

APPROVED

Order of the Antimonopoly

Committee of Ukraine

December 14, 2023 N 22-pp

PROCEDURE for determining the amount of the fine imposed for violation of the legislation on protection of economic competition

I. General Provisions

1. This Procedure sets forth the mechanism for calculating the amount of the fine provided for in parts two and five of Article 52 of the Law of Ukraine "On Protection of Economic Competition" (the "Law"), parts one and two of Article 21 of the Law of Ukraine "On Protection from Unfair Competition", which is imposed for violation of the legislation on protection of economic competition (the "violation").

2. In this Procedure, the terms are used in the following meanings:

benefit received as a result of the violation — positive consequences for the defendant in any form that the defendant directly or indirectly managed or intended to receive as a result of the violation, namely: income (revenue) received as a result of the violation, losses or expenses that he or she managed or intended to avoid as a result of the violation, increase in the market share of the undertaking in the market, gaining advantages in competition with other market participants, the ability to influence the economic activities of other legal and/or individuals that are undertakings, the ability to receive a portion of the profits of other legal entities and/or individuals that are undertakings;

maximum amount of fine — the maximum amount of fine that may be imposed for violations in accordance with parts two and five of Article 52 of the Law, parts one and two of Article 21 of the Law of Ukraine "On Protection against Unfair Competition";

income (revenue) related to the violation is the total amount of income (revenue) received from the sale of products (goods, works, services) that occurred in violation of the legislation on protection of economic competition in the market where the violation occurred and in the market(s) affected by it for the period during which the violation lasted; with respect to an undertaking — a group of persons, income (revenue) is defined as the total income (revenue) from the sale of products (goods, works, services) related to the violation of all legal entities and/or individuals that are members of the group recognized as an undertaking in accordance with Article 1 of the Law and on whom a fine is imposed;

initiator of anticompetitive concerted actions — a legal entity or an individual — an undertaking that was the first to offer other legal entities or individuals to participate in concerted actions that have signs of anticompetitive behavior;

period during which the violation lasted — the period from the date of the actual commencement of actions (inaction) or the beginning of their detection by the body of the Antimonopoly Committee of Ukraine (hereinafter referred to as the Committee), recognized as a violation, until the date of their termination or, if the violation was not terminated, until the date of the submission with preliminary conclusions by the employees of the Committee, its territorial branch, who collect and analyze evidence in the case;

deterrent effect — additional losses of the defendant that would make it unprofitable for him or her and other persons to commit violations in the future.

Other terms shall have the meanings given in Article 1 of the Law.

II. Main approaches to determining the amount of the fine

The Committee's bodies impose fines on associations and undertakings: legal entities; individuals; groups of undertakings — legal entities and/or individuals that are recognized as undertakings in accordance with Article 1 of the Law, in cases provided for in part 4 of Article 52 of the Law.

1. Fines are imposed on undertakings whose actions (inaction) are found to be a violation.

If several legal entities and/or individuals are members of a group recognized as an undertaking, the fine shall be imposed on the undertaking represented by the legal entities and/or individuals who:

committed acts (actions, omissions) that led to a violation by the said undertaking, and/or

have rights without which the violation would not have been possible, and/or

have received or may receive competitive advantages or other benefits (in particular, the ability to influence the activities of other legal entities and/or individuals — undertakings, to receive a portion of their profits).

2. In determining the amount of the fine, the Committee's bodies are guided by the principles of legality, transparency, and protection of competition on the basis of equality of individuals and legal entities before the law.

3. The circumstances taken into account when determining the amount of the fine are established by the employees of the Committee, its territorial branches, who collect and analyze evidence in the case, before the decision on the case is made by the Committee's body.

4. The circumstances taken into account when determining the amount of the fine are established on the basis of any information that is appropriate and reliable (confirmed/certified by public authorities or can be verified):

statistical information; administrative data;

financial and tax reports, accounting data;

other information on the activities of undertakings received by the Committee's bodies during inspections, at the request of the Committee's bodies, the head of the territorial branch of the Committee for information.

5. The established circumstances that are taken into account when determining the amount of the fine are set forth by the employees of the Committee, its territorial branches that collect and analyze evidence in the case, in a statement of preliminary conclusions sent by post or electronically via information and communication systems to the parties and third parties.

