



**COMPETITION AND CONSUMER PROTECTION  
COMMISSION**

**SETTLEMENT PROCEDURE GUIDELINES 2016**

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**POLICY OBJECTIVE**

The policy objectives of these guidelines are to:

- (i) set out the framework for rewarding co-operation in the conduct of proceedings for contravening Part III of the Competition and Consumer Protection Act No. 24 of 2010 (“the Act”) dealing with abuse of dominance, cartels and other restrictive business practices, Part IV of the Act specifically Section 37 and Part VII of the Act dealing with consumer protection;
- (ii) ensure timely resolution of cases and increase compliance; and
- (iii) raise awareness of the law.

## **PREAMBLE**

### **Purpose**

These guidelines are issued in terms of, and are subject to the Act and the Competition and Consumer Protection (General) Regulation No. 97 of 2011 (“the Regulations”) made thereunder and apply to the extent that they are not inconsistent with the Act and Regulations as well as any other written law.

Section 84 of the Act empowers the Competition and Consumer Protection Commission (the “Commission”) to make guidelines for the better carrying out of the provisions of the Act.

These guidelines are not a substitute for the Act and the Regulations and orders made under it, nor are they a definitive interpretation of the law.

These guidelines provide practical guidance on the application of the relevant proceedings for rewarding co-operation in the conduct of proceedings commenced for contravening Part III of the Act dealing with abuse of dominance, cartels and other restrictive business practices, Part IV of the Act specifically Section 37 and Part VII of the Act dealing with consumer protection.

The Commission may revise these guidelines from time to time, should the need arise. In applying these guidelines, the facts and circumstances of each case will be considered. Where a person or an enterprise is uncertain about how the guidelines apply in the context of a particular situation, it is advisable that they seek legal advice.

These guidelines shall bind all persons regulated under the Act.

## **PART I GENERAL PROVISIONS**

### **1. Short Title & commencement**

These guidelines are referred to as the Competition & Consumer Protection Commission Settlement Procedure Guidelines 2016 and shall come into effect on the date of their publication in line with Section 84(2) of the 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.

Settlement in these guidelines shall mean the resolution of a matter by the parties to an investigation without recourse to the Competition and Consumer Protection Tribunal/or Courts of law<sup>1</sup>.

## 3. Introduction

- (i) Where a person or enterprise that has contravened the Act is willing to acknowledge their participation in and liability for the contravention, the Commission may engage in settlement discussions with such person or enterprise to expedite the proceedings leading to a final decision. Although the Act provides in the relevant Sections, that a party that contravenes the Act may be liable for administrative penalties, civil and criminal liability, this does not prevent the Commission from engaging in settlement discussions with a party, provided that any settlement discussions do not protect a party from criminal or civil liability by third parties arising from the contravention of the Act.

- (ii) Settlement discussions are different from the leniency programme which requires the voluntary production of evidence that triggers or advances the Commission's investigation.
- (iii) Application of settlement procedures in terms of these Guidelines and the Leniency Programme are not mutually exclusive. An applicant for leniency can settle a case in terms of the Commission's Leniency Programme and Settlement Procedures and benefit from both leniency and settlement discounts.
- (iv) Effective enforcement of the Act is also compatible with full respect for the parties' rights of defence, which constitutes a fundamental principle of public law to be respected in all circumstances, and in particular in violations under the Act which may give rise to penalties. It follows that the rules established to conduct the Commission proceedings to enforce Part III, Section 37 under part IV and VII of the Act should ensure that the enterprises and associations of enterprises concerned are afforded the opportunity to effectively make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission, throughout the administrative procedure.

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<sup>1</sup> Settlement as contemplated in these guidelines is not found by the tribunal or courts to constitute a consent agreement as stipulated in Section 57 of the Act.

