

# **CCCS PRACTICE STATEMENT ON THE FAST TRACK PROCEDURE FOR SECTION 34 AND SECTION 47 CASES**

**Effective from: 1 December 2016**



## CCCS PRACTICE STATEMENT ON THE FAST TRACK PROCEDURE FOR SECTION 34 AND SECTION 47 CASES

### 1 INTRODUCTION

- 1.1 This procedural note sets out a framework to incentivise parties to co-operate with the Competition and Consumer Commission of Singapore (“CCCS”) to “fast track” proceedings where a decision of an infringement of section 34 and/or section 47 of the Competition Act (Chapter 50B) (“the Act”) may be made. Under the fast track procedure, parties who admit liability for their infringement of the Act will be eligible for a fixed percentage reduction in the amount of financial penalty they are directed to pay pursuant to section 69(2)(d) of the Act.<sup>1</sup>
- 1.2 The purpose of the fast track procedure is to assist CCCS to more effectively and efficiently enforce the Act. It enables CCCS to achieve procedural efficiencies and resource savings through a streamlined administrative procedure that results in an earlier infringement decision than would have been possible without the fast track procedure. The fast track procedure is distinct from CCCS’s ability to accept commitments and CCCS’s leniency policy set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*.
- In a voluntary commitments process, an investigated party offers commitments to CCCS to address the competition concerns that CCCS has identified. There is no admission of liability by such parties for an infringement of the Act. There is also no finding of an infringement where the undertaking, by giving a voluntary commitment, has addressed the competition concerns identified by CCCS.
  - CCCS’s leniency policy and the fast track procedure are not mutually exclusive, and it is possible for a leniency applicant to benefit from discounts arising from both the leniency policy and the fast track procedure.
- 1.3 In considering which cases may be appropriate for the fast track procedure, CCCS may take into account the number of parties concerned in the investigation, the number of parties who have proactively indicated their willingness to engage in a fast track discussion, foreseeable divergences in the parties’ relative positions, possibility of parties’ contradicting positions regarding the attribution of liability, as well as the predicted margin for argument and extent to which facts may be contested.
- 1.4 The fast track procedure can be initiated by CCCS prior to or after a

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<sup>1</sup> *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016* provides general advice and information about the basis on which CCCS will calculate financial penalties for infringements of the section 34 or 47 prohibition.

provisional infringement decision (“PID”) but not after an infringement decision (“ID”) has been issued. However, CCCS envisages that in general, the fast track procedure will be initiated by CCCS prior to a PID being issued.

- 1.5 Parties under investigation may choose to proactively indicate to CCCS their willingness to engage in a fast track procedure discussion. However, CCCS retains a broad margin of discretion in determining whether the case is suitable for the fast track procedure.
- 1.6 As a matter of principle, CCCS considers the fast track procedure to be suitable for a case when CCCS is reasonably satisfied, based on information and evidence available to CCCS, that the evidentiary standard of proof has been met such that CCCS would be prepared to issue a PID or ID (as appropriate given the stage of proceedings) in that case.
- 1.7 The fast track procedure consists of the following stages: initiation, discussion, agreement and acceptance. Throughout the process, CCCS retains a broad margin of discretion as to whether to continue with the fast track procedure. Should the fast track procedure be discontinued, e.g. each party decides after discussion with CCCS not to opt for the fast track procedure, CCCS will notify the relevant party(s) that the fast track procedure no longer applies. Any information or documents provided in the course of the fast track procedure by a party, who subsequently is no longer in the fast track procedure, will be deemed to be withdrawn. Such information and documents cannot be used as evidence by CCCS against any of the parties to the proceedings.
- 1.8 Parties to any fast track procedure may not disclose to any third-party any information received during the fast track procedure unless they have prior explicit authorisation by CCCS. Unauthorised disclosure by a party of any information received during the fast track procedure may result in the fast track procedure being discontinued and/or may be regarded as a lack of co-operation within the meaning of *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016*.

