

Resolution – Question A

The League recognizes the importance of entrusting competition authorities / courts with a certain degree of discretion in applying fines for competition law infringements. However, the League also underlines the importance of adequate controls on the exercise of this power and of consistency.

The League recommends that

The level of fines imposed for infringements of the competition rules should be based on the following factors:

- Competition law fines should be aimed at achieving a **double objective**: to sanction the undertaking involved and to deter other undertakings from future infringements; while satisfying the principles of proportionality and equal treatment.
- With a view to this, the **seriousness of the infringement** should be one of the factors taken into account. In defining seriousness, reference should be made to the nature of the agreement or conduct as generally recognized in the respective jurisdictions and to the specific circumstances of the case.
- **Fault** (e.g., including the extent to which the undertaking knew or should have known that the conduct was illegal or anti-competitive) should also be taken into account whether a fine should be imposed and with regard to its level.
- **Effects** could be assessed as an aggravating or mitigating factor. The burden of proof for lack of effects should rest with the defendant.
- In line with the above, the **size of the undertaking** involved should be one of the essential factors in determining the amount of the fine. In this regard, the turnover, at least within the market affected by the infringement, is an accepted starting point. However, adjustments may be necessary in cases where turnover does not provide an economically realistic measure of the true size of an undertaking.
- **Duration** of the infringement should also be adequately taken into account.

In addition, competition authorities / courts should be empowered (and required, if to the benefit of the undertakings concerned) to take account of a number of additional factors:

- **Cooperation with the authorities (outside leniency)** should be reflected in the amount of the fine where it goes beyond compliance with legal obligations placed on the undertaking (for example, to produce documents or to provide information).
- **Compliance programs** created before the infringement and showing the undertakings true and intense efforts to avoid infringements (e.g., reflected by the extensiveness of the programme) can be taken into account as a mitigating factor.
- A **failing firm defence** should be admitted within strict limits as a factor which could reduce the fine.

- The **repeat of the same or a similar infringement by the same undertaking** should be taken into account as an aggravating factor;
- The **geographic scope** of the infringement should be reflected in the amount of the fine.
- Account should also be taken of other aggravating or mitigating factors such as the **role played by the undertaking in the infringement** or whether **senior management** knew or should have known of that role.

Concerning the concept of a binding framework determining the level of fine and the question who should decide the framework the following conclusions can be drawn, the League recommends:

- **Statutory or other formal law** should determine the level / maximum amount of fine. Furthermore, as simply prescribing a maximum penalty leaves too much discretion in the hands of CAs and /or courts, statutory law should also define the basic principles with regard to the factors taken into account when imposing a fine.
- **Guidelines** issued by (administrative) CAs should be published, after wide consultation, to ensure in detail the transparency of the methodology of setting fines. In order to react to current legal developments, the CAs should be free to adjust the guidelines concerning infringements in future. The guidelines should be binding on the CAs, save in exceptional cases (in which the CAs should be required to explain why the case is exceptional). The guidelines should be taken into account by the court to which any appeal against a fining decision is brought but should not bind the court.
- As regards the **authority competent to impose a fine**, legal systems should provide for appropriate checks and balances. If a system does not opt for a strict separation of powers (i.e., separation of the accuser and the judicial body deciding on the fine), at least case handler / teams should operate in entirely separated teams within the authority (“firewalls” between teams of investigation and decision).
- Strict and transparent **periods of limitation** should be applied.