



CONSOLIDATED ADMINISTRATIVE REMEDIES AND SETTLEMENT GUIDELINES

2023

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PREFACE

The Competition Authority of Kenya (“the Authority”) is mandated by the Competition Act No. 12 of 2010 (“the Act”) to promote and safeguard competition in the national economy and to protect consumers from unfair and misleading market conduct. To achieve this mandate, the Authority has, among others, developed these Guidelines in pursuant to section 8(2) of the Act which allows it to regulate its own procedure on matters falling within its jurisdiction. The Guidelines outline the Authority’s approach to administrative remedies and settlement in regard to violations of the Act.

In addition, the Guidelines are intended to present the general methodology and the analytical construct the Authority will apply in determining administrative remedies and settlement arrangements with respect to Part III, IV, V and VI infringements. Their primary objective is to ensure objectivity, consistency, certainty and transparency.

The Guidelines are not intended to be a substitute of the Act or any subsidiary Rules made pursuant thereto and do not have the force of law. The Guidelines may be revised, supplemented, or replaced from time to time.

This publication contains general information intended for guidance on how administrative remedies and settlements are applied to violations of the Competition Act No.12 of 2010. This publication may not be reproduced, in part or in whole by any means without the express permission of the Competition Authority of Kenya.

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A. BACKGROUND

1. These Guidelines set out the principles for the determination of administrative remedies imposed by the Competition Authority of Kenya (“the Authority”) and the procedure for pursuing settlements as provided for under the Competition Act No. 12 of 2010 (“the Act”) and the Competition (General) Rules, 2019 (“the Rules”).
2. The Guidelines address remedies and settlements for infringements under the Act. They shall apply to the following:
 - i. Section 36 which provides for among others, financial penalties on contraventions relating to restrictive agreements, decisions, and practices by undertakings or associations of undertakings, abuse of dominance, abuse of buyer power, and consumer welfare;
 - ii. Section 38 of the Act which provides for settlements;
 - iii. Section 42 which provides for financial penalties for Mergers Implemented Without prior authorization by the Authority (“MIWA”);
 - iv. Section 47 which provides for the imposition of financial penalties in relation to giving materially incorrect or misleading information or, failure to comply with conditions attached to the approval of a merger;
 - v. Section 61 which provides the Authority with the power to impose administrative actions to a supplier to remedy the infringement of Sections 59-60 of the Act; and
 - vi. Part IX of the Rules which expounds on settlement for infringements under the Act.
3. The Guidelines offer the Authority and the undertakings concerned an opportunity to resolve matters expeditiously including referrals from the tribunal or court- mandated settlements.
4. The Guidelines incorporates the Authority’s experience in its imposition of administrative remedies and entering into settlements with undertakings, and principles and best practices in determination of administrative remedies.
5. The Guidelines are not a substitute for the Act and they shall be read together with the Act and subsidiary rules made pursuant thereto.

B. CITATION

6. The Guidelines shall be known as the Consolidated Administrative Remedies and Settlement Guidelines.

C. DEFINITIONS

7. In these Guidelines, words and phrases which are defined in the Act have the same meaning herein unless otherwise indicated.
8. Unless otherwise indicated, the following words and phrases in these Guidelines have the meaning attributed to them under the Act as follows –

Act refers to the Competition Act No.12 of 2010 (as amended from time to time);

Aggravating factors are circumstances surrounding the behaviour of the undertaking during an investigation and sufficient to raise the severity of the conduct under investigation. These factors are weighted depending on the negative impact of the infringement on the suppliers and lead to an increase in the penalty;

Base Penalty is the reference amount of money the Authority considers at the initial stage before adjusting for aggravating and/or mitigating factors;

Mitigating factors are circumstances that lessen the severity or culpability of an infringement. These factors are weighted depending on the impact of the initiatives or interventions by the respondent on reducing the harm, damage or loss to the suppliers and leading to a decrease in the penalty.

D. OBJECTIVES

9. These Guidelines present the general methodology as well as give clarity on the analytical construct that the Authority will follow and apply in determining administrative remedies and settlement arrangements with respect to Part III, IV, V and VI infringements.
10. Specifically, these Guidelines are aimed at achieving the following:
 - i. Enhance transparency, efficiency, predictability and consistency in determining the administrative remedial measures;
 - ii. Identify the various categories of contraventions, the administrative financial remedies and other remedies that may be imposed by the Authority;
 - iii. Achieve proportionality on the remedies imposed against the degree of contravention;
 - iv. Ensure the availability of effective consumer dispute resolution mechanisms and redress for loss or injury arising from the infringement of the rights of consumers as provided for under Article 46 of the Constitution of Kenya, 2010 (“the Constitution”); and
 - v. Provide for cost- effective and efficient alternative dispute resolution mechanism for MSMEs pursuant to Article 159 of the Constitution.

