JUDICIAL CONTROL OF GUIDELINES ON ANTIMONOPOLY FINES IN POLAND

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Abstract: *This article presents the issue of judicial control of guidelines on fines prepared and applied by the Office for Competition and Consumer Protection (Polish NCA). It is shown that guidelines historically raised many controversies in Polish law but the situation has changed after Poland joined the UE. The OCCP has published many soft law documents, including guidelines on fines, even though the statutory basis to adopt such documents has not always been clear and it still remains elementary. This article explains the role of fining guidelines in filling the legislative gap on the method of calculation of fines. Until 2015 fining guidelines were a primary source of indication of how the antimonopoly authority calculates fines since the statutory provision was of a rudimentary character. Courts have been rather hesitant to fully grasp the issue of guidelines in general and of the fining guidelines in particular. There is a relatively low number of judgments which discuss the scope or the substance of the fining guidelines. One may see initial skepticism of courts towards soft law documents which turned into acceptance of the guidelines in terms of a policy document more than a soft law act. Furthermore, the detailed analysis of the case law shows some lack of consistency and visible reluctance of courts in analyzing guidelines on fines. This article argues for better regulation of guidelines in Polish administrative law and more efficient judicial control of those instruments.*

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1. INTRODUCTION

Regulation of the calculation of antimonopoly fines in the Polish competition law has evolved immensely since 1990. Before 2000 there were no provisions in the Polish antimonopoly act regulating any of these issues. During the last decade, the situation has improved but it is still far from being perfect. However, the lack of such clear rules regarding how to levy and calculate fines or issue guidelines is not exceptional and it is one of characteristic features of Polish administrative law[1]. The absence of general rules on fines usually leaves a wide margin of discretion with public administration and may adversely affect judicial control[2]. Similarly, there is no general regulation on issuing of guidelines by public authorities. Nevertheless, after the amendment of 2015, the antimonopoly act[3] provides for relevant provisions on fines which may serve as an example to follow for the other Polish administrative law statutes. Regulation of guidelines adoption in the antimonopoly act remains limited, though. Despite the underdeveloped provisions on guidelines, the antimonopoly authority[4] has issued several soft law documents covering almost all areas where the authority levies administrative fines[5]. What is equally important is that those guidelines are being followed in the daily practice of the antimonopoly authority. Surprisingly, the judicial review of guidelines issued by the Polish antimonopoly authority is rather limited, both in terms of quantity as well as quality of jurisprudence. It is partially the result of the absence of direct legal remedies against adopted guidelines. Soft law documents issued by the antimonopoly authority may be challenged only indirectly when the party is appealing against the decision of the authority. Even though the number

1 Wincenciak, 2008: 267. The lack of rules concerning issuance and calculation of fines in Polish administrative law was raised by the Polish Ombudsman in one of her address to the Minister of Administration on 29 January 2013 – http://www.sprawy-generalne.brpo.gov.pl/szczegoly.php?pismo=1698149 (in Polish).

2 Such judicial control in relation to administrative decisions based on a statutory guaranteed discretion is limited. Kruk, 2013: 251, Szydło, 2003: 146.

3 Act of 16 February 2007 on amendment of the act on competition and consumer protection, Journal of Laws of 2015 item 184 with further amendments, referred also as the "antimonopoly act" or "competition act".

4 The official name of the Polish antimonopoly authority is the President of the Office for Competition and Consumer Protection (OCCP).

5 Apart from guidelines on antimonopoly fines there are relevant guidelines on merger fines, consumer fines and pricing information fines.

of relevant judgments is not significant, most of them concern guidelines on fines issued by the OCCP. Therefore it is justified to focus on these particular guidelines and analyze how courts review those soft law instruments.

This article consists of five parts. The first one briefly introduces the concept of guidelines under Polish administrative law. It provides a historical context which is important when analyzing the reluctance of the Polish legislator as well as the courts to tackle the issue of guidelines. The second part discusses the regulation of guidelines under the Polish antimonopoly law. It shows a rather significant number of soft law documents adopted by the Polish NCA. Special attention is given to the fining guidelines. The third part briefly deals with the evolution of provisions on fines. It explains the importance of the fining guidelines for the development of statutory provisions. The fourth part begins with a general characterization of the judicial system in antimonopoly cases. It is followed by the selection of relevant case law. This presentation of court judgments is made chronologically according to general problems discussed in particular judgments. It shows the evolution of jurisprudence – from early skepticism until the recent reluctant acceptance of guidelines. The last part describes how judgments influenced administrative practice of the antimonopoly authority. It also discusses the problem whether conclusions drawn from the jurisprudence have been recognized and included in the guidelines on fines issued by the OCCP.

2. THE CONCEPT OF GUIDELINES IN POLISH ADMINISTRATIVE LAW LITERATURE

2.1. Historical background

To understand the skepticism, in Polish administrative law, surrounding administrative guidelines and other soft law documents issued by the public administration authorities, it is essential to describe how those instruments were used under the administrative law of communist Poland. During the existence of the People's Republic of Poland, public administration had an omnipotent role in public life, being responsible for all social, economic and political spheres. Public administration was a strictly hierarchical organization and there was no place for independent corporations (like local government or professional organizations). The characteristic feature of this state was parallel

existence of statutory provisions adopted by the legislator (Parliament and State Council) and internal normative acts adopted by public administration. Those internal normative acts took various forms of "guidelines", "ordinances", "directives" or "bylaws"[6]. Irrespective of their names, they formed a system of internal laws of public administration[7]. The specific feature of those instruments was that the particular authority did not need any statutory basis for the adoption of such acts. They were issued on the basis of general administrative jurisdiction of specific authority. Moreover, guidelines were formally binding only for subordinated authorities of lower instances. Furthermore, guidelines were distinct from administrative decisions and they were more like normative acts of general and abstract character[8]. Last but not least, guidelines were not usually published and they were known usually only by public administration. Despite the formal "internal" character of guidelines, they had actual external legal effect. It was called a "reflexive effect of guidelines"[9]. As a consequence, guidelines were often used as a basis for administrative decisions. This led to massive violations of rights of the parties to the administrative proceedings who were often deprived of basic knowledge of what were the rules that were being applied in their specific case. The situation began to change after the establishment of administrative courts in the early 80's of the XX century. Administrative courts had limited jurisdiction under the communist regime, but even such imperfect judicial protection led to condemnation of guidelines as a basis for administrative decisions[10]. Not surprisingly, after 1989, in an effort to make public administration accountable, guidelines were abandoned and public authorities have been precluded from using this instrument. Furthermore, the Polish Constitution[11] made it clear that only statutory provisions may serve as a basis for administrative decisions.

6 Janowicz, 1978: 30.

7 Lipowicz, 1991: 108-109.

8 Hoff, 1989: 22-23.

9 Janowicz, 1978: 31.

10 See, for example, judgments of the Head Administrative Court of 25 March 1981, SA 353/81 or of 20 July 1981 r., SA 805/81.

11 Art. 7 of the Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78.483 with further amendments.

2.2. Contemporary views on the legal character of guidelines

During communist Poland, guidelines were often discussed by administrative law scholars[12]. However, guidelines did not attract similar attention from legal scholars after 1989. The situation has changed after the accession of Poland to the European Union. Soft law documents form an important part of *acquis communautaire* and the Polish administration has begun to imitate the European administration in using them. Guidelines have become a legitimate administrative activity under the Polish administrative law once again. At present, many scholars point to the growing number of various soft law documents issued by the Polish administration[13]. Guidelines have become one of the more frequent types of those acts. However, guidelines are not treated as a source of law, but rather as acts of official interpretation of statutory provisions[14] or non-statutory directives of application of binding provisions[15]. Therefore, guidelines are not binding on third parties or courts. They are binding on the authority which adopted them and for any authority of lower instance.

