleged cartel-like behaviour.

3 Comments

We understand that the policy considerations underpinning the Competition Commission of Singapore's leniency programme are similar to those of other major competition regulators: the public interest in bringing cartel-like conduct to an end outweighs the public interest in fining a given cartel participant.

An effectively designed leniency programme strikes at the heart of an essential component in the success of any cartel - trust. The effectiveness of a leniency programme will however ultimately depend on its relative attractiveness for would-be "whistle blowers" and that will turn on a consideration of a number of factors, including legal certainty and the level of fines that might be avoided.

3.1 Marker procedure

The CCS has proposed the introduction of a marker system. This is a welcome improvement to the CCS' leniency programme. A marker system increases legal certainty for leniency applicants when substantive and procedural conditions are clearly set out for the grant and perfection of the marker.

3.1.1 Granting the marker

The grant of the marker should not be discretionary. We note that under paragraph 5.9 of the CCS' draft *Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases*, it is stated that the "grant of a marker is discretionary". This might be a cause for concern if the CCS were to adopt a position similar to that of the European Commission, which requires undertakings to justify requests for a marker. This practice, which can lead applicants to apply for a marker and leniency at the same time, creates legal uncertainty which undermines the leniency system's effectiveness by diminishing its attractiveness.

The position should be that markers are granted by the authority more or less as a matter of course as for example is currently the practice of the UK, French and Japanese competition authorities. This is not to say that the authority should not establish preconditions for the grant of a marker. There can be preconditions but these should be minimal, flexibly applied and capable of being easily satisfied by an applicant. For example, the applicant might be asked to identify itself and provide the CCS with a description of the conduct in sufficient detail to allow the authority to determine whether it has already made available a marker in respect of the same conduct. Once these minimal preconditions are satisfied the grant of the marker should be more or less automatic.

Information required. Paragraph 5.5 of the Draft Guidelines could offer greater clarity on the information that applicants for a marker must provide. Drawing on the European Competition Network's Model Leniency Programme, the following might be requested:

- The applicant's name and address.
- The basis for the concern which led to the leniency application.
- The parties to the disclosed conduct (to the extent these can be discerned at the time of the marker request).
- The market(s) on which the conduct took place.

- The duration of the disclosed conduct (to the extent this can be discerned at the time of the marker request).
- The nature of the conduct.
- Information on any past or possible future leniency applications to any other authorities in relation to the conduct.

Markers should be available for subsequent applicants. The CCS has proposed that the marker system will not apply to subsequent leniency applicants (who may be entitled to a reduction of up to 50 percent in financial penalties). This is reflected in paragraph 5.5 of the Draft Guidelines. In its Consultation Document (at paragraph 7), the CCS explains that “[t]his is to encourage leniency applicants to act quickly if they want to benefit from total immunity or a possible 100 percent reduction in financial penalty. If a marker is perfected, the other undertakings in the marker queue will be informed so that they can decide whether to submit leniency applications for a reduction of up to 50 percent in financial penalties. These subsequent leniency applicants will be required to gather their evidence before applying for leniency.” Accordingly, the benefit of a marker would only be available for the first to apply as subsequent applicants would see their markers fall away once the undertaking first in line managed to perfect its marker. In those circumstances the benefits of applying for a marker where one is already in existence (albeit not yet perfected) seem marginal (the only hypothetical benefit being should applicants ahead in the queue fail to perfect). Further, the fact that CCS proposes not to reveal to applicants their position in the queue - other than to let them know whether they are first - will have the effect of discouraging applicants where a first place marker has already been granted.

Extending the benefit of the marker to those who are not first in line gives the CCS a simple tool for determining which undertaking came through the door at which point in time - and this factor could in turn feed in to the CCS’ decision making as regards levels of leniency credit earned. Furthermore where applicants place a marker and are then given a time within which to perfect it, they are more likely to provide evidence that will add significant value to an authority’s investigation - presumably it is considerations of this nature that encouraged the UK Office of Fair Trading to make a marker available in Type C cases (those cases where an undertaking is granted a reduction of up to 50 percent in the level of financial penalty imposed in circumstances where the undertaking was not first through the door and there was already a pre-existing investigation). In addition, allowing a marker to be available for subsequent applicants would enhance equal treatment of all applicants in the procedure. As the abundant case law of the EC Courts on this point illustrates, the long-term effectiveness and credibility of a leniency regime depends on its ability to treat all applicants fairly and equally.