E. LEGAL EFFECT AND DISCRETION

11. These Guidelines only set out the general methodology and do not, in any way, fetter the discretion of the Authority in determining administrative remedies and settlement agreements on a case-by-case basis. They do not constitute legal advice.
12. In the event of inconsistency between these Guidelines and the Act, the provisions of the Act shall prevail.

F. LEGAL FRAMEWORK

13. In determination of the administrative remedies and settlement arrangements under the Act, the Authority will also be guided by the following:
 - i. Article 46, 47 and 159 of the Constitution
 - ii. The Fair Administrative Action Act No. 4 of 2015
 - iii. The Data Protection Act
 - iv. Any other relevant applicable laws and statutes

G. ADMINISTRATIVE REMEDIES

14. Subsequent to investigations and a finding of infringement of Part III, IV, V and VI of the Act, the Authority shall impose administrative remedies under the Act and the Rules under which it may consider the imposition of either financial or non-financial remedies.
15. The Authority may apply any of the **non- financial remedies** under section 36 (a),(b),(c),(e), 61(2) of the Act and Rule 6 and 25(5) of the Rules, or a combination of any or all of them on a case-by-case basis as the circumstances of each case dictate.
16. Additionally, the Authority may pursuant to Section 38, enter into an agreement of settlement with an undertaking or undertakings whose terms may contain financial or non- financial remedies or a combination of both.
17. **Financial remedies** are provided for under the Act as explained below:

Area	Provision
Restrictive trade practices, Abuse of Buyer Power and Consumer Welfare	Section 36 of the Act prescribes that after consideration of any written representations raised at the conference the Authority may take various measures, including (d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking(s) in question. Rule 42 and 45 of the Rules sets out the factors to be considered.
Mergers Implemented Without Approval	Section 42(6) of the Act provides that the Authority may impose a financial penalty in an amount not exceeding 10% of the

	preceding years’ gross annual turnover in Kenya of the undertakings in question. Rule 46 of the Rules shall be taken into account in the determination of the penalty.
Mergers approved based on materially incorrect information and/ or non-compliance with conditions attached to the approval of a merger	Section 47 (3) of the Act provides that the Authority may impose a financial penalty of up to ten percent of the preceding year’s annual gross turnover.
Settlement	Section 38 (1) of the Act enables the Authority, during or after an investigation into an alleged infringement of the prohibitions under the Act, to enter into an agreement of settlement with the undertaking or undertakings concerned which may include imposition of a pecuniary penalty

18. The Authority will take full account of the particular facts and circumstances of each case when determining whether to impose a financial penalty. The Authority will also consider any representations made to it by the respondents and other interested parties.

H. METHODOLOGY FOR CALCULATION OF FINANCIAL REMEDIES

19. In computing the financial penalty, the Authority will consider an undertaking (s) preceding year’s gross annual turnover. The Authority may consider adjusting the base amount on grounds such as aggravating and mitigating factors. The aggravating and mitigating factors will be considered on a case-by-case basis.

20. As stipulated in section 36(d), 42(6) and 47(3) of the Act, the administrative penalty shall not exceed 10% of the undertaking’s gross annual turnover during the firm’s preceding financial year.

21. As stipulated in section 38 of the Act, a settlement may include an amount to be imposed as a pecuniary penalty. The penalty shall not exceed 10% of the undertaking’s preceding year’s gross annual turnover.

22. The methodology for calculating remedies is broken down into three broad areas; Restrictive trade practices and control of mergers (H.1), Abuse of buyer power (H.2) and Violations under Consumer welfare (H.3) discussed below.

H.1 Restrictive Trade Practices and control of Mergers

a) Relevant Turnover

23. The affected turnover of an undertaking(s) is the preceding years’ gross annual turnover. The affected turnover, together with the duration of conduct, gives an indication of the amount of



commerce affected. In relation to an association of undertakings, the gross annual turnover shall be derived from the individual members' turnover.

24. In relation to MIWA and Section 47 Violations, the affected turnover will be the undertakings' gross annual turnover for the year preceding implementation of the merger.
25. The preceding year for contraventions under Part III of the Act shall be the year before the Authority reaches a decision.

b) Base amount/ Percentage

26. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. The proportion applied will be based on;
 - i. The nature, duration, gravity, and extent of the contravention,
 - ii. Any loss or damage suffered as a result of the contravention, and
 - iii. The market circumstances in which the contravention took place.
27. The base percentage for the contraventions under Part III and IV of the Act shall be 10% of the undertakings' preceding year gross annual turnover.

c) Aggravating factors

28. The base amount may be increased where the Authority finds that there are aggravating circumstances. Further to the factors provided under Rule 42(1) of the Rules, the Guidelines provide for five (5) aggravating factors:
 - i. nature of the contravention
 - ii. duration of the conduct
 - iii. coverage
 - iv. recidivism
 - v. public interest concerns
29. It should be noted that this is not an exhaustive list and that the Authority may consider any other aggravating factor on a case-by-case basis.

i) Nature of the contravention

30. The Guidelines will consider the gravity of the contravention in terms of whether it relates to a horizontal agreement, vertical agreement, or unilateral conduct.
31. Horizontal agreements, also known as cartels, are considered to be the most egregious contravention of competition laws. The object of such agreements is to dampen competition and often have far-reaching negative effects on consumers in terms of high prices, low quality, and lack of innovation. Cartels are evaluated on a per se basis as the presumption of the object of preventing competition between the parties exists. Cartels will therefore be rated highest in relation to the other contraventions.

