

LEGAL UPDATE

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COMPETITION UPDATE

COMPETITION COMMISSION OF SINGAPORE PUBLISHES REVISED GUIDELINES ON LENIENCY

The Competition Commission of Singapore (the “**CCS**”) has gazetted its revised “Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases” (“**Revised Leniency Guidelines**”) on 8 January 2009. The Revised Leniency Guidelines came into effect yesterday.

The Revised Leniency Guidelines were released following the conclusion of a month-long public consultation held last year to consider the addition of a “Marker System” and a “Leniency Plus System” to the existing leniency programme. These two schemes were introduced to enhance the effectiveness of the CCS’ enforcement action against cartels, as part of its efforts to protect the competitive process for the ultimate benefit of the consumers. A brief description of the two schemes is set out below.

Based on submissions made by interested parties during the public consultation, two minor additional amendments were made to provide clarity to the Revised Leniency Guidelines.

Marker System

Under the current leniency programme, the first applicant for leniency will need to meet the evidential threshold before qualifying for total immunity or a reduction of up to 100 percent of the financial penalty. The Marker System was introduced to preserve the position of the first applicant; it gives the applicant a time frame to meet the evidentiary threshold. Under the revised leniency programme, the CCS will preserve the position of the first applicant within the specified period, even where a second leniency applicant meets all the evidentiary thresholds before the first applicant.

Leniency Plus System

The Leniency Plus System is designed to encourage cartel members who are under investigation for a cartel activity to provide information on its involvement in a separate cartel. It is not necessary for the undertaking to be in receipt of leniency for the first cartel to qualify under the Leniency Plus System. If the CCS is satisfied that the evidence relates to a separate cartel activity and the undertaking would qualify for total immunity from or a reduction of up to 100 percent of the financial penalties in relation to its activities in the second cartel, it would grant the cartel member a further reduction in the financial penalty in relation to the first cartel.

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The CCS' Responses and Clarifications to Issues Raised During Public Consultation

Purpose of initial contact (paragraph 5.3 of Revised Leniency Guidelines)

In response to queries on the purpose of the anonymous initial contact with or “feelers” to the CCS, the CCS clarified that the intent of these meetings was to allow potential leniency applicants to anonymously ascertain if they qualified for leniency. The revised leniency guidelines have been amended to reflect this intent. However should the applicant want to secure a marker or proceed with a formal leniency application, it must disclose its name to the CCS.

Discretionary grant of marker (paragraph 5.9 of Revised Leniency Guidelines)

During the consultation, it was highlighted that the discretionary nature of the marker was undesirable, given that international experience suggests that “certainty of application is a condition for effectiveness”. The exercise of discretion could potentially undermine the marker system as potential whistle-blowers would be deterred by the prospect of self-incrimination without certainty of being granted a marker. The CCS was urged to set out firm assessment criteria for the grant of a marker if it still wished to require applicants to justify requests for a marker (similar to the position taken by the European Commission).

In response, the CCS clarified that, while it will still retain discretion over the grant of a marker, it expects the grant to be “the norm rather than the exception”. The Revised Leniency Guidelines have been amended to reflect this.

What happens to information provided if the application for a marker fails?

The CCS clarified, in response to this query, that all information submitted will be returned. In addition, the CCS stated that it would not make use of or disclose the information to private parties, foreign competition authorities or foreign courts, except within the bounds of the law. However, the CCS highlighted that this will not preclude it from gathering evidence against the cartel in question through its own independent investigations.

Can the first-in-line lose its place in the queue?

It was highlighted that the CCS' intention to re-examine the need for the remaining time granted to the first applicant to perfect the marker whenever a second undertaking applies for leniency and satisfies all conditions suggests that the marker may potentially be lost during the timeframe allocated to the first applicant. This ambiguity reduced the attractiveness of the marker system, given that an applicant faced the possibility of being “queue-jumped”.

The CCS clarified that paragraph 5.6 of the Revised Leniency Guidelines makes it clear that the first-in-line will not lose his position within the specified timeframe even if a subsequent applicant satisfies all conditions for perfecting the marker before the first applicant. By retaining the flexibility of re-assessing the time granted to the first applicant, the CCS can ensure that its investigations are not unnecessarily delayed by rogue applicants. This should not be a cause of concern to genuine applicants.

Quantification of the leniency plus credit

The CCS rejected calls for the quantification of the leniency plus credit (ie. reduction in financial penalty) in respect of the first cartel at the point of perfecting the marker in respect of the second cartel. The CCS explained that this is not practicable given that one of the conditions for leniency plus is the continued cooperation with the CCS in the second cartel investigation.

Further, to address the possibility that an applicant withdraws cooperation in the second cartel investigation after receiving a reduction in financial penalty for the first cartel infringement, the CCS indicated that it would retain the flexibility to either increase the penalty for the second cartel infringement or “clawback” the amount reduced in the first cartel. Ultimately, these measures are meant to prevent applicants from “gaming” the system; the CCS indicated that it would, in any event, adjust its procedures to suit the circumstances.

If you wish to discuss how this topic may potentially affect you, please feel free to contact the Competition Law Practice Group:

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