Persons to whom a statement of preliminary conclusions is sent may submit their objections to the circumstances taken into account when determining the amount of the fine by means of postal communication or in electronic form by means of information and communication systems.

The circumstances taken into account when determining the amount of the fine are set forth by the employees of the Committee, its territorial branches that collect and analyze evidence in the case, in a statement of preliminary conclusions and not refuted in the objections of the persons to whom the statement

of preliminary conclusions in the case was sent, are reliably established, unless the Committee body subsequently establishes otherwise during the consideration of the case.

6. Decisions to impose a fine of more than four thousand tax-free minimum incomes are made exclusively by the Committee as the supreme collegial body, the administrative board of the Committee at their meetings.

7. In case the Committee applies the settlement procedure in cases of anticompetitive concerted actions and abuse of monopoly (dominant) position in the market in accordance with Article 46¹ of the Law, exemption from liability of participants in anticompetitive concerted actions in accordance with Article 52¹ of the Law, a fine shall be imposed in the amount that takes into account such application.

8. The rationale for calculating the amount of the fine shall be specified in the narrative and motivational part of the case decision, and the amount of the fine for the violation imposed on the defendant shall be specified in the operative part of such decision.

III. Stages of determining the amount of the fine

The amount of the fine is determined in the following stages:

determining the basic amount of the fine;

adjusting the amount of the fine given the circumstances that are taken into account when determining the amount of the fine and increase or decrease the amount of the fine compared to the basic amount of the fine;

determining the maximum amount of the fine.

IV. Determination of the basic amount of the fine

1. The basic amount of the fine is determined taking into account:

1) the need to seize the income (revenue) received as a result of the violation (if available and can be calculated in monetary terms);

2) the deterrent effect.

2. In order to ensure that the circumstances that are taken into account when determining the amount of the fine and increase it compared to the basic amount can be addressed, the basic amount of the fine should not exceed two-thirds of the maximum amount of the fine.

3. If the violation has led or may lead to the prevention, elimination, restriction of competition, or infringement of the interests of other undertakings or consumers not only in the market where the defendant's actions (inaction) took place, but also in another related market, the income (revenue) related to the violation is determined as the amount of the defendant's income (revenue) from the sale of products (goods, works, services) in the market where the violation occurred and the defendant's income (revenue) from the sale of products (goods, works, services) in the market where the violation resulted in the prevention, elimination, restriction of competition or infringement of the interests of undertakings or consumers.

4. Determination of the basic amount of the fine for violations in the form of anticompetitive concerted actions of undertakings and abuse of monopoly (dominant) position:

1) for committing violations under clauses 1, 2 of Article 50 of the Law (except for violations specified in sub-clause 2 of this clause), the basic amount of the fine is set at up to 30 percent of the income (revenue) related to the violation, taking into account the degree of negative impact on competition and/or on the interests of undertakings or consumers, which is established in each specific case of violation, taking into account the circumstances of the case. The most

negative impact on competition, which leads to the largest share of income (revenue) related to the violation, is created by concerted actions between competitors, as provided for in clauses 1, 2 and 3 of part 2 of Article 6 of the Law;

2) for committing a violation of the legislation on protection of economic competition provided for in clause 1 of Article 50 and clause 4 of part 2 of Article 6 of the Law in the form of anticompetitive concerted actions related to the distortion of the results of tenders, auctions, competitions, bidding, the basic amount of the fine shall be set at up to 30 percent of the amount of the contract concluded on the basis of the results of the tender, auction, competition, bidding, taking into account the degree of negative impact on competition, the interests of the customer, which is established in each specific case of the violation, taking into account the circumstances of the case, and in case of recognition of the tender, auction, competition, bidding as invalid - in the amount of up to 30 percent of the expected value of the tender, competition, bidding or the initial selling price of the lot during the auction, taking into account the degree of negative impact on competition, the interests of the customer, which is established in each specific case of violation taking into account the circumstances of the case.

5. In the event of a violation in the form of anticompetitive concerted actions of undertakings or abuse of monopoly (dominant) position in the market, which relate to restriction of production, markets of goods, full or partial refusal to sell or purchase products (goods, works, services) in the absence of alternative sources of sale or purchase, the amount of income (revenue) related to the violation is determined as the amount of income (revenue) that the defendant would have received for the period during which the violation lasted if such violation had not occurred.