32. Unilateral conduct includes practices by dominant undertakings aimed at undermining their competitors (exclusionary) or leading to direct consumer harm (exploitative). Restrictive vertical agreements relate to agreements between parties at different levels in the value chain e.g. producer, and distributor relationships. Some vertical agreements may be found to have efficiency justifications and are evaluated on a rule-of-reason basis.
33. The scoring of the factors will be done invariably from the most harmful at score 3 to the least harmful at 1.
34. The nature of the contravention will be scored as below;

No.	Nature of the Contravention	Score (%)
1.	Horizontal Agreements	+3
2.	Unilateral Conduct	+2
3.	Vertical Agreements	+1

35. In considering the appropriate financial penalty for MIWA and Section 47 Violations, the Authority will consider the impact of the transaction on competition. This will include considering whether the MIWA or Section 47 Violation resulted in the substantial lessening of competition, restriction of trade, or the provision of any service. This parameter shall be scored at a maximum of +2 as below:

No.	Nature of implemented merger	Score (%)
1.	Horizontal mergers with negative competition concerns	+2
2.	Vertical mergers with negative competition concerns	+1
3.	Conglomerate mergers with negative competition concerns	+0.5

ii) Duration of the conduct

36. The duration of the conduct is an indicator of the period during which the anticompetitive conduct took place.
37. The parameter will consider if the conduct is continuing or otherwise and will be scored as below;

No.	Duration in years	Score
1.	More than 3 years	+3
2.	Between 2-3 years	+2
3.	Between 1- 2 years	+1
4.	Up to 1 year	+0.5

38. In the case of a MIWA, consideration of the duration of the conduct shall be the time between when the merger was implemented and the time the Authority makes a determination.

39. For Section 47 Violations, the parameter considers the time between when the merger was approved by the Authority and the time of the Authority’s proposition to revoke its decision.

iii) Coverage

40. Coverage is in terms of the spread of the conduct in the market. This parameter will be determined by the undertaking(s) presence in the country and the significance of the players in the national economy, which will be determined using the market share. The scores will be as below:

No.	Coverage	Score
1.	Above 50%	+2
2.	Between 30%- 50%	+1
3.	Below 30%	+0.5

iv) Recidivism

41. The Authority will consider recidivism where an undertaking that had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +1.

v) Public interest concerns

42. The Authority will consider if the contravention negatively affected among others, MSMEs, employment, exports and impact on specific sectors. The parameter will be scored as below:-

No.	Public Interest Issue	Score (%)
1.	Effects on employment (including job losses)	+1.5
2.	Affected the ability of SMEs to gain access to or to be competitive in any market	+1.5
3.	Affected the ability of national industries to compete in international markets	+0.5
4.	Affected a particular industrial sector or region (including endangering the continuity of supplies or services)	+0.5

vi) Other Aggravating factors

43. The Authority may consider any other additional aggravating factors which shall be each scored up to +0.5. However, the maximum score shall be capped at +2.

d) Mitigating factors

i) Cooperation

44. Cooperation is useful where it leads to the effectiveness of the Authority’s enforcement actions by; contributing to the speedy adoption of the Authority’s decisions, gathering additional evidence, and better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority outside the

scope of the Leniency Programme Guidelines¹ through admission of liability; and/or disclosure of more evidence, provision of commitments, and working within the given timelines; and Remedying of the conduct by the undertaking(s) and the same being notified to the Authority.

45. The scores for cooperation will be as below;

No.	Parameter	Score
1.	Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act. For MIWA and Section 47 Violations, when parties proactively notified the Authority of the contravention	-1.5
2.	The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1
3.	Undertaking(s) provided information to the Authority in a timely manner.	-0.5
4.	The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5
5.	The undertaking is willing to acknowledge liability for the infringement	-1

ii) First-time offender

46. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender shall be -1.

iii) Public Interest and Justifications on Efficiency and consumer benefits

47. The Authority will consider public interest in terms of salvaging a failing firm, protecting job losses, international or regional competitiveness, foreign direct investment, and employment creation. The Authority may also consider any plausible efficiency justification which has benefits to the consumers presented by the parties as a mitigating factor.

48. These justifications may apply to matters relating to Restrictive Trade Practices and MIWA, and may vary from one industry to another hence each acceptable mitigating factor shall be scored up to -0.5. The maximum score shall be capped at -3.

iv) Other mitigating factors

49. The parties may provide any other additional mitigating factors such as premeditation which, if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5. However, the maximum score shall be capped at -2.

