

METHODOLOGY FOR DETERMINING THE PENALTY AMOUNT:

GUIDELINES OF THE
OFFICE FOR COMPETITION

GUIDELINES OVERVIEW: PURPOSE AND SCOPE

1. The purpose of the Guidelines on the method of calculating penalties is to enhance the predictability in how the Office for Competition (hereinafter “the Office”) interprets and applies the provisions regarding penalties in the Competition Act (Chapter 379 of the Laws of Malta) when the Office proposes such penalties.
2. These Guidelines outline the principles that the Office will follow when determining the penalty amount to be proposed in Court proceedings against an undertaking and/or association of undertakings. The European Commission’s guidelines on the method of setting fines serve as a primary reference for the Office when setting the methodology for determining the penalty amount.¹ The Office also takes into account relevant European case law, as well as guidance issued in other European jurisdictions.
3. The purpose of these Guidelines is to promote transparency by setting out further information regarding the methodology for the determination of the amounts of the penalty. In preparation of these Guidelines, the Office has also given regard to the need that the penalties to be imposed on undertaking/s are effective, proportionate, and dissuasive.²
4. An effective penalty should fully reflect the circumstances of the infringement being assessed and consider, in particular, the harm to competition caused by the infringement. This effectiveness is being reflected in the methodology being set by these Guidelines.
5. When determining the amount of the penalty on an undertaking, the penalty proposed by the Office must be proportionate and not excessive. As outlined in these Guidelines, this requires consideration of factors such as the nature, gravity, and duration of the infringement; the behaviour and conduct of the undertakings involved in the infringement; and the size and financial position of the undertakings being sanctioned.

¹ 2006 European Commission Guidelines on the method of setting fines imposed pursuant to Articles 23(2)(a) of Regulation No 1/2003: [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC0901(01)&from=EN)

² As per Article 21(8) of the Competition Act.

6. The general principle of the Office when determining the size of the penalty is that the penalty should be large enough to deter both the infringing undertakings from engaging in future conduct that could infringe competition law (referred to as ‘specific deterrence’) and to deter other undertakings that may be considering anti-competitive practices from engaging in such practices and thus breaching competition regulations (referred to as ‘general deterrence’).
7. Consideration of the penalty amount proposed by the Office in previous cases should not be interpreted as a prerequisite for proposing the same amount of a penalty amount in an ongoing investigation. Before proposing a penalty, the Office will consider all the relevant facts and circumstances.
8. In order to determine the penalty to be requested by the Office to be imposed by the Court on an undertaking, the Office uses a step-by-step approach.
9. The following position on determining the amount of the penalty is not binding for Maltese courts, but it represents the Office’s legal position and its current practises.
10. Publication of the Guidelines on the method of setting penalties will provide the undertakings with at least an estimation of the amount of financial penalty the Office will propose should the Office consider that an infringement of the competition law may have occurred. This improves the transparency of the Office’s application activity.
11. These Guidelines are not a binding indication of how discretion will be exercised in any specific case and should not be interpreted as such.
12. The Office may amend or revoke these Guidelines at any time.
13. The Office has published these Guidelines on the MCCAA’s website, and will publish any amendment to, or revocation of, these Guidelines on the MCCAA’s website.

STATUTORY BACKGROUND

14. According to article 12A(1) of the Competition Act, if the Director General of the Office considers, after conducting an investigation, that an infringement of article 5, and/or article 9 of the Competition Act and, or an infringement of Article 101 and/or Article 102 of the Treaty on the Functioning of the European Union (hereinafter “TFEU”) may have occurred the Director General of the Office is required to submit a sworn application to the Civil Court (Commercial Section), hereinafter referred to as “the Court.”
15. Moreover, article 12A(2)(c) of the Competition Act provides that in the sworn application

“Where appropriate, contain a request by the Director General for the Court to impose a penalty, and, or any other remedy on the undertaking and, or association of undertakings concerned as contemplated in this Act:

Provided that the Director General may also indicate a specific amount of the penalty either in its sworn application or by a note presented in Court during proceeding:

.....”

16. Article 12A(7) of the Competition Act provides that

“In the interpretation of this Act and of any regulations made thereunder and in the exercise of his responsibilities under this Act and any regulations made thereunder, the Director General shall have recourse to the judgements of the Court of Justice of the European Union, to relevant decisions and statements of the European Commission including interpretative notices on the relevant provisions

of the TFEU and secondary legislation relative to competition and may have recourse to his decisions, and those of the Court and to those of the Competition and Consumer Appeals Tribunal and the Commission.” for Fair Trading:

Provided that the Director General may have recourse to other sources as long as they are consistent with the competition law judgements of the Court of Justice of the European Union and to decisions and statements of the European Commission.”

