



*competition***commission**
south africa

Guidelines for the Determination of Administrative Penalties for Prohibited Practices

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Draft

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PREFACE

These guidelines have been prepared in terms of section 79(1) of the Competition Act No. 89 of 1998 (as amended) (“the Act”) which allows the Competition Commission (“Commission”) to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act.

There has been a growing need from the Competition Tribunal (“Tribunal”), the Competition Appeal Court (“CAC”) and stakeholders for the Commission to develop guidelines for determining administrative penalties.¹

These guidelines present the general methodology that the Commission will follow in determining administrative penalties for purposes of concluding consent orders and settlement agreements and recommending an administrative penalty in a complaint referral before the Tribunal. The Commission recognises that the imposition of administrative penalties is not a precise science. Therefore these guidelines will not prevent the Commission from exercising its discretion on a case-by-case basis. The primary objective of these guidelines is to provide objectivity and transparency in the method of determining administrative penalties.

¹ See *Competition Commission v. Southern Pipelines Contractors & Conrite Walls (Pty) Ltd* Case No.: 23/CR/Feb09 at paragraphs 40, 42 and 43
See *Southern Pipelines Contractors & Conrite Walls (Pty) Ltd v. Competition Commission* Case Nos.: 105 &106/CAC/Dec10

1. DEFINITIONS

1.1. Unless the context indicates otherwise, the following terms are applicable to these guidelines –

- 1.1.1. “The Act” means the Competition Act No. 89 of 1998 (as amended);
- 1.1.2. “Administrative penalty” means a monetary penalty that may be imposed by the Tribunal in terms of section 59 of the Act;
- 1.1.3. “Affected turnover” means the annual turnover of the firm in the Republic and exports from the Republic in the line of business in which the contravention has taken place;
- 1.1.4. “Base amount” means a proportion of the affected turnover determined in accordance with the methodology stated below;
- 1.1.5. “Base year” means the most recent financial year in which there is evidence that the firm participated in the contravention;
- 1.1.6. “The CAC” means the Competition Appeal Court as established in terms of section 36 of the Act;
- 1.1.7. “CLP” means the Competition Commission’s Corporate Leniency Policy as defined in Notice 195 of 2004, Government Gazette No. 25963 of 6 February 2004 (as amended);
- 1.1.8. “The Commission” means the Competition Commission, a juristic person established in terms of section 19 of the Act;
- 1.1.9. “Duration” means the number of months or years of participation in the contravention by a firm;

- 1.1.10. "Firm" includes a person (juristic or natural), partnership or a trust. This may include a combination of firms that form part of a single economic entity, a division and/or a business unit of a firm;
- 1.1.11. "Firm's annual turnover" means the firm's annual turnover in the Republic and its exports from the Republic in a financial year;
- 1.1.12. "Holding company" means holding company as defined in section 1 of the Companies Act No. 71 of 2008, as amended;
- 1.1.13. "The Tribunal" means the Competition Tribunal, a juristic person established in terms of section 26 of the Act.

2. INTRODUCTION

- 2.1. The Commission regards administrative penalties as an important tool in enforcing the Act. The primary objective of administrative penalties is deterrence. Administrative penalties serve as a specific deterrent against future anti-competitive behaviour by firms that have contravened the Act and as a general deterrent to other firms that may consider engaging in anti-competitive conduct.
- 2.2. The Act provides for administrative penalties to be imposed on firms for engaging in conduct that is prohibited in terms of sections 4(1)(b), 5(2) or 8(a), (b) or (d) of the Act and for engaging in conduct that is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice in terms of sections 4(1)(a), 5(1), 8(c) or 9(1) of the Act.
- 2.3. The Tribunal and the CAC have now provided guidance on how administrative penalties ought to be determined. This has culminated in a specific six-step methodology

developed by the Tribunal² and the CAC.³ The Commission issues these guidelines setting out its interpretation of the application of the Tribunal's methodology in consent or settlement agreements as well as in recommending the imposition of administrative penalties before the Tribunal and the CAC.

3. OBJECTIVES

3.1. The primary objective of these guidelines is to provide some measure of transparency and objectivity in how the Commission will determine administrative penalties.

