

## **GOVERNMENT OF THE REPUBLIC OF CROATIA**

Pursuant to Article 64 paragraph (9) of the Competition Act (Official Gazette, No 79/2009), the Government of the Republic of Croatia in its session held on 11 November 2010, adopted the following

### **REGULATION ON THE METHOD OF SETTING FINES**

#### **I GENERAL PROVISIONS**

##### *Subject matter of the Regulation*

##### **Article 1**

(1) This Regulation stipulates criteria which the Croatian Competition Agency (hereinafter: the Agency) shall take into account when defining the conditions for imposing and for imposing fines on undertakings who have infringed the provisions of Articles 61 to 63 of the Competition Act (hereinafter: the Act).

(2) The purpose of the fines imposed under paragraph (1) is sanctioning of the undertaking who infringe the provisions of the Act, elimination of harmful consequences of this infringement, in order to deter other undertakings from engaging in behaviour that is contrary to the Act and to ensure effective competition.

(3) The highest amount of the fine which can be imposed by the Agency pursuant to this Regulation on the undertaking for the infringement of the Act may not exceed the level of fine stipulated under Article 64 paragraph (1) of the Act and Article 11 of this Regulation.

##### *Definitions*

##### **Article 2**

For the purpose of this Regulation:

- a) “undertakings” mean persons under Article 3 of the Act;
- b) “fines” mean sanctions imposed on undertakings who have been found by the Agency to infringe the provisions of Articles 61 to 63 of the Act;
- c) “turnover” is the value of the sales of goods and/or services realized by the undertaking exclusively based on its activities on the relevant market on which the Agency identified the infringement of the Act, where the value of sales will be determined before VAT and other taxes directly related to the sales;
- d) “relevant market” defines a market of particular goods and/or services which are the subject of the business operations performed by the undertaking in the specific geographic territory;

e) “aggregate turnover of the undertaking” means turnover realized by this particular undertaking from all the activities for which he has been registered;

f) “basic amount of the fine” means its share in the turnover of the undertaking as referred to in point d) of this Article, which depends of the type and gravity of the infringement of the Act which is multiplied by the number of years of infringement;

g) “cartels” are, by definition, secret horizontal agreements entered into between two or more independent undertakings, or decisions by associations of undertakings or concerted practices of undertakings at the same level of production or distribution chain, which have as their object distortion of competition between competitors, whereas cartel members may agree on such matters as purchase or sale prices, allocation of markets allocation of customers, limit total industry output and/or sales and technological development, bid-rigging and similar, which harm the consumers thorough higher prices and less choice of goods and/or services;

## II METHOD FOR THE SETTING OF FINES

### *Setting of fines*

#### Article 3

(1) Within the meaning of Article 64 paragraph (2) of the Act, the Agency will use the following two-step methodology when setting the fine to be imposed on undertakings who have been found to infringe the provisions of the Act.

(2) Within the meaning of paragraph (1) of this Article, the Agency will determine a basic amount of the fine, which is considered the first step in fine setting.

(3) The basic amount of the fine referred to in paragraph (2) of this Article shall be increased or reduced by the Agency (adjusted upwards or downwards), depending on the established mitigating and/or aggravating circumstances in the proceedings. This increase or reduction of the basic amount of the fine shall be considered the second step in fine setting.

## III FIRST STEP – DETERMINATION OF THE BASIC AMOUNT OF THE FINE

### *Elements for the determination of the basic amount of the fine*

#### Article 4

(1) The basic amount of the fine in the calculation of the Agency will be related to a proportion of the turnover realized by the undertaking concerned, whereas this proportion depends on the degree of gravity of the infringement of the Act, multiplied by the number of years of infringement.

(2) The Agency will carry out the assessment of gravity on a case-by-case basis for all types of infringement of the Act, taking account of all the relevant facts and circumstances of the case.

(3) As a general rule, the proportion of the turnover referred to under paragraph (1) of this Article taken into account in the calculation of the basic amount of the fine will be set by the Agency at a level of up to 30 % of the turnover of the undertaking concerned.

(4) When determining the number of years of the duration of the infringement referred to under paragraph (1) of this Article, periods of less than six months will be counted by the Agency as half a year, whereas periods longer than six months but shorter than one year will be counted by the Agency as a full year.

