

ECA Working Group on Sanctions

Pecuniary sanctions imposed on undertakings for infringements of antitrust law

Principles for convergence

This document reflects general principles shared by the European Competition Authorities for the determination of pecuniary sanctions imposed on undertakings for infringements of substantive antitrust provisions. This document is not legally binding on the European Competition Authorities.

I. General principles

1. Pecuniary sanctions imposed on undertakings which infringe substantive antitrust provisions [hereinafter: “fines”] should effectively sanction and deter the offender from repeating an infringement, as well as deterring any other potential offenders.

Comment A: Deterrence - both specific and general - of anticompetitive behaviour is the crucial objective pursued through the imposition of fines.

Comment B: In the ECA jurisdictions, fines imposed on undertakings play a key role in ensuring deterrence, although other sanctions, such as imprisonment or pecuniary sanctions imposed upon individuals, may also contribute to ensuring that antitrust violations are effectively deterred.

Comment C: Sufficiently deterrent fines are also a prerequisite for effective leniency programmes, which have proven to constitute a highly efficient tool for the detection of cartels. Absent such deterrent fines, offenders will not have the incentive to apply for immunity or a fine reduction under a leniency programme, which may seriously hamper cartel enforcement.

2. In compliance with the principle of proportionality fines should not exceed what is necessary to effectively sanction and achieve an adequate level of deterrence.
3. In order to achieve an adequate level of deterrence, the level of fines should exceed any potential gains that may be expected from the infringement.

Comment A: Deterrence is achieved by persuading market players that the risks involved in anticompetitive behaviour outweigh any possible benefits. Therefore,

potential offenders should anticipate the level of penalties to be higher than any potential gains they may expect from infringing competition law.

Comment B: For any infringement, the expected gains are in principle directly related to the value of sales affected by the infringement. However, this does not entail a duty for competition authorities to establish or to quantify expected gains deriving from the investigated infringement.

4. Transparency and a certain degree of predictability should be ensured, with a view to increasing the effectiveness of the fining policy pursued by competition authorities.

Comment A: Provided the level of fines is set at a deterrent level, the conduct of undertakings is expected to be influenced to a greater extent if they have a better understanding of the methodology employed to determine the fines.

Comment B: However, some level of uncertainty as to the actual amount of the fine flowing from the application of a given methodology may increase its deterrent effect, since such limited uncertainty prevents potential offenders to calculate exactly in advance the cost of the infringement. Competition authorities should not commit to any automatic and arithmetical calculation method, but retain a sufficient margin of discretion for setting the level of the fine.

Comment C: Guidelines or similar transparent information setting forth the methodology followed by competition authorities in order to calculate fines should be made publicly available. This would ensure a certain degree of predictability and transparency of the fining policy pursued by the authorities. It would also strengthen the impartiality of their decision making process and thus increase the acceptability of the fines. Finally, guidelines or similar transparent information would facilitate the judicial review of competition decisions.

Comment D: The same considerations of transparency and legal certainty require that the undertakings concerned are adequately informed of the principal reasoning followed by the competition authorities to determine the level of fines imposed on them.

II. The maximum statutory fine

5. The maximum statutory fine should be set at a level, which is high enough to enable the competition authority or the competent court to impose a sanction capable to deter the unlawful conduct.

6. The maximum statutory fine may be calculated as a percentage of the overall consolidated turnover of the offender.

Comment A: The maximum statutory fine should reflect the economic dimension of potential offenders, with a view to ensuring both an adequate level of deterrence and proportionality of the fine. Reference to the overall consolidated turnover of the offender can also enable competition authorities to counter fine evasion strategies.

Comment B: Where an association of undertakings infringes competition law and the infringement relates to the activities of its members, the maximum statutory fine may be calculated as a percentage of the overall turnover of each member active in the market affected by the infringement.

III. The determination of the fine

The seriousness of the infringement and its duration

7. The level of fines should reflect the seriousness of the infringement and its duration.

8. An appropriate basis for the calculation of fines would be the value of sales to which the infringement relates. An appropriate starting point of such calculation would be a percentage of the value of sales to which the infringement relates, reflecting its seriousness.

Comment A: The value of sales to which the infringement relates is a more appropriate basis to calculate the fine than the overall turnover of the offender, since the gains that potential offenders expect to derive from the infringement may not be directly related to the overall turnover of the offender.

Comment B: An approximate indication of the total value of sales to which the infringement relates may be derived by multiplying the value of sales made by the offender in a representative year by a factor equal to the duration of the infringement expressed in years.