Even though guidelines are not a source of law and are not binding on third parties, they have legal effects. It is argued that by adopting guidelines the authority makes a public promise and anyone following such official interpretation should not be adversely affected by it[16]. It is called in Polish law a "principle of deepening of trust towards the administration"[17], and it is similar to the principle of protection of legitimate expectations. In the area of competition law, this principle is limited to acts of the antimonopoly authority. Furthermore, it only prevents third parties from adverse effects of public announcements of the OCCP. However, it applies exclusively to future actions of the competition authority which made such public promise. Therefore, the antimonopoly court is not bound by such promise and may adhere to a

12 For the review of Polish literature see Hoff, 1989: 7-23.

13 Bojanowski & Kaszubowski, 2009: 155; Jabłoński, 2012: 137; Błachucki, 2014: 122-123.

14 Lang, 2012: 229.

15 Sachajko, 2002: 74.

16 Kmieciak, 2008: 123.

17 Art. 6 of the Act of 14 June 1960 – Administrative Procedural Code, Journal of Laws of 2000 No. 98.1071 with further amendments.

different interpretation of the statutory provisions, even if such interpretation is less favourable for the parties[18].

As a result of the growing popularity of soft law instruments, there are areas of law where guidelines play a crucial role in regulating behaviour of third parties, such as tax law[19] or management and payment of European funds[20]. Despite the dissemination of guidelines in the daily work of the Polish administration, this phenomenon has not been adequately recognized by the statutory provisions. There are no general rules on adoption of guidelines, nor on administrative or judicial control over those soft law instruments[21]. There are a few specific administrative law acts where such rules may be found. A good example is competition law, where the regulation of guidelines has been developed since 1990, but it is still far from being perfect.

3. REGULATION OF GUIDELINES IN POLISH COMPETITION LAW

3.1. History of regulation of guidelines

The first modern antimonopoly act was adopted in Poland in 1990. It was a part of economic reforms that were intended to guide Poland through the transitional period. The antimonopoly act of 1990[22] did not provide for any provisions related to adoption of guidelines nor other soft law documents. Not surprisingly, the antimonopoly authority did not issue any guidelines before 2000. In that year, the new antimonopoly act[23] was adopted, which provided for a first legal basis to issue guidelines. Art. 27 of the Act stipulated that the antimonopoly authority shall issue an official journal. The authority was compelled to publish in the journal decisions, as well as judgments of relevant courts. Furthermore, the antimonopoly authority was obliged to publish in the journal "information, communications, notices, guidelines and interpretations having significant importance for the application of the provisions encompassed

18 Under the Polish civil procedural law, the antimonopoly court may change appealed decision of OCCP even at the detriment of appellant.

19 Brolik, 2013: 273.

20 Talaga, 2012: 321.

21 Błachucki, 2012b: 247-249.

22 Act of 24 February 1990 on counteracting monopolistic practices, Journal of Laws No. 14.88.

23 Act of 15 December 2000 on competition and consumer protection, Journal of Laws No. 122.1319.

by the scope of the activities of the office". Even though this provision was rather vague, it was repeated[24] in the following antimonopoly act of 2007[25].

The first guidelines were published in 2003[26]. These were two guidelines concerning merger control. The first set of guidelines was devoted to the substantive criteria for notification of mergers and the second one dealt with procedural aspects of notifications. However, those guidelines hardly reflected the official standing of the Polish NCA. They were prepared, not by the authority itself but by an external law firm. Furthermore, they relied primarily on the European Commission's merger guidelines and the actual Polish antimonopoly law interpretations were limited. Despite this first rather unfortunate experience with adopting guidelines, the antimonopoly authority prepared a new set of guidelines in 2009. Even though they followed the European Commission's guidelines in many respects, they were prepared by the authority itself and they mostly reflected the experience gained by the OCCP. They concerned the calculation of antimonopoly fines[27] and leniency procedure[28]. The adoption of guidelines in that specific area of antimonopoly law showed that the statutory regulation of fines proved to have been the most problematic during the application of the competition act by the antimonopoly authority and it was necessary to provide some additional guidance for undertakings. Those guidelines paved the way for other official interpretations by the antimonopoly authority.

3.2. Regulation of guidelines in the present Polish competition act

The situation changed with the amendment of the antimonopoly act which entered into force in January 2015[29]. The amendment introduced important changes in the information policy of the antimonopoly authority. The publication of the official journal was ceased and the journal itself was canceled.

24 The new Art. 32.4 stated that "Information, communications, notices, explanations and guidelines of high significance to the application of provisions regarding the scope of activities of the President of the Office, shall be also published in the Official Journal of the Office of Competition and Consumer Protection".

25 Act of 16 February 2007 on competition and consumer protection, Journal of Laws No. 20.331.

26 Office for Competition and Consumer Protection, 2003a and 2003b.

27 Office for Competition and Consumer Protection, 2009a.

28 Office for Competition and Consumer Protection, 2009b.

29 Act of 10 June 2014 on amendment of the act on competition and consumer protection and the civil Procedural Code, Journal of Laws of 2014 item 946.

All the relevant information was to be published on a dedicated website called Public Information Bulletin. Despite the name, it is purely an electronic information source. Following those changes, the amendment introduced a clear legal basis for adopting soft law documents by the antimonopoly authority. According to Art. 31a, the "President of the Office may publish and announce explanations and interpretations of significant relevance for the application of legal provisions as regards issues falling within the scope of competences of the President of the Office. Explanations and interpretations shall be published in the Public Information Bulletin of the Office".

The analyzed provision does not use the term "guidelines", but instead it uses terms like "explanations" and "interpretations", which stand for the same form of document but with different headings. Furthermore, the antimonopoly authority enjoys full discretion with regard to adopting soft law documents. There are still no clear premises on when guidelines may or should be adopted. The general clause "significant relevance to enforcing statutory norms" is so vague that it leaves full discretion to the antimonopoly authority. No procedure is prescribed to adopt soft law instruments. It leaves the decision on consultation of draft guidelines with any interested third parties up to the antimonopoly authority. The past practice of the antimonopoly authority showed that the Polish NCA quite often publicly consulted on draft soft law documents. However, on several occasions, consultations were limited to a certain group of stakeholders consisting of selected associations and academics. Nonetheless, some guidelines were adopted without any public consultation. The important guarantee introduced by the recent amendment is that all guidelines adopted by the antimonopoly authority must be published and be publicly accessible on a dedicated website. Finally, even after the amendment, the antimonopoly act fails to offer any legal remedies against guidelines.

The OCCP has been rather active in the field of adopting soft law documents. At present, there are eleven general interpretations and guidelines that remain in force[30]:

1. Guidelines on setting fines for competition-restricting practices, of 29.12.2015.

30 All soft law documents are accessible at https://uokik.gov.pl/wyjasnienia_i_wytyczne.php (access at 31.01.2016). They are only in Polish. However, guidelines on antimonopoly fines and guidelines on fines in consumer cases are also accessible in English at https://uokik.gov.pl/home.php (access at 31.01.2016). Please note that available English translation of guidelines on antimonopoly fines is partially outdated.

2. Explanations on settlement procedure, of 18.11.2015.
3. Explanations on commitment decisions in competition and consumer cases, of 01.09.2015.
4. Clarifications on communication of competition concerns in cases of antitrust, consumer and fines, of 01.09.2015.
5. Guidelines on criteria and procedure of merger notifications to the President of OCCP, of 23.01.2015.
6. Clarifications on the rules of communication between undertakings and the authority during administrative proceedings, of 23.01.2015.
7. Guidelines on setting fines for infringements of the act on informing about prices of goods and services, of 22.12.2014.
8. Guidelines on setting fines for practices infringing collective consumer rights, of 10.05.2013.
9. Guidelines on substantive assessment of notified mergers, of 11.06.2012.
10. Guidelines of the President of the Office of Competition and Consumer Protection on the Leniency Programme (the procedure of submitting and handling applications for immunity from or reduction of a fine – "leniency applications"), of 24.02.2009.