6. In order to ensure a deterrent effect, the basic amount of the fine determined in accordance with sub-clauses 1 or 2 of clause 4 of this section shall be increased:

1) for committing a violation under clause 1 of Article 50 and clauses 1–4 of part 2 of Article 6 of the Law, by the amount of 15 to 25 percent of the basic fine;

2) for committing a violation under clause 1 of Article 50 and part one or clauses 5–8 of part 2 of Article 6, clause 2 of Article 50, and parts 1 and 2 of Article 13 of the Law — by the amount equal to the product of the basic amount of the fine and the Cde coefficient, which is:

$Cde = DR_{nbu} / 100$, where

DR_{nbu} — the discount rate of the National Bank of Ukraine on the day of the decision on the violation case.

If the discount rate of the National Bank of Ukraine on the day preceding the day of the decision on the violation case is more than 25 percent, the basic amount of the fine in all cases shall be increased by the amount calculated in accordance with paragraphs one through three of this sub-clause.

7. Determination of the basic amount of the fine for violations provided for in clauses 5, 10, 11, 12, 19 of Article 50 of the Law:

1) for committing a violation provided for in clauses 5, 10–12, 19 of Article 50 of the Law, if it led to monopolization of commodity markets or significant restriction of competition therein, the basic amount of the fine is set at up to 30 percent of the income (revenue) from the sale of products (goods, works, services) in the markets where the relevant concentration, concerted actions took place, taking into account the circumstances of the case in each particular case of violation, for the year preceding the year of imposition of the fine, or, if in the year preceding the imposition of the fine the defendant did not operate in the market where the concentration (concerted actions) took place, for the year in which the fine is imposed, subject to the provisions of clause 2 of this section;

2) for committing a violation provided for in clauses 5, 10–12, 19 of Article 50 of the Law, if it did not lead to monopolization of commodity markets or significant restriction of competition on them, the basic amount of the fine is set at up to 15 percent of the income (revenue) from the sale of products

(goods, works, services) in the markets in which the relevant concerted actions, concentration of undertakings took place, taking into account the circumstances of the case in each specific case of violation, for the year preceding the year of imposition of the fine, or, if in the year preceding the imposition of the fine the defendant did not operate in the market in which the concentration (concerted actions) took place, for the year in which the fine is imposed, subject to the provisions of clause 2 of this section.

For the violations referred to in the first paragraph of this sub-clause, if only one participant in the concentration (concerted actions) operates in Ukraine or if the participants in the concentration operate in different and unrelated markets, the basic amount of the fine shall be set within the limits specified in the third paragraph of part two of Article 52 of the Law, taking into account the circumstances of the case established in each specific case of violation and the provisions of clause 2 of this section.

8. For committing a violation provided for in clauses 13–15 of Article 50 of the Law, the basic amount of the fine shall be determined within the limits set forth in clauses two and five of Article 52 of the Law, depending on the degree of negative impact on the ability of the Committee to perform the tasks set forth in the legislation on protection of economic competition, which shall be determined in each specific case of violation, taking into account the circumstances of the case and the provisions of clause 2 of this section.

9. Determination of the basic amount of fines for other violations of the legislation on protection of economic competition provided for in Article 50 of the Law:

1) for committing a violation under clauses 8, 9 of Article 50 of the Law, the basic amount of the fine shall be determined within the limits set forth in parts two and five of Article 52 of the Law, depending on the degree of negative impact on competition, interests of other undertakings or consumers, which shall be determined in each specific case of violation, taking into account the circumstances of the case and the provisions of clause 2 of this section;

2) for committing a violation provided for in clauses 16, 17, 21 of Article 50 of the Law, the basic amount of the fine shall be determined within the limits set forth in clauses two and five of Article 52 of the Law, depending on the degree of negative impact on the ability of the Committee to perform the tasks set forth in the legislation on protection of economic competition, which shall be determined in each specific case of violation, taking into account the circumstances of the case and the provisions of clause 2 of this section;

3) for committing the violation provided for in clause 18 of Article 50 of the Law, the basic amount of the fine shall be determined within the limits established by parts two and five of Article 52 of the Law, depending on the degree of negative impact on the interests of undertakings in respect of which the restrictions were applied, the degree of negative impact on the ability of the Committee to perform the tasks defined by the legislation on protection of economic competition, which is established in each specific case of violation, taking into account the circumstances of the case and the provisions of clause 2 of this section.

