Autorità di Regolazione dei Trasporti

Annex A to Decision No 49/2017

GUIDELINES ON THE QUANTIFICATION OF ADMINISTRATIVE FINES IMPOSED BY THE TRANSPORT REGULATION AUTHORITY

1. Introduction

These guidelines are adopted by the Transport Regulation Authority for the quantification of administrative fines imposed following the establishment of infringements of the rules under its monitoring.

The purpose of this document is to provide a useful tool for the quantification of the fines imposed pursuant to the criteria laid down in Article 11 of Law No 689 of 24 November 1981, according to which *"in the determination of the statutory administrative fine ranging from a minimum to a maximum amount and in the application of optional ancillary fines, account shall be taken of the seriousness of the infringement, the work carried out by the infringer to eliminate or mitigate the consequences of the infringement, and its personality and economic situation*".

In addition, with reference to the sanctioning proceedings relating to users' rights, that are governed by Legislative Decree No 70/2014 on the protection of rail passengers, Legislative Decree No 169/2014 on the protection of passengers in bus and coach transport and Legislative Decree No 129/2015 on the protection of passengers in sea and inland waterway transport, it is necessary to refer to the "*principles of effectiveness and proportionality in accordance with: (a) seriousness of the infringement; (b) repetition of the infringement; (c) actions taken to eliminate or mitigate the consequences of the infringement; (d) percentage ratio of passengers affected by the infringement compared to the passengers carried*".

The Authority's sanctioning policy is aimed at adequately repressing unlawful conduct and preventing its repetition, not only by the offender, but by other parties as well, in compliance with the criteria established by law. The quantification, in practice, of fines through the application of the above-mentioned criteria, together with the underlying reasons, is therefore particularly relevant in the exercise of the sanctioning power. Indeed, they are intended to make clear, including for the purpose of general prevention, the disvalue attributed by the legal system to certain unlawful conducts.

For the above reasons, these guidelines have the dual function of facilitating the Authority in the quantification of the fines that may be imposed, while ensuring that the parties concerned are able to verify the consistency of the Authority's sanctioning action. Consequently, they are aimed at ensuring uniform application, objectivity, and transparency in the exercise of the sanctioning power.

The methodology set out below provides general guidance. The Authority may, on a reasoned basis, derogate therefrom to achieve a specific deterrent effect or to consider the economic condition of the infringer.

2. General considerations on the application of the criteria for quantification of the fines

As a rule, administrative fines are established by the law ranging from a minimum [so-called minimum prescribed] to a maximum [so-called maximum prescribed]; therefore, under the law it is not possible to fall below the threshold of the minimum prescribed and, except in the cases provided for by law, to exceed the maximum.

Consequently, to carry out, at the outcome of the relevant proceedings, the practical quantification of the fine to be imposed, the Authority intends to apply the methodology set out below.

Moreover, the criteria for quantification of the fines may also be applied in the event the law does not expressly provide for a prescribed minimum, such as, e.g., in the case referred to in Decree-Law No 201 of 6 December 2011, Article 37(3*)* (*i*) and (*l*)*,* which regulates certain relevant sanctioning cases falling under the Authority's remit, such as for *"non-compliance with the criteria for pricing and updating of tariffs, charges, tolls, fees and prices subject to administrative control, however described, for non-compliance with the criteria for accounting separation and unbundling of costs and revenues relevant to public service activities and for breach of the rules on access to networks and infrastructure or of the conditions imposed by the Authority, as well as for non-compliance with prescribed orders and measures"*; in this case, the law provides for the possibility of imposing "*a pecuniary administrative fine of up to 10% of the turnover of the undertaking concerned";* on the other hand, if *"the addressees of a request by the Authority refuse to provide, or provide incomplete records, or where they refuse to provide or provide incorrect, misleading, or incomplete clarifications",* the Authority *"may impose a pecuniary administrative fine of up to 1 per cent of the turnover of the undertaking concerned".*

In order to determine the amount of the sanctions, the Authority's proceedings may be divided into two categories: the first one is subject to the "rules of procedure for the conduct of sanctioning proceedings falling under the remit of the Authority", as approved by Decision No 15/2014 of 27 February 2014 and amended by Decision No 57/2015 of 22 July 2015 (hereinafter referred to as the "general sanctions rules of procedure"), while the second category is covered by specific user rights' regulations.

