



ADMINISTRATIVE REMEDIES GUIDELINES FOR CONSUMER PROTECTION

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Preface

One of the objectives of the Competition Act No. 12 of 2010 is to protect consumers from unfair and misleading market conduct. In furtherance of that objective and in accordance with the powers conferred on the Authority under Section 9(f) of the Competition Act, the Authority hereby publishes these guidelines on the determination and imposition of administrative remedies in relation to infringements of Part VI of the Act.

The guidelines are intended to:

- Inform suppliers or undertakings and their legal representatives on how the Authority undertakes its determination of administrative remedies with respect to consumer violations and in particular provide the criteria the Authority will use in the determination assessment of consumer violations;
- provide clarity on the analytical construct that the Authority may use in determining administrative remedies;

This guideline document is not intended to be a substitute for the provisions on Consumer Welfare under Part VI of the Act or any subsidiary rules made pursuant thereto and do not have the force of law. It may be amended periodically as it may be deemed appropriate.

Table of Contents

Section 1: Introduction	Error! Bookmark not defined.
Section 2: Objectives	Error! Bookmark not defined.
Section 3: Imposition of Administrative Remedies	Error! Bookmark not defined.
Section 5: Deciding on the type of administrative remedy.....	Error! Bookmark not defined.
Section 6: Categories' of Violations	Error! Bookmark not defined.
Section 7: Criteria for the Determination of a Financial Penalty	Error! Bookmark not defined.
Section 9: Settlement	Error! Bookmark not defined.
Section 10: Statutory Limit	Error! Bookmark not defined.

A. INTRODUCTION

1. These guidelines shall be known as the Administrative Remedies Guidelines for Consumer Protection
2. The Guidelines set out the principles and conditions adopted by the Authority that govern the determination of administrative remedies and procedures for pursuing settlements as provided for under the Act.
3. The Guidelines cover the administrative financial penalties and non-financial remedial measures for prohibitions under Part VI of the Act and also considers the determination of pecuniary penalties in settlements agreements. Further, the Guidelines incorporate international best practices in the determination of financial penalties and other remedies related to consumer welfare violations.
4. The Act empowers the Authority to carry out investigations related to consumer violations. Part VI of the Act entrusts the Authority with the power to protect consumers from false and misleading representations, unconscionable conduct, product safety and unsafe goods, unsuitable and defective goods.
5. For enhanced consumer protection and welfare, the Act under Section 70A provides that:
 - i. Pursuant to the provision of this part, the Authority may on its own initiative or upon receipt of information or a complaint from any person, government agency Ministry, or consumer body, initiate investigations into a consumer complaint.
 - ii. The provisions of Sections 31, 32, 33, 34, 35, 36, 37, 38, 39 and 40 of the Act shall apply *mutatis mutandis* to the investigation of consumer complaints under this Section.
6. Additionally, Section 58 of the Act provides the Authority with power to publish a warning notice to the public in regard to investigations into unsafe goods and/or warning them of possible risks involved in the use of the said goods.
7. Pursuant to section 36 of the Act, the Authority is empowered to impose administrative remedial measures including financial penalties on consumer welfare violations. Specifically, section 36(d) provides the Authority with power to impose financial penalties on violations against consumer welfare under Part VI of the Act.
8. Further, Section 38 of the Act provides that the Authority may at any time during or after an investigation into an alleged infringement enter into an agreement of settlement with the undertaking(s) concerned. This may include a pecuniary penalty.

9. In regard to non-financial administrative remedies, the Authority is empowered under Section 36 (c) to impose administrative actions to be taken by the undertaking(s) or supplier(s) concerned to remedy or reverse a consumer related infringement or the effects thereof. Additionally, Section 61 (2) provides the Authority with power to impose administrative actions to a supplier to remedy the infringement of Sections 59-60 of the Act.
10. The Authority may also impose injunctions, enforcement orders or “cease” orders under Section 37 of the Act, in situations where continuing or further contraventions will lead to such a level of social harm that prevention of the continuing unlawful activity is regarded, in the individual case, as essential.

Objectives

11. The guidelines are aimed at achieving the following objectives;
 - i. Enhance transparency, predictability, and consistency in arriving at the administrative remedial measures including financial penalties,
 - ii. Identify the various categories of contraventions, the administrative financial remedies and other remedies that may be imposed by the Authority,
 - iii. Achieve proportionality on the remedies imposed against the degree of contravention
 - iv. Ensuring the availability of effective consumer dispute resolution mechanisms and redress for loss or injury arising from the violation of consumer protection provisions under the Constitution and the Act;

B. ADMINISTRATIVE REMEDIES

Imposition

12. The Authority shall impose administrative remedies to redress a consumer, additionally it may impose a financial penalty for consumer violations.
13. In regard to minor consumer welfare violations, the Authority shall take precedence on imposition of non-financial remedies which are sufficient to redress or retribute the aggrieved consumer. Consequently, the Authority may not impose a financial penalty in such cases.
14. The Authority will take full account of the particular facts and circumstances of each case when determining whether to impose a financial penalty. The Authority will also consider any representations made to it by the respondents and other interested parties.