¹ Refer to the Authority's Leniency Programme Guidelines



50. In a case of a MIWA where the turnover or assets value of the acquirer is above KES ten billion and the target has very low assets/ turnover values (less than one hundred million shillings) and the transaction has clear positive competition and public interest outcomes, the Authority shall take into consideration the value of the assets acquired.

H.2 Abuse of Buyer Power

a) Relevant Turnover

51. The relevant turnover of an undertaking(s) is the preceding year's gross annual turnover of the undertaking. Therefore, the relevant turnover shall mean the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question.

b) Base Amount/ Percentage

52. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. The base percentage shall be 10% for infringements of section 24A(1) of the Act.

c) Aggravating Factors

53. The base amount may be increased where the Authority finds that there are aggravating circumstances. Aggravating factors to be considered include:

- i. Nature of the contravention
- ii. Duration of conduct
- iii. Public interest
- iv. Recidivism
- v. Coercion or retaliatory measures to ensure the continuation of the infringement
- vi. Refusal to co-operate
- vii. Any other aggravating factor(s) which the Authority finds reasonable and relevant

i) Nature of the contravention

54. The Authority will consider the gravity of the contravention in terms of conduct amounting to Abuse of Buyer Power in line with section 24A (5) of the Act and paragraph 51 and 52 of the Abuse of Buyer Power Guidelines 2022.

55. The basis for this is that the various conducts have varying effect on the suppliers and competition. For instance, the consequences of delayed payments and demand for preferential terms may be more severe to suppliers resulting to suppliers' inability to settle debts or direct loss of business due to downtime or crippling of the suppliers' business compared to return of goods. On the other hand, the conduct by buyers to bid up prices of inputs which has the net effect of driving out competition is considered egregious to competition.

56. The nature of the contravention will be scored as below;



No	Nature of the Contravention	Score
1.	Delays in Payment	+2
2.	Demand for preferential terms	+2
3.	Unilateral termination of a commercial relationship	+2
4.	Reducing prices below competitive levels	+1
5.	Refusal to receive or return goods	+1
6.	Bidding up prices of Inputs	+0.5
7.	Transfer of costs or risks	+0.5
8.	Transfer of commercial risks	+0.5

ii) Duration of the conduct

57. The duration of the contravention is an indicator of the harm to suppliers as a result of the abuse of buyer power. The longer the conduct persists the more likely it is to lead to irreparable damage to suppliers as opposed to when the conduct lasts for a shorter period. The parameter will also consider if the conduct is continuing or otherwise and will be scored as below:

No	Duration in years	Score
1.	3 years and above	+3
2.	Between 2 and 3 years	+2
3.	Between 1 and 2 years	+1
4.	Up to 1 year	+0.5

iii) Public Interest

58. Public interest will be considered as an aggravating factor in terms of effect on SMEs. The Authority will have regard to whether the issues for determination transcend the circumstances of the particular case, and have significant bearing on the public interest. For instance in the event the conduct in question leads to SMEs operating below cost forcing them to engage in cost cutting strategies such as reducing production which consequently leads to laying off employees. The parameter will be scored as below:

No	Factor	Score
1.	Leading to SME's collapse	+1.5
2.	Leading to job losses	+1.5

iv) Recidivism

59. The Authority will consider recidivism where an undertaking had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +1.

v) Coercion or retaliatory measures to ensure the continuation of the infringement

60. The Authority will take into account action taken by a buyer with relation to the relevant supplier(s) both prior to and subsequent to commencement of investigations. For instance, where the supplier(s) have been coerced by the accused party to continue with the oppressive circumstances prior to or during the investigations notwithstanding their protests. Or where, as a retaliatory measure after a party learns of being reported to the Authority, it forces the supplier(s) to continue with the prevailing terms through, for instance, threatening to delist the supplier(s). This parameter will be scored are +2.

vi) Refusal to co-operate

61. A party's refusal to cooperate with the Authority in the course of investigations will be taken into account. As an example, where a party fails to respond to Authority's communications/orders or submit such evidence as required during investigations. The parameter will be scored at +1.

vii) Any other aggravating factor(s) which the Authority finds reasonable and relevant

62. The Authority may consider any other additional aggravating factors which shall be each scored upto +0.5. However, the maximum score shall be capped at +2.

d) Mitigating factors

63. The base amount may be decreased where the Authority finds that there are mitigating factors. The following are considered as mitigating factors:

- i. Co-operation with Authority
- ii. First-time offender
- iii. The breach was inadvertent
- iv. Any other mitigating factor(s) which the Authority finds reasonable and relevant

i) Co-operation with Authority

64. Cooperation is useful where it leads to the effectiveness of the Authority's enforcement actions by contributing to the speedy adoption of the Authority's decisions, gathering of relevant and additional evidence, and arriving at better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority through early admission of liability, disclosure of more evidence, and working within the given timelines and remedying of the conduct by the undertaking(s) at the earliest opportunity.

