

PROCEDURE OF SETTING FINES IMPOSED PURSUANT TO THE ACT ON THE PROTECTION OF COMPETITION

Article 1

Introduction

- 1.1 The purpose of this Directive of the Chairman (hereinafter referred to as „the Directive“) is to ensure transparency and predictability of the procedure applied by the Office for the Protection of Competition (hereinafter referred to as „the Office“) when imposing fines on undertakings during administrative proceedings conducted pursuant to the Act on the Protection of Competition (hereinafter referred to as „Competition Act“).¹
- 1.2 The procedure of calculating and imposing fines results from the assessment of factual, economic and legal matters within the wide discretion of the Office, with respect to the legal criteria for administrative penalties and taking into account specific circumstances of each case. The Directive defines the decisive factors for calculating the amount of the fine and evaluation methods, providing undertakings and public authorities with a basic framework to help them estimate the level of fines which may be imposed on them in case they infringe the Competition Act.
- 1.3 Fines imposed for an infringement of the Competition Act shall fulfil the function of an administrative penalty and be sufficiently serious for fined undertakings or public authorities. The fine shall also fulfil repressive and preventive function, to deter the infringer from repeated infringement and at the same time, to create sufficient deterrent effect on other undertakings or public authorities.
- 1.4 This Directive refers only to the most typical cases of competition law infringements, i.e. to substantive offences committed by legal and enterprising natural persons, or by public authorities in relation to a direct distortion of competition.
- 1.5 This Directive replaces Guidelines of the Office on the method of setting fines from 2006 (hereinafter referred to as „Guidelines“).² From the date of the Guidelines issuance, there have been substantial changes in both the legislation and the case law, causing the necessity of updating the rules.
- 1.6 It shall be expected that in some cases the application of this Directive may result in the amount of fines higher than fines imposed pursuant to the Guidelines. However, when the competition

¹ The Act No. 143/2001 Coll., on the Protection of the Competition and on Amendments to Certain Acts (Act on the Protection of Competition), as amended.

² Guidelines of the Office for the Protection of Competition on the method of setting fines imposed pursuant to the Art. 22(2) of the Act No. 143/2001 Coll., on the Protection of Competition as amended.

authority finds out anticompetitive and thus illegal practices still relatively frequent, it is entitled to increase the level of fines to strengthen their deterrent effect.³

Article 2

Legal Framework

2.1 Pursuant to the Art. 22a and Art. 22aa of the Competition Act, the Office is entitled to impose a fine on legal entity, enterprising natural persons and public authorities. The general principles are established in the Art. 38 of the Act No. 250/2016 Coll., on Liability for Offences and Proceedings (hereinafter referred to as „Act on Offences“). The Competition Act allows the imposition of a fine in case of offences in particular for:

- the conclusion of a prohibited agreement contrary to Art. 3(1) of the Competition Act or Article 101 of the TFEU,
- the abuse of dominant position contrary to Art. 11(1) of the Competition Act or Article 102 of the TFEU,
- the early merger implementation contrary to Art. 18 of the Competition Act,
- the distortion of competition contrary to Art. 19a(1) of the Competition Act,
- the failure to fulfil commitments pursuant to Art. 7(2), Art. 11(3) or Art. 17(4) of the Competition Act,
- the failure to fulfill remedies pursuant to Art. 20(4) of the Competition Act or coercive measures set in order to restore effective competition pursuant to Art. 18(5) of the Competition Act.

2.2 The Competition Act sets the upper limit of the fine for legal entities and enterprising natural persons (Art. 22a(2) of the Competition Act), and for the public authorities (Art. 22aa(2) of the Competition Act). When setting the amount of the fine imposed on a legal entities and enterprising natural persons or public authorities, pursuant to Art. 22b(1) the Office shall take into account:

- the gravity of the infringement, in particular the manner of committing the offence and its consequences,
- circumstances in which the offence has been committed,
- the conduct of the fined entity during proceedings before the Office,
- the effort of the fined entity to eliminate harmful effects of the offence.

