



**Malaysian
Aviation Commission**
Suruhanjaya Penerbangan Malaysia

Draft Guidelines On
**THE DETERMINATION OF
FINANCIAL PENALTIES**

Published by



**Malaysian
Aviation Commission**
Suruhanjaya Penerbangan Malaysia

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1. Background

1.1 These Guidelines are issued by the Commission in the exercise of its power pursuant to section 65 of the Act to provide explanation on the financial penalties that may be imposed by the Commission pursuant to paragraph 59(1)(c) of the Act and the factors that may be considered by the Commission in imposing such financial penalty.

1.2 The factors provided in these Guidelines which may be considered by the Commission in imposing a financial penalty pursuant to paragraph 59(1)(c) of the Act are not exhaustive and the examples are for illustrative purposes only. The Commission will consider the specific facts and circumstances of each case and may take into account any other factor that the Commission deems relevant in imposing a financial penalty in an infringement decision.

1.3 These Guidelines serve to supplement Part VII of the Act or any regulation relating to the same. These Guidelines should be read together with all other guidelines issued by the Commission pursuant to section 65 of the Act.

1.4 The concepts and principles in these Guidelines are based on the domestic and international best practices relating to competition law.

1.5 The Commission may revise these Guidelines from time to time taking into account developments in competition law and the civil aviation industry.

1.6 Enterprises providing aviation services are advised to conduct self-assessment exercises of their businesses in respect of their conduct, procedures, management and control. Enterprises are also advised to have competition compliance procedures in place for their employees at all levels including the top management and the governing body, where applicable.

1.7 Any enterprise in doubt about how its commercial activities may be affected by Part VII of the Act may wish to seek independent legal advice.

2. Financial Penalties under Paragraph 59(1)(c) of the Act

2.1 Paragraph 59(1)(c) of the Act provides that the Commission may impose a financial penalty on an enterprise if the Commission determines that there is an infringement of a prohibition under Part VII of the Act. However, the imposition of a financial penalty by the Commission pursuant to paragraph 59(1)(c) of the Act shall not exceed ten percent of the worldwide turnover of the enterprise over the period during which an infringement occurred.

2.2 The imposition of a financial penalty under paragraph 59(1)(c) of the Act has two main objectives, which are as follows:

- (a) to reflect the seriousness of the infringement; and
- (b) to deter the infringing enterprises from carrying out any other commercial activity, agreement or merger that would infringe a prohibition under Part VII of the Act in the future.

The threat of being imposed with a financial penalty may also deter other enterprises in the aviation service market from infringing any prohibition under Part VII of the Act.

2.3 The Commission will determine the amount of a financial penalty on a case by case basis.

2.4 Any financial penalty imposed by the Commission under paragraph 59(1)(c) of the Act shall be payable to the Aviation Commission Fund, pursuant to paragraph 25(1)(b) of the Act.

3. Factors in Determining the Amount of Financial Penalty

Base Penalty

3.1. In assessing the amount of a financial penalty to be imposed in a specific case, the Commission will first determine the base penalty by considering the following three factors:

- (a) The turnover of the enterprise for the relevant aviation services for the financial year during which the infringement occurred
 - In general, the relevant turnover figures will be based on the enterprise's audited accounts. However, the Commission may use different figures in certain situations such as where the audited accounts are not available or reliable.
 - In this regard, it is noted that in the interpretation of "enterprise" under section 47 of the Act, "a parent and subsidiary company shall be regarded as a single enterprise if, despite their separate legal entity, they form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their actions in the aviation service market". As such, the turnover of a parent company and a subsidiary company that form a single economic unit shall be regarded as the turnover of a single enterprise.
 - If the figures of the enterprise's turnover for the financial year during which the infringement occurred are not available, the Commission may have regard to the enterprise's turnover for the financial year immediately preceding the infringement.