Therefore it is possible to differentiate between: (i) sanctioning proceedings of a 'general' nature, that are governed by Article 14 of the general sanctions rules of procedure and by the provisions of Article 11 of Law No 689/81 and (ii) sanctioning proceedings relating to users' rights, that are governed by the above-mentioned sectoral legislation: Legislative Decree No 70/2014 on the protection of rail passengers, Legislative Decree No 169/2014 on the protection of passengers in bus and coach transport and Legislative Decree No 129/2015 on the protection of passengers travelling by sea and inland waterway. For these homogenous proceedings, the legislation of reference lays down specified criteria for the determination of pecuniary administrative fines.

3. General sanctioning proceeding: basic amount

Article 14 of the general sanctions rules of procedure identifies the seriousness of the infringement as a criterion for determination of the sanction.

The basic amount of the sanction should therefore be defined thereupon for the purpose of its application.

Article 14 of the general sanctions rules of procedure provides that, for the purpose of assessing the seriousness of the infringement, account is taken of:

- ✓ nature of the interest protected by the infringed rule, harm derived by the conduct and capability of the conduct to harm more than one interest;
- ✓ duration of the infringement, its territorial extent, including by considering, where possible, the number of users/customers involved, and the other ways in which the protected interests are harmed;
- ✓ significance of any adverse effects on the market, users, final customers, or administrative action of the Authority;
- ✓ undue economic and non-economic advantages achieved by the infringer as a result of the violation;
- ✓ degree of guiltiness of the infringer as derived, *inter alia*, from the absence of organisational and management models capable of preventing infringements of the same kind and from the attempt to conceal the infringement.

As regards the nature of the interest protected by the infringed rule, it must be observed, in accordance with the case-law, that this does not have to be assessed in the abstract, since the seriousness of the infringement must be appreciated in relation to the actual fact and globally deduced from objective and subjective factors, taking into account all the specific conditions under which the conduct of the infringer is carried out, and not the mere relevance of the protected legal interest. In fact, the abstract reference to the nature of the interest protected by the rule has already been considered by the legislator when identifying the legal range of the fine, thus expressing a judgment on the social disvalue of the infringement.

Concerning the offensiveness of the conduct and its capability to harm more than one interest, reference shall be made to the objective negative relevance of the conduct of the infringer, which is to be considered mainly in its substantial modalities of implementation.

With reference to the duration of the infringement, its territorial extent, including on account, where possible, of the number of users/customers involved, and the other ways in which the protected interests are harmed, it is necessary to assess:

- extent of the duration (short, medium and long, to be examined with reference to the specificities of individual cases);
- territorial extension (at local, regional, national level);
- consistency of the number of parties involved (competitors, users);
- other ways in which the protected interests are affected, e.g. by means of legal instruments which, although allowed under the existing legislation, are still liable to affect the infringement under certain conditions. For example, group policies or management and coordination activities carried out by a holding company.

Concerning the possible adverse effects on the market, users, final customers, or administrative action of the Authority, their minor, medium or substantial relevance should be considered.

As regards the undue advantages obtained by the infringer as a result of the violation, consideration shall also be given to the advantages that are not necessarily economic, such as those concerning the image of the undertaking.

Finally, with regard to the degree of guiltiness of the infringer, that may be inferred, *inter alia*, from the absence of organisational and management models capable of preventing infringements of the same kind,

it should be pointed out that the absence of such models may constitute a separate infringement, governed by specific legislation, which does not fall under the Authority's remit, but remains, in any event, a valid element of assessment for the purpose of quantifying the sanction.

4. Adjustments to the basic amount: aggravating and mitigating circumstances

The basic amount of the sanction may, where appropriate, be increased or reduced to take account of specific circumstances which aggravate or mitigate the infringer's liability.

In order to ensure substantial equal application of the sanctions, where applicable, the minimum amount prescribed by law may be imposed, as a rule, in the case of infringements of little relevance in terms of seriousness, prompt and diligent conduct of the infringer to remove the consequences of the violation, absence of previous infringements, and full cooperation in the preliminary inquiry stage, except in the case of economic conditions of the infringer which do not allow the imposition of a sum exceeding the minimum amount.

