GUIDELINES ON THE METHOD OF SETTING FINES FOR INFRINGEMENTS OF COMPETITION RULES: KEY ISSUES

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1. PURPOSE OF THE GUIDELINES FOR SETTING FINES

According to best practice as recommended by all international institutions, National Competition Authorities (NCAs) should adopt specific guidelines on antitrust fines to clarify the criteria and methodology applied. In this respect, the final document of the 2008 ECA Working Group on fines stated that “predictability and transparency should be ensured, with a view to increasing the effectiveness of the fining policy pursued by competition authorities”. To date, most ECN jurisdictions apply guidelines on the setting of fines in cases of infringements of competition law (specifically, 19 NCAs).

A certain degree of predictability of the penalty associated with infringement of competition rules helps to ensure the necessary deterrent effect more than would be the case if the penalty could not be anticipated ex-ante; in any case, companies should not be able to produce an accurate estimate of the economic benefit of the infringement. In addition, a certain degree of predictability allows parties to be aware of the rationale and of the reasoning that led the Authority to impose a specific fine, thus helping to make it more “acceptable” for its recipient. Finally, explaining the methodology used for the quantification of sanctions facilitate a full and effective judicial review by the Courts of Antitrust Authority fining decisions.

After many years of setting its fines by applying European Commission guidelines, in October 2014 the Italian Competition Authority (ICA) adopted its own specific guidelines on methods of setting antitrust fines, after having submitted a draft version to public consultation in May 2014.

* Italian Competition Authority.

1 ECA is the former name of the European network of competition authorities and corresponds, by and large, to the current ECN.

2 The draft guidelines subject to public consultation were accompanied by a specific report illustrating for each proposed rule: (i) the relevant EU provisions, according to the 2006 European Commission Guidelines on the method of setting fines; (ii) solutions adopted in other member states, in a comparative perspective; (iii) the main questions posed by the domestic judicial review. The aim was to support the choices made, in order to stimulate the critical contribution from all the stakeholders, on the assumption that shared regulations (like the guidelines in question) allows a better application of
The objective of the guidelines is therefore to “illustrate the principles that the Authority is committed to follow in setting fines, in order to ensure transparency, predictability and objectivity in its decisions”. In this respect, the ICA has taken into account the recommendation made in the past by the administrative courts which have often urged the institution to make the method and the logic followed when imposing fines clear, for a more effective judicial review and full protection of the right to defence.

2. MAIN FEATURES OF THE GUIDELINES

The ICA’s aim in adopting the guidelines was to make its deterrent policy (in both specific cases and a general sense) more effective, by making its decision-making process more transparent and predictable while also taking into account – where applicable – the criteria established by Law no. 689/1981 (general legislation concerning penalties for administrative offences) specifically referred to in Article 31 of Law no. 287/90 (the Competition Act).

With regard to these two aspects, the most important elements of its guidelines for setting fines are as follows:

- like the European Commission guidelines, the ICA’s guidelines refer to the value of sales of goods and services directly or indirectly related to the infringement by the undertaking in the relevant market during its last full year of participation; the fine may be up to 30% of this value, according to the seriousness of the violation;

- in assessing the gravity of the infringement, the ICA has considered it appropriate, borrowing from the experience of some Member States (Belgium, Bulgaria, Czech Republic, Spain, France, Lithuania, Latvia, Poland and Romania) but differing from the EU Guidelines, to establish a minimum percentage, normally not less than 15% of the value of sales, for the most harmful restrictions of competition, i.e. for secret price-fixing cartels, market-sharing and output-limitation horizontal agreements. In this respect, the ICA specifically considers that the secrecy of an illegal practice is directly related to the likelihood of its discovery and, therefore, to the expected fine;

- another measure to ensure the necessary deterrent effect with specific reference to the most serious restrictions of competition, is the so called “entry-fee”, that is the possibility of adjusting the basic fine with an additional penalty, the size of which would range between 15% and 25% of the value of sales, regardless of the duration of the infringement and of its effective implementation. To a certain extent, this provision is similar to one provided for by the Commission Guidelines, which however

the relevant law, as for the commonly recognized relationship between consultation process and the quality of regulation. Seventeen interested parties took part into the public consultation, including trade associations, law firms and single companies.
do not mention, as one of the drivers for its application, the effective implementation of the illegal conduct;

- criteria for assessment of the gravity of the offence include the following elements, which, though not mentioned in the Commission Guidelines, are provided for in the fine-setting guidelines of several Member States: competitive conditions in the relevant market (for example, the level of concentration and the existence of barriers to entry); prejudice against innovation; the degree of the actual economic impact, or, more generally, the effects on the market and/or on consumers, where the ICA has evidence that allow such effects to be reliably estimated;

