



## **INTRODUCTION**

The Competition Act is a statute which aims at protecting consumer rights as well as ensuring a robust market through the protection and promotion of competition in Kenya. In doing so, this statute lists a number of offences which can be perpetrated by both persons (natural and corporate) that would prevent, distort or otherwise lessen competition.

In particular, the Act lists the following prohibitions:

- (a) Restrictive Agreements, Practices and Decision including price fixing, cartel conduct, collusive tendering etc;
- (b) Restrictive practices by trade associations;
- (c) Abuse of dominant position by an undertaking including imposition of unfair trading conditions, application of dissimilar conditions to equivalent transactions.
- (d) Abuse of buyer power. [Read more on this here.](#)
- (e) Unlawful mergers and take-overs;

So what happens on infringement of the law? The Competition Authority is mandated to promote and enforce the Competition Act. This it does by investigating complaints, investigating illegal conduct and generally overseeing the implementation of the Act. To undertake this, the Act gives the Authority power to:

- Investigate through summons and taking of statements;
- To conduct an entry and search of premises as deemed necessary during investigations;
- Take evidence- including taking evidence on oath or affirmation; and
- Conduct hearings

Upon conclusion of the investigations, the Authority may decide to mete out financial penalties or administrative actions including prosecution. The Authority, upon concluding its investigation may either impose financial and/or non-financial remedies.

The non-financial remedies include:

- a. Declaration that the conduct to constitute an infringement of the Act;
- b. restraining the undertaking from engaging in the problematic conduct;
- c. directing any action to be taken by the undertaking(s) to remedy or reverse the infringement or the effects thereof; or
- d. recommending prosecution; or
- e. any other appropriate remedy.

### **FINANCIAL REMEDIES**

- a. imposing a financial penalty of up to 10% of the immediately preceding year's gross annual turnover in Kenya.

Financial remedies under the Act are listed as follows:

<b>Restricted/ Prohibited Conduct</b>	<b>Maximum Penalty</b>
Restrictive Trade Practices	Up to 10% of the preceding year's turnover
Mergers Implemented Without Approval	Up to 10% of the preceding year's turnover of the undertaking(s).
Abuse of Buyer Power and Consumer Welfare	Up to 10% of the preceding year's turnover
Submission of Materially Incorrect Information or Non-Compliance with Merger Approval Conditions:	Up to 10% of the preceding year's turnover

This Article will delve more into the Financial Remedies as the consolidate guidelines were published to bring light and transparency in how the penalties are calculated.

In determining the financial penalty, the Authority considers the specific facts and circumstances of each case, along with any representations made by the involved undertakings and other interested parties. This ensures a fair and tailored approach to enforcement in accordance with the law. In calculating the percentage to be imposed, the Authority adjusts the Base Percentage (this is the starting point as prescribed by law) against 'Aggravating Factors' and 'Mitigating Factors'.

## 1. Aggravating Factors.

Aggravating factors play a significant role in determining the severity of penalties for violations under the Competition Act. These factors are crucial considerations for the Competition Authority of Kenya when assessing the appropriate level of financial penalties. Here's a breakdown of the key aggravating factors:

- a) Impact of the contravention: The Authority evaluates the impact of the violation on competition, assessing whether it substantially lessened competition or restricted trade. Depending on the severity of the impact, a score is assigned accordingly.
- b) Duration of the conduct: This refers to the timeframe during which the anticompetitive behavior occurred. The longer the duration, the higher the severity score.
- c) Coverage: This factor examines the spread of the conduct within the market, considering the presence and significance of the undertaking(s) in the national economy.
- d) Recidivism: The Authority takes into account whether the undertaking has previously violated the Act, particularly for substantially similar conduct. Repeat offenders face higher penalty scores.
- e) Public interest concerns: The Authority considers if the contravention negatively impacted various aspects such as employment, access to markets for MSMEs, competitiveness of national industries in international markets, and specific industrial sectors or regions.
- f) The nature of the contravention: The Authority will consider whether the contravention relates to false and misleading representations, unconscionable conduct, unsuitable goods, unsafe and defective goods
- g) Severity of the violation.

