

# Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, replacing the earlier version of 1998

(2006/C 210/02)

(Text with EEA relevance)

## Contents

Introduction.....	1
Methods for the Settings of Fines.....	2
1. Basic Amount of the Fine .....	3
2. Adjustments to the Basic Amount .....	5
Final Considerations .....	6
Notes and Questions .....	8

*(Words in italics provided by Valentine Korah)*

## 1. INTRODUCTION

### *Recites power to impose fines*

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.*

### *Discretion – gravity, duration and limits (paras 5 – 6 & 13-31 of notice)*

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.

### *Former guidelines*

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.*

### *Fines to deter infringements of arts 81 & 82 EC (para 25)*

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*

<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).

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).

*By reference to turnover to which infringement relates and number of years' duration*

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.

*Turnover to which infringement relates and duration reflect economic importance of infringement and weight of each party*

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.

*Specific addition for deterrence (paras 4, 25 & 30)*

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.

*Principles below*

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**

### ***Two step methodology***

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.

#### *Basic amount*

10. First, the Commission will determine a basic amount for each undertaking or association of undertakings (see Section 1 below).

#### *Adjustments*

11. Second, it may adjust that basic amount upwards or downwards (see Section 2 below).

### **1. Basic amount of the fine**

<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.

12. The basic amount will be set by reference to the value of sales and applying the following methodology.

*A. Calculation of the value of sales*

*Turnover to which infringements relates*

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>6</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').

*associations*

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.

*Best available figures*

15. In determining the value of sales by an undertaking, the Commission will take that *undertaking's best available figures*.

*Where figures from undertakings are not reliable or incomplete*

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.

*Exclude VAT and other direct taxes*

17. The value of sales will be determined before VAT and other taxes directly related to the sales.

*Where infringement extends beyond EEA*

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*

*Basic amount based on proportion of turnover, gravity & duration*

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.

*Gravity depends on all relevant circumstances*

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.

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<sup>6</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.

*Usually up to 30% turnover*

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.

*Relevant factors*

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*

*Heavy fines on horizontal price fixing, market allocation and limits on output*

23. *Horizontal price-fixing, market-sharing and output-limitation agreements*<sup>7</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.

*Turnover of each party multiplied by number of years*

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.

*+ 15-25% of turnover for deterrence included in basic amount*

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*.

*Rounding figures etc.*

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**

*All relevant circumstances will be taken into account*

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.

### **A. Aggravating circumstances**

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

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<sup>7</sup> This includes agreements, concerted practices and decisions by associations of undertakings within the meaning of Article 81 of the Treaty.

*Recidivism*

- 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*

- refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

*Leader or instigator, punishing chiselers*

- 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**

*Reduction in fine*

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

*Evidence of termination as soon as Commission intervened, unless secret cartel*

- 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);

*Infringement only negligent*

- where the *undertaking provides evidence* that the infringement has been committed as a *result of negligence*;

*Minor role*

- 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;

*Effective cooperation beyond scope of leniency notice and general legal obligation*

- 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;

*Authorisation or encouragement by public authorities or legislation*

- where the anti-competitive conduct of the undertaking has been authorized or encouraged by public authorities or by legislation<sup>8</sup>.

**C. Specific increase for deterrence**

*Increase for deterrence (para 4)*

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.

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<sup>8</sup> This is without prejudice to any action that may be taken against the Member State concerned.

*To exceed amount of gain*

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*

*Limit permitted by regulation 1/2003*

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.

*Infringement by association*

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*

*Combine leniency rules with these*

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**

*Symbolic fine*

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

*Overriding discretion*

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.

*These guidelines apply where statement of objections after September 1 2006*

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>9</sup>.

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<sup>9</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).

## Notes and Questions on the Notice on Setting Fines

Taken from earlier notice.

1. (Point 2). Note that Regulation 1/2003, Article 23(2) provides for fines for intentional or negligent infringements of up to 10 per cent of the undertaking's turnover for the previous year. The ECJ held in *Pioneer* that this included the turnover of a group of companies, all products worldwide. This amount cannot be exceeded. Up to that figure, the Commission has stated its fining policy.

2. This Notice may raise legitimate expectations and therefore bind the Commission until it issues a different notice or informs individual undertakings of different intentions. So, the notice is binding on the Commission. See *Hercules v Commission* (C-51/92 P), 8 July 1999, [1999] ECR I-4235 (ECJ).

3. After reading the Notice are you in a position to warn a client of the likely fine anticipated conduct may attract? Should the notice enable you to do so?

4. (Point 4). Is the notice based on ideas of deterrence or of punishment?

