

CNMC's Provisional guidelines on the method of setting fines for infringements of Articles 1, 2 and 3 of the Spanish Competition Act, and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU)

I. Scope of the Provisional guidelines

- (1)** The Spanish Competition Act 15/2007 of 3 July, regulates in Title V (Articles 61 to 70) the penalty regime. The law attributes competence to the National Authority for Markets and Competition (CNMC) to impose sanctions on those who infringe the provisions of the Act. In the exercise of this sanctioning power, the CNMC discretionally applies the principles of proportionality and deterrence, within the limits provided for in the Act itself.
- (2)** The Spanish Supreme Court's Judgement of 29 January 2015 forced the CNMC to abandon the method established on the Communication on competition fines published by the extinct National Competition Commission in 6 February 2009, and laid the foundations for a new methodology for the setting of fines.
- (3)** This Judgment interprets Article 63.1 of the Spanish Competition Act as follows:
 - The 10% referred to in the Act should not be interpreted as a legal maximum that applies *a posteriori*, once the sanction has been set, but constitutes the upper limit of a range of fines within which the sanction should be set according to the specific characteristics of the conduct. Therefore, the 10% upper limit should be reserved for the worst possible infringements.
 - The turnover referred to in Article 63.1 of the Act is to be understood as the total turnover of the infringing undertaking as shown in its annual accounts. That is, the turnover from all economic activities in which the undertaking is involved, irrespective of the market affected by the infringement.
- (4)** These Provisional guidelines explain the general method that is used by the CNMC, within its discretionary powers, for setting fines on competition infringements. Our goal is to improve transparency and objectivity, ensure the proportionality and dissuasive nature of the sanctions, and promote legal certainty in the application of the Spanish Competition Act.
- (5)** The methodology for setting fines presented in these Provisional guidelines has been confirmed in various judgments of the Spanish National Court. These rulings refer to both CNMC's new fining decisions and to decisions in fulfilment of National Court's judgements ordering the CNMC to recalculate the fine¹.

¹Among others, Judgments of the Spanish National Court (Administrative Law Chamber, Sixth Division) of 20 March 2018 and 6 April 2018, appeals No. 374/2016 and No. 363/2016, in relation to file S/DC/0504/14, AIO; Judgment of the Spanish National Court (Administrative Law Chamber, Sixth Division), of 14 June 2018, appeal No. 395/2017, concerning file S/0237/10, MOTOCICLETAS (MOTORCYCLES); Judgments of the Spanish National Court (Administrative Law Chamber, Sixth Division) of 3 June 2018, appeal No. 350/2017, concerning file S/0037/08, COMPAÑÍAS SEGURO DECENAL (DECENAL INSURANCE COMPANIES).

- (6) The Provisional guidelines regarding the setting of fines are applied in most cases. However, when its application is not possible or reasonable, the CNMC might use alternative methods, sufficiently reasoned, to set the fine.
- (7) In any event, these indications apply without prejudice to the rules governing the leniency programme, when applicable, in accordance with Articles 65 and 66 of the Spanish Competition Act, its implementing regulation, and the CNMC's Communication on the Leniency Programme regarding applications for fine exemption and fine reduction.

II. Fine-setting methodology

a. Introduction

- (8) The methodology for setting fines for competition law infringements consists of two main steps:
1. First, a general fining rate is set, according to the infringement's overall appraisal, as a percentage of the annual total turnover of the infringing undertaking in the year preceding the fine. The general rate is set within the fine range established in Article 63 of the Spanish Competition Act. Habitually, this general rate represents around 60% of the total fining rate.
 2. Secondly, an individual fining rate is set for each undertaking according to the specific characteristics of its unlawful conduct. The individual fining rate accounts for around 40% of the total fining rate.
- (9) The *total fining rate* is the result of adding the general and the individual fining rates. The monetary fine is the result of multiplying the total fining rate by the total turnover of the company in the business year preceding the fining decision.
- (10) In accordance with the jurisprudence of the Spanish Supreme Court since 29 January 2015, once the total fining rate for each infringing undertaking has been set, a proportionality test is performed to make sure that the corresponding monetary fine is proportional to the actual dimension of the undertaking's infringement (see Section III).

b. Setting the general fining rate

- (11) The starting point is an initial fining rate, dependent on the type of infringement. This rate is higher for the most harmful offences, i.e. price fixing and market allocation agreements.
- (12) The initial rate is increased or reduced in accordance with objective and subjective legal criteria, established by Article 64 of the Spanish Competition Act, which refer to the overall circumstances of the prohibited conduct, that is, those that are common to all infringing undertakings:
1. *The characteristics of the market affected by the infringement (Art. 64.1.a).* It involves taking into account the circumstances of the affected market, such as the presence of downstream effects, type of products affected by the infringement, importance of the sector for the economy, or the fact that the prohibited conduct took place in the context of a public bidding and caused damage to the public finances, among others.

