



سوروهنجاي قرسايشن برونبي دارالسلام  
COMPETITION COMMISSION  
BRUNEI DARUSSALAM

## Guidelines

# FINANCIAL PENALTY IN PURSUANT TO SECTION 42

## **Guidelines' Notes**

These Guidelines are intended to be an introductory text and guidance document on how the Commission enforces and administers the provisions under the Competition Order ("Order"). These Guidelines, however, are not a substitute for the Order or any Regulations made pursuant to the Order. They are not exhaustive, and do not set a limit on the investigation and enforcement activities of the Competition Commission of Brunei Darussalam ("CCBD"). In applying these Guidelines, the facts and circumstances of each case will be considered in totality. These Guidelines may be revised should the need arise. In the event that any of the provisions in these Guidelines are inconsistent or incompatible with the provisions of the Order, the provisions of the latter shall take precedence.

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## 1. Introduction

- 1.1. Pursuant to Section 42(4) of Competition Order, the CCBD may, by decision, impose financial penalty on undertakings for the infringement of the Order, intentionally or negligently.
- 1.2. In exercising its power, no financial penalty may exceed 10 per cent of such turnover of the business of the undertaking in Brunei Darussalam for each year of infringement, up to maximum of 3 years.
- 1.3. The CCBD's power to impose penalty on undertakings is one of the means conferred on it in order for it to carry out its duties entrusted by the Order. The penalty should have a deterrence effect, not only to the infringing undertakings but also for other undertakings from engaging in, or continuing, behaviour which may be in contrary to the Order.
- 1.4. These Guidelines provide general guidance and information on how the CCBD determines the appropriate financial penalty for the infringement of Section 11, Section 21 and Section 23 prohibitions under the Order.

## 2. Legal basis

### Section 42(4)

“No financial penalty fixed by the Commission under this section may exceed 10 *per cent* or such other percentage of such turnover of the business of the undertaking in Brunei Darussalam for each year of infringement for such period, up to a maximum of 3 years, as the Minister may, by order published in the *Gazette*, prescribe.”

## 3. Policy objectives

- 3.1. The main objectives of the CCBD'S policy on financial penalties are:
  - (a) to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and
  - (b) to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.
- 3.2. The CCBD has a discretion to impose financial penalties and intends, where appropriate, to impose financial penalties which are severe for agreements

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between undertakings which fix prices or share markets, bid-riggings and abuses of a dominant position.

- 3.3. The CCBD may, in certain cases, impose a symbolic penalty.
- 3.4. Undertakings which come forward to report its violation of the Competition Order 2015, through Leniency Application may benefit from partial or total exemption from financial penalty.
- 3.5. No financial penalty will be imposed for conducts exempted by the CCBD such as conduct which may have no adverse effect on competition or consumer welfare.

### 4. Method for determining financial penalty

- 4.1. The following present the general five-steps methodologies for the setting of financial penalty:

Step 1 – determine basic amount for each undertaking

Step 2 – adjustment according to the aggravating and mitigating factors

Step 3 – adjustment for other relevant factors

Step 4 – adjustment to the statutory cap under Section 42 of the Order

Step 5 – adjustment for immunity under leniency

### 5. Step 1 - Basic amount of penalty

- 5.1. In determining the basic amount of penalty, the CCBD will have regards to the following matters:

- (a) value of sales of goods or services to which the infringement relates (turnover);
- (b) seriousness of the infringement; and
- (c) duration of the infringement

- 5.2. Hence, the basic amount of penalty will be related to a proportion of the turnover, depending on the seriousness of the infringement, multiplied by the number of years of infringement.

<p style="text-align: center;"><b>Base penalty = (Turnover within Brunei Darussalam x percentage point of seriousness) x years of infringement</b></p>
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**5.3. Turnover**

- 5.3.1. The CCBD will take relevant turnover from the value of sales of goods or services to which the infringement directly or indirectly relates to the infringement in the undertaking's last business year. In this context, this refers to the last turnover made by the undertaking during the last full business year of its participation in the infringement.
- 5.3.2. The CCBD will require undertaking to provide their relevant turnover pursuant to Section 34 request of documents or information. The CCBD will base relevant turnover on figures from the undertaking's audited accounts.
- 5.3.3. Where the figures made available by an undertaking are incomplete or not reliable, the CCBD retains the discretion to use different figures on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

