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The Fair Trading Commission

FTC 4

The Fair Trading Commission of Seychelles

Penalties and Remedies

1. Introduction	4
Statutory Background.....	4
Policy Objectives.....	4-5
2. Determining the Level of Penalty	5
Seriousness of Infringement.....	5-6
Duration.....	6
Other Relevant Factors.....	6-7
Aggravating and Mitigating Factors.....	7
3. Procedure for Penalty	8
4. Remedy	8
Effectiveness.....	9
Principle of Proportionality.....	10
Offsetting Benefits.....	10
Summary of Process.....	10-11
5. Choice of Remedies	11
Advocacy.....	11
Behavioural.....	11-12
Structural.....	12-13
6. References	

These guidelines are not a substitute of the Act or any Regulations and should instead be read in conjunction with the relevant legal instruments. The examples used within these guidelines are for illustration and do not set a limit on the investigation and enforcement activities of the Commission. Persons in doubt with regards to how their commercial activities may be affected by the Act may wish to seek legal advice. The Commission may, from time to time, review and issue revised versions of its guidelines.

1. Introduction

1.1 The Fair Competition Act 2009 gives The Fair Trading Commission the power to issue directions and impose financial penalties on enterprises for infringing PART 3 (*sub-part 1-5*) of the Act.

1.2 This document describes the approach of The Fair Trading Commission (FTC) to setting remedies and penalties, as required by Section 41-46 of the Competition Act 2009.

1.3 The FTC is empowered by the Act to remedy competition problems that it finds in its investigations, and in some cases to impose financial penalties on enterprises in breach of the Act. Remedies are actions taken to correct an existing or anticipated failure of competition. Penalties penalize past anticompetitive behaviour. This document describes the principles the FTC will follow in taking both these different forms of action.

1.4 Statutory Background

As per FCA Section 46 (2): *“Where the Commission imposes a financial penalty on an enterprise, the financial penalty shall not exceed 10 percent of the turnover of the enterprise in Seychelles during the period of the breach of the prohibition up to a maximum period of 5 years.”*

1.5 Policy Objectives

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

- To reflect the seriousness of the infringement, and
- To deter enterprises from engaging in anti-competitive practices.

The imposition of a financial penalty is discretionary. The FTC will, where appropriate, impose financial penalties which are severe, particularly, in respect of cartel activities, for example, in price-fixing, market sharing, bid-rigging (collusive tendering) or, limiting or controlling production or investment arrangements, and serious abuses of dominance as they are among the most serious infringements of competition law. This is aimed at deterring not only the infringing enterprise but also other like-minded enterprises.

1.6 The assessment of an appropriate penalty to be imposed for all types of infringement will depend on the facts of each case.

1.7 **Business year:** Refers to a period of more than six months in respect of which an enterprise publishes accounts or, if no such accounts have been published for the period, prepares accounts.

1.8 **Turnover:** Refers to the turnover of an enterprise for the business year preceding the date on which the decision of the FTC is taken or, if figures are not available for that business year, the one immediately preceding it.

2. Determining The Level of Penalty

2.1 A financial penalty imposed by the FTC under section 46 of the Act will be calculated taking into consideration the following:

- The seriousness of the infringement;
- The turnover of the business of the enterprise in Seychelles for the relevant product and relevant geographic markets affected by the infringement in the enterprise's last business year;
- The duration of the infringement;
- Other relevant factors
- Any further aggravating or mitigating factors.

2.2 The amount of the financial penalty to be imposed will depend in particular upon the nature of the infringement and how serious and widespread the infringement is.

2.3 In assessing the **seriousness of the infringement**, the FTC will consider a number of factors, including the nature of the product, the structure and condition of the market, the market share(s) of the enterprise(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, will also be an important consideration.

2.4 In assessing the impact and effect of the breach on the market, direct or indirect impact, the FTC will take into consideration, among other things the turnover of the enterprise in Seychelles for the last business year. The business year, for this purpose, will be the one preceding the date on which the decision of the FTC is taken, or if figures are not available for that business year, the one immediately preceding it.

2.5 Where the enterprise is a group of companies, the FTC will normally consider the relevant turnover to be that of the company active in the market(s) affected by the breach.

2.6 The amount of financial penalty to be imposed will also depend on the duration of the breach.¹

2.7 $n = period \text{ (Turnover) } V\%$

2.8 Duration of Infringement

The amount of financial penalty to be imposed will also depend on the duration of the infringement. An infringement covering more than half of a year may be treated as a full year for the purpose of calculating the duration of the infringement.

2.9 Other Relevant Factors

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 1.5 above, in particular, to deter enterprises 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 enterprise and any other special features of the case, including the size and financial position of the enterprise in question. Where relevant, any gains which might accrue to the enterprise in other product or geographic markets as well as in the relevant market under consideration may be taken into account.

¹ Note that the breach can only be deemed to have occurred from or after the date at which the Act came into force: April 05,2010.

