



Bundeskartellamt

## **Notice no. 38/2006**

**on the imposition of fines under  
Section 81 (4) sentence 2 of the  
German Act against Restraints of  
Competition (GWB)  
against undertakings and  
associations of undertakings**

**- Guidelines on the setting of fines -**

**of 15 September 2006**

## **I. Scope of application**

1. These guidelines shall apply to the setting of fines under Section 81 (4) Sentence 2 GWB against undertakings and associations of undertakings that have violated any of the provisions of the GWB or the EC Treaty, the violation of which is punishable by a fine. This concerns infringements in the following areas:
  1. Horizontal and vertical competition restraints as well as unilateral anti-competitive behaviour (abusive practices, unfair hindrance, boycott, etc.),<sup>i</sup>
  2. Merger control.<sup>ii</sup>
2. The guidelines shall only apply to the calculation of the punitive element of the fine.

## **II. Exact calculation of fines pursuant to Section 81 (4) sentence 2 GWB**

3. The Bundeskartellamt uses a two-step procedure to calculate the exact fine:
  1. Basic amount
    - a) Horizontal and vertical competition restraints as well as unilateral anti-competitive behaviour (abusive practices, unfair hindrance, boycott, etc.)
    - b) Merger control
  2. Adjustment factors
    - a) Deterrence
    - b) Aggravating circumstances
    - c) Extenuating circumstances

### **1. Basic amount**

#### **a) Horizontal and vertical competition restraints as well as unilateral anti-competitive behaviour (abusive practices, unfair hindrance, boycott, etc.)**

4. The calculation of the basic amount is based on the gravity and duration of the infringement. It may amount to up to 30 per cent of the turnover achieved during and from the infringement (para 5).
5. The turnover achieved from the infringement is the domestic turnover achieved by the undertaking concerned with the products or services connected with the infringement. Where due to the nature of the infringement (e.g. in the case of market-sharing cartels) or an unforeseen course of development (e.g. bid rigging agreements, where only some of the agreed bids have yet been awarded or a third party has been awarded the contract), the undertaking concerned has not achieved the expected turnover, the turnover used for the calculation will be the turnover the undertaking would have achieved in the absence of the infringement or in the absence of the unforeseen course of development with the products or services connected with the infringement.

6. For the calculation of the turnover achieved from the infringement the Bundeskartellamt shall apply Section 38 (1) GWB. Turnover revenues achieved from the supply of goods and services between affiliated undertakings shall be considered as turnover achieved from the infringement where they are in connection with the infringement. The special provision for undertakings from the credit and insurance industry (Section 38 (4) of the GWB) shall apply.
7. The Bundeskartellamt may estimate the turnover achieved from the infringement.
8. As regards the gravity of the infringement the Bundeskartellamt takes into account determining factors such as the nature of the infringement, its effects on the market, the market position of all participating undertakings, and the size and significance of the market affected.
9. In the case of price-fixing and quota cartels, territorial and customer agreements and other severe horizontal competition restraints, the basic amount is generally set in the upper range of the maximum possible basic amount.
10. Where the infringement lasted for a period of less than 12 months the Bundeskartellamt bases its calculation of the basic amount on a period of 12 months irrespective of the actual duration of the infringement. The months relevant for the calculation are the last 12 months before the infringement was terminated.
11. If the infringement is committed negligently the maximum basic amount shall, corresponding to Section 17 (2) of the Administrative Offences Act, be half of the basic amount calculated according to the procedure described under paras 4 to 10.

#### **b) Merger control**

12. The rules explained above shall also apply to the calculation of the basic amount for infringements in the area of merger control. The turnover achieved from the infringement within the meaning of para 5 sentence 1 shall be the domestic turnover achieved by the undertaking in the markets affected by the merger. In the case of horizontal mergers the markets affected are those where there is an increase in market shares due to the merger. In the case of non-horizontal mergers those markets are affected in particular in which the merger results in a strengthening of the competitive position of one of the participating undertakings.
13. In addition to the determining factors mentioned under para 8 the Bundeskartellamt will also take appropriate account of the likelihood of the merger being prohibited if it had been notified.

#### **2. Adjustment factors**

14. In setting its fines the Bundeskartellamt takes adjustment factors into account. Determining factors which have already been taken into account in the calculation of the basic amount will not be considered a second time as adjustment factors.

### **a) Deterrence**

15. For deterrent purposes the basic amount can be raised by up to 100 per cent. The size of the undertaking concerned is particularly decisive for such an increase. When determining the size of the undertaking the Bundeskartellamt takes into account the turnovers of the affiliated undertakings.

