

## Method of setting administrative fines

### Introduction

1. According to Chapter 3, Article 5 of the Swedish Competition Act (2008:579 – KL), the Swedish Competition Authority may apply to Stockholm City Court for an administrative fine to be imposed on an undertaking that has intentionally or negligently infringed the prohibitions contained in Chapter 2, Articles 1 or 7 of KL or Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
2. When determining the amount of administrative fines under Chapter 3, Articles 8 to 11 of KL, account shall be taken of the gravity and duration of the infringement as well as other aggravating and mitigating circumstances of significance. Chapter 3, Articles 12, 14 and 15 of KL contain rules relating leniency regarding administrative fines. Chapter 3, Articles 13 and 14 of KL contain rules relating to the reduction of administrative fines.
3. The Swedish Competition Authority has produced this memorandum with a view to explaining how the Authority intends to interpret and apply the rules contained in the Competition Act relating to administrative fines. This method will be applied when the Swedish Competition Authority drafts summons applications and issues orders for fines.
4. The memorandum does not pre-empt the interpretations that courts may make as regards the provisions on administrative fines contained in the Competition Act. The circumstances specified in items 15, 23, 25 and 26 below are by way of example and are not meant to represent an exhaustive list.

5. A two-step methodology is used when determining the amount of administrative fines. First, a sanction value will be set for each undertaking (see items 6 to 20 below). Second, this sanction value may be adjusted upwards or downwards (see items 21 to 28 below).

### **Setting the sanction value**

6. A sanction value will be set by reference to the value of sales in the relevant market, the gravity of the infringement and its duration.

### **Determining sales in the relevant market**

7. The basis for assessing the sanction value is the undertaking's sales in the market to which the infringement relates, i.e. the relevant market in the case.<sup>1</sup>
8. If the infringement only relates to part of the undertaking's sales in the relevant market, the Swedish Competition Authority shall nonetheless take the undertaking's total sales in the relevant market.
9. If the undertaking has no sales in the relevant market, the sanction value will be set by making an overall assessment of the circumstances in the case. The same applies when setting a fine for an association of undertakings that has no sales at all in the market.<sup>2</sup>
10. The Swedish Competition Authority's calculation will be based on the sales made by the undertaking in the relevant market during the last full business year of its participation in the infringement.<sup>3</sup>

### **Sanction value: Chapter 3, Article 8 of KL**

11. When assessing the sanction value, account shall be taken of the objective circumstances relating to the infringement itself, i.e. the gravity and duration of the infringement.<sup>4</sup>

### **Gravity: Chapter 3, Article 8, third paragraph of KL**

12. The gravity of an infringement is assessed at a value of at most ten per cent of the undertaking's sales in the relevant market.

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<sup>1</sup> MD 2005:7 (*Norsk Hydro et al.*) p. 44, MD 2009:11 (*NCC et al.*), pp. 110 and 112 and also Government Bill 2007/08:135, p. 125

<sup>2</sup> Government Bill 2007/08:135, p. 125

<sup>3</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 13

<sup>4</sup> Government Bill 2007/08:135, p. 123

13. Infringements such as, for example, horizontal price-fixing, market-sharing and output-limitation agreements shall be deemed to be very grave in nature and will generally be construed as representing gravity at the higher end of the scale.<sup>5</sup>
14. When an undertaking holding a position similar to that of a monopoly abuses this position by taking measures to prevent new undertakings from entering the market, this is deemed to constitute a grave abuse of a dominant position that by its nature will be construed as representing gravity at a high level.<sup>6</sup>
15. When determining the gravity of the infringement, the following circumstances will in particular be taken into consideration:<sup>7</sup>
- (i) the nature of the infringement,
  - (ii) the size and significance of the market,
  - (iii) the infringement's actual or potential impact on competition in the market,<sup>8</sup>
  - (iv) whether or not the infringement has been implemented, and<sup>9</sup>
  - (v) whether consumers have incurred significant direct damage or whether a large number of consumers were affected.<sup>10</sup>
16. The various factors that may be considered when assessing the gravity of the infringement do not all carry the same weight within the framework of the total investigation. The nature of the infringement plays a prominent role and when its nature may be classified as very grave there is no need for such conduct to have entailed any particular impact because price-

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<sup>5</sup> Government Bill 2007/08:135, p. 123. Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 23

<sup>6</sup> Government Bill 2007/08:135, p. 124

<sup>7</sup> However, this is not exhaustive; see Government Bill 2007/08:135, p. 123

<sup>8</sup> Cf. judgment of 2 October 2003 in Case no. C-194/99 P *Thyssen Stahl* v. the European Commission, item 180 and judgment of the Court of First Instance of 8 July 2008 in Case no. T-53/03 *BPB* v the European Commission, item 318. See also MD 2009:11 (*NCC et al.*), p. 111

