



# CONSOLIDATED ADMINISTRATIVE REMEDIES AND SETTLEMENT GUIDELINES

2023

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## **PREFACE**

The Competition Authority of Kenya is mandated by the Competition Act No. 12 of 2010 to promote and safeguard competition in the national economy and to protect consumers from unfair and misleading market conduct. To achieve this mandate, the Authority has, among others, developed the Consolidated Administrative Remedies and Settlement Guidelines in pursuant to section 8(2) of the Competition Act No. 12 of 2010 which allows it to regulate its own procedure on matters falling within its jurisdiction. These Guidelines outline the Authority's approach to administrative remedies and settlement in regard to violations of the Act.

In addition, the Consolidated Administrative Remedies and Settlement Guidelines are intended to present the general methodology and the analytical construct the Authority will apply in determining administrative remedies and settlement arrangements with respect to Parts II, III, IV and VI infringements. Their primary objective is to ensure objectivity, consistency, certainty and transparency.

The Consolidated Administrative Remedies and Settlement Guidelines are not intended to be a substitute of the Act or Rules made pursuant to the Act and do not have the force of law. The Guidelines may be revised, supplemented, or replaced from time to time.

This publication contains general information intended for guidance on how administrative remedies and settlements are applied to violations of the Act.

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## 1. CITATION

1. These Guidelines shall be known as the Consolidated Administrative Remedies and Settlement Guidelines, 2023.

## 2. BACKGROUND

2. The Consolidated Administrative Remedies and Settlement Guidelines (“Guidelines”) set out the principles for the determination of administrative remedies imposed by the Competition Authority of Kenya (“the Authority”) and the procedure for pursuing settlements as provided for under the Competition Act No. 12 of 2010 (“the Act”) and the Competition (General) Rules, 2019 (“the Rules”).
3. The Guidelines address remedies and settlements for infringements under the Act. They shall apply to the following:
  - i. Section 36 which provides for among others, financial penalties on contraventions relating to restrictive agreements, decisions, and practices by undertakings or associations of undertakings, abuse of dominance, abuse of buyer power, and consumer welfare;
  - ii. Section 38 of the Act which provides for settlements;
  - iii. Section 42 which provides for financial penalties for Mergers Implemented Without prior authorization by the Authority (“MIWA”);
  - iv. Section 47 which provides for the imposition of financial penalties in relation to giving materially incorrect or misleading information or, failure to comply with conditions attached to the approval of a merger;
  - v. Section 61 which provides the Authority with the power to impose administrative actions to a supplier to remedy the infringement of Sections 59-60 of the Act; and
  - vi. Part IX of the Rules which expounds on settlement for infringements under the Act.
4. The Guidelines offer the Authority and the undertakings concerned an opportunity to resolve matters expeditiously including referrals from the tribunal or court- mandated settlements.
5. The Guidelines incorporate the Authority’s experience in its imposition of administrative remedies and entering into settlements with undertakings, and principles and best practices in determination of administrative remedies.
6. The Guidelines are not a substitute to the Act and they shall be read together with the Act and rules made pursuant to the Act. They supersede the Fining and Settlement Guidelines, 2018, Administrative Remedies Guidelines for Consumer Protection, 2017 and the Competition Administrative Penalties and Settlement Guidelines, 2020

### 3. DEFINITIONS

7. In these Guidelines, words and phrases which are defined in the Act have the same meaning herein unless otherwise indicated.
8. Unless otherwise indicated, the following words and phrases in these Guidelines have the meaning attributed to them under the Act as follows –

*Act* refers to the Competition Act No.12 of 2010 (as amended from time to time);

*Aggravating factors* are circumstances that increase the severity or culpability of an infringement of Part III, IV and VI. These factors are weighted depending on the negative impact of the infringement on commerce, suppliers, consumers or competitors;

*Base Percentage* refers to the initial penalty percentage as prescribed in law before adjusting for aggravating and/or mitigating factors;

*Gross Annual Turnover* refers to the turnover of an undertaking based on the firms' Audited Financial Statements;

*Mitigating factors* are circumstances that lessen the severity or culpability of an infringement. These factors are weighted depending on the impact of the initiatives or interventions by the respondent on reducing the harm, damage or loss to the competitor, suppliers, consumers or commerce and leading to a decrease in the penalty.

### 4. OBJECTIVES

9. These Guidelines present the general methodology as well as give clarity on the analytical construct that the Authority will follow and apply in determining administrative remedies and settlement arrangements with respect to Part III, IV and VI infringements.
10. Specifically, these Guidelines are aimed at achieving the following:
  - i. Enhance transparency, efficiency, predictability and consistency in determining the administrative remedial measures;
  - 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 gravity of contravention;
  - iv. Ensure the availability of effective consumer dispute resolution mechanisms and redress for loss or injury arising from the infringement of the rights of consumers as provided for under Article 46 of the Constitution of Kenya, 2010 ("the Constitution"); and

- v. Provide for cost- effective and efficient alternative dispute resolution mechanism for Micro, Small and Medium Enterprises (MSMEs) pursuant to Article 159 of the Constitution.

**5. LEGAL EFFECT AND DISCRETION**

- 11. These Guidelines only set out the general methodology and do not, in any way, fetter the discretion of the Authority in determining administrative remedies and settlement agreements on a case-by-case basis. They do not constitute legal advice.
- 12. In the event of inconsistency between these Guidelines and the Act/ Rules, the provisions of the Act/ Rules shall prevail.