17. As per article 21(1) of the Competition Act, the Court shall impose a penalty not exceeding 10% of the total worldwide turnover of an undertaking and/or association of undertakings concerned in the business year preceding the judgement imposing the penalty for each infringement where the undertaking and/or association of undertakings intentionally or negligently:
 - i. infringes the provisions of article 5 and/or article 9 of the Competition Act, and, or
 - ii. infringes Article 101 and/or Article 102 of the TFEU.
18. If the infringement of an association of undertakings relates to the activities of its members, article 21(1) of the Competition Act states that the penalty imposed shall not exceed 10% of the sum of the total worldwide turnover of each member operating in the market affected by the infringement of the association of undertakings.
19. References to undertaking/s also applies to associations of undertakings thereafter.
20. Article 21(4) of the Competition Act outlines how the amount of the penalty should be determined. According to this provision, the Court should give due regard to the gravity and the duration of the infringement, as well as other factors that may aggravate or mitigate the circumstances to the infringement.

DETERMINING THE AMOUNT OF THE PENALTY

21. The Office will adopt the following step-by-step methodology when determining the amount of the penalty requested to be imposed by the Court on the undertakings involved in the alleged infringement:

Step 1: Establishing the basic amount of the penalty.

Step 2: Adjustment for the infringement duration.

Step 3: Adjustment for aggravating and mitigating factors.

Step 4: Adjustment for specific deterrence.

Step 5: Adjustment to check that the penalty is proportionate and prevent the maximum penalty from being exceeded.

Step 6: Application of reductions for leniency and/or settlement discounts.

22. Details on each of these steps are set out in the paragraphs 23 to 63 below.

STEP 1 - THE BASIC AMOUNT OF THE PENALTY

23. The starting point for determining the financial penalty that the Office will request the Court to impose, is the calculation of a basic amount for each undertaking involved in the alleged anti-competitive conduct. This basic amount is established by reference to the value of the undertaking's relevant sales.

24. The Office will then calculate the basic amount of the penalty by taking **the value of relevant sales**, multiplying this figure by a factor measuring the **degree of gravity** of the infringement, which is then multiplied by the number of years (i.e., adjustment for **the duration** in step 2) of the undertakings' participation in the infringement.³

³ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 19.

CALCULATION OF THE VALUE OF RELEVANT SALES

25. To provide a link between the undertaking and the activity in which the alleged infringement of competition law occurred or is occurring, the basic amount of the penalty shall be determined by the Office by taking the value of the undertaking's sales of goods and services. This should reflect the sales to which the infringement directly or indirectly relates in the relevant geographic area. This will normally include the sales made by the undertaking during the last full financial year of an undertaking's participation in the alleged infringement (hereinafter "value of sales").
26. In determining the basic amount of the penalty, the Office will take the undertaking's relevant sales during the last full financial year preceding the Office's finding of the infringement.
27. The value of relevant sales is calculated before the deduction of sales rebates, value added tax and other taxes directly related to sales being considered.
28. In determining the value of sales by an undertaking, the Office will take the undertaking's best available figures and information which are of the highest indicative value. When the figures made available by an undertaking are incomplete, evidently incorrect or unreliable, the Office may determine the value of sales on the basis of partial figures it has obtained, or any other information it regards as relevant and appropriate.

ASSESSMENT OF THE GRAVITY OF THE INFRINGEMENT

29. As a general principle, the Office sets the gravity of the infringement as a proportion of the value of relevant sales, with a percentage ranging from **0 to 30%**, depending on the seriousness of the alleged infringement. The more serious and widespread the infringement is, the higher is the percentage rate. This follows the European Commission's Guidelines on the method of setting fines.⁴
30. The assessment of gravity undertaken by the Office will be made on a case-by-case basis, taking into consideration all the relevant circumstances of that particular case.
31. In order to assess whether the proportion of the value of relevant sales should be set at the lower or at the higher end of the scale, the Office will give regard to a considerable number of factors, including:
- i. how likely it is for the type of infringement under investigation, by its nature, to harm competition;
 - ii. the nature of the products involved;
 - iii. the combined market share of all the undertakings concerned (i.e., size and significance of the market);
 - iv. the geographic scope of the infringement and its actual or potential impact on competition in the market;
 - v. the actual or potential harm on consumers;
 - vi. the actual or potential effect of the infringement on competitors or third parties; and
 - vii. whether or not any agreement which is subject of the infringement has been implemented.
32. There is no pre-set starting point for the different types of infringements, given the range of conduct that may arise in the cases assessed by the Office. However, for the most serious infringements of competition law, such as cartels, the Office will apply a starting point at the higher end of the available range.

