



Bundeskartellamt

## **Guidelines for the setting of fines in cartel administrative offence proceedings**

25 June 2013



**Bundeskartellamt**  
open markets | fair competition

## **I. Principles**

- (1) In exercising its discretionary powers and in accordance with Section 81 (7) of the German Act against Restraints of Competition (GWB), the Bundeskartellamt lays down the following guidelines by which it will proceed against companies and associations of companies in assessing the punitive element of fines imposed for so-called serious cartel administrative offences (administrative offences under Section 81 (1), (2) nos. 1, 2 lit. a) and (3) GWB) except for offences in the area of merger control. The Bundeskartellamt's current guidelines on the setting of fines (Notice no. 38/2006 of 15 September 2006 on the imposition of fines under Section 81 (4) sentence 2 GWB against undertakings and associations of undertakings) are replaced by the following guidelines.
- (2) In future the Bundeskartellamt will set its fines based on the interpretation of Section 81 (4) sentence 2 GWB as a turnover-based upper limit (cf. see Federal Court of Justice, decision of 26.02.2013, KRB 20/12, WuW/E DE-R 3861, para. 55). Each offence has to be assessed and classified within this framework of fines. In this way the abstract threat of a fine for a company under law is substantiated on the basis of the legal criteria for setting a fine. According to Section 81 (4) sentence 6 GWB and Section 17 (3) Administrative Offences Act (OWiG) the gravity of the offence and its duration form the basis for the assessment of the fine as well as the significance of the offence and charge faced by the offender. The offender's financial situation is also taken into account. In setting the fine, the principle of proportionality is to be observed.
- (3) The upper limit is based on the total turnover achieved by the company concerned in the business year preceding the authority's decision. The company can consist of several legal persons (economic unit). The level of the upper limit can therefore vary depending on the company concerned. This spread of the statutory framework is necessary in order to adequately punish any company, be it small, medium-sized or large in consideration of its sensitivity to punishment. The Bundeskartellamt will therefore take particular account of the size of the company in an individual assessment. As a result the fines can vary significantly for the same offence simply due to this circumstance.
- (4) As well as taking account of the sensitivity of the company to punishment, the punishment must be adequate to further circumstances of the offence and offender and be justifiable in terms of special and general deterrence effect. In particular, the fine should not be disproportionate to the possibilities of the company to gain competitive advantages from the offence and cause disadvantages for third parties or for the economy as a whole (subsequently referred to as: gain and harm potential). Conclusions about any gain and harm potential can be drawn from the domestic turnover achieved by the company from the sale of the products or services connected with the infringement over the duration of the violation (subsequently referred to as: turnover achieved from the infringement). In cases in which the turnover achieved from the infringement accounts for or exceeds a considerable part of a company's total turnover in the business year before the authority's decision, the legal framework of fines sets an upper limit for an appropriate sanction, in consideration of the gain and harm potential. In other cases in which the turnover achieved from the infringement and the resulting gain and harm potential only account for a modest share of a company's total annual turnover, this is to be taken into consideration when setting the fine to maintain the principle of adequate punishment. The guidelines generally define how the Bundeskartellamt will consider the turnover achieved from the infringement and the gain and harm potential on the one hand and the total turnover on the other.

- (5) In combination with the company's total turnover, the turnover achieved from the infringement is an appropriate starting point for determining a penalty level above which a fine, even in the worst possible constellation, would usually not be appropriate for the specific case and the sensitivity of the company to punishment. The turnover achieved from the infringement is an adequate indication of the importance of the market affected, the company's position on the market as well as the gain and harm potential derived from the turnover, whereas the total turnover represents the sensitivity of the offender to punishment. Both turnover figures are relatively easy to establish, which is important for the transparency and predictability of the threat of a fine (cf. Federal Court of Justice, loc. cit., para. 62, with regard to the total turnover).
- (6) On the basis of a turnover-based framework of fines a calculation of the actual effects of the offence on the market is not necessary (Düsseldorf Higher Regional Court, decision of 22.08.2012, V – 4 Kart 5 + 6/11 OWi., WuW/E DE-R 3662, 3670). In particular, a fine which is proportional to the gravity of the case is not to be quantified mainly in terms of its effects on the market. This would be incompatible with the general pre-assessment determined by the statutory framework of fines which no longer focuses on the excess profit generated by the cartel and where the upper limit can even be lower than the excess profit.
- (7) In consideration of the gain and harm potential and the sensitivity of the company to punishment based on its total turnover, the scope for setting a fine can in a specific case be even narrower than the legal framework. If this is the case, the fine is determined on the basis of the other legal criteria for setting a fine on appraisal of all aggravating and mitigating factors within this closer scope for assessment, otherwise within the legal framework. All the relevant circumstances relating to the specific case are to be considered in an overall appraisal. Any positive post-offence conduct in the form of a leniency application or a settlement will still be considered in the appraisal. On the basis of this overall appraisal the Bundeskartellamt will set the fine it considers adequate.