**5.4. Seriousness**

- 5.4.1. The assessment of seriousness will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.
- 5.4.2. The CCBD will consider the seriousness of the infringement and set a percentage for calculating the base penalty. As a general rule, the scale of the percentage can be set in the range of 15% to of to 30 % of the turnover. The more serious and widespread the infringement, the higher end of that scale would the percentage point is likely to be.
- 5.4.3. In assessing the seriousness of the infringement, CCBD will consider a number of other factors, including the nature of the product, nature of the infringement, the combined market share of all the undertakings concerned, 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.
- 5.4.4. Serious infringement of Section 11 such as agreements on price-fixing, market-sharing and supply limitation and bid rigging are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.
- 5.4.5. Conduct which infringes the Section 21 prohibition and which by virtue of the undertaking's dominant position and the nature of the conduct has, or is likely

to have, an adverse effect on the process of competition, for example, predatory pricing, is also considered to be a serious infringement.

- 5.4.6. With respect to the Section 23 prohibition, the seriousness of the substantial lessening of competition within the relevant market that has resulted, or which may be expected to result from the merger may be a factor used in assessing the percentage point.

## 5.5. Duration

- 5.5.1. To reflect the time-based extent of the conduct in question, the CCBD will have regard to the number of years of the undertaking's participation in the infringement.

- 5.5.2. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

## 6. Step 2 – Adjustment according to aggravating and mitigating factor

- 6.1. In setting the penalty, the CCBD may take into account circumstances that result in an increase or decrease in the basic amount as determined in Step 1 above. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances.

### 6.2. Aggravating factors

The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

- (a) role of an undertaking as a leader in, or an instigator of, the infringement;
- (b) coercive and/or retaliatory measures by undertakings against other persons to ensure the implementation, continuation, and/or concealment of the infringement;
- (c) continuance of the infringement after the start of investigation;
- (d) where an undertaking repeats the same or a similar infringement;
- (e) involvement of directors and senior management;
- (f) refusal to cooperate with or obstruction of the CCBD in carrying out its investigations; and
- (g) infringements which are committed intentionally rather than negligently.

### 6.3. Mitigating factors

The basic amount may be reduced where the CCBD finds that mitigating circumstances exist, such as:

- (a) undertaking's limited involvement in the infringement;
- (b) genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constituted an infringement;
- (c) termination of the infringement as soon as the Commission intervened; and
- (d) cooperation with the CCBD which enables the enforcement process to be concluded more effectively and/or speedily.

## 7. Step 3 – Adjustment for other relevant factors

7.1. The amount of financial penalty to be imposed after Step 2 may be adjusted by the CCBD in the following circumstances:

- (a) **Specific increase for deterrence** - the CCBD will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the penalty to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.
- (b) **Ability to pay** - In exceptional cases, the CCBD may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the penalty on the mere finding of an adverse or loss-making financial situation. A reduction could be granted on the basis of objective evidence that imposition of the penalty would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

## 8. Step 4 – Adjustment to the statutory maximum penalty

8.1. In respect of a financial penalty, it is set not to exceed 10% of the total turnover of the undertaking in Brunei Darussalam for each year in which the infringement occurred, up to a maximum of three years.

8.2. The involvement of an association of undertakings (e.g. a trade association) in an infringement of the Order may result in financial penalties being imposed on the association itself, its members or both. Where the infringement by an association of undertakings relates to the activities of its members, the penalty shall not exceed 10% of the sum of the turnover of business of each member of the association of undertakings in Brunei Darussalam, for each year of infringement, up to a maximum of three years.

## **9. Step 5 – Adjustment for immunity under leniency**

- 9.1. If an undertaking has granted leniency, then the amount of its financial penalty will be reduced by the amount stipulated in the grant of leniency.

## **10. Exemptions**

- 10.1. No financial penalty will be imposed on the following:

- (a) Exemption granted under Section 13 (individual exemption) and Section 15 (block exemption) of Competition Order;
- (b) Acceptance of undertaking by the CCBD under Section 45 of Competition Order;
- (c) Excluded activities specified under third and fourth schedule;
- (d) Any agreement made on or before 31 May 2019 for infringement of Section 11 prohibition –
  - i. During the transitional period;
  - ii. During any extension of the transitional period granted to undertakings;
  - iii. During the interim period, where undertakings made application of extension of the transitional period; and
  - iv. During any period specified by the CCBD or the Competition Appeal Tribunal for undertakings to bring infringement to an end, where undertakings made application of extension of the transitional period and the application is refused.
- (e) Effect of decision that anticipated merger, if carried into effect, will not infringe Section 23 prohibition as stipulated in Section 29 of Competition Order; and
- (f) Effect of decision that merger has not infringed Section 23 prohibition as stipulated in Section 30 of Competition Order.



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