

**GUIDELINES**

on the

**METHODOLOGY TO BE USED IN IMPOSING  
FINES  
IN THE SCOPE OF ARTICLE 69(8) OF LAW  
No. 19/2012, OF MAY 8**

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## GUIDELINES ON THE METHODOLOGY TO BE USED IN THE APPLICATION OF FINES, WITHIN THE SCOPE OF ARTICLE 69(8) OF LAW No. 19/2012

### I. INTRODUCTION

1. Pursuant to Articles 67 and 68 of the legal framework for competition, approved by Law no. 19/2012, in conjunction with Article 7 (1) and (2) (a) of the Competition Authority Statutes<sup>1</sup>, it is this Authority's responsibility, in carrying out its mission, to impose fines for infringement of competition rules laid down in Law No 19/2012 and Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU).
2. In order to ensure the transparency and objectivity of its decisions, in addition to ensuring legal certainty and the deterrent effect of sanctions on competition infringements<sup>2</sup>, the Competition Authority adopts these *Guidelines on the methodology to be used in the application of fines*, without prejudice to a necessarily case-by-case analysis.
3. These *Guidelines* set out the methodology to be used for imposing fines for infringement of Articles 9, 11 and 12 of Law No 19/2012, and Articles 101 and 102 of TFEU, pursuant to Article 68 (1) (a) and (b) of Law No 19/2012, applicable to undertakings and associations of undertakings, and to natural persons, according to Article 73 (6) of Law No 19/2012.
4. The methodology set out in these *Guidelines* is based, in most of the investigations initiated by the Competition Authority for infringement of the rules of Articles 9, 11 and 12 of Law No 19/2012 and Articles 101 and 102 of TFEU, on the turnover related to the infringement. Where the available information and elements are unreliable or do not make it possible to determine the turnover related to the infringement, or where there is apparent disparity, on the one hand, between the turnover related to the infringement and, on the other hand, the economic impact of the infringement, the total turnover of the person concerned by the proceedings or its importance to the economic sector, the Competition Authority shall use the total turnover of the person concerned by the proceedings in accordance with numbers 21 and 22 of these *Guidelines*, giving reasons for this decision.
5. These *Guidelines*, whose approval is determined by Article 69(8) of Law No. 19/2012, are not intended to allow the prior determination of the

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<sup>1</sup> Published in an annex to Decree-Law No. 10/2003, of January 18.

<sup>2</sup> The task of ensuring compliance with laws, regulations and decisions aimed at promoting the defense of competition [Article 6 (1) (a) of the Competition Authority Statutes] involves setting fines at a sufficiently dissuasive level, not only to penalize the person concerned by the proceedings (specific deterrent effect), but also to deter other actors from engaging in conduct contrary to competition rules (general deterrent effect).

concrete fines applicable in each case, but rather provide the information necessary to understand the method used by the Competition Authority in determining such fines.

6. In preparing these *Guidelines*, the Competition Authority has considered the European Commission's Guidelines for the calculation of fines imposed pursuant to Article 23 (2) (a) of Regulation (EC) no. 1/2003.
7. These *Guidelines* apply only to administrative offences whose investigation is opened following the entry into force of Law No. 19/2012.
8. The Authority may revise these *Guidelines* where justified as a result of the experience gained in the exercise of the sanctioning powers relating to the application of Articles 9, 11 and 12 of Law No 19/2012 and Articles 101 and 102 of TFEU.

