



Eswatini
Competition Commission

ESWATINI COMPETITION COMMISSION

GUIDELINES FOR ISSUANCE OF ADMINISTRATIVE PENALTY:

**OUTLINING THE PRINCIPLES AND PRACTICES FOR ISSUANCE OF
ADMINISTRATIVE PENALTIES UNDER THE COMPETITION ACT, NO. 8 OF
2007.**

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I. POLICY OBJECTIVE

1. These Guidelines are hereby established to set forth the manner in which the appropriate administrative penalty to be imposed by the Commission will be determined. The policy objectives of the Guidelines on the Issuance of Administrative Penalty (ESCC Administrative Penalty Guidelines) are to:

- (a) impose penalties which reflect the seriousness of the violation;
- (b) act as a deterrent measure, provide for appropriate restitution and promote compliance and raise awareness of the Competition Act No.8 of 2008 (the "Act"); and
- (c) provide for consistency, fairness and certainty in the imposition of administrative penalties.

II. PREAMBLE

2. These Guidelines are issued subject to the Act, the Competition Commission Regulations Notice of 2010 (the "Regulations") and the Competition Commission (Amendment) Regulations of 2016 ("Regulation 28A") made there under and shall apply to the extent that they are not inconsistent with both as well as any other written law.

3. The Commission, in accordance with Section 43(a) of the Act, read with Regulation 28A, is mandated to issue regulations for anything required to be prescribed under, or for the purposes of, this Act including administrative penalties, with regard to the effective implementation of the provisions of the Act. Specifically, Section 43 of the Act provides that-

The Minister may, on the advice of the Commission, make regulations for carrying into effect the provisions of this Act, and, in particular and without prejudice to the generality of the foregoing power, such regulations may provide for-

- (a) *anything required to be prescribed under, or for the purposes of, this Act **including penalties to be imposed for infringements of this Act;***

Regulation 28A states that-

(1) *The Commission may impose an administrative penalty not exceeding ten percent of the total turnover of a company to ensure compliance with the Act.*

4. The penalties have, as required, been prescribed through Legal Notice No. 164 of 2016, which amended the Competition Regulations, 2010. Under regulation 28A(3), the factors that the Commission may consider have been listed, which will guide how the Commission will arrive at the penalty.

5. These guidelines are not a substitute to the Act and the Regulations and maybe revised from time to time, should the need arise. Any examples in these guidelines are for illustrative purposes only and should not be taken as exhaustive. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Act or these Guidelines may wish to seek legal advice.

III INTRODUCTION

1. Citation

These Guidelines may be cited as the Competition Commission Guidelines on Issuance of Administrative Penalty 2019 (“Administrative Penalty Guidelines”) and shall come into force on the date of their publication pursuant to Section 43(a) of the Act read with Regulation 28A of Act.

2. Definitions

For purposes of these Guidelines, any word or phrase to which a meaning has been assigned in the Act shall have such meaning.

3. Offences Punishable by Administrative Penalty under the Act

(i) The Commission has discretion to impose administrative penalties on enterprises or persons that offend the Act.

(ii) Offences subject to administrative penalties under the Act include Sections 30, 31, 32, 33, 34, and 35. These offences are punishable by administrative penalties to be imposed by the Commission without prior recourse to any court or arbiter.

III. DETERMINATION OF ADMINISTRATIVE PENALTY

1) *Administrative Penalty under Part V of the Act*

- (a) Section 42 of the Act provides for criminal sanctions on offending enterprises or persons contravening any provisions of the Act.
- (b) Further, Section 43(a) of the Act read with Regulation 28A provides for administrative penalty to be imposed by the Commission on offending enterprises or persons on any of the provisions of the Act.
- (c) Regulation 28A specifically provides the approach the Commission will apply when determining the administrative penalty to be imposed to enterprises or persons for contravening any of the sections 30, 31, 32, 33, 34 and 35 of the Act.