This list shows that the antimonopoly authority adopts various official interpretations. They differ in terms of heading, length, scope of application or the act they refer to. It proves that issuing soft law document has become a very important tool of development of information policy by the antimonopoly authority.

The guidelines on fines serve as an instrument to increase transparency and disseminate antimonopoly law. The educational role of the guidelines on fines is often underlined. It is argued that well drafted fining guidelines led to a successful dissemination and application of not only the fining guidelines but of the guidelines on leniency, as well[31]. When read in conjunction, the fining guidelines and leniency guidelines provide the undertaking with a full picture of potential exposure to antimonopoly sanctions. Undertakings engaged in cartel behaviour may relatively precisely assess potential fines. This proves that the guidelines and other soft law documents issued by the antimonopoly authority gained significance and they have started to form a system designed to shape the behaviour of undertakings.

31 Turno, 2013: 181.

3.3. Guidelines on antimonopoly fines

The first guidelines on setting antimonopoly fines were adopted in January 2009. They were a very important instrument for increasing the transparency of fine calculation, since the statutory provisions were rudimentary and offered no real guidance for undertakings. These guidelines were adopted in response to postulates formulated by undertakings and scholars[32]. Stakeholders were also involved in discussing a draft of the guidelines[33]. The guidelines have been updated recently and the new version entered into force on 1 January 2016.

When analyzing the fining guidelines, one may easily spot that they were inspired by the European Commission's guidelines on fines. It is interesting to note that they were based on the EC fining guidelines of 1998[34] and not 2006[35]. This is especially visible in the methodology for establishing the basic amount of the fine. Polish guidelines distinguish three types of antimonopoly infringements and associate each of them to a basic amount of fine. It is similar to the manner used by the EC in the guidelines of 1998. However, the Commission abandoned this typology of competition infringements in the guidelines of 2006. The Polish antimonopoly authority has decided not to change it, even during the last update of the fining guidelines in 2015. This is a subject of criticism – some commentators claim that the introduction of three types of antimonopoly infringements as a basis for establishing the basic amount of the fine violates statutory provisions, as the antimonopoly act has not recognized such distinction between three types of antimonopoly infringements[36]. Polish guidelines on fines are less detailed and they do not cover all the issues covered by EC guidelines (like calculation of the value of sales, specific increase of fine for deterrence or ability to pay the fine). On the other hand, Polish guidelines on fines include specific issues not discussed in EC document (like fines levied upon undertakings with an insignificant turnover or fines for natural persons, i.e. managers).

The most controversial issue regarding the newly updated guidelines is that they repeat statutory provisions by duplicating the list of mitigating and

32 Sachajko, 2002: 74.

33 Stefaniuk, 2011: 330.

34 European Commission, 1998.

35 European Commission, 2006.

36 Król – Bogomilska, 2013: 172.

aggravating circumstances and offer no interpretation of terms used to describe those circumstances. What is even more surprising is that the new Art. 111 provides for a more detailed list of such circumstances then the guidelines themselves. Such a list of circumstances proved to have been a great achievement in 2009 when the statutory provisions were rudimentary and did not cover such circumstances. However, after the amendment of 2015, the antimonopoly authority should elaborate on those circumstances and provide for more explanation on how they should be understood or applied. As a result, this part of the fining guidelines may be more misleading then helpful.

The fining guidelines begin with a short preamble explaining the reasons behind the adoption of the document, scope of application and legal character. They have been adopted in response to expectations from the business community, in order to increase the transparency of the methodology used to set fines. The guidelines should allow undertakings to make a preliminary estimate the fine which they may face in case of anticompetitive behavior. The document was adopted by the antimonopoly authority and will be applied solely by the authority. They will be applied when the Polish NCA issues antimonopoly fines on the basis of the Polish antimonopoly act, as well as Art. 101 and 102 of the TFEU. The guidelines underline their interpretative character and preclusion from interfering with statutory provisions. Therefore, they do not constitute binding rules for undertakings. However, undertakings may rely on the promise of the antimonopoly authority that it will follow them when levying antimonopoly fines.

As mentioned earlier, the guidelines distinguish between three types of antimonopoly infringements: very serious infringements, serious infringements and other infringements. This serves as a basis to establish the basic amount of the fine. In the next step, the antimonopoly authority assesses the specificity of the market and the activity of the enterprise. This part of the analysis may influence the basic amount up or down by 80%. This analysis includes the assessment of characteristics of the product and its recipients, characteristics of the market (the structure, barriers of entry and the economic potential of the enterprise which commits the infringement), negative effects for market participants arising from the infringement, irreversible effects of the infringement, actual implementation of the infringement, geographical range of the behaviour and the revenue obtained from the infringement. The following step in calculating the fine concerns the duration of the infringement. This may raise the basic amount of the fine by up to 100% (for abuse of

dominance) or 200% (for antitrust violations). The next step of the analysis includes evaluation of mitigating and aggravating circumstances. This may increase or decrease the amount of the fine by 80%. As indicated earlier, the list of mitigating and aggravating circumstances is purely descriptive and offers no guidance on the meaning of particular circumstances. In the last part of the process of calculating fines the antimonopoly authority considers exceptional situations like levying maximum or symbolic fines or fining undertakings with an insignificant turnover.

Last but not least, some commentators raised doubts on whether guidelines on fines should ever be published and remain an internal document. It is argued that the publication of guidelines decreased the efficiency of antimonopoly sanctions. At the same time, undertakings may easily learn about past decisions of the antimonopoly authority and predict possible sanctions[37]. Those doubts seem to be unfounded. The analysis of official policy documents and decisions of the antimonopoly authority did not support an argument that guidelines on fines decreased effectiveness of cartel enforcement. Neither have they adversely affected the average amount of the fines paid by undertakings. Furthermore, any analysis of decisions made independently by undertakings will not create any legitimate expectations in relation to future behavior of the antimonopoly authority. Such independent analysis would have a purely informative value. Therefore, guidelines on fines serve as an important guarantee for undertakings by providing more legal certainty. Finally, the publication of guidelines on fines makes it possible for the courts to better understand the fining policy of the antimonopoly authority and review the interpretation of the relevant statutory provisions.

The guidelines on fines are an important tool in providing accurate and comprehensive information about the antimonopoly law to undertakings. Therefore, the antimonopoly authority should ensure the quality of those guidelines. However, the antimonopoly authority has failed to keep them updated. The last change of the guidelines of 2015 revised them only as required by the prior amendment of the antimonopoly act. Despite the passage of 6 years from the adoption of the fining guidelines, the antimonopoly authority has not decided to reflect more on those guidelines in terms of new experiences gained from the cases handled by the authority and delivered court judgments. Therefore, it is disappointing that the update of guidelines covered only legislative

37 Piszcz, 2013: 302.

changes and has not offered more reflection on the administrative and judicial case law.

