OFFICE OF COMPETITION AND CONSUMER PROTECTION

Guidelines on setting fines for practices infringing collective consumer interests

Taking into consideration the body of decisions issued so far in cases concerning fines imposed by the President of the Office of Competition and Consumer Protection[1] and seeking to meet the expectations of the business community, the President of the Office herby adopts these Guidelines on setting fines in cases concerning infringements of Article 24(1) and (2) of the Act of 16 February 2007 on competition and consumer protection[2].

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 infringement 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.

1. Relevant revenue

The basis for calculating the amount of the fine is the revenue obtained by the enterprise in the accounting year preceding the year when the fine is imposed.

2. The weight of the infringement

2.1 Infringements at the stages of contracting

Infringements have been divided by the stage of contracting (concluding the contract) when the infringement of collective consumer interests occurred. It has been recognised that the stage of contracting has influence on consumers' freedom in making market decisions, which in turn determines the weight of a given infringement.

Thus, a hierarchy has been developed where an infringement of collective consumer interests occurring at the stage of performing the contract is classified as the most serious, followed by infringements that occur at the stage of concluding the contract and infringements in the pre-contractual phase. The President of the Office distinguishes three types of infringements:

[1] "President of the Office"
[2] Journal of Laws No. 50, item 331 with further changes.

a) infringements in the pre-contractual stage, which in essence are business practices oriented towards winning consumers or providing them with an offer, with the aim to persuade these consumers to conclude a contract

   from 0.02 to 0.3 % of revenue,

b) infringements at the stage of concluding the contract, which in essence are business practices aimed at a consumer expressing willingness to conclude a contract, consisting in infringing the law which influences the content of the contract

   from 0.05 % to 0.6% of revenue,

c) infringements at the stage of contract performance, which in essence are business practices consisting in using the advantage arising from the fact of concluding the contract to distort the rights and obligations of the parties to the contract laid down in the law

   from 0.1% to 0.7% of revenue.

The weight of an infringement will be assessed within each category by estimating its harmful effects. The weight of an infringement will be reflected in the amount of the fine. The weight of an infringement should be established based on objective criteria meant to illustrate the influence of the infringement on consumers' situation, including the duration of the infringement.

2.2 Employing prohibited contract clauses entered into the Register

A separate category has been created for infringements of collective consumer interests consisting in employing prohibited contract clauses entered into a register[3] maintained by the President of the OCCP. The category has been created because of the premise of unlawfulness specific for this category and arises exclusively from the equivalence of the examined contract clauses with clauses recognised as prohibited and entered into the Register, instead of arising from universally binding legal regulations.

For every prohibited contract clause, the base sum will be from 0.02% to 0.1% of revenue.

In the case of accumulation of infringements consisting in employing prohibited contract clauses the base sum shall not exceed 0.6% of revenue.

[3] Pursuant to Article 24(2)(1), practices infringing collective consumer interests mean unlawful business practices which are detrimental to collective consumer interests and consist in applying in standard form contracts clauses entered in the register of clauses of standard form contracts that have been pronounced prohibited, referred to in Article 479^{45} of the Code of Civil Procedure. The register of contract clauses recognized as prohibited is maintained by the President of the Office and based on binding court judgements provided to the President of the Office by the Court of Competition and Consumer Protection (Article 479^{45} of the Code of Civil Procedure). The register is available at: www.uokik.gov.pl

Individual clauses shall be graded taking into account the level of their harmfulness to the economic interests[4] of consumers, including the duration of the infringement.

3. Base sum

The sum set on the basis of the criterion specified in point 2 herein constitutes the base sum used to determine the amount of the fine according to the criteria specified hereinafter.

The base sum may be reduced – not more, however, than by 80% – if the revenue gained by the enterprise from the activity to which the allegation of infringing collective consumer interests refers constitutes a small share of the revenue referred to in point 1 herein.

4. Mitigating and aggravating circumstances

The circumstances of employing practices infringing collective consumer interests may cause the fine to be reduced or increased. Mitigating and aggravating circumstances will be assessed taking into account the context of a given case. In principle, individual mitigating or aggravating circumstances are of a different weight. Consequently, the percentage by which the base sum might be reduced or increased will differ.

4.1 *Mitigating circumstances*

Mitigating circumstances include in particular:

a) discontinuation of practices infringing collective consumer interests before relevant proceedings are instituted by the President of the OCCP or immediately after they are instituted – reduction by 30%;

b) active cooperation with the President of the OCCP in the course of proceedings, particularly contributing to quick and efficient conduct of the proceedings – reduction by 20%;

c) positive reaction to the fact of instituting proceedings, manifesting itself in taking actions aiming to discontinue the practice, however, not constituting its complete discontinuation – reduction by 10% - 20%;

d) paying voluntary compensation for the losses resulting from the infringement to the aggrieved persons – reduction by 10% - 20%.

4.2. *Aggravating circumstances*

Aggravating circumstances include in particular:

[4] The term "economic interests of consumers" should be understood both to mean infringements of interests of strictly economic nature (relating to property) and preventing consumers from making commercial transactions with enterprises, with full understanding of the actual economic and legal sense of the circumstances of the actions taken in the pre-contractual stage and during the performance of the contract, which is reflected *inter alia* in the abstractly understood right to reliable, true and complete information in the communication between the enterprise and the consumer.

a) intentional infringement – increase by 50%, except in cases of breaching the ban on employing prohibited contract clauses entered into the Register by enterprises employing clauses recognised as prohibited as a result of a court action brought against this enterprise, in which case the fine is increased by 100%,

b) employing practices infringing collective consumer interests in the past, where repeated and intentional infringement of the same kind (infringing collective consumer interests in the same way, e.g. misleading advertising, employing clauses entered into the Register) is considered a particularly aggravating circumstance – increase by 25% - 35%,

c) significant territorial scope of the infringement:

- nationwide infringements – increase by 20%

- supra-local infringements – increase by 5% - 10%,

d) considerable benefits gained as a result of employing a practice found to be infringing collective consumer interests – increase by 10% - 20%.

4.3. In the case of an accumulation of mitigating circumstances the fine cannot be reduced by more than 90% of the base sum.

4.4. In the case of an accumulation of aggravating circumstances the fine cannot be increased by more than 200% of the base sum.

5. Exceptional increase of the amount of the fine

If exceptional circumstances, such as in particular: significant harmfulness of the activities employed, repeated employment of practices infringing collective consumer interests in the past, indicate that the fine set according to the criteria specified in points 2-4 herein will not serve its purpose, the President of the Office may increase the fine.

6. Maximum amount of a fine

The fine imposed cannot exceed 10% of the revenue gained by the enterprise in the year preceding the year when the fine is imposed. If the fine set exceeds this amount, the maximum fine shall be imposed.

7. Exceptionally low fine

The President of the OCCP may impose an exceptionally low fine if there are circumstances which, in the President's view, guarantee that a lower fine will serve its purpose.

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