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**EXPERIENCE WITH DIRECT SETTLEMENTS IN CARTEL CASES**

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## GERMANY

### 1. Regulatory Framework

The Bundeskartellamt is the authority responsible both for prosecuting offences that qualify as administrative offences under the German Act against Restraints of Competition (ARC) and for imposing fines on the offending companies and natural persons. The fining decisions of the Bundeskartellamt can be appealed in court. Any fine imposed by the Bundeskartellamt that is not appealed within the statutory period for appeal takes effect.

The decision of a defendant not to appeal and to let the fine as it is imposed by the Bundeskartellamt take effect may be regarded as a settlement solution, since court proceedings are avoided. However, defendants also have the option of an “early settlement”, before the proceedings of the Bundeskartellamt have been terminated and a fine has been set.

According to the ARC and the relevant guidelines of the Bundeskartellamt on the setting of fines, the conduct of a defendant (a company or a natural person) after the offence and during the period of prosecution can be taken into consideration as an extenuating (fine-reducing) circumstance when determining the fine to be imposed.<sup>1</sup> The willingness of a defendant to conclude a settlement within the proceedings of the Bundeskartellamt can be an extenuating circumstance. Other possible extenuating circumstances are, e.g., compensating parties damaged by the offence before the Bundeskartellamt has reached its decision, or cooperation on the basis of the leniency programme.

### 2. Proceedings

The Bundeskartellamt may offer an early settlement to a defendant at any stage of the proceedings, once it has gained an overall picture of the offence and the relevant evidence.

The proceedings are usually opened by a settlement offer by the Bundeskartellamt to the defendants. If defendants express their interest to settle, individual sessions with the Bundeskartellamt are scheduled. In these sessions, the following usually forms the basis of discussion:

- facts of the case,
- scope of objections and liabilities,
- corresponding evidence,
- resulting conclusions and
- circumstances to be taken into account for determining the fine.

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<sup>1</sup> See Notice no. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the German Act against Restraints of Competition against undertakings and associations of undertakings - Guidelines on the setting of fines - of 15 September 2006, batch no. 17, published at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf>.

The defendants have the opportunity to express their views on any of these or other factors they deem relevant. At the end of the session, a short deadline is set within which it is to be decided whether a settlement can be agreed or not. If the defendant wishes to reach an early settlement this will usually necessitate a guilty plea. The Bundeskartellamt will place its proceedings on a “fast track” and the settling defendant will receive, depending on the progress of the proceedings, a short statement of objections and within a short time frame a fining decision.

The reduction of the fine in a settlement must not jeopardize the attractiveness of the leniency programme.

During the “fast track” proceedings and as long as the decision has not become legally binding, the defendant has the option to terminate the settlement proceedings. There is no obligation on the defendant to abandon the right to appeal; in fact, this is not an option as an abandonment is not legally possible in Germany. Where the settlement proceedings are terminated, the case reverts back from “fast track” to the ordinary procedure. The latest possibility for terminating settlement proceedings is the deadline of the period for appeal against the imposed fine. In this case the Bundeskartellamt can amend the fine and come to a new decision.

### **3. Experience**

The likeliness of a successful settlement depends very much on the circumstances of each single case. A key criterion is, of course, the quality of evidence (i.e. relevant for the chances of an appeal). Beyond this there are some general, not case-specific as well as case-specific factors that affect the likeliness of a settlement.

In the Bundeskartellamt’s practice of fine setting, the following not case-specific factors have been identified:

- Legal framework (i.e. likeliness of high fines that “hurt”/low fines),
- Fine-setting practice of the Bundeskartellamt (i.e. high/low fines in recent cases),
- Fine-setting practice of the courts (i.e. increase/reduction of fines in recent cases).

There are also circumstances which are related to the individual case. Some of these, in the experience of the Bundeskartellamt, are:

- Number of parties involved (i.e. few/many),
- Structure of the markets (i.e. single market/network of regional markets),
- Structure of the undertakings (i.e. management/ownership relationship),
- Duration of the offence (i.e. short time/long-running),
- Strategy of the lawyers (i.e. loss-minimizing defence/conflict oriented defence).

Due to the limiting factors mentioned above, a settlement is only possible in some case.