



**COMPETITION AND CONSUMER PROTECTION
COMMISSION**

GUIDELINES FOR ADMINISTRATION OF FINES:

**OUTLINING PRINCIPLES AND PRACTICES FOR
ADMINISTRATION OF FINES UNDER THE
COMPETITION AND CONSUMER PROTECTION
ACT, NO. 24 OF 2010**

2019

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POLICY OBJECTIVE

The policy objectives of these Guidelines for the Administration of Fines (CCPC Fines Guidelines) are to;

- a. Impose fines 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 and Consumer Protection Act No.24 of 2010 (“the Act”).
- c. Provide for consistency, fairness and certainty in the imposition of fines.

PREAMBLE

These Guidelines are issued subject to the Act and the Competition and Consumer Protection (General) Regulation No. 97 of 2011 (the Regulations) made there under and shall apply to the extent that they are not inconsistent with both the Act and the Regulations.

The Competition and Consumer Protection Commission (the Commission) in accordance

with Section 84 of the Act is mandated to issue Guidelines with respect to the effective implementation of provisions of the Act. Specifically, Section 84 (1) of the Act states that-

(1) In the exercise of its functions under this Act, the Commission may make such guidelines as are necessary for the better carrying out of the provisions of this Act.

These Guidelines are hereby established to set forth the manner in which appropriate fines to be imposed by the Commission will be determined.

Imposition of fines are administrative actions taken by the Commission to address a violation of the Act. This document describes the principles that the Commission will follow in imposing administrative fines.

Pursuant to Section 86 of the Act, a fine payable under this Act shall be a debt due to the state.

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 their commercial activities may be affected by the Act or these Guidelines may wish to seek legal advice.

PART I

INTRODUCTION

1. Citation

Short Title	These Guidelines may be cited as the Competition and Consumer Protection Commission Guidelines for Administration of Fines 2019 (CCPC Fines Guidelines) and shall come into force on the date of their publication pursuant to section 84(2) of the Competition and Consumer Protection Act, No. 24 of 2010 ('the Act').
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1.2 Definitions

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

1.3 Basis of Fine

- (i) Fines are calculated based on the turnover of an enterprise(s) that violates the Act. Turnover has been defined under the Act. The turnover to be considered in the calculation of any administrative fines considered in this Guideline will be the latest audited gross sales of an enterprise. For the avoidance of doubt the latest audited gross sales of an enterprise are limited to the immediate preceding year to the year in which the investigation started. If the immediate preceding latest audited gross sales of an enterprise are not available, the Commission will use the latest audited gross sales of an enterprise after the immediate preceding year to the year the investigation started¹.

¹ For example, if the Commission instigated an investigation against an enterprise in 2017, the latest gross sales considered in calculating the fine would be those of 2016, which is the latest preceding year's sales. However, if the

1.4 Aggravating and Mitigating Factors

In assessing the amount of financial fine(s) to be imposed, the Commission will consider the aggravating and mitigating factors for any case. The aggravating and mitigating factors to be considered are outlined below:

Mitigating and aggravating factors can lead to an increase or reduction in the fine. The Commission will be fair, equitable and consistent in the application of mitigating and aggravating factors.

1.4.1 The aggravating factors may include but not be limited to:

- (a) *The role of the enterprise as a leader in, or an instigator of the infringement;*

2016 books are not available, the 2017 books will be used and if not, then 2018 and so forth.

- (b) *The involvement in or awareness of the infringing conduct by directors and senior management as defined in the organogram of the party under investigation, who knew or ought to reasonably have known that the conduct in issue constituted anti-competitive behavior.*
- (c) *The retaliatory or other coercive measures taken against other enterprises including leniency applicants aimed at ensuring the continuation of the violation;*
- (d) *The repeated violation (i.e. having previously violated the same provision of the Act) by the same enterprise or its branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them.*
- (e) *The prevalence of the alleged offence, i.e. whether the conduct is widespread and the application of a sanction is likely to have a wide deterrent effect;*
- (f) *Whether the alleged offender has demonstrated resistance by being*

obstructive or defiant towards the Commission ;

- (g) *The number of years the offender has been engaged in the prohibited conduct;*

