

GETTING THE DEAL THROUGH

Cartel Regulation

Getting the fine down
in 37 jurisdictions worldwide

2008

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

The Norwegian Competition Act 2004 (the Act) introduced domestic competition rules modelled after those of the EC Treaty and the EEA Agreement.

Section 10 of the Act (corresponding to article 81 EC and article 53 EEA) prohibits agreements that restrict competition. Abuse of a dominant position is prohibited under section 11 of the Act (corresponding to article 82 EC and article 53 EEA). The preparatory works of the Act state that these prohibitions shall be interpreted and applied in accordance with the case law of the Court of Justice of the European Communities and the EFTA Court, and with the case law of the European Commission and the EFTA Surveillance Authority. There is, however, one exception from full harmonisation: the application of the provisions of the Competition Act is not conditional on trade between EU and EEA states being affected.

A separate piece of legislation, the EEA Competition Act, implements the rules on the application and enforcement of the competition rules of the EEA Agreement. The EEA Competition Act implements Regulation (EC) No. 1/2003 on decentralised enforcement and provides *inter alia* for the application and enforcement of articles 53 and 54 EEA by the Norwegian competition authorities and national courts.

The competition authorities are the Council of State, the Ministry of Government Administration and Reform, and the Norwegian Competition Authority (NCA). The Act is enforced on a day-to-day basis by the NCA, which is located in Bergen. The Council of State may order the NCA to initiate investigation of a particular matter but the NCA may not be instructed on decisions in individual cases. The Ministry is the appellate body for certain of the NCA's decisions and may also reverse decisions by the NCA if they are invalid, even if the decision has not been appealed.

2 What is the substantive law on cartels in the jurisdiction?

Section 10 of the Act prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition and that are not exempted under paragraph 3 of the same section. The prohibition applies to both vertical and horizontal agreements. Section 10 provides a non-exhaustive list of practices that are prohibited, including, in particular, price fixing, market sharing and output restrictions. The Act does not, however, contain any definition of a 'cartel' as such.

Section 10 provides that agreements or concerted practices are automatically exempted from the prohibition if specific conditions are fulfilled. These conditions are identical to those contained in article 81(3) EC and article 53(3) EEA. Whether the agreement is exempted from the prohibition must be assessed on a case-by-case basis. In general, an agreement is not prohibited if the efficiencies of the agreement outweigh the anti-competitive effects. 'Hard-core' restrictions, such as price fixing, market sharing and bid rigging, will almost always be caught by the prohibition and are not likely to benefit from an exemption.

It is not possible to request an individual exemption from NCA. However, block exemptions on vertical restraints, vertical agreements and concerted practices within the motor vehicle sector, specialisation agreements, and research and development agreements have been adopted under the Act. These block exemptions correspond to the similar block exemptions adopted under article 81(3) EC and article 53(3) EEA.

Any agreement or decision prohibited pursuant to section 10 is automatically void, no prior decision to that effect being required. Violations of section 10 can result in either administrative or criminal sanctions (see questions 14 and 15).

3 Are there any industry-specific offences and defences?

Section 3 of the Act provides that specific markets or industries may be exempted from the Act, in the form of Regulations. Exemptions have been given for certain forms of cooperation between groups of health professionals in private practice, certain forms of cooperation related to the sale of books and for certain practices in the agricultural and fishery sectors. Exemptions for cooperation between certain undertakings operating in the forestry sector are expected to be adopted and implemented shortly.

4 Does the law apply to individuals or corporations or both?

The prohibition of collusion applies to collusion between undertakings. The term 'undertaking' is to be interpreted in accordance with the similar term in EU/EEA competition law.

Sanctions may also be imposed on individuals. Section 30 of the Act provides for criminal sanctions in the case of individuals infringing the Act, including *inter alia* their engagement in cartel activity on behalf of undertakings and breach of the requirement to provide true and complete information to the NCA when requested.

5 Does the regime extend to conduct that takes place outside the jurisdiction?

The Act applies to terms of business, agreements and actions that are undertaken, have effect or are liable to have effect within the realm of Norway. Thus, the Act captures actions conducted outside Norway if they produce effects in Norway.

6 Are there any proposals for change to the regime?

There are no current proposals for amendments to the rules applicable to cartels in the Act.

