



Namibian Competition Commission

Enforcement, Exemptions & Cartels Guidelines on Settlement Procedures and Pecuniary Penalty Determination

08 February 2023

TABLE OF CONTENTS

1. Interpretation2

2. Introduction2

3. Scope.....2

4. Objectives2

5. The Principle of Settlement Negotiations3

6. Schematic Section 40 Process4

7. The Principle of Penalty Determination5

8. Methodology of Calculating a Pecuniary Penalty.....5

9. Conclusion.....7

1. Interpretation

In these guidelines, unless the context otherwise indicates, the words defined under Section 1 of the Competition Act, 2003 (Act No. 2 of 2003) (“the Act”) shall carry the same meaning as defined therein.

2. Introduction

These guidelines set out the Namibian Competition Commission’s (“the Commission”) procedure for pursuing settlements as provided for in terms of section 40 of the Act. Settlements are crucial to effective enforcement, and increases procedural efficiency, thus reducing time and financial resources spent on proceedings, hence the commission deems it necessary to provide the guidance contained herein.

In addition, these guidelines set out the methodology for the determination of appropriate pecuniary penalties, when the Commission and concerned parties are engaged in settlement negotiations, in accordance with section 53 of the Act.

3. Scope

These guidelines address fundamental areas of enforcement such as; the determination of appropriate pecuniary penalties to be imposed when settling matters in terms of Chapter 3 of the Act, specifically Part I and Part II prohibitions. These guidelines provide a basis upon which the Commission relies on for developing of consent agreements and submitting same to Court for confirmation (relating to contraventions as stipulated under Chapter 3 of the Act) as orders of the Court.

Applicable principles and methods used by authorities in other jurisdictions (i.e. United Kingdom, European Commission, South Africa, Kenya) pertaining to settlement negotiations and the computation of pecuniary penalties, have been considered in developing these guidelines.

These Guidelines are however not a substitute of the Act, and any interpretation and application should be done in accordance with relevant provision in the Act and the rules made thereunder.

4. Objectives

These guidelines are aimed at achieving the following:

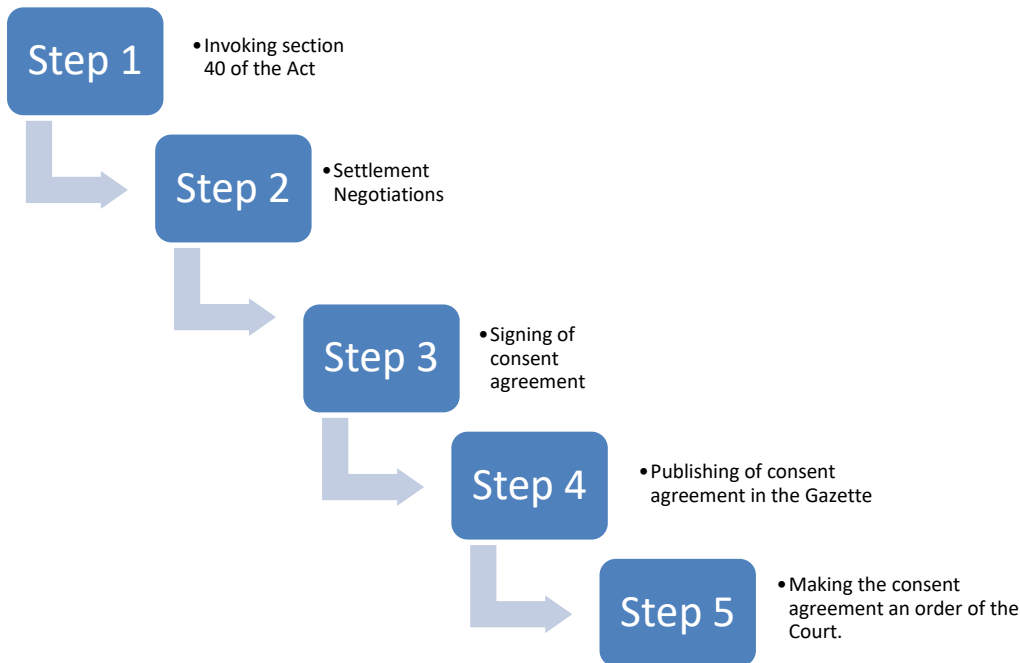
- i. Promote transparency of the approach to settlement negotiations;
- ii. Promote transparency of the methodology applied in determining pecuniary penalties for settlement purposes;
- iii. Inform stakeholders on the Commission’s settlement approach;
- iv. Guide concerned parties in settlement negotiations with the Commission.