1.4.2 Mitigating factors may include but not be limited to:

- (a) *The 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 speedily;*

- (e) *Termination of the violation as soon as the Commission intervenes.*
- (f) *Several offences that occur at the same time /period and reviewed by the Board together will account as one strike or one action.*

1.5 Offences punishable by Administrative fines under the Act

Administrative fines are financial penalties that the Commission has discretion to impose on persons or enterprises that violate the Act. Offences subject to administrative fines under the Act include Section 9, Section 10, Section 16, Section 21, Section 37, Section 46, Section 47, Section 48, Section 51, Section 55, Section 58 and any other such provisions. These provide for offences punishable by administrative financial penalties to be imposed by the Commission without prior recourse to any court or arbiter. However, for Section 49(2), Section 50 and Section 52 of the Act or any other such provisions are subject to recourse to the courts or arbiter.

1.6 Procedure on imposing an administrative fine and date of payment

- (i) When the Commission makes an order imposing an administrative fine 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 fine is required to be paid.

PART II

DETERMINATION OF ADMINISTRATIVE FINES

2.1 Administrative Fines under Part VII of the Act

Part VII of the Act provides for both criminal and civil cases. For the purposes of civil cases, treatment and imposition of an administrative fine will depend on whether the offence relates to product safety or not.

- (i) The following steps below are followed in determining the fine:

Step One

- (ii) The starting point of a financial fine will be a fine of not less than 0.5% of annual turnover for first time offenders.
- (iii) The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.

Step Two

- (iv) Thereafter, the Commission will be adding a 10% of the fine determined in step one above for each aggravating factor listed in clause 1.4.1 above.
- (v) For the avoidance of doubt for example, the fact that an offence has been repeated is an aggravating factor. To account for this, the determined fine in step one will have an additional fine equivalent to 10% of the immediate previous fine of the Respondent for the same provision.

Step Three

- (vi) The percentage fine determined in step two above may thereafter be adjusted taking into consideration the mitigating factors listed in clause 1.4.2 above.
- (vii) The fine determined in step three above shall not exceed the statutory limit which is 10% of the annual turnover and shall not be below 0.5% of the annual turnover.

Step Four

- (viii) The Final percentage fine determined in step three above will thereafter be applied on the annual turnover of an enterprise.

Step Five

- (ix) The absolute value of the fine determined in four above will not exceed the caps determined in annex 1. Where the absolute value of the fine exceeds the cap, the cap will apply.

ADMINISTRATIVE FINES UNDER PART III AND IV OF THE ACT

2.2 Restrictive Business Practice – Rule of Reason cases

Administrative fines for the violation of Section 8 cases are provided for in Section 58(3) and are applicable retrospectively. The said provision states that, *“the Commission may, in relation to a restrictive agreement referred to under subsection (1), in addition to, or instead of, giving a direction, make an order imposing a financial fine on the enterprise not exceeding ten percent of that enterprise’s annual turnover during the period of the breach of the prohibition up to a maximum period of five years.”*

2.3 Abuse of Dominance Cases

Abuse of Dominance cases are a unilateral conduct and determined under the rule of reason approach. Appropriate administrative fines will depend on the steps shown below and table 1 below.

2.4 Mergers - PART IV Cases

For cases relating to mergers, offences committed are punishable under Section 37 of the Act.

- (i) When considering the appropriate turnover in the case of a merger consummated without approval or a merger rejected by the Commission, annual turnovers of all the parties to the merger prior to consummation will be taken into consideration.
- (ii) When considering the appropriate turnover of an enterprise that fails to comply with conditions or with undertakings given as a condition for a merger approval, annual turnover of the merged entity will be taken into consideration.

2.5 Restrictive Business Practice – Per Se offences

Section 9 and 10 provide for *per se* offences. Ordinarily, fines imposed on these cases will be higher than the fines imposed on the rule of reason cases.

2.6 Cartels – Section 9

- (i) Cartels are a per se violation and generally considered to be the most egregious competition cases.
- (ii) The years under investigation can go back as far as the Commission may deem fit.
- (iii) The years under investigation will not be limited to the immediate past 5 years.
- (iv) For purposes of imposing a fine, this period will be limited to a continuous period of 5 years. In the event the conduct extends beyond 5 years the administrative fine to be imposed will be restricted to five years.