Investigation**7** What are the typical steps in an investigation?

The NCA may start an investigation on its own initiative, as a result of a complaint from a third party or following information from a party to a concerted practice.

The NCA may require the suspected cartel participants and any third party to provide any information it considers necessary. The NCA may, furthermore, carry out surprise inspections (dawn raids) at the premises of undertakings and in private homes if it has obtained a court order.

After having gathered and considered the necessary information, normally in several stages, the NCA will consider whether the evidence appears to warrant an adverse decision. If the NCA considers that it does, it will inform the parties of its preliminary view in the form of a reasoned statement of objections, giving the parties a deadline to submit its comments. Having received the parties' comments the NCA considers if additional investigation is necessary (typically to verify information provided by the parties in their response) before it carries out its final assessment of the matter. If the NCA concludes that the Act has been infringed it will adopt a decision requiring that the infringement be brought to an end and, depending on the nature and gravity of the matter, imposing an administrative fine. As an alternative to imposing administrative fines the NCA may report the case wholly or in part to the financial crime unit of the police with a view to public prosecution. While a party's request for a meeting will always be accommodated there is no formal oral hearing during the investigation.

The duration of a cartel case may vary greatly according to, inter alia, the complexity of the case, the number of parties involved, their cooperativeness, their attitude towards a swift settlement and whether the initial decision is appealed. However, the case-handling period can normally be measured in years rather than months.

8 What investigative powers do the authorities have?

Under section 24 of the Act, the NCA may at any time request any individual or undertaking, including third parties such as customers or competitors, to provide the NCA with the information it considers necessary to perform its responsibilities under the Act. The request could include information in written and oral form, and it may be retained as audio recordings. Furthermore, the NCA may require access to sources of such information for examination. Failure to provide the information requested may result in administrative fines, criminal fines and even imprisonment.

The NCA may carry out surprise inspections when there are reasonable grounds to assume that the Act or decisions under the Act have been infringed, or when it is necessary to meet

Norway's obligations under agreements with foreign states or international organisations. The NCA may only conduct such inspections after having received a court order from a District Court. During an inspection, the NCA may demand access to premises, land, means of transport, and other places where evidence may be found. It may, furthermore, demand access to private homes if there are special reasons to assume that evidence may be kept there. The NCA only has the right to demand access to such premises and private homes as are identified in the court order. The undertaking has the right to legal assistance, but the NCA does not have to delay inspection until legal counsel has arrived.

The duty to provide information as described above also applies during dawn raids. During the inspections, the NCA can, furthermore, confiscate items that may have significance as evidence for further examination and seal business premises, books or business documents for the duration of the investigation or as long as deemed necessary. The NCA may even confiscate original documents without providing the company with copies.

The NCA also has the right to copy electronically stored information, even in situations where this necessarily results in the confiscation of information outside the scope of the investigation.

Certain provisions of the Criminal Procedure Act apply by reference during the NCA's surprise investigations. In addition a specific regulation (the Investigation Regulation) has been adopted to provide for certain procedural aspects pertaining to the NCA's information gathering and handling of evidence.

The NCA does not have the right to confiscate documents or storage devices containing information covered by legal privilege. The Investigation Regulation authorises the NCA to review documents to the extent necessary to verify whether they contain information covered by legal privilege, and hence confers less protection on undertakings than the prohibition against 'even a cursory glance' reiterated by the European Court of First Instance in *Akzo*. In the event of a dispute over such information, the documents or storage devices in question can be sealed and the dispute referred to the competent court.

The protection against self-incrimination, as interpreted by the European Court of Human Rights, and other safeguards stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms apply. The protection that follows from EU and EEA law in respect of self-incrimination is not directly applicable when applying national competition law and the protection against self-incrimination pursuant to Norwegian competition law may therefore be of a somewhat more narrow scope than that in the EU and EEA.

International cooperation**9** Is there inter-agency cooperation? If so, what is the legal basis for, and extent of, cooperation?

The NCA is party to a Nordic cooperation agreement between the competition authorities of Denmark, Iceland, Norway and Sweden which provides for, among other things, information exchange. The NCA also participates in several inter-agency cooperation systems, including the European Competition Authorities (ECA) network, formed by the directors general of the EEA competition authorities, and the International Competition Network (ICN), which aims to make enforcement of competition legislation more efficient. The NCA also cooperates with the competition authorities of the member countries of the Organisation of Economic Cooperation and Development (OECD).