10. For committing a violation provided for in clause 4 of Article 50 of the Law, the basic amount of the fine shall be determined in the same manner as the basic amount of the fine for the violation in respect of which a decision was made, a previous decision of the Committee's bodies that was not implemented or was not fully implemented.

11. Determination of the basic amount of the fine for violations under the Law of Ukraine "On Protection against Unfair Competition":

1) for committing a violation under Articles 1, 4–19 of the Law of Ukraine "On Protection against Unfair Competition", if it is possible to determine the amount of income (revenue) related to the violation, the basic amount of the fine shall be determined in the amount of up to 15 percent of such income (revenue) depending on the degree of negative impact on competition, which is determined in each specific case of the violation, taking into account the circumstances of the case and the provisions of clause 2 of this section;

2) for committing a violation provided for in Articles 1, 4–19 of the Law of Ukraine "On Protection against Unfair Competition", if the amount of income (revenue) related to the violation cannot be established, the basic amount of the fine shall be determined within the limits established by parts one and two of Article 21 of the Law of Ukraine "On Protection against Unfair Competition", depending on the degree of negative impact on competition, which is determined in each specific case of violation, taking into account the circumstances of the case, and the provisions of clause 2 of this section.

12. If the violation is not terminated after the date of the statement of preliminary conclusions by the employees of the Committee, its territorial branches that collect and analyze evidence in the case, the amount of income (revenue) related to the violation, which is taken into account when determining the basic amount of the fine in accordance with sub-clause 1 of clause 4, clause 5 and sub-clause 1 of clause 11 of this section, shall increase by the amount of DS equal to:

$DS = I_{vr} / T_1 \times T_2$, where:

DS — the amount of increase in the basic amount of the fine;

I_{vr} — the amount of income (revenue) related to the violation;

T_1 — the period during which the violation lasted, in days;

T_2 — the number of days from the date of the statement of preliminary conclusions prepared by the employees of the Committee, its territorial branches that collect and analyze evidence in the case, until the day the violation is terminated, or, if the violation is not terminated on the day the decision of the Committee's body to impose a fine is made, until the day preceding the day the decision of the Committee's body to impose a fine is made, inclusive.

V. Adjustment of the amount of the fine given the circumstances that are taken into account when determining the amount of the fine and increase or decrease the amount of the fine compared to the basic amount of the fine

1. If there are circumstances that are taken into account when determining the amount of the fine, the basic amount of the fine is increased or decreased taking into account these circumstances.

In the absence of circumstances that are taken into account when determining the amount of the fine and increase or decrease it compared to the basic amount, the amount of the fine is equal to the basic amount of the fine.

2. The basic amount of the fine is increased if the following circumstances exist:

1) the defendant initiated and/or coordinated the anticompetitive concerted actions that were found to be a violation;

2) violation provided for in clauses 1, 2, 4, 8, 9 of Article 50 and defined in Articles 6, 13, 18–20 of the Law, Articles 1, 4–19 of the Law of Ukraine "On Protection against Unfair Competition" covered more than two regions of Ukraine (including parts of these regions);

3) as a result of the violation provided for in clauses 5, 10–12, 19 of Article 50 of the Law, monopolization or significant restriction of competition in commodity markets occurred in the territory covering more than two regions of Ukraine (including parts of these regions);

4) for defendant's repeated commission of a violation provided for in clauses 1, 2, 4, 5, 8–19, 21 of Article 50 of the Law, Articles 1, 4–19 of the Law of Ukraine "On Protection against Unfair Competition" with the same qualification (Article of the Law, its part, clause/paragraph) within the period specified in part one of Article 42 of the Law or Article 28¹ of the Law of Ukraine "On Protection against

unfair competition", taking into account the circumstances of the case, which are established in each specific case and specified in the decision of the Committee's body in the case.

3. In cases where circumstances are taken into account when determining the amount of the fine and increase its amount compared to the basic amount of the fine specified in sub-clauses 1–3 of clause 2 of this section, the amount of the fine may not increase by more than 1.5 times compared to the basic amount of the fine calculated in accordance with clauses 4, 5, 7–11 of Section IV of this Procedure, taking into account the circumstances of the case, which are established in each case and specified in the decision of the Committee's body in the case.

