



**Common Market for Eastern
and Southern Africa**

**DRAFT COMESA COMPETITION COMMISSION GUIDELINES FOR DETERMINATION
OF ADMINISTRATIVE PENALTIES, 2021**

SEPTEMBER, 2021

**PREPARED IN ACCORDANCE WITH THE
COMESA COMPETITION REGULATIONS 2004 AND
COMESA COMPETITION RULES 2004**

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DISCLAIMER

These Guidelines are for general guidance on the implementation of the provisions of the COMESA Competition Regulations of 2004 (the “Regulations”) & and the COMESA Competition Rules of 2004 (the “Rules”) dealing with the setting administrative fines and other penalties. These Guidelines do not constitute legal advice and should not be relied upon as a statement of law relating to the Regulations and the Rules. Undertakings are encouraged to seek legal advice on issues related to penalties under the Regulations and the Rules.

PREAMBLE

- (A) WHEREAS the purpose of the COMESA Competition Regulations of 2004 as enshrined under Article 2 of the Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors;
- (B) WHEREAS the Regulations establish the COMESA Competition Commission (the “Commission”) and empowers it, in respect of trade between Member States, to monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalize undertakings whose business appreciably restrains competition within the Common Market;
- (C) RECOGNIZING the power of the Commission to remedy or penalize anti-competitive activity and consumer rights violations under the Regulations where, after the findings of its investigations, it makes a determination that there has been a breach of the Regulations;
- (D) CONSIDERING that administrative penalties is an important tool in enforcing the Regulations and that the primary objective of administrative penalties is deterrence. Administrative penalties serve as a specific deterrent against future anti-competitive behaviour and violations of consumer rights by undertakings that have contravened the Regulations or Rules and as a general deterrent to other firms that may be contemplating engaging in anti-competitive conduct or violating consumer rights;

The Commission hereby adopts the following Guidelines in the setting of administrative fines and other penalties.

SECTION 1

CITATION

These Guidelines shall be cited as the COMESA Competition Commission Guidelines for Determination of Administrative Penalties, 2021 (Penalties Guidelines).

SECTION 2 INTERPRETATION

- (1) In these Guidelines, unless the context indicates otherwise:

“**administrative penalty**” means a sanction that may be imposed by an enforcement institution for any infringement of the Regulations or the Rules;

“annual turnover” means the amounts derived by the undertaking or association of undertakings in the preceding financial year in the Common Market from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of sales rebates and of value added tax and other taxes directly related to turnover;

“compensation” means indemnification, payment of damages, or making amends imposed by the enforcement institutions to the affected persons for harm suffered as a result of contravention of the Regulations or the Rules;

“Enforcement institutions” means the **COMESA Competition Commission Secretariat, the Board of Commissioners and the COMESA Court of Justice**

“fine” means a sum of money exacted as a penalty or punishment by the enforcement institutions;

“remedies” means measures which are adopted by the enforcement institutions in terms of the Regulations or the Rules to maintain or restore competition in the relevant market;

“Regulations” means the COMESA Competition Regulations, 2004; and

“Rules” means the COMESA Competition Rules, 2004.

- (2) For purposes of these Guidelines, any word or phrase to which a meaning has been ascribed in the Regulations or the Rules shall have such meaning.

SECTION 3 PURPOSE OF THE GUIDELINES

The purposes of these Guidelines are to:

- (a) provide consistency, transparency, fairness, objectivity and certainty in the determination of penalties and in particular the imposition and calculation of fines;
- (b) achieve proportionality in the remedies and penalties imposed against the degree of contravention of the Regulations or the Rules;
- (c) guide the Commission and the concerned parties on the factors and issues that the Commission shall take into account when determining fines or other administrative penalties for any violation of the Regulations or the Rules;
- (d) ensure that penalties deter future behaviour and prevent undertakings from contravening the Regulations or the Rules; and
- (e) ensure awareness of the Regulations and the Rules as well as compliance with the law.