Reproduced, Regulation 28A reads thus:

- (1) *The Commission may impose an administrative penalty not exceeding ten percent of the total turnover of a **company** to ensure compliance with the Competition Act.*
- (2) *Where the **company** has subsidiaries, all the **companies** belonging to the same economic unit will be considered for computation of the penalty.*
- (3) *When imposing the administrative penalty, the Commission **may** consider the following factors:*
 - (a) *The nature, duration, gravity, and extent of the contravention;*
 - (b) *The market circumstances in which the contravention took place, for instance, the market share, the number of competitors that might have exited the market as a result of the uncompetitive conduct;*
 - (c) *The deterrent effect of the penalty;*
 - (d) *The harm suffered by the consumers;*
 - (e) *The degree of involvement in the infringement, that is, acting as a leader,*

instigator, or an influential party in the infringement;

(f) Refusal or unwillingness to cooperate with the Commission;

(g) Repeat infringement by the same enterprises

*(h) Influence or coercive behavior on other parties by refusing to cooperate with an investigation; **or***

(i) Continuation of the infringement after the Commission commenced an investigation

- (d) On the usage of the word “company” in Regulation 28A, the Commission will be guided by Section 5 of the Interpretation Act, 1970 of the Kingdom of Eswatini, which states as follows:

“Where terms defined in a law are used in regulations, rules, by-laws or orders under a law, those terms shall have the meanings assigned to them by the law unless they are otherwise defined in those regulations, rules, bye-laws or orders, or unless there is something in the subject or context inconsistent with such construction.”

The Commission, therefore, will construe the usage of the word “company” to mean the same thing as a commercial enterprise, as described under the Act.

- (e) The Commission has discretion whether to take into account what appears to be *aggravating factors* listed under regulation 28A(3).
- (f) The Commission should take into account all the identified aggravating factors to maintain uniformity in penalty setting:
- (i) the identified aggravating factors should be weighted in order to have some semblance of objectivity putting value to them;
 - (ii) there must be consideration for mitigating factors and principle of proportionality;
 - (iii) there should be “base penalties” i.e, the lowest penalty percentage or starting point for a penalty; and
 - (iv) there should ultimately be a formula to assist the Commission on how it will arrive at a specific figure for a penalty.

2) Mitigating Factors

In addition to aggravating factors stated under Regulation 28A(3), the Commission may consider the following mitigation factors:

- a) role of the enterprise, for example, that the enterprise was acting under duress or pressure;
- b) the alleged offender has not been the subject of previous enforcement action on similar conduct;
- c) the alleged offender is willing to accept lesser enforcement options e.g. give undertakings, enter into consent agreement;
- d) the alleged offender has cooperated with the Commission in providing information and evidence which enables the enforcement process to be concluded more effectively and/ or expeditiously;
- e) termination of the violation as soon as the Commission intervenes; or
- f) offence/s committed by the offender as a result of a genuine and/or innocent mistake.

3) Principle of Proportionality

The Commission may, on application by the company, reduce the penalty in relation to the following conditions, if proven that:

- a) a company is facing confirmed liquidity problems at the time of fining for reasons not connected with fraud, strike-action, mismanagement, etc., but as a result of general and confirmed macro-economic factors that have directly affected the company's business;
- b) the penalty results effectively in an absurd outcome in relation to the harm caused in the market place; or
- c) there is a demonstrable public interest for the company to continue existing as a viable and effective competitor in the market place.

The Commission may consider using the principle of proportionality only after the calculation of the administrative penalty nominal figure. If the resulting nominal figure for the

administrative penalty is absurd (i.e. too big relative to the harm caused or value thereof), the Commission shall consider adjusting this figure based on the principle of proportionality factors as listed in this Guidelines.