**6. LEGAL FRAMEWORK**

- 13. In determination of the administrative remedies and settlement arrangements under the Act, the Authority will also be guided by the following:
  - i. Article 46, 47 and 159 of the Constitution of Kenya, 2010
  - ii. The Fair Administrative Action Act No. 4 of 2015
  - iii. The Data Protection Act No 24 of 2019
  - iv. Any other relevant applicable laws and statutes

**7. ADMINISTRATIVE REMEDIES**

- 14. Subsequent to investigations and a finding of infringement of Part III, IV, and VI of the Act, the Authority may impose administrative remedies under the Act and the Rules under which it may consider the imposition of either financial or non-financial remedies.
- 15. The Authority may apply any of the **non- financial remedies** under sections 36 (a),(b),(c),(e) & 61(2) of the Act and Rules 25(5) & 26, or a combination of any or all of them as the circumstances of each case dictate.
- 16. Additionally, the Authority may pursuant to Section 38, enter into an agreement of settlement with an undertaking or undertakings whose terms may contain financial or non- financial remedies or a combination of both.
- 17. **Financial remedies** are provided for under the Act as explained below:

*Table 1: Financial remedies under the Act*

Area	Provision
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Restrictive Trade Practices, Abuse of Buyer Power and Consumer Welfare	The Act prescribes that after consideration of any written representations and of any matter raised at the conference the Authority may take various measures, including section 36(d) <i>impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking(s) in question.</i> Rules 42 and 45 set out the factors to be considered.
Mergers Implemented Without Approval	Section 42(6) of the Act provides that the Authority may impose a financial penalty in an amount not exceeding 10% of the preceding year's gross annual turnover in Kenya of the undertakings in question. Rule 46 of the Rules shall be taken into account in the determination of the penalty.
Mergers approved based on materially incorrect information and/ or non-compliance with conditions attached to the approval of a merger	Section 47 (3) of the Act provides that the Authority may impose a financial penalty of up to ten percent of the preceding year's annual gross turnover.
Settlement	Section 38 (1) of the Act enables the Authority, during or after an investigation into an alleged infringement of the prohibitions under the Act, to enter into an agreement of settlement with the undertaking or undertakings concerned which may include imposition of a pecuniary penalty

18. 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 involved undertakings and other interested parties.

**8. METHODOLOGY FOR CALCULATION OF FINANCIAL REMEDIES**

19. In computing the financial penalty, the Authority will consider an undertaking (s) preceding year's gross annual turnover. In determination of the gross annual turnover, the Authority will have regard to the undertaking's Audited Financial Statements.

20. Where the undertaking's Audited Financial Statements for the preceding year are not available, the Authority may either rely on the most recent audited financial statements projected to the preceding year based on an annual increment of ten percent or the undertaking's Management Accounts for the preceding year duly certified as compliant with International Financial Reporting Standards by a licensed accountant who is a member of the Institute of Certified Public Accountants. The Authority may consider adjusting the base



percentage on grounds such as aggravating and mitigating factors. The aggravating and mitigating factors will be considered on a case-by-case basis.

21. As stipulated in section 36(d), 42(6) and 47(3) of the Act, the administrative penalty shall not exceed 10% of the undertaking's gross annual turnover during the firm's preceding financial year.
22. As stipulated in section 38 of the Act, a settlement may include an amount to be imposed as a pecuniary penalty. The amount shall not exceed 10% of the undertaking's preceding year's gross annual turnover.
23. The methodology for calculating remedies is broken down into three broad areas; Restrictive Trade Practices and Control of Mergers (H.1), Abuse of Buyer Power (H.2) and Violations under Consumer welfare (H.3) discussed below.

## **8.1 Restrictive Trade Practices and Control of Mergers**

### **8.1.1 Relevant Turnover**

24. The Authority may impose administrative financial penalty on an undertataking(s), association of undertakings or both. Where the Authority imposes a financial penalty on undertakings, the turnover of an undertaking(s) is the preceding years' gross annual turnover. The turnover gives an indication of the amount of commerce affected.
25. In relation to an association of undertakings, the gross annual turnover shall be derived from the association and/or individual members' turnover.
26. If the nature of the conduct is perpetuated by the association for the benefit of the members, the relevant turnover shall be the individual turnover of the members of the association involved in the contravention. Where the gains from the conduct benefit the association, the relevant turnover shall be the turnover of the association.
27. If the nature of the conduct benefits both the association and its members, the relevant turnover shall be the turnover for the association and for the individual members involved in the contravention.
28. In relation to MIWA and Section 47 Violations, the affected turnover will be the undertakings' gross annual turnover for the year preceding implementation of the merger.
29. The preceding year for contraventions under Part III of the Act shall be the year before the Authority reaches a decision.
30. In instances where the undertaking(s) has no turnover the value of assets shall be considered in imposing the administarive financial penalty.

### 8.1.2 Base Percentage

31. The base percentage denotes the starting point at which the mitigating and aggravating factors will be adjusted.
32. The base percentage for the contraventions under Part III and IV of the Act shall be 10% of the undertakings' preceding year gross annual turnover. The penalty imposed subsequent to assessment of aggravating and mitigating factors shall not exceed 10% of the undertakings' preceding year gross annual turnover.

### 8.1.3 Aggravating factors

33. The base percentage may be increased where the Authority finds that there are aggravating circumstances. Further to the factors provided under Rule 42(1), the Guidelines provide for five (5) aggravating factors:
  - i. impact of the contravention
  - ii. duration of the conduct
  - iii. coverage
  - iv. recidivism
  - v. public interest concerns
34. It should be noted that this is not an exhaustive list and that the Authority may consider any other aggravating factor on a case-by-case basis.