Comment C: Where an association of undertakings infringes competition law and the infringement relates to the activities of its members, regard may be had to the sum of the value of affected sales by its members.

9. When assessing the seriousness of the infringement, competition authorities should consider its nature, i.e. the ability of that type of conduct to affect

competition and ultimately consumers, as well as its significance in the economic context where it occurred.

10. Factors which could be referred to in order to estimate the significance of the infringement in its economic context include - but are not limited to - :

- a) the combined market share of the undertakings concerned;
- b) the extent to which the infringement has been implemented.

Comment A: The consideration of the significance of the infringement in the economic context where it occurred entails no duty for competition authorities to engage in a process of quantification of the effects of the infringement.

Comment B: In case of restrictions by object, the consideration of the significance of the infringement in the economic context where it occurred entails no duty for competition authorities to establish the effects of the infringement.

11. In order to deter more effectively the most harmful anti-competitive practices, irrespective of their duration, competition authorities may further increase the fine applicable to undertakings engaging in such practices.

Adjustment factors

12. The level of fines should also reflect the specific characteristics of the offender, including its role in the infringement and its behaviour in the course of the investigation.

Comment A: The following list of adjustment factors is not to be considered exhaustive.

Aggravating circumstances

13. Fines should be increased for undertakings which played a leading or instigating role and/or coerced others to join a cartel or to continue their participation therein.

Comment A: The applicable increase should reflect the seriousness of the conduct of the offender in the specific circumstances of the case, with particular reference to any retaliatory measures taken against other undertakings to police the infringement.

14. The level of fines may be increased whenever undertakings obstruct the competition authority's investigation, contrary to their obligation to co-operate.

Comment A: Obstruction of the competition authority's investigation, contrary to the undertakings' obligation to co-operate, may also attract procedural sanctions.

15. Recidivism

- a. Increased fines should be imposed on an undertaking which has previously committed an antitrust infringement.
- b. In assessing recidivism, competition authorities may, *inter alia*, have regard to the relative similarity and/or proximity in time of the previous infringement.
- c. In determining the appropriate increase of the fine, competition authorities may take into account that an undertaking has previously committed one or more antitrust infringement(s).

Comment A: Increased fines for recidivists are necessary, since such undertakings were not effectively discouraged from infringing competition law by the fines already imposed upon them, and thereby show a propensity to infringe competition law.

Mitigating circumstances

16. In case of cartels, competition authorities may reduce the fine applicable to undertakings, which played a substantially limited role.

Comment A: No reduction of the fine should be warranted for the sole fact that an undertaking failed to approve expressly the concerted behaviour or to attend all the relevant meetings, unless the conduct of the undertaking concerned departed significantly and openly from the proposed course of action and its participation in the infringement is genuinely peripheral.

17. Undertakings may be granted a reduction of the fine, when they provide a significant contribution to the investigation of the competition authority outside the scope of application of the leniency programme and beyond their legal obligation to do so.

Comment A: Whenever the investigated infringement falls within the scope of application of the leniency programme, co-operation is normally only rewarded pursuant to the programme, in order not to jeopardise the incentives to apply for

immunity or reduction of fines under the leniency programme and in order not to circumvent the specific conditions of the leniency programme.

18. The applicable fine may be reduced if the offender takes active steps to mitigate the adverse consequences of the infringement, in particular by providing voluntarily, timely and adequate compensation to those who have suffered damage as a result of it.

Comment A: Where compensation is taken into account as a mitigating circumstance, this reduction should not in any case be such as to undermine the deterrent effect of the fine.

Other adjustment factors

19. Fines may be increased to the extent necessary to ensure effective deterrence, in particular where the offender's turnover is particularly large beyond the sales to which the infringement relates.

Comment A: For example, larger multi-product or multi-market firms might not be effectively deterred by fines which are inadequate in comparison with their overall turnover.

20. When the fine calculated according to the methodology set out above exceeds the maximum statutory fine, it should be reduced to the statutory ceiling.

Comment A: The maximum statutory fine should not otherwise be considered in the process of determination of the fine.

21. Fines for antitrust infringements may be reduced to take account of the undertaking's inability to pay.

Comment A: A reduction of the fine due to the undertaking's financial capacity should only be considered in exceptional circumstances and only if the undertaking provides clear evidence relating to its financial situation and to the context in which it operates.

Comment B: Where the parent company of the offender cannot be held liable for the infringement, the fine should be imposed on the offender only. However, in such a case the economic dimension of the parent company may be taken into account when assessing the offender's ability to pay, since it is a decision of the parent company whether to bear the fine and to keep its subsidiary on the market or not.