

# **COMPETITION COMMISSION**

**GUIDELINES OF THE COMPETITION COMMISSION ON THE  
PRINCIPLES TO BE USED IN DETERMINING ANY PENALTY OR  
REMEDY IMPOSED IN TERMS OF SECTION 25 AND SECTION 26 OF  
THE COMPETITION ACT (CAP: 46:09)**

## I. Introduction

1. The Competition Commission is a body established under section 9(1) of the Competition Act (hereinafter referred to as “the Act”). The mandate of the Commission is to adjudicate on matters brought before it under the Act and also to give general policy direction to the Competition Authority. The functions of the Commission are clearly spelt out in section 9(2)(a) and (b) of the Act which provides as follows:

*“(a) adjudicate on matters brought before it by the Authority under this Act; and*

*(b) give general policy direction to the Authority.”*

2. In carrying out its adjudicative function, which is mainly to determine cases brought by the Authority or by a complainant in terms of section 39(6) of the Act, the Commission is guided by its own rules of procedure.
3. The most important function in its adjudicative process is the imposition of fines and/or remedies. The Commission is enjoined to exercise discretion in the imposition of such remedies. Thus, if at the conclusion of a hearing the Commission finds that an infringement of section 25 and/or 26(1) has occurred, the Commission may impose a fine. Section 43(1) and (2) of the Act provides as follows:

*“43(1) Where the Commission determines that a breach of the prohibitions under sections 25(1) and 26(1) has occurred, the Commission shall give an enterprise or enterprises involved in any of the activities prohibited by sections 25 and 26 such directions as are necessary to bring the breach of the prohibition to an end, including a direction to terminate or modify the agreement in question if it is still in force”.*

*“43(2) The Commission may, in addition to, or instead of, giving a direction, make an order imposing financial penalty on the enterprise or enterprises concerned.”*

4. The purpose of these Guidelines is to set out how the Commission will proceed to impose fines and/or penalties on enterprises (or parties to the proceedings) in proceedings conducted pursuant to infringements of section 25 and section 26(1) of the Act.

5. These Guidelines refer only to the principles, circumstances and factors that are taken into account by the Commission in imposing the fines and/or penalties for the infringement of the Act.
6. These Guidelines are not meant to be a substitute for the law where any law has provided clarity, and where there is inconsistency, the provisions of the relevant law shall prevail over these Guidelines.

## **II. General Provisions**

7. Pursuant to section 43(3) of the Act, the Commission may impose a financial penalty on enterprises which are found to have intentionally or negligently offended against the prohibitions set out below:
  - 7.1 Prohibition of horizontal agreements as set out in section 25 of the Act; and
  - 7.2 Prohibition of vertical agreements as set out in section 26(1) of the Act.
8. The imposition of a financial penalty by the Commission shall be at a level not exceeding ten percent (10%) of the turnover of the enterprise during the breach of the prohibition up to a maximum of three (3) years. Section 43(4) of the Act is apt and provides that:

*“The amount of a penalty imposed in terms of subsection (2) shall not exceed 10% of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years.”*

## **III. Basic Principles in setting fines**

9. In fixing the amount of a particular fine the Commission may have regard to the gravity of the infringement, and the recurrence or duration of the infringement. The Commission, in determining the appropriate penalty, may also consider the following specific factors:
  - 9.1 the nature, duration, gravity and extent of the contravention;
  - 9.2 any loss or damage suffered as a result of the contravention;

- 9.3 the market circumstances in which the contravention took place e.g., the respondent's market share; the number of competitors that might have exited the market as a result of the conduct, the quantities of the products manufactured, sold and distributed by the respondent, whether there was any limited demand of the product, control over supply of the product or services and the geographic spread of the conduct (this list is not exhaustive);
- 9.4 the level of profit derived from the contravention;
- 9.5 the degree to which the respondent has cooperated with both the Competition Authority and the Competition Commission;
- 9.6 the adequate deterrent effect of the penalty, while at the same time being proportionate to the infringement;
- 9.7 the extent to which the respondent has cooperated with the Authority (discounts for leniency or undertaking);
- 9.8 financial hardships of the respondent; whether the respondent is capable of paying the fine and whether imposition of the fine would lead to the shutdown of the business or drive the business into insolvency;
- 9.9 the nature of the product and the market shares of the enterprise e.g., whether the use of that product is essential to the livelihood of the nation or to its health or whether the product is of strategic or national interest to the country or whether it is a product, the manufacture, sale and distribution of which creates employment (this list is not exhaustive);
- 9.10 the harm incurred by consumers and the need to send the message to other enterprises that anti-competitive conduct will not be tolerated; and
- 9.11 whether the respondent had previously been found in contravention of the Act.

10. The Commission, when assessing a penalty, will take into account the following factors as aggravating circumstances (the list is not exhaustive):
  - 10.1 the involvement of Senior Managers and Directors in the infringement;
  - 10.2 repeated infringements by the same enterprise;
  - 10.3 whether an infringement is intentional, rather than merely negligent;
  - 10.4 engagement in coercive or retaliatory measures against a leniency applicant;
  - 10.5 continuation of the infringement after the Authority commenced the investigations;
  - 10.6 acting as a leader, or instigator, of the infringement, in other words the enterprise was a ringleader; and
  - 10.7 coercing other enterprises to continue with the infringement.
11. The following would be taken into account, as mitigating factors, when the Commission is assessing a penalty (the list is not exhaustive):
  - 11.1 the enterprise under investigation:
    - 11.1.1 acted under severe duress or pressure;
    - 11.1.2 was genuinely not sure or uncertain as to whether the agreement or conduct at issue constituted an infringement of the Competition Act;
    - 11.1.3 took adequate steps to ensure compliance with sections 25 and 26(1) of the Competition Act;
    - 11.1.4 terminated the infringement as soon as the Authority intervened; and
    - 11.1.5 cooperated with the Authority to enable the enforcement process to be concluded speedily and effectively.

#### **IV. Conclusion**

12. These Guidelines are meant to state some of the factors that the Commission should take into account in deciding the penalty/remedy to impose. This ensures predictability and certainty in the use of discretionary powers by the Commission.
13. These Guidelines introduce a greater degree of clarity in the way the Commission approaches the fining process. The imposition of fines will reflect the seriousness of the offence and the deterrent effect on enterprises that infringe or violate the Competition Act.