2.3 The general provision in the Art. 38 of the Act on Offences expressly specifies that the nature and gravity of the offence defined according to the criteria in Art. 22b(1) of the Competition Act shall be also determined in particular by the length of the offence duration and by the number of individual partial actions which constitute a continuation of the offence.

2.4 The amount of the fine imposed on the legal successor of a legal entity shall be also determined by the amount of revenues, benefits and other advantages gained due to committing an offence which was transferred to the legal successor, and also by the possible fact that one of the legal successors continues in the activity which results in committing an offence (Art. 22(3) of the Competition Act).

³ See i.e. the judgment of the Court of Justice of the European Union of 28 June 2005, E-189 et al./02 P *Dansk Rørindustri*, and of 7.6.2007 C-76/06 P *Britannia Alloys & Chemicals*.

- 2.5 Special rules for adjusting the amount of the fine resulting from leniency and the settlement procedure are not affected by this Directive.⁴
- 2.6 The above mentioned rules together with the general principles of administrative penalties constitute a comprehensive legal regulation of the imposition of fines and its calculation. In accordance with the same rules, the Office also imposes fines for the EU competition law infringements (Article 101 and Article 102 of the TFEU).

Article 3

Procedure of imposing a fine on legal entity and enterprising natural person

- 3.1 The fine imposed on legal entity or enterprising natural person acting as undertaking shall be assessed with respect to two factors; namely the value of sales of goods⁵ directly or indirectly affected by anticompetitive conduct (turnover on the relevant market) during its duration and current total net turnover of the undertaking. Only in case of undertakings not generating the turnover as a result of their activities, or when the turnover is negligible (i.e. non-entrepreneurial legal entities, professional chambers, associations of undertakings, etc.), the Office shall use another data, such as the income of the association, etc.; in these cases, the rules mentioned below shall be applied proportionally.
- 3.2 In case of an association of undertakings, the amount of the fine shall be assessed with respect to the total turnover of all its members (Art. 22a(3) of the Competition Act). In particular, this will be in the case of the association which has only a limited number of members achieving high turnover in the markets in which they operate, while the association itself does not generate any or negligible turnover.
- 3.3 The procedure of calculation of the fine consists of several relatively separate steps:
- a) the determination of the **value of sales**, i.e. the turnover achieved by the undertaking for the sale of goods directly or indirectly affected by the distortion of competition,
 - b) the determination of the **proportion of the value of sales**, depending on the gravity of the offence, taking into account the manner of committing the offence and its consequences, as well as the circumstances leading to committing the offence, eventually the number of partial actions in case of a continuing offence,
 - c) the determination of the **time coefficient**, depending on the duration of the infringement,
 - d) the determination of the **basic amount of the fine** on the basis of the proportion of the value of sales and time coefficient,
 - e) the determination of the **final amount of the fine** on the basis of **mitigating and aggravating circumstances**⁶ taking into account the conduct of the fined entity during the proceedings before the Office and its attempt to eliminate the harmful consequences of the offence,
 - f) **the consideration of other possible anticompetitive offences** on the grounds of the principle of absorption,
 - g) **the adjustment of the final amount of the fine** with regard to a total net turnover of the undertaking,

⁴ See the notice of the Office of 4. 11. 2013 on the application of Art. 22ba of the Competition Act (leniency program) and of 8. 11. 2013 on a procedure aimed to accelerate the administrative proceedings by using the institute of application for a reduction of fines pursuant to the Art. 22b(2) of the Act (settlement procedure).

⁵ „Goods” shall mean products and services.

⁶ It is no more possible to take into account the circumstances already taken into account in determining the proportion of the value of sales to decide about the mitigating and aggravating circumstances

- h) the check of the **upper level of the fine** on the basis of total turnover of the undertaking,
- i) **the adjustment of the total amount of the fine** with regard to eventuality of the fine being **eliminating**.

Concerning point a)

Determination of the value of sales

3.4 To determine the value of sales, the Office shall define:

- (i) the goods directly or indirectly affected by anticompetitive conduct,
- (ii) the territory directly or indirectly affected by anticompetitive conduct,
- (iii) the period of time from which the value of sales shall be calculated.