**4. The Commission’s Discretion**

- (i) The Commission may engage in settlement discussions either upon the written request of the parties concerned or upon the Commission’s own initiative.
- (ii) The Commission retains the discretion to determine which cases are suitable for settlement discussions. In this regard the Commission may decide whether or not to:
  - a. engage in settlement discussions with a party;
  - b. discontinue settlement discussions that have already commenced; or
  - c. conclude a settlement agreement with a party.
- (iii) When deciding whether or not to engage in settlement discussions with a party or to discontinue settlement discussions that have already commenced the Commission will consider:
  - a. the probability of reaching a common understanding regarding the scope of the potential complaint with the parties involved within a reasonable timeframe having regard to factors including:

- the number of parties involved;
  - foreseeable conflicting positions on the attribution of liability; and
  - the extent to which the facts are contested;
- b. the prospect of achieving procedural efficiencies having regard to progress made during the settlement discussions and the provision of confidential documents by the parties;
  - c. whether a party has disclosed confidential information or documents without the Commission’s written authorisation;
  - d. the possibility of setting a precedent;
  - e. whether a party distorts or destroys evidence relevant to establishing a contravention or any part of it or to the calculation of the applicable fine.<sup>2</sup>

**5. Confidentiality**

- (i) Parties to the settlement discussions may not disclose the contents of the discussions or of any documents and information which they had access

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<sup>2</sup> Distortion or destruction of evidence constitutes an aggravating factor when assessing the fine to be imposed on a party.

to during the settlement discussions, unless otherwise agreed by parties.

- (ii) If a party discloses confidential information or documents without the other party's consent, either party may discontinue the settlement discussions.
- (iii) The Commission will strictly adhere to confidentiality as stipulated in paragraph 5 of the Administrative and Procedural Guidelines.

## **6. Initiating proceedings**

- (i) The Commission may initiate settlement discussions at any time before the Board makes a decision at any of the following stages:
  - a. When a party, upon receipt of a Notice of Investigation (NOI), expresses its interest to settle in writing. The response by the party shall not be construed as an admission of liability or
  - b. On its own initiative, at any time during the investigation but before the board decision.

## **7. Settlement discussions**

- (i) Once the Commission has decided to initiate settlement discussions, it will engage the parties to the settlement discussions.
- (ii) Settlement discussions with each enterprise may not exceed 30 working days. The Commission retains the discretion to extend the duration of these discussions.
- (iii) Having regard to the progress made during the settlement discussions, the Commission must determine matters including :
  - a. the order and sequence of the discussions;
  - b. the timing of the disclosure of information, including the evidence in the Commission's possession used to establish the envisaged objections and the potential fine.
- (v) The parties must disclose information and documents in a timely manner and as directed by the Commission during settlement discussions.
- (vi) Early disclosure by the parties will enable them:
  - a. To be informed of the essential elements being considered at each stage, such as:
    - the facts alleged;

- the classification of those facts;
- the gravity of the alleged contravention;
- the duration of the alleged conduct;
- the attribution of liability;
- an estimation of the range of possible fines;
- the evidence used to establish the alleged contravention.

- b. To effectively assert their views on the alleged complaints against them; and
- c. To make an informed decision on whether or not to settle with the Commission.

(vii) The Commission will request a party to submit its settlement submissions to the Commission:

- a. Once the Commission has formed its preliminary view on the procedural efficiencies likely to be achieved by engaging in settlement proceedings; and
- b. Once the parties to the settlement proceedings and the Commission have a common understanding regarding:

- the scope of the alleged complaints; and

- the estimation of the range of possible fines to be imposed by the Commission,

### **8. Preliminary settlement report and reply**

- (i) At the conclusion of the settlement discussions, the Commission will issue a preliminary report detailing the discussions, submissions and agreed settlement.
- (ii) The Commission will submit the report to the parties participating in the settlement discussions for confirmation.
- (iii) The party to the settlement discussion must make submission to the Commission, if any, within 30 days from date of receiving the Commission's preliminary settlement report.
- (iv) The Commission will consider the submissions made by a party to the preliminary settlement report to determine whether or not to amend the Commission's findings before making a final decision.

### **9. Commission decision and settlement**

**reward**

- (i) Once the parties to the settlement discussions have confirmed that the Commission's final report and findings corresponds to the contents of their settlement submissions and confirmed their commitment to settle, the Commission shall adopt the final decision and present it to the Board for their Ratification.