4. REGULATION OF FINES IN POLISH ANTIMONOPOLY LAW

The significance of fining guidelines in the Polish antimonopoly law may be easily understood after the analysis of the relevant statutory rules on fine calculation in Polish antimonopoly acts. The first antimonopoly act of 1990 did not provide for any rules on fine calculation. Neither had such rules ever existed in Polish administrative law[38]. It left the antimonopoly authority with almost full discretion when levying fines. Some improvement took place together with the adoption of the antimonopoly act of 2000. Art. 104 stated that "when calculating the amount of the fines referred to in Articles 101-103, the duration, gravity and circumstances of the previous infringement of the provisions of the Act should be particularly taken into account". This regulation was a step forward in establishing limits to the discretion of the antimonopoly authority but it remained rudimentary. Introduction of some directives of fine assessment was welcomed and it was perceived as a great achievement even though the wording of the statutory provision was imprecise[39]. The following antimonopoly act of 2007 repeated the statutory provision with only slight linguistic change[40]. In the absence of a developed statutory regulation of fine calculation, such rules could have been found in the case law of the antimonopoly court. The role of the courts was especially significant since the previous statutory provisions were limited and imperfect. This situation compelled courts to carefully assess the adequacy of the amount of fines and review the proper application of fining guidelines. The antimonopoly court managed to identify, in numerous judgments, specific circumstances and directives that should be taken into account when calculating fines[41]. This case law served as one of the

38 The Polish code of administrative procedure has never contained any rules on fine calculation. Neither have there ever been any such general provisions of Polish administrative law. Any rules on administrative fine adjustment may be found in some administrative law acts regulating certain areas, like the antimonopoly law.

39 Król – Bogomilska, 2001: 88.

40 Art. 111 of the antimonopoly act of 2007 stated that "when calculating the amount of the fines referred to in Articles 106 to 108, the duration, gravity and circumstances of the infringement of the provisions of the Act, as well as the previous infringement, should be particularly taken into account".

41 For the summary of those directives see Sachajko, 2006: 197.

most important sources of inspiration for the antimonopoly authority when drafting the guidelines on fines in 2006.

The substantial change took place in January 2015, when the amendment of the antimonopoly act entered into force. The relevant statutory provision has been immensely developed. A significant part of the guidelines on antimonopoly fines has been transferred to the antimonopoly act. The new Art. 111[42] distinguishes between fines for antitrust, merger and consumer violations.

42 "Article 111. 1. When determining the amount of a fine to be imposed, the President of the Office shall take into consideration, in particular, circumstances of the infringement of the provisions of this Act, and previous infringements of provisions of this Act, and, in the case of a fine referred to in:
1) Article 106 paragraph 1 and in Article 108 paragraph 1 subparagraph 2 – the duration, degree and market consequences of infringement of the provisions of this Act, the degree of infringement being assessed by the President of the Office taking into consideration the nature of the infringement, the undertaking's business activity being the subject of the infringement, as well as – in the cases referred to in Article 106 paragraph 1 subparagraphs 1 to 3, and in Article 108 paragraph 1 subparagraph 2 – the specific nature of the market on which the infringement took place;
2) Article 106a – degree of influence of a managing person's conduct on the infringement committed by the undertaking, revenue obtained by the managing person at the undertaking concerned, having regard for the period of infringement, as well as the duration and market consequences of the infringement;
3) Article 106 paragraph 2 and in Article 108 paragraphs 2 and 3 – the influence of the infringement on the course of the proceedings and the conclusion date;
4) Article 107 and in Article 108 paragraph 1 subparagraph 1 – market consequences of failing to comply with decisions, rulings or judgments referred to in Article 107.
2. When determining the amount of fines according to paragraph 1, the President of the Office shall take into consideration the mitigating or aggravating circumstances of the case.
3. The mitigating circumstances as referred to in paragraph 2 shall be in particular:
1) in the case of infringement of prohibition of competition-restricting practices:
a) voluntary remedy of consequences of the infringement,
b) discontinuing the prohibited practice prior to or immediately after institution of proceedings,
c) performing activities at one's own initiative in order to cease the infringement or to remedy the consequences thereof,
d) cooperation with the President of the Office in the course of the proceedings, in particular contributing to the proceedings being conducted quickly and efficiently,
e) the undertaking's passive role in infringing the prohibition of competition-restricting agreements, including the undertaking's avoiding implementation of provisions of a competition-restricting agreement,
f) acting under duress – in the case of infringement of prohibition of competition-restricting practices;
2) in the case of infringement of prohibition of practices infringing collective consumer interests – circumstances referred to in subparagraph 1 points (a) to (d);
3) in the case of a managing person allowing an undertaking to infringe prohibitions referred to in Article 6 paragraph 1 subparagraphs 1 to 6 of this Act or in Article 101 paragraph 1 items (a) to (e) of the TFEU:
a) acting under duress;
b) contributing to the undertaking's voluntary remedy of consequences of the infringement,
c) contributing to ceasing the prohibited practice by the undertaking at that person's own initiative prior to or promptly after institution of the proceedings,
d) circumstances referred to in subparagraph 1 points (c) and (d);
4) in the case of failure to submit notification of the intent to concentrate as referred to in Article 13 – informing the President of the Office that the concentration has been performed and circumstances referred to in subparagraph 1 point d.

For each type of infringement, a separate list of relevant circumstances have been included. This new provision introduced important guarantees – the list of aggravating circumstances that may adversely affect the amount of fine has been closed. At the same time the list of mitigating circumstances remained exemplary and open.

This statutory provision on calculation of fines shows a clear pattern of development. At the beginning, it was the basic task of courts, then it was followed by the fining guidelines which served as intermediary steps for future development of statutory rules. At present, such a detailed provision on fine calculation increases legal protection of undertakings and limits the discretion enjoyed by the antimonopoly authority.

5. JUDICIAL REVIEW OF FINING GUIDELINES ISSUED BY THE POLISH ANTIMONOPOLY AUTHORITY

5.1. Courts competent to supervise actions of the antimonopoly authority

There are two types of courts competent in antimonopoly cases: civil and administrative ones. The primary role is played by civil courts adjudicating on appeals from decisions of the antimonopoly authority, as well as authorizing and supervising dawn raids undertaken by the antimonopoly authority. In

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4. The aggravating circumstances as referred to in paragraph 2 shall be:
1) in the case of infringement of the prohibition of competition-restricting practices:
a) role of the leader or initiator of the competition-restricting agreement or inducing other undertakings to participate in the agreement – in the case of infringement of competition-restricting agreements,
b) forcing, exerting pressure or application of retaliatory measures with respect to other undertakings or persons in order to implement or continue the infringement,
c) previous similar infringement,
d) intentionality of the infringement;
2) in the case of infringement of the prohibition of practices infringing collective consumer interests:
a) considerable territorial range of the infringement or the effects thereof,
b) considerable profits obtained by the undertaking in connection with the infringement,
c) circumstances referred to in subparagraph 1 points (c) and (d);
3) in the case of a managing person allowing an undertaking to infringe the prohibitions referred to in Article 6 paragraph 1 subparagraphs 1 to 6 of this Act or in Article 101 paragraph 1 items (a) to (e) of the TFEU:
a) role of the organiser or initiator of the competition-restricting agreement or inducing other undertakings or persons to participate in the agreement,
b) considerable profits obtained by the managing person in connection with the infringement,
c) circumstances referred to in subparagraph 1 points (b) and (c);
4) in cases of failure to notify the intent to concentrate as referred to in Article 13 – circumstances referred to in subparagraph 1 points c and d."

addition, administrative courts provide judicial protection for individuals in antimonopoly cases with regard to specific procedural acts or failure to act of the antimonopoly authority. Detailed delimitation of jurisdiction of civil and administrative courts is sometimes confusing and leads to jurisdictional disputes[43]. To provide a complete picture of the judicial system in competition cases both court systems will be described, with special attention given to civil courts.