⁴ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 21.

33. In establishing the starting point, the Office will also consider whether this will be sufficient for the purpose of *general deterrence*. In particular, the Office will consider the need to deter other undertakings from engaging in similar conduct or behaviour in the future. To this end, the Office will include in the basic amount a sum of between 15% and 25% of the value of relevant sales in order to deter undertakings from even entering into cartel agreements, such as horizontal price-fixing, market-sharing and output limitation agreements, and also in the cases of other very serious infringements.⁵
34. The factors listed in paragraph 31 of these Guidelines carry different weighting in the Office's assessment of the gravity of the alleged infringement. The nature of the infringement has in fact a significant role when the Office assesses the gravity aspect of the infringement.
35. The Office considers that the category of the *most serious infringements* consists mainly of cartel agreements including horizontal price-fixing agreements, market-sharing and information exchange, and agreements on division of market or output-limitation agreements. The Office also considers that the abuse of dominant position of undertakings with significant impact on broader group of consumers and the implementation of mergers prior to the approval by the Office as falling under the most serious of infringements. Overall, such type of infringements, by their very nature, are the most harmful to competition and, thus, the proportion of the value of sales taken into account for such infringements will be generally set at the higher end of the scale, also to serve as a deterrent on the undertaking in question.
36. The Office considers, amongst others, that vertical price fixing agreements on the division of markets or the fixing of retail resale prices, and other particular abuse of dominant position to be categorised as *serious infringements* when making its assessment of the nature of the alleged infringement.

⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 25.

37. The Office considers that alleged infringements with limited impact on consumers and that affect only a small proportion of the market, and other less serious distortions of competition, to be *less serious infringements*.
38. The size of the market is also of significance when assessing the gravity of an alleged infringement.
39. The importance of the products involved in the alleged infringement and the market share of the infringing undertakings are also circumstances that the Office will consider when assessing the gravity aspect of an alleged infringement.
40. The Office will also give importance to the impact that a particular practice has on the market and competition and will also consider in its assessment the harmfulness of the alleged infringement on consumers and if many consumers will be impacted.

STEP 2 - ADJUSTMENT FOR THE DURATION OF THE INFRINGEMENT

41. In determining the amount of the financial penalty, the duration of the alleged infringement must also be considered.
42. The duration of the alleged infringement is taken into account by multiplying the gravity total, determined in accordance with Step 1 of the Office's assessment of the alleged infringement, by the number of years during which the undertakings involved have participated in the alleged infringement. In determining the duration, the Office considers that periods shorter than six months will generally be counted as half a year, while periods longer than six months but shorter than one year will be counted as a full year.⁶

⁶ The European Commission adopts similar methodology in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 24.

43. The method, described in paragraph 42, for taking account of the duration of an infringement is appropriate for infringements that cause damage to competition throughout their duration. The consequences of such infringements, if they existed for a long period of time, are expected to be of a more serious nature than infringements that have taken place over a shorter period.
44. However, the Office considers that, in some cases, even infringements of a relatively short duration, for instance a single exchange of information between undertakings, may be of a long-lasting nature. A typical feature of such types of infringements is that the more effective the practice is, the shorter the duration of the infringement. In such cases, the Office may depart from the methodology described in paragraph 42 of these Guidelines, as using this methodology might under-estimate, or over-estimate, the amount of the penalty of such an infringement.

STEP 3 - ADJUSTMENT FOR AGGRAVATING AND MITIGATING FACTORS

45. The Office may adjust the amount of the penalty depending on the existence of any aggravating or mitigating circumstances. As such, the amount of the penalty in Step 3, may be increased where there are aggravating factors, or decreased where there are mitigating factors, attributable to the alleged infringement. A non-exhaustive list of aggravating and attenuating circumstances is provided in article 21(4)(b-c) of the Competition Act. The Office will consider whether any adjustments are appropriate in all cases for each undertaking, based on the specific circumstances of the infringement.

