



FINING AND SETTLEMENT GUIDELINES

2020

Part A:

INTRODUCTION

1. This document will be known as the Fining and Settlement Guidelines and it sets out the principles for the determination of administrative penalties and procedure for pursuing settlements as provided for under the Competition Act No. 12 of 2010 (the Act).
2. The Guideline covers the financial penalties for prohibitions under Part III and IV of the Act and also considers the determination of pecuniary penalties in settlement agreements.
3. The guidelines shall apply to section 38 of the Act providing for settlements and other sections of the Act providing for administration of financial penalties, specifically;
 - a) Section 36 (d) which provides for financial penalties on contraventions relating to restrictive agreements, decisions and practices by undertakings or associations of undertakings, abuse of dominance, and abuse of buyer power, and
 - b) Section 42 (6) which provides for financial penalties for mergers implemented without prior authorization by the Authority.
4. The Guideline also covers settlements which offer the Authority and the parties concerned an opportunity to resolve matters expeditiously. Further, financial penalties are often imposed to achieve deterrence for anti-competitive conduct
5. The Guideline considers principles and approaches taken in other jurisdictions in the computation of financial penalties and pursuing settlement negotiations.
6. The Guideline is not a substitute of the Act and they shall be read together with the Act and subsidiary rules made pursuant thereto.

OBJECTIVES

7. The Guideline aims at achieving the following objectives;
 - a. Enhance transparency, consistency and predictability in computation of the financial penalties; and
 - b. Achieve proportionality on the remedies imposed against the degree of the contravention.

Part B: Fining Guidelines for Restrictive Trade Practices (including Abuse of Buyer Power) and Mergers implemented without authorization by the Authority

8. Financial penalties are provided for under the Act as explained below:

Area	Provision
Restrictive trade practices and Abuse of Buyer Power	Section 36 of the Act which prescribes that after consideration of any written representations raised at conference the Authority may take various measures, including: (d) 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
Mergers implemented without authorization by the Authority	Section 42(6) of the Act provides that the Authority may impose a financial penalty in an amount not exceeding 10% of preceding years' gross annual turnover in Kenya of the undertakings in question.
Settlement	Section 38 (2) of the Act provides that an agreement referred to in subsection (1) may include; (b) any amount proposed to be imposed as a pecuniary penalty. Any other remedies that the Authority deems fit, in order to achieve transparency and consistency such as out of court/tribunal negotiations.

Key principles for the determination of financial penalties

9. In computing the financial penalty, the Authority will consider the affected (relevant) turnover *vis-a-vis* the base amount. The Authority may consider to adjust the base amount on grounds such as aggravating and mitigating factors. The aggravating and mitigating factors will be considered on a case to case basis.
 - a. **Affected Turnover**
10. The affected turnover of an undertaking(s) is the preceding years' gross annual turnover of the products that are the subject of the contravention. The affected turnover, together with the duration of conduct, give indication of the amount of commerce affected. In relation to an association of undertakings, the gross annual turnover shall be derived

from the individual members' turnover of the products or services that are the subject of a contravention.

In relation to mergers implemented without authorization by the Authority, the affected turnover will be the preceding years' gross annual turnover of the undertakings.

The preceding year shall be determined as the year before the Authority reaches a decision in Restrictive Trade Practices (including Abuse of Buyer Power) cases and shall be considered to be the year before the implementation of the merger for cases relating to mergers implemented without approval.

b. Base amount/ Percentage

- 11. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. The proportion applied will be based on;
 - 11.1 The nature, duration, gravity and extent of the contravention,
 - 11.2 Any loss or damage suffered as a result of the contravention, and
 - 11.3 The market circumstances in which the contravention took place.
- 12. The base percentages will be as below;

Conduct	Base percentage
Cartels, Abuse of dominance, Abuse of Buyer Power, where there is more than one abusive conduct, and where any such conduct has been carried out for more than three (3) years, horizontal mergers implemented without authorization of the Authority	10
Vertical agreement and vertical mergers implemented without authorization of the Authority and Abuse of Buyer Power where there is more than one abusive conduct where any such conduct has been carried out for less than one year	10



Conglomerate mergers implemented without authorization of the Authority and, Abuse of Buyer power where there is a single abusive conduct, and where a such conduct has been carried out for less than one year	10
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c. Aggravating factors

13. The basic amount may be increased where the Authority finds that there are aggravating circumstances. The guideline provides for 4 aggravating factors i.e. nature of the contravention, duration, coverage and recidivism. It should be noted that this is not an exhaustive list and that the Authority may consider any other aggravating factor on a case to case basis. The subsequent aggravating factor will be scored +1.

i. Nature of the contravention

14. The guideline will consider the gravity of the contravention in terms of whether it relates to a horizontal agreement, vertical agreement or a unilateral conduct.
15. Horizontal agreements, also known as cartels, are considered to be the most egregious contravention of the competition laws. The object of such agreements is to dampen competition and often has far reaching negative effects on consumers in terms of high prices, low quality and lack of innovation. Cartels are evaluated on a per se basis as the presumption of the object of preventing competition between the parties exists. Cartels will therefore be rated highest in relation to the other contraventions.
16. Unilateral conduct are practices by dominant undertakings aimed at undermining their competitors (exclusionary) or leading to direct consumer harm (exploitative). Restrictive vertical agreements relate to agreements between parties at different levels in the value chain e.g. producer, distributor relationships. Some vertical agreements may be found to have efficiency justifications and are evaluated on a rule of reason basis.
17. The scoring of the factors will be done in a consistent manner from the most harmful at score 3 to the least harmful at 1.