Deciding on the type of administrative remedy

15. The Authority will assess the gravity/seriousness of the infringement which will be taken into account in determining the applicability of a financial penalty and other remedies. This will also be used in determining the baseline percentage for a financial penalty.
16. In assessing the gravity of the infringement, the factors that the Authority will consider include the following:
 - i. Nature of the good or service in reference to (but not limited to);
 - a) the possible effect of the infringement on the consumer(s) and/or the public;
 - b) the prevalence of the infringement; and
 - c) Geographical coverage.
 - ii. Harm/ Damage / danger / loss caused to consumers, and/or the public by the infringement;
 - iii. Benefit or amount improperly gained or evaded as a result of the infringement when it is objectively possible to estimate that amount;
 - iv. Duration of the infringement (when there is evidence to show the duration or it is objectively possible to infer from the evidence); and
 - v. Repetition of the offense/ recidivism.
17. For the purposes of imposing remedial measures on consumer welfare infringements, the Authority will categorize the infringement depending on level of gravity into the three violation categories; (1) minor, (2) serious and (3) grave. A different baseline financial penalty and non-financial remedies will be pursued for each of these categories. The purpose of the categories is to associate the baseline penalty value of a violation and the non-financial remedial measures imposed with violation's level of regulatory significance.

C. VIOLATIONS

Violations are categorized y of violations are as follows:

Minor violations

18. These are consumer welfare violations that involve:
 - i. A violation specific to one consumer;
 - ii. Financial loss to a consumer as depicted by the price of the product or service;
 - iii. No physical injury or health harm involved;

19. The Authority, pursuant to section 36 (c) and (e) of the Act, shall endeavor to impose non-financial remedies. which may include :
- i. Repair of goods;
 - ii. Replacement of the goods;
 - iii. Refund to the Consumer, to whom the goods were supplied or service was rendered, the price of the goods or service within a time specified;
 - iv. Compensate the consumer for any loss (in case of supply of a service)
 - v. Reprimand by the Authority;

Serious violation

20. These are consumer welfare violations that involve:

- i. Violations relating to a number of consumers;
- ii. Financial loss to a consumer as depicted by the price of the product or service
- iii. No physical injury or health harm involved;
- iv. The violation covers a sub-region or a town or a part of a city;
- v. A repeated violation where a reprimand had previously been issued by the Authority.

21. The Authority pursuant to section 36 (d) of the Act, shall impose a financial penalty. In addition the Authority may impose other remedies pursuant to section 36 (c), (e) and 61 of the Act to ensure deterrence and also restitution of the consumer. These may include either/or:

- i. Repair of goods;
- ii. Replacement of the goods;
- iii. Refund to the Consumer to whom the goods were supplied the price of the goods within a time specified ;
- iv. Compensate the consumer for any loss (in case of supply of service)
- v. Issue a public notice;
- vi. Require an undertaking from the supplier to reverse the conduct e.g place an advert reversing a false or misleading claim;

Grave violation

22. These are consumer welfare violations that:

- i. May affect health, cause physical injury or harm,
- ii. Involve high financial loss to consumer(s) as depicted by the price of the product or service,
- iii. Is prevalent or committed by more than one supplier or undertaking,
- iv. Has a regional or national dimension, or covers a city or populous urban centers.

23. The Authority shall impose a financial penalty pursuant to Section 36 (9), (e) and 61 (2) (a) of the Act, coupled with non-financial remedies for grave violations to ensure deterrence and restitution to the consumer. Such other remedies may include:
- i. Recall the goods period specified in a Notice;
 - ii. Notice to the public on the nature of defect or dangerous characteristic of the goods;
 - iii. Circumstances in which the use of the goods are dangerous;
 - iv. Orders on the supplier or undertaking to undertake the following:
 - a) Repair of goods
 - b) Replacement of the goods
 - c) Refund to the Consumer to whom the goods were supplied the price of the goods within a time specified in a Notice
 - d) Compensate the consumer for any loss (in case of supply of service)
 - e) Issue a public notice; and
 - f) Require a firm commitment from the supplier to reverse the conduct e.g. place an advert to reverse a false or misleading claim.

D. FINANCIAL PENALTIES AND SETTLEMENT

Criteria for determination of a financial penalty

24. Sections 36 (d) of the Act prescribe that the Authority may impose a financial penalty of up to ten percent (10%) of the immediately preceding year's gross annual turnover in Kenya. However, for the purpose of computing a financial penalty relating to violations under Part VI of the Act, the Authority will take the preceding year's gross annual turnover to be the value of sales of the goods or services under investigation for the period of the existence of the conduct.
25. In computing the financial penalty, the Authority will consider the affected (relevant) turnover, base amount and adjust the base amount for aggravating and mitigating factors..
26. The duration of the infringement will also play a significant role in the setting of the appropriate amount of the penalty, since it has an impact on the potential consequences of the infringement on the consumers or the public. It is therefore considered important that the penalty should also reflect the period or number of years during which a supplier participated in the infringement.
27. Any financial penalty imposed by the Authority under Section 36 (d) in relation to violations of Part VI of the Act, will be calculated by a 3-step approach as follows:

- i. Calculation of base penalty;
- ii. Adjustment for aggravating factors
- iii. Adjustment for mitigating factors.