AGGRAVATING CIRCUMSTANCES ATTRIBUTABLE TO THE INFRINGEMENT

46. There may be aggravating circumstances attributable to the undertaking's behaviour in connection with the infringement. In particular, the Office will consider whether the undertaking

- i. has had a leading role, or instigator of, the infringement in relation to the other undertakings;
- ii. took steps to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings aimed at ensuring the continuation of the infringement;
- iii. has already committed an infringement under articles 5 and/or 9 of the Competition Act and, or under Articles 101 and/or 102 of the TFEU, or repeats the same infringement (i.e., recidivism) which will be considered as especially aggravating;
- iv. refuses to cooperate or obstruct the investigation conducted by the Office;
- v. has committed the infringement intentionally rather than negligently; and
- vi. has disclosed information to any third party not part of the relevant proceedings under the Competition Act.

47. In addition, the Office may consider if an undertaking has been more active in the infringement than other participating undertakings, without necessarily having the role as a leader of the infringement.

MITIGATING CIRCUMSTANCES ATTRIBUTABLE TO THE INFRINGEMENT

48. The amount of the penalty may be reduced if there are mitigating circumstances attributable to the infringement. In particular, the Office will consider whether the undertaking
- i. has had a substantially limited role in its involvement in the infringement. The undertaking concerned needs to provide evidence that during the period in which it was party to the agreement distorting the competition, it actually avoided applying it by adopting its own competitive conduct in the market;
 - ii. has terminated the infringement on its own accord following the intervention by the Office;
 - iii. was acting under severe duress and/or pressure;
 - iv. has provided evidence that the infringement has been committed as a result of unintentional negligence;
 - v. has effectively cooperated with the Office outside the scope of the leniency agreement agreed upon with the Office and beyond the legal obligations of the undertaking concerned;
 - vi. has significantly contributed to uncover the infringement; and
 - vii. where the anti-competitive conduct of the undertaking has been authorized or encouraged by a public authority or by legislation.
49. The Office will not consider as mitigating circumstance the fact that an undertaking's involvement in an infringement is of a shorter period than that of other undertakings, as this is already being considered in Step 2 when adjusting for the duration of the infringement. Finally, the Office will not generally propose a penalty reduction on the grounds of uncertainty on the part of the undertaking as to whether the agreement constituted an infringement.

STEP 4 - ADJUSTMENT FOR SPECIFIC DETERRENCE

50. The Office may adjust the penalty in this step to achieve the objective of specific deterrence and restraining effect, ensuring that the penalty to be proposed will deter an undertaking from engaging in any anti-competitive practices in the future. Any penalty that is set too low to deter an infringing undertaking from breaching competition law in the future is also unlikely to deter other undertakings that may be considering engaging in any anti-competitive practices.
51. The Office may consider increasing the penalty to be proposed on undertakings which have a particularly large turnover from the sales goods or services, other than those to which the infringement relates to, or in cases where the potential penalty is too low to achieve the objective of deterrence in view of that undertaking/s size and financial position.
52. There could also be circumstances where the infringing undertaking's value of sales in the market impacted by the infringement is zero, or where the value of sales did not accurately reflect the undertaking's involvement in the infringement or the likely harm to competition resulting from the infringement. Thus, an increase in the penalty would be warranted to achieve specific deterrence for the infringing undertakings.

STEP 5 - ADJUSTMENT TO CHECK THAT THE PENALTY IS PROPORTIONATE AND PREVENT MAXIMUM PENALTY FROM BEING EXCEEDED

53. In step 5, the Office assesses whether the overall penalty achieved after steps 1 to 4 is proportionate, taking into account, *inter alia*, the appropriate indicators of the size and financial position of the undertaking. The assessment of proportionality is not mechanistic in its nature, but one of evaluation and judgement. If necessary, the penalty may be decreased to ensure that the amount of the penalty is not disproportionate.
54. In assessing proportionality, the Office considers all relevant circumstances, including the nature of the alleged infringement, the role of the undertaking in the alleged infringement, the impact of the alleged infringing activity on competition and the market involved, the duration of the infringement, and the undertaking/s size and financial position. The overall assessment should appropriately reflect the seriousness of the alleged infringement and achieve the expected deterrence.
55. If the undertaking concerned gained a profit during its involvement in the anti-competitive practice, eventually causing harm to other competitors through this conduct, the penalty should be higher than the illicit profit gained, or the harm caused. As such, the Office may increase the penalty at this step, in order to exceed the amount of economic gains that were improperly made as a result of the alleged infringement.
56. The final amount of the penalty proposed by the Office for an alleged infringement shall not, in any circumstance, exceed 10% of an undertaking's total worldwide turnover in the business year preceding the Office's findings of an infringement.

