Competition & Antitrust and Trade

CCCS Consults on Amendments to Penalty Guidelines

Introduction

On 16 July 2021, the Competition and Consumer Commission of Singapore ("**CCCS**") announced a public consultation on proposed changes to the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases ("**Penalty Guidelines**").

The Penalty Guidelines provide general guidance on how financial penalties for infringements of the prohibitions in sections 34, 47, and 57 of the Competition Act (Cap. 50B) ("**Competition Act**") are calculated by CCCS. CCCS operates through a six-step process, namely:

1. Calculation of the base penalty;
2. Adjustment for the duration of the infringement;
3. Adjustment for aggravating or mitigating factors;
4. Adjustment for other relevant factors;
5. Adjustment if the statutory maximum penalty is exceeded; and
6. Adjustment for immunity, leniency reductions and/or fast-track procedure discounts.

CCCS is seeking feedback on two clarificatory amendments to mitigating factors, which are weighed in step three of the above process and set out in the Penalty Guidelines. It is highly likely that these changes have been introduced following recent infringement decisions, including one which was appealed to the Competition Appeal Board ("**CAB**").

The Consultation will run from 16 July 2021 to **5 August 2021**, with feedback to be summarised and published in due course. We strongly recommend that businesses and trade associations in particular review the proposals very carefully and consider responding.

Amendment 1: Where Undertaking had Substantially Limited Involvement

Section 34 of the Competition Act prohibits any agreements, decisions, or concerted practices that have the prevention, restriction, or distortion of competition in Singapore as their object or effect. CCCS regards as an infringement of section 34 an undertaking's mere presence at a meeting where anti-competitive discussions take place. Such participation gives an impression of solidarity and may embolden the other members of the cartel, and any form of conduct which lends strength to a cartel is regarded by CCCS as infringing behaviour. Given this, CCCS has typically not accorded an undertaking which was a passive participant a mitigating discount.

This was criticised by CAB in its decision on 4 December 2020 in the Chicken Cartel case where it noted that "CCCS asserted the stark position in the [Infringement Decision] that minor and passive participation is not a mitigating factor" and consequently reduced the financial penalties of some of the Appellants on the basis that they "were passive participants, which is a mitigating factor".

Taking the cue from the CAB decision, CCCS now seems to recognise that there are limited instances when an undertaking may be less culpable, albeit noting that the circumstances under which any such mitigating discount is available should be narrowly circumscribed. To allow for this, a new example will be inserted regarding when (in the context of a section 34 infringement) the role of the undertaking may constitute a mitigating factor in paragraph 2.15 of the Penalty Guidelines, which sets out a non-exhaustive list of mitigating factors.

Specifically, the proposed amendment provides that to enjoy the benefit of a mitigating discount, the undertaking must *provide evidence that its involvement in the infringement was substantially limited and demonstrate that, during the period in which it was party to the infringement, it actually avoided applying [the anti-competitive agreement] by adopting competitive conduct in the market.*

In making this proposal, CCCS added that it would require the undertaking to provide evidence that its conduct had clearly and substantially departed from the anti-competitive understanding or consensus to the point of disrupting its very operation. To illustrate, in the case of an agreement to increase prices, CCCS has clarified that a decision by the undertaking not to increase its price at all may constitute a *bona fide* act to apply competitive conduct on the market. In contrast, a situation where an undertaking decides to raise its prices at a lower quantum after agreeing to a higher level with the rest of the group will not constitute a *bona fide* act to apply competitive conduct, as the undertaking may simply be looking to benefit from the knowledge of the anti-competitive arrangement at the expense of other infringing undertakings. Whilst this is helpful, the difficulty associated with this is that if an undertaking, not intending to act in collusion with others, nevertheless increases its prices as a consequence of increases in raw material costs, it may be viewed as having participated in the alleged cartel and not qualify for any mitigating discount. Arguably more guidance ought to be provided here.

We highlight that the use of the conjunction "and" would mean that to qualify for a mitigating discount, the undertaking must further demonstrate that it had avoided applying the agreement *and* adopted a competitive conduct. The mere evidencing that an undertaking had a substantially limited involvement in the infringement would not suffice for a mitigating discount.

Amendment 2: Where Undertaking was Not a Leader, Instigator, or Pro-active Participant

CCCS notes from past cases that undertakings do submit in investigations that they ought to be granted discounts for their allegedly lesser roles in a cartel. Whilst the Penalty Guidelines do take into consideration the role of an undertaking in an infringement, the key aspect that is looked at to mitigate

is the fact that the undertaking was acting under severe duress or pressure. From a business perspective, this is obviously too narrow.

Hence, it is welcome that CCCS has proposed modifying its Penalty Guidelines by expressly allowing the undertaking to *provide evidence that its involvement in the infringement was substantially limited.* Although the proposal is positive, arguably it could do with more clarity. Further, as highlighted above, it is not clear how CCCS would assess the situation if the undertaking is able to provide evidence that its involvement in the infringement was substantially limited but if the undertaking could not prove that it did not increase its prices at all. For reference, we note that whilst the language used by CCCS seems to borrow from the European Commission 1998 Guidelines on the Method of Setting Fines ("**EC 1998 Penalties Guidelines**"), the EC 1998 Penalties Guidelines distinguished between "an exclusively passive or 'follow-my-leader' role in the infringement" and the "non-implementation in practice of the offending agreements or practices". Seemingly, CCCS does not intend to make such a distinction.

CCCS has said in its Consultation that it needs to strike a balance "between providing sufficient clarity and being overly prescriptive." We agree; yet to assist business, it would aid to have more illustrations at least.

Note that even as CCCS opens a door to allow undertakings to provide evidence of its limited involvement in an infringement, CCCS proposes a clarification that seemingly makes it tougher to establish the limited participation. In this regard, CCCS proposes to introduce a new paragraph 2.16 as follows:

> *For the avoidance of doubt, the fact that an undertaking did not play a leader or instigator role in the infringement or that it was not a pro-active participant in the infringement will not, in itself, be regarded as a mitigating factor. Furthermore, the fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating factor since this will already be reflected in the duration of the infringement at Step 2.*

Concluding Words

The Penalty Guidelines are a non-exhaustive statement of CCCS's approach to financial penalties, as CCCS seeks to walk the line between being overly prescriptive versus providing sufficient clarity. Nonetheless, the Penalty Guidelines indicate CCCS's general policy approach in establishing a high threshold for undertakings to successfully obtain a mitigating discount based on its role in the infringement. It is critical at this juncture, where a consultation has been put out, for businesses to consider the potential impact on them and to propose tweaks as may be necessary.

If you have any questions or comments in relation to the above consultation or on competition laws in Singapore, please do not hesitate to contact our team below or email us at competitionlaw@rajahtann.com.

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