

Key Insights: Consolidated Settlement Guidelines on Administrative Remedies and Settlement

1. Background

The Competition Act, 2015 (**Act**) mandates the Competition Authority of Kenya (the **Authority**) to carry out investigations on alleged anti-competitive conduct either on its own initiative or upon receipt of a complaint. Following investigations, the Authority may impose administrative penalties including among others, a financial penalty of up to ten percent (10%) of the gross annual turnover in Kenya of the business under investigation.

The Act also mandates the Authority to enter into settlement agreements with the undertaking or undertakings concerned at any time, during or after an investigation.

The Competition Authority of Kenya (**Authority**) recently issued the [Consolidated Administrative Remedies and Settlement Guidelines](#) (**Consolidated Settlement Guidelines**) outlining the Authority's approach to administrative remedies and settlements for violations of the Act.

Prior to the publication of the Consolidated Settlement Guidelines, the Authority relied on various guidelines including the Fining and Settlement Guidelines, 2018, Administrative Remedies Guidelines for Consumer Protection, 2017 and the Competition Administrative Penalties and Settlement Guidelines, 2020. The Consolidated Settlement Guidelines, which supersede and consolidate the previous versions, therefore aim to ensure consistency, certainty, and transparency in the assessment of penalties.

However, as the Consolidated Settlement Guidelines do not have the force of law, they complement but are not a substitute for the Act and Competition (General) Rules, 2019.

2. Notable Provisions

We have summarised notable provisions of the Consolidated Settlement Guidelines below:

- (a) **Sanctions** – pursuant to an investigation, the Authority may impose financial or non-financial sanctions. It may also enter into a settlement agreement whose terms may contain financial or non-financial sanctions or a combination of both.
- (b) **Calculation of financial penalties** - the financial penalty is determined based on

the preceding year's gross annual turnover of the undertaking, with a standard base percentage of 10% applied by the Authority. The Authority may adjust this base percentage considering aggravating factors such as the nature and impact of the contravention, duration, coverage, refusal to cooperate, recidivism, and public interest concerns. Conversely, mitigating factors like cooperation with the Authority, inadvertent breach, being a first-time offender, efficiency justifications, consumer benefits, and the value of goods/services may also influence the penalty. These factors vary depending on the offence in question i.e. whether it is in relation to restrictive trade practices and control of mergers, abuse of buyer power or violations under consumer welfare.

The ultimate financial penalty is determined by adding the base percentage with the predetermined percentages assigned to each aggravating factor and thereafter subtracting the percentages attributed to each mitigating factor provided that the maximum penalty does not exceed the 10% statutory cap.

- (c) **Settlement process** – parties interested in the settlement process should notify the Authority, which will decide within seven days if it is open to the settlement. Upon the Authority's consent, the parties have 14 days to submit a settlement proposal. The Authority will then outline a roadmap with timelines for the settlement negotiations, incorporating feedback from the parties, who must adhere to

these agreed-upon timelines during their negotiations.

- (d) **Settlement by leniency applicants** – an undertaking that has applied for leniency (under the Leniency Program Consolidated Settlement Guidelines) cannot apply for settlement unless the application has been revoked, rejected by the Authority, or withdrawn.
- (e) **Settlement negotiations between parties in cases of abuse of buyer power** - in cases of abuse of buyer power, the Authority is open to facilitating settlement negotiations between parties under its supervision and approval. Buyers and suppliers willing to negotiate to settle issues like delayed payments are granted a four-month period, with a possible one-month extension, to present a reasonable settlement plan. If parties fail to agree within this timeline, the Authority will review and may recommend or require revisions to the settlement terms. Should negotiations fail, the Authority reserves the right to conclude investigations and make a final determination.
- (f) **Payment of penalties in instalments** - the Authority may permit undertakings to pay penalties in installments, with the frequency to be mutually agreed upon on a case-by-case basis. In this case, the undertaking must demonstrate that paying the penalty in one lump sum would severely jeopardize its economic viability and ability to sustain trading operations.
- (g) **Transition** - investigations or proceedings initiated before the Consolidated Settlement Guidelines'

introduction will be treated or continued under the Consolidated Settlement Guidelines with necessary modifications applied.

3. Conclusion

The Consolidated Settlement Guidelines mark a significant step forward in the country's competition law framework. They offer clarity and predictability in the assessment of penalties and the settlement

process and while they do not have the force of law, they serve as a valuable tool for businesses to understand their obligations and navigate the regulatory landscape effectively.

Please feel free to reach out to us should you require any further information or clarification on the contents of this note.



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