



**THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA,
COMESA**



**COMESA COMPETITION COMMISSION
GUIDELINES FOR DETERMINATION OF
ADMINISTRATIVE FINES AND PENALTIES,
2023**

19 DECEMBER 2023

**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 of administrative fines and penalties. These Guidelines are not a substitute of the Rules and Regulations, and if there is a conflict between the Guidelines and the Rules and Regulations, the latter will prevail. Undertakings are encouraged to seek legal advice on issues related to penalties under the Regulations and the Rules. The COMESA Competition Commission (the “**Commission**”) reserves the right to change these Guidelines.

PREAMBLE

- (A) **WHEREAS** the purpose of the Regulations 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 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 activities 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; and
- (D) **CONSIDERING** that administrative fines and penalties are 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 Board of Commissioners hereby adopts these Guidelines for Determination of Administrative Fines and Penalties.

SECTION 1 – CITATION

These Guidelines shall be cited as the COMESA Competition Commission Guidelines for Determination of Administrative Fines and Penalties, 2023.

SECTION 2 – INTERPRETATION

1. In these Guidelines, unless the context indicates otherwise:

“**administrative penalty**” includes a monetary 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;

“**Board**” means the Board of Commissioners established by Article 12 of the Regulations and is the adjudicative body of the Commission;

“**Commission**” means the COMESA Competition Commission established by Article 6 of the Regulations;

“**Commission Secretariat**” is the investigative body of the Commission;

“**Committee Responsible for Initial Determinations**” is the committee established under Article 13 (4) of the Regulations;

“**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;

“**preceding financial year**” is as provided for in Section 5(4) of these Guidelines;

“**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 and provide redress for consumer infringements;

“**regulations**” means the COMESA Competition Regulations, 2004;

“**rules**” means the COMESA Competition Rules, 2004; and

“**typical year**” means a year representing the usual manner in which an undertaking performs on either its sales or turnover and is calculated as an average of the past 3 years performance.

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

1. The purposes of these Guidelines are to:
 - a. Enhance 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 penalties have a deterrent effect on future behaviour and prevent undertakings from contravening the Regulations or the Rules; and
 - e. Promote awareness of the Regulations and the Rules as well as compliance with the law.

SECTION 4 – LEGISLATIVE FRAMEWORK FOR ADMINISTRATIVE FINES AND PENALTIES

1. 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 undertaking 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** which provides for sanctions and penalties for non-compliance with merger notification requirements as follows:
 - i. Article 24 (2) 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) 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) 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 financial 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

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 and mitigating 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 a given financial year which shall be determined as follows: -
 - a. For restrictive business practices and abuse of dominance cases, it shall be the last full year of the undertaking's participation in the infringement.
 - b. For mergers implemented in contravention of the Regulations, it shall be the year before implementation of the merger.
 - c. For non-compliance to the Commission's decisions, it shall be the year when compliance falls due.
 - d. For consumer infringements, it shall be the last full year of the undertaking's participation in the infringement.

Where the given financial year in (3) above does not reflect the typical turnover or sales performance of the undertaking, the Commission can use another, more typical, year.

4. 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.
5. 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.
6. In determining the turnover of an undertaking or association of undertakings, the Commission shall be guided by Rule 5 of 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

7. 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 a proportion of the turnover depending on the nature, the degree of gravity and the duration of the infringement.
8. 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.
9. For violations under Part 5 of the Regulations, the Commission, in setting the base amount, shall take the following factors in to account:
 - 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 (the number of years the infringement has been taking place):** 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 Member States affected (Geographic Scope of the Infringement):** A conduct will be considered widespread if at least three or more Member States are affected or are likely to be affected.
10. 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, gravity and duration 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.
11. 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.
12. In general, the base proportion of turnover to be applied shall be as follows:
 - a. For cartel conduct, a base from **5% to 7%** of turnover;

- b. For other horizontal conduct, a base from **2% to 4%** of turnover;
- c. For abuse of dominance, a base from **3% to 5%** of turnover;
- d. Vertical restraints, a base from **2% to 5%** of turnover;
- e. Consumer protection violations, a base from **2% to 4%** of turnover;
- f. Mergers implemented in contravention of the Regulations, a base from **2% to 4%** of turnover;
- g. Failure to cooperate with the Commission, a base from **0.5% to 1%** of turnover; and
- h. Other infringements, a base from **0.5% to 1%** of turnover.

B. Adjustments to the Base Amount

- 13. The Commission may adjust the basic amount of the fine; downwards if it finds that there are mitigating factors, or upwards in the event of aggravating circumstances.
- 14. It will do so on the basis of an overall assessment which takes account all the relevant circumstances as highlighted below:

Aggravating Circumstances

- 15. The base amount may be increased within the maximum penalty provided under the Regulations and Rules where the Commission establishes aggravating circumstances, such as the following:
 - a. Where an undertaking is a repeat offender or having committed past infringements of the Regulations, **the base amount may be increased by up to 50%** for each such infringement established;
 - b. Where an undertaking refuses to cooperate with or obstructs the Commission in carrying out its investigations, **the base amount may be increased by up to 50%**;
 - c. Where an undertaking is a leader in, or instigator of the infringement, **the base amount may be increased by up to 40%**. The Commission may 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.
 - d. The Commission will also pay attention to the extent of the damage suffered as a result of the infringement and/or the benefits derived from the infringement in its consideration of aggravating circumstances.

Mitigating Circumstances

- 16. The Commission may reduce the base amount where it finds that mitigating circumstances exist, such as:
 - a. **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 base amount may be decreased by up to 50%**;

- b. **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 Commission at its discretion may decrease the base amount by up to 30%**. This does not apply under conduct appearing under Article 19(3) of the Regulations;
- c. **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 base amount may be decreased by up to 5%**;

Legal Maximum

- 17. 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.
- 18. 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.

Payment of Penalties in Instalments

- 19. In exceptional circumstances the Commission has 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.

SECTION 6 – GENERAL

Appeal

- 1. The Regulations empower the Commission Secretariat to recommend fines to the Committee Responsible for Initial Determination (CID) for determination. Once the CID makes a determination, the undertaking has a right of appeal to the Board of Commissioners and a further right of appeal to the COMESA Court of Justice.

Final Considerations

- 2. The above process presents the general process that the Commission will follow in the determination of administrative penalties. Notwithstanding the above, this will not fetter the discretion of the Commission's Secretariat, the CID or the Board and other courts to consider administrative penalties on a case-by-case basis should the need arise.
- 3. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.
- 4. Although these Guidelines present the general process 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 process or from the limits specified in these Guidelines.

Failure to comply with fine imposed by the Commission

5. Any penalties imposed by the Commission pursuant to the provisions of the Regulations shall be paid within the period stipulated by the Commission. Failure to do so shall attract a periodic penalty payment in accordance with Rule 46.

Settlement

6. Fines or penalties subject to settlement procedures will be considered as part of the settlement process provided for in the Settlement and Commitment Guidelines. Without prejudice to the fines set out under these Guidelines, the fine to be imposed may be reduced by 20% -30%.

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 Lusaka on the 19th day of December 2023.