

**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**

(98/C 9/03)

(Text with EEA relevance)

The principles outlined here should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10 % of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalizing infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.

#### 1. Basic amount

The basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15 (2) of Regulation No 17.

##### A. Gravity

In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

###### — *minor infringements:*

These might be trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market.

Likely fines: ECU 1 000 to ECU 1 million.

###### — *serious infringements:*

These will more often than not be horizontal or vertical restrictions of the same type as above, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the

common market. There might also be abuse of a dominant position (refusals to supply, discrimination, exclusion, loyalty discounts made by dominant firms in order to shut competitors out of the market, etc.).

Likely fines: ECU 1 million to ECU 20 million.

###### — *very serious infringements:*

These will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardize the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly (see Decisions 91/297/EEC, 91/298/EEC, 91/299/EEC, 91/300/EEC and 91/301/EEC <sup>(1)</sup> — Soda Ash, 94/815/EC <sup>(2)</sup> — Cement, 94/601/EC <sup>(3)</sup> — Cartonboard, 92/163/EC <sup>(4)</sup> — Tetra Pak, and 94/215/ECSC <sup>(5)</sup> — Steel beams).

Likely fines: above ECU 20 million

Within each of these categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed.

It will also be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect.

Generally speaking, account may also be taken of the fact that large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognize that their

<sup>(1)</sup> OJ L 152, 15.6.1991, p. 54.

<sup>(2)</sup> OJ L 343, 30.12.1994, p. 1.

<sup>(3)</sup> OJ L 243, 19.9.1994, p. 1.

<sup>(4)</sup> OJ L 72, 18.3.1992, p. 1.

<sup>(5)</sup> OJ L 116, 6.5.1994, p. 1.

conduct constitutes an infringement and be aware of the consequences stemming from it under competition law.

Where an infringement involves several undertakings (e.g. cartels), it might be necessary in some cases to apply weightings to the amounts determined within each of the three categories in order to take account of the specific weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type.

Thus, the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without this differentiation being governed by arithmetic calculation.

#### B. *Duration*

A distinction should be made between the following:

- infringements of short duration (in general, less than one year): no increase in amount,
- infringements of medium duration (in general, one to five years): increase of up to 50 % in the amount determined for gravity,
- infringements of long duration (in general, more than five years): increase of up to 10 % per year in the amount determined for gravity.

This approach will therefore point to a possible increase in the amount of the fine.

Generally speaking, the increase in the fine for long-term infringements represents a considerable strengthening of the previous practice with a view to imposing effective sanctions on restrictions which have had a harmful impact on consumers over a long period. Moreover, this new approach is consistent with the expected effect of the notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases<sup>(6)</sup>. The risk of having to pay a much larger fine, proportionate to the duration of the infringement, will necessarily increase the incentive to denounce it or to cooperate with the Commission.

The basic amount will result from the addition of the two amounts established in accordance with the above:

$$x \text{ gravity} + y \text{ duration} = \text{basic amount}$$

#### 2. **Aggravating circumstances**

The basic amount will be increased where there are aggravating circumstances such as:

- repeated infringement of the same type by the same undertaking(s),
- refusal to cooperate with or attempts to obstruct the Commission in carrying out its investigations,
- role of leader in, or instigator of the infringement,
- retaliatory measures against other undertakings with a view to enforcing practices which constitute an infringement,
- need to increase the penalty in order to exceed the amount of gains improperly made as a result of the infringement when it is objectively possible to estimate that amount,
- other.

#### 3. **Attenuating circumstances**

The basic amount will be reduced where there are attenuating circumstances such as:

- an exclusively passive or 'follow-my-leader' role in the infringement,
- non-implementation in practice of the offending agreements or practices,
- termination of the infringement as soon as the Commission intervenes (in particular when it carries out checks),
- existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct does indeed constitute an infringement,
- infringements committed as a result of negligence or unintentionally,
- effective cooperation by the undertaking in the proceedings, outside the scope of the Notice of 18 July 1996 on the non-imposition or reduction of fines in cartel cases,
- other.

#### 4. **Application of the Notice of 18 July 1996 on the non-imposition or reduction of fines<sup>(7)</sup>**

<sup>(6)</sup> OJ C 207, 18.7.1996, p. 4.

<sup>(7)</sup> See footnote 6.

## 5. General comments

- (a) It goes without saying that the final amount calculated according to this method (basic amount increased or reduced on a percentage basis) may not in any case exceed 10 % of the worldwide turnover of the undertakings, as laid down by Article 15 (2) of Regulation No 17. In the case of agreements which are illegal under the ECSC Treaty, the limit laid down by Article 65 (5) is twice the turnover on the products in question, increased in certain cases to a maximum of 10 % of the undertaking's turnover on ECSC products.

The accounting year on the basis of which the worldwide turnover is determined must, as far as possible, be the one preceding the year in which the decision is taken or, if figures are not available for that accounting year, the one immediately preceding it.

- (b) Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders (see

Twenty-first report on competition policy, point 139), the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and the fines should be adjusted accordingly.

- (c) In cases involving associations of undertakings, decisions should as far as possible be addressed to and fines imposed on the individual undertakings belonging to the association. If this is not possible (e.g. where there are several thousands of affiliated undertakings), and except for cases falling within the ECSC Treaty, an overall fine should be imposed on the association, calculated according to the principles outlined above but equivalent to the total of individual fines which might have been imposed on each of the members of the association.
- (d) The Commission will also reserve the right, in certain cases, to impose a 'symbolic' fine of ECU 1 000, which would not involve any calculation based on the duration of the infringement or any aggravating or attenuating circumstances. The justification for imposing such a fine should be given in the text of the decision.

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### Initiation of proceedings

(Case No IV/M.970 — TKS/ITW Signode/Titan)

(98/C 9/04)

(Text with EEA relevance)

On 22 December 1997, the Commission decided to initiate proceedings in the above-mentioned case after finding that the notified concentration raises serious doubts as to its compatibility with the common market. The initiation of proceedings opens a second phase investigation with regard to the notified concentration. The decision is based on Article 6 (1) (c) of Council Regulation (EEC) No 4064/89.

The Commission invites interested third parties to submit their observations on the proposed concentration.

In order to be fully taken into account in the procedure, observations should reach the Commission not later than 15 days following the date of this publication. Observations can be sent by fax ((32-2) 296 43 01/296 72 44) or by post, under reference IV/M.970 — TKS/ITW Signode/Titan, to:

European Commission,  
Directorate-General for Competition (DG IV),  
Directorate B — Merger Task Force,  
Avenue de Cortenberg/Kortenberglaan 150,  
B-1040 Brussels.

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