2.7 Resale Price Maintenance – Section 10

- i. Resale Price Maintenance cases constitute per se violations.
- ii. The following steps will be followed in the determination of fines under Part III and IV of the Act:

Step One:

The starting point of each financial penalty will be the base which is different from offences under part

VII of the Act. The base for competition cases for the different violations is as follows:

Table 1

Violation	Base Fine
Rule of Reason Cases	
Restrictive Business Agreements (Section 8 of the Act)	2%
Abuse of Dominance (Section 16 of the Act)	3%
Mergers (Section 37(a) of the Act)	1% with a cap of 1,000,000 fee units
Mergers (Section 37(b) and 37(c) of the Act)	3%
Per se Offences	
Cartels (Section 9 of the Act)	7%
Resale Price Maintenance (Section 10 of the Act)	7%

The starting point of a financial fine for a repeat offender will be the previous fine charged by the Commission.

Step Two

In this step, the base fine determined in step one above will be adjusted taking into account the aggravating and mitigating factors under 1.4.1 and 1.4.2.

Step three: Statutory Limit

The Commission will ensure that the fine determined in step two above does not exceed the statutory requirement of 10 percent of the annual turnover. In this regard, if the calculated percentage from the above steps exceeds 10 percent, the Commission will impose a maximum fine of 10 percent of the infringing enterprise's annual turnover.

Step three is the last step for violations relating to abuse of dominance and mergers such that the fine determined in this step will be multiplied with the latest turnover of an enterprise.

Step Four: Adjustment for Leniency Application/ Consideration.

In cases where the leniency program applies as stipulated in the document, the fine from step three will be adjusted to consider Leniency applications. This implies that the calculated fine from the above steps may be reduced further if the applicant qualifies for partial immunity in the case of cartels.

The fine determined from the above steps will not be above 10% but maybe below the base fine depending on the aggravating and mitigating factors on a case by case basis.

Further, for offences relating to Sections 8, 9 and 10, the next step will be step five.

Step Five: Further consideration for the duration of the infringement for violations of Sections 8, 9 and 10

For violations of Sections 8, 9 and 10, the imposition of a fine will not be restricted to only one year of the period of the infringement but will in particular cover the period of the breach up to a maximum of 5 years.

In the calculation of an appropriate financial penalty, each year of breach will have an

appropriate fine levied on the corresponding turnover of the Respondent enterprise. Table 2 below provides an illustration of the application of the administrative fine retrospectively.

Table 2: Fine application

Yr1	Yr2	Yr3	Yr4	Yr5
P%	P%	P%	P%	P%

The same can also be expressed as follows, Applicable fine “**Total Fine = P% multiplied by (Yr1+Yr2+Yr3+Yr4+Yr5)**”

Where:

- P% is the fine determined using the above steps under competition
- Yr1, Yr2, Yr3, Yr4 and Yr5 are the annual turnovers of each year when the conduct was in effect.

The percentage (P%) will be applied to the turnovers of the considered years up to a maximum of five preceding years. For the avoidance of doubt, the years that the Commission will consider for the purposes of imposing an administrative fine will be those covered under an investigation.

In the event the breach perpetuated exceeds the 5 year limit provided by the Act, for example, 10

years, the fine applicable will only apply to 5 years of those 10 years. The fact that the breach was going on for a much longer period, will be used as an aggravating factor in the consideration of the fines.

Annex 1

Table 3: Determination of Fines for offences under Part VII of the Act

Offence	Starting Fine	Maximum Fine in Fee units
Unfair trading practice	0.5% of turnover	• 3,333.33 for turnover upto 166,666.67
False or misleading representation		
Price Display		• 33,333.33 for turnover above 166,666.67 upto
Supply of defective and unsuitable goods and services		

(Section 49) except for Section 49(2)		<p>833,333.33</p> <ul style="list-style-type: none"> • 133,333.33 for turnover above 833,333.33 upto 1,666,666.67 • 233,333.33 for turnover above 1,666,666.67 upto 5,000,000 • 500,000 for turnover above 5,000,000 upto 10,000,000 • 666,666.67 for turnover above 10,000,000
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		<p>upto 16,666,666.7</p> <ul style="list-style-type: none"> • 1,666,66.67 for turnover above 16,666,666.7
Display of Disclaimer	of 0.5% of turnover	of 100,000