3.5 The value of sales represents sales achieved by the undertaking⁷ by purchase or sale of goods directly or indirectly affected by the anticompetitive conduct, i.e. undertaking's sales affected by the anticompetitive conduct.

3.6 In case of an illegal merger pursuant to Art. 18(1) of the Competition Act, the Office shall calculate the value of sales achieved by merging undertakings on all markets in which they are active.

3.7 In the case of failure to fulfil commitments pursuant to Art. 7(2), Art. 11(3) or Art. 17(4) of the Competition Act, remedies pursuant to Art. 20(4) of the Competition Act or coercive measures set in order to restore effective competition pursuant to Art. 18(5) of the Competition Act, the Office shall calculate the values of sales achieved on relevant markets where such commitments, remedies or coercive measures set in order to restore effective competition should be applied.

3.8 Concerning the territory mentioned in point (ii), the Office shall define the value of sales as sales achieved by the undertaking on relevant markets, i.e. within territories affected by anticompetitive conduct.

3.9 Concerning the time period mentioned in point (iii), the Office shall determine the value of sales on the basis of the last complete accounting year in which the undertaking infringed competition law; if the accounting year is not terminated during the process of assessment of the fine, the Office shall use data from the immediately preceding completed accounting year.

3.10 The Office shall determine the value of sales according to the most comprehensive and accurate data available. If there are some difficulties with achieving such data, the lack of credibility or the impossibility or difficulty with its objectification, the Office shall use any other suitable information or resources to assess the value of sales, or may use the qualified estimates where appropriate. In such cases, the Office may also determine the value of sales from the total turnover of the undertaking.

3.11 The value of sales is determined as value without VAT and other taxes, which are directly related to it.

Concerning point b)

Determination of the proportion of the value of sales

⁷ The value of sales achieved by the undertaking represents sales achieved on relevant market by all entities constituting the undertaking as one economic unit pursuant to Art. 2 (1) of the Competition Act, with the exclusion of intra-group sales (in-house supplies); unless the special circumstances require to calculate such sales too.

3.12 The proportion of the value of sales used for calculating the basic amount of the fine shall be determined with respect to the gravity and circumstances of the offence. It is necessary to take into account not only the type of the gravity defined by the characteristics of the offence, but also the individual gravity resulting from the manner and circumstances of its committing and its consequences.

Types of gravity of the offence

3.13 The competition law infringement can be categorized into three gravity categories, namely:

- (i) very serious offences,
- (ii) serious offences,
- (iii) minor offences.

3.14 Very serious offences include:

- horizontal agreements distorting competition, in particular price agreements, market-sharing, restriction on production or bid rigging,
- vertical agreements containing so-called „hardcore restrictions“ on a condition there is or is likely to be a foreclosure of the market by the cumulative effect of the parallel network of agreements with similar effects,⁸
- the abuse of a dominant position,
- the failure to fulfil commitments pursuant to the Art. 7(2), Art. 11(3) or Art. 17(4) of the Competition Act,
- the failure to fulfil remedies pursuant to the Art. 20(4) of the Competition Act or coercive measures set in order to restore effective competition pursuant to Art. 18(5) of the Competition Act.

3.15 Serious offences include:

- horizontal agreements other than those described in the previous point,
- vertical agreements containing so-called „hardcore restrictions“,
- the merger implementation infringing Art. 18(1) of the Competition Act, unless the Office did authorize the merger or allowed it subject to commitments.

3.16 Minor offences include:

- vertical agreements other than those described in the previous point,
- the merger implementation infringing Art. 18(1) of the Competition Act other than those described in the previous point.

Individual gravity of the offence

3.17 Concerning the individual gravity of the offence, especially the manner of committing the offence, its consequences and circumstances in which it was committed, it is necessary to take into account all aspects of the particular form of conduct of undertakings concerned, in particular:

⁸ See Notice of the Office for the Protection of Competition on agreements of minor importance which do not appreciably restrict competition (de minimis)

- whether the conduct was really implemented,
- whether it had real or only potential impact on competition,
- the profit achieved as a result of anticompetitive behavior,
- the nature and type of the goods concerned,
- the impact of the conduct on final consumers,
- the market power of the undertakings participating in the anticompetitive conduct compared relatively to other undertakings active on the relevant market.