The EEA and EFTA states – Norway, Iceland and Liechtenstein – have not been included in the European Union's network for cooperation regarding enforcement (the European Competition Network, ECN). However, the NCA participates in working groups in the EU where competition policy is discussed. Furthermore, the NCA cooperates with the national competition authorities of the other EEA and EFTA states and with the EFTA Surveillance Authority within the EFTA network of competition authorities. The EFTA Surveillance Authority Notice on cooperation within the EFTA Network of Competition Authorities (2006/C227/07) lays down principles of allocation of cases where articles 53 and 54 EEA are applied, as well as mechanisms of cooperation for the purpose of case allocation and assistance (such as exchange and use of information). In relation to cases affecting both the EU-pillar and the EFTA-pillar, there is cooperation between the Commission and the EFTA Surveillance Authority.

The police sometimes participate in the NCA's dawn raids. The police can use coercive measures and also have specific knowledge used to secure evidence from computers and other electronic storage devices.

- 10** How does the interplay between jurisdictions affect the investigation, prosecution and punishment of cartel activity in the jurisdiction?

In general, to the extent that the concerted practice has effects in several jurisdictions, interplay between jurisdictions may make the investigation, prosecution and punishment more effective. However, there are not many known examples of such interplay actually affecting the outcome of a cartel investigation in Norway.

When applying EEA competition rules according to the EEA Competition Act, there is interplay between the NCA and the EFTA Surveillance Authority equivalent to that of article 11 of Regulation (EC) No. 1/2003, the cardinal provision being that an initiation of proceedings by the EFTA Surveillance Authority relieves the NCA of its competence to apply articles 53 and 54 EEA.

Adjudication

- 11** How is a cartel matter adjudicated?

Depending on the choice of the NCA, a Norwegian cartel case may follow either an administrative and civil law track or a criminal law route.

As far as corporations (as opposed to individuals) are concerned, the Competition Authority may choose to end its investigation by imposing administrative fines. The legality of such fines can be challenged before the competent district court in civil litigation.

As an alternative to imposing administrative fines, the Competition Authority may choose to report the matter wholly or in part to the financial crime unit of the police with a view to criminal prosecution. Since administrative fines can only be imposed on undertakings (not their directors or employees) criminal prosecution is necessary to penalise individuals involved in cartel activity. Depending on the outcome of the investigation, the public prosecutor may issue a fine against the corporations and individuals in question. If the fine is not accepted (or as an alternative to issuing a fine) the public prosecutor may bring criminal charges before the competent district court.

Whether the case follows the civil law or criminal law track, the judgment of the district court can be appealed to the competent appeals court and further to the Supreme Court, subject to procedural limitations.

- 12** What is the appeal process?

See question 11.

- 13** With which party is the burden of proof?

The burden of proof lies as a point of departure with the NCA or the public prosecutor. However, if a breach of section 10(1) (corresponding to article 81(1) EC) is established, it is for the private party to prove that the conditions for exemption under section 10(3) (corresponding to article 81(3) EC) are satisfied.

On the criminal law track, the legal standard of proof is probability beyond reasonable doubt. As regards the civil law track, the preparatory works of the Act and the NCA holds that mere probability is sufficient. At the time of writing there are no court cases concerning cartel activity under the Competition Act 2004, so the standard of proof issue has not been tried before the courts. A first-instance court judgment relied on mere probability in the only abuse case to be adjudicated to date.

Sanctions

- 14** What criminal sanctions are there for cartel activity? Are there maximum and minimum sanctions?

According to section 30 of the Act, anyone who intentionally or through gross negligence engages in cartel activity may be punished with fines or imprisonment of up to three years. In severely aggravated circumstances, cartel activity may be punished by imprisonment of up to six years. When deciding if severely aggravated circumstances are present, factors such as whether there was an attempt to conceal the violation, whether significant monetary damage occurred, whether considerable financial advantages were obtained, and the severity of the violation in general will be considered.

- 15** What civil or administrative sanctions are there for cartel activity?

