



CARICOM COMPETITION COMMISSION

GUIDELINES FOR SETTING FINES FOR ANTI-COMPETITIVE BUSINESS CONDUCT

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1. INTRODUCTION

- 1.1 Article 174.4(d) of the Revised Treaty of Chaguaramas (“the Treaty”) bestows unto the CARICOM Competition Commission (“the Commission”) the power to impose fines on any undertaking that engages in anti-competitive behaviour, either intentionally or negligently, as defined in Article 177 of the Treaty. These Guidelines describes the approach of the Commission to calculating these financial penalties.
- 1.2 The Guidelines are not a substitute for the Treaty. They may be revised from time to time, should the need arise. In applying these guidelines, the facts and circumstances of each case will be considered. Persons in doubt about how they and their commercial activities may be affected by the Treaty may wish to seek legal advice.

2. FINANCIAL PENALTIES

Policy objectives

- 2.1 In imposing any financial penalty, the Commission has the following two objectives:
 - (a) To reflect the seriousness of the infringement; and
 - (b) To deter enterprises from engaging in anti-competitive practices.
- 2.2 The imposition of a financial penalty is discretionary. The Commission may, where appropriate, impose financial penalties in respect of:
 - (a) agreements between enterprises, decisions by associations of enterprises, and concerted practices by enterprises which have as an object or effect the prevention, restriction or distortion of competition within the Community;

- (b) actions by which an enterprise abuses its dominant position within the Community; and
 - (c) any other like conduct by enterprises whose object or effect is to frustrate the benefits expected from the establishment of the CARICOM Single Market and Economy.
- 2.3 The assessment of an appropriate penalty to be imposed for all types of breaches will depend on the facts of each case.

Determining the amount of penalty

- 2.4 A financial penalty imposed by the Commission for prohibited anti-competitive conduct under Article 177 of the Treaty will be calculated taking into consideration the following:
- (a) The seriousness and impact of the infringement;
 - (b) The relevant turnover of the enterprise based on the relevant product and geographical markets affected by the infringement in the last business/financial year;
 - (c) The duration of the infringement;
 - (d) Adjustments to reflect other relevant factors such as deterrent value and any further aggravating or mitigating factors;
 - (e) Not exceeding a maximum of 10% of the net total global revenue of the enterprise in the last business/financial year; and
 - (f) The payment capacity of the entities investigated.

Seriousness and Impact of the Infringement

- 2.5 The base-level amount of financial penalty to be imposed will depend in particular upon the nature of the infringement and how serious and widespread the impact of the infringement is.

- 2.6 In assessing the seriousness of the infringement, the Commission will consider a number of factors including: the nature of the product; the structure and condition of the market; the market(s) of the enterprises involved in the infringement; entry conditions; and the effect on competitors and third parties. The impact and effect of the infringement on the market, direct or indirect, will also be an important consideration.
- 2.7 Horizontal restrictions and forms of abuse of dominant position by offenders in a monopolistic or all but monopolistic position will be qualified as very serious. Examples of very serious infringements are:
- horizontal price agreements;
 - collective vertical price fixing;
 - collective boycotts;
 - horizontal agreements aimed at market sharing and quota schemes (including allocation restrictions and prohibited tendering agreements – ‘bid-rigging’);
 - forms of abuse of a dominant position aimed at driving out or excluding an undertaking from the market
- 2.8 Horizontal schemes (in part or in full), in particular, which cannot be regarded as very serious infringements, are regarded as serious infringements. Forms of abuse of a dominant position, such as discrimination and tied sales, which may not be qualified as very serious infringements, are regarded as serious infringements.
- 2.9 Schemes that distort competition to a limited degree are regarded as less grave infringements. As a rule, vertical schemes will be deemed to be less grave infringements. Also branch schemes that restrict competition, which do not directly have prices and sales opportunities as their object, will be deemed to be less serious infringements.