#### 8.1.3.1 Impact of the contravention

35. In considering the appropriate financial penalty on Restrictive Trade Practices, MIWAs and Section 47 violations, the Authority will consider the impact of the contravention on competition. This will include considering whether violation resulted in the substantial lessening of competition, restriction of trade, or the provision of any service. This parameter shall be scored to a maximum of +2% as below:

*Table 2: Scores for Impact of the Contravention*

No.	Market Shares of the parties involved (%)	Score (%)
1.	40 and above	+2
2.	Below 40	+1

#### 8.1.3.2 Duration of the conduct

36. The duration of the conduct is the time frame during which the anticompetitive conduct took place.
37. The parameter will consider if the conduct is continuing or otherwise and will be scored as below;

**Table 3: Scores for Duration of the conduct**

No.	Duration in years	Score (%)
1.	More than 3 years	+3
2.	Between 2-3 years	+2
3.	Between 1- 2 years	+1
4.	Up to 1 year	+0.5

38. In the case of a MIWA, consideration of the duration of the conduct shall be the time between when the merger was implemented and the time the Authority initiated the investigation through a NOTICE. In the case of voluntary disclosure, consideration of the duration of the conduct shall be the time between when the merger was implemented and the time at which the undertaking formally notifies the Authority.

39. For Section 47 Violations, the parameter considers the time between when the merger was approved by the Authority and the date on which the Authority proposes to revoke its decision.

**8.1.3.3 Coverage**

40. Coverage is in terms of the spread of the conduct in the market. This parameter will be determined on the basis of the presence of the undertaking(s) in the country and their significance in the national economy. Such significance will be determined using the market shares in the relevant market. The scores will be as below:

**Table 4: Scores for Coverage**

No.	Market share (%)	Score (%)
1.	Above 50	+2
2.	Between 30- 50	+1
3.	Below 30	+0.5

**8.1.3.4 Recidivism**

41. The Authority will consider recidivism where an undertaking that had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +3% for repeat offenders of substantially similar conduct.

**8.1.3.5 Public interest concerns**

42. The Authority will consider if the contravention negatively affected among others, MSMEs, employment, exports and impact on specific sectors. The parameter will be scored as below:-

**Table 5: Scores for Public interest concerns**

No.	Public Interest Concerns	Score (%)
1.	Effects on employment (including job losses)	+1.5



2.	Affected the ability of MSMEs to gain access to or to be competitive in any market	+1.5
3.	Affected the ability of national industries to compete in international markets	+0.5
4.	Affected a particular industrial sector or region (including endangering the continuity of supplies or services)	+0.5

### 8.1.3.6 Other Aggravating factors

43. The Authority may consider any other additional aggravating factors which shall be each scored up to +0.5%. However, the maximum score shall be capped at +2% for all the additional aggravating factors considered.

### 8.1.4 Mitigating factors

#### 8.1.4.1 Cooperation

44. Cooperation is useful where it leads to the effectiveness of the Authority's enforcement actions by; contributing to the timely adoption of the Authority's decisions, gathering additional evidence, and better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority outside the scope of the Leniency Programme Guidelines<sup>1</sup> through admission of liability; and/or disclosure of more evidence, provision of commitments, and working within the given timelines; and remedying of the conduct by the undertaking(s) and the same being notified to the Authority.

45. The scores for cooperation will be as below;

**Table 6: Scores for Cooperation**

No.	Parameter	Score (%)
1.	For MIWAs and Section 47 Violations, when parties proactively notified the Authority of the contravention	-3
2.	Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5
3.	The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1
4.	Undertaking(s) provided information to the Authority in a timely manner <sup>2</sup> .	-0.5

<sup>1</sup> Refer to the Authority's Leniency Programme Guidelines

<sup>2</sup> All the Authority's communication contain clear timelines within which to provide required information/response

5.	The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5
6.	The undertaking is willing to acknowledge liability for the infringement	-1

#### 8.1.4.2 First-time offender

46. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender shall be -2%.

#### 8.1.4.3 Public Interest and Justifications on Efficiency and consumer benefits

47. The Authority will consider public interest in terms of salvaging a failing firm, protecting job losses, international or regional competitiveness, foreign direct investment, and employment creation. The Authority may also consider any plausible efficiency justification which has benefits to the consumers presented by the parties as a mitigating factor.

48. These justifications may apply to matters relating to Restrictive Trade Practices and MIWA, and may vary from one industry to another hence each acceptable mitigating factor shall be scored up to -0.5%. The maximum score shall be capped at -3%.

#### 8.1.4.4 Other mitigating factors

49. The parties may provide any other additional mitigating factors which if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5%. However, the maximum score shall be capped at -3%.

50. In a case of a MIWA where the turnover or assets value of the acquirer is above Kenya Shillings Ten Billion (KES 10B) and the target has very low assets/ turnover values (less than Kenya Shillings one hundred million (KES 100M)) and the transaction has clear positive competition and public interest outcomes, the Authority shall take into consideration the value of the assets acquired based on the Audited Financial Statements.

## 8.2 Abuse of Buyer Power

### 8.2.1 Relevant Turnover

51. The relevant turnover of an undertaking(s) is the preceding year's gross annual turnover of the undertaking. Therefore, the relevant turnover shall mean the immediately preceding year's gross annual turnover in Kenya of the undertaking(s) in question.

### 8.2.2 Base Percentage

52. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. The base percentage shall be 10% of the gross annual turnover for infringements of section 24A(1) of the Act.

### 8.2.3 Aggravating Factors

53. The base percentage may be increased where the Authority finds that there are aggravating circumstances. Aggravating factors to be considered include:

- i. Nature of the contravention
- ii. Duration of conduct
- iii. Public interest
- iv. Recidivism
- v. Coercion or retaliatory measures to ensure the continuation of the infringement
- vi. Refusal to co-operate
- vii. Any other aggravating factor(s) which the Authority finds reasonable and relevant

#### 8.2.3.1 Nature of the contravention

54. The Authority will consider the gravity of the contravention in terms of conduct amounting to Abuse of Buyer Power in line with section 24A (5) of the Act and Rules.