SECTION 4 LEGISLATIVE FRAMEWORK FOR ADMINISTRATIVE FINES AND PENALTIES

These Guidelines have been prepared in line with the following relevant provisions of the Regulations and the Rules:

- (a) **Article 8(3) of the Regulations** which empowers the Commission to make a determination that there has been a breach of the Regulations in that the conduct at issue, has or is likely to have, an appreciable negative competitive impact and is inconsistent with the objectives of the Common Market;

- (b) **Article 8(4) of the Regulations** which empowers the Commission, to the extent required to remedy or penalize anti-competitive activity, to:
- i. order the termination or nullification, as the case may require, of agreements, conduct, activities or decisions prohibited by Part 3 of the Regulations;
 - ii. direct the enterprise to cease and desist from anti-competitive conduct and to take such steps as it believes may be necessary to overcome the effects of abuse of its dominant position in the market, or any other business conduct inconsistent with the principles set out in the Regulations;
 - iii. order payment of compensation to persons affected; or
 - iv. impose fines for breaches of the provisions of the Regulations.
- (c) **Article 8(5) of the Regulations** which provides that any person who contravenes or fails to comply with any provision of the Regulations or any Rules made hereunder or any directive or order lawfully given, or any requirements lawfully imposed under these Regulations or any Rules made hereunder, for which no penalty is provided shall be determined to have breached the Regulations and shall be liable, pursuant to that determination, to a fine (in an amount to be determined by Rules) and/or such other penalty as may be assessed;
- (d) **Article 21(10) of the Regulations** confers on the Commission the discretion to decide, based on its determination, that the party in breach of the Regulations should:
- i. cease its conduct immediately; and/or
 - ii. pay a fine in an amount to be determined by the Commission; and/or
 - iii. take whatever action the Commission deems necessary to remove and/or diminish the effect of the illegal conduct.
- (e) **Article 24 of the Regulations** provides for sanctions and penalties for non-compliance with merger notification requirements as follows:
- i. Article 24 (2) which stipulates that any merger carried out in contravention of Article 24 shall have no legal effect and no rights or obligations imposed on the parties by any agreement in respect of the merger shall be legally enforceable in the Common Market
 - ii. Article 24(4) which states that the Commission may impose a penalty if the parties to the merger fail to give notice of the merger as required by 24 (1); and
 - iii. Article 24(5) which states that the Commission may impose a maximum penalty of up to 10% of the either or both of the merging parties annual turnover in the Common Market for the preceding financial year.
- (f) **Rule 45 (1) of the Rules** empowers the Board to impose fines of up to 10% of annual turnover on undertakings or associations of undertakings where parties negligently or intentionally:

- i. supply incorrect or misleading information in an application for negative clearance (Rule 32) or in notification of new or existing agreements, decisions or practices (Rule 34 or 35);
 - ii. supply incorrect information in response to a request for information made by the Commission (Rule 41 (3) or (5)) or inquiry into sectors of economy (Rule 42);
 - iii. do not supply information within the time limit fixed by a decision for a request for information (Rule 41 (5));
- (g) **Rule 45(2)** provides that the Commission may, by decision, impose on undertakings or associations of undertakings a fine up to 10% of annual turnover units of account, in the Common Market in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:
- i. they infringe Parts 3 and 5 of the Regulations, or
 - ii. they commit any breach of any obligation imposed pursuant to Rule 38 (1) with regard to decisions on the application of Article 16(4) of the Regulations;
- (h) In fixing the amount of the fine, **Rule 45(3)** mandates the Commission to have regard to both the gravity and the duration of the infringement.
- (i) **Rule 45(4)** mandates the Commission to liaise closely and constantly with the competent authorities of the Member States who have the right to express their views on the fines imposed by the Commission.
- (j) Pursuant to **Rule 45 (5)**, it is also important to note that the decisions to impose fines are not of a criminal nature.
- (k) **Rule 79** provides for maximum monetary penalties as follows:
- i. for each contravention of Article 19 of the Regulations the maximum is USD 750,000;
 - ii. for each contravention of Article 18 of the Regulations the maximum is USD 500,000;
 - iii. for each contravention of Article 16 of the Regulations the maximum is USD 300,000; and
 - iv. For each contravention of Part 5 of the Regulations, the maximum is USD 300,000.