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

No.	Nature of the Contravention	Score (%)
1.	Horizontal Agreements	+3
2.	Unilateral Conduct	+2
3.	Vertical Agreements	+1

19. In determining abuse of Buyer Power, Section 24A (4) takes into consideration:

- a. the nature and determination of contract terms between concerned undertaking,
- b. the payment requested for access to infrastructure, and
- c. Price paid to suppliers.

In considering the appropriate financial penalty, the Authority will consider the impact of the transaction on competition and will be scored as below;

No.	Nature of the Contravention	Score (%)
1.	If all three aspects are present	+3
2.	If any two of these aspects is present	+2
3.	If only one of these aspects is present	+1

20. The Act envisages that all mergers occurring in Kenya have to be approved by the Authority. Any merger implemented without authorization from the Authority falls within the prohibitions under the Act. In considering the appropriate financial penalty, the Authority will consider the impact of the transaction on competition and will be scored as below;

No.	Nature of the transaction	Score (%)
1.	Horizontal mergers	+3
2.	Vertical mergers	+2
3.	Conglomerate mergers	+1

ii. Duration of the conduct

21. The duration of the contravention is an indicator of the harm to consumers as a result of the anticompetitive conduct. The parameter will also consider if the conduct is continuing or otherwise and will be scored as below;

No.	Duration in years	Score
1.	Up to 3 years and continuing	+3
2.	Up to 3 years and stopped	+2.5
3.	Between 1 and 2 years and continuing	+2
4.	Between 1 and 2 years and stopped	+1.5
5.	Up to 1 year and continuing	+1
6.	Up to 1 year and stopped	+0.5

iii. Coverage

22. Coverage is in terms of the spread of the conduct in the market and will be determined by the undertaking(s) presence in the country, whether national or by region and whether the conduct was confined to specific geographical location or the entire nation. The Authority will presume that the conduct is national where the undertakings products or services have a national blueprint.
23. The scores will be as below;

No.	Coverage	Score
1.	National	+3
2.	Cities and major towns	+2
3.	Specific geographic locations	+1

iv. Recidivism

24. The Authority will consider recidivism where an undertaking which had been found to be in contravention of the Act previously is condemned for another instance of contravening the provisions of the Act. Repeat offenders may be an indication of ineffective remedies levied by the Authority which do not invoke behaviour change by the undertaking. Recidivism will be scored at +3.

Mitigating factors

i. Cooperation

25. Cooperation is useful where it leads to the effectiveness of the Authority's enforcement actions by; contributing to speedy adoption of the Authority's decisions, gathering of additional evidence better targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority outside the scope of the leniency provisions 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 party(ies) and the same being notified to the Authority.
26. The scores for cooperation will be as below;

No.	Parameter	Score
1.	Party elect to resolve the matter through a settlement pursuant to section 38 of the Act. For mergers, when parties proactively notified the Authority of a merger they implemented without approval	-1
2.	Party pursue a settlement during investigation or before the Authority makes a finding and provides additional information	-1
3.	Party agree to a more structured and shorter procedure of settlement (consider providing a timeline) and Party helps in designing and implementing remedies	-0.5

4. Party is willing to acknowledge liability for the infringement -1.5

ii. First time offender

27. The Authority may consider the fact that a party is a first time offender and has not been subject of previous enforcement action on similar conduct. The score for a first time offender shall be -1.

iii. Public Interest and Justifications on Efficiency and consumer benefits

28. The public interest will be considered 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 have benefits to the consumers presented by the parties as a mitigating factor.

29. These justifications may apply to matters relating to Restrictive Trade Practices, Mergers and Buyer Power and may vary from one industry to another hence each acceptable mitigating factor shall be scored at -0.5. The maximum score allowable for these factors shall be -3.

iv. Other mitigating factors

30. The parties may provide any other additional mitigating factors which, if considered acceptable by the Authority, shall be each scored at -0.5. However, the maximum score attainable under this section shall be capped at -2.

Ability to pay

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

32. For instances of mergers without approval where the said firms do not have turnover, the value of the assets shall be considered in the computation of the penalty.

Procedure of imposing financial Penalties

33. The procedure of arriving at a financial penalty will take three steps of:-

- a. Determination of the affected turnover,
- b. setting the base amount/ percentage, and
- c. adjusting for mitigating and aggravating factors.

Step 1: Determination of the affected turnover

34. In determining the affected turnover, the Authority will have regard to the firm's audited financial statements. Where audited financial statements are incomplete or unreliable the Authority may determine the value of sales or services of that undertaking by applying the internationally accepted international accounting standards. In cases of bid-rigging, the Authority will consider the value of the tender contract to be the affected turnover.

Step 2: Setting of the base amount/ percentage

35. The base percentages shall be as in para 12 above.

Step 3: Adjusting for aggravating and mitigating factors

36. Upon determination of the base percentage, the Authority will adjust for aggravating and mitigating factors on the basis of the firm's specific factors to arrive at the applicable penalties.

Consideration of the Statutory Limit

37. As stipulated in section 36 (d) and 42(6) of the Act, the administrative penalty shall not exceed 10% of the firm's annual gross turnover during the firm's preceding financial year.

Payment of Penalties

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

Part C: Settlements and Settlement Procedures

38. 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.

39. 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 and the Competition General rules.