5.2. Administrative courts

Administrative courts in Poland consist of two instances: Voivodeship administrative courts and the Supreme Administrative Court. Administrative courts review challenged decisions or acts through the prism of the principle of legality. They may issue only cassatory rulings, i.e. either uphold or set aside the contested act. The jurisdiction of administrative courts covers hearing complaints against administrative acts of the public administration and some other types of official actions of administrative authorities[44]. However, administrative courts do not control soft law documents issued by public authorities, with only one exception. This exception concerns general and individual tax law interpretations. Any other guidelines or soft law documents may be reviewed only indirectly by administrative courts, when adjudicating on the legality of challenged administrative acts.

In principle, all administrative decisions may be challenged before administrative courts. Between 1987 and 1990, administrative court heard complaints against decisions taken by the Minister of Finance serving as the antimonopoly authority. However, in 1990, the Polish legislator decided to alter the jurisdiction of administrative courts and empowered civil courts to control certain activities of public administrative authorities. This has been the case of competition law cases[45].

As indicated earlier, in the area of competition law, administrative courts have only limited jurisdiction and they are competent to hear complaints against specific procedural acts (such as the discontinuance of proceedings in certain

43 Comprehensive discussion of those problems is presented by Błachucki, 2011b: 130-158.

44 Detailed analysis is provided by Błachucki, 2011a: 12-13.

45 Alteration of judicial jurisdiction in antimonopoly law cases raises various problems – ranging from disputes of character and competences of the civil court to denial of judicial protection. There is no convincing explanation why these matters have been allocated to civil courts. On the contrary this change was accidental and it is hardly impossible to identify reasons for the legislator's choice. Detailed discussion of those issues is provided by Gronowski, 2006: 13-16.

cases or return of merger notification form to parties) or failure to act, as well as undue prolonging of proceedings by the antimonopoly authority. They also hear complaints against failure to provide access to public information by the antimonopoly authority.

Last but not least, administrative courts are competent to hear complaints against decisions of the antimonopoly authority taken in other areas of law (like the quality of goods act[46] or price information act[47]). As mentioned earlier, the antimonopoly authority issued guidelines on fines regarding the price information act. Therefore, there is the possibility that administrative courts may also indirectly review those guidelines. However, the antimonopoly authority has issued only a few decisions in that area. In none of those decisions have guidelines been directly invoked, even though several of them contain direct excerpts from those guidelines. As a result, administrative courts have not yet reviewed those guidelines.

5.3. Civil courts

Civil courts play the primary role in reviewing actions of the antimonopoly authority. The appeals against administrative decisions of the antimonopoly authority are heard by the antimonopoly court. The official name of the antimonopoly court is the Court for Competition and Consumer Protection[48]. The judgment of the antimonopoly court may be appealed to the Court of Appeals. Finally, the judgments of the court of Appeals are subject to extraordinary cassatory complaints heard by the Supreme Court. The Court for Competition and Consumer Protection was established by the Ministry of Justice as a department of the Voivodeship Court in Warsaw[49]. Formally, the antimonopoly court is a civil court. Nonetheless, its legal character has been unclear. It was argued that the antimonopoly court cannot be described as a civil court or as an administrative court since the proceedings that are taking

46 Act of 12 December 2003 on general product safety, Journal of Laws No. 229.2275 with further amendments.

47 Act of 9 May 2014 on informing about prices of goods and services, Journal of Laws of 2014 item 915.

48 The name was changed in 2002 by the Act of 5 July 2002 on amending the act on competition and consumers protection, the Act – Civil procedural code and the Act on unfair competition, Journal of Laws No. 129.1102.

49 Regulation of the Minister of Justice of 30 December 1998 on the establishment of the antimonopoly court, Journal of Laws No. 166.1254.

place before it consist of elements of civil and administrative procedure[50]. Others described the proceedings before the antimonopoly court as an external extraordinary procedure, i.e. judicial scrutiny of legality of antimonopoly decisions done by the civil court[51]. Even the Antimonopoly Court used to characterize itself as, essentially, an administrative court[52] and a court of administrative nature with strictly defined scope of cognition restricted to the hearing of appeals against decisions and concerning issues which are governed by the antimonopoly act[53]. These ambiguous concepts were typical to early 90's when the Polish antimonopoly law started to develop. At present, the civil nature of the Court for Competition and Consumer Protection and proceedings before it are not being contested.

The Court for Competition and Consumer Protection is competent to hear appeals and complaints against all administrative acts (decisions and orders) issued by the antimonopoly authority on the basis of the antimonopoly act (it includes decisions in antitrust, mergers, as well as consumer protection cases). Furthermore, the Court for Competition and Consumer Protection may hear appeals from administrative acts issued by sector regulators (energy, telecommunications and railways). The antimonopoly court has full jurisdiction when reviewing the case. Therefore, the antimonopoly court may not limit its jurisdiction just to control the legality of the challenged decision (like an administrative court), but is under an obligation to independently review and establish all relevant facts and apply the law. The antimonopoly court may not rely solely on the evidence gathered by the antimonopoly authority but should produce evidence on its own[54]. As a result, the court may uphold the challenged decision, change it or, in exceptional circumstances, set aside the decision and send the case back to the antimonopoly authority.

Analysis of the jurisdiction of the Court for Competition and Consumer Protection proves that this court is a specialized civil court competent in all competition related matters, i.e. general and regulatory. Similarly to administrative courts, the antimonopoly court has no direct jurisdiction over guidelines

50 Ereciński, 1991: 33.

51 Woś, 1995: 104.

52 The judgment of the Antimonopoly Court of 16 July 1991, XVII Amr 8/91.

53 The judgment of the Antimonopoly Court of 19 September 1991, XVII Amr 9/91.

54 Gronowski, 2010: 449.

issued by the antimonopoly authority. Undertakings or any other entities may not directly challenge soft law documents adopted by the Polish NCA before the antimonopoly court. Nonetheless, the parties may raise arguments relating to the application of guidelines as one of the grounds of the appeal. Finally, the antimonopoly court is obliged to *ex officio* review if during the antimonopoly proceedings before the authority there hasn't been any manifest procedural error which may influence the outcome of proceedings. On rare occasions, i.e. total absence of application of fining guidelines or some extreme form of misapplication of guidelines on fines, the court may also treat this as an excessive procedural infringement. However, there has not been any such case, yet.

5.4. Review of case-law regarding fining guidelines

When analyzing the case law concerning guidelines on fines, it is visible that there have been several issues that courts specifically addressed in judgments. Those issues present a variety of problems ranging from procedural to substantive ones. Issues and judgments are presented in a chronological order to show the development of jurisprudence and the shift towards more substantive analysis. It should be noted that in all of the cases discussed below, the judicial analysis of guidelines was treated as a side consideration[55].

a) When should the guidelines be adopted?