(b) The seriousness or gravity of the infringement

- In assessing the seriousness or gravity of the infringement in question, the type of infringement may be relevant. For example, an infringement of the prohibition on anti-competitive agreements in the form of cartels such as those listed under subsection 49(2) of the Act may be considered as a serious infringement.
- The impact of the infringement on the relevant aviation service market and the extent of the anti-competitive practice or conduct may also be considered in assessing the seriousness or gravity of the infringement. A widespread anti-competitive practice or conduct would entail a finding of a more serious and grave infringement such as an infringement that affects multiple aviation service markets or geographical areas. The number of enterprises involved in an infringement or the number of enterprises and consumers affected by the infringement may also be considered.
- In addition, the Commission may also have regard to other relevant factors such as the nature of the services, the structure of the relevant aviation service market, the market share of the infringing enterprise and the degree of barriers to entry.

(c) Duration of the infringement

- For the purpose of calculating the duration of the infringement, the Commission may treat an infringement that occurred for a period below one year as a full year or a half year period, as the Commission deems appropriate.
- For an infringement that occurred for a period of more than one year, the Commission may determine the duration of infringement based on the number of years over which the infringement occurred.

Aggravating and Mitigating Factors

3.2 Upon determining the base penalty based on the factors listed in paragraph 3.1 above, the Commission will further consider adjusting the base penalty amount taking into account the aggravating or mitigating factors applicable in each case, if any.

3.3 The Commission may increase the financial penalty amount if it determines that there are aggravating factors in a particular case. Aggravating factors include –

- (a) the role of the enterprise as an instigator or leader of an agreement, conduct or merger that infringes a prohibition under Part VII of the Act;
- (b) the coercive behaviour of the enterprise towards any other enterprise in carrying out an agreement, conduct or merger that infringes a prohibition under Part VII of the Act;
- (c) obstruction or lack of co-operation by the enterprise during the investigation process carried out by the Commission;
- (d) unreasonable failure by the enterprise to provide relevant information as requested by the Commission during the investigation process;
- (e) the enterprise has a record of committing similar infringement or any other infringement of a prohibition under Part VII of the Act;
- (f) the enterprise had continued with its agreement, conduct or merger that infringes a prohibition under Part VII of the Act after the notice of investigation has been issued or published by the Commission; and
- (g) the involvement of the enterprise's board members or senior management in the infringement.

3.4 On the other hand, the Commission may reduce the financial penalty amount if it determines that there are mitigating factors in a particular case. Mitigating factors include the following:

- (a) the enterprise has a low degree of fault over the infringement;
- (b) the enterprise played a relatively minor role in the infringement especially if its involvement was secured by threats or coercion by any other enterprise;
- (c) the enterprise gave good co-operation in the investigation process carried out by the Commission;
- (d) the existence of a competition compliance programme that is appropriate having regard to the nature and size of the enterprise. However, depending on its implementation, the existence of a competition compliance programme may indicate a higher degree of fault and may instead be treated as an aggravating factor; and
- (e) any compensation made by the enterprise to the victims of the infringement.

3.5 The list of aggravating and mitigating factors under paragraphs 3.3 and 3.4 are not exhaustive.

Maximum Financial Penalty Amount

3.6 The financial penalty amount imposed by the Commission shall not exceed the maximum limit provided under paragraph 59(1)(c) of the Act, which is ten percent of the worldwide turnover of the enterprise over the period during which an infringement occurred.

3.7 Unlike the factor in determining the base penalty under subparagraph 3.1(a) of these Guidelines, the worldwide turnover of an enterprise in terms of paragraph 59(1)(c) of the Act is not limited to the turnover for the relevant aviation services only.

3.8 In light of the interpretation of “enterprise” under section 47 of the Act, the worldwide turnover of a parent company and a subsidiary company that form a single economic unit shall be regarded as the turnover of a single enterprise.

3.9 With regard to the “the period during which an infringement occurred”, the Commission may treat an infringement that occurred for a period below one year as a full year or half year period, as it deems appropriate. For an infringement that occurred for a period of more than one year, the Commission may determine the duration of infringement based on the number of years over which the infringement occurred.

Grant of Leniency under Section 60 of the Act

3.10 If an enterprise has received leniency pursuant to section 60 of the Act, the amount of the financial penalty to be imposed by the Commission pursuant to paragraph 59(1)(c) of the Act will be reduced by a percentage to be determined by the Commission in the grant of leniency.