55. The basis for this is that the various conducts have varying effect on the suppliers and competition. For instance, the consequences of delayed payments and demand for preferential terms may be more severe to suppliers resulting in suppliers' inability to settle debts or direct loss of business due to downtime or crippling of the suppliers' business compared to return of goods. On the other hand, the conduct by buyers to bid up prices of inputs which has the net effect of driving out competition is considered egregious to competition.

56. The nature of the contravention will be scored as below;

*Table 7: Scores for Nature of the contravention*

No.	Nature of the Contravention	Score (%)
1.	Delays in Payment	+2
2.	Demand for preferential terms	+2
3.	Unilateral termination of a commercial relationship	+2
4.	Reducing prices below competitive levels	+1
5.	Refusal to receive or return goods	+1
6.	Bidding up prices of Inputs	+0.5
7.	Transfer of costs or risks	+0.5
8.	Transfer of commercial risks	+0.5

#### 8.2.3.2 Duration of the conduct

57. The duration of the contravention is an indicator of the harm to suppliers as a result of the abuse of buyer power. The longer the conduct persists the more likely it is to lead to

irreparable damage to suppliers as opposed to when the conduct lasts for a shorter period. The parameter will also consider if the conduct is continuing or otherwise and will be scored as below:

**Table 8: Scores for Duration of the conduct**

No.	Duration in years	Score (%)
1.	3 years and above	+3
2.	Between 2 and 3 years	+2
3.	Between 1 and 2 years	+1
4.	Up to 1 year	+0.5

### 8.2.3.3 Public Interest

58. Public interest will be considered as an aggravating factor in terms of effect on MSMEs. The Authority will have regard to whether the issues for determination transcend the circumstances of the particular case, and have significant bearing on the public interest. For instance in the event the conduct in question leads to MSMEs operating below cost forcing them to engage in cost cutting strategies such as reducing production which consequently leads to laying off employees. The parameter will be scored as below:

**Table 9: Scores for Public Interest**

No.	Factor	Score (%)
1.	Leading to MSMEs collapse	+1.5
2.	Leading to job losses	+1

### 8.2.3.4 Recidivism

59. The Authority will consider recidivism where an undertaking had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +3%.

### 8.2.3.5 Coercion or retaliatory measures to ensure the continuation of the infringement

60. The Authority will take into account action taken by a buyer with relation to the relevant supplier(s) both prior to and subsequent to commencement of investigations. For instance, where the supplier(s) have been coerced by the accused party to continue with the oppressive circumstances prior to or during the investigations notwithstanding their protests. Or where, as a retaliatory measure after a party learns of being reported to the Authority, it forces the supplier(s) to continue with the prevailing terms through, for instance, threatening to delist the supplier(s). This parameter will be scored are +2%.



### 8.2.3.6 Refusal to co-operate

61. A party's refusal to cooperate with the Authority in the course of investigations will be taken into account. As an example, where a party fails to respond to Authority's communications/orders or submit such evidence as required during investigations. The parameter will be scored at +1%.

### 8.2.3.7 Any other aggravating factor(s) which the Authority finds reasonable and relevant

62. The Authority may consider any other additional aggravating factors including default on an agreed payment plan, which shall be each scored upto +0.5%. However, the maximum score shall be capped at +2%.

### 8.2.4 Mitigating factors

63. The base percentage may be decreased where the Authority finds that there are mitigating factors. The following are considered as mitigating factors:

- i. Co-operation with Authority
- ii. First-time offender
- iii. The breach was inadvertent
- iv. Any other mitigating factor(s) which the Authority finds reasonable and relevant.

#### 8.2.4.1 Co-operation with Authority

64. Cooperation is useful where it leads to the effectiveness of the Authority's enforcement actions by contributing to timely conclusion of investigations by providing relevant and additional evidence and arriving at better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority through early admission of liability, disclosure of more evidence, and working within the given timelines and remedying of the conduct by the undertaking(s) at the earliest opportunity.

65. The scores for cooperation will be as below:

*Table 10: Scores for Co-operation with the Authority*

No.	Parameter	Score (%)
1.	Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5

2.	The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1
3.	Undertaking(s) provided information to the Authority in a timely manner.	-0.5
4.	The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5
5.	The undertaking is willing to acknowledge liability for the infringement	-1

#### 8.2.4.2 First-time offender

66. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender is -2%.

#### 8.2.4.3 The breach was inadvertent

67. The Authority may consider whether the conduct in question was beyond the control of the undertaking and not deliberate planning. The score for inadvertent conduct shall be up to -2%.

#### 8.2.4.4 Any other mitigating factor(s) that the Authority finds reasonable and relevant

68. The parties may provide any other additional mitigating factors if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5%. However, the maximum score shall be capped at -2%.

### 8.3 Violations under Consumer Welfare

69. The Authority shall impose administrative remedies to redress a consumer, in which it may consider imposition of non-financial or financial remedies, or both pursuant to Sections 36(d) and 61 of the Act and Rules 25 (5) and 26. In addition, the Authority may also enter into a Settlement agreement with the undertaking pursuant to Section 38 of the Act.

70. The Authority, pursuant to Sections 36 (c), (e), 61(2) of the Act and Rules 25(5), 26, may impose non-financial remedies including issuing a public notice, banning of goods, reprimanding the undertakings and may require the undertakings to:

- i. Repair goods;
- ii. Replace the goods;
- iii. Refund the Consumer, to whom the goods were supplied or service was rendered, the price of the goods or service within a time specified;
- iv. Reverse the conduct;
- v. Place an advert reversing a false or misleading claim; and

- vi. Recall unsafe goods.

