

# Kluwer Competition Law Blog

## Polish Competition Authority Publishes New Guidelines on Setting Fines. More Understandable Consequences of the ECN+ Directive?

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### Introduction

In April 2024, the President of the Office of Competition and Consumers Protection (the “PCA”) introduced new [guidelines](#) for setting fines in antitrust cases (the “**Guidelines**”). The Guidelines are the only document of this type issued by the PCA. Other fields of actions of the PCA, e.g. violations of consumer law, do not have such a clear policy of the imposition of penalties.

The Guidelines are not legally binding. However, they indicate that the PCA will determine fines imposed in antitrust cases in the manner specified by them, and any deviations from them will involve presenting a justification by the PCA. They apply to cases in which antitrust proceedings were initiated after 1 January 2024.

The Guidelines aim to enhance transparency and consistency in the imposition of fines. The Guidelines reflect the broader harmonisation efforts under the [ECN+ Directive](#) and their implications extend beyond the national borders. In this article, we delve into the key aspects of the Guidelines and their impact on the competition law landscape.

### Context

The ECN+ Directive, adopted in 2019, aims to empower national competition authorities and ensure effective enforcement of competition law across the EU. One of its crucial provisions pertains to the imposition of penalties on capital groups, which aims to ensure that penalties are deterrent yet fair.

Although [the Act implementing the ECN+ Directive](#) in Poland entered into force almost a year ago (20 May 2023), so far it has not been clear how the PCA will use its new powers. These include the power to impose penalties not only on undertakings directly committing the infringement but also on undertakings exerting the so-called decisive influence within the parent company. The Guidelines are a direct response to the ECN+ Directive, aiming to clarify how fines should be calculated and imposed within such groups.

## Key Developments

### *Penalties for undertakings exercising decisive influence*

Decisive influence applies when there are economic, legal or organisational ties between undertakings the effect of which is that the undertaking over whom decisive influence is exerted carries out or adapts to instructions given to them by the undertaking exerting decisive influence, in a way that limits or prevents their independent behaviour on the market (Article 6b para. 1 of the Polish Act on Competition and Consumer Protection). There is a presumption that an undertaking exercises decisive influence if his share in the capital of the undertaking over which he exercises such influence is more than 90% (Article 6b para. 2 of the Polish Act on Competition and Consumer Protection). However, even if these shares are lower, this does not exclude the finding of decisive influence.

The Guidelines specify what the imposition of a fine on undertakings in such a situation will look like in practice. The PCA will conduct one proceeding against both undertakings and impose a joint fine on them. Undertakings will be responsible jointly and severally so that each of them will be fully responsible for paying the fine. Derogation from this rule and the imposition of separate fines is possible but will require informing the parties of the proceedings before issuing a decision in that direction. However, the Guidelines omit any examples of situations requiring the imposition of separate fines. We can only assume that this can apply when, e.g., the undertakings play autonomous roles in committing the infringement.

The Guidelines also address another important issue related to the imposition of fines, i.e. turnover, which is taken into account when imposing a fine. In addition to the turnover of the undertaking who is a direct participant in the infringement, the PCA will also take into account the turnover achieved by the undertaking exercising decisive influence, which may significantly increase the amount of the final fine.

### *Aggravating and mitigating circumstances*

The scope of this document is much broader. The Guidelines include an exhaustive list of aggravating circumstances, which may increase the amount of the penalty by up to 25%. These circumstances include:

- The role of the leader or initiator of an agreement restricting competition or persuading other undertakings to participate in this agreement;
- Coercing, exerting pressure or using retaliatory measures against other undertakings or individuals (in Poland it is possible to impose an antitrust fine not only on an undertaking but also on “managers” intentionally allowing the infringement) in order to implement or continue the infringement;
- The existence of Previous violations;
- The commission of an intentional infringement.

The Guidelines also list examples of mitigating circumstances that reduce the fine to 25%, such as:

- The voluntary removal of the effects of the violation;
- Discontinuing the use of competition-restricting practices before or immediately after the initiation of antitrust proceedings;
- Cooperating with the PCA during the proceedings.

The list of circumstances is non-exhaustive, so that undertakings have a chance to successfully present other arguments proving the validity of reducing the fine in the proceedings before the PCA.

#### *Other factors taken into consideration in imposition of fines*

The Guidelines also attach great importance to other factors taken into account by the PCA when determining the amount of the fine. Although many of these circumstances have been already taken into account by the PCA in its decisional practice, now they are explained in more detail.

These factors include: (i) period of violation; (ii) type of practice; (iii) characteristics of the product and its recipients; (iv) market characteristics; (v) other market effects of the infringement; (vi) the degree of organization of the violation; and the (vii) irreversibility or difficult reversibility of the violation.

