

THE GUIDELINES ON CALCULATING THE AMOUNTS OF FINES BY THE ANTIMONOPOLY COMMITTEE OF UKRAINE ("AMC") DATED 15 SEPTEMBER 2015

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On 15 September 2015 the AMC adopted the Guidelines on imposing the fines for certain antitrust infringements, including among others, a failure to file a notifiable merger (the "Guidelines").

In Ukraine the amounts of fines for various antitrust infringements are statutorily capped at a certain percentage of the worldwide turnover of the undertaking group in breach (e.g., up to 5% for merger control related infringements). Within such caps, the AMC has a wide statutory discretion in determining the amounts of fines.

The Guidelines aim to limit the AMC's discretion by setting out certain principles and rules that must be taken into account by the AMC when determining the amounts of fines. These Guidelines seem to combine the policies adopted by the European Commission guidelines setting fines for competition law infringements and the existing fining policies in Ukraine.

The Guidelines are not binding on the AMC and have recommendatory nature. However, the AMC has publicly assured that they will adhere to the Guidelines and that such "unofficial status" of the document is temporary. The binding fining guidelines are expected to be adopted as a part of the competition law reform package which is currently under discussions and is expected to be adopted in 2016.

HOW DOES THE AMC CALCULATE THE AMOUNTS OF FINES UNDER THE GUIDELINES?

The procedure for calculating the amounts of fines includes the following two steps:

- (a) determination of a basic amount of the fine; and
- (b) upward or downward adjustment of a basic amount based on the aggravating and mitigating circumstances respectively.

KEY ISSUES

- The AMC will calculate fines according to the fixed methodology;
- The procedure for calculating the amounts of fines will include two stages;
- The basic amount of the fine is determined as percentage to benefit related to the infringement or a fixed amount;
- An "amnesty" for historic transactions is provided

Before a final amount of the fine is set by the AMC it may also take into account:

- (i) a maximum thresholds set out by the law;
- (ii) an impact of the fine on the undertaking's competitive position or the ability to meet consumers' demand; and
- (iii) exceptional circumstances, e.g. force majeure, which allow imposing a fine below a recommended minimum (a symbolic amount).

FIRST STEP: BASIC AMOUNT OF THE FINE

The following factors are taken into consideration when determining a basic amount of the fine:

- economic scope of an infringement (value of sales related to the infringement),
- gravity of an infringement,
- need for a deterrence effect, and
- duration of an infringement.

A basic amount of the fine is determined pro rata (percentage) to the value of sales/economic benefit related to the infringement or as a fixed amount and with reference to the gravity of a violation. The Guidelines provide for four degrees of gravity: very high, high, medium and low.

The suggested maximum percentages of the value of sales for infringements of the different gravity types are:

- 45% - (i) horizontal anticompetitive concerted actions between competitors (cartels), and (ii) the abuse of dominant position which resulted in prevention, elimination or substantial restriction of competition;
- 30% - (i) other anticompetitive concerted practices, (ii) other cases of abuse of dominant position, (iii) failure to comply with the AMC's decision, (iv) economic concentration, which resulted in monopolisation or substantial restriction of competition, and (v) failure to implement conditions imposed by the AMC;
- 5% - (i) restrictive practices and (ii) failure to file a non-problematic concentration with overlaps; and
- 1% - (i) obstruction to the AMC's activities and (ii) restriction of the economic activity of an undertaking in retaliation for informing the AMC about antitrust law infringement by another undertaking.

The fixed amount will apply for:

- failure to file a non-problematic concentration without overlap (EUR 6,850 - EUR 20,550)*;
- actions which force or facilitate infringements of the antitrust laws (EUR 4,100 – EUR 13,700); and
- failure to submit the requested information to the AMC or submission of inaccurate information (EUR 550 – EUR 5,500).

The basic amount of the fine should not exceed the two-thirds of the maximum amount set out by the antitrust laws.

SECOND STEP: AGGRAVATING AND MITIGATING CIRCUMSTANCES' ADJUSTMENTS

Having calculated the basic amount, the AMC may adjust to factor in the aggravating and mitigating circumstances:

Aggravating circumstances

(the list is exhaustive)

The basic amount of the fine **increases up to 50%** in case the following aggravating circumstances are proved:

- initiating or coordinating actions (inactions) which constitute an antitrust infringement,
- obstructing the case investigation, or
- refusal to cooperate with the AMC

The basic amount of the fine **doubles** if a repeated violation is proved.

Mitigating circumstances

(the list is not exhaustive)

The basic amount of the fine **decreases by 50%** in case the mitigating circumstances are proved, for example:

- voluntary termination of an infringement before the AMC initiates infringement proceedings,
- compensation for damages caused by the infringement or mitigation of the infringement in another manner,
- elimination of the conditions that caused the infringement,
- the actual non-compliance with the cartel terms by a participant of the concerted actions and the existence of evidence that the participant actually competed on the market,
- cooperation with the AMC,
- committing infringement under the pressure by the public authority, or applying for merger clearance prior to the AMC's initiating infringement proceedings.

*Amounts in EUR are according to the official exchange rate of the National Bank of Ukraine as of 15 September 2015, EUR 1 = UAH 24.82.

WHAT ABOUT THE PAST INFRINGEMENTS?

The Guidelines provides for an "amnesty" for historic transactions, which were closed without the AMC's approval when such approval was required. The amnesty can be used after 15 September 2015, i.e. the date when the Guidelines were published.

In relation to non-notified historic transactions, if the participants apply for clearance prior to 15 March 2016, then an amount of fine will be approximately EUR 820 for each concentration. If the participants apply to the AMC for clearance after 15 March 2016 but before 15 September 2016, an amount of fine will be approximately EUR 4,100 for each concentration.

The Guidelines are silent about the procedure for amnesty filings. Thus, we believe that, most likely, the AMC would apply a standard procedure for filing each individual concentration. Applicants still have the right to ask the AMC to reduce the scope of disclosure and the review period. Generally, it remains to be seen how the practice of amnesty filings will develop within the next couple of months.

CONTACTS

IF you would like to know more about the subject covered in this alert, please contact:

[Yevheniy Deyneko](#)
+380 44 337 7007

[Ulyana Khromyak](#)
+380 44 337 7007

To email one of the above, please use `firstname.lastname@everlegal.com.ua`