3.2. In developing these guidelines, the Commission conducted a review and comparison of guidelines and penal codes developed by other competition authorities such as the European Commission and the United Kingdom's Competition and Markets Authority as well as the principles laid out by the Tribunal (and endorsed by the CAC) in its six-step methodology. In doing so, the Commission was mindful of the nuances and variations in each jurisdiction, including the statutory mandate that the competition authorities in these jurisdictions have to impose administrative penalties. The Commission was further mindful of the differences in the nature of prohibited practices under Chapter 2 of the Act.

4. LEGISLATIVE FRAMEWORK

4.1. These guidelines have been prepared in terms of section 79(1) of the Act which allows the Commission to prepare guidelines to indicate its policy approach on any matter falling within its jurisdiction in terms of the Act. These guidelines are aimed at providing guidance in terms of section 79(2)(b) of the Act and are not binding on the Commission,

² *Competition Commission v. Aveng (Africa) Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd and BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09

³ *Reinforcing Mesh Solutions (Pty) Ltd and Vulcania Reinforcing (Pty) Ltd v. Competition Commission* 119 & 120/CAC/May2013

the Tribunal or the CAC in the exercise of their respective discretion, or their interpretation of the Act.

- 4.2. The Commission is not the final arbiter of administrative penalties, nor is it the final arbiter of consent orders or settlement agreements. Rather, the decisions taken by the Commission in terms of administrative penalties are subject to the approval of the Tribunal and oversight by the courts through appeals and/or review.
- 4.3. In terms of section 58(1)(a)(iii) and (b) of the Act, read together with section 59, the Tribunal may impose an administrative penalty for a prohibited practice in contravention of sections 4(1)(b), 5(2), 8(a), (b),(d) of the Act. The Tribunal may also impose an administrative penalty for a prohibited practice in contravention of sections 4(1)(a), 5(1), 8(c) or 9(1) of the Act if the conduct is substantially a repeat by the same firm of conduct previously found by the Tribunal to be a prohibited practice.
- 4.4. Pursuant to sections 49D and 58(1)(b) of the Act, the Commission and the respondent may reach an agreement on the terms of an appropriate order, which may be confirmed by the Tribunal. The terms of such order may include an agreement on the payment of an appropriate administrative penalty.
- 4.5. Pursuant to section 27 of the Act, the Tribunal may adjudicate on any prohibited conduct and upon making a determination, may impose an administrative penalty as a remedy provided for in the Act.

5. METHODOLOGY FOR THE CALCULATION OF PENALTIES

- 5.1. As a general approach, the Commission will apply the Tribunal's six-step methodology when determining the administrative penalty that a firm will be liable to pay for contravening the relevant sections of the Act, namely:

- 5.1.1. **Step 1:**Determination of the affected turnover in the base year;

- 5.1.2. **Step 2:** Calculation of the base amount being that proportion of the affected turnover relied upon;
- 5.1.3. **Step 3:** Multiplying the amount obtained in step 2 by the duration of the contravention;
- 5.1.4. **Step 4:** Rounding off the figure obtained in step 3 if it exceeds the cap provided for by section 59(2) of the Act;
- 5.1.5. **Step 5:** Considering factors that might mitigate and/or aggravate the amount reached in step 4, by way of a discount or premium expressed as a percentage of that amount that is either subtracted from or added to it; and
- 5.1.6. **Step 6:** Rounding off this amount if it exceeds the cap provided for in section 59(2) of the Act.

5.2. Where appropriate, the amount calculated in terms of the above methodology may be further adjusted:

- 5.2.1. By application of settlement discount(s); and
- 5.2.2. In exceptional circumstances, the inability to pay as provided under paragraph 7 (seven) below.