<sup>9</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 22

<sup>10</sup> Government Bill 2007/08:135, p. 128

fixing, market-sharing and output-limitation agreements are as such deemed to have the aim of distorting the structure of the market.<sup>11</sup>

17. An infringement that encompasses, for example, the whole of Sweden, is deemed to be graver than an infringement limited to a small geographical area.<sup>12</sup>
18. Duration: Chapter 3, Article 8, second paragraph of KL The duration of the infringement is determined by multiplying the level of gravity determined in items 12 to 17 above by the number of years the undertaking participated in the infringement.<sup>13</sup>
19. When determining the duration of the infringement, periods of less than six months will be counted as half a year, while periods longer than six months but shorter than one year are counted as a full year.<sup>14</sup>
20. The assessment of whether the conduct constitutes one and the same infringement or multiple infringements may have an impact on the scope of the sanction, since a finding that multiple infringements exist may entail the imposition of a number of distinct administrative fines, which will be determined in each individual case within the assessment criteria laid down by KL.<sup>15</sup>

### **Adjustments to the sanction value**

21. The sanction value may be adjusted upwards or downwards considering the aggravating and mitigating circumstances attributable to the infringement. Such circumstances entail an adjustment of 5 to 15 per cent per circumstance.
22. When determining the amount of administrative fines, account may also be taken of certain circumstances that are not referable to the infringement itself.

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<sup>11</sup> Judgment of the Court of First Instance of 18 June 2008 in Case no. T-410/03 *Hoechst GmbH v European Commission*, item 345, MD 2009:11 (*NCC et al.*), p. 109 and Government Bill 2007/08:135, p. 124

<sup>12</sup> Government Bill 2007/08:135, p. 124

<sup>13</sup> Cf. Government Bill 2007/08:135, p. 125

<sup>14</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 24

<sup>15</sup> Judgment of the Court of First Instance of 12 December 2007 in the joined cases T-101/05 and T-111/05 *BASF AG v the European Commission*, item 158

**Aggravating circumstances referable to the infringement: Chapter 3, Article 9 of KL**

23. The sanction value may be increased if there were aggravating circumstances in conjunction with the infringement, for example, if the undertaking:

- (i) has coerced another undertaking to participate in the infringement,
- (ii) had the role of leader<sup>16</sup> in the infringement,
- (iii) was more active than others, without having the role of leader, in the infringement<sup>17</sup>, or
- (iv) has taken retaliatory measures against another undertaking with a view to enforcing the practices constituting the infringement.<sup>18</sup>

24. The Swedish Competition Authority may possibly regard the fact that an infringement occurred through intent as an aggravating circumstance.<sup>19</sup>

**Mitigating circumstances referable to the infringement: Chapter 3, Article 10 of KL**

25. The sanction value may be reduced if there were mitigating circumstances in connection with the infringement, for example, if:

- (i) the undertaking's participation in the infringement was limited,<sup>20</sup>
- (ii) the undertaking participated in the infringement through negligence,<sup>21</sup>  
or
- (iii) the collaboration was encouraged or authorised by the public authorities.<sup>22</sup>

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<sup>16</sup> MD 2009:11 (*NCC et al.*), pp. 114-115, 120

<sup>17</sup> Government Bill 2007/08:135, p. 128

<sup>18</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 28

<sup>19</sup> Government Bill 2007/08:135, p. 128

<sup>20</sup> See judgments of the Court of First Instance of 15 March 2006 in Case no. T-26/02 *Daichii* v the European Commission, item 113, of 29 April 2004 in joined cases T-236/01 *Tokai Carbon et al.* v the European Commission, item 297, of 8 July 2004 in Case no. T-44/00 *Mannesmannröhren-Werke AG* v the European Commission, items 277-279 and of 9 July 2003 in Case no. T-220/00 *Cheil Jedang* v the European Commission, item 167

<sup>21</sup> Government Bill 2007/08:135, pp. 128-129

<sup>22</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 29

26. The fact that an undertaking participated in the infringement as a consequence of pressure from another undertaking is not deemed to be a mitigating circumstance.<sup>23</sup> Nor is it a mitigating circumstance that an undertaking can prove that the undertaking did not make any profit from the infringement.<sup>24</sup> Nor does an undertaking suffering damage as a result of the cartel operation that the undertaking took part in constitute a mitigating circumstance.<sup>25</sup>

**Circumstances referable to the infringement: Chapter 3, Article 11 of KL**

27. If there are aggravating or mitigating circumstances that are not attributable to the infringement, these will still be considered if the undertaking:

- (i) has previously infringed the prohibitions contained in Chapter 2, Articles 1 or 7 of KL or Articles 101 or 102 of the TFEU<sup>26</sup>
- (ii) is in such a financial situation that an adjustment is necessary. This may involve increasing the fine for an economically strong undertaking, where the fine is intended to have a restraining and deterrent effect.<sup>27</sup> A reduction of the fine may also be considered if the undertaking finds itself in a difficult financial crisis.<sup>28</sup>
- (iii) discontinued the infringement quickly after it has been pointed out by the Swedish Competition Authority, or even earlier on its own initiative.<sup>29</sup> However, this does not apply to particularly serious infringements.<sup>30</sup>