### **8.3.1 Relevant Turnover**

71. The relevant turnover of an undertaking(s) is the preceding year's gross annual turnover of the undertaking. Therefore, the relevant turnover shall mean the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

### **8.3.2 Base percentage**

72. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. In accordance with Section 36 of the Act, the base penalty will be 10% and is applied to the relevant turnover. Similarly, the base penalty to be considered under Section 38 shall be 10% of the gross annual turnover.

### **8.3.3 Aggravating factors**

73. The Authority will adjust the base percentage penalty based on the aggravating factors. These are factors that are weighted depending on the negative impact of the infringement to the consumer and/or the public in terms of harm, damage or loss and leads to an increase in the fine. These include:

- i. Nature of contravention;
- ii. Coverage;
- iii. Effect and duration;
- iv. Recidivism;
- v. Public interest;
- vi. Refusal to cooperate; and
- vii. Any other aggravating factor.

#### **8.3.3.1. Nature of contravention**

74. The Guidelines will consider the gravity of the contravention in terms of whether it relates to false and misleading representations, unconscionable conduct, unsuitable goods, unsafe and defective goods.

75. Conduct may be termed as false or misleading, if the overall expression or impression created is deceptive, inaccurate or cannot be substantiated. However, the determination on whether the conduct is false or misleading will depend on the particular circumstances of the case. Pursuant to section 55 of the Act, suppliers are prohibited from engaging in any conduct that is false or misleading.

76. Unconscionable conduct includes an act that is particularly unfair or where one party knowingly exploits its relative strengths of the bargaining position over a consumer. The conduct is particularly deliberate, unfair, and unreasonable. Under section 56(1) of the Act, it

is an offense for supplier(s) of goods and services to engage in conduct that is in all circumstances unconscionable.

77. Unsafe goods are goods that do not comply with consumer product safety standards and/or consumer information standards. Unsafe goods also include:
- a. Goods that have been banned or goods that have been declared unsafe by a Notice publicized by the Authority in accordance with sections 58 and 61 of the Act; and
  - b. Goods that upon consumption, a person suffers loss/damage by reason of a defect, dangerous characteristic of the goods, or by reason of not having particular information.
78. Under section 59 of the Act, it is an offense for suppliers to supply unsafe goods in the market.
79. Defective goods are goods that are found to have a defect as a result of which an individual suffers loss or injury. Under section 64, a supplier is liable to compensate a consumer for the loss of injury suffered from the defective goods.
80. Unsuitable goods are goods acquired by the consumer for a particular purpose that was expressly or by implication made known to the supplier, and the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied.
81. The nature of the contravention will be scored as below;

*Table 11: Scores for Nature of contravention*

No.	Nature of the Contravention	Score (%)
1.	Unconscionable conduct	+3
2.	Unsafe and defective goods	+3
3.	False and misleading representations	+2
4.	Unsuitable goods	+0.5

### 8.3.3.2. Coverage

82. Coverage relates to the spread of the conduct in the market. This parameter will be determined by the geographical presence of good(s) or services relating to the conduct under investigation. The scores will be as below:

*Table 12: Scores for Coverage*

No.	Coverage	Score (%)
1.	National	+2
2.	Regional (More than one County)	+1
3.	One county	+0.5



### 8.3.3.3. Effect and Duration

83. The Authority shall take into consideration whether the undertaking continues to infringe on the Act during the investigation, how the infringement has negatively impacted the livelihood and financial implication to the consumer. Additionally, goods or services that may harm the health of consumers will be scored as illustrated below:

*Table 13: Scores for Effect and Duration*

No.	Effect and Duration	Score (%)
1.	Continuation of infringement during investigation	+1
2.	Financial implication/loss	+2
3.	Harm to health	+3

### 8.3.3.4. Recidivism

84. The Authority will consider recidivism where an undertaking had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +3%.

### 8.3.3.5. Public Interest

85. The Authority will consider public interest in terms of safety, health and economic interest of the consumer. Public interest concerns may therefore arise for conducts involving product(s) or product related services if there is a risk that they may cause serious injury, illness or loss of livelihood or adversely affects the vulnerable group of consumers namely the old-aged, children, and consumers with existing health conditions.

86. Public interest will be scored as below:

*Table 14: Scores for Public Interest*

No.	Public Interest	Score (%)
1.	Dangerous characteristics of the good <sup>3</sup>	+2
2.	Affects vulnerable consumers (babies, old aged, sick, poor)	+2

### 8.3.3.6. Refusal to co-operate

87. A party's refusal to cooperate with the Authority in the course of investigations will be taken into account. As an example, where a party fails to respond to Authority's

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<sup>3</sup> Refer to the section on product safety standards, unsafe goods and product liability of the Consumer Protection Guidelines

communications/orders or submit such evidence as required during investigations. The parameter will be scored at +1%.

### 8.3.3.7. Other aggravating factor

88. The Authority may consider any other additional aggravating factors which shall be each scored up to +0.5%. However, the maximum score possible shall be capped at +2%.