Where there is no minimum prescribed by law, the determination of the amount shall in any event ensure the deterrent effect of the sanction imposed by the Authority, in compliance with the principle of proportionality.

The Authority shall adjust the basic amount of the sanction to be applied to the specific case, by using the criteria set out in Article 11 of Law No 689/1981, that are additional with respect to the above-mentioned seriousness of the infringement, and that are related to:

a. the work carried out by the infringer to eliminate or mitigate the consequences of the infringement;
b. the infringer's personality;
c. the infringer's financial situation.

4.1. The work carried out by the infringer to eliminate or mitigate the consequences of the infringement

For the purposes of applying this criterion, the basic amount may be reduced if the undertaking supports with documentary evidence, in the context of the sanctioning proceeding, that the consequences of the infringement have been eliminated or mitigated.

Account may be taken only of the initiative adopted rather than of the results achieved, since it is sufficient for the undertaking to demonstrate that it has taken action to eliminate or mitigate the consequences of the infringement by means of objectively appropriate means. In any case, where a concrete result is achieved, the mitigating effect may be more significant.

Further, the initiatives aimed at removing or mitigating the consequences of infringements may take on different relevance, depending on whether they are carried out before or after the commencement of the sanctioning proceeding.

The basic amount of the fine may be reduced, e.g. in cases where:

- ✓ the infringer has notified the Authority of the violation, provided that the Authority does not already hold information on the issue and provided that the infringer itself ceases its unlawful conduct without delay and restores the situation prior to the infringement;

- ✓ the infringer has cooperated effectively in the preliminary inquiries, beyond what is required by legal obligations or by the mere exercise of rights of defence;
- ✓ the infringer has mitigated or eliminated, on its own initiative, the consequences of the offence.

The basic amount may, on the other hand, be increased e.g. in cases where:

- ✓ the infringer has acted so as to prevent, impede or otherwise delay the inquiries by the Authority;
- ✓ the infringer did not cooperate in the inquiries carried out by the Authority, by failing to provide the requested information or by supplying unnecessary, misleading, or incorrect information.

4.2. Personality of the infringer

The criterion of the infringer's personality may be assessed in the light of the following factual evidence:

- ✓ imposition of one or more previous sanctioning measures, for different infringements, in the matters regulated by the Authority, or for the same infringement, which took place within a specified period of time and is more or less relevant to signify an inclination towards unlawful conducts;
- ✓ role played in the context of a tort involving different persons, which may be assessed as mitigating the conduct given the marginality of the infringer's contribution and, on the contrary, as aggravating such conduct if this contribution has been decisive in the promotion, organisation or monitoring of the infringement;
- ✓ adoption of an initiative, including after the initiation of the proceeding, that is worthy of appreciation, aimed at improving the conditions of regulated markets or in any case useful for the more effective pursuit of the interests entrusted with the Authority.

4.3. Economic situation of the infringer

The economic situation of the infringer is mainly derived from its turnover, considering, furthermore, the weighting of profit or loss in the financial year in which the sanction is imposed.

In this respect, for the purpose of quantification, the amount of the fine shall be commensurate with the economic capacity of the person subject to the proceedings, taking into account substantiated situations of financial distress or insolvency.

Such economic capacity may normally be inferred from the last financial statements published before the initiation of the sanctioning proceeding.

4.4. Combination of circumstances

In case of different simultaneous circumstances, the Authority will apply individual increases and decreases to the basic amount.

As a rule, with respect to general sanctioning proceedings, the impact of each of the circumstances considered by the Authority may not exceed one quarter of the basic amount.

5. Cumulation of administrative fines

Given the close correlation with the issue of the practical quantification of the fine, it should be recalled that the Authority may apply, except for sectoral regulations, the legal combination of sanctions provided for by Article 8(1) of Law No 689/1981.

The above provision sets out that "*unless otherwise provided by law, any person who, by an act or omission, infringes different provisions concerning administrative fines or commits several infringements of the same provision, shall be subject to the sanction laid down for the most serious infringement, increased up to three times*".

Where it is found that the same person has committed more infringements of the same provision or of different provisions, for the purpose of determining the applicable sanction, it is necessary to first assess the nature of the unlawful conduct, with particular reference to its uniqueness or plurality and diversity.