- in cases of collusion in the context of public tenders (bid rigging), the basic amount of the fine will be determined by taking into account the value of sales directly or indirectly affected by the specific unlawful conduct (that is, in principle, the sums involved in the tender procedures affected by the infringement). However, when the relevant market is broader than that of the tenders under investigation, the ICA may alternatively consider the total value of sales regarding the entire market for the specific product/service affected by the infringement (including, therefore, all sales made by the undertaking in the relevant market and not only the value of sales to which the tender in question relates) in the last full year of participation in the infringement;

- with regard to the duration, for periods of less than one year, the ICA will consider the effective length of time in terms of months and days of participation in the infringement. This provision, endorsed by the most recent European and national case-law, will replace the rounding rule for periods of less (counted as half a year) or longer (counted as a full year) than six months;

- with specific reference to adjustments to be applied to the basic amount, the ICA, departing from the Commission Guidelines but in line with the practice of a number of other competition authorities, considered it appropriate to establish a range (in percentage terms) to be applied both to the individual type of aggravating/mitigating circumstances (15% of the basic amount) and to the overall incidence of such circumstances (50% of the basic amount). The rationale behind this decision is to provide not only the ICA itself, but also the administrative court, with a consistent yardstick in the event of the fine being re-determined. An exception is represented by recidivism which, in line with the Commission Guidelines, may entail a further increase up to as much as 100% of the basic amount, according to the nature and the relative affinity between the ascertained violations. This decision is consistent with the criteria established by Law no. 689/81 and in particular with Article 11 which identifies, among the relevant criteria for determining the fine, also the personality of the agent;

3 Specific increases in percentage terms for each single aggravating or mitigating circumstance (generally ranging from 5 to 15%) are set out in the guidelines of a number of national competition authorities (e.g. Bulgaria, Spain, Romania and Sweden), while other authorities refer to a maximum percentage increase for the relevant circumstances altogether (usually set at 50%, such as in the Czech Republic, Lithuania and Poland).
- in relation to the different types of mitigating circumstances, a further reduction of up to 50% of the basic amount may be applied if during the investigation the undertaking provides information and documentation which on closer analysis is deemed to be crucial to the identification of other infringements (other than the infringement in question in the current proceeding) and may be legitimate grounds for conditional immunity from penalties, in accordance with the leniency programme (the so-called “Amnesty Plus” programme);

- with reference to mitigating circumstances, specific legal value is also accorded to the “... adoption and implementation of a specific compliance programme, in line with the best European and national practices”. The guidelines expressly state that the mere existence of a compliance program will not be considered by itself a mitigating circumstance, in the absence of evidence of adequate steps proving a credible and effective commitment to it (e.g. the clear and continuous involvement of the management, the appointment of a compliance unit/officer, risk assessment on the basis of the business sector and the context of operations, the provision of training proportionate to the economic size of the undertaking concerned, the existence of appropriate monitoring, auditing and reporting mechanisms, consistent disciplinary procedures and incentives for compliance);

- in order to ensure proportionality and a sufficient deterrent effect, the ICA may increase the penalty by up to 50% if, during the last financial year prior to the issue of the infringement decision, the undertaking concerned recorded a particularly high global turnover compared to the value of sales related to the infringement or if it belongs to a group of significant economic size. The penalty may also be further increased in consideration of the amount of unlawful gains improperly made by the undertaking responsible for the infringement, where the ICA has evidence that allow it to be reliably estimated;

- as provided for by Article 8 of Law no. 689/81, the guidelines for setting fines contain provisions concerning several concurrent offences. Specifically, where the same conduct is in violation of Articles 2 and 3 of Law no. 287/90 or of Articles 101 and 102 TFEU or it involves multiple violations of the same provisions, the penalty for the most serious violation will be applied, increased by up to three times (this provision does not refer to the case of continuous and complex concerted practice and/or to the abuse of a dominant position committed through a single complex strategy).

- finally, the guidelines lay out the economic conditions that may justify an instance of inability to pay: specifically, a company requesting a reduction must show “complete, reliable and objective” evidence that the penalty would actually put it out of business.

Others provisions included in the guidelines represent elements of continuity, in that they give formal recognition to the ICA’s established practice. This is specifically the case with regard to reference to the amount of membership fees for the calculation of the value of sales in the case of associations of undertakings, the option of imposing a single sanction with joint liability in the case of participation in infringement on the part of several undertakings belonging to the same group, and the option of imposing symbolic fines, taking into account the specific circumstances of the case.