OFFICE OF COMPETITION AND CONSUMER PROTECTION

Guidelines on setting fines for competition-restricting practices

Taking into consideration the body of decisions issued so far in cases concerning fines imposed by the antitrust authority and seeking to meet the expectations of the business community, the President of the Office of Competition and Consumer Protection[1] herby adopts these Guidelines on setting fines in cases concerning infringements of Article 6 or 9 of the Act of 16 February 2007 on competition and consumer protection[2] or of Article 81 or 82 of the Treaty establishing the European Community.

The aim of the Guidelines is to increase the transparency of the methodology used to set fines for the abovementioned infringements under the Act. The Guidelines will allow enterprises to make a preliminary estimation of the fine which they may face should they act in breach of the provisions of the Act.

The Guidelines do not aim to and cannot regulate the matter of imposing fines in a manner broader than, not to mention contrary to, the provisions of the Act. They only indicate the ways of setting the fines provided for in the Act.

The Guidelines are not of a legally binding nature, however, the fact of their publication should be interpreted in such a way that the President of the Office shall be setting fines based on the criteria stated in the Guidelines.

Pursuant to Article 32(4) of the Act, these Guidelines are subject to publication in the Official Journal of the Office of Competition and Consumer Protection.

The Guidelines shall apply as of 1 January 2009.

1. Revenue

The fine is set on the basis of the revenue obtained by the enterprise in the accounting year preceding the year when the fine is imposed.

2. Harmfulness of the infringement

Two groups of circumstances determine the harmfulness of the infringement: circumstances concerning the nature of the infringement and factors connected with the specificity of the market and the activity of the enterprise. The criteria specified in this section are applied to set the **base sum**.

2.1 The nature of the infringement

The President of the Office distinguishes between three types of infringements:

[1] Further referred to as the President of the Office.
[2] Further referred to as the Act, published: Journal of Laws, No. 50, item 331 with further changes)

(a) **very serious** infringements, which include, first and foremost, particularly harmful horizontal restrictions of competition (including price fixing, bid rigging, dividing the market and collective boycotts), as well as instances of the abuse of a dominant position aiming at or leading to the elimination of competition from the market,

(b) **serious** infringements, which include, first and foremost, horizontal agreements not considered as very serious infringements, vertical agreements which affect the price or the conditions of offering the product (e.g. fixing the resale price[3]), instances of the abuse of a dominant position aiming at or leading to a significant restriction of competition or to a severe exploitation of the contracting parties or of consumers.

(c) **other** infringements, which include *inter alia* vertical agreements not concerning the price or the possibility of reselling the product, as well as instances of the abuse of a dominant position of less significant weight.

The nature of the infringement is reflected in the fine in that the initial sum provides the base for further calculations for particular types of infringements. The initial sum is:

- above 1% but not more than 3% of revenue for very serious infringements,
- above 0.2% but not more than 1% of revenue for serious infringements,
- above 0.01% but not more than 0.2% of revenue for other infringements.

Guided by the assessment of the circumstances of the case, the President of the Office may decide that the nature of a particular infringement makes it possible to qualify it as an infringement of a different type than it would result from a straightforward application of the above rules.

2.2 The specificity of the market and the activity of the enterprise

The fine depends on the influence of the infringement on the market: the greater the intensity of the negative effects connected with the infringement or the greater the benefits for the enterprise, the higher the fine. Guided by the assessment of the influence of the infringement on the market, the President of the Office may increase or decrease the sum set based on section 2.1 above by up to 80%. When assessing this factor, in particular the following circumstances are taken into account:

a) Characteristics of the product and its recipients,

The President of the Office takes into account the fact whether the product is unusually important for particularly sensitive group of consumers, as well as the importance of the product for other sectors of the economy.

b) Characteristics of the market: the structure, barriers of entry and the economic potential of the enterprise which commits the infringement,

The President of the Office takes into account the fact that the more concentrated and isolated by high barriers of entry the market is, the higher the probability that

[3] Some agreements fixing the resale price function as de facto cartels, where the producer performs the role of the "supervisor" who ensures the stability of the agreement. These types of agreements are treated as the most serious infringements of competition law.

the particular competition-restricting practice has a negative influence on the market participants.

c) Negative effects for the market participants following from the infringement,

d) The fact that the effects of the infringement are irreversible or difficult to reverse,
The President of the Office takes into account the fact that if the given infringement has irreversible or hardly reversible consequences (e.g. a negative and lasting change in the market structure) the benefits resulting from the infringement may be drawn by the enterprise concerned also for a certain period after the infringement has been ceased.

e) The fact whether the infringement has actually been brought to effect or not,
The fact that the given infringement has not been brought to effect, if proven, may constitute a basis for a significant reduction of the fine.

f) Small geographical range of the practice in relation to the scope of the enterprise's activities.

g) Small share of the revenue obtained from the goods belonging to the relevant market in the total revenue of the enterprise.

The sum set based on the criteria specified in section 2 constitutes the base sum which is later used to set the total fine in accordance with the criteria specified below.

3. Durability of the infringement

Taking into consideration the duration of the infringement, the President of the Office may increase the base sum if the durability of the competition-restricting practice results in the intensification of its negative effects, in particular if it has influence on the amount of benefits obtained by the enterprise which committed the infringement, or the harm faced by other market participants. An infringement that lasts more than 1 year shall be treated as a long-lasting infringement.

Considering the above, to reflect the influence of the durability of the infringement on the fine the President of the Office may increase the base sum by up to 200% of the base sum in the case of competition-restricting agreements and by 100% in the case of the abuse of a dominant position. The above difference follows from the fact that competition-restricting agreements are usually secret and consequently it is more probable that their particularly harmful forms persist on the market for a longer period of time than in the case of particularly harmful forms of the abuse of a dominant position.

4. Mitigating and aggravating circumstances

Mitigating and aggravating circumstances are assessed jointly, separately for each case and for each enterprise. Individual mitigating or aggravating circumstances may be of a different weight. The amount of fine set at earlier stages may be increased or decreased by up to 50%.

4.1 Mitigating circumstances

Mitigating circumstances include in particular:

a) performing a passive role in the infringement, including avoiding the implementation of the resolutions of a competition-restricting agreement,
b) acting under coercion,
c) removing the effects of the infringement voluntarily,
d) discontinuing the competition-restricting practice by the enterprise before the antitrust proceedings are initiated or without delay after their initiation,

    Undertaking actions aiming at the surcease of the practice which, however, do not constitute a complete surcease (e.g. initiation of the process of withdrawing contracts containing clauses infringing competition law from use) shall be also be treated as mitigating circumstances, however, of lesser significance.

e) cooperation with the President of the Office in the course of proceedings, in particular contributing to a quick and efficient conduct of the proceedings.

4.2 Aggravating circumstances

Aggravating circumstances include:

a) performing as the leader or initiator of the competition-restricting practice,
b) using coercion, exerting pressure or using retaliatory measures in relation to other enterprises with the aim to bring the infringement to effect or continue it,
c) having infringed the prohibition of competition-restricting practices in the past,
d) the fact that the infringement was intentional.

5. Maximum fine

The fine imposed cannot exceed 10% of the enterprise's revenue obtained in the year preceding the year when the decision is issued. If the fine set based on the Guidelines exceeds this limit, the President of the Office imposes a fine in the maximum amount possible.

6. Fine in a particularly low amount

The President of the Office may impose a fine in particularly low amount in the event of circumstances which, in the view of the President of the Office, will ensure that a fine in a lower amount fulfills its purpose.