## II. RELEVANT LEGAL FRAMEWORK FOR THE DETERMINATION OF THE FINE

9. The Competition Authority determines the fine applicable for intentional infringement of Articles 9, 11 and 12 of Law No. 19/2012 and Articles 101 and 102 of the TFEU in accordance with the relevant provisions of Law No. 19/2012 and, alternatively, according with the provisions of the legal framework for administrative offences (hereinafter, RGIMOS), approved by Decree-Law No. 433/82 of October 27<sup>4</sup>.
10. Pursuant to Article 69(1) of Law No. 19/2012, the Competition Authority may consider, among others, the following criteria in determining the amount of the fine:
  - a) The seriousness of the infringement regarding its impact on effective competition in the national market;
  - b) The nature and size of the market affected by the infringement;
  - c) The duration of the infringement;
  - d) The degree of participation of the person concerned by the proceedings in the infringement;
  - e) The advantages enjoyed by the person subject to the proceedings as a result of the infringement, should they be identified;
  - f) The conduct of the person concerned by the proceedings in eliminating restrictive practices and in remedying the damage caused to competition;
  - g) The economic situation of the person concerned by the proceedings;

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<sup>3</sup> Published in the Official Journal of the European Union, C 210, 1.9.2006, pp. 2-5

<sup>4</sup> See Article 13 of Law No. 19/2012.

*h)* The administrative offence history of the person concerned by the competition rules infringement proceedings;

*i)* Cooperation with the Competition Authority until the end of the procedure.

11. If undertakings or associations of undertakings are concerned by the proceedings, the applicable fine shall not exceed 10% of the turnover achieved in the year immediately preceding the final condemnatory decision issued by the Competition Authority, for each of the undertakings or, in the case of associations of undertakings, of the aggregate turnover of the associated undertakings (Article 69 (2) of Law No 19/2012).
12. If natural persons are concerned with the proceedings, the applicable fine shall not exceed 10% of their annual remuneration earned for the exercise of their functions in the offending company, in the last full year in which the prohibited practice has occurred (Article 69 (4) of Law No. 19/2012).
13. If there are elements that allow the economic benefit obtained from the infringement to be calculated and it is found that it was higher than the upper limit of the applicable fine, the Competition Authority may set a fine up to the amount of the benefit, provided that it does not exceed one third of the applicable upper limit, up to a total of 13.33% (Article 18 (2) of the RGIMOS).
14. In the case of concurrent offences, the single fine applicable may not exceed twice the upper limit of the administrative offences in the procedure (Article 19 (2) of the RGIMOS).
15. In cases of negligence, the amount of the fine is reduced by half (Articles 68 (3) of Law 19/2012 and 17 of the RGIMOS).

### **III. METHODOLOGY FOR DETERMINING THE FINE TO BE APPLIED**

#### **III.1. General Aspects**

16. The determination of the fine for infringement of Articles 9, 11 and 12 of Law No. 19/2012 and Articles 101 and 102 TFEU typically comprises the following phases:
  - (i) First, a basic amount of the fine is determined for each party concerned by the proceedings;
  - (ii) Thereafter, that basic amount may be increased or reduced as a result of the verification, in the specific case, of aggravating or mitigating circumstances (adjustment of the basic amount);

(iii) Finally, the amount resulting from (ii) may be increased or reduced according to the facts as a whole, in particular the advantages that the person concerned by the proceedings has enjoyed as a result of the infringement, when they are identified, as well as general and special prevention objectives that may be imposed in each case (concrete determination of the fine).

17. The basic amount of the fine is a percentage of the turnover related to the infringement, determined according to the seriousness of the infringement, multiplied by the number of years of its duration.
18. If it is not possible or appropriate to consider the turnover related to the infringement, the basic amount of the fine corresponds to a percentage of the total turnover of the person concerned with the proceedings, and is determined according to the gravity and duration of the infringement.

### **III.2. The concept of turnover**

19. For the purpose of determining the basic amount of the fine, the turnover achieved by the person subject to the proceedings in respect to goods or services directly or indirectly related to the infringement<sup>5</sup> shall be considered.
20. For the purposes of the preceding paragraph, the updated average of sales of goods or services<sup>6</sup>, directly or indirectly related to the infraction, made in Portuguese territory, determined before the application of VAT and other taxes directly related to sales, in the years of the infraction, shall be considered.
21. Where the available information and elements are unreliable or do not make it possible to determine the turnover related to the infringement, the Competition Authority shall, on the basis of the information at its disposal, use the total turnover of the person concerned by the proceedings to determine the basic amount of the fine; where it is not possible to determine the turnover in question in the last year of the infringement, the turnover of the financial year immediately preceding the final decision shall be deemed to be the turnover of the year in question.
22. Due to the special and general prevention objectives, when there is apparent disproportion between the turnover related to the infringement and the economic impact of the infringement, the total turnover of the person concerned by the proceedings or the weight of the latter in the economic sector concerned, the Competition Authority also makes use of the total turnover of the person concerned by the proceedings, as set out in the preceding paragraph.