SECTION 5

METHODS FOR SETTING FINES UNDER PARTS 3, 4 AND 5 OF THE REGULATIONS

- (1) The Commission will use the following two-step methodology when setting the fine to be imposed on undertakings found to be in breach of the Regulations:
- (a) First, the Commission will set a base amount for each undertaking or association of undertakings.

- (b) Second, the Commission may adjust the base amount upwards or downwards considering aggravating, mitigating or any other factors on a case-by-case basis.

A. Base Amount of the Fine

- (2) The base amount will be set by reference to the turnover and applying the following methodology:

Calculation of Turnover

- (3) In determining the base amount of the fine to be imposed, the Commission will consider the undertaking's turnover within the Common Market in the preceding financial year of its participation in the infringement.
- (4) For the purpose of this calculation, the preceding financial year shall be determined as follows:-
- i. For restrictive business practices and abuse of dominance cases, it shall be the year before the Commission makes a determination in the matter.
 - ii. For mergers implemented in contravention of the Regulations, it shall be the year before implementation of the merger.
 - iii. For non-compliance to the Commission's decisions, it shall be the year when compliance falls due.
- (5) Where the infringement by an association of undertakings relates to the activities of its members, the turnover will generally correspond to the sum of the turnover of its members.
- (6) In determining the turnover of an undertaking, the Commission will take into account the undertaking's latest available audited figures. Where the figures made available by an undertaking are incomplete or are not reliable, the Commission may determine turnover on the basis of the figures it has obtained and/or any other information which it regards as relevant and appropriate.
- (7) In determining the turnover of an undertaking or association of undertakings, the Commission shall be guided by the *COMESA Rules on the Determination of Merger Notification Thresholds and Method of Calculation* (as amended), as applicable with the necessary changes.

Setting of the Base Amount of the Fine

- (8) The base amount of the fine denotes the starting point against which the mitigating and aggravating factors will be adjusted. The base amount will be proportion of the turnover, depending on the nature, degree of gravity of the infringement and multiplied by the number of years of the infringement.
- (9) The assessment of gravity will be determined on a case-by-case basis for all types of infringements, taking account of all the relevant circumstances of the case.
- (10) The Commission will consider the following aggravating factors for violations under Part 5 of the Regulations-
- (a) **the nature and gravity of the infringement:** the Commission will apply more weight for infringements of provisions relating to product safety and unsuitable goods that may cause loss of lives such as Articles 31, 33, 35 and 36 of the Regulations;

- (b) **the duration of the infringement:** infringements that have been in existence for more than three (3) months will have more weight. However, this does not prevent the Commission from looking at the temporal effects of the conduct and those that have lasted for periods less than three (3) months;
- (c) **number of consumers affected in the Member States and any action taken by the company to mitigate or remedy the damage suffered by consumers:** A conduct will be considered widespread if at least two thirds of the consumers are affected or are likely to be affected in the Member States.
- (11) Under the Regulations, the Commission is empowered to impose a fine of up to 10 % of the parties' annual turnover in the Common Market. In deciding whether the proportion of turnover should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
- (12) Conduct prohibited under Article 19(3) of the Regulations are, by their very nature, among the most harmful restrictions of competition and are prohibited. As a matter of policy, such conduct attracts heavy fines. Therefore, the proportion of the turnover taken into account for such infringements will generally be set at the higher end of the scale.
- (13) In general, the base proportion of turnover to be applied shall be as follows:
- (a) For cartel conduct, a base of **5% of turnover**;
 - (b) For other horizontal conduct, a base of 4% of turnover;
 - (c) For abuse of dominance, a base of **3% of turnover**;
 - (d) Vertical restraints, a base of **2% of turnover**;
 - (e) Consumer protection violations, a base of **1% of turnover**;
 - (f) Mergers implemented in contravention of the Regulations, a base of **2% of turnover**;
 - (g) Failure to cooperate with the Commission, a base of **0.5%** of turnover; and
 - (h) Other infringements, a base of **0.5%** of turnover.
- (14) In order to take into account, the duration of participation of each undertaking in the infringement, the amount determined will be multiplied by the number of years of participation in the infringement. Periods of less than one year will be counted as a full year.