## 2. Mitigating Factors

To mitigate against the foregoing and therefore decrease the financial penalty, the Authority considers the following *Mitigating Factors*:

- a) Cooperation: Cooperation is valued as it enhances the effectiveness of the Authority's enforcement actions. This includes actions such as admitting liability, disclosing additional evidence, providing commitments, and adhering to timelines.
- b) First-time Offender: The Authority may consider leniency for first-time offenders who have not previously been subject to enforcement action under the Act, resulting in a score of -2%.
- c) Public Interest and Justifications on Efficiency and Consumer Benefits: Consideration is given to public interest concerns such as preserving failing firms, preventing job losses, and promoting consumer benefits through efficiency justifications.
- d) Other Mitigating Factors: Parties may present additional mitigating factors for consideration, such as unique industry circumstances or remedial actions taken.

## SETTLEMENT & LENIENCY

### Settlement

Section 38 of the Act grants the Authority the discretion to engage in settlement agreements with undertakings involved in alleged infringements, at any time- during or after investigations. Such settlements may include pecuniary penalties. Settlement negotiations are tailored to each case and guided by constitutional provisions, the Act, principles of fair administrative action, and the Competition

(General) Rules, 2019.

According to Rule 41(3) of the Competition (General) Rules, 2019, the ninety-day settlement period begins upon the Authority's written consent to initiate settlement negotiations. If mandated by a court or tribunal, this period commences upon the court or tribunal's approval.

Undertakings seeking settlement must submit a detailed proposal to the Authority within 14 days of receiving consent. Within seven days, the Authority responds to the settlement request and provides a counter-proposal within 14 days thereafter. Negotiations follow, guided by principles of expediency and good faith, with a roadmap prepared by the Authority and agreed upon timelines.

If the 90-day period lapses without agreement, a written request for a 30-day extension must be submitted before expiry. Pursuant to Rule 41(4), this extension starts the day after the 90th day.

Upon successful negotiation, a binding settlement agreement is executed. If negotiations fail, parties are notified in writing.

### **Leniency**

An undertaking may make an application for leniency under the Leniency Programme Guidelines. The circumstances for such an application are:

- When the Authority has no knowledge of the contravention; or
- When the Authority has knowledge of the contravention but lacks sufficient information to start an investigation; or
- When the Authority has commenced investigations but requires additional evidence to penalize the offenders.

Eligible applicants are awarded leniency as follows:

First through the door applicant	Will be granted 100% percent reduction in penalties
Second through the door	applicant may be granted up to 50% percent reduction in penalties
Third through the door	may be granted up to 30% percent reduction in penalties
Any subsequent applicant who approaches the Authority before investigations are completed and provides useful information that significantly contributes to success of the investigations	may be given up to 20% percent reduction in penalties

Where an undertaking applies to the Authority for leniency but is not granted permanent leniency or

where conditional leniency is revoked, the undertaking may apply for settlement pursuant to section 38 of the Act.

## **CONCLUSION**

In navigating the landscape of competition law in Kenya, businesses must prioritize understanding and compliance with the Competition Act. By proactively embracing compliance measures, companies not only mitigate the risk of financial repercussions but also cultivate a positive reputation and solidify their standing in the marketplace.

At CM Advocates, we offer a wealth of experience and expertise in competition law matters. Our dedicated team is committed to assisting businesses in navigating the intricacies of the Competition Act, from initial investigations to settlement negotiations and beyond.

By partnering with CM Advocates, businesses can access comprehensive support tailored to their unique needs, ultimately safeguarding their interests and mitigating potential risks in the ever-evolving landscape of competition law enforcement in Kenya.

## **HOW WE CAN HELP?**

The Corporate and Commercial Business Unit at CM Advocates LLP is well versed in matters relating to Competition Law. Our expertise extends to various facets, including advisory services on compliance with competition regulations as well as conducting comprehensive audits to assess adherence to Competition Law. Should you have any questions regarding employment or labour law, please do not hesitate to contact: **Victorine Rotich** on [vrotich@cmadvocates.com](mailto:vrotich@cmadvocates.com) or **Maureen Njenga** on [mnjenga@cmadvocates.com](mailto:mnjenga@cmadvocates.com)



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