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<sup>5</sup> This delimitation makes it possible to approximate the basic amount of the fine of possible or potential advantages obtained by the person concerned by the proceedings more directly than the total turnover, as well as the economic impact of the infringement and the relative weight of each person concerned in the sector affected.

<sup>6</sup> Update referenced to the last year of the infraction, considering as discount rates the inflation rates announced by Banco de Portugal for each year of the infraction.

### **III.3. Determining the basic amount of the fine (supra, 16 (i))**

23. Once the turnover related to the infringement or the total turnover has been determined, in accordance with paragraphs 19 to 22 of these *Guidelines*, the percentage of the infringement

corresponding to the basic amount shall be calculated.

24. If the methodology is based on the turnover related to the infringement, the Competition Authority, following the practices of the European Commission and other European authorities, considers that the percentage to be taken into account for this purpose is set at between 0% and 30%, depending on the seriousness of the infringement.
25. If the methodology is based on the total turnover of the person concerned with the proceedings, the Competition Authority considers that the percentage to be taken into account for this purpose is set at between 0% and 10%, depending on the gravity and duration of the infringement.
26. The seriousness of the infringement shall be determined on a case-by-case basis and shall be considered all relevant circumstances, including the nature of the practice, the degree of sophistication of its implementation, its effects on the economy, the affected market and the behavior of economic actors, in particular with regard to the dynamics of innovation, the economic size of the persons concerned with the proceedings and their participation in the infringement, as well as the relevance and size of the economic sector affected.
27. If associations of undertakings are concerned, in the case of turnover related to the infringement, the Competition Authority considers a percentage of between 0% and 30% of the aggregate volumes of sales of goods or services directly or indirectly related to the infringement of the associated undertakings under the terms of paragraphs 19 and 20 of these *Guidelines*; in the case of the total turnover of the target, the Competition Authority considers a percentage of between 0% and 10% of the total aggregate turnover of the associated undertakings under the terms of paragraph number 21 of these *Guidelines*.
28. For the purpose of calculating the basic amount of the maximum fine applicable to natural persons, the Competition Authority shall consider the ratio between the basic amount of the fine imposed on the legal person or entity represented and its total turnover, applying that proportion to the annual remuneration of the natural person concerned.

#### **III.4. Duration of infringement [supra, 16 (i)]**

29. If the methodology is based on the turnover related to the infringement, once the relevant percentage is determined, a multiplication factor corresponding to the number of years of duration of the infringement is applied; periods of less than one semester will be counted as half an year and periods of more than six months and less than twelve months will be counted as a full year. This is an upper limit, which will be adjusted in accordance with the terms referred to in III.6.

#### **III.5. Additional fraction in the most severe restrictive practices [supra, 16 (i)]**

30. If the methodology is based on turnover related to the infringement, in order to deter very serious infringements, in particular the collusive practices referred to in Article 75 of Law No. 19/2012 or unilateral abusive practices of exclusion or creation of barriers to market entry, the Competition Authority includes in the basic amount of the fine, regardless of the duration of the infringement, an additional fraction of the turnover related to the infringement, between 15% and 25% of the turnover.

#### **III.6. Adjustment of the basic amount (supra, 16 (ii))**

31. In determining the extent of the fine, the Competition Authority may consider, in an overall

assessment, all relevant factors and circumstances involving an increase or reduction in the basic amount of the fine to be imposed on the person concerned by the proceedings.