## 2 INITIATION OF THE FAST TRACK PROCEDURE

- 2.1 Where CCCS is of the view that a case may, in principle, be suitable for the fast track procedure, CCCS will send a letter to each party whom it contemplates issuing a PID or ID (as appropriate given the stage of proceedings), asking each party to indicate in writing their interest in engaging in discussions under the fast track procedure. Parties will have to indicate their interest to CCCS within a short stipulated time frame.
- 2.2 An undertaking under investigation that consists of two or more parties, e.g. parent and subsidiary, if willing to engage in discussions under the fast track procedure, shall be represented jointly by a single representative.
- 2.3 Where CCCS initiates the fast track procedure, parties will not be obliged

to enter into discussions with CCCS or utilise the fast track procedure.<sup>2</sup> While CCCS will initiate the fast track procedure, the fast track procedure will only apply where a party responds to CCCS indicating that it wishes to utilise the fast track procedure. In general, where there is more than one party under investigation in a case, CCCS will only apply the fast track procedure when all parties under investigation in the case indicate their interest to utilise the fast track procedure.

### 3 DISCUSSION OF THE FAST TRACK PROCEDURE

- 3.1 At the commencement of fast track procedure discussions, CCCS will provide parties with an indicative timetable so that each party may make necessary arrangements to be able to participate fully with CCCS during the fast track procedure. In order to facilitate the discussions in relation to the possible range and quantum of financial penalties, a request may also be made for each party to furnish CCCS with its financial information.
- 3.2 During the discussion phase, CCCS and each party involved in the fast track procedure will discuss the following:
- scope and gravity of the conduct, including identifying the infringements upon which CCCS contemplates making a PID/ID; and
  - the possible range and/or quantum of financial penalties calculated according to *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016*.
- 3.3 Parties taking part in the fast track procedure will also be informed by CCCS of the following:
- the evidence used to determine the scope of the contemplated infringement; and
  - non-confidential versions of key documents that CCCS determines are necessary to enable the party to ascertain its position regarding the contemplated infringements.
- 3.4 Each party taking part in the fast track procedure will be allowed to express its views on essential elements of the contemplated infringement such as the alleged facts, classification of the infringement, the gravity and duration of the infringement and the liability of the party for its involvement in the infringing conduct. Any views expressed should be supported by evidence.
- 3.5 The key aims of the discussions are to allow each party and CCCS to evaluate the benefits of the fast track procedure from their respective perspectives and make an informed choice between the fast track procedure and the ordinary

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<sup>2</sup> The fact that an investigated party chooses not to utilise the fast track procedure offered by CCCS does not constitute an aggravating factor for the purposes of calculating penalties or signify a lack of cooperation by a leniency applicant.

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investigation process. These discussions, which take the form of one or more rounds of bilateral discussions between CCCS and each party, will be undertaken on a “without prejudice” basis.

3.6 When the discussion leads to some common understanding between CCCS and each party regarding the scope of the potential infringements and the range of likely financial penalties to be imposed, and CCCS is of the view that procedural efficiencies are likely to be achieved with the fast track procedure, each party will be given a set timeframe to express to CCCS its willingness to utilise the fast track procedure. Each party will indicate this by way of a submission to CCCS (the “Fast Track Procedure Submission”).

3.7 In the Fast Track Procedure Submission, each party will have to:

- unequivocally state that it will admit its liability to the infringement and to an agreed set of facts. This admission of liability will be set out in the Fast Track Procedure Agreement;
- state that it has been sufficiently informed of CCCS’s proposed decision and that it has been given sufficient opportunity to be heard during discussions with CCCS; and
- state that it will not make extensive written representations, request to make oral representations to CCCS or request to inspect the documents and evidence in CCCS’s file, but it could provide a concise memorandum identifying any material factual inaccuracies in the PID.

The above will then be set down as part of the terms of a Fast Track Procedure Agreement to be signed by the party, described below.

3.8 CCCS envisages that the fast track procedure will generally only be used where all parties who are contemplated to be addressees of any decision agree to the fast track procedure. However, depending on the facts and circumstances of the case, even if not all parties are agreeable to entering into discussions, CCCS may still proceed with the fast track procedure in limited circumstances. For example, CCCS may still consider it to be appropriate to use the fast track procedure if all parties to the cartel agree to the fast track procedure except for one party that is under judicial administration or has been ordered by the Court to be wound up.

3.9 A party can request an extension of the deadline by which to submit its Fast Track Procedure Submission, but must furnish reasons for its request. If any party fails to submit its Fast Track Submission within the deadline stated or any extension that has been granted by CCCS, the fast track procedure will be deemed to have lapsed and CCCS may revert to the original investigative procedure.

