

GUIDELINES ON IMPOSITION OF FINANCIAL PENALTIES (FINING GUIDELINES)

1. Introduction

- 1.1 The Competition Ordinance, 2007 (the Ordinance) empowers the Competition Commission of Pakistan (the Commission) to issue directions and impose financial penalties on undertakings for contravention of the provisions of the Ordinance.
- 1.2 Pursuant to regulation 41 of the Competition Commission (General Enforcement) Regulations, 2007, the Commission may, where deemed necessary issue and publish guidelines from time to time in order to ensure compliance with the provisions of the Ordinance and the rules/regulations made thereunder.
- 1.3 These Guidelines are not a substitute for the Ordinance, rules, regulations and the orders made thereunder. They may be revised should the need arises. The examples in these Guidelines are for the sake of illustration. They are not exhaustive, and do not set a limit on the investigation and enforcement powers of the Commission.
- 1.4 In imposing the penalty, the gravity of infringement has to be determined by reference to numerous factors, such as circumstances of case, its context and the dissuasive effect of fine. However, it is clarified that there is no binding or exhaustive list of criteria that must be taken into account in every case.

2. Statutory Background

- 2.1 Section 38 of the Ordinance provides that the Commission may impose financial penalties only after giving the undertaking concerned an opportunity of being heard, and it determines that such undertaking—
 - (a) has been found engaged in any activity prohibited under the Ordinance;
 - (b) has failed to comply with an order of the Commission, or Chairman/Members thereof or of an officer of the Commission so authorized in this behalf, made under the Ordinance;
 - (c) has failed to supply a copy of the agreement or any other document and information as required under the Ordinance or requisitioned by the Commission;
 - (d) has furnished any information or made any statement to the Commission which such undertaking knows or has reason to believe to be false or found by the Commission to be inaccurate; or

- (e) knowingly abuses, interferes with, impedes, imperils, or obstructs the process of the Commission in any manner;

2.2 The Commission can impose the financial penalties—

- (a) for a contravention of any provision of Chapter II of the Ordinance, an amount not exceeding fifty million rupees or an amount not exceeding fifteen percent of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission;
- (b) for non-compliance of any order, notice or requisition of the Commission an amount not exceeding one million rupees, as may be decided in the circumstances of the case by the Commission;
- (c) for knowingly abusing, interfering, impeding and obstructing the process of the Commission in any manner, an amount not exceeding one million rupees as may be decided in the circumstances of the case by the Commission, and
- (d) for a continuing violation of the order of the Commission, penalty of a further sum which may extend to one million rupees for every day after the first such violation.

3. Policy Objectives

3.1 In imposing any financial penalty, the Commission has the following twin objectives:

- To deter undertakings from engaging in anti-competitive practices.
- To reflect the seriousness of the infringement.

3.2 The assessment of an appropriate penalty to be imposed for all types of infringements shall depend on the facts of each case.

4. Determining quantum of penalty

4.1 A financial penalty imposed by the Commission under Section 38 of the Ordinance shall be calculated taking into consideration, the following factors:

- The seriousness of the infringement;

- The duration of the infringement;
- Aggravating or mitigating factors; and
- Other relevant factors, e.g. deterrent value.

5. Seriousness of Infringement

- 5.1 The amount of the financial penalty to be imposed may depend, in particular, upon the nature of the infringement and how serious and widespread the infringement is. Such infringements *inter-alia* include, price-fixing, market sharing, bid-rigging (collusive tendering) and limiting or controlling production.
- 5.2 In assessing the seriousness of the infringement, the Commission may consider a number of factors, including the nature of the product, the structure and condition of the market, the market share(s) of the undertaking(s) 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, may also be an important consideration.
- 5.3 Price cartel would be considered a very serious offence even if the undertakings do not receive cartel profits.

6. Duration of Infringement

- 6.1 The duration of the infringement may also be a relevant factor in determining the quantum of the penalty.

7. Aggravating and Mitigating Factors

- 7.1 In assessing the amount of financial penalty to be imposed, the Commission may consider any aggravating or mitigating factors.
- 7.2 Aggravating factors may include:
- role of the undertaking as a leader in, or an instigator of, the infringement;
 - involvement of directors or senior management;
 - retaliatory or other coercive measures taken against other undertakings aimed at ensuring the continuation of the infringement;
 - continuance of the infringement after the start of investigation;

- where an undertaking continues or repeats the same or a similar infringement after the Commission has made a finding that the undertaking has infringed any of the prohibition mentioned in Para 2.2 above;
- refusal to cooperate with or obstruction of the Commission's action for carrying out its investigations;
- an intentional infringement would add to its gravity and for infringement to be intentional, it would be sufficient to show that the undertaking could not have been unaware that the conduct complained of was aimed at restricting competition;
- neither the comparative limited size of the territory where infringement is committed nor the very limited participation would tend to reduce the gravity of the infringement or prevent the infringement being considered a serious one, and
- the gravity of infringement has to be determined by reference to numerous factors such as circumstances of case, its context and the dissuasive effect of fine. However, it is clarified that there is no binding or exhaustive list of criteria that must be taken into account in every case.

8. Mitigating Factors:

8.1 Mitigating factors may include----

- genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- role of the undertaking; for example, the undertaking was acting under severe duress or pressure;
- where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: (the mere fact that an undertaking participated in an infringement for shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount of penalty);

- adequate steps taken with a view to ensuring compliance with the prohibitions of Chapter II of the Ordinance, for example, existence of any compliance programme; and
- co-operation which enables the enforcement process to be concluded more effectively and/or speedily;

8.2 In considering how much mitigating value may be accorded to the existence of any compliance scheme of an undertaking, the Commission may consider:

- whether there are appropriate compliance schemes and procedures in place;
- whether such scheme has been actively implemented;
- whether it has the support of, and is observed by, senior management; and
- whether such scheme is evaluated and reviewed at regular intervals?

9. Other Relevant Factors

9.1 The amount of financial penalty to be imposed may be adjusted, as appropriate, on a case by case basis, to achieve the policy objectives outlined in paragraph 3 above, in particular, to deter undertakings from engaging in anti-competitive practices. Other considerations may include, but not limited to, an objective estimate of any economic or financial benefit derived or likely to be derived from the infringement by the infringing undertaking and any other special features of the case, including any gains which might accrue to the undertaking in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

9.2 The commission has to take account not only of the specific circumstances but also the general context of the infringement, especially if it is a manifest infringement of a particular harmful type.

9.3 In setting fines, commission would be under no obligation to take account of the financial position of an undertaking.

9.4 The anti-competitive conduct of an undertaking can be attributed to its parent company where the subsidiary does not independently determine its market behavior but, mainly because of economic and legal ties has essentially followed its instructions in such instances commission can choose whether to attribute the infringement committed by the subsidiary to it or to the parent company.

- 9.5 The ending of the infringement after inspection has taken place or a notice has been issued has to be considered from case to case. However, ending of an infringement would not always be a mitigating circumstance.
- 9.6 The undertaking's decision or act of not contesting the facts raised by the commission may justify a reduction in fine.

10. Leniency

- 10.1 An undertaking participating in cartel activity may benefit from total immunity from, or a significant reduction in the amount of financial penalty to be imposed if it satisfies the requirements for lenient treatment set out in the *Competition (Leniency) Regulations, 2007*.