According to section 29 of the Act, an undertaking may be subject to administrative fines if the undertaking or someone acting on its behalf intentionally or negligently engages in cartel activity. Administrative fines are determined by the NCA on the basis of several factors, in particular the turnover of the offending undertaking, the gravity and duration of the violation, and applicable rules on leniency. During 2005, a regulation on the method of setting administrative fines and immunity and leniency was adopted; see questions 18 and 20 respectively.

- 16** Are private damage claims or class actions possible?

Private damage claims are possible, but have so far been very rare in Norway. They are, however, expected to become more common under the new Act of 2004. A new (general) Civil Procedure Act has been adopted and will introduce general rules on class actions when it enters into force in 2008.

- 17** What recent fines or other penalties are noteworthy? What is the history of fines? How many times have fines been levied? What is the maximum fine possible and how are fines calculated?

Historically, fines for cartel activity have been of a rather modest size in Norway. The maximum fine under the former Competition Act of 1993 amounted to 13.5 million Norwegian kroner (approximately €1.7 million).

Based on the preparatory works of the Competition Act 2004, it can be expected that the level of fines will become substantially higher than was the case under the former Act. At the time of writing no cartel case has resulted in administrative or criminal fines or imprisonment under the new Act. However, in 2007 the NCA has issued statements of objections in two cartel cases. In the first case the NCA has notified two companies in the flooring sector that it may impose fines of up to 500,000 kroner and 700,000 kroner (approximately €63,000 and €88,000), as the NCA has taken the preliminary view that the companies have allocated customers between them. In the second case the NCA has notified two companies in the chemical sector that it may impose fines of up to 1.6 million kroner and 1.3 million kroner (approximately €202,000 and €164,000) since the NCA has taken the preliminary view that the two companies have allocated customers between them. Decisions are pending in both cases.

The maximum administrative fine for an infringement of section 10 of the Competition Act 2004 is an amount corresponding to 10 per cent of the undertaking's total sales revenue for the last accounting year. There is no similar limit for criminal law fines.

It follows from section 29 of the Act that when determining the amount of an administrative fine, particular attention should be paid to the turnover of the undertaking, the gravity and duration of the infringement, and (if applicable) leniency.

The Regulation on the calculation of and leniency from administrative fines lays down detailed rules on the calculation of administrative fines in sections 2 and 3. According to Section 3 of the Regulation, the following will be given particular consideration when assessing the gravity of an infringement: the nature of the infringement; the actual effect of the infringement on the market; the size of the affected market; the undertaking's profits, degree of guilt, and whether the person infringing the Act had played a leading or passive role in the infringement. Other elements that can influence the calculation of the fine are inter alia whether the arrangement or action was implemented, whether the undertaking through guidelines, instructions, training, supervision or other actions could have prevented the infringement, and the financial position of the corporate group of which the undertaking is a part.

Sentencing

18 Do sentencing guidelines exist?

No specific sentencing guidelines exist with regard to criminal sanctions. However, section 48(b) of the General Civil Penal Code states that particular consideration shall be paid to, inter alia:

- the preventive effect of the penalty;
- the seriousness of the offence;
- whether the undertaking by guidelines, instruction, training, control or other measures could have prevented the offence;
- whether the offence was committed to promote the interests of the undertaking;
- whether the undertaking has had or could have obtained any advantage by the offence;
- the undertaking's economic capacity; and
- whether the offence has resulted in other sanctions being imposed on the undertaking or on any person acting on its behalf.

The principles for calculating administrative fines are outlined in question 17.

19 Are sentencing guidelines binding on the adjudicator?

As regards criminal sanctions, section 48(b) of the General Civil Penal Code merely states that particular consideration shall be paid to the criteria set out in question 18.

As regards administrative fines, the Regulation on the calculation of and leniency from administrative fines is binding on the adjudicator within the somewhat wide margins of discretion the regulation gives.

Leniency or immunity programmes

20 Is there a leniency or immunity programme?

Yes, there is a leniency programme applicable to administrative fines. The programme is set out in chapter 3 (sections 4 to 9) of the Regulation on the calculation of and leniency from administrative fines, and applies for both full and partial leniency.