## II. Precise setting of fines

### 1. Definition of the statutory framework of fines

- (8) The lower limit of the statutory framework amounts to five euros (Section 17 (1) OWiG). Under Section 81 (4) sentence 2 GWB, the upper limit of the framework of fines for serious intentional cartel administrative offences to be imposed on a company or an association of companies amounts to 10 % of the total turnover achieved in the business year preceding the authority's decision. For negligent offences the maximum fine amounts to 5 % of the total turnover achieved (Section 17 (2) OWiG).

### 2. Setting of fine within the statutory framework of fines

- (9) The scope for setting a fine in a specific case is determined with due consideration to the gain and harm potential on the one hand and the total turnover of the company on the other.
- (10) The Bundeskartellamt assumes a gain and harm potential of 10% of the company's turnover achieved from the infringement during the infringement period.
- (11) The turnover achieved from the infringement is the domestic turnover achieved by the company from the sale of the products or services connected with the infringement over the duration of the violation. It can be estimated according to the general rules. If due to the nature of the infringement or an unforeseen course of development the expected turnover was not achieved, the turnover the company would probably have achieved without the infringement or the unforeseen course of development will be used to determine the gain and harm potential.
- (12) In cases in which the infringement lasted less than 12 months, the Bundeskartellamt bases its calculation on a period of 12 months irrespective of the actual duration of the infringement. The last 12 months before the infringement ceased are relevant in this respect.
- (13) A multiplication factor is applied to the established gain and harm potential to account for the size of the respective company:

Factor	2-3	3-4	4-5	5-6	>6
<b>Total turnover of the company pursuant to Section 81 (4) sentence 2 GWB</b>	≤€100 million	€100 million up to €1 billion	€1 billion up to €10 billion	€10 billion up to €100 billion	>€100 billion.

- (14) In cases in which the value calculated under para. 13 is below the legal upper limit, subject to para. 15, this value will represent the upper limit for the further assessment of the fine. In all other cases the scope for setting fines will not be limited within the statutory framework for setting fines.
- (15) Where the value determined under para. 13 is obviously too low in a specific case on account of a significantly higher gain and harm potential, this value can by exception be exceeded in order to set an adequate fine.

- (16) Within the scope of setting a fine based on the statutory framework of fines in consideration of paras. 9-15, the offence is assessed according to the legal criteria for setting a fine (Section 81 (4) sentence 6 GWB and Section 17 (3) OWiG) based on an overall appraisal of all aggravating and mitigating factors.
- Offence-related criteria are, for example: the type and duration of the infringement, its qualitative effects (e.g. size of the geographic markets affected by the infringement, significance of the companies involved in the infringement on the markets affected), the importance of the markets (e.g. type of product affected by the infringement) and the degree of organisation among the parties involved. In the case of price-fixing and quota cartels, territorial and customer agreements and other similarly serious horizontal competition restraints, the fine will usually be set in the upper range.
  - Offender-related criteria are, for example, the role of the company within the cartel, its position on the market affected, specifics concerning the degree of value creation, the extent of intention/negligence and previous infringements. The Bundeskartellamt also takes the company's financial capacity into account.
- (17) Apart from punishing the infringement, the Bundeskartellamt reserves the right to skim off the economic benefit either in the fine proceedings or in separate proceedings (Section 32 GWB, Section 34 GWB).
- (18) A positive post-offence conduct in the form of a leniency application is considered in a separate stage. Finally, reductions may be granted if a settlement agreement was reached.