32. The Competition Authority considers aggravating circumstances, namely: (i) the insensitivity revealed by agents regarding legal assets protected by competition rules; (ii) the recurrence of restrictive practices; (iii) the refusal to cooperate or obstruction during the investigation; (iv) inciting the commission of anti-competitive practices; (v) leadership in cases of collusion; (vi) the imposition of retaliatory measures against other agents to enforce practices that constitute infractions; and (vii) the implementation of measures to conceal the practice.
33. The Competition Authority also considers mitigating circumstances, namely: (i) the fact that the anti-competitive behavior has been authorized or encouraged by public authorities or regulations; (ii) the cooperation with the Competition Authority during the investigation, in addition to cases of strict compliance with the duty of collaboration referenced in Law No. 19/2012 or cases of exemption or reduction of a fine; (iii) the conduct of the person concerned with the proceedings with a view to eliminating prohibited practices or repairing the damage caused to competition; and (iv) the proof and demonstration by the person concerned with the proceedings that their participation in the infringement is substantially reduced and that, therefore, during the period in which they joined the infringement, they have effectively evaded its application by adopting a competitive behavior in the market.

### **III.7. Specific determination of the fine [supra, 16 (iii)]**

34. In order to ensure that the fine to be imposed is dissuasive and proportionate, the Competition Authority may increase the amount of the fine calculated based on the turnover related to the infringement.
35. Thus, the Competition Authority considers the circumstances of the specific case that demonstrate special needs in terms of special and general prevention, and in these cases, if it is not justified to adopt the total turnover of the person concerned with the proceedings under the terms of paragraph number 22 of these *Guidelines*, the Competition Authority may increase up to 100% the amount of the fine calculated on the basis of the turnover related to the infringement; the size of the person concerned by the case, its economic power, its financing resources and the economic relevance of the sector where the practice took place will be particularly relevant elements in this area<sup>7</sup>.
36. The Competition Authority may reduce the amount of the fine calculated on the basis of the turnover related to the infringement by taking into account the fact that the person concerned by the proceedings carries out the bulk of their activity on the market affected by the infringement, thereby ensuring the proportionality of the fine to be imposed.
37. The Competition Authority takes into consideration the advantages that the person concerned with the proceedings has benefited from as a result of the infringement, when they are identified, in accordance with Article 69 (1) ( *e*) of Law No. 19/2012.
38. The amount of the fine may be increased so that the actual fine imposed exceeds the amount of the unlawful profits gained as a result of the infringement, provided that the applicable upper limit of the fine is not exceeded.
39. The Competition Authority takes into consideration the economic situation of the person concerned with the proceedings, pursuant to Article 69 (1) ( *g*) of Law No. 19/2012.

40. The Competition Authority may take into consideration, in particular, the inability of the person concerned with the proceedings to pay the fine in the economic and social context concerned.
41. The Competition Authority does not grant any reduction of fines solely on the basis of a mere finding of an unfavorable or deficient financial situation.
42. The reduction of the fine is granted only on the basis of the objective demonstration that the imposition of a fine, under the conditions set out in these *Guidelines*, would irretrievably endanger the economic viability of the person concerned with the proceedings and would result in their assets being deprived of any value.
43. As mentioned in paragraphs 11, 12 and 13 of these *Guidelines*, the fine may not exceed 10% of the turnover pertaining to the year immediately preceding the final condemnatory decision issued by the Competition Authority, by each of the undertakings or, in the case of associations of undertakings, of the aggregate turnover of the associated undertakings (Article 69 (2) of Law No. 19/2012); if the entity concerned with the proceedings is a natural person, the fine

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<sup>7</sup> To this end, the Competition Authority shall take into account, in particular, the priorities of competition policy as defined in accordance with Article 7 (3) of Law No 19/2012.



applicable may not exceed 10% of the respective annual remuneration earned for the exercise of their functions in the offending company, in the last full year in which the prohibited practice has occurred (Article 69 (4) of Law No. 19/2012); notwithstanding the foregoing, if there are elements that allow the calculation of the economic benefit obtained from the infraction and if it is possible to find that it was higher than the upper limit of the applicable fine, the Competition Authority may set a fine up to the amount of the benefit, provided that it does not exceed one third of the applicable upper limit (Article 18 (2) of the RGIMOS).