3.1.2 Perfecting the marker

The Guidelines should clearly establish the evidential threshold for perfecting the marker.

In that regard, paragraph 5.7 states that “[t]o perfect a marker, the undertaking must provide all information available to it in relation to the cartel activity”. While providing all evidence available to an undertaking might well be a condition for the perfection of a marker it is not a sufficient condition. At paragraph 7.1 of the Draft Guidelines it is stated that:

“[a]s 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.”

In order to clarify the position, we would suggest that the CCS make explicit the conditions for perfection of a marker in those cases where the benefit of a marker is available - under the revised programme as currently proposed only for the first applicant to come forward. The CCS might therefore clarify as follows:

- To perfect a marker for immunity where the CCS has yet to commence an investigation, the undertaking must provide all information available to it in relation to the cartel activity and, as a minimum, that information must be such as to provide the CCS with a sufficient basis for taking forward a credible investigation. In practice, this means that the information is sufficient to allow the CCS to exercise its formal powers of investigation under the Competition Act.
- To perfect a marker for a reduction of up to 100 percent in the level of financial penalties where the CCS has commenced an investigation, the undertaking must provide all information available to it in relation to the cartel and that information must be such as to add significant value to the CCS' investigation. In practice, this means that the information is sufficient to genuinely advance the CCS' investigation.

If the CCS were minded to extend the availability of the marker to second and subsequent leniency applicants, the evidential threshold for perfecting the marker would be the same as the second of these two bullets.

3.1.3 Other procedural considerations

Paragraphs 5.4 and 5.5 of the Draft Guidelines should be explicitly stated to be alternatives. An undertaking should be free to either initially apply for a marker or immediately proceed to make a full application as it prefers.

The CCS Leniency Guidelines should provide that information submitted to the CCS during a marker approach and which is self-incriminatory will not be relied on by the CCS against the undertaking supplying the information where that undertaking has failed to qualify for immunity (or a discretionary 100 percent reduction in fines as the case may be) because, for example, the information was insufficient to provide the CCS with a sufficient basis for taking forward a credible investigation or because another undertaking (ahead of it in the leniency queue) has managed to perfect a marker. Similarly, information provided to the CCS for the purposes of determining the availability of full immunity or a discretionary 100 percent reduction should only be used for that purpose.

Information and evidence submitted under the marker system should not be made available to competition authorities or courts overseas unless the applicant consents.

3.2 Leniency plus

Clearer description of benefits. The introduction of a leniency plus mechanism as proposed by the CCS is also to be welcomed. Nonetheless the system could be improved by clarifying for applicants the leniency benefit that might be earned in the context of the first cartel by reporting a second. In particular the level of benefit capable of being earned in respect of the first cartel should ideally not be left entirely within the gift of the CCS - "decided on a case-by-case basis and... discretionary" (Consultation Paper, paragraph 9). Rather this could be set out in the Guidelines themselves. The Korean FTC leniency plus programme offers a useful precedent which the CCS may wish to follow:

- The standard reduction of fine in respect of the first cartel for a successful leniency plus application is 20percent.
- A 30 percent reduction is given where the second cartel is larger (in terms of affected sales) than the first cartel but smaller than twice the size of the first cartel.
- A 50 percent reduction is given where the second cartel is at least twice the size (in terms of affected sales) of the first cartel but smaller than four times the size of the first cartel.

- A 100 percent reduction in fines for the first cartel is given where the second cartel is at least four times the size of the first cartel (again, in terms of affected sales).

Clarity of this sort within the CCS' Guidelines would add significantly to the attractiveness (and therefore effectiveness) of the authority's leniency plus system. Regardless of whether the CCS is minded to adopt this approach it would be inappropriate for the authority to determine the leniency plus deduction in the first cartel investigation by reference to "the evidence that the applicant provides and the evidence that CCS already has in possession, in relation to the second cartel" (paragraph 9 of the Consultation Paper). For leniency plus to be available at all the applicant must either qualify for full immunity or a 100 percent reduction in fines in relation to the second cartel (as set out in the second bullet point of paragraph 6.2 of the Draft Guidelines). If the applicant has satisfied this test there should be no further consideration of the evidence submitted in respect of the second cartel for the purposes of fixing the leniency plus credit available in the first investigation. This is however subject to the comments we have made above concerning the size of the second reported cartel.