Step 1: Determination of Affected Turnover

5.3. The affected turnover is the firm's turnover or the turnover of an association of firms, derived from the products or services that are the subject of the contravention.⁴

⁴ See paragraph 134 of the Competition Tribunal decision in *Competition Commission v. Aveng Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd & BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09

See paragraph 45 of the Competition Tribunal decision in *Competition Commission v. DPI Plastics (Pty) Ltd, Petzetakis Africa (Pty), Marley Pipe Systems (Pty) Ltd, Swan Plastics (Pty) Ltd, Amitech South Africa (Pty) Ltd, Flo-Tek Pipes & Irrigation (Pty) Ltd, MacNeil Agencies (Pty) Ltd, Andrag (Pty) Ltd, Gazelle Plastics (Pty) Ltd & Gazelle Engineering (Pty) Ltd* Case No.: 15/CR/Feb09

- 5.4. The Commission, as a general approach, will have regard to the firm's affected turnover during the base year.
- 5.5. The Commission will have regard to the firm's audited financial statements. Where audited financial statements are not available, the Commission may consider any other reliable records reflecting the firm's affected turnover or estimate the affected turnover based on available information.
- 5.6. Where the contravention took place within the auspices of an association of firms and the association is responsible for aiding, organising and/or executing the contravention, the association will be liable for payment of the administrative penalty, separately from the members of the association. The affected turnover that will generally be considered shall be based on the total revenue of the association.
- 5.7. In circumstances where the affected turnover of a firm is zero for a particular market (for example, in the case of market allocation agreements precluding entry into certain product or geographical areas), the Commission may consider the firm's annual turnover in the market that was protected as a result of the conduct, that is the market that was allocated to the firm as a result of the conduct.
- 5.8. In cases where there is a once-off bid-rigging contravention:
- 5.8.1. For the firm that has won the tender, and that was party to the collusive agreement, the Commission will consider the affected turnover to be the value of the tender/contract;
- 5.8.2. For the firm that did not win the tender, where it was party to the collusive agreement and submits one or more complementary bids, or where it agrees to not submit a bid or submits a high bid to ensure a bid is won by another firm, the Commission will consider the affected turnover to be the greater of (1) the turnover generated by the firm in the goods or services that were affected by the contravention, or (2) the turnover reflected in the contract or bid on which the firm

submitted a rigged bid or a cover bid in connection with the contravention, or (3) the value of the tender/contract.

Step 2: Calculation of the Base Amount

5.9. The Commission will calculate the base amount of the administrative penalty to be imposed with reference to the firm's affected turnover.

5.10. The base amount will be calculated as a proportion of the affected turnover on a scale from zero percent (0%) to thirty per cent (30%)⁵. The proportion applied will be based on some of the factors listed in section 59(3), specifically section 59(3)(a), (b), and (d), which are:

5.10.1. The nature, duration, gravity and extent of the contravention;

5.10.2. Any loss or damage suffered as a result of the contravention; and

5.10.3. The market circumstances in which the contravention took place.

5.11. In determining whether the proportion of the base amount will be at the higher end or lower end of the scale (i.e. 0 to 30%), in light of the factors listed above, the Commission will consider the following:

5.11.1. The nature of the affected product(s);

5.11.2. The structure of the market;

5.11.3. The market shares of the firms involved;

5.11.4. Barriers to entry in the market; and

5.11.5. The effect of the contravention on competitors and third parties including the likely impact on small and medium-sized enterprises and the likely impact on low income consumers.

⁵ See paragraph 147 of *Competition Commission v. Aveng Africa Limited t/a Steeledale, Reinforcing Mesh Solutions (Pty) Ltd, Vulcania Reinforcing (Pty) Ltd & BRC Mesh Reinforcing (Pty) Ltd* Case No.: 84/CR/Dec09

5.12. Notwithstanding the above, the Commission notes that it may not always be possible to measure or estimate the loss or damage suffered as a result of the conduct with any precision especially where given the nature of the conduct, it would not be possible to construct the counterfactual. For cartel conduct, harm is presumed and will not be proved.

5.13. The higher end of the scale will be reserved for the most serious contraventions such as hard-core cartel conduct (price-fixing, market allocation, and collusive tendering) and some forms of abuse of dominance or unilateral conduct (excessive pricing, predation, refusal to provide access to essential facilities, inducement-related practices, and buying-up a scarce supply of intermediate goods or resources).⁶

Step 3: Duration of the Contravention

5.14. Once the Commission has established an appropriate base amount, it will take into account the duration of the firm's participation in the contravention. In doing so, the Commission will multiply the base penalty by the number of years of participation in the contravention.

