

## Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003

(2006/C 210/02)

(Text with EEA relevance)

### INTRODUCTION

1. Pursuant to Article 23(2)(a) of Regulation No 1/2003<sup>(1)</sup>, the Commission may, by decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 81 or 82 of the Treaty.
2. In exercising its power to impose such fines, the Commission enjoys a wide margin of discretion<sup>(2)</sup> within the limits set by Regulation No 1/2003. First, the Commission must have regard both to the gravity and to the duration of the infringement. Second, the fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No 1/2003.
3. In order to ensure the transparency and impartiality of its decisions, the Commission published on 14 January 1998 guidelines on the method of setting fines<sup>(3)</sup>. After more than eight years of implementation, the Commission has acquired sufficient experience to develop further and refine its policy on fines.
4. The Commission's power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article 81 or 82 of the Treaty is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles<sup>(4)</sup>. For this purpose, the Commission must ensure that its action has the necessary deterrent effect<sup>(5)</sup>. Accordingly, when the Commission discovers that Article 81 or 82 of the Treaty has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).
5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.
6. The combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement. Reference to these factors provides a good indication of the order of magnitude of the fine and should not be regarded as the basis for an automatic and arithmetical calculation method.
7. It is also considered appropriate to include in the fine a specific amount irrespective of the duration of the infringement, in order to deter companies from even entering into illegal practices.
8. The sections below set out the principles which will guide the Commission when it sets fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

### METHOD FOR THE SETTING OF FINES

9. Without prejudice to point 37 below, the Commission will use the following two-step methodology when setting the fine to be imposed on undertakings or associations of undertakings.
  10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).
  11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).
- 1. Basic amount of the fine**
12. The basic amount will be set by reference to the value of sales and applying the following methodology.

<sup>(1)</sup> Council Regulation (EC) No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1).

<sup>(2)</sup> See, for example, Case C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri A/S and others v Commission* [2005] ECR I-5425, paragraph 172.

<sup>(3)</sup> Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3).

<sup>(4)</sup> See, for example, *Dansk Rørindustri A/S and others v Commission*, cited above, paragraph 170.

<sup>(5)</sup> See Joined Cases 100/80 to 103/80 *Musique Diffusion française and others v Commission* [1983] ECR 1825, paragraph 106.

### A. Calculation of the value of sales

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly<sup>(1)</sup> relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales').
14. Where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members.
15. In determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures.
16. Where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.
17. The value of sales will be determined before VAT and other taxes directly related to the sales.
18. Where the geographic scope of an infringement extends beyond the EEA (e.g. worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement. This may be the case in particular with worldwide market-sharing arrangements.

In such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine.

### B. Determination of the basic amount of the fine

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.
20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

<sup>(1)</sup> Such will be the case for instance for horizontal price fixing arrangements on a given product, where the price of that product then serves as a basis for the price of lower or higher quality products.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales.
22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.
23. Horizontal price-fixing, market-sharing and output-limitation agreements<sup>(2)</sup>, which are usually secret, 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.
24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see points 20 to 23 above) will be multiplied by the number of years of participation in the infringement. 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.
25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 % and 25 % of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.
26. Where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount. Moreover, in determining the basic amount of the fine, the Commission will use rounded figures.

### 2. Adjustments to the basic amount

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

<sup>(2)</sup> This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

A. *Aggravating circumstances*

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

- where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100 % for each such infringement established;
- refusal to cooperate with or obstruction of the Commission in carrying out its investigations;
- role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement.

B. *Mitigating circumstances*

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

- where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);
- where the undertaking provides evidence that the infringement has been committed as a result of negligence;
- where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;
- where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;
- where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation. <sup>(1)</sup>

<sup>(1)</sup> This is without prejudice to any action that may be taken against the Member State concerned.

C. *Specific increase for deterrence*

30. The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.
31. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount.

D. *Legal maximum*

32. The final amount of the fine shall not, in any event, exceed 10 % of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.
33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement.

E. *Leniency Notice*

34. The Commission will apply the leniency rules in line with the conditions set out in the applicable notice.

F. *Ability to pay*

35. In exceptional cases, the Commission 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 fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

**FINAL CONSIDERATIONS**

36. The Commission may, in certain cases, impose a symbolic fine. The justification for imposing such a fine should be given in its decision.

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.
38. These Guidelines will be applied in all cases where a statement of objections is notified after their date of publication in the Official Journal, regardless of whether the fine is imposed pursuant to Article 23(2) of Regulation No 1/2003 or Article 15(2) of Regulation 17/62 <sup>(1)</sup>.
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<sup>(1)</sup> Article 15(2) of Regulation 17/62 of 6 February 1962: First Regulation implementing Articles 85 and 86 [now 81 and 82] of the Treaty (OJ 13, 21.2.1962, p. 204).