65. The scores for cooperation will be as below:

No.	Parameter	Score
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1.	Undertaking elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5
2.	The undertaking pursues a settlement during the investigation or before the Authority makes a finding	-1
3.	Undertaking(s) provided information to the Authority in a timely manner.	-0.5
4.	The undertaking(s) agrees to a shorter period (less than ninety (90) days) of settlement and undertaking(s) helps in designing and implementing remedies	-0.5
5.	The undertaking is willing to acknowledge liability for the infringement	-1

ii) First-time offender

66. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender is -2.

iii) The breach was inadvertent

67. The Authority may consider whether the conduct in question was beyond the control of the undertaking and not deliberate planning. The score for inadvertent conduct shall be up to -2.

iv) Any other mitigating factor(s) that the Authority finds reasonable and relevant e.g Compensation of injured Suppliers

68. The parties may provide any other additional mitigating factors such as premeditation which, if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5. However, the maximum score shall be capped at -3.

H.3 Violations under Consumer Welfare

69. The Authority shall impose administrative remedies to redress a consumer, in which it may consider imposition of non-financial or financial remedies, or both pursuant to Sections 36(d) and 61 of the Act and Rule 25 sub-rule (5) and (6) of the Rules. In addition, the Authority may also enter into a Settlement agreement with the undertaking pursuant to Section 38 of the Act.

70. The Authority will take full account of the particular facts and circumstances of each case when determining whether to impose a financial or pecuniary penalty. The Authority will also consider any representations made to it by the respondents and other interested parties.

71. The Authority, pursuant to Sections 36 (c), (e), 61(2) of the Act and Rule 25(5), (6) of the Rules, may impose non-financial remedies which include:

- i. Repair of goods;
- ii. Replacement of the goods;

- iii. Refund to the Consumer, to whom the goods were supplied or service was rendered, the price of the goods or service within a time specified;
- iv. Compensate the consumer for any loss (in case of supply of a service)
- v. Reprimand to the undertaking;
- vi. Issue a public notice;
- vii. Require an undertaking to reverse the conduct;
- viii. Place an advert reversing a false or misleading claim; and
- ix. Recalls and bans of unsafe goods.

a) Relevant Turnover

72. For the purpose of computing a financial remedies relating to violations under Part VI of the Act, the Authority will take the preceding year's gross annual turnover to be the turnover that relates to the good(s) or services under investigation for the preceding year.

b) Base amount/ percentage

73. The base percentage denotes the starting point against which the mitigating and aggravating factors will be adjusted. In accordance with Section 36 of the Act, the base penalty will be 10% and is applied to the affected turnover. Similarly, the base penalty to be considered under Section 38 shall be 10%.

c) Aggravating factors

74. Upon determination of the base penalty the Authority will adjust the penalty based on the aggravating factors. These are factors that are weighted depending on the negative impact of the infringement to the consumer and/or the public in terms of harm, damage or loss and leads to an increase in the fine. These include:

- i. Nature of contravention
- ii. Coverage
- iii. Effect and duration
- iv. Recidivism
- v. Public interest
- vi. Refusal to cooperate
- vii. Any other aggravating factor

i. Nature of contravention

75. The Guidelines will consider the gravity of the contravention in terms of whether it relates to false and misleading representations, unconscionable conduct, unsuitable goods, unsafe and defective goods.

76. A conduct may be termed as false or misleading, if the overall expression or impression created is false or inaccurate or cannot be substantiated. However, whether the conduct is false or misleading will depend on the particular circumstances of the case. Pursuant to

section 55 of the Act, suppliers are prohibited from engaging in any conduct that is false or misleading.

77. Unconscionable conduct is an act that is particularly harsh or unfair or where one party knowingly exploits its relative strengths of the bargaining position over a consumer. The conduct is particularly deliberate, unfair, and unreasonable. Under section 56(1) of the Act, it is an offense for supplier(s) of goods and services to engage in a conduct that is in all circumstances unconscionable.

78. Unsafe goods are goods that do not comply with consumer product safety standards and/or consumer information standards. Unsafe goods also include:

- a. Goods that have been banned or goods that have been declared unsafe by a Notice publicized by the Authority in accordance with sections 58 and 61 of the Act; and
- b. Goods that upon consumption, a person suffers loss/damage by reason of a defect, dangerous characteristic of the goods, or by reason of not having particular information.

79. Under section 59 of the Act, it is an offense for suppliers to supply unsafe goods in the market.

80. Defective goods are goods that are found to have a defect as a result of which an individual suffers loss or injury. Under section 64, a supplier is liable to compensate a consumer for the loss of injury suffered from the defective goods.