### **b) Aggravating circumstances**

16. The following factors can primarily be considered as aggravating circumstances:

- serious forms of deliberate intent and a high degree of negligence;
- repetition of an infringement;
- a particularly active role within the cartel (ringleader or initiator of the cartel or other prominent position within the cartel), a high degree of organisation within the cartel agreement or the threat of retaliatory or coercive measures in connection with the anticompetitive behaviour.

### **c) Extenuating circumstances**

17. The following factors can primarily be considered as extenuating circumstances:

- post-offence conduct (e.g. compensation for third parties' financial losses);
- forced participation or passive role in the infringement;
- approval or furtherance of the infringement by a national or supranational authority or regulations currently in force.

## **III. Capping threshold**

18. If the fine calculated in accordance with paras. 4 to 17 exceeds 10 per cent (or, in the case of an infringement committed negligently, 5 per cent) of the turnover achieved in the previous business year by the undertaking or association of undertakings involved in the infringement, the Bundeskartellamt will reduce the fine in accordance with Section 81 (4) sentence 2 GWB.

19. Where an undertaking is affiliated to another undertaking, the Bundeskartellamt shall calculate the total turnover by taking into account the turnover achieved by the affiliated undertakings.

20. In order to determine the total turnover the Bundeskartellamt shall apply Section 38 (1) GWB. The special provision for undertakings from the credit and insurance industry (Section 38 (4) of the GWB) shall apply as well.

21. The Bundeskartellamt may estimate the total turnover.

## **IV. Skimming off of economic benefit, application of the Leniency Programme, financial capacity**

22. Apart from punishing the infringement the Bundeskartellamt reserves the right to skim off the economic benefit within the meaning of Section 17 (4) of the Administrative Offences Act either in the fine proceedings or in separate proceedings (Section 34 GWB). In the case of infringements terminated by 30 June 2005, under Section 34 GWB of the version applicable until 30 June

2005, the economic benefit can only be skimmed off in fine proceedings. If the Bundeskartellamt skims off the economic benefit in its fine proceedings, the fine can exceed the capping threshold in accordance with Section 17 (4) p.2 of the Administrative Offences Act.

23. If the Leniency Programme is applied in the proceedings, the amount calculated in accordance with paras. 4 to 11 and 14 to 22 will be reduced.
24. The Bundeskartellamt takes into account the undertakings' financial capacity. If an undertaking proves that it is unable to pay the fine in the short or medium term without jeopardizing its existence the Bundeskartellamt can issue a debtor warrant or allow payment of the fine to be deferred. A reduction of the fine will, however, only be considered in exceptional cases if a company proves that, even on a long-term basis, it would be unable to pay the fine without jeopardizing its existence.

Bonn, 15 September 2006

Dr Böge

President of the Bundeskartellamt

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<sup>i</sup> These are administrative offences under Section 81 (1) GWB in conjunction with Articles 81 and 82 EC, Section 81 (2) no. 1 GWB in conjunction with Section 1 GWB, Section 19 (1) GWB, Section 20 (1), also in conjunction with (2) sentence 1 GWB, Section 20 (3) sentence 1, also in conjunction with sentence 2 GWB, Section 20 (4) sentence 1 GWB, Section 20 (6) GWB, Section 21 (3) or (4) GWB, Section 81 (2) no. 2a) GWB in conjunction with Section 30 (3) GWB, Section 32 (1) GWB, Section 32a (1) GWB, Section 32b (1) sentence 1 GWB or Section 60 no. 3 GWB, Section 81 (3) no. 1 GWB in conjunction with Section 21 (1) GWB, Section 81 (3) no. 2 GWB in conjunction with Section 21 (2) GWB, as well as Section 81 (3) no. 3 GWB in conjunction with Section 24 (4) sentence 3 GWB.

<sup>ii</sup> These are administrative offences under Section 81 (2) no. 1 GWB in conjunction with Section 41 (1) sentence 1 GWB, Section 81 (2) no. 2a) GWB in conjunction with Section 41 (4) no. 2, also in conjunction with Section 40 (3a) sentence 2 GWB, also in conjunction with Section 41 (2) sentence 3 GWB, Section 60 no. 1, Section 81 (2) no. 5 GWB in conjunction with Section 40 (3) sentence 1 GWB, as well as Section 81 (3) no. 3 GWB in conjunction with Section 39 (3) sentence 5 GWB.