5. The Principle of Settlement Negotiations

Area	Relevant Provisions/Requirements/Steps taken
Conduct	
Part I Prohibition	Part I of Chapter 3 of the Act (section 23) prohibits agreements between parties in vertical or horizontal relationships, concerted practices or decisions by association of undertakings that by effect or object, prevent or substantially lessen competition.
Part II Prohibition	Part II of Chapter 3 of the Act (section 26) prohibits conduct that amounts to an abuse of a dominant position in Namibia or part of Namibia.
Settlement	
Consent Agreement	Section 40 of the Act provides that the Commission may at any time during or after an investigation into alleged infringement of the Part I or the Part II prohibition, enter into an agreement of settlement with parties concerned, setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court.
Offer of Settlement	<p>To invoke section 40 of the Act, concerned parties must make an offer of settlement to the Commission with proposed settlement terms, covering the following:</p> <ol style="list-style-type: none"> i. Admission of liability; ii. Cessation of conduct & Compliance programme; and iii. A proposal on pecuniary penalty. <p>Upon receipt of settlement offer, the Commission may accept the offer or reject the offer by way of making a negotiable counteroffer.</p> <p>If possible, the Commission may also agree with the concerned party that, the Commission drafts the settlement offer with terms for the concerned party's consideration.</p> <p>The Commission's offer or counteroffer is given without prejudice, and remains as such, unless reduced to writing and signed by the Commission.</p>
Settlement Negotiations	Where the Commission made an offer of settlement or has made a counteroffer after a settlement offer is made, the Commission and the concerned party may enter into settlement negotiations on the terms proposed in the initial offer or counteroffer.
Conclusion of Settlement Negotiations	The Commission usually allows for a settlement negotiation of 30 calendar days, which can be extended upon request by either party. The negotiations are considered concluded if terminated

	by the Commission when no settlement is reached, or upon signing of the consent agreement by both parties after reaching settlement.
Signing of Consent Agreement	After reaching settlement, the Commission will prepare a draft consent agreement and submit same to the concerned party for input (if any). After consideration of any inputs and reaching a consensus, the Commission and the party will proceed to sign the consent agreement. The Commission will thereafter make an application to Court for the confirmation of the consent agreement as an order of the Court.
Confirmation of Consent Agreement as a Court Order	Section 40 (3) provides that after hearing a motion for confirmation of a consent agreement as an order of the Court, the Court may: <ul style="list-style-type: none"> i. make the order as agreed to and proposed by the Commission and the party concerned; ii. indicate any changes that must be made in the proposed draft order before it will make the order; or iii. refuse to make the order.
Publication of Consent Agreement	Section 41 provides that the Commission must cause notice to be given in the Gazette of any consent agreement referred to in section 40 to be submitted to the Court for confirmation as an order of the Court.