### 8.3.4 Mitigating Factors

89. Additionally, the base percentage will be adjusted for mitigating factors. These factors are weighted depending on the impact of the initiatives or interventions by the undertaking on reducing the harm or loss to the consumer or the public, resulting from the infringement. These may include:

- i. Cooperation
- ii. Status of the conduct
- iii. First time offender
- iv. Value of goods/ services
- v. Other mitigating factors

#### 8.3.4.1. Cooperation

90. Cooperation is useful where it leads to the effectiveness of the Authority’s enforcement actions by; contributing to the timely adoption of the Authority’s decisions, gathering additional evidence, and better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority through admission of liability; and/or disclosure of more evidence, provision of commitments, and working within the given timelines; and Remedying of the conduct by the undertaking(s) and the same being notified to the Authority. This will be scored as given below:

*Table 15: Scores for Cooperation*

No.	Cooperation	Score (%)
1.	Party elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5
2.	The party pursues a settlement during the investigation or before the Authority makes a finding and provides additional information	-1
3.	Undertaking(s) provided information to the Authority in a timely manner.	-0.5
4.	The party agrees helps in designing and implementing remedies (immediate termination of breach)	-0.5
5.	The party is willing to acknowledge liability for the infringement( early admission of breach )	-1

### 8.3.4.2. Status of the Conduct

91. The Authority may consider whether the conduct was deliberate or inadvertent and whether the accused party has ceased the conduct at any time before the conclusion of the investigations. This will be scored as given below:

*Table 16: Scores for Status of the conduct*

No.	Status of the conduct	Score (%)
1.	The conduct was inadvertent	-2
2.	Immediate termination of the conduct	-1

### 8.3.4.3. First time offender

92. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender shall be -2%.

### 8.3.4.4. Value of goods or services

93. For goods and services that are of very low value and have no direct harm to health, the Authority shall apply a score of up to -0.5%.

### 8.3.4.5. Other mitigating factors

94. The undertakings may provide any other additional mitigating factors, if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5%. However, the maximum score shall be capped at -2%.

## 8.4. Calculation of Financial Penalty Amount

### - Financial Penalty percentage

95. 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, Bp is the base percentage, AF are the aggravating factors and MF are the mitigating factors. Fp ≤ 10%.*

96. Annexure 1 provides a summarized guide for the mitigating and aggravating factors with the score for administrative remedies and settlement arrangements with respect to Part III, IV and VI infringements.

## - Financial Penalty Amount

97. 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:

$Fp \times To = FpTo$  where *To* is the relevant turnover.

## 9. SETTLEMENT PROCEDURES

### 9.1. Settlement Process under Section 38 of the Act

98. 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 concerned. This may include an amount as a pecuniary penalty. Settlement negotiations will be determined on a case-by-case basis.

99. The Authority will facilitate settlements in accordance with Article 47 of the Constitution of Kenya, section 38 of the Act, the general principles of section 4 of the Fair Administrative Action Act 2015, and the Competition (General) Rules, 2019.

100. Pursuant to Rule 41(3) of the Competition (General) Rules, 2019, the ninety-day period shall be deemed to run from the date the Authority communicates its consent in writing to the settlement request by the undertaking(s). Where the settlement proceedings are mandated by the court or tribunal, the ninety-day period shall be deemed to commence from the date the court or tribunal grants orders to commence settlement.

101. The undertaking(s) pursuing settlement negotiations shall be required to submit a detailed settlement proposal to the Authority within 14 days from the date of receipt of the Authority's consent to initiate the settlement negotiations.

102. The Authority shall inform the parties within seven (7) days whether it is amenable to the request for settlement.

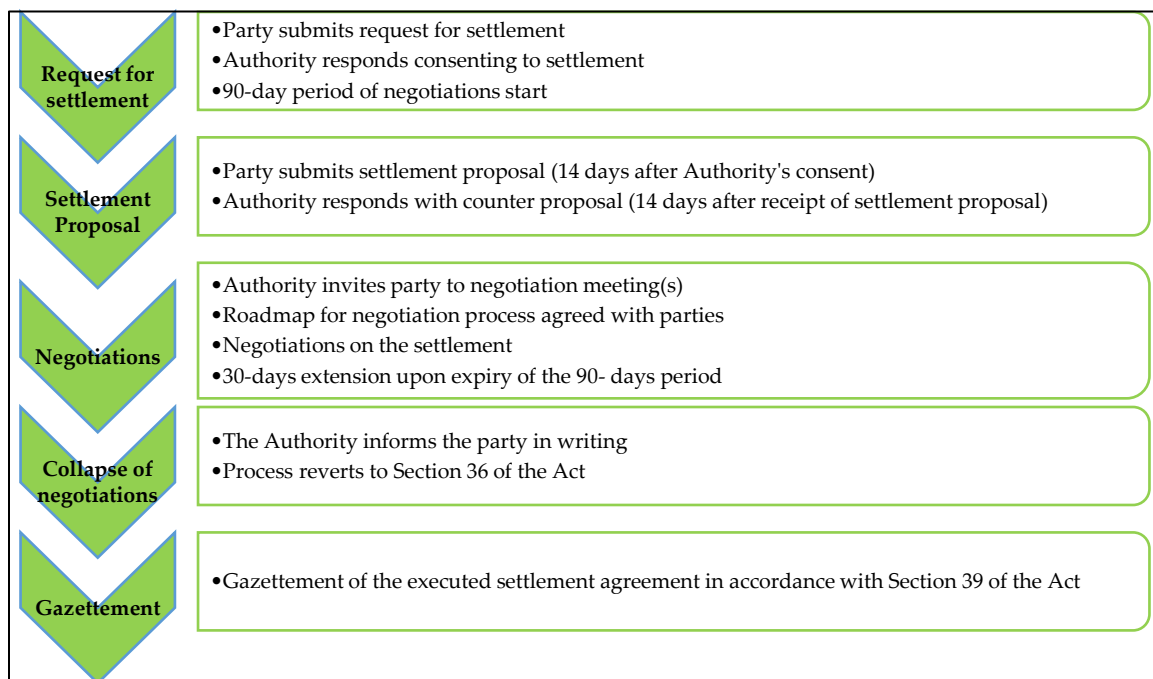
103. Thereafter, the Authority shall give its counter-proposal to the parties within 14 days after the receipt of the detailed settlement proposal from the parties. The counter proposal by the Authority shall additionally invite the parties to convene the first settlement meeting to commence the negotiations.