In cases where the circumstances taken into account when determining the amount of the fine are addressed and increase its amount compared to the basic amount of the fine specified in sub-clause 4 of clause 2 of this section, the basic amount of the fine shall be increased from 0.01 to 2 times.

4. In order to ensure a proper deterrent effect, given the circumstances that are taken into account when determining the amount of the fine, the amount of the fine calculated in accordance with the provisions of Section IV and clause 1 of this section may be increased within the limits specified in parts two and five of Article 52 of the Law, parts one and two of Article 21 of the Law of Ukraine "On Protection against Unfair Competition".

5. The increase in the amount of the fine specified in clause 4 of this section may be applied if:

1) the benefit received as a result of the violation is established, the amount of which, in monetary terms, exceeds the amount of the fine calculated in accordance with the provisions of Section IV and clause 1 of this section, and/or

2) the violations led or could have led to a significant restriction, prevention, or elimination of competition, significant losses of other undertakings, consumers in markets whose functioning is critical or particularly important for defense, state security, including economic, food, energy, health, and welfare of the population, and/or

3) the amount of the defendant's income (revenue) related to the violation does not exceed 1 percent of its total income (revenue) for the year preceding the year in which the fine is imposed, and/or

4) the existence of illegally obtained profits exceeding ten percent of the undertaking's income (revenue) from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed (not exceeding three times the amount of illegally obtained profits) is established.

6. The basic amount of the fine is reduced if the following circumstances exist:

1) cessation of actions (inaction) by the defendant before the date of the statement of preliminary conclusions prepared by the Committee or its territorial branches;

2) compensation for the damage caused by the violation or elimination of the consequences of the violation in another way until the day the Committee body makes a decision on the violation;

3) failure of the participant to comply with the terms of the concerted actions and evidence that the undertaking competed in the market in the period during which the violation lasted;

4) cooperation with the Committee's bodies during the proceedings, which helped to clarify the circumstances of the case, in particular, to identify facts, information that the Committee's bodies did not request, or to identify other signs of violations of the legislation on protection of economic competition, including those committed by other persons;

5) committing a violation as a result of inducement to violate the legislation on protection of economic competition by a governmental body, local self-government body, administrative and economic management and control body;

6) applying for a concentration permit by an undertaking prior to the commencement of a violation case in case of a violation under clause 12 of Article 50 of the Law;

7) the defendant has taken actions aimed at mitigating the negative consequences of the violation for economic competition, the interests of undertakings, and consumers.

7. The amount of the fine may be reduced compared to the amount of the fine calculated in accordance with the provisions of Section IV and clause 1 of this section, in cases of:

force majeure (circumstances of insuperable force), including in connection with the introduction of martial law or a state of emergency, confirmed in accordance with the procedure established by law;

evidence that the imposition of the fine in the proposed amount will lead to its bankruptcy or subsequent liquidation, or to the termination of its sale (purchase) of goods on the market.

The justification for such a reduction must be provided in the decision of the Committee's body imposing the fine.

VI. Determining the maximum amount of the fine

1. The amount of income (revenue) of the undertaking from the sale of products (goods, works, services) for the last reporting year preceding the year in which the fine is imposed, according to which the maximum amount of the fine is determined, is determined:

1) on the basis of documented information provided by the defendant;

2) on the basis of the information specified in the form N 2 "Statement of financial results (Statement of comprehensive income)", provided in Annex 1 to the National Accounting Regulation (Standard) 1 "General requirements for financial reporting" approved by the Order of the Ministry of Finance of Ukraine dated February 07, 2013, No. 73, registered with the Ministry of Justice of Ukraine on February 28, 2013, under No. 336/22868, or on the basis of financial statements and consolidated financial statements prepared in accordance with the taxonomy of financial statements under international financial reporting standards for undertakings that apply international financial reporting standards for accounting.

In the event of discrepancies between the data specified in sub-clauses 1 and 2 of this clause, the information specified in sub-clause 2 of this clause shall be taken into account.

2. The amount of the fine imposed for the violation, given the circumstances taken into account when determining the amount of the fine, may not exceed the maximum amount of the fine provided for in parts two and five of Article 52 of the Law and parts one and two of Article 21 of the Law of Ukraine "On Protection against Unfair Competition".

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