(5) In determining the basic amount of the fine referred to under paragraph (1) of this Article, the Agency will use the multiple of 1,000 Kuna.

#### *Calculation of the turnover*

##### Article 5

(1) The turnover as defined under Article 2 point c) of this Regulation shall be understood the turnover referred to under Article 4 of this Regulation.

(2) As a rule, in the calculation of the turnover realized from the carrying out of the activities in the relevant market in which the infringement of the provisions of the Act has been established, within the meaning of paragraph (1) of this Article, the Agency will take the value of the undertaking's sales of goods and/or services made during the last full business year of its participation in the infringement of the provisions of the Act, or, the last year in which financial statement has been concluded. The value of sales of goods and/or services will be determined by the Agency before VAT and other taxes directly related to the sales.

(3) Where the Agency determines that the infringement of the provisions of the Act was made by an association of undertakings, in the determination of the basic amount of the fine referred to under Article 4 paragraph (1) of this Regulation the value of sales of the association of undertakings will generally correspond to the sum of the value of sales by its individual members.

(4) The figures on the value of sales referred to under paragraph (1) of this Article shall be made available to the Agency by the undertaking who has been found to infringe the provisions of the Act. Where the figures made available by an undertaking are incomplete or not reliable, the Agency may determine the relevant turnover data on the basis of Article 41 paragraph (6) of the Act or the partial figures it has obtained and/or any other information which it regards as relevant and appropriate.

#### *Assessment of gravity of the infringement*

##### Article 6

(1) With the view to determining the appropriate basic amount of the fine the Agency shall in line with Article 4 paragraph (2) of this Regulation assess the gravity of the infringement of the provisions of the Act on a case-by-case basis.

(2) Within the meaning of Article 4 paragraph (3) of this Regulation, in order to decide whether the proportion of the turnover to be considered in a given case should be at the lower end or at the higher end of the scale, the Agency will have regard to a number of factors, such as the nature of the infringement of the provisions of the Act, the combined market share of all the undertakings involved in the infringement of the provisions of the Act, the geographic scope in which the infringement of the provisions of the Act has or may have effects, and whether the infringement of the provisions of the Act has been implemented in practice or there is merely an open possibility to commit the infringement.

(3) Cartels referred to under Article 2 point g) of this Regulation are, by their very nature, among the most harmful restrictions of competition or most harmful infringements of the provisions of the Act. Therefore, the proportion of the turnover of the undertakings as referred to under Article 4 paragraph (3) of this Regulation that the Agency will take into account for such infringements will generally be set at the higher end of the scale, taking into account all the factors referred to under paragraph (2) of this Article.

#### *Additional amounts for deterring undertakings from infringements*

#### Article 7

(1) In case of price-fixing, market-sharing and output-limitation cartel agreements, irrespective of the duration of the undertaking's participation in the infringement of the Act, the Agency will include in the basic amount of the fine as referred to under Articles 4 and 6 of this Regulation a sum of between 15 % and 25 % of the turnover of the undertakings concerned.

(2) The basic amount of the fine will be increased by the proportion laid down in paragraph (1) of this Article in order to deter other undertakings from even entering into cartel agreements which are considered the most serious infringements of the Act.

(3) As an exception, such an additional amount to under paragraph (1) of this Article, may also be applied by the Agency in the case of other infringements of the Act, if it establishes that in the particular case no hardcore restrictions of competition are involved.

### IV SECOND STEP – DETERMINATION OF CIRCUMSTANCES THAT LEAD TO UPWARDS OR DOWNWARDS ADJUSTMENTS TO THE BASIC AMOUNT OF THE FINE

#### *Mitigating circumstances*

#### Article 8

(1) The basic amount of the fine referred to under Article 4 paragraph (1) of this Regulation may be reduced where the Agency finds that mitigating circumstances exist.

(2) Mitigating circumstances referred to under paragraph (1) of this Article shall be considered particularly as follows:

a) where the undertaking concerned provides evidence to the Agency that it terminated the infringement as soon as the undertaking concerned comes to know that a preliminary market investigation is being carried out in line with Article 32 point 1) of the Act, in other words, before the Agency opens the proceeding in line with Article 39 of the Act;

b) where the undertaking provides evidence to the Agency that the infringement has been committed as a result of negligence;

c) where the undertaking provides evidence to the Agency that even though party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market;

d) where the undertaking concerned has effectively cooperated with the Agency outside the scope of its legal obligation to do so under Article 41 of the Act;

(3) By way of derogation from paragraph (2) point e) of this Article, in the case of cartels in the sense of Article 6 paragraph 3 of this Regulation, the termination of the infringement after the undertaking concerned came to knowledge that the proceeding has been opened by the Agency shall not be considered a mitigating circumstance.