81. Unsuitable goods are goods acquired by the consumer for a particular purpose that was expressly or by implication made known to the supplier, and the goods are not reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied. Under section 63, a supplier is liable to compensate a consumer for the loss suffered due to the supply of unsuitable goods.

82. The nature of the contravention will be scored as below;

No.	Nature of the Contravention	Score (%)
1.	Unconscionable conduct	+3
2.	Unsafe and defective goods	+3
3.	False and misleading representations	+2
4.	Unsuitable goods	+0.5

ii. Coverage

83. Coverage relates to the spread of the conduct in the market. This parameter will be determined by the presence of good(s) or services relating to the conduct under investigation. The scores will be as below:



No	Coverage	Score
1.	National	+2
2.	Regional (More than one County)	+1
3.	One county	+0.5

84. The Authority will also consider if the conduct affects more than one consumer. This will be scored at +0.5.

iii. Effect and Duration

85. The Authority shall take into consideration whether the undertaking continues to infringe on the Act during the investigation, how the infringement has negatively impacted the livelihood and financial implication to the consumer. Additionally, goods or services that may harm the health of consumers will be scored as illustrated below:

No	Effect and Duration	Score
1.	Continuation of infringement during investigation	+1
2.	Financial implication/loss	+2
3.	Harm to health	+3

iv. Recidivism

86. The Authority will consider recidivism where an undertaking had previously contravened the Act is found in another instance of contravention. The score for this parameter shall be +1.

v. Public Interest

87. The Authority will consider public interest in terms of safety, health and economic interest of the consumer. Public interest concerns may therefore arise for conducts involving product(s) or product related services if there is a risk that they may cause serious injury, illness or loss of livelihood or adversely affects the vulnerable group of consumers namely the old-aged, children, and consumers with existing health conditions.

88. Public interest will be scored as below:

No	Public Interest	Score
1.	Dangerous characteristics of the good ²	+2
2.	Affects vulnerable consumers (babies, old aged, sick, poor)	+2

vi. Refusal to co-operate

² Refer to the section on product safety standards, unsafe goods and product liability of the Consumer Protection Guidelines

89. A party's refusal to cooperate with the Authority in the course of investigations will be taken into account. As an example, where a party fails to respond to Authority's communications/orders or submit such evidence as required during investigations. The parameter will be scored at +1.

vii. Other aggravating factor

90. The Authority may consider any other additional aggravating factors which shall be each scored up to +0.5. However, the maximum score possible shall be capped at +2.

d) Mitigating Factors

91. Additionally, the base amount/ percentage will be adjusted for mitigating factors. These factors are weighted depending on the impact of the initiatives or interventions by the undertaking on reducing the harm or loss to the consumer or the public, resulting from the infringement. These may include:

- i. Immediate termination of the infringement as soon as the Authority intervenes;
- ii. Remedial measures taken to rectify the wrong-doing e.g. by indicating evidence of compliance;
- iii. Early admission of the breach;
- iv. Cooperation by the undertaking with the Authority;
- v. The breach was genuinely accidental or inadvertent;
- vi. The alleged offender has not been the subject of previous enforcement action on similar conduct; and
- vii. Any other mitigating factors which the Authority finds reasonable and relevant.

i. Cooperation

92. Cooperation is useful where it leads to the effectiveness of the Authority's enforcement actions by; contributing to the speedy adoption of the Authority's decisions, gathering additional evidence, and better-targeted remedies. Cooperation will be considered material where the undertaking concerned has effectively cooperated with the Authority through admission of liability; and/or disclosure of more evidence, provision of commitments, and working within the given timelines; and Remedying of the conduct by the undertaking(s) and the same being notified to the Authority. This will be scored as given below:

No	Cooperation	Score
1.	Party elects to resolve the matter through a settlement pursuant to section 38 of the Act.	-1.5
2.	The party pursues a settlement during the investigation or before the Authority makes a finding and provides additional information	-1

3.	Undertaking(s) provided information to the Authority in a timely manner.	-0.5
4.	The party agrees helps in designing and implementing remedies (immediate termination of breach)	-0.5
5.	The party is willing to acknowledge liability for the infringement(early admission of breach)	-1

ii. Nature of the Conduct

No	Nature of the conduct	Score
1.	The conduct was inadvertent	-1
2.	Immediate termination of the conduct	-0.5

iii. First time offender

93. The Authority may consider the fact that a party is a first-time offender and has not been subject to previous enforcement action under the Act. The score for a first-time offender shall be -1. Additionally, for an inadvertent

iv. The breach was inadvertent

94. The Authority may consider whether the conduct in question was beyond the control of the undertaking and not deliberate planning. The score for inadvertent conduct shall be up to -2.

v. Value of goods or services

95. For goods and services that are of very low value and have no direct harm to health, the Authority shall apply a score of up to -0.5.

vi. Other mitigating factors

96. The undertakings may provide any other additional mitigating factors such as premeditation which, if considered acceptable by the Authority, shall be each scored up to a maximum of -0.5. However, the maximum score shall be capped at -2.