5.15. If the contravention existed prior to the Competition Act, the duration will begin from 1 September 1999, which is the date of the commencement of the Competition Act.

5.16. For contraventions lasting less than 1 year, the Commission will apply a duration multiplier equal to the proportion of the year over which the contravention lasted. For example, if the contravention lasted for 8 months, the Commission will apply a duration multiplier of $8/12$ ⁷.

⁶ Ibid at paragraphs 140 – 147

Commission v. Telkom Case No. 11/CR/Feb04 (decision 7 August 2012); and *Commission v. Sasol Chemical Industries* Case No. 48/CR/Aug2010 [011502]

⁷ In *Commission v DPI Plastics & Others*, the Tribunal applied a $7/12$ duration multiplier on MacNeil's for its 7 month participation in the contravention

5.17. For contraventions relating to section 4(1)(b)(iii) of the Act, i.e. collusive tendering, the Commission will use the number of years for which the contract lasts, as the multiplier⁸. In cases relating to compensation payments⁹, the Commission may consider the duration as extending to the period up to at least the date when the final compensation payment was made.¹⁰

Step 4: Statutory Limit

5.18. Where the administrative penalty determined in step 3 exceeds the maximum allowable limit of 10% of the firm's annual turnover during its preceding financial year, the Commission may have regard to the maximum allowable statutory limit in line with section 59(2) of the Act for the purposes of proceeding with the administrative penalty calculation.

Step 5: Aggravating and Mitigating Factors

5.19. Once the base amount has been determined, the Commission will adjust this figure based on the relevant factors in section 59(3) of the Act which assess the aggravating and mitigating circumstances of each firm and its conduct, which may have not been considered in step 2 above. These factors include:

5.19.1. Section 59(3)(c) of the Act which relates to the behaviour of the firm in the market during the period of the contravention, that is, in relation to consumers and competitors, as opposed to how it responds to the competition authorities. This will also include but is not limited to a consideration of:

⁸ *Videx Wire Products (Pty) Ltd v Competition Commission of South Africa* Case No.: 124/CAC/OCT12

⁹ Compensation payments occur where two or more bidders each prepare and submit their own bids on condition that the winning party will pay the losing party an agreed sum of money. See decision of the Office of Fair Trading, No. CA98/02/2009: *Bid rigging in the construction industry in England* 21 September 2009 (Case CE/4327-04)

¹⁰ See decision of the Office of Fair Trading, No. CA98/02/2009: *Bid rigging in the construction industry in England* 21 September 2009 (Case CE/4327-04)

- 5.19.1.1. The nature of the firm's involvement in the contravention i.e. whether the firm was proactive in initiating the contravention, whether it was a passive participant or whether it was coerced by other firms who are party to the contravention;
 - 5.19.1.2. Bona fide, negligence or deliberate and wilful engagement in the contravention;
 - 5.19.1.3. The involvement of directors and/or senior management in the contravention;
 - 5.19.1.4. The firm's encouragement of staff to participate in the contraventions for example. through personal incentives linked to the success of the contravention;
 - 5.19.1.5. Whether the firm continued with its conduct or ceased the conduct, following its knowledge of the Commission's investigation;
 - 5.19.1.6. Whether the firm was proactive and timeous in exercising its initiative by, for example, instituting corrective measures within the firm;
 - 5.19.1.7. Evidence that demonstrates the termination of the conduct as soon as the Commission intervened;
 - 5.19.1.8. Whether the firm implemented the anticompetitive conduct.
- 5.19.2. Section 59(3)(e) of the Act which relates to the profit derived from contravention.
- This may include but is not limited to a consideration of an assessment of the level of profit achieved by the firm as a result of the contravention. The Commission notes that this may not always be possible to assess in all cases. This is because the benefits of participation in some anticompetitive conduct not only translate to quantifiable monetary benefit but also extend to the protection of participants from the demands of competition such as efficiency, investment and service. For 4(1)(b) cases, there will be a presumption that the conduct was profitable.