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<sup>23</sup> Government Bill 2007/08:135, p. 128 and MD 2009:11 (*NCC et al.*), p. 115

<sup>24</sup> Judgment of the Court of First Instance of 18 July 2005 in Case no. T-241/01 *Scandinavian Airlines System v the European Commission*, item 146

<sup>25</sup> Government Bill 2007/08:135, p. 128

<sup>26</sup> Government Bill 2007/08:135, p. 128, judgments of the Court of First Instance of 25 October 2005 in Case no. T-38/02 *Groupe Danone v the European Commission*, item 353, of 12 December 2007 in Case no. T-101/05 and T-111/05 *BASF AG et al. v the European Commission*, item 64, and of 8 July 2008 in Case no. T-53/3 *BPB plc v the European Commission*, items 383-387

<sup>27</sup> Government Bill 2007/08:135, p. 130. See e.g. judgment of the Court of Justice of the European Union of 29 June 2006 in Case no. C-289/04 *Showa Denko v the European Commission*, items 15, 18 and 23-29. See also Government Bill 1992/93:56, p. 93

<sup>28</sup> Government Bill 2007/08:135, p. 130 and judgment of Court of Justice of the European Union of 29 June 2006 in Case no. C-308/04 P *SGL Carbon v the European Commission*, items 105-106. See also judgment of the Court of First Instance of 13 December 2006 in Case no. T-271/03 *et al. FNCBV v the European Commission*, item 359

<sup>29</sup> MD 2009:11 (*NCC et al.*), p. 115

<sup>30</sup> Government Bill 2007/08:135, pp. 129-130

(iv) on its own initiative compensates those affected by the infringement.<sup>31</sup>

(v) admits to an alleged infringement for abuse of a dominant position and facilitates the Authority's investigation.<sup>32</sup>

28. The fact that an undertaking has set up a programme to comply with the rules on competition (a 'compliance programme') is not deemed to be a mitigating circumstance.<sup>33</sup> Nor is the obligation to pay damages regarded as a mitigating circumstance.<sup>34</sup> The fact that an employee continues to commit infringements in direct violation of the undertaking's instructions is not deemed to be a mitigating circumstance. Nor is the fact that the undertaking gives notice terminating the employee who committed the infringement deemed to be a mitigating circumstance.<sup>35</sup> In exceptional cases, a trade ban may be regarded as a mitigating circumstance.<sup>36</sup>

#### **Sufficient deterrent in relation to the gravity of the infringement**

29. In exceptional cases, the Swedish Competition Authority may depart from the limits specified in item 12 above where the circumstances in a particular case so require.<sup>37</sup>

#### **Symbolic administrative fine**

30. The Swedish Competition Authority may, in certain cases, determine a symbolic administrative fine. The justification for this shall be given in the summons application.<sup>38</sup>

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<sup>31</sup> Cf. Swedish Government Official Report – SOU 2006:99, p. 505

<sup>32</sup> Government Bill 2007/08:135, p. 130

<sup>33</sup> Judgment of the Court of First Instance of 29 April 2004 in joined cases T-236/01 *Tokai Carbon et al. v the European Commission*, item 343 and MD 2009:11 (*NCC et al.*), p. 115

<sup>34</sup> MD 2009:11 (*NCC et al.*), p. 115 and cf. Swedish Government Official Reports – SOU 2006:99, p. 505

<sup>35</sup> Judgment of the Court of First Instance of 8 July 2008 in joined cases T-50/03 *BPB et al. v the European Commission*, items 430-431

<sup>36</sup> Government Bill 2007/08:135, p. 130, cf. Swedish Government Official Reports – SOU 2006:99, p. 601 and *Nytt Juridisk Arkiv* (a renowned Swedish law report series) 1983, p. 163

<sup>37</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 37

<sup>38</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 36

**Legal maximum: Chapter 3, Article 6 of KL**

31. If the administrative fine exceeds ten per cent of the affected undertaking's total sales for the preceding business year, the fine shall be adjusted downwards to this legal maximum.

**Rules on leniency and reductions: Chapter 3, Articles 12-15 of KL**

32. After the administrative fine has been checked in relation to the legal maximum under item 31 above, the administrative fine shall be reduced or full leniency granted in the event that the rules on leniency and reductions apply.<sup>39</sup>

**Other**

33. This method will be applied in all cases where the Swedish Competition Authority issues a draft summons application according to the method finally determined and published on the Authority's website.<sup>40</sup>

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<sup>39</sup> General Guidelines of the Swedish Competition Authority, KKVFS 2008:3

<sup>40</sup> Cf. Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210, p. 2, item 38