Even though the antimonopoly court has been established in 1990, its early case law hardly ever discussed the problem of guidelines. The situation changed to some extent after the accession of Poland to the European Union in 2004. In one of the first judgments relevant to this issue, the Court for Competition and Consumer Protection ruled that the **adoption of guidelines by the antimonopoly authority may be justified only in exceptional situations**, where the interpretation of the antimonopoly act raised serious doubts. The aim of the guidelines would be to clarify identified doubts. Therefore, the adoption of guidelines is a legitimate and legal form of activity of the antimonopoly authority. This was the first situation where the antimonopoly court directly dealt with the problem of guidelines. The court formulated four conditions

55 Apart from judgments related directly to guidelines on antimonopoly fines a few judgments related to guidelines on consumer fines have been included, as well. Both guidelines have been prepared and applied by the antimonopoly authority, as well as the same antimonopoly court controls them. The additional judgments represent a small sample and they are presented in order to give a comprehensive picture of all issues related to fining guidelines.

which the antimonopoly authority should follow when issuing guidelines. First, guidelines should be limited to interpreting those provisions which proved to have raised conflicting readings. Second, adoption of guidelines should be reserved to exceptional situations. Third, adopted guidelines should be published. Four, **the guidelines may be deemed correct only if they were verified and confirmed by the following judicial case law**[56]. This first judicial attempt to set conditions to adopt guidelines by the antimonopoly authority remained theoretical. The attempt of the court was overambitious and the conditions to adopt guidelines were impractical. If followed, these conditions would lead to harsh restrictions in adopting guidelines and, in some areas, guidelines would never be adopted due to the lack of judicial case law (like mergers). Furthermore, proposed conditions to adopt guidelines had no ground in statutory provisions. The antimonopoly act left a wide margin of discretion for the antimonopoly authority to adopt guidelines and the antimonopoly court failed to acknowledge this fact. For those reasons, the administrative practice of the antimonopoly authority disregarded analyzed conditions. The antimonopoly authority began to adopt guidelines on a regular basis. Contrary to limits set by the court, those were often complex guidelines covering all provisions from the given area (especially merger and fining guidelines). Despite the mentioned criticism, the significance of the analyzed judgments should be measured by the fact they were the first to officially recognize guidelines as a form of legal activity of the antimonopoly authority.

b) What is the legal character and effect of guidelines on fines?

The most important judgment of the Supreme Court in the analyzed area represents a very skeptical approach towards guidelines on fines. The court ruled that the **guidelines are binding only for the antimonopoly authority and courts are under no obligation to follow them**. Furthermore, courts enjoy full discretion (within statutory limits) when assessing and calculating the amount of fine. Therefore, appealing **undertakings may not effectively demand from the court to apply administrative guidelines and change the decision**. Last but not least, the Supreme Court questioned the legality of issuing guidelines by the antimonopoly authority, pointing that there is no

56 Two judgments of the Court for Competition and Consumer Protection of 7 November 2007, cases XVII XVII AmA 26/07 and XVII AmA 27/07.

legal basis to adopt such document by the authority[57]. This judgment shows that the Supreme Court was initially very skeptical on the adoption and against any legal effect of guidelines. The ruling of the Supreme Court plays a very important role in the legal treatment of guidelines. It is especially important for the courts of lower instances that should be very cautious when dealing with guidelines.

The critical opinion of the Supreme Court on fining guidelines was welcomed by some scholars who pointed out that if the rules on fine calculation were substantially underdeveloped, it should be a sign for the legislator to intervene and the antimonopoly authority should not replace the legislator. Moreover, the judgment shows the strong devotion of the Supreme Court to the principle of legality and judicial independence[58]. Others argued that even if the legal basis to adopt guidelines is not clear, it is outweighed by the overall positive effects of issuing guidelines measured by the increase in level of transparency and ensuring fairness and equality in levying fines[59]. Furthermore, it was stressed that guidelines are useful instruments both for the antimonopoly authority and undertakings, increasing transparency and solving many problems with the interpretation of the antimonopoly act and such a strict approach of the Supreme Court is unjustified[60].

This strict line of interpretation taken by the Supreme Court received support in some judgments of lower courts. For example, the antimonopoly court underlined the fact that the antimonopoly authority issues decisions on the basis of the statutory provisions and not guidelines. Therefore **it is legally correct when the guidelines are not invoked in the decisions**[61]. In another similar judgment, the Court for Competition and Consumer Protection has declared that it is bound solely by the statutory provisions on fine calculation. Therefore, rules on fine calculation set in the guidelines prepared by the authority indicating the percentage by how much the fine may be reduced or increased are not legally binding. At the same time, the court stated that "**despite the fact that the antimonopoly authority applied its guidelines,**

57 Judgment of the Supreme Court of 19 August 2009, III SK 5/09.

58 Król – Bogomilska, 2010: 11.

59 Turno, 2013: 182-183.

60 Błachucki, 2012: 70-72.

61 Judgment of the Court for Competition and Consumer Protection of 16 October 2014, XVII Ama 54/13.

the fine was calculated properly"[62]. These judgments show a deep disbelief by some judges in the positive effects of guidelines, leading to a denial of the value of guidelines.

When assessing the correctness of fines, the role of the court is twofold. First, the court is obliged to assess if the antimonopoly authority properly applied the statutory provisions on fines, especially provisions regarding fine calculation. Second, the court is under the duty to verify whether the antimonopoly followed its guidelines on fines. However, this verification differs significantly from the first step. In the first step the court undertakes substantial assessment of the accuracy of fine. In the second step, the court must verify the procedural issue of whether the guidelines were properly applied by the authority in order to rule if the legal principle of protection of legitimate expectations was observed by the authority when calculating the fine[63]. This explains the nature of judicial control of antimonopoly guidelines and it emphasizes, at the same time, that the fining guidelines are not a source of law and their legal effect is indirect.

However, many judgments tended to relax such a strict judicial approach towards guidelines. In one of such judgments, the Court for Competition and Consumer Protection pointed that **guidelines on fines are not legally binding but they are an official indicator for enterprises of how the antimonopoly authority calculates fines**. The Court stressed that "the guidelines may not go beyond the statutory provisions nor be contrary to statutory norms. The guidelines indicate solely how fines are calculated within the statutory limits. The aim of the guidelines is the increase of transparency of the antimonopoly authority in relation to the methodology of fine adjustment. The guidelines allow undertakings to initially assess the amount of fine which may be potentially levied for their anticompetitive behavior"[64]. Similarly, on several occasions, courts described guidelines on fines as a policy document presenting the current administrative practice on fine calculation[65].

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62 Judgment of the Court for Competition and Consumer Protection of 13 March 2012, XVII Ama 34/10.

63 Judgment of the Court of Appeals of 5 February 2013, VI ACa 1021/12.

64 Judgment of the Court for Competition and Consumer Protection of 16 October 2014, XVII Ama 54/13.

65 For example judgment of the Court for Competition and Consumer Protection of 13 March 2012, XVII Ama 34/10, judgment of the Court of Appeals of 22 November 2012, VI ACa 1170/11, judgment of the Court of Appeals of 10 May 2013, VI ACa 1362/12 or judgment of the Court of Appeals of 5 December 2012, VI ACa 764/12.

It is very important to notice that some judges expressly acknowledge the possibility of supplementing existing rudimentary rules on fine calculation. Court of Appeals ruled several times that "the list of circumstances taken into account when calculating antimonopoly fines is not exhaustive. The **list is supplemented by the case law of the antimonopoly authority, as well as by soft law documents which describe the current fining policy of the competition authority**". The court indicated that the administrative discretion of the OCCP is limited by the proportionality principle (Art. 31.3 of the Polish Constitution) which precludes any administrative authority from imposing fines which are more severe than it is necessary to achieve the aim of the sanction[66].

c) Is it admissible for the antimonopoly authority (and courts) to apply EC guidelines on fines?

One of the issues which was invoked in several court cases was the problem whether the European Commission's guidelines on fines are applicable in Poland and if the authority or courts should follow them. The Supreme Court rejected such possibility stating that "contrary to provisions of the act on the protection of collective consumer interests – provisions of the antimonopoly act on the prohibition of anticompetitive practices do not implement EU directives. Therefore, when interpreting provisions of the antimonopoly act on the prohibition of anticompetitive practices, the antimonopoly authority is not limited by the obligation of "pro-European" interpretation of domestic provisions. Consequently **soft law documents issued by the European Commission in the field of competition law as well as the case law of the European courts have only subsidiary relevance and may be used to conduct comparative law analysis**"[67]. Furthermore, the Supreme Court underlined that Regulation 1/2003 does not create a legal basis for the applicability of European Commission guidelines in Polish law. When assessing Commissions guidelines on fines, the Supreme Court pointed that this soft law document applies only when Regulation 1/2003 is being enforced. By their legal nature, guidelines issued by the European Commission are binding exclusively on the authority which prepared them[68].