2. *The market share of the undertaking or undertakings involved (Art. 64.1.b).* The higher the joint market share of all infringing undertakings in the relevant market, the higher will be the harm caused, since the consumers will have had less opportunity to use non-infringing alternative suppliers.
3. *The scope of the infringement (Art. 64.1.c).* The initial rate is also modified according to the size of the geographical markets affected by the infringement. A larger affected market would correspond with a higher increase in the initial rate.
4. *The effect of the infringement on the rights and legitimate interests of the consumers and end users or on other economic operators (Art.64.1.c), and the illicit profits obtained as a consequence of the infringement (Art. 64.1.f).*
5. *The adoption of measures for enforcing or safeguarding the implementation of the unlawful conducts. (Art.64.2.c).* It can be identified with one of the aggravating circumstances in the Spanish Competition Act when it applies to all infringing undertakings. If it applies only to some offenders, it is considered when setting the individual fining rate.

c. Setting the individual fining rate

(13) To assess the particular illicit conduct of each undertaking, three main criteria are considered:

1. *The duration of the infringement (Art. 64.1.d).* The duration of the involvement of each company in the prohibited conduct.
2. *The dimension of the market affected by the infringement (Art. 64.1.a).* The specific share of each infringing undertaking in the affected market turnover (AMT) during the infringement is calculated on the basis of the data supplied by the companies in response to CMNC's request for information. A higher share in total AMT during the infringement implies a higher individual fining rate for that firm.

The above two criteria account for approximately two thirds of the individual fining rate.

3. *The aggravating and mitigating circumstances which may be present in relation to each of the infringing undertakings (Art. 64.1.g).* The aggravating and mitigating factors provided for in Articles 64.2 y 64.3 of the Spanish Competition Act are applied when appropriate.

(14) In case of infringement of Article 2 of the Spanish Competition Act, where an undertaking has abused its dominant position, the same appraisal criteria are taken into account in a similar way, but without reference to its share in the affected market turnover (AMT).

III. Final proportionality test

(15) The methodology described in Section II ensures that the total fining rate imposed on each firm is appropriate to the severity and relevant circumstances of the infringement, and to each firm's involvement in it. However, the penalty in euros might be

disproportionate to the actual dimension of the prohibited conduct when the firm's activity in the affected market is small relative to its total turnover.

- (16) In order to verify whether the monetary fine resulting from the total fining rate is proportionate to the actual dimension of a firm's infringement, it is necessary to estimate a benchmark for a fine that would be both dissuasive and proportional. This reference value is called the proportionality threshold. If the fine in euros resulting from the total fining rate (determined as described in Section II) significantly exceeds that proportionality threshold, it is likely that the proposed fine is disproportionate, and it should be reduced to match the proportionality threshold.
- (17) In order to estimate the proportionality threshold, first it is necessary to estimate the potential illicit profit that the firm could have obtained during the infringement. If the case file provides insufficient information to determine the illicit profit, it can be estimated as a percentage of each undertaking's affected market turnover throughout the infringement. This percentage is basically set by taking into account the gross operating margin of the sector in which the company operates, unless the specific circumstances of the case suggest otherwise².
- (18) Secondly, for the sanction imposed to be dissuasive it must be equal to or greater than the firm's expected illicit gains (without prejudice to the limits established in Article 63 of the Spanish Competition Act). Therefore, the proportionality threshold is obtained by multiplying the estimated illicit profit (computed as described in Paragraph 17) by a deterrent factor ranging from 1 to 4 depending on the duration of the infringement and the size of the firm.
- (19) If the fine in euros proposed for each firm (according to the method explained in Section II) is lower than the estimated proportionality threshold, the fine is not considered to be disproportionate relative to the actual dimension of its infringement. On the other hand, if the fine in euros is higher than the estimated proportionality threshold for the offender, the sanction would be considered disproportionate to the actual dimension of its infringement, and should be reduced to match the proportionality threshold.

10 October 2018

² In cases in which enough data are available, the potential illicit profit is also estimated taking into account the competitive mark-up, the price overcharge due to the infringement and the price-elasticity of demand in the relevant market are taken into account. The data regarding the gross operating margin of the sector is obtained from public databases containing information about the relevant market, such as the one published by the Bank of Spain which provides annual sectoral ratios of non-financial companies (RSE base).