5.19.3. Section 59(3)(f) of the Act which relates to the degree of co-operation with the Commission and Tribunal. This may include but is not limited to a consideration of:

5.19.3.1. The extent to which the firm, inter alia, delayed, obstructed, and/or assisted in expediting the investigation and litigation process;

5.19.3.2. Whether the firm co-operated through tangible actions to facilitate the speedy resolution of the case.

5.19.4. Section 59(3)(g) of the Act which relates to previous contraventions by the firm and in this instance the Commission will determine whether the firm is a repeat offender. This may include but is not limited to a consideration of:

5.19.4.1. whether the firm has engaged in conduct which is a repeat by that firm of conduct previously found by the Tribunal to be a prohibited practice;

5.19.4.2. instances where the firm was granted leniency in terms of the Commission's CLP, for any conduct previously found to be a prohibited practice by the Tribunal and/or settled a case by consent order.

Step 6: Consideration of the Statutory Limit

5.20. As stipulated in section 59(2) of the Act, the administrative penalty may not exceed 10% of the firm's annual turnover in the Republic and its exports from the Republic during the firm's preceding financial year.

5.21. Where the administrative penalty determined above exceeds the maximum allowable statutory limit of 10% of the firm's annual turnover during its preceding financial year, the Commission will apply the maximum allowable administrative penalty.

5.22. Where an association of firms is liable for payment of an administrative penalty on the basis of its own turnover or income, the administrative penalty imposed will not exceed 10% of that turnover or income in the preceding financial year.

5.23. The preceding financial year that the Commission will generally consider for the purposes of the statutory cap, will be the financial year preceding that in which the administrative penalty is imposed. If there is no turnover in that preceding financial year it shall be the last year in which there is turnover available.

6. DISCOUNT FOR SETTLEMENT OF CASES BY FIRM

6.1. The Commission, at its sole discretion, may offer a discount of between 10% - 50% off the administrative penalty derived in applying the six-step methodology above. In doing so, the Commission will consider, inter alia:

6.1.1. The firm's demonstrated willingness to expeditiously conclude settlement with the Commission. Firms that settle their cases with the Commission in the early stages of the investigation are likely to enjoy a greater settlement discount than those firms who settle on the eve of litigation;

6.1.2. The extent to which the firm assists in the prosecution of other firms involved in the contravention. The Commission may take into account relevant factors, such as whether the firm provided timely, complete and/or accurate information that will corroborate other evidence gathered by the Commission during the investigation. The following factors provide guidance on the Commission's expectations from a firm and these may earn the firm a maximum discount for cooperating with the Commission and Tribunal:

6.1.2.1. Being proactive in approaching the Commission with information of the possible existence of anti-competitive conduct. This does not negate the objectives of the Commission's CLP in respect of cartel activity, but may

be beneficial (earn discounts) to a firm that does not achieve full immunity in terms of the Commission's CLP;

6.1.2.2. Providing full evidence, such as documents, under the control and/or possession of the contravening firm which may be relevant to the Commission's ongoing investigations and/or prosecutions that enable the Commission to effectively and expeditiously prosecute cases; and

6.1.2.3. Make available to the Commission all and any witnesses to testify at the Tribunal in support of the Commission's case.

7. ABILITY TO PAY THE ADMINISTRATIVE PENALTY

7.1. The Commission may, after determining an appropriate administrative penalty and in exceptional circumstances, consider the firm's ability to pay the administrative penalty. This will be the exception and there must be no expectation that the administrative penalty will be adjusted on this basis. In these circumstances, the Commission will be mindful of the firm's financial position and market circumstances in order to avoid imposing substantial hardship on a particular firm that may lead to a significant reduction in competition. This does not negate the need for consideration of the principle of proportionality and fairness.

7.2. To be considered for this, the firm must provide the Commission with objective evidence¹¹ that the imposition of the administrative penalty as provided for in these guidelines would irretrievably jeopardise the economic viability of the firm concerned and cause its assets to lose all their value. This evidence may include, but will not be limited to, audited financial statements attesting the veracity of the firm's financial position. The Commission will consider the financial viability of the firm as a whole and not of any specific division(s).

7.3. The mere existence of a loss making financial situation may not suffice for purposes of obtaining special discounts under this consideration.