## 4 AGREEMENT TO ACCEPT THE FAST TRACK PROCEDURE OFFER

4.1 Each party that has provided a Fast Track Procedure Submission will sign an

agreement with CCCS containing the terms in their Fast Track Procedure Submission as well as other terms agreed at the conclusion of each party's discussions with CCCS (the "Fast Track Procedure Agreement"). The agreement shall be in writing.

### 4.2 The Fast Track Procedure Agreement will include the following terms:

- an acknowledgement of the party's liability for the infringement and of its involvement in it (including for example object or effect, duration, main facts of the case and legal assessment, etc);
- an agreement to cooperate throughout CCCS's investigation;
- an indication of the maximum amount of the financial penalties each party would accept to be imposed. This maximum amount would include the application of any leniency discount and the fast track procedure discount;
- CCCS reserves the right to: (i) adjust the figures in applying the penalties, provided that the final penalty does not exceed the maximum amount of financial penalties the party has indicated, and (ii) make further adjustments that may reduce the final penalty without further notice to the party;
- confirmation of the party's request pursuant to their Fast Track Procedure Submission to use the fast track procedure;
- confirmation by the party that it has been sufficiently informed of the contemplated infringements and that it has been given the opportunity to be heard;
- confirmation by the party that it will not make extensive written representations, request to make oral representations to CCCS or request to inspect the documents and evidence in CCCS's file, but it can provide a concise memorandum identifying any material factual inaccuracies in the PID; and
- an acknowledgement that should the party bring appeal proceedings before the Competition Appeal Board ("CAB") in respect of CCCS's decision, CCCS reserves the right to make an application to the CAB for a penalty amount that differs from that calculated in its ID, and may require the party to pay the full costs of CCCS's appeal regardless of the outcome of the appeal.

### 4.3 Until the Fast Track Procedure Agreement has been signed by a party, that party will not be committed to accept the fast track procedure. A party will only be deemed to have accepted the fast track procedure when it enters into a Fast Track Procedure Agreement with CCCS.

## 5 ACCEPTANCE AND CCCS'S DECISION

- 5.1 Following the Fast Track Procedure Agreement being signed, CCCS will issue a PID or ID depending on the stage at which CCCS has initiated the fast track procedure. CCCS will adopt a streamlined PID or ID (as appropriate) reflecting the content agreed between CCCS and each party in the Fast Track Agreement. Where a PID is issued based on the Fast Track Procedure Agreement, each party will have a limited time period set by CCCS in which to make representations. CCCS's ID will take into account representations received following the issuance of the PID.
- 5.2 The PID and/or ID will provide for a reduction of 10% on the financial penalty that would otherwise be imposed on the party if it had not agreed to the fast track procedure. This discount will be applied in Step 6 of the penalty calculation framework, as set out in *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016*.
- 5.3 Where a leniency applicant is also a party that has been emplaced on the fast track procedure, the reduction in any financial penalty granted for the fast track procedure will be added cumulatively to the leniency reduction conferred as set out in the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016*. For example, if a party is granted a 40% reduction in financial penalties due to leniency and a further 10% reduction due to the fast track procedure, the party will receive an overall reduction of 50% in financial penalties.
- 5.4 CCCS retains the right to issue a PID or ID that departs from the position that is agreed to between itself and any party in the fast track procedure, for example where new exculpatory evidence comes to light after the Fast Track Procedure Agreement has been signed but before CCCS has issued a PID or ID. In such cases, CCCS will inform the party(s) concerned that the fast track procedure is no longer available in the form that was agreed and that the normal investigatory procedure will apply. If the fast track procedure no longer applies, any admission by a party will be deemed to be withdrawn, and the party concerned will be granted a reasonable time-limit allowing them, upon request, to present their defence, including the possibility to access the file and to request an oral hearing.
- 5.5 Should the fast track procedure no longer apply, any documents provided by a party in the course of discussions will be deemed to have been withdrawn and will not be used by CCCS. However, CCCS reserves the right to request any document using its formal powers at a later stage of its investigation, except those documents created for the purposes of the fast track procedure.

Figure 1. Flowchart of Fast Track Procedure