3.18 In case of continuing offences, it is also necessary to take into account the number of partial actions constituting the offence, at least by estimation if they cannot be quantified.

Determination of percentage used to calculate the proportion of the value of sales

3.19 Concerning the type of offence's gravity, the Office sets a basic range for calculation of specific percentage of the value of sales, which determine the proportion of the value of sales for offence in question. The basic range shall be set as follows:

- (i) 5 to 15% for very serious offenses,
- (ii) 3 to 10% for serious offenses,
- (iii) up to 5% for minor offenses.

3.20 The specific percentage for determining the proportion of the value of sales shall be calculated within this range taking into account the individual circumstances of the case; if there are specific circumstances worthy of special consideration, it is exceptionally appropriate to set the percentage outside of the range.

3.21 The proportion of the value of sales is equal to a specific percentage derived from the value of sales.

3.22 Special rules should be established in relation with the offence of early merger implementation pursuant to the Art. 18(1) of the Competition Act, which has a form of inchoate offence with limited actual impact on competition; at the same time, it concerns the undertakings with very high turnover, and due to the merger impact on competition the turnover of whole undertakings concerned has to be taken into account when calculating the value of sales. The fine calculated regardless considering mitigating circumstances and only respecting the above mentioned rules might be disproportionately severe. In case of subsequent merger clearance without any commitments, the actual proportion of the value of sales will be set within a range up to 2 %, and if it is a case of a merger which was approved in simplified procedure within a range up to 1 %.

Concerning point c)

Determination of the time coefficient

3.23 The duration of anticompetitive conduct significantly affects its impact on competition and therefore it is appropriate to reflect these facts when calculating the basic amount of the fine. To do so, the so-called time coefficient will be used to adjust the proportion of the value of sales.

3.24 The time coefficient shall be set with regard to each month during the infringement occurred according to the following formula:

$$\text{Time coefficient} = f(x) = x/12$$

where x is the number of months commenced during which the infringement occurred.

The calculated value of the time coefficient is always rounded up to two decimal places upwards. At the same time, in case of infringement lasting less than 12 months, the time coefficient is equal to 1 and in case of infringement lasting 120 or more months, the time coefficient is equal to 10.

Concerning point d)

Calculation of the basic amount of the fine

3.25 The basic amount of the fine is calculated as the multiplication of the proportion of the value of sales and the time coefficient.

Concerning point e)

Adjustment of the final amount of the fine taking into account mitigating and aggravating circumstances of the case

3.26 Basic amount of the fine will be further reduced, respectively increased, with regard to specific mitigating or aggravating circumstance, so far not taken into account when assessing the proportion of the value of sales, whereas the final assessment shall be always set within a range up to 70 % of the basic amount of the fine.

3.27 The mitigating circumstances shall include in particular:

- notifying and proving the existence of anticompetitive conduct the Office has not yet been informed thereof, with the condition it is not covered by leniency program,
- extraordinary cooperation of undertaking during the investigation beyond its legal obligations (i.g. obligations resulting from the leniency program or the settlement procedure), which will significantly contribute to investigation and proving the existence of the competition law infringement or to achieve faster conclusion of a case,
- activity of undertaking aimed at reducing or eliminating the damaging consequences of the law infringement,
- voluntarily termination of anticompetitive conduct no later than before the Office's first-instance decision; this does not apply in cases of secret conduct (in particular secret cartel agreements),
- anticompetitive conduct was initiated or recommended by the state body or performed with its participation, possibly supported or facilitated by relevant legislation.

3.28 The aggravating circumstances shall include in particular:

- previously committing an offence (repeated infringement of the competition law or EU competition law), in case the final decision was issued in the period of 10 years prior to the initiation of the administrative proceedings in which the fine is calculated both by the Office or other competition authority including the Commission,
- leading or initiating role in anticompetitive conduct,
- forcing other undertakings to participate in the anticompetitive conduct or creating threat of retaliation aimed to force the undertakings to comply with the agreed anticompetitive practices,
- intentionally committed offence.