As a rule, in order to establish the uniqueness of the act or omission, even in the presence of multiple infringements, all those infringements should relate to a single act or omission taking place in a given geographical and chronological context.

In order to consider a behaviour as a single conduct, the two conditions of concurrence of the acts and singleness of the material effects must be both met.

On the other hand, there will be a plurality of unlawful conducts where the examination of the specific case shows that they cannot be unified as indicated above and that, therefore, there is structural autonomy and independent offensive capability of each of those conducts.

Following the preliminary assessments of the cases, it is possible to identify the applicable sanctioning system. In particular:

- ✓ if the unlawful conduct is unitary (albeit split over time) and the infringed rules are multiple, or the same rule is infringed several times, the so-called "formal concurrence" results in the imposition of a single sanction, the amount of which is determined in accordance with Article 8(1) of Law No 689/1981, by considering all the circumstances of the case (juridical aggregation of sanctions).
- ✓ on the other hand, a "material concurrence" occurs if the unlawful conducts are not unitary; in this event every conduct is subject to an administrative fine, in case by means of a single measure (material aggregation of sanctions).

6. Administrative fines for infringement of passenger rights

In the exercise of its powers for passenger rights' protection in bus and coach, rail and sea and inland waterway transport, the Authority determines the amount of the administrative fines within the framework laid down for each case of infringement by the relevant sectoral decree.

With respect to the general indications, however, some partly different criteria should be considered for the determination of the sanctions at issue.

Legislative Decree No 70/2014 on the protection of passengers in rail transport, Legislative Decree No 169/2014 on the protection of passengers in bus and coach transport and Legislative Decree No 129/2015 on the protection of passengers in sea and inland waterway transport provide that the amount of administrative fines shall be determined in compliance with the "*principles of effectiveness and proportionality and according to: a) seriousness of the infringement; b) repetition of the infringement; c) actions taken to eliminate or mitigate the consequences of the infringement; d) percentage ratio of passengers affected by the infringement compared to the passengers carried*".

In addition, the general rules on the juridical aggregation of sanctions may apply unless otherwise provided for in the legislation for passenger rights' protection.

6.1. Determination of the basic amount

For the purposes of determining the basic amount of the fine, reference is made to the general indications concerning the seriousness of the infringement (letter a) and to the criterion relating to the percentage ratio of passengers affected by the infringement to those carried (letter d). Those two criteria may be regarded as essential as they apply in all cases, whereas the criteria under (b) and (c) are contingent.

With reference to (d), the following additional considerations are made.

Preliminarily, it should be noted that the type of infringement and its external relevance must be taken into consideration for the purpose of the application of this criterion.

Consequently, concerning the number of passengers affected by the infringement, it will be necessary to consider not only the users who have lodged complaints or alerts, but more broadly the overall impact of the infringement (e.g., cases of omitted information and infringements related to delays and cancellations).

If no specific information is available, reference may be made to presumptive elements such as average data, estimates, comparisons, etc. in relation to the route concerned or, failing this, to the geographical/temporal context as close as possible to the case in question.

6.2. Aggravating and mitigating circumstances

For the purposes of determining aggravating or mitigating circumstances, account shall be taken of:

b) repetition of the infringement;
c) actions taken to eliminate or mitigate the consequences of the infringement.

As regards the criterion under b), it should be noted that, in the proceedings concerning the protection of users' rights, the repetition of the infringement is subject to autonomous consideration by the legislator and that the application of this parameter must comply with the provision laid down in Article 8a of Law No 689/1981. Non-repetition of the infringement will not constitute an attenuating circumstance.

With regard to the criterion under (c), in addition to referring to the general indications concerning the parameters for determination of the fine, it is further underlined that the criterion at issue can also include the compliance or, conversely, non-compliance with the injunction to terminate the infringement, which,

according to the Authority's regulations on users' rights, must be included in the act initiating the proceeding if the assessed infringement is still in place.

As a rule, regarding the sanctions for infringements of passenger rights, the impact of each of the circumstances considered by the Authority shall not exceed half of the basic amount.

In the event of combined circumstances, this shall be done in accordance with paragraph 4.4 above.