104. The process and nature of negotiation for settlement shall subsequently depend on the circumstances of each case but shall be governed by the principles of expediency and good faith. The Authority will prepare a road map with timelines and receive input on the same from the undertaking. Parties shall conduct the negotiations within the agreed timelines in the road map.



105. In the event that the 90-day period expires before a settlement agreement is concluded, the parties shall in writing seek an extension from the Authority for a further 30-day period before the expiry of the 90-day period.
106. Pursuant to Rule 41(4) of the Rules, the 30-day period shall be deemed to run a day after the expiry of the 90<sup>th</sup> day.
107. Upon successful settlement negotiations, a settlement agreement whose terms shall be binding on the Authority and the undertaking(s) shall be effective upon execution. In the event of the collapse of the settlement negotiations, the Authority shall in writing inform the parties to the settlement of the termination of further settlement proceedings. The Principles applicable under **Part 8** of these Guidelines shall apply in the determination of pecuniary penalty under section 38 of the Act and the tribunal or court-mandated settlements.
108. A summary of the settlement process is outlined in Diagram 1.

**Diagram 1: Summary of the settlement process**



## 9.2. Settlements and Leniency Applications

109. These Guidelines shall be read alongside the Leniency Program Guidelines (LPG)<sup>4</sup>. In doing so, the following will apply:-

<sup>4</sup> Refer to the Authority's Leniency Program Guidelines

- i. An undertaking under investigation, which has not applied for leniency, is at liberty to apply for settlement. However, a leniency applicant cannot apply for settlement unless their application has been revoked, rejected by the Authority or withdrawn by the parties.
- ii. Where an undertaking applies to the Authority for leniency pursuant to section 89A of the Act but is not granted permanent leniency or where conditional leniency is revoked, it may apply for settlement pursuant to section 38 of the Act.
- iii. Penalties subsequent to successful leniency applications shall be determined under the criteria in **Part 8** and will be guided by LPG.

### **9.3. Settlement negotiations between parties in cases of abuse of buyer power**

110. For purposes of abuse of buyer power, the Authority may facilitate parties that are willing to explore settlement negotiations subject to the Authority's supervision and approval of terms agreed by the parties.
111. In the event a buyer and supplier(s) undertakings show a willingness to enter into a negotiation with the objective of settling delayed payments, the Authority will grant the parties four (4) months with an extension of one (1) month within which time an agreed reasonable settlement plan should be presented.
112. In the event the buyer and the supplier are unable to come to an agreement within the stipulated timelines, the Authority shall review the proposed settlement terms and recommend terms of settlement to the parties or require revision of the same. The parties will submit the settlement agreement to the Authority for adoption.
113. The Authority shall proceed with this settlement modality as follows:
  - a. Upon presentation of an agreed settlement plan or written intention of a settlement agreement by the parties, the Authority shall draw a settlement agreement for execution by the parties and witnessed by the Authority.
  - b. The buyer undertaking will be required to submit regular updates of the instalment payment with corresponding evidence as proof of settlement.
  - c. At the end of the settlement process, as envisaged in this section, both parties shall be required to inform the Authority of the completion of the settlement process, with the accused providing details of payments if not provided in (b) above.
  - d. Upon full settlement of the delayed payments, the Authority shall subsequently conclude investigations and close the file.
114. In the event the buyer undertaking defaults the terms of the settlement, the Authority may grant such party adequate additional time to resolve the default. In view of the terms of the settlement agreement being mutually agreed, the Authority will in the event of sustained default proceed to impose any of the penalties under section 36 of the Act.

115. Where settlement negotiations fail, the Authority may proceed to finalize investigations and make a determination.

116. A person aggrieved by the determination of the Authority shall have the right to appeal in writing to the Competition Tribunal.

#### **10. ABILITY OF AN UNDERTAKING TO PAY THE PENALTY**

117. In addition to the foregoing, in exceptional circumstances, the Authority has the discretion to allow undertakings to pay penalties in reasonable installments. The frequency of the installments shall be discussed and mutually agreed upon on a case-by-case basis.

118. In determination of the penalty payment by installments, the undertaking shall clearly demonstrate the payment of the penalty in one installment would irretrievably jeopardise the economic viability of the undertaking and its ability to continue trading.

#### **11. DEFAULT IN PAYMENT OF PENALTIES**

119. In the event that parties default on the payment of penalties within the stipulated period, interest shall accrue as provided for under Rule 48 of the Competition (General) Rules, 2019.

#### **12. PUBLISHING OF DECISIONS IN THE GOVERNMENT GAZETTE AND ANNUAL REPORTS**

120. Notwithstanding any confidentiality granted, the Authority shall cause notice to be given in the Kenya Gazette of any agreement referred to in section 38 of the Act.

121. The notice referred to above shall include:

- i. the name of every undertaking involved; and
- ii. the nature of the conduct that is the subject of the action or the settlement agreement which includes the contravention, penalty amount and any other conditions agreed upon in the settlement

#### **13. CONFIDENTIALITY**

122. The Authority shall grant confidentiality pursuant to provisions of Section 20 of the Act on any material information given by undertakings.

#### 14. TRANSITION

123. Any investigation or such other proceedings instituted before the commencement of these Guidelines shall, with the necessary modifications, be treated or continued as if they were instituted under the previously applicable Guidelines.

#### 15. EFFECTIVE DATE

124. These Consolidated Administrative Remedies and Settlement Guidelines shall take effect on 16<sup>th</sup> day of December, 2023 and will remain effective until such a time they are reviewed/revoked by the Authority.