66 Judgment of the Court of Appeals of 22 November 2012, VI ACa 1170/11 or judgment of the Court of Appeals of 10 May 2013, VI ACa 1362/12.

67 Judgment of the Supreme Court of 3 September 2009, III SK 9/09.

68 Judgment of the Supreme Court of 15 May 2014, III SK 54/13.

Similarly, the Court for Competition and Consumer Protection pointed that the **guidelines on fines prepared by the European Commission are not a source of law but they describe the administrative practice of the European Commission**. The EC guidelines on fines may serve as an ancillary aid when levying fines for violations of collective consumer interests (since those provisions implement European law). However, antimonopoly fines have distinctive character which precludes application of EC guidelines in those matters[69]. Therefore, European Commission guidelines may be used for comparative analysis of similar provisions of competition laws[70]. Therefore, the **parties may not successfully argue against the decision of the antimonopoly authority which is contrary to EC guidelines**[71].

However, some inconsistencies may be spotted in this area. Despite the fact that majority of court judgments underline the non-binding nature of the European Commission's guidelines on fines, in a recent judgment the Court for Competition and Consumer Protection directly applied the said guidelines. When assessing the amount of the fine, the court pointed to two additional mitigating circumstances which were listed in the EC guidelines on fines which were ignored by the authority. The court ruled that those circumstances should be taken into account in the given case and it ultimately reduced the fine[72]. This judgment is very surprising since the court did not explain why it referred to the EC guidelines and what the status of those guidelines was in the given case. What is even more peculiar is that the case was decided upon national provisions and there was no Community element.

Last but not least, despite this cautious attitude towards EC guidelines on fines, it is quite frequent for courts in Poland to invoke substantive guidelines prepared by the European Commission – especially vertical guidelines[73]. However, they are treated as one of the sources for inspiration for courts, not as a legal basis for adjudication.

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69 Judgment of the Court for Competition and Consumer Protection of 11 May 2011, XVII Ama 37/10.

70 Judgment of the Supreme Court of 9 August 2006, III SK 6/06 and Judgment of the Supreme Court of 19 August 2009, III SK 5/09.

71 Judgment of the Supreme Court of 19 August 2009, III SK 5/09.

72 Judgment of the Court for Competition and Consumer Protection of 2 March 2015, XVII Ama 69/12.

73 For example: judgment of the Supreme Court of 23 November 2011, III SK 21/11, judgment of the Court for Competition and Consumer Protection of 5 September 2013, XVII Ama 129/10 or judgment of the Court for Competition and Consumer Protection of 29 January 2014, XVII Ama 121/10.

d) How should courts respond to misapplication of guidelines on fines by the antimonopoly authority?

It is not unusual for undertakings appealing decisions of the antimonopoly authority to raise arguments related to the misapplication of the guidelines by the authority or the illegality of the applied guidelines on fines[74]. In one of such cases, the Court for Competition and Consumer Protection upheld the decision of the antimonopoly authority stating that the decision provided a comprehensive justification of the levied fine. The court underlined that the antimonopoly authority followed statutory provisions on fine calculation and it consistently applied all the rules set in the guidelines on fines. For these reasons the fine was found to have been correct[75]. The case shows that the antimonopoly court adjudicates on the argument of misapplication of fining guidelines and reviews the challenged decision through the prism of the guidelines on fines.

In another interesting case, the party complained that the "automatic" application of guidelines in each and every case leads to a significant procedural error. Instead of comprehensive review of the particular case, the antimonopoly authority concentrates on general criteria from guidelines. After analyzing the case, the Court of Appeals ruled that such "automatic" application of guidelines on fines in each and every case by the competition authority does not violate the principles of equity and proportionality. Such automatism serves as a guarantee for undertakings that the guidelines will be followed. The Court indicated that the guidelines provide for a comprehensive assessment of aggravating and mitigating circumstances, which prevents the authority from blind automatism in calculating fines[76].

e) Is it admissible for the courts to apply the guidelines on fines directly?

On some occasions, courts have applied the guidelines on fines directly. In one of the judgments, the Court for Competition and Consumer Protection ruled that the antimonopoly authority failed to apply one of the rules set in the fining guidelines and did not reduce the amount of the fine by 80%. Therefore, the court changed the decision of the authority in accordance with

74 For example: judgment of the Court for Competition and Consumer Protection of 16 October 2014, XVII Ama 54/13 or judgment of the Court of Appeals of 5 February 2013, VI ACa 1021/12.

75 Judgment of the Court for Competition and Consumer Protection of 21 September 2012, XVII Ama 81/11.

76 Judgment of the Court of Appeals of 16 June 2015, VI ACa 1048/14.

the guidelines and decreased the total fine by 80%. It should be noted that the court underlined that it was not bound by the guidelines. However, it did not preclude it from following the rules set in guidelines when changing the decision of the authority[77].

In another case, when evaluating the amount of the fine levied by the antimonopoly authority the Court of Appeals pointed that putting an end to the anticompetitive behavior may result in a 30% decrease of the amount of the fine. Such an opportunity is foreseen in the administrative guidelines and, therefore, it is not possible to reduce the fine more due to this circumstance. Any more significant reduction could violate the principle of equal treatment of all subjects of the antimonopoly law. Furthermore, the court did not accept another mitigating circumstance because it was not listed in the guidelines[78]. This judgment is quite surprising, showing an inability of the court to independently assess all circumstances of the case and strict reliance on administrative guidelines. The Court of Appeals misinterpreted the principle of equal treatment by treating antimonopoly guidelines equally to statutory provisions.

The analyzed judgments show that courts occasionally take an opportunist approach when adjudicating the case. Instead of independently assessing the facts and applying the antimonopoly act, they choose to follow the guidelines. It is interesting to note that neither of those judgments offers any justification for the courts' application of the administrative guidelines on fines.

f) Is it possible for the court to take a different view from the one presented in the guidelines on fines?

Guidelines on fines present the official interpretation of statutory provisions made by the antimonopoly authority. The non-binding nature of guidelines and the obligation of courts to independently interpret the antimonopoly act has led courts, on some occasions, to adhere to criteria which were different from the authority's interpretation of the relevant provisions. It is not a very common situation, but there are at least two judgments showing this possibility. What is also important is that in neither case did the courts refer directly to the guidelines on fines. However, the antimonopoly authority strictly followed the guidelines and the interpretation provided by the authority was rejected by the court. In both these judgments, the main problem was the same.

77 Judgment of the Court for Competition and Consumer Protection of 29 May 2014, XVII Ama 13/13.

78 Judgment of the Court of Appeals of 5 December 2012, VI ACa 764/12.

In two subsequent decisions[79], after the calculation of the fine, the result of the equation exceeded the maximum amount of the fine foreseen by the antimonopoly act. In accordance with the guidelines on fines, the antimonopoly authority decreased the amount of fine and levied maximum fines as proscribed by the antimonopoly act. It resulted in a situation where the cartel members received formally the same maximum fine irrespective of some differences in their behavior. Such application of statutory rules was rejected by the antimonopoly court[80]. The antimonopoly court presented the opinion that the lack of differentiation of fines between the cartel members and levying fines in the same maximum amount upon all of them was contrary to the principle of equality. The court pointed that the authority miscalculated all the aggravating circumstances. In the opinion of the Court, such calculation may never exceed the maximum foreseen by the statutory provisions. Therefore the methodology used by the antimonopoly authority was wrong. The antimonopoly court indicated that all the aggravating circumstances should have equal value when calculating the amount of the fine. This value is the result of dividing the maximum statutory amount of fine by the number of identified aggravating circumstances. Such equation will prevent the antimonopoly authority from exceeding the statutory maximum for fines. The reasoning of the court was repeated in another case[81].

