



COMPETITION COMMISSION'S GUIDELINES FOR ADMINISTRATIVE PENALTIES: FORESEEABILITY VERSUS TRANSPARENCY

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LEGAL BRIEF MARCH 2015

There are various reasons as to why guidelines relating to the determination of administrative penalties are required. Werksmans Attorneys looks at the foreseeability and transparency of the Competition Commission's draft Guidelines for the Determination of Administrative Penalties.

INTRODUCTION

The growing need from the Competition Tribunal ("Tribunal"), the Competition Appeal Court ("CAC") and various stakeholders, for the Competition Commission ("Commission") to develop guidelines for determining administrative penalties has been recognised by the Commission. In response to this need, the Commission published its draft Guidelines for the Determination of Administrative Penalties for Prohibited Practices ("Guidelines") at the end of 2014 for public comment.

METHODOLOGY

In developing the Guidelines, the Commission conducted an evaluation and comparison of the guidelines and penal codes developed by other competition authorities, specifically the European Commission ("EC") and the United Kingdom's Competition and Markets Authority. In addition, the Commission took into account the principles laid out by the Tribunal¹ (and endorsed by the CAC²) in its 6-step methodology.

The Guidelines present the general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal. Importantly the Guidelines will not prevent the Commission from exercising its discretion on a case-by-case basis.

The 6-step methodology proposed by the Commission is as follows –

- > Step 1: determination of the affected turnover in the base year;
- > Step 2: calculation of the base amount being that proportion of the affected turnover relied upon;
- > Step 3: multiplying the amount obtained in step 2 by the duration of the contravention;
- > Step 4: rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2)³ of the Act;
- > Step 5: considering factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and
- > Step 6: rounding off this amount if it exceeds the cap provided for in section 59(2)⁴ of the Act.

¹ *Competition Commission v. Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09

² *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v. Competition Commission* 119 & 120/CAC/May2013

³ An administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

⁴ An administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

There are various opinions as to how foreseeable or predictable fines should be – these range from arguments that it is better to have more predictable fines, to a warning against the risk of too high a degree of predictability⁵. However, it is recognised that there will never be full predictability of the amounts of the penalties due to all the factors that are required to be taken into account when determining a penalty as well as the variety of cases. Without guidelines, the Commission may reach amounts that are chosen arbitrarily and at random. Therefore there must be a policy balance between the needs for transparency and objectivity and the need for the Commission to retain its discretionary power.

WHAT ARE THE AIMS OF ADMINISTRATIVE PENALTIES?

Simply stated, the main aims of administrative penalties are enforcement, punishment and both specific and general deterrence. Administrative penalties are the main way in which to remedy and deter violations of competition law.

As stated by the Commission, the primary objective of the Guidelines is to provide some measure of objectivity and transparency in the method of determining administrative penalties. It is therefore clear from this stated objective, that the aim of the guidelines to determine administrative penalties, is not for entities to be able to determine with predictability the amount of the fine they will pay if found to be in contravention of the Competition Act 89 of 1998 ("**Competition Act**"), but rather to be able to understand the method of calculation and that this method is transparent and objective.

WHY ARE GUIDELINES REQUIRED IN THE DETERMINATION OF ADMINISTRATIVE PENALTIES?

From a brief look at the historic development of Guidelines, as issued by competition authorities, it is apparent that there are various reasons as to why guidelines relating to the determination of administrative penalties are required. These reasons include a need for objectivity by an authority when imposing a fine. Transparency, certainty, consistency, coherency and fairness inform the application of competition law and any authority should strive to ensure these principles are applicable when determining a fine. It is in the interest of all parties concerned that both the authority as well as those that are fined, have clarity as to the method of calculation and more precise guidance on the method of calculation, all underpinned by rational calculations. Such approach will inform equal treatment, impartial decisions and indeed have a sufficient deterrent effect.

Only the future will tell whether this will indeed be achieved in South Africa.

⁵ Wouter P.J. Wils, The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis, Public Lecture, King's College London, Centre of European Law, 15 February 2007 at page 12

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