**Dr. Adano W. Roba, Ag. Director-General**  
**16<sup>th</sup> December 2023**

**Annexure 1.**

Factor	Score
<b>1. Restrictive Trade Practices and Control of Mergers</b>	
<b>Base percentage-</b> refers to the initial penalty percentage as prescribed in law before adjusting for aggravating and/or mitigating factors	
<b>Base Amount</b> (The base percentage for the contraventions under Part III and IV of the Act shall be 10% of the undertakings' preceding year gross annual turnover)	10%
<b>Adjustment for Aggravating Factors</b>	
<b>a) Impact of the contravention</b>	
Market Shares of the parties involved (40% and above)	+2%
Market Shares of the parties involved (below 40%)	+1%
<b>b) Duration of the conduct</b>	
More than 3 years	+3%
Between 2-3 years	+2%
Between 1- 2 years	+1%
Up to 1 year	+0.5%
<b>c) Coverage</b>	
Market share (Above 50%)	+2%
Market share (Between 30%- 50%)	+1%
Market share (Below 30%)	+0.5%
<b>d) Recidivism</b>	
	+3%
<b>e) Public interest concerns</b>	
Effects on employment (including job losses)	+1.5%
Affected the ability of MSMEs to gain access to or to be competitive in any market	+1.5%
Affected the ability of national industries to compete in international markets	+0.5%
Affected a particular industrial sector or region (including endangering the continuity of supplies or services)	+0.5%
<b>f) Other Aggravating factors</b>	+0.5% capped at a max of +2%
<b>Adjustment for mitigating factors</b>	
<b>a) Cooperation</b>	
For MIWAs and Section 47 Violations, when parties proactively notified the Authority of the contravention	-3%
Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5%
The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1%
Undertaking(s) provided information to the Authority in a timely manner	-0.5%

The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5%
The undertaking is willing to acknowledge liability for the infringement	-1%
<b>b) First-time offender</b>	-2%
<b>c) Public Interest and Justifications on Efficiency and consumer benefits</b>	-0.5% capped at a max of -3%
<b>d) Other mitigating factors</b>	-0.5% capped at a max of -3%
<b>2. Abuse of Buyer Power</b>	
<b>Base Amount</b> (The base percentage shall be 10% of the gross annual turnover for infringements of section 24A(1) of the Act)	10%
<b>Adjustment for Aggravating Factors</b>	
<b>a) Nature of the contravention</b>	
Delays in Payment	+2%
Demand for preferential terms	+2%
Unilateral termination of a commercial relationship	+2%
Reducing prices below competitive levels	+1%
Refusal to receive or return goods	+1%
Bidding up prices of Inputs	+0.5%
Transfer of costs or risks	+0.5%
Transfer of commercial risks	+0.5%
<b>b) Duration of the conduct</b>	
3 years and above	+3%
Between 2 and 3 years	+2%
Between 1 and 2 years	+1%
Up to 1 year	+0.5%
<b>c) Public interest</b>	
Leading to MSMEs collapse	+1.5%
Leading to job losses	+1%
<b>d) Recidivism</b>	
	+3%
<b>e) Coercion or retaliatory measures to ensure the continuation of the infringement</b>	
	+2%
<b>f) Refusal to co-operate</b>	
	+1%
<b>g) Any other aggravating factor(s) which the Authority finds reasonable and relevant</b>	
	+0.5% capped at a max of +2%
<b>Adjustment for mitigating factors</b>	
<b>a) Co-operation with Authority</b>	
Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5%

The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1%
Undertaking(s) provided information to the Authority in a timely manner.	-0.5%
The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5%
The undertaking is willing to acknowledge liability for the infringement	-1%
<b>b) First- time offender</b>	-2%
<b>c) The breach was inadvertent</b>	-2%
<b>d) Any other mitigating factor</b>	-0.5% capped at a max of -2%
<b>3. Violations under Consumer Welfare</b>	
<b>Base Amount</b> (In accordance with Section 36 of the Act, the base penalty will be 10% and is applied to the relevant turnover. Similarly, the base penalty to be considered under Section 38 shall be 10% of the gross annual turnover)	10%
<b>Adjustment for Aggravating Factors</b>	
<b>a) Nature of the contravention</b>	
Unconscionable conduct	+3%
Unsafe and defective goods	+3%
False and misleading representations	+2%
Unsuitable goods	+0.5%
<b>b) Coverage</b>	
National	+2%
Regional (More than one County)	+1%
One county	+0.5%
<b>c) Effect and duration</b>	
Continuation of infringement during investigation	+1%
Financial implication/loss	+2%
Harm to health	+3%
<b>d) Recidivism</b>	
<b>e) Public interest</b>	
Dangerous characteristics of the good	+2%
Affects vulnerable consumers (babies, old aged, sick, poor)	+2%
<b>f) Refusal to co-operate</b>	
<b>g) Other aggravating factor</b>	
	+0.5% capped at a max of +2%
<b>Adjustment for mitigating factors</b>	
<b>a) Cooperation</b>	
Party elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5%

The party pursues a settlement during the investigation or before the Authority makes a finding and provides additional information	-1%
Undertaking(s) provided information to the Authority in a timely manner.	-0.5%
The party agrees helps in designing and implementing remedies (immediate termination of breach)	-0.5%
The party is willing to acknowledge liability for the infringement( early admission of breach )	-1%
<b>b) Status of the conduct</b>	
The conduct was inadvertent	-2%
Immediate termination of the conduct	-1%
<b>c) First time offender</b>	-2%
<b>d) Value of goods or services</b>	
Goods and services that are of very low value and have no direct harm to health	-0.5%
<b>e) Other mitigating factors</b>	-0.5% capped at a max of -2%