Bonn, 25 June 2013

Mundt

President of the Bundeskartellamt



## Explanatory notes on the guidelines for the setting of fines in cartel administrative offence proceedings

25 June 2013

### 1. General remarks on principles

**Note 1:** In its decision of 26 February 2013 (KRB 20/12, WuW/E DE-R 3861) the Federal Court of Justice confirmed the constitutionality of the provision of Section 81 (4) sentence 2 GWB introduced in the 7th amendment of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) in the version of 7 July 2005, published on 12 July 2005 (Federal Law Gazette BGBl. I p. 1954), as the provision neither violates the ban on retroactivity nor the principle of legal certainty.

**Note 2:** In its decision the Federal Court of Justice interprets the provision as providing an upper limit within a framework of fines. This differs from the capping threshold under European competition law (Art. 23 (2) sentence 2 Regulation (EC) no. 1/2003). In the Bundeskartellamt's Guidelines on the setting of fines of 15 September 2006 (paras. 18ff.), which are no longer applicable, the provision had been interpreted as such a threshold.

**Note 3 (on para. 5 of the guidelines):** In the setting of fines, an isolated consideration of the gain and harm potential deduced from the turnover achieved from the infringement would not be compatible with the general pre-assessment according to the statutory framework of fines, particularly as the statutory upper limit can be lower than the gain and harm potential. In combination with the company's total turnover, however, the turnover achieved from the infringement is an appropriate starting point.

### 2. Re: Setting of fine

**Re: para 9:** *"The scope for setting a fine in a specific case is determined with due consideration to the gain and harm potential on the one hand and the total turnover of the company on the other."*

**Note 1:** The gain and harm potential will be multiplied by a factor that depends on the total turnover in order to assess in each individual case which range of fine would generally be inappropriate in a specific case and for a specific company, even in the worst possible constellation, or whether the statutory framework already provides for a sufficient limit in this respect (cf. also paras 4ff. of the guidelines).

**Re: para 10:** *"The Bundeskartellamt assumes a gain and harm potential of 10% of the company's turnover achieved from the infringement during the infringement period."*

**Note 1:** In individual cases the gain and harm achieved from the infringement can be higher or lower, in particular since the cartel infringements covered by these principles are very diverse. However, on the basis of a framework of fines based on total turnover, investigations are no longer required on this or on the excess profit which were previously decisive for determining the range of fines and which were established by comparing the cartel prices with the hypothetical competitive price (Düsseldorf Higher Regional Court, decision of 22.08.2012, V - 4 Kart 5 + 6/11 OWi u.a., WuW/E DE-R 3662, 3670, cp. also para. 6 of the guidelines).

**Note 2:** The Bundeskartellamt considers a general gain and harm potential of 10% of the turnover achieved from an infringement to be an adequate starting point for setting fines for all cartel law infringements covered. Where, due to an obviously significantly higher gain and harm potential, the general calculation of 10% of the turnover achieved from the infringement is too low in a specific case, the scope for assessment can by exception be exceeded (s. para 15 of the guidelines).

**Note 3:** Specificities of the individual case can be considered in an overall appraisal of all the relevant circumstances (see para 16 of the guidelines).

**Note 4:** For the calculation of the turnover achieved from the infringement the Bundeskartellamt applies Section 38 (1) GWB subject to the proviso that turnover revenues achieved from the supply of goods and services between affiliated undertakings are considered as turnover achieved from the infringement if they are connected with the infringement. The special provision for credit institutions and insurance companies (Section 38 (4) GWB) applies.

**Re: para 11 sentence 3:** *"If due to the nature of the infringement or an unforeseen course of development the expected turnover was not achieved, the turnover the company would probably have achieved without the infringement or the unforeseen course of development will be used to determine the gain and harm potential."*

**Example 1:** Due to the type of infringement a company might not achieve any turnover from a market-sharing cartel.

**Example 2:** No turnover is achieved from the infringement due to an unforeseen course of development if, for example in collusive tendering, a third party is awarded the contract or the tendering process is not carried out.