¹¹ For example information relating to business rescue proceedings, insolvency proceedings etcetera

7.4. If a firm is able to demonstrate its inability to pay the administrative penalty in accordance with 7.1 and 7.2 above, the Commission may consider the use of favourable payment terms. The Commission will only consider a discount on this basis if a firm can objectively demonstrate that, even in the long term, it will still not be in a position to pay the administrative penalty.

8. LIABILITY OF A HOLDING COMPANY LIABILITY FOR ADMINISTRATIVE PENALTY

8.1. The Commission may impute liability for payment of the final administrative penalty on a holding company (parent company) where its subsidiary has been found to have contravened the Act. In determining the applicability of this section the Commission will consider whether:

8.1.1. The parent or holding company wholly owned the subsidiary;

8.1.2. The parent or holding company directly controls the subsidiary or has decisive or material influence over the commercial policy of the subsidiary. Material influence in this instance is analogous to that considered under section 12(2)(g) of the Act which refers to, “the ability to materially influence policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).”;

8.1.3. The parent or holding company had knowledge of the subsidiary’s participation in the contravention; or

8.1.4. The parent derived substantial benefit from the activities of the subsidiary.

8.2. In order to determine whether the parent or holding company has material influence over its subsidiary, the Commission will, based on the facts and on a case-by-case basis, analyse the overall relationship between the parent or holding company and its subsidiary. The Commission will consider whether the parent or holding company has

the ability materially to influence policy relevant to the behaviour of the subsidiary in the marketplace. Such policy will include the strategic direction and ability of the parent or holding company to define and achieve commercial objectives through its subsidiary.

- 8.3. When determining the appropriate penalty in cases where the Commission has imputed liability of payment of the administrative penalty on the parent or holding company, the statutory cap at step 4 above, will be based on the subsidiary's annual turnover during the preceding financial year. At step 6, the statutory cap will be based on the annual turnover of the parent or holding company during the preceding financial year.
- 8.4. In the case of full functioning joint venture (and any other joint ventures) which contravened the Act, the Commission may impute liability, jointly or severally, for payment of the final administrative penalty on the parent companies of the joint venture. The Commission will do so if the parent companies of the joint venture are shown to have decisive or material influence over the commercial policy of the subsidiary¹². Material influence is the same as discussed in paragraph 8.1.2 above. The Commission will take account of, based on the facts and on a case-by-case basis analysis, the overall relationship between the parent companies and the joint venture and whether the parent companies had the ability materially to influence the strategic and commercial policy of the joint venture¹³.
- 8.5. If the Commission imputes the liability of paying the administrative penalty on the parent or holding company, the statutory limit in step 6 will be calculated on the consolidated annual turnover of that parent or holding company during the preceding financial year.
- 8.6. In instances where a division or business unit of the firm has contravened the Act, the firm legally responsible for the division or business unit may be held liable for the final administrative penalty.

¹² *El du Pont de Nemours and Company v. European Commission*, Case C-172/12 P

¹³ *Coöperatieve Verkoop- en Productievereniging van Aardappelmeel en Derivaten Avebe BA v. Commission of the European Communities*, Case T-314/01

9. GENERAL AND SPECIAL PROVISIONS

- 9.1. Notwithstanding the imposition of an administrative penalty, the Commission may consider other remedies that seek to address the harm caused to competition as a result of the contravention. The remedies can be over and above the final administrative penalty.
- 9.2. In certain cases the Commission may impose a nominal administrative penalty taking into account the facts of each case.
- 9.3. Where applicable, the Commission will determine the interest payable in relation to the imposed administrative penalty in terms of section 80(1)(b) of the Public Finance Management Act 1 of 1999 and the Prescribed Rate of Interest Act No. 55 of 1975.

10. DISCRETION

The above process presents the general methodology that the Commission will follow in the determination of administrative penalties. Notwithstanding the above, this will not fetter the discretion of the Commission and/or the Tribunal and/or the CAC and other courts to consider administrative penalties on a case-by-case basis should a need arise.

11. EFFECTIVE DATE AND AMENDMENTS

These guidelines become effective on the date indicated in the Government Gazette and may be amended by the Commission from time to time.