

Hindering inspections and searches. Competition law. A record fine of PLN 130 million imposed by The President of the UOKiK for Competition and Consumer Protection.

February 24, 2011, the President of the Office for Competition and Consumer Protection (hereinafter: UOKiK) imposed on Polkomtel S.A., seated in Warsaw, a fine of more than PLN 130 million (equivalent of EUR 33 million) for failing to cooperate in the inspection conducted by the UOKiK. This information was made public on March 15, 2011. The President of UOKiK invoked Article 106, part 2, point 3 of the Act of 16 February, 2007 on competition and consumer protection which states, that the President of UOKiK may, by decision, impose a fine equivalent of EUR 50 million on an entrepreneur, if he, even unintentionally, does not cooperate in the course of the inspection performed under relevant regulations.

European trends

It is yet another such a high fine within three months, imposed exclusively for procedural violations, that becomes part of European trends. In 2008, the European Commission imposed a fine of EUR 38 million on E.ON Energia for breaking the door seals which had been fixed by the officials of The European Commission as part of inspections and searches aimed at gathering evidence for the existence of a cartel on the market of electric energy in Germany. E.ON appealed to the court and the case is pending. In other cases, the European Commission is inclined to take into account procedural violations while calculating the final fine in the final decision. That was the case of a price cartel of videotapes producers in which the European Commission increased the fine for Sony by 30% for impeding the proceedings by refusing to answer verbally asked questions in the course of the inspection and for destroying documents.

Legal basis for inspection with search

Pursuant to the Act on competition and consumer protection, the President of UOKiK may, in the course of the proceedings on the suspicion of the existence of restrictive practices, perform an inspection with search at an entrepreneur's. In the case of such an inspection, an entrepreneur is obliged to act in a specific manner, allowing holders of relevant authorization and consent of UOKiK, in the form of a decision of the Court of Competition and Consumer Protection, to perform the search. In particular, an entrepreneur is obliged to allow the inspectors to access the premises and documents, including computers, and to provide explanations etc. UOKiK normally initiates such inspections without prior notice, in several places simultaneously, in order to ensure as much evidence as possible.

The case of Polkomtel S.A.

That was the case of Polkomtel S.A. The inspectors, accompanied by police officers, appeared simultaneously on 2 December 2009 in several companies suspected of having concluded agreements restricting competition. The decision of the President of UOKiK shows that the inspectors were prevented from reaching persons authorized to represent the company. Over an hour passed from their arrival, until the meeting with the President of the Board, who was present in the same building at all times, took place. Additionally, Polkomtel did not hand over to the officials a hard drive with copies of email boxes of employees who, according to the suspicions of The President of UOKiK, could have concluded an unlawful agreement. This hard drive, the property of UKOiK, has not been delivered to date despite repeated attempts to recover it by UOKiK. The company argues that the hard drive contained documents beyond the scope of the inspection, including private data of the employees and trade secrets of the company. Moreover, the President of UOKiK accuses the company that it provided UOKiK only with selected parts of the requested documentation. It should be noted that during the inspection the company filed a complaint against the activities of the inspectors. The complaint was dismissed by the Court of Competition and Consumer Protection.

The case of PTC

Just a few months earlier, in November 2010, the President of UOKiK imposed an equally high fine of over PLN 123 million (equivalent of EUR 30 million) on Polkomtel Sp. Z o.o. which was inspected and searched by UKOiK in the course of the same procedure as in the case of Polkomtel. The President of UKOiK accused PTC that the company prevented the inspectors from commencing immediate inspection with search by delaying contact with the person authorized to represent the company and by preventing the inspectors from entering the office of the company despite the fact that the inspectors presented relevant documents authorizing them to carry out the inspection. The decision of UOKiK shows that the inspectors were stopped at the reception desk for over an hour. Afterwards, contact with the persons authorized to represent the company was still delayed. Both the receptionist and security staff of the building did not want to admit the inspectors and refused to acknowledge the documents despite the fact that the inspectors had informed them about the consequences arising thereof. Subsequently, the employees of the Legal Department of ERA, after examining the documents, delayed the decision to admit the inspectors to the building as well. In addition, they did not follow other instructions of the inspectors, e.g. the request not to make any calls.

Consequences for the entrepreneur

The decision to impose the fine is not final. Entrepreneurs may appeal to the Court for Competition and Consumer Protection, which the fined companies will certainly exercise. It is worthy of remembering that the obligation to pay the fine arises within 14 days from the day when the decision of the President of UOKiK becomes valid. The lodging of an appeal suspends the execution of this decision, at least until the case is settled by SOKiK (the Court for Competition and Consumer Protection) or even the Court of Appeal. However, the outcome of the companies' struggles is unknown yet, since these are the first cases of this kind in the history of Polish competition law. The issue concerning fine imposition for hindering the inspection will be pending regardless of the antitrust proceedings, for the purpose of which the inspection was carried out.

Conclusions

Given the above decisions of the President of UOKiK, it might be concluded that a failure to cooperate with UOKiK during inspections may be very expensive for a company. Furthermore, appropriate training of employees within the scope of competition law, including the issues of powers of inspectors and obligations of an inspected entrepreneur, is not limited to the Board and the executives. It also concerns the so called employees of first contact, such as receptionist and security guards, which one of the companies painfully learnt about. In order to reduce the risk of fines in antitrust proceedings, it is recommended to a so called "compliance" program which consists of regular staff trainings, a manual and mock inspections. Should you be interested in implementing the "compliance" program in your company, do not hesitate to contact us.

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