6. Schematic Section 40 Process



7. The Principle of Penalty Determination

Settlement Pecuniary Penalties	
Pecuniary Penalty Determination	<p>In determining the pecuniary penalty or what the Commission considers is an appropriate settlement amount, the Commission uses the provisions of section 53 of the Act, which provides that; in determining an appropriate penalty, the Court must have regard to all relevant matters concerning the contravention, including:</p> <ol style="list-style-type: none"> i. the nature, duration, gravity and extent thereof; ii. the nature and extent of any loss or damage suffered by any person as a result thereof; iii. the behaviour of any undertaking involved; iv. the market circumstances in which it took place; v. the level of profit derived therefrom; vi. the degree to which the undertaking involved has co-operated with the Commission and the Court; and vii. whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of this Act.
Maximum Penalty	<p>Section 53 (2) provides that; the pecuniary penalty amount must not exceed 10 per cent of the global turnover of the undertaking during its preceding financial year.</p>

8. Methodology of Calculating a Pecuniary Penalty

Imposing an appropriate penalty is done through the following steps:

i. Starting Point

Section 53 of the Act caps pecuniary penalties to not more than 10 per cent of the undertaking(s) turnover of the preceding financial year. Thus, settling parties are advised to submit their latest audited financial statements (“AFS”) which will be used by the Commission in determining an appropriate and reasonable settlement amount. The focus is on turnover, however, the Commission may consider other factors as far as the party’s financial position is concerned, such as *inter alia*; net profit levels, liabilities, assets, accounts receivable and accounts payable.

ii. Section 53 Factors

In calculating the appropriate penalty, the Commission lists the elements presented under section 53 of the Act, considering the nature of the contravention and mitigating factors of the case at hand. These makes up the methodologies used by the Commission, which as follow:

iii. Assessment of Fines

Nature of conduct: the first assessment is categorising the conduct in question, whether it is an agreement between parties in a horizontal relationship/a decision by an association of undertakings in a horizontal relationship, an abuse of dominance or vertical agreements. The conduct is then assigned a percentage accordingly.

Duration: this is then assessed, in terms of how long the undertaking has been engaged in the conduct that is subject to the investigation.

Behaviour/co-operation: the undertaking is assessed for its behaviour or cooperation throughout the Commission's investigation. Things such as submission of information as requested or within the required timeframe, refusal to respond to requests for information, will be considered as non-co-operative or obstructing the investigation. 1.5% will be added for an undertaking that has refused to cooperate or for obstructive behaviour.

An additional 1.5% will be allocated for **repeated offenders**.

Market concentration is measured in terms of the Herfindahl-Hirschman Index (HHI). The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. A market with an HHI less than 1,500 is considered a competitive marketplace, an HHI of 1,500 to 2,500 is moderately concentrated, and an HHI of 2,500 or greater is highly concentrated. As such, 1% will be added for highly concentrated market of more than 2,500 HHI and 0.5% for the moderately concentrated market.

Profit derived: from activities from the conduct that is the subject of the investigation will attract 1% if it is more than N\$500,000 and 0.5% if it is between N\$100,000 to N\$500,000.

Other mitigating factors: the Commission may also consider other mitigating factors such as the ability to pay as well as whether the undertaking concerned is the instigator/initiator/market leader. In considering ability to pay, the Commission may reduce the settlement amount or consider more favourable payment terms.

FACTORS	SCORE
Nature of conduct	
Horizontal Agreements including decisions by an association of undertakings	2.5
Unilateral conduct (abuse of dominance)	1.5
Vertical Agreements	1
Duration	
More than 10 years	2.5
From 5 to 10 years	1.5
Less than 5 years	1
Behaviour/Co-operation	
Resistant/obstructing investigation	+1.5
Repeated offender	+1.5
Market Circumstance (HHI)	
Over 2500	+1
1500-2500	+0.5
Profit derived (in the preceding financial year/year before conduct ceased)	
More than 500,000	+1
From 100,000 to 500,000	+0.5

9. Conclusion

These Guidelines present the approach that the Commission follows in settlement negotiations as well as in determining an appropriate penalty for purposes of settlement negotiations. These Guidelines are not cast in stone; thus, the Commission may apply these guidelines in a flexible manner. In addition, these guidelines should not affect the discretion of the Commission in adopting a unique approach to certain settlement negotiation should need be. These guidelines will be applicable to all future settlement negotiations.