Determination of the Relevant Turnover

- 2.10 In assessing the impact and effect of the infringement on the market, direct or indirect impact, the Commission will take into consideration, among other things the net relevant turnover (the net value of sale of goods and services in the geographic area concerned) of the enterprise in

the Community for the last complete financial year. The business year, for this purpose, will be the one proceeding the date on which the decision of the Commission is taken, or if figures are not available for that business year, the one immediately preceding it.

- 2.11 Where the enterprise is a group of companies, the Commission will normally consider the relevant turnover to be that of the companies that are active in the geographic market affected by the infringement.
- 2.12 Base-level fines may not in any event exceed 10 percent, of the **relevant turnover** of the infringing enterprise. The percentage used to calculate the base-level fines will depend on the seriousness of the infringement.
- 2.13 Generally, the CARICOM Competition Commission will base the relevant turnover on figures from the audited accounts of an enterprise. However, in the event that it is not possible to delimit the relevant turnover of the infringing enterprise, sanctions of the nominal form will be considered:
 - a) Minor infringements: *USD 15,000 – USD 250,000*
 - b) Serious infringements: *USD 20,000 – USD 600,000*
 - c) Very serious infringements: *USD 50,000 – USD 1,000,000*

Duration of Infringement

- 2.14 The amount of financial penalty to be imposed will also depend on the duration of the infringement. An infringement over a part of the year may be treated as a full year for the purpose of calculating the duration of the infringement.
- 2.15 The base-level fine calculated in 2.12 or determined by the Commission as per 2.13 will be multiplied by the duration of the infringement.

Other Relevant Factors

- 2.16 The amount of financial penalty to be imposed may be determined by the Commission, as appropriate, on a case-by-case basis in order to achieve the policy objectives outlined in 2.1 above.

Aggravating and Mitigating Factors

2.17 In assessing the amount of financial penalty to be imposed, the Commission will consider any aggravating or mitigating factors.

2.18 Aggravating factors include but are not limited to:

- (a) Role of the enterprise as a leader in, or an instigator of, the infringement;
- (b) Involvement in or awareness by directors and senior management;
- (c) Retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the breach;
- (d) Repeated breaches by the same enterprise or other enterprise in the same group;
- (e) Attempts to hide the conduct or deceive consumers or users;
- (f) Refusal to cooperate with the CCC's enforcement process;
- (g) Breaches that are committed intentionally rather than negligently; or
- (h) Retaliatory measures taken or commercial reprisal sought by the enterprise against a leniency applicant.

2.19 Mitigating factors include but are not limited to:

- (a) Role of the enterprise, for example, that the enterprise was acting under duress or pressure;
- (b) Genuine uncertainty on the part of the enterprise as to whether the agreement or conduct constituted a breach;
- (c) Adequate steps taken with a view to ensuring compliance with Article 177 of the Treaty, for example, existence of any effective compliance programme;

- (d) Termination of the infringement before or as soon as the Commission intervenes;
- (e) Cooperation which enables the enforcement process to be concluded more effectively and/ or speedily.
- (f) Government's authorisation or encouragement of anti-competitive practices; or
- (g) Voluntary compensation by the offender to the economic agents or individuals that were harmed by the conduct under investigation;

The Maximum Penalty

- 2.20 The amount of financial penalty to be imposed may not exceed 10 percent of the net total global revenue of the enterprise in the last complete financial year preceding the determination of the CCC.
- 2.21 The involvement of an association of enterprises (e.g. a trade association) in a breach of Article 177 of the Treaty may result in financial penalties being imposed on the association itself, its members or both. Where the breach by an association of enterprises relates to the activities of its members, the penalty shall not exceed 10 percent of the sum of the net total global revenue of the business of each member of the association of enterprises in the Community, for the last complete financial year preceding the determination of the CCC, multiplied by the duration of the breach.
- 2.22 Besides the sanction set out in the above, the Commission wishes to note that when the offender is an individual, persons that comprise the management bodies that have participated in an anti-competitive agreement or decision, or its legal representatives, [the Commission reserves the right to impose] a fine of up to US \$75,000 may be imposed on each person based on their degree of involvement in the conduct investigated. The fines imposed on these individuals may not be paid by the enterprise in which they work or by shareholders or partners of the same.