Step 1- Calculation of the base penalty

28. To determine the base penalty the Authority will have regard to the gravity of the infringement as set in Schedule 1

Step 2 - Adjustment for Aggravating factors

29. Upon determination of the base penalty the Authority will adjust of aggravating factors including :

- i. Degree of premeditation shown by the offender;
- ii. Continuation of the infringement after the start of the investigation;
- iii. Refusal to cooperate with or attempts to obstruct the Authority in carrying out investigations;
- iv. negligence;
- v. Past violations or repeated violation; and
- vi. Any other aggravating factors which the Authority may consider.

Step 3 – Adjustment for Mitigating Factors

30. Additionally the baseline penalty will be adjusted for mitigating factors which may include:

- i. Immediate termination of the infringement as soon as the Authority intervenes;
- ii. Remedial measures taken to rectify the wrong-doing;
- iii. Early admission of the breach;
- iv. Cooperation during the investigation process;
- v. Where the breach was genuinely accidental or inadvertent; and
- vi. Other mitigating factors which the Authority finds reasonable and relevant.

31. After consideration of the aggravating and mitigating factors, the Authority will arrive at the financial penalty as percentage figure.

Settlement

32. Pursuant to section 38, the Authority may, at any time during or after an investigation into an alleged infringement, enter into an agreement of settlement with the undertaking concerned. The settlement agreement may include an award of damages to the complainant and/or an amount as a pecuniary penalty securing earlier redress or protection for consumers.

33. Cognizant of the above, The Authority may reduce the amount of the financial penalty that might otherwise have been payable based on settlement at the earliest opportunity.. The final notice will indicate that a settlement has been reached.

Statutory limit

34. Section 36 (d) of the Act, sets a limit on maximum financial penalty to be an amount not exceeding 10 per percent of the firm’s annual turnover during the firm’s preceding financial year

Schedule 1: CALCULATION OF FINANCIAL PENALTIES

A. Step 1: Base Penalty (BP)

1. The base percentage denotes the starting point against which the aggravating and mitigating factors will be adjusted
2. For the purpose of calculating a baseline penalty value of a consumer welfare violation under the Act, the Authority will categorize infringement into the three categories; (1) Minor Violations, (2) Serious Violations and (3) Grave Violations. The minor violations will not attract a financial penalty.
3. The Authority will assign Baseline Penalties as follows:

	Violation category	BP %
1.	Minor	-
2.	Serious violation	6%
3.	Grave violation	10%

B. Step 2- Adjustment for Aggravating Factors (AF)

4. The basic amount may be increased where the Authority finds that there are aggravating circumstances (**BP+ AF**)
5. The aggravating factors are weighted depending the negative impact of the infringement to the consumer and/or the public in terms of harm, damage or loss. These factors are weighted ranging from 0.5 to three percent (3%).

	Category of violation		
	Minor violation	Serious violation	Very serious violation
Aggravating factors	%	%	%



Degree of premeditation shown by the offender;	-	0.5	0.5
Continuation of the infringement after the start of the investigation	-	2	3
lack of cooperation or attempts to obstruct the Authority in carrying out investigations	-	1	1
Negligence	-	1	2
Past or repeated violations	-	1	2

C. Step 3 - Adjustment for Mitigating Factors (MF)

- After adjusting for aggravating circumstances, the Authority may reduce the resulting financial penalty in consideration of the mitigating factors ($(BP+ AF)-MF$)
- The mitigating factors are weighted depending the impact of the initiatives or interventions by respondent on reducing the harm, damage or loss to the consumer or the public, resulting from the infringement. The mitigating factors are weighted ranging from 0.5 to 2 percentage.

	Category of violation		
	Minor violation	Serious violation	Grave serious violation
Mitigating factors	%	%	%
Immediate termination of the infringement as soon as the Authority intervenes	-	1	2
Remedial measures taken to rectify the wrongdoing;	-	1	2
Early admission of the breach	-	1.5	1.5
Cooperation during the investigation process	-	1.5	1.5
The breach was genuinely accidental or inadvertent	-	0.5	0.5

D. Step 4 - Financial Penalty percentage

After consideration of the aggravating and mitigating factors, the Authority will arrive at the financial penalty as follows:

Financial Penalty (Fp)=(Bp+AF)-MF where Fp is the final financial penalty as a percentage of value of sales of the product under investigation where $Fp \leq 10\%$

E. Step 5 - Financial Penalty Amount

8. To get the actual amount of the Financial penalty to be imposed upon the supplier/undertaking that is in violation of the provision of the Act:

$Fp \times Vs = FpVs$ where Vs is the value of sales of the product under investigation for the period under which the conduct existed.