2.10 Aggravating and Mitigating Factors

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

2.11 Aggravating factors include:

- Role of the enterprise as a leader in, or an instigator of, the infringement;
- Involvement of directors or senior management;
- Retaliatory or other coercive measures taken against other enterprises aimed at ensuring the continuation of the infringement;
- Continuance of the infringement after the start of investigation;
- Repeated infringements by the same enterprise or other enterprises in the same group;
- Infringements which are committed intentionally rather than negligently;

and

- Retaliatory measures taken or commercial reprisal sought by the enterprise against a leniency applicant.

2.12 Mitigating factors include:

- Role of the enterprise, for example that the enterprise was acting under severe duress or pressure;
- Genuine uncertainty on the part of the enterprise as to whether the agreement or conduct constituted an infringement;
- Adequate steps taken with a view to ensuring compliance with the sections of the FCA 2009.
- Termination of the infringement as soon as the FTC intervenes; and
- Co-operation which enables the enforcement process to be concluded more effectively and/or speedily.

3. Procedure for Penalty

3.0 When FTC makes an order imposing a penalty on an enterprise, such order shall be according to FCA Section 46 (3) (4) (5).

4. Remedy

4.1 Competition law remedies are adopted with the principal aim to restore competition in the market.² This includes first the 'micro' goals of putting the infringement to an end, compensating the victims, and curing the particular problem of competition, but also the 'macro goal' of putting incentives in place so as to minimize the recurrence of just such anticompetitive conduct.

4.2 Remedies seek generally to restore "*the plaintiff's rightful position, that is, to the position that the plaintiff would have occupied if defendant had never violated the law*" or "*to restore the defendants to the defendant's rightful position, that is, the position that the defendant would have occupied absent the violation.*"³ In other words, remedies are a cure to a "*wrong*" the plaintiff committed, "*in contravention of some legally-recognized right of the plaintiffs*"⁴ or of the category of right-recipients that the legislator aimed to protect. The wrong of the defendant gives rise to the enforceable right of the plaintiff (or the protected category) to impose on the defendant a correlative duty of stopping the illegal behavior, paying damages, making restitution, adopting a specific behavior.

² See Melamed, AD, 'Afterword: The Purposes of Antitrust Remedies' (2009) 76 Antitrust Law Journal 359.

³ Douglas Laycock, Modern American Remedies : Cases and Materials (Little, Brown, 1994), at 2.

⁴ Michael Tilbury, Michael Noone & Bruce Kercher, Remedies: Commentary and Materials (3d ed., LBC Information Services, 2000), at 1.

Effectiveness

4.3. The FTC will assess the effectiveness of remedies and this will involve several distinct dimensions:

- The FTC views competition as a dynamic process of rivalry between firms seeking to win customers' business over time. Restoring this process of rivalry through remedies that re-establish the structure of the market should be expected to address the adverse effects at source. Such remedies are normally preferable to measures that seek to regulate the ongoing behaviour of the relevant parties (*so-called behavioural remedies such as price caps, supply commitments or restrictions on use of long term contracts*) as these are unlikely to deal with an substantial lessening of competition (SLC) and its adverse effects as comprehensively as structural remedies and may result in distortions compared with a competitive market outcome.
- Appropriate duration and timing. Remedies need to address the substantial lessening of competition effectively throughout its expected duration. Remedies that act quickly in addressing competitive concerns are preferable to remedies that are expected to have an effect only in the long term or where the timing of the effect is uncertain.
- Practicality. A practical remedy should be capable of effective implementation, monitoring and enforcement. To enable this to occur, the operation and implications of the remedy need to be clear. The practicality of any remedy is likely to be reduced if elaborate and intrusive monitoring and compliance programmes are required. Remedies regulating ongoing behavior are generally subject to the disadvantage of requiring ongoing monitoring and compliance activity.
- Acceptable risk profile. The effect of any remedy is always likely to be uncertain to some degree. In evaluating the effectiveness of remedies, the FTC will seek remedies that have a high degree of certainty of achieving their intended effect.

4.4 The FTC has the right to modify the remedy if feedback from the market is as such that the anti-competitive nature is not being totally addressed by previous remedies or due to unforeseen circumstances in the market.

The Principle of Proportionality

4.5 The FTC will ensure that the remedy designed and chosen is one whose scope and form does not exceed what is necessary to achieve the competition law's objectives. The FTC will therefore consider the proportionality of the costs of any remedy it imposes to the benefits it expects to result from the operation of that remedy. Striving for proportionality can help to ensure that relief measures are appropriate for the conduct at issue, and that they are less arbitrary and thus more predictable.

4.5 The FTC is not required or expected to conduct a full 'cost-benefit' analysis of its remedies, and does not regard itself as bound to produce any numerical estimates of costs or of the benefits of its remedies. The benefits of competition can be difficult to quantify, while the costs are normally clearer.