Concerning point f)

Fine imposed for committing more offences in concurrence

- 3.29 In case the Office finds that the undertaking has committed more competition law infringements, this fact shall be reflected in the total amount of a fine; the Office will proceed in accordance with the absorption principle, i.e. it shall impose a fine for the most serious offence connected with the most punishable effects, and the total amount of the fine shall be increased with regard to the fact that more offences have been committed.⁹ The fact that the Office leads more administrative proceedings dealing with different offences committed by the same undertaking shall not result in imposition of other penalties or raising upper limits when setting a fine.¹⁰
- 3.30 The Office assesses the most severely punishable offence and calculates the fine according to the procedure described in the previous chapter, i.e. by setting the basic amount of the fine with regard to adjusting it due to mitigating and aggravating circumstances. The most severely punishable offence is the one which would be charged by the highest fine imposed by the Office in a single proceeding. The Office shall increase the amount of a fine up to 25 % for each subsequent infringement of the Competition Act. While assessing the increase of the fine due to subsequent offence, the Office shall take into account the type and individual gravity of an offence, its duration, mitigating and aggravating circumstances as well as other circumstances relevant for the assessment of the fine imposed for such offence.
- 3.31 In situations where the same undertaking has already been fined in another proceedings for competition law infringement which was at that time assessed as the most severely punishable one, when calculating the fine the Office shall follow above mentioned procedure, as it would be one single proceeding; this fine shall be reduced by the amount of the fine imposed on the previously fined offence.

Concerning point g)

Adjustment of the final amount of the fine with regard to total net turnover of the undertaking

- 3.32 According to the opinion of the Office, the assessment of the fine with regard to the value of sales directly or indirectly affected by anticompetitive conduct represents fair approach which directly takes into account the impact of the conduct in question on competition. However in some cases such approach does not allow the Office to individualize the fine sufficiently. Therefore in below mentioned cases, it is necessary to increase the basic amount of the fine in relation to the total turnover of the undertaking and decrease in relation to the volume of sales directly affected by anticompetitive conduct.
- 3.33 The fine shall be at a first place significant for the undertaking concerned. Only then the fine represents punishment as well as prevention, with regard to undertaking concerned as well as other undertakings, which should be deterred from infringing competition law. If the final amount of the fine adjusted on the basis of absorption would represent only negligible amount compared to actual total turnover of the undertaking, such fine may fail to fulfil its main function. Therefore the Office shall increase the basic amount of a fine at least to 0,5 % of total annual turnover of the undertaking for the last completed accounting period in cases of very serious offences. Concerning serious offences and minor offences the Office may use the same procedure in justified cases; this does not apply for offences committed by early merger implementation contrary to the Art. 18(1) of the Competition Act.

⁹ See Decision of the Supreme Administrative Court from 31. 10 2008, ref. no. 5 Afs 9/2008.

¹⁰ Ibid.

3.34 The fine assessed with regard to the value of sales could be disproportionately high in situations where the volume of sales affected by the anticompetitive conduct is negligible compared to the total turnover of the undertaking. In particular this may be the case of bid rigging where the forbidden agreement would concern only certain contracts whose value is negligible in comparison with the total turnover of undertakings concerned. In such case the fine may not exceed 10 times the amount of sales directly or indirectly affected by anticompetitive conduct (in bid rigging cases it is 10 times contract value). This provision takes precedence over the increase of the fine in cases of very serious offences pursuant to previous paragraph; this does not apply on the case of recidivism.

Concerning point h)

The upper level of the fine on the basis of total turnover of the undertaking

3.35 The fine shall be imposed up to a maximum of CZK 10,000,000 or 10 % from the net turnover achieved by undertaking within the last completed accounting period (Art. 22(2) of the Competition Act). The Office shall use the higher option.¹¹

3.36 The decisive factor for the determination of upper level of the fine is net turnover achieved by the undertaking in the last completed accounting period, i.e. the period prior to the issuance of the first-instance decision.¹²

3.37 If the fine for association of undertakings has been assessed with regard to the turnover of its members, the upper level of the fine shall be moderated in relation to the turnover of those undertakings.