57. In the case where the infringement of an association of undertakings relates to the activities of its members, article 21(1) of the Competition Act also provides that the penalty shall not exceed 10% of the sum of the total worldwide turnover of each member active on the market affected by the infringement of the association of undertakings.
58. If the proposed penalty for a particular undertaking exceeds the maximum amount outlined paragraphs 56-57 of these Guidelines, then the penalty will be reduced accordingly to this maximum amount.
59. Total worldwide turnover refers to the total global turnover of the undertaking, without being limited to the product or market that the infringement was concerned to.

STEP 6 - APPLICATION OF REDUCTIONS FOR LENIENCY AND/OR SETTLEMENT DISCOUNTS

60. The Office will reduce an undertaking's penalty at step 6 where the undertaking has a leniency agreement with the Office, provided that the undertaking meets the conditions of the leniency agreement. Information on how the Office applies leniency rules can be found in the Subsidiary Legislation 379.10 on *Immunity from penalties and reduction of penalties in cartel investigations regulation*.⁷
61. The Office will also reduce an undertaking's penalty if that undertaking agrees to enter into a settlement procedure with the Office. The Director General of the Office together with an undertaking, can initiate settlement proceedings by filing a joint application before Court pursuant to article 12B of the Competition Act.

⁷ Link to the Subsidiary Legislation 379.10: <https://legislation.mt/eli/sl/379.10/20210618/eng>

62. Article 12B(9) of the Competition Act provides that

“If the undertaking, and, or association of undertakings concerned agree to terminate the investigation before the Office or the proceedings before the Court by means of settlement, by filing together with the Director General the joint application, the Director General shall reward the undertaking and, or association of undertakings for the settlement, by reducing the penalty which would otherwise have been requested by the Director General to be imposed by the Court in terms of article 21(1) of the Act by ten to thirty-five per centum (10-35%).”

63. Thus, the Office will apply a penalty reduction of between 10-35% where an undertaking decides to settle with the Office, which will involve, amongst others, the undertaking admitting its participation in the infringement.

FINAL CONSIDERATIONS BY THE OFFICE

64. In exceptional circumstances, the Office may, upon request, take account of an undertaking's long-term inability to pay when proposing the final penalty. The Office will not consider a reduction in the penalty on the mere finding of an adverse or loss-making economic situation. A reduction may could be granted solely on the basis of objective evidence that proves that the imposition of such penalty according to these Guidelines *“would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value”*.⁸

65. The Office may also, in exceptional circumstances, decide to propose a symbolic penalty. The justification for imposing such a penalty should be given in the decision.⁹

⁸ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 35

⁹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 36

66. While these Guidelines set out the general methodology for determining the penalty amount that the Office will propose to the Court in cases of alleged infringements, the specific circumstances of a case – or the need to ensure adequate deterrence – may justify a departure from this methodology or from the 0% to 30% scale set out in paragraph 29. In such instances, the Office may propose a one-time penalty. The justification for such a penalty should be given in the Office’s findings.¹⁰
67. The Office retains the ability to amend and update its guidelines if and when necessary.

¹⁰ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, para. 37.

SUMMARY

Figure 1: Summary Table of the Calculation of the Penalty

Basic Penalty	Percentage of the value of relevant sales (0-30% based on gravity of infringement) x duration (number of years of the infringement)
General Deterrence	15-25% of relevant sales: additional deterrence for cartels and other very serious infringements
Increased by	Aggravating factors e.g.: infringer's leading role, repeated offender, obstructing investigation, intention, etc.
Decreased by	Mitigating factors e.g.: limited role, termination of infringement on own accord, conduct encouraged by public authority, etc.
Specific Deterrence	Penalty may be increased to deter infringing undertakings from engaging in anti-competitive practices in the future
Proportionality	Penalty may be increased/decreased to ensure it is not disproportionate
Subject to an overall cap	10% of total worldwide turnover
Possible further reductions	Leniency Program Settlement Procedure: 10-35% Inability to Pay



MCCAA

MALTA COMPETITION AND
CONSUMER AFFAIRS AUTHORITY

mccaa.org.mt