The analyzed judgments show that the courts are sometimes willing to present their own interpretation of statutory provisions on fines and enforce it. Even though not directly, the interpretation put forward in the guidelines on fines has been rejected by the court for the first time. This proves that the judicial review of guidelines may take place, even if only indirectly. This positive sign should not overshadow the fact that the analyzed cases showed that both the court and the antimonopoly authority made mistakes. First, the authority should avoid situations where the calculation of fines may exceed the maximum set by the antimonopoly act. Second, the reasoning of the court is very simplistic and formalistic. There is no justification for treating all aggravating circumstances equally. This is why discretion is allowed, so as to individually

79 Decisions of the President of the Office for Competition and Consumer Protection of 31 December 2010 No. DOK 11/2010 and No. DOK 12/2010.

80 Judgment of the Court for Competition and Consumer Protection of 13 December 2013, XVII AmA 173/10.

81 Judgment of the Court for Competition and Consumer Protection of 30 March 2015 r., XVII AmA 69/12.

asses all the circumstances. Given the context of the case, some circumstances may play a more significant role in calculating the amount of the fine then others. Unfortunately, the antimonopoly court missed it.

5.5. Impact of judicial review on fining guidelines and decision-making of the antimonopoly authority

Analysis of decisions of the antimonopoly authority shows that the authority closely follows the guidelines on fines when levying financial penalties. All decisions of the antimonopoly authority provide for detailed calculation of fines, so it is easy to verify if the authority follows the guidelines or not[82]. However, it is very rare to find a direct reference to the guidelines in any of those decisions[83]. Such references may only be found in older decisions of the antimonopoly authority[84]. What is equally interesting is that one may find the exact excerpts from those guidelines in the wording of fining decisions. This shift may be seen as a response of the antimonopoly authority to the criticism towards legal effectiveness of guidelines raised by courts and as an attempt of the antimonopoly authority to clear any doubts that the guidelines are treated as a legal basis for issuing administrative decision[85].

The abovementioned situation describes the judicial skepticism against guidelines and the formal reaction of the antimonopoly authority. It seems both the court and the authority lost a balanced approach. The Supreme Court, as well as the lower courts, are right when pointing out the non-binding nature of the guidelines. Therefore, the antimonopoly may never treat guidelines as the source of law nor invoke guidelines in the operative part of the decision where the ruling is presented. However, the absence of reference to guidelines in the narrative part of the decision creates an impression of lack of transparency of the antimonopoly authority in presenting the inspiration for the given

82 In the past the antimonopoly authority did not always include such considerations in the decisions but moved detailed calculations to a restricted appendix to decision – see for example decision of the President of the Office for Competition and Consumer Protection of 17 December 2010 No. RKT 42/2010. Such practice was legally doubtful and it was abandoned by the authority.

83 For example see some recent decisions of the President of the Office for Competition and Consumer Protection No. RGD 1/2015, RBG 47/2014, DOK 9/2014, RLU 29/2014 or RKT 42/2014.

84 For example see some recent decisions of the President of the Office for Competition and Consumer Protection No. DOK 11/2010, DOK 12/2010 DOK 13/2011.

85 Błachucki, 2015: 57.

reasoning[86]. This impression is deepened by the fact that one may find excerpts from the guidelines in the decision. For these reasons, the approach taken by the antimonopoly authority should be criticized. Reference to guidelines on fines in the decision will surely increase transparency and help the undertaking to better understand the reasoning of the authority. It will also create an opportunity for the court to assess the guidelines on fines more directly.

Even though the antimonopoly authority is willing to make some formal changes and exclude any references to guidelines from decisions, it is evident that the authority is not willing to change substantive parts of the guidelines in response to judicial criticism. The last amendment of the guidelines of 2015 made it perfectly clear that the antimonopoly authority has not been willing to engage in discussions about possible changes in relation to identified flaws in interpretation of statutory provisions, for example if maximum amount of fines is levied on cartel members irrespective of differences in their behavior. This is a part of a wider problem, that there is no transparent procedure on how to adopt, change and abrogate guidelines. Without proper public consultations and proper analysis of case law, the antimonopoly authority may tend to draft guidelines in a way which may not necessarily reflect all the relevant issues and the interpretation may not be as comprehensive as needed.

6. CONCLUSIONS

This article described the judicial control over guidelines on fines adopted and applied by the Polish antimonopoly authority. Due to the lack of legal remedies against guidelines and some reluctance of courts, the analyzed case law has been rather limited. Even though the number of relevant judgments concerning guidelines in general is not significant, most of them concern guidelines on fines issued by the antimonopoly authority. The explanation of this phenomenon is rather straightforward. Guidelines on fines are often questioned during the appeal procedure by the undertakings who disagree with the levied fine. Despite the fact that the sample was not extensive, some general conclusions may be drawn from this short review.

The basic obstacle in performing full judicial control over the fining guidelines is that there are no direct legal remedies against them. However, under the

86 At the same time, the antimonopoly authority eagerly presents other sources of inspiration by including in decisions references to national and foreign decisions and judgments or to the relevant literature.

Polish law such remedies are not available so it is a clear legislator's choice to eliminate any possibilities to question general soft law acts adopted by public authorities. Therefore, the control of the antimonopoly court over the fining guidelines is indirect and may take place if the party appeals the decision of the antimonopoly authority and only if the party raised the argument in the appeal. Furthermore, limited regulation of guidelines precludes the court from exercising full control. Because of the absence of procedural rules on adoption, change and abrogation of guidelines, the party may effectively question the misapplication of guidelines but not the guidelines themselves. Therefore, legislative change in the given area is desirable. The antimonopoly act ought to be changed in order to provide more effective ways of judicial control over the soft law documents issued by the antimonopoly authority, by developing provisions on guidelines.

The analysis of the judgments shows a paradox. On several occasions, courts have stressed that guidelines are not a source of law and the authority should avoid invoking them in the decision. However, the same courts acknowledged the fact that the guidelines exist and that they may fill legislative gaps, being the source of reasoning for the antimonopoly authority. At the same time, the absence of any reference to guidelines on fines prevent courts from directly evaluating them. As a result, such strict approach presented by courts may result in limiting their effective control over important acts adopted by the antimonopoly authority, which may adversely affect appealing undertakings. Therefore, a change in decision drafting should be envisaged and the antimonopoly authority should return to the previous practice of directly invoking the guidelines on fines in its decisions.

Our analysis described some inconsistencies in the case law. In some recent judgments, courts showed an opportunistic attitude towards the guidelines. Instead of carrying out independent interpretation of the guidelines on fines, courts applied the guidelines directly, not only those prepared by the Polish NCA, but by the European Commission as well. Examples of such judgments should be alarming and this approach should be rejected. Fortunately, there are also promising examples when courts actually engage in discussion with the interpretation presented in the guidelines on fines (even if guidelines have not been directly mentioned). This seems to be the right direction on how courts should control the application of guidelines on fines. By abandoning their strong initial skepticism and accepting guidelines as a legitimate legal instrument, courts may focus on essentially reviewing the interpretation provided

by the antimonopoly authority. In addition to this change, the antimonopoly authority should be more responsive to case law and include it in guidelines.

Last but not least, the antimonopoly authority should be more active in evaluating and updating guidelines. Some issues are problematic enough to be cleared in the guidelines on fines, such as calculation of the value of sales when levying fines, explaining when a specific increase of the fine may be made in order to achieve a deterrence effect, or the problem of (in)ability to pay the fine. These are specific issues which should be covered by the guidelines and later verified by the antimonopoly court.

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