2.23 The Commission in lieu of a fine for an offender who is an individual, person that comprise the management bodies that have participated in an anti-competitive agreement or decision, or its legal representatives, may require the person or individual to be disqualified from holding a position as a director at a firm for a specific period of time or indefinitely depending on the nature and duration of the offense.

Ability to Pay or Financial Capacity of the Enterprise

2.24 In exceptional cases, the Commission may, upon request, take account of the enterprise's inability to pay in a specific social and economic context. It will not base any reduction granted in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the enterprise concerned and cause its assets to lose all their value. The evidence considered would include:

- (a) The total revenue of the enterprise for the last five completed financial years adjusted for inflation;
- (b) The value of the enterprise's assets for the last five financial years adjusted for inflation; and
- (c) Any other relevant information for the purpose of determining the enterprise's ability to pay the fine.

2.25 The Commission will also consider the payment of fines on a phased basis over an agreed period of time in consultation with a firm to ensure that the payment of a fine has no deleterious effect on a firm's financial viability.

Procedure for Imposing a Financial Penalty and Date of Payment

2.26 When the Commission makes an order imposing a penalty on an enterprise, such order shall be in writing and shall specify the date before which the penalty is required to be paid.

2.27 **The date specified in an order imposing a penalty shall not be a date before the end of** the period within which an appeal against the order of Commission may be brought under the Treaty.

Formula for setting of fines imposed on offenders

2.28 Fines will be set according to the following formula:

$$\text{Calculated Fine} = \text{Base-level} \times \text{Duration} + \text{aggravating factors} - \text{mitigating factors} \leq 10\% \text{ net global turnover}$$

Where,

Base-level = (nets sales value in the affected market x seriousness factor)

Box 1 Example: Suppose the CCC determined that an enterprise was guilty of engaging in an anti-competitive business practice over a period of 5 years. In the firm's last financial year it recorded net sales to a value of \$30,000,000 in the affected market. The following are simulations if the infringement was considered by the CCC to be less serious, serious or very serious. For this example, we will use what was originally proposed as the base-level fine, which was 2%, 6% and 10% of the relevant turnover for infringements that are less serious, serious and very serious respectively. The maximum fine is capped at 10 percent of the firm's global turnover in the last financial year.

Step One: The base-level is calculated by multiplying the relevant turnover by the seriousness factor. The base-level is then multiplied by the duration of the breach.

$$(\$30,000,000 \times 0.02) \times 5 \text{ years} = \$3,000,000 \text{ (less serious offense)}$$

$$(\$30,000,000 \times 0.06) \times 5 \text{ years} = \$9,000,000 \text{ (serious offense)}$$

$$(\$30,000,000 \times 0.1) \times 5 \text{ years} = \$15,000,000 \text{ (very serious offense)}$$

Step Two: Increases or reductions for aggravating and mitigating factors are applied. Regarding aggravating circumstances, if the CCC determined that the firm in question committed the breach intentionally an increase of 15% could be applied. However, if the CCC also determined that the firm terminated the conduct immediately at the moment the investigation started and cooperated with the investigation each mitigating factor earns a reduction of 10%.

$$\$3,000,000 \times (100\%+15\%-10\%-10\%) = \$2,850,000 \text{ (less serious offense)}$$

$$\$9,000,000 \times (100\%+15\%-10\%-10\%) = \$8,550,000 \text{ (serious offense)}$$

$$\$15,000,000 \times (100\%+15\%-10\%-10\%) = \$14,250,000 \text{ (very serious offense)}$$

Step Three: The calculated fine is examined to ensure it is not greater than 10% of the firm's total global revenue during the last complete financial year preceding the determination of the CCC. Let us assume that the total global revenue is \$110,000,000 in its last financial year. The maximum allowable fine would therefore be \$11,000,000, which is 10% of the total revenue. Based on the simulations only in the case of a very serious offense would the cap be imposed instead of the calculated fine.



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