21 What are the basic elements of a leniency or immunity programme?

Pursuant to section 4 of the Regulation an undertaking shall be given full leniency if it, on its own initiative, is the first to submit evidence that is sufficient for the NCA to:

- obtain a court order to carry out a surprise investigation, and the NCA at the time the information is submitted, is not in possession of sufficient evidence to be able to acquire such an order; or
- prove an infringement of section 10 of the Act, and the NCA at the time the information is provided is not in possession of sufficient evidence to prove such infringement.

However, full leniency will only be granted if the undertaking:

- fully cooperates with the NCA's investigation, including the provision of all evidence that is known to the undertaking and answering any question or inquiry the NCA has in connection with the infringement;
- terminates its participation in the infringement at the latest when the evidence is submitted, unless the NCA has requested a different course of action; or
- has not sought to coerce other undertakings to participate in the infringement.

Pursuant to section 6 of the Regulation undertakings that do not meet the conditions for full leniency can still be granted partial leniency if the submitted evidence significantly strengthens the NCA's ability to establish an infringement of section 10 of the Act. In addition, the undertaking must end its participation in the infringement no later than when the evidence is submitted. In such cases, the first undertaking may obtain a reduction of between 30 and 50 per cent, the second undertaking a reduction of between 20 and 30 per cent, and subsequent undertakings up to 20 per cent.

22 What is the importance of being 'first-in' to cooperate?

According to section 4 of the Regulation only the first company meeting the cumulative criteria may obtain full leniency.

23 What is the importance of going second? Is there an 'immunity plus' or 'amnesty plus' option?

Only the first applicant can obtain full leniency. Although there is no limitation on the numbers of applicants that may obtain partial leniency pursuant to section 6 of the Regulation, the possible

reduction of the fine is larger for the second applicant compared to subsequent applicants; see question 21 above.

Neither 'immunity plus' nor 'amnesty plus' is available under the Act.

24 What is the best time to approach the authorities when seeking leniency or immunity?

See questions 21 to 23. In general timing is crucial with regard to whether it is possible to obtain full or partial leniency.

25 What confidentiality is afforded to the leniency or immunity applicant and any other cooperating party?

There are no specific rules regarding confidentiality in relation to leniency.

As long as the case has not been brought to its conclusion the Access to Information Act does not apply to cases concerning infringements of inter alia section 10 of the Act; see also section 26 of the Act.

After the case has been brought to a conclusion the name of the undertakings that applied for leniency will normally become publicly known as the NCA will publish a non-confidential version of its decision.

In cases that have been concluded, anyone with legal interest may demand access to documents with the competition authorities pursuant to section 27, paragraph 2 of the Act. This right to access may include information subject to statutory confidentiality obligations, as long as access does not appear unreasonable to those whom the information concerns. Upon such requests for access to information subject to confidentiality, those to whom the confidential material pertains must be notified and given a deadline for submitting their view on the matter. In the absence of publicly known cases it is as yet somewhat uncertain how the rules on access to the files and confidentiality will be applied by the NCA in relation to documents concerning leniency applications.

26 What is needed to be a successful leniency or immunity applicant?

See question 21 for an outline of the basic criteria for obtaining full and partial leniency.

Requests for full leniency or partial leniency should be addressed to the NCA; see section 8 of the Regulation. It follows from the commentary (issued by the Ministry of Government Administration and Reform) to section 8 of the Regulation that the crucial point is that the undertaking makes it clear that it requests leniency, and that there are no special requirements regarding the form and content of the request.

The undertaking requesting full leniency can choose to submit the evidence immediately or initially submit the evidence in hypothetical terms; see section 5 of the Regulation.

If the undertaking chooses to submit the evidence immediately, it must submit all evidence in its possession regarding the infringement.

If the undertaking chooses to submit the evidence in hypothetical terms, the undertaking shall give a clear description of the nature and content of the evidence so that the NCA has a sufficient basis on which to assess whether the evidence fulfils the requirements for granting full leniency. The NCA will set a final date for submission of the evidence described in hypothetical terms.

27 Does the enforcement agency have the authority to enter into a 'plea bargain' or a binding resolution to resolve liability and penalty for alleged cartel activity?

