

Final guidelines for determination of administrative penalties published

 By [Leana Engelbrecht](#)

8 Jun 2015

The Competition Commission has published the final Guidelines for Determination of Administrative Penalties for Prohibited Practices.



© [123RF.com](#)

The guidelines took effect on 1 May 2015. Draft guidelines were published by the Commission in 2014 and a process of public engagement followed.

Section 79(1) of the Competition Act, No 89 of 1998 empowers the Competition Commission to prepare guidelines to support its policy approach to matters within its jurisdiction. In this light, the Commission published the guidelines to provide some clarity on the somewhat contentious matter of penalty calculations for purposes of settlement or referral of prohibited practice matters.

In setting out the guidelines, the Commission stated that the primary objective was to provide transparency and objectivity when dealing with penalty calculations, however, the Commission also emphasised that the process of penalty calculation is not a precise science and that the Commission may still exercise discretion in arriving at calculations. In addition, the Commission acknowledged that it does not have the final say on penalty calculations as its decisions are subject to approval of the Competition Tribunal and the scrutiny of the Competition Appeal Court and other courts in appeals and reviews.

Six-stage test

The Commission's methodology is based on a six-stage test developed in the case of *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) which was later confirmed by the Competition Appeal Court.

In essence, the six-stage test comprises of the following steps:

I. the determination of the affected turnover (being the annual turnover derived by the relevant firm in South Africa and exports from South Africa in relation to the market in which the collusive conduct took place) in the most recent financial

year in which there is evidence that the relevant firm participated in the contravention;

II. the calculation of the base amount by multiplying the affected turnover with a percentage of up to 30% determined with reference to the nature and extent of the contravention, and loss and damage suffered as a result of the contravention and market circumstances;

III. multiplying the base amount by the duration of the contravention;

IV. reducing the amount obtained at step (III) if it exceeds the statutory limit for an administrative penalty of 10% of total turnover;

V. a consideration of aggravating and mitigating factors (reflected in a percentage reduction or increase in the administrative penalty); and

VI. reducing the amount obtained at step (v) if it exceeds the statutory limit.

Some notable features of the guidelines include:

- where the contravention took place within the auspices of an association of firms, the association will be liable for the payment of an administrative penalty separately from the members of the association. The administrative penalty imposed may not exceed 10% of the association's own turnover or income in the preceding financial year;
 - the affected turnover may include turnover in a market that was protected as a result of the contravening conduct (by virtue of, for example, a market division agreement in terms of which the relevant firm agreed not to participate in a particular market and, in turn, the other participating firms agreed not to participate in a market in which the relevant firm is active in);
 - in once-off bid-rigging cases, a successful firm's affected turnover will be considered to be the greater of:
 - (i) the value of the bid submitted by the successful bidder;
 - (ii) the value of the contract concluded or to be concluded; or
 - (iii) the amount ultimately paid to the successful bidder pursuant to the tender. The affected turnover of an unsuccessful firm that participated in the collusion will be considered to be the greater of:
 - (i) the value of the bid submitted by the unsuccessful bidder;
 - (ii) the value of the contract concluded or to be concluded; or
 - (iii) the amount ultimately paid to the successful bidder pursuant to the tender;
 - if a contravention existed prior to the commencement date of the Act, the duration of the conduct will be calculated from 1 September 1999;
 - the Commission will assess the degree of co-operation by a relevant firm with reference
 - (i) the extent to which the firm may have delayed, obstructed or assisted the investigation and litigation process; and
 - (ii) whether the firm co-operated through tangible action to facilitate the speedy resolution of the case;
- a. the Commission may offer a discount of up to 50% of the administrative penalty calculated based on the six-step methodology when settling with a firm, subject to factors such as the expeditious conclusion of settlement during the early stages of the investigation, providing assistance in the prosecution of other firms by providing timeous, complete and accurate information that corroborates evidence the Commission already has in its possession, and being pro-active in providing assistance to the Commission;

b. under exceptional circumstances, the Commission will take into consideration the respondent firm's ability to pay the administrative penalty. The Commission shall be guided by the production of objective evidence such as audited financial statements which can attest to the veracity of the firm's financial position. If the Commission is satisfied that the administrative penalty shall put the respondent firm at risk, then it may consider the use of payment terms amenable to both parties; and

c. the Commission may in certain instances impute liability on a holding company where its subsidiary company has been found to have contravened the Act. In doing so, the Commission will consider whether:

(i) the subsidiary company is wholly owned by the holding company;

(ii) the holding company exercises decisive or material influence over the commercial policy of the subsidiary;

(iii) the holding company had knowledge of the subsidiary's participation in the contravention; or

(iv) the holding company derived substantial benefit from the activities of the subsidiary. Notably, the statutory cap (ie the 10% maximum penalty) for purposes of determining an administrative penalty in instances of imputed liability will be calculated at step four based on the turnover of the subsidiary involved in the conduct, however, at step six (the final and most definitive step in the calculation) the statutory cap will be calculated based on the holding company's consolidated turnover in the preceding financial year.

As mentioned above, the guidelines are not binding policy determinations and the competition authorities may still exercise their discretion in applying these guidelines. It remains to be seen whether certain provisions of the guidelines, such as the imputed liability on holding companies, will pass muster once legally challenged as the Act does not make provision for the such imputed liability (as is the case in other jurisdictions).

ABOUT LEANA ENGELBRECHT

Leana Engelbrecht is a senior associate in the Competition Practice at Baker McKenzie.

■ #BizTrends2018: Eight trends in Competition Law in 2018 - 12 Jan 2018

■ Final guidelines for determination of administrative penalties published - 8 Jun 2015

■ Competition Tribunal approves Elerine transactions - 9 Feb 2015

■ Competition Commission's appeal against SAB dismissed - 5 Feb 2015

■ Mondi granted access to information used by the Commission to initiate complaint - 3 Dec 2014

[View my profile and articles...](#)

For more, visit: <https://www.bizcommunity.com>