A detailed description of some of these factors can be interpreted as emphasising the PCA's increased interest, particularly in several sectors considered problematic. The PCA will look at the broader effects of the infringement than the impact on competition, which is in line with current discussions among [academia](#), [practitioners](#) and [officials](#) on the axiology of competition law.

For instance, the Guidelines explain with regard to the characteristics of the product and its recipients that the PCA may take into account in particular the significance of the product for extremely sensitive recipients. This can be related to products such as medicines, from which the recipient cannot give up, even temporarily. The PCA may also include in its assessment the importance of the product for the economy and society (in particular, for the security of Poland, including economic security, environmental protection, privacy protection, freedom of speech).

Another example is market characteristics. According to the Guidelines, the PCA takes into account the fact that the more concentrated a market is and separated by high entry barriers, the greater the probability that a given competition-restricting practice will have a negative impact on market participants. This may refer primarily to the problematic digital sector, in which high entry barriers are combined with strong network effects, economies of scale, scope and , and other features unfavourable for maintaining a high level of competition.

#### *Duration of infringement*

It is worth noting that the Guidelines explain in detail how the PCA will take into consideration the duration of an infringement. The PCA determines the base amount of a fine in relation to one year of infringement. In a situation in which the infringement lasts longer (which often occurs) the PCA will take into consideration the period of infringement in such a way that the base amount will be multiplied by the number of (full) years of participation in the infringement for a fine is imposed.

At the same time, if in the last commenced year of the infringement for which a fine is imposed, the duration of the infringement is longer than 6 months, the PCA will increase the multiplier by 0.5.

### *Assessment of adequacy of fines*

The Guidelines also specify how the PCA conducts the assessment of the adequacy of the penalty. The concept of a fine's adequacy is not new. The Guidelines have, however, now clarified it.

The final amount of the penalty is the result of a several-stage analysis.

Firstly, the PCA sets the starting amount as a percentage of the undertaking's annual turnover (ranging from 0.01% to 3% of turnover). Secondly, the PCA indicates a base amount, which is influenced by factors such as the type of practice or the market's characteristics. Thirdly, the PCA takes into account the duration of the infringement and the aggravating and mitigating circumstances.

The fourth stage consists of the assessment of the fine's adequacy. After introducing the institution of assessment of "adequacy" of a fine, the PCA could only reduce the amount of the fine if it found it inadequate. After issuing [previous guidelines on setting fines](#) in 2021, the PCA could also treat the undertaking "severely" if the fine did not reflect the undertaking's total turnover or the scale of his business.

The Guidelines elaborate on how the assessment of the adequacy of fine works in practice. The PCA may find that, in specific situations, the fine calculated on the basis of the three steps will not fulfil its function (e.g. the deterrence effect). Then, the PCA may increase the amount of the final amount, but within the applicable maximum penalty of 10% of the annual turnover.

Although the Guidelines explain in detail how the assessment of the fine's adequacy influences its final amount, the PCA still enjoys great discretion in such assessment. The PCA's margin of discretion to impose a more or less severe fine lowers the predictability of the policy surrounding the setting fines for undertakings and managers.

## **Conclusions**

By addressing the imposition of fines for parent companies in line with the ECN+ Directive, the Guidelines underscore Poland's commitment to enhancing the effectiveness and transparency of competition law enforcement. Stakeholders across the legal and business communities will closely monitor the impact of the Guidelines, recognising the implications for undertakings and their management within and beyond Poland.

Despite the aim of the Guidelines, which is to strengthen legal certainty, the PCA still retains significant discretion to adjust fines, potentially undermining predictability. This discretionary power can lead to the inconsistent application of penalties, especially without ensuring the safeguards regarding the PCA's independence, which is also required by the ECN+ Directive.

We will be able to assess the Guidelines' effects after the PCA issues its first fines based on the new interpretation. Taking into account the retroactive application of the Guidelines, this may happen soon.

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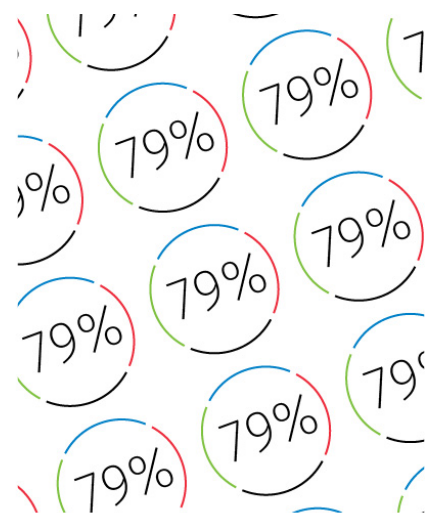
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