3.38 If the final amount of the fine adjusted due to absorption exceeds the upper level of the fine, it shall be reduced to that upper level.

Concerning point i)

Assessment of the fine in terms of being eliminating

3.39 Finally, the Office examines whether the amount of the fine shall not have an eliminating effect on the undertaking in relation to its individual circumstances.¹³ For this reason the Office assesses the whole economic and financial situation (financial health) of the undertaking which is to be fined.

3.40 The reason for reduction of the fine due to its eliminating effect shall not be the merely finding that the undertaking makes a loss or is in unfavorable financial situation. The reduction of the fine due to its eliminating effects can be applied only if it is proved that the amount of the fine would result in the termination of the asset base for further business activity or if it exceeds possible revenues so the activity of the undertaking would become meaningless, i.e. in the long term all revenues should be used for paying the imposed fine.¹⁴

Article 4

Procedure of imposing the fine on public authority

¹¹ See Decision of Regional Court in Brno of 31. 05. 2006, ref. no. 31 Ca 64/2004

¹² See Resolution of the extended composition of the Supreme Administrative Court of 24. 06. 2014, ref. no. 7 Asf 57/2011.

¹³ See Resolution of the extended composition of the Supreme Administrative Court of 20. 04. 2010, ref. no. 1 As 9/2008-133.

¹⁴ See Judgement of the Constitutional Court No. 405/2002 Coll.

- 4.1 *Actus reus* of the offence pursuant to Art. 22aa(1) of the Competition Act includes a wide range of acts made by public authorities with different effects on competition. Therefore the Office shall be considering all possible criteria during the process of setting the appropriate level of fine for offences of public authorities to be able to distinguish a wide gravity range of such conduct.
- 4.2 The fine imposed to the public authority for the exercise of its power resulting in distortion of competition shall be assessed in particular with the respect to the following criteria, whereby the Office shall consider only the relevant criteria for each case:
- the gravity of the offence,
 - the legitimacy of the objective pursued by the public authority,
 - current financial situation of the public authority,
 - the duration of the offence,
 - the extent of relevant territory, which may be expressed for example by the number of inhabitants,
 - the value of sales of goods directly or indirectly affected by the exercise of public authority,
 - the public authorities' benefits resulting from distortion of competition,
 - conduct of the public authority during proceedings before the Office,
 - the public authorities' efforts to eliminate harmful consequences of the offence,
 - the previous commitment of the offence, if it has been lawfully decided within 10 years before initiation of administrative proceedings assessing the fine,
 - the number of individual partial actions constituting a continuing offence; if they cannot be qualified, at least the estimate is required.
- 4.3 The fine imposed to the public authority for exercise of its power resulting in distortion of competition may be imposed at a level of up to CZK 10,000,000.¹⁵
- 4.4 The fine imposed to the public authority for exercise of its power leading to the distortion of competition within the whole territory of the Czech Republic, shall be generally imposed at least in the amount of CZK 5,000,000.
- 4.5 The fine imposed to the public authority for exercise of its power resulting in distortion of competition shall be lower than CZK 100,000 only in exceptional cases, in order to preserve its at least basic significance.

Article 5

Transitional and Final Provisions

- 5.1 The principles used for the assessment of the fine defined in this Directive shall not preclude imposing only symbolic fine in cases worth special attention and consideration.¹⁶
- 5.2 The principles used for assessment of the fine defined in this Directive shall not apply in non-standard cases where the case specifics and the degree of difference can be briefly and clearly defined and where different procedure is required by the principles of proportionality and fairness.

¹⁵ See Art. 22aa(2) of the Competition Act.

¹⁶ See Judgement of the Supreme Administrative Court of 26. 6. 2013, ref. No. 1 Afs 23/2013.

- 5.3 The Office shall impose fines in accordance with this Directive in the administrative proceedings initiated after its entry into force.
- 5.4 This Directive enters into force on 24 April 2018 and replaces the previous Guidelines of the Office for the Protection of Competition on the method of setting fines imposed pursuant to Art. 22(2) of the Competition Act.

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