**Re: para 13:** *"A multiplication factor is applied to the established gain and harm potential to account for the size of the respective company:*

<b>Factor</b>	<b>2-3</b>	<b>3-4</b>	<b>4-5</b>	<b>5-6</b>	<b>&gt;6</b>
<b>Total turnover of the company pursuant to Section 81 (4) sentence 2 GWB</b>	≤ € 100 million	€ 100 million up to € 1 billion	€ 1 billion up to 10 billion	€ 10 billion up to € 100 billion	> € 100 billion"

**Note 1:** Where the calculation is based on the turnover achieved from the infringement and the total turnover of a company, the purpose of the calculation is not to set a specific fine, but to determine a level above which a fine would generally no longer be appropriate, even in the worst possible constellation based on the specific case and the sensitivity of this specific company to punishment.

**Note 2:** A fine which exceeds the gain and harm potential several times over can be appropriate for deterrent purposes. The larger the company is, the less sensitive it will be to punishment. Therefore, the limit above which the fine would no longer be appropriate will be higher, even in the worst possible constellation of a specific case.

**Note 3:** The specific factor within the respective interval is determined by the total turnover.

**Note 4:** The turnover referred to is the total turnover achieved by a company in the business year preceding the decision of the authority (Section 81 (4) sentence 2 GWB). The point of reference is the economic unit which can consist of several legal persons or associations of persons and, in some cases, may be natural persons.

**Re: para 14:** *"In cases in which the value calculated under para 13 is below the legal upper limit, subject to para 15, this value will represent the upper limit for the further assessment of the fine. In all other cases the scope for setting fines will not be limited within the statutory framework for setting fines"*

**Example 1 (re sentence 1):** If, in the business year preceding the decision of the authority, a company achieved a total turnover amounting to € 10 billion (i.e. factor 5 according to para 13), the statutory upper limit in the case of an intentional cartel infringement is € 1 billion. If the turnover achieved by the company from the infringement amounts to € 40 million (e.g. € 10 million each year over four years), the Bundeskartellamt generally assumes that the gain and harm potential amounts to € 4 million. According to paras 9-13, a fine exceeding € 20 million (€ 4 million [= 10% of € 40 million] x 5 [factor according to para 13]) would generally no longer be appropriate in the specific case.

**Example 2 (re sentence 2):** If, in the business year preceding the decision of the authority, a company achieved a total turnover amounting to € 100 million (i.e. factor 3 according to para 13), the statutory upper limit in the case of an intentional cartel infringement is € 10 million. If the turnover achieved by the company from the infringement amounts to € 40 million, the Bundeskartellamt generally assumes that the gain and harm potential amounts to € 4 million. According to paras 9-13, a fine exceeding € 12 million (€ 4 million [=10% of € 40 million] x 3 [factor according to para 13]) would no longer be appropriate in the specific case. However,



the statutory upper limit of € 10 million does not reach this amount, which is why, under the aspect of adequate punishment, it is not necessary to limit the scope for setting a fine within the statutory framework of fines.

**Re: para 16 (1):** *"Within the scope of setting a fine based on the statutory framework of fines in consideration of paras 9-15, the offence is assessed according to the legal criteria for setting a fine (Section 81 (4) sentence 6 GWB and Section 17 (3) OWiG) based on an overall appraisal of all aggravating and mitigating factors."*

**Note 1:** It depends on each individual case whether, how and to what extent a specific criterion for setting a fine has an effect on the fine set in an individual case.

**Re: para 17:** *"Apart from punishing the infringement, the Bundeskartellamt reserves the right to skim off the economic benefit either in the fine proceedings or in separate proceedings (Section 32 GWB, Section 34 GWB)."*

**Note 1:** In contrast to the general law on administrative offences, under the law on cartel offences the legal criterion of skimming off economic benefits provided for by Section 17 (4) OWiG is at the discretion of the competition authority (Section 81 (5) GWB).

**Re: para 18:** *"A positive post-offence conduct in the form of a leniency application is considered in a separate stage. Finally, reductions may be granted if a settlement agreement was reached."*

**Note 1:** For the Bundeskartellamt's leniency programme, cf. the authority's Notice no. 9/2006 of 7 March 2006 on the immunity from and reduction of fines in cartel cases which remains applicable.

**Note 2:** For the Bundeskartellamt's guidelines on settlement agreements, cf. the authority's Activity Report 2007/2008, p. 35, and the case summary of 18.12.2009 on the decision in the "Fines proceedings against coffee roasters" (B11-18/08), p. 3f.