H.4. Calculation of Financial Penalty Amount

Financial Penalty percentage

97. After consideration of the aggravating and mitigating factors, the Authority will arrive at the financial penalty as follows:

Financial Penalty (Fp)=(Bp+AF)-MF where Fp is the final financial penalty, Bp is the base percentage, AF are the aggravating factors and MF are the mitigating factors. Fp ≤ 10%.

Financial Penalty Amount

98. To get the actual amount of the Financial penalty to be imposed upon the supplier/undertaking that is in violation of the provision of the Act:

$Fp \times To = FpTo$ where *To* is the relevant turnover.

I. SETTLEMENTS AND SETTLEMENT PROCEDURES

99. Section 38 of the Act provides that the Authority may, at any time during or after an investigation into an alleged infringement, enter into an agreement of settlement with the undertaking concerned. This may include an amount as a pecuniary penalty. Settlement negotiations will be determined on a case-by-case basis.

100. The Authority will facilitate settlements in accordance with Article 47 of the Constitution of Kenya, section 38 of the Act, the general principles of section 4 of the Fair Administrative Action Act 2015, and the Competition (General) Rules 2019.

101. Pursuant to Rule 41(3) of the Competition (General) Rules 2019, the ninety-day period shall be deemed to run from the date the Authority communicates its consent in writing to the settlement request by the parties. Where the settlement proceedings are mandated by the court or tribunal, the ninety days period shall be deemed to commence from the date the court or tribunal grants orders to commence settlement.

102. Parties to settlement negotiations shall be required to submit a detailed settlement proposal to the Authority within 14 days from the date of receipt of the Authority's consent to initiate the settlement negotiations.

103. The Authority shall give its counter-proposal to the parties within 14 days after the receipt of the detailed settlement proposal from the parties. The counter proposal by the Authority shall additionally invite the parties to convene the first settlement meeting to commence the negotiations.

104. The process and nature of negotiation for settlement shall subsequently depend on the circumstances of each case but shall be governed by the principles of expediency and good faith. The Authority will prepare a road map with timelines and receive input on the same from the undertaking. Parties shall conduct the negotiations within the agreed timelines in the road map.

105. In the event that the 90-day period expires before a settlement agreement is concluded, the parties shall in writing seek an extension from the Authority for a further 30 days period before the expiry of the 90-day period.

106. Pursuant to Rule 41(4) of the Rules, the 30-day period shall be deemed to run a day after the expiry of the 90th day.

107. Upon successful settlement negotiations, a settlement agreement whose terms shall be binding on the Authority and the parties shall be effective upon execution. In the event of the collapse of the settlement negotiations, the Authority shall in writing inform the parties to the settlement of the termination of further settlement proceedings. The Principles applicable under Part H of these Guidelines shall apply in the determination of pecuniary penalty under section 38 of the Act and the tribunal or court-mandated settlements.

Settlements Post Leniency Applications

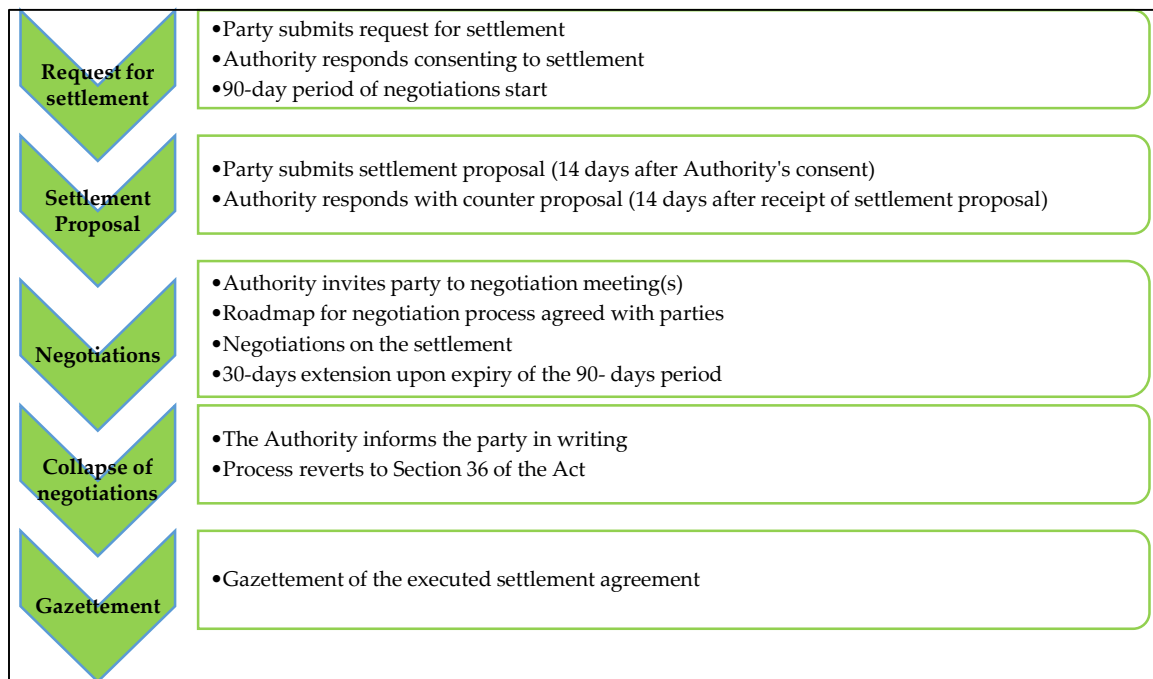
108. These Guidelines shall be read alongside the Leniency Program Guidelines (LPG)³. In doing so, the following will apply:-