Clarification of what constitutes separate conduct. It should be emphasised that what is required is that the applicant report separate cartel activity or - in American parlance - a "second, unrelated conspiracy". Even though paragraph 6.2 of the Draft Guidelines indicates that "the fact that the activity is in a separate market is a good indicator, but not always decisive", the emphasis on markets (as opposed to conduct) in the consultation materials is liable to mislead:

"CCS proposes to put in place a Leniency Plus system to encourage cartel members, who fail to obtain 100 percent reduction in respect of one cartel to provide information of its involvement in a completely separate cartel activity in a separate market." (Consultation Paper, paragraph 8, emphasis added)

"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." (Draft Guidelines, paragraph 6.1, emphasis added)

In most cases a separate cartel will likely be in a separate market. But the CCS may wish to retain the flexibility of granting the benefit of leniency plus for separate conduct irrespective of the market affected by that conduct. In the event that this flexibility was of interest, we would suggest paragraph 6.1 of the Draft Guidelines be revised.

It should be possible to qualify for leniency plus immediately upon perfection of the marker in respect of the second cartel. The CCS Consultation Paper at paragraph 13 provides that "[a]s far as possible, 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). This is to ensure that enough evidence is gathered in Market B to substantiate the cartel before a decision is made to grant a leniency plus applicant, a 'leniency plus' uplift in the reduction for the first cartel in Market A." A simpler approach might be to quantify the leniency plus credit in respect of the first cartel at the time of perfection of the marker in respect of the second cartel. Further, leniency plus should be available in circumstances where the CCS declines to investigate the second reported conduct or where the investigation into the second conduct is delayed for procedural or other reasons. In addition, deciding the level of leniency plus credit at the time of marker perfection in respect of the second cartel affords applicants the prospect of *banking* that credit early on which will only serve to increase the attractiveness of the mechanism generally.

Disqualification of initiators may undermine the effectiveness of the leniency plus system. The bar on applicants having initiated the cartel may negatively affect the attractiveness of the CCS regime overall and reduce its effectiveness. Whereas one can see little difficulty in establishing to the requisite standard that a party is a coercer - the bar on coercers is not uncommon in leniency regimes - it is less straightforward to establish that a party was an initiator or a co-initiator. In our experience, the potential for debate on a party's role in instigating the conduct may constitute a disincentive for parties self-reporting under regimes

where initiators are not eligible for leniency. It is our understanding that authorities which have an "instigator" bar in theory - the South African Competition Commission for example - tend not to respect the bar in practice as to do so would require the determination of difficult considerations of fact. Following the many legal uncertainties associated with determining whether one or more undertakings instigated or initiated conduct, the European Commission abandoned an earlier condition that applicants for immunity should "not [have] acted as an instigator or played a determining role in the illegal activity" (1996 Commission Notice on the non-imposition or reduction of fines in cartel cases).

The bar on those who initiate cartels from qualifying for leniency may also negatively impact on the success of the CCS' proposed leniency plus system. An undertaking involved in cartel A, the subject of a CCS investigation, will be dissuaded from availing of leniency plus in circumstances where there is a risk that its role in relation to cartel B may be considered as that of initiator. This is particularly the case under the CCS Leniency Guidelines as an initiator is barred from all lenient treatment and not only full immunity and/or the 100 percent reduction.

4 Closing comments and conclusion

The effectiveness of a leniency programme will ultimately depend on its relative attractiveness for would-be whistle blowers and that will turn in no small part on a consideration of the level of fines that might be avoided. These policy instruments - leniency and fining guidelines - are in effect two sides of the same coin and revisions to one in isolation may not bring about the desired results.

Transparency as regards the level of leniency credit is also clearly a key consideration for whistle blowers and many of our comments above on the CCS' proposed changes to its leniency programme are motivated by an appreciation of this point. However, outside those aspects of its leniency policy which the CCS is currently minded to revise consideration could be given to clarifying in particular the position of leniency applicants who are not first through the door where CCS policy is to offer a reduction of up to 50 percent. In respect of this category of applicant, we note that the CCS Guidelines provide that "[a]ny reduction in the level of financial penalty... is discretionary" and in exercising that discretion the CCS will take into account various factors. No doubt the CCS is reluctant to fetter its discretion here but the position of those who are "second through the door" in terms of what they would earn in exchange for cooperation is simply not capable of quantification at the outset and this is likely to dissuade undertakings from self-reporting. In that regard again the CCS might wish to consider adopting the approach of the European Commission which offers clear guidance on the level of reduction available to different undertakings in the leniency queue.

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We hope the CCS will find the above comments useful.

Marc Waha / Philip Monaghan