(4) The mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded by the Agency as a mitigating circumstance referred to under paragraph (2) of this Article since the duration of the infringement will already be reflected in the basic amount determined in the first step within the meaning of Article 4 paragraph (1) of this Regulation.

### *Aggravating circumstances*

#### Article 9

(1) The basic amount of the fine referred to under Article 4 paragraph (1) of this Regulation may be increased where the Agency finds that there are aggravating circumstances.

(2) Aggravating circumstances referred to under paragraph (1) of this Article shall be considered particularly as follows:

a) where an undertaking continues the infringement of the provisions of the Act after the Agency has established that the undertaking infringed the provisions of the Act and took a decision thereof;

b) where an undertaking repeats the infringement of the provisions of the Act after the Agency has established that the undertaking infringed the provisions of the Act and took a decision thereof;

c) refusal to cooperate with the Agency in carrying out its investigations;

d) obstruction of the Agency in carrying out its investigations;

e) role of leader in, or instigator of, the infringement of the provisions of the Act;

f) any steps taken to coerce other undertakings to participate in the infringement of the provisions of the Act with a view to enforcing the practices constituting the infringement.

(3) Where an undertaking continues or repeats the same or a similar infringement referred to in paragraph (2) points a) and b) of this Article, the basic amount of the fine will be increased by the Agency by 100 % for each such infringement established.

#### *Deterrent effect of the fine*

##### Article 10

(1) In order to ensure that fines have a sufficiently deterrent effect in the sense of Article 1 paragraph (1) of this Regulation, namely to deter the same undertaking who already infringed the provisions of the Act but also other undertakings from infringements of competition rules, the Agency may, regardless of the turnover realized on the relevant market by the undertaking who infringed the provisions of the Act, increase the fine to be imposed on undertakings which have significant market power on at least two or more markets, or on those which have a particularly large turnover from all the business operations he is registered.

(2) Without prejudice to paragraph (1) of this Article, the Agency will also take into account the need to increase the fine determined in the first and second step within the meaning of this Regulation, in order to exceed the amount of gains improperly made as a result of the infringement of the provisions of the Act where it is possible to estimate that amount.

#### *Legal maximum*

##### Article 11

The highest amount of the fine imposed by the Agency for infringements of the provisions of the Act, and taking into account all the criteria provided in this Regulation, shall not, in any event, exceed 10 % of the total turnover realized from all the business operations for which the undertaking is registered in the preceding business year for which financial statements have been concluded in line with Article 64 paragraph (1) of the Act.

#### *Exceptional reduction of the fine due to ability to pay*

##### Article 12

(1) In exceptional cases, the Agency may, upon request of the undertaking, and taking into consideration the criteria provided in this Regulation, take account of the undertaking's financial difficulties and its inability to pay for the fine imposed in line with the Act and additionally reduce the amount of the fine.

(2) The mere fact that the undertaking is in an adverse or loss-making financial situation will not constitute for itself a base for reduction of the fine.

(3) As an exception, a reduction of the fine referred to in paragraph (1) of this Article could be granted by the Agency to the undertaking who submitted to the Agency the request for reduction of the fine accompanied by objective evidence that imposition of the fine as

provided for in the Act and in line with the criteria stipulated in this Regulation, would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

*Symbolic fine*

Article 13

(1) In exceptional cases, the Agency may impose a symbolic fine.

(2) The symbolic fine referred to in paragraph (1) of this Article may be imposed on the undertaking referred to under Article 12 of this Regulation, as well as in other cases where the Agency established that effective competition has not been seriously impeded or where anticompetitive effects have not been significant.

(3) In the case referred to in paragraph (1) of this Article the Agency shall provide the justification for imposing such a symbolic fine in its decision.

V TRANSITIONAL PROVISIONS

*Entry into force*

Article 14

This Regulation shall enter into force on the eighth day following the day of its publication in the Official Gazette.

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Zagreb, 11 November 2010

Prime Minister:

Jadranka Kosor