- i. An undertaking under investigation, which has not applied for leniency, is at liberty to apply for settlement. However, a leniency applicant cannot apply for settlement unless their application has been revoked or rejected by the Authority.
- ii. The Authority shall apply higher discounted penalties to leniency applicants as specified in the LPG.
- iii. Where an undertaking applies to the Authority for leniency pursuant to section 89A of the Act but is not granted permanent leniency or where conditional leniency is revoked, it may apply for settlement pursuant to section 38 of the Act.
- iv. Penalties subsequent to successful leniency applications will be lower than those that will be offered to settlement applicants in the same cases.

109. A summary of the settlement process is outlined in **Diagram 1**.

³ Refer to the Authority's Leniency Program Guidelines

Diagram 1



Negotiation between parties in cases of abuse of buyer power

110. For purposes of abuse of buyer power, the Authority may facilitate parties that are willing to explore settlement negotiations subject to the Authority's supervision and approval of terms agreed by the parties.

111. In the event a buyer and supplier(s) undertakings show a willingness to enter into a negotiation with the objective of settling delayed payments, the Authority will grant the parties four (4) months with an extension of one (1) month within which time an agreed reasonable settlement plan should be presented.

112. The Authority shall review the agreed settlement terms and either approve or require revision of the same. The Authority will have final discretion on the approval of agreed terms.

113. The Authority shall proceed with this settlement modality as follows:

- a. Upon presentation of an agreed settlement plan or written intention of a settlement agreement by the parties, the Authority shall draw a settlement agreement for execution by the parties and witnessed by the Authority.
- b. The buyer undertaking will be required to submit regular updates of the instalment payment with corresponding evidence as proof of settlement.
- c. At the end of the settlement process, as envisaged in this section, both parties shall be required to inform the Authority of the completion of the settlement process, with the accused providing details of payments if not provided in (b) above.

d. Upon full settlement of the delayed payments, the Authority shall subsequently conclude investigations and close the file.

114. In the event the buyer undertaking defaults the terms of the settlement, the Authority shall grant such party additional time to resolve the default. In view of the terms of the settlement agreement being mutually agreed, the Authority will in the event of sustained default proceed to impose any of the penalties under section 36 of the Act.

115. Default on an agreed payment plan shall be considered in the calculation of any applicable financial penalties as an aggravating factor.

116. If the aggrieved parties are not willing to settle, the Authority may proceed to finalize investigations and make a determination.

J. ABILITY OF AN UNDERTAKING TO PAY THE PENALTY

117. In addition to the foregoing, in exceptional circumstances, the Authority has the discretion to allow undertakings to pay penalties in reasonable installments. The frequency of the installments shall be discussed and mutually agreed upon on a case-by-case basis.

118. In determination of the penalty payment by instalments, the undertakings shall provide clear demonstration on financial distress/ shock that may hinder payment of the penalty in one instalment.

K. DEFAULT IN PAYMENT OF PENALTIES

119. In the event that parties default on the payment of penalties within the stipulated period, interest shall accrue as provided for under Rule 48 of the Competition General Rules, 2019.

L. PUBLISHING OF DECISIONS IN THE GOVERNMENT GAZETTE AND ANNUAL REPORTS

120. Notwithstanding any confidentiality granted, the Authority shall cause notice to be given in the Kenya Gazette of any agreement referred to in section 38 of the Act.

121. The notice referred to above shall include:

- i. the name of every undertaking involved; and
- ii. the nature of the conduct that is the subject of the action or the settlement agreement which includes the contravention, penalty amount and any other conditions agreed upon in the settlement

M. CONFIDENTIALITY

122. The Authority shall grant confidentiality pursuant to Section 20(5) of the Act on any material information given by undertakings. Notwithstanding that the Authority has granted

confidentiality, the Authority may disclose the subject information for purposes of gazettelement and publication of the Authority’s annual reports as required by section 78 of the Act.

N. EFFECTIVE DATE

123. These Consolidated Administrative Remedies and Settlement Guidelines are effective as from2023 and will be reviewed as and when the need arises.

Dr. Adano W. Roba

Ag. Director General