Upon receiving a leniency application the NCA will inform the undertaking in question whether the evidence submitted qualifies for full or partial leniency and (if it does) that the undertaking qualifies for leniency provided that all the applicable criteria are met (see question 29 for further details in this respect). Hence, the leniency applicant will not receive any unconditional promise or decision from the NCA that it qualifies for leniency at this stage. It is thus not likely that the NCA will give any form of advance commitment in a cartel case. If it does however, the question of whether the NCA is bound to its commitment should be resolved on the basis of Norwegian Administrative Law. The NCA does not have the power to bind the prosecution authorities and in theory an undertaking that qualifies for leniency, and persons having acted on its behalf, may be subject to criminal prosecution. There are no specific provisions concerning 'plea bargains' in the Competition Act. However, examples of more or less explicit plea bargaining has been seen in the past both in administrative and criminal cases, and in our view are likely to be seen again.

28 What is the effect of leniency or immunity granted to a corporate defendant on its employees?

The immunity and leniency rules apply to undertakings and do not affect the situation of individuals. In principle, employees can be prosecuted even though their employer has qualified for leniency or immunity. In such cases the reduction of the criminal penalty imposed on the employee will be subject to the principles relating to mitigating circumstances in general criminal law.

29 What guarantee of leniency or immunity exists if a party cooperates?

With regard to administrative fines, the leniency rules in the regulation are binding on the adjudicator within the somewhat wide margins of discretion the regulation gives the same.

Upon receiving a leniency application the NCA will inform the undertaking in question whether the evidence submitted qualifies for full or partial leniency and (if it does) that the undertaking qualifies for leniency provided that the undertaking complies with the remaining conditions for full leniency and or partial leniency, respectively.

One should be aware of that full leniency will be revoked if the undertaking does not comply with the conditions set out in section 4, paragraph 2 of the Regulation, namely if the undertaking:

- does not fully cooperate with the NCA's investigation, including to provide all evidence that is known to the undertaking and to answer any question or inquiry the NCA has in connection with the infringement,
- does not end its participation in the infringement at the latest when the evidence is submitted, unless the NCA has requested a different course of action, or
- has sought to coerce other undertakings to participate in the infringement.

Further, full leniency may be revoked if the NCA reveals that the undertaking has not submitted all evidence that it had in its possession at the time of the submission.

Partial leniency will be revoked if the undertaking does not end its participation in the infringement at the latest when the evidence is submitted; refer to section 6(b) of the Regulation for details.

Update and trends

The Competition Act 2004 has not yet resulted in any cartel fines. While statements of objections have been issued in 2007 against four companies in two different alleged cartel cases it seems as if enforcement of the Competition Act is still suffering from the relocation of the NCA from Oslo to

Bergen, a process which was finalised in 2007 and resulted in the loss of the majority of the former staff. In the last year the NCA hired a former prosecutor to assist with rebuilding the NCA's enforcement department and this move might help boosting its enforcement capability.

30 What are the practical steps in dealing with the enforcement agency?

A request for leniency shall be filed with the NCA. The preparatory works to the Act presuppose that the NCA contacts the prosecutor's office in cases where the violation may be subject to criminal fines or imprisonment. There are no further detailed rules on the practical steps in dealing with the enforcement agency.

Whether the same counsel can or should act on behalf of corporate defendants as well as its directors, officers or employees must be decided on a case-by-case basis, having regard to the rules on conflict of interest governing the Norwegian legal profession as well as the practicability and desirability of such representation, including the possibility of an unexpected shift during the investigation of the case.

31 Are there any ongoing or proposed leniency and immunity policy assessments or policy reviews?

There are no ongoing or proposed leniency or immunity policy assessments or policy reviews in Norway.

Defending a case**32** May counsel represent employees under investigation as well as the corporation? Do individuals require independent legal advice or can counsel represent corporation employees? When should a present or past employee be advised to seek independent legal advice?

See question 30, second paragraph.

33 May counsel represent multiple corporate defendants?

Whether the same counsel can and should act on behalf of multiple corporate defendants must be decided on a case-by-case basis, with regard to the rules on conflict of interest governing the Norwegian legal profession as well as the practicability and desirability of such representation, including the possibility of an unexpected shift during the investigation of the case.

34 May a corporation pay the legal costs of and penalties imposed on its employees?

Yes. Such disbursement of funds may, however, be considered as taxable salary by the tax authorities.

Getting the fine down**35** What is the optimal way in which to get the fine down?

See question 21.

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