5. (Points 5, 6, 12-19, 25). Is turnover a good basis for quantifying appropriate fines? Does it indicate the gravity of the infringement, what the infringer is capable of paying, or what it deserves? See Sir Jeremy Lever on this and other questions, 'Just deserts,' (2008) 7 *Competition Law Journal*, 123, 125.

6. (Point 23). What kinds of restrictions are harmful per se?

7. (Point 25). Is the additional amount of fine to be included in the basic amount, is it added to or multiplied by the basic amount?

8. (Point 28). Should fines be heavier for recidivism by a corporate group? Is it relevant that the infringements were decades apart, in subsidiaries that knew little of what the other did etc? Why is recidivism by human beings punished more severely? Do these considerations apply within a corporate group? Should it be relevant that the other subsidiary was punished by an NCA, not the Commission?

9. (Point 29, last indent). Given the prevalence of state intervention in markets, should authorisation or encouragement of anticompetitive conduct be a mitigating or an aggravating circumstance?

10. (Point 32). The legal maximum is imposed by the empowering regulation.

11. In its decisions, the Commission often spells out its starting point and, then multiplies or divides according to the mitigating or aggravating circumstances.

12. Does the notice limit the Commission's discretion much? Should it?
13. Note that the Commission will fine super-dominant firms more heavily. It doubled the fine on Microsoft March 24 2004, [2005] 4 CMLR 965 on this ground.

**Notes and Questions on the Notice on the Method of Setting Fines, Replacing that of 1998.**

1. (Point 2). Note that Regulation 1/2003, Article 23(2) provides for fines for intentional or negligent infringements of up to 10 per cent of the undertaking's turnover for the previous year. The ECJ held in Pioneer that this included the turnover of a group of companies, all products worldwide. This amount cannot be exceeded. Up to that figure, the Commission has stated its fining policy within those limits.

2. (Point 4). Is the notice based on ideas of deterrence, punishment or both?

3. (Points 5 - 7, 12-19, 25). Is turnover a good basis for quantifying appropriate fines? Does it indicate the gravity of the infringement, what the infringer is capable of paying, or what it deserves? Turnover in distribution is often several times as great as a percentage of turn over as in production. Some undertakings add on a tiny fraction of value and others a great deal. For many basic criticisms of the notice, see Sir Jeremy Lever, 'Just deserts,' 2008) 7 Competition Law Journal, 123, 125. Would it have been more appropriate to base the regulation on the capital employed by the undertaking or some other test? Should mechanistic criteria be used?

4. (Point 6). Should the Commission use a test as a proxy for a different test set by the Council?

5. (Point 23). What kinds of restrictions are harmful per se? What is the higher end of the scale – 30% of turnover?

6. (Points 25 & 28). Is the additional amount of fine to be included in the basic amount, is it added to or multiplied by the basic amount? Will it be multiplied by the aggravating circumstances listed in para 28?

7. (Point 28. first indent). Should fines be heavier for recidivism by a corporate group? Is it relevant that the infringements were decades apart, in subsidiaries that knew little of what the other did etc? Why is recidivism by human beings punished more severely? Do these considerations apply within a corporate group? Should it be relevant that the other subsidiary was punished by an NCA, not the Commission? If the duration and gravity of the earlier infringements were minor, is it sensible to multiply the basic amount several times? Is such an outcome avoided by the work 'may' in the introductory phrase of Point 28?

8. (Point 29, last indent). Given the prevalence of state intervention in Community markets, should authorisation or encouragement of anticompetitive conduct by government or regulator be a mitigating or an aggravating circumstance when the act of state defence does not apply?

9. (Point 32). The legal maximum is imposed by the empowering regulation.

10. In its decisions, the Commission often spells out its starting point and, then multiplies or divides according to the mitigating or aggravating circumstances. Is multiplication or division required by the aggravating and mitigating circumstances?

11. This Notice may raise legitimate expectations and therefore bind the Commission until it issues a different notice or informs individual undertakings of different intentions. So, the notice is binding on the Commission. See *Hercules v Commission* (C-51/92 P), 8 July 1999, [1999] ECR I-4235 (ECJ).

12. After reading the Notice are you in a position to warn a client of the likely fine anticipated conduct may attract? Should the notice enable you to do so? Is the Commission any longer in a position to take account of the principles of proportionality and justice in an individual case? These guidelines were adopted without being published for comment or even submitted to the Advisory Committee of the Commission.

13. Note that the Commission will fine super-dominant firms more heavily. It doubled the fine on Microsoft March 24 2004, [2005] 4 CMLR 965 on this ground.