4) Base Penalty

The following shall be the base, minimum, or starting point for calculating the final penalty;

Nature of Infringement	Base Penalty	Rationale
Cartels	1% of turnover	They are amongst the most harmful of infringements.
Abuse of Dominance	1% of turnover	This is also the most harmful infringement.
Other anti-competitive trade practices	0.5% of turnover	They are based on a case by case approach.
Consumer Protection	0.5% of turnover	While penalty is due, remedial actions in consumer protection are also applicable in addition.
Un-notified Merger	0.5% of turnover	After the penalty, the merger notification fee has to be still paid.

5) The Penalty Formula

In setting a percentage for the penalty, the Commission shall take into account the following:

- (a) the Base penalty;
- (b) the ratio of the Aggravating factors (i.e., **RAF**);
- (c) the ratio of the Mitigating factors (i.e., **RMF**);

- (d) Beta term (i.e. β , which can have either an incremental or decremental effect on the penalty) to capture any event which might not have been captured by the aggravating and mitigating factors; and
- (e) the ratio of Proportionality factors (i.e. RP, which is a negative, and has a reducing effect on the final percentage figure).

The penalty formula therefore shall be as follows:

$$P = B + (RAF - RMF) + \beta - RP$$

Where:

- **P** is the final percentage penalty;
- **B** is the base penalty;
- **RAF** represents the ratio of aggravating factors;
- **RMF** represents the ratio mitigating factors;
- **β** represents any other circumstances in the case which can be either a positive or a negative value depending on whether the conduct aided or hindered the investigation; and
- **RP** represents the ratio of proportionality factors (it is always a negative).

It should be noted that in the formula the resulting figure from the term (RAF – RMF) is always in percentage form.

6) Determination of Ratios

The determination of the ratios for the aggravating, mitigation and proportionality factors shall be as follows:

AGGRAVATING FACTORS	Weight	MITIGATING FACTORS	Weight	PROPORTIONALITY	Weight
<i>The nature, duration, gravity, and extent of the contravention;</i>	2	Role of the enterprise, e.g., that the enterprise was acting under duress or pressure;	1	A company is facing confirmed liquidity problems at the time of the penalty for reasons not connected with fraud, strike-action, mismanagement, etc but as a result of general and confirmed macro-economic factors that have directly affected the company's business;	1
<i>The market circumstances in which the contravention took place, for instance, the market share, the number of competitors that might have exited the market as a result of the uncompetitive conduct;</i>	1	the alleged offender has not been the subject of previous enforcement action on similar conduct;	1	the penalty results effectively in an absurd outcome disproportionate to the harm caused in the market place; or	1
<i>The deterrent effect of the penalty;</i>	1	the alleged offender is willing to accept lesser enforcement options e.g. give undertakings, enter into consent agreement;	1	There is a demonstrable public interest for the company to continue existing as a viable and effective competitor in the market place	1
<i>The harm suffered by the consumers;</i>	1	the alleged offender has cooperated with the Commission in providing information and evidence which enables the	1		

		enforcement process to be concluded more effectively and/ or speedily;			
<i>The degree of involvement in the infringement, that is, acting as a leader, instigator, or an influential party in the infringement;</i>	1	termination of the violation as soon as the Commission intervenes; or	1		
<i>Refusal or unwillingness to cooperate with the Commission;</i>	1	Offence/s committed by the offender as a result of a genuine and/or innocent mistake	1		
<i>Repeat infringement by the same enterprise(s)</i>	1				
<i>Influence or coercive behavior on other parties by refusing to cooperate with an investigation;</i>	1				
<i>Continuation of the infringement after the Commission commenced an investigation</i>	1				
Total Weight	10		6		3

- (a) When the Commission makes an order imposing an administrative penalty on an enterprise or a person, such order shall be in writing, shall specify the offence, the factors the Commission took into consideration in arriving at the amount to be paid and the date before which the penalty is required to be paid.
- (b) The date specified in an order imposing a penalty shall not be a date before the end of the period within which an appeal against the order of Commission may be brought under the Act.