Consideration of Offsetting Benefits

4.6 In determining, any particular case, the remedial measures required to be taken under FCA Sections 41 and 42, the FTC shall have regard to the extent to which any of the offsetting benefits specified in FCA Section 40 (2) are present in that case.

4.7 These off-setting benefits, listed in Section 40(1) (2) essentially provide for an 'efficiency defence'⁵

4.8 In assessing off-setting benefits, the FTC will consider if its proposed remedy will nullify or weaken the off-setting benefits. The aim of the FTC is ideally to remedy the anti-competitive effect it has found, while also preserving any off-setting benefits.

Summary of Process

4.9 In designing remedies, the FTC aims to make markets work better than they would otherwise have done. In particular, the FTC might make directions in order to remove restrictions to competition or otherwise to enhance (or prevent from worsening) the competitive working of the market. The

⁵ This is a standard term in competition policy, meaning essentially that conduct which is agreed to be anticompetitive is beneficial because it has positive effects which outweigh the negative effects of reduced competition.

remedies put in place must address both the short term anti-competitive practices in the market and the long term health of the competition process.

4.10 The FTC will publish its final decision on the competition complaint and remedies together with supporting reasons and information in a final report. The report will contain sufficient detail on the nature and scope of remedies to provide a firm basis for subsequent implementation of remedies by the FTC. In addition, the FTC will publish and update an administrative timetable regarding the implementation of remedies. The action the FTC takes in implementing remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the FTC has a special reason for acting differently.

5. Choice of Remedies

5.1 This section provides an overview of the various types of remedies and their characteristics. In most cases, FTC will adopt a combination of remedies rather than a single type. Remedies available to FTC will be classified into 3 Categories:

1. Advocacy.

5.2 This is the softest approach available to the FTC as a means of correcting anti-competitive practices on the market. If as a result of its investigation, the FTC has concluded that certain Government policies or regulations contribute to the competition problems it has found, the FTC will recommend removing or modifying them. It would be up to Government whether to do so, as only the Government can consider the effects of its policies other than on competition.

2. Behavioural.

5.3 Behavioural remedies, which obligate a company either to do something or to stop doing something, can be tailored more easily to fit individual defendants and market circumstances. Overall, they generally are less controversial than divestitures and have been applied far more frequently. Nonetheless, behavioural remedies do not attack concentration and market power directly. They also tend to require ongoing, and occasionally extensive, oversight and intervention by courts and agencies. Furthermore, behavioural remedies are more susceptible to strategic neutralization, minimization, or evasion by defendants than other measures.

5.4 The FTC will generally only use behavioural remedies as the primary source of remedial action in a merger inquiry for example where structural remedies are not feasible, or where the SLC is expected to have a short duration or behavioural measures will preserve substantial relevant customer benefits that would be largely removed by structural measures. However, the FTC may also use behavioural measures as an adjunct to structural measures.

5.5 As behavioural remedies are designed to have ongoing effects on business conduct throughout the period they are in force, the duration of these measures is a material consideration. The FTC may specify a limited duration if measures are designed to have a transitional effect. The FTC may, also, specify a long-stop date in a 'sunset clause' beyond which the measures will definitely not apply. The period used for the long-stop date will depend on the circumstances of the case but usually not greater than 10 years.

5.6 For behavioural remedies to have the desired impact it is essential that there are effective and adequately resourced arrangements in place for monitoring and enforcement so that there is a powerful threat that non-compliance will be detected and that action will be taken to enforce compliance where this is necessary.

3. Structural Divestiture of assets.

5.7 Structural remedies, which require firms to sever links from assets they hold, have the virtue of being able to eliminate market power rapidly while creating or invigorating competitors. They may also require less oversight by courts and agencies than other remedies. They are generally one-off measures that seek to restore or maintain the competitive structure of the market.

5.8 The aim of divestiture is to address an SLC by either creating a new source of competition through disposal of a business or assets from parties to a merger for example to a new market participant or strengthening an existing source of competition through disposal of a business or assets to an existing participant independent of the merger parties.

5.9 Divestitures may be subject to a variety of risks that may limit their effectiveness in addressing an SLC. It is helpful to distinguish between three broad categories of risks that may impair the effectiveness of divestiture remedies as follows:

(a) Composition risks—these are risks that the scope of the divestiture package may be too constrained or not appropriately configured to attract a suitable purchaser or may not allow a purchaser to operate as an effective competitor in the market.

(b) Purchaser risks—these are risks that a suitable purchaser is not available.

(c) Asset risks—these are risks that the competitive capability of a divestiture package will deteriorate before completion of divestiture, for example through loss of customers or key members of staff.

5.10 FTC will be prudent in its decision to recommend divestiture as a remedy to the Board of Commissioners taking into account the competition process and consumer welfare at all times. Divestitures will generally not require detailed monitoring following implementation although, in some cases, an effective divestiture may require supplementary behavioural measures for a specified period (eg to secure supplies of an essential input or service from parties to a merger to the divested business).

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