B. Adjustments to the Base Amount

- (15) In determining the fine, the Commission may take into account circumstances that result in an increase or decrease in the base amount. It will do so on the basis of an overall assessment which takes account all the relevant circumstances as highlighted below:

Aggravating Circumstances

- (16) The basic amount may be increased within the maximum penalty provided under the Regulations and Rules where the Commission establishes aggravating circumstances, such as the following:
- (i) where an undertaking continues or repeats the same or a similar infringement after the Commission has made a finding that the undertaking infringed the Regulations, **the basic amount will be increased by 3% of the amount of the fine** for each such infringement established;
 - (ii) where an undertaking refuses to cooperate with or obstructs the Commission in carrying out its investigations, **the basic amount will be increased by 5% of the amount of the fine**;
 - (iii) where an undertaking is a leader in, or instigator of the infringement, **the basic amount will be increased by 4% of the amount of the fine**. The Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the behaviour constituting the infringement.

Mitigating Circumstances

- (17) The Commission may reduce the basic amount where it finds that mitigating circumstances exist, such as:
- (i) **cooperation**- where the undertaking concerned has cooperated with the Commission during the investigation among others through admission of liability, disclosure of more evidence, provision of undertakings and working within the given timelines, **the basic amount will be decreased by 5% of the amount of the fine**;
 - (ii) **first offender**- where a party is a first-time offender and has not been a subject of previous enforcement action on similar conduct under the Regulations, **the basic amount will be decreased by 3% of the amount of the fine**;
 - (iii) **justifications on efficiency and consumer benefits** -the Commission at its discretion may consider any plausible efficiency justification and the benefits to the consumers, **the basic amount will be decreased by 0.5% of the amount of the fine**;
 - (iv) **termination of the infringement**- where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission commenced investigations or intervened, **the basic amount will be decreased by 0.5% of the fine**;
 - (v) **negligence**- where the undertaking provides evidence that the infringement has been committed as a result of negligence, **the basic amount will be decreased by 0.1% of the amount of the fine**;
 - (vi) **extent of involvement in the infringement**- where the undertaking provides evidence that its involvement in the infringement is substantially limited and is

able to demonstrate this, **the basic amount will be decreased by 0.5% of the amount of the fine;**

Specific increase for deterrence

- (18) The Commission will pay particular attention on the need to:
- (i) ensure that fines have a sufficient deterrent effect. To this end, the Commission may increase the fine to be imposed on undertakings which have a particularly large market share, **by up to 1% of the total turnover;** or
 - (ii) increase the fine in order to exceed the amount of gains improperly made as a result of the infringement (where it is possible to estimate that amount), provided that the fine will not exceed the maximum provided under the Regulations and the Rules.

Legal Maximum

- (19) The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Rule 45 (2) as read together with Rule 79 of the Rules.
- (20) Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

Inability to Pay

- (21) In exceptional cases, the Commission may, upon request, take into account the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardize the economic viability of the undertaking concerned and cause its assets to lose all their value.

**SECTION 6
GENERAL**

Final Considerations

- (1) The above process presents the general methodology that the Commission will follow in the determination of administrative penalties. Notwithstanding the above, this will not fetter the discretion of the Commission or the Board and other courts to consider administrative penalties on a case by case basis should the need arise.
- (2) The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

(3) Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in these Guidelines.

**SECTION 7
REVIEW OF THE GUIDELINES**

These Guidelines may be reviewed from time to time to reflect changing market circumstances and the law governing their implementation.

**SECTION 8
ENTRY INTO FORCE**

These Guidelines shall enter into force upon approval by the Board.

APPROVED by the Board at on the.....day
of....., 2021.

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