44. It is at this stage that the Competition Authority considers the above-mentioned upper limit of the fine, reducing, where appropriate, in accordance with it, the fine calculated in accordance with the methodology set out in these *Guidelines*.

#### IV. EXEMPTION OR REDUCTION OF FINE AND TRANSACTION PROCEDURES

45. In cases of exemption or reduction of a fine in infringement of competition rules proceedings, the Competition Authority may grant exemption or reduction of the fine that would be imposed, set in accordance with the methodology previously stated, under the terms provided for in Chapter VIII of Law No. 19/2012.
46. In the settlement procedures laid down in Articles 22 and 27 of Law No 19/2012, the Competition Authority defines the percentage of reduction of the applicable fine<sup>8</sup>; if the administrative offences that are the subject of the transaction also involve an application for leniency, the reduction of the amount of the fine defined during the settlement shall be added to the reduction resulting from that request<sup>9</sup>.

#### V. PROCEDURAL ACTS

47. With the notification of the Statement of Objections [Article 24 (3) (a) of Law No. 19/2012], the person concerned with the proceedings is informed of the criteria to be considered in the concrete determination of the fine, namely the total turnover considered for the purposes of the abstract framework of the fine, the turnover related to the infringement or, where applicable, the total turnover of the person subject to the proceedings in the last year of the infringement, the classification of the seriousness of the infringement and the duration of the infringement, without prejudice to the elements and information that are brought to the attention of the Competition Authority during the investigation of the proceedings, namely in the statement of the person concerned.
48. The specific fine to be applied is not communicated in the Statement of Objections, since at this stage of the process all the necessary elements for the

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<sup>8</sup> See paragraph 146 of the *Guidelines on Process Instruction*, available at [www.concorrenca.pt](http://www.concorrenca.pt).

<sup>9</sup> See Articles 22 (14) and 27 (9) of Law 19/2012.

determination of the fine are yet to be determined; only after the person concerned with the proceedings is notified of the Statement of Objections may they make a statement on the charges attributed to them, attach pre-existent evidence and/or request the provision of new evidence. As a whole, these elements can modify the conviction previously formed by the Competition Authority regarding the objective or subjective elements of the imputed infraction<sup>10</sup>.

49. The concrete amount of a fine is only communicated to the person concerned with the proceedings in the Final Decision referred to in Article 29 (3) (a) and (b) of Law No. 19/2012.
50. In the settlement procedures initiated during the investigation, the notification addressed to the person concerned with the proceedings containing the imputation of the offense also gives the person concerned with the proceedings knowledge of the elements referred to in paragraph 47 of these Guidelines<sup>11</sup>; the transaction draft referred to in Articles 22 (8) and 27 (3) of Law No. 19/2012 determines the concretely applicable fine, which will be calculated according to the methodology defined in these *Guidelines*, along with the indication of the respective reduction.

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<sup>10</sup> "[...] *the evidence is only considered in its entirety, including the evidence produced by the accused party when the accused party has presented their defense. Therefore, only at that moment does the Authority have the conditions to determine the concrete sanctions that it deems appropriate. Therefore, with the Statement of Objections, the Authority cannot notify the defendant of the sanction that it intends to impose simply because it does not yet have all the elements necessary for that purpose. [...] This means that, with the statement of objections, the administrative authority only must inform the defendant of the sanctions abstractly applicable if it concludes that the offense imputed to the defendant was committed by the defendant*" (Judgment of the Commercial Court of Lisbon, 4th judgment, of 05.29.2012, in case 349/11.7TYLSB, pp. 21-22).

<sup>11</sup> See Article 22 (3) of Law No 19/2012 and point 149 of the *Guidelines on the Instruction of Proceedings*.