



Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings

I. Principles

- (1) In the exercise of its discretionary powers and in accordance with Section 81d (4) of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen, GWB*), the Bundeskartellamt adopts these guidelines by which it will proceed against undertakings and associations of undertakings in assessing the punitive element of fines imposed for so-called serious cartel administrative offences (administrative offences pursuant to Section 81 (1), (2) no. 1, no. 2 a) and (3) GWB), with the exception of offences in the area of merger control. Where reference is made to undertakings in sections I and II below, these rules also apply to associations of undertakings. The guidelines at hand do not encompass the application of Sections 81c (4) and 81b GWB; they supersede the Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings of 25 June 2013.
- (2) The 10th Amendment to the Act against Restraints of Competition, which entered into force on 19 January 2021, serves to transpose Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (ECNplus Directive) in respect of the setting of fines and determines a non-exhaustive list of possible criteria which can be applied when setting a fine (Section 81d GWB). In accordance with the procedure adopted by the European Commission, the magnitude of the turnover achieved from the infringement (*tatbezogener Umsatz*) was legally enshrined as an important criterion to be applied when setting a fine.

- (3) The Bundeskartellamt uses the turnover achieved from the infringement together with the undertaking's total turnover to determine a baseline value within the statutory framework of fines.
- (4) In a specific individual case the fine is then determined on the basis of the baseline value, taking account of all the aggravating or mitigating facts and circumstances as part of a comprehensive overall appraisal. As a result, the final amount of the fine may be considerably higher or lower than the baseline value.
- (5) The fines set on the basis of these guidelines serve only to punish the infringement which has occurred. Besides punishing an infringement, the Bundeskartellamt reserves the right to skim off the economic benefit achieved on account of the anticompetitive conduct either by ordering disgorgement of that benefit beyond the ambit of these guidelines or by conducting a separate procedure (Sections 32, 34 GWB).

II. Setting of fines

1. Determining the statutory framework of fines

- (6) The minimum possible statutory fine is 5 euros (Section 17 (1) Administrative Offences Act (*Ordnungswidrigkeitengesetz, OWiG*)). Pursuant to Section 81c (2) sentence 2 GWB, the fine imposed for an intentional infringement may not exceed the statutory maximum of 10 per cent of the undertaking's total turnover generated in the business year preceding the authority's decision. Where this amounts to less than 1 million euros, the maximum possible fine is 1 million euros (Section 81c (2) sentence 1 GWB). The fine imposed for a negligent infringement may not exceed half the maximum fine imposable (Section 17 (2) OWiG).
- (7) The amount of the total turnover used to determine the maximum statutory fine may be estimated (Section 81c (5) sentence 2 GWB). The Bundeskartellamt bases its estimate especially on the undertaking's consolidated annual accounts or – where these are not yet available – the provisional annual accounts.

2. Determining the baseline value

- (8) The baseline value is determined on the basis of the so-called turnover size (*Umsatzgröße*), that is the turnover achieved from the infringement as a function of the size of the undertaking (total turnover):

Undertaking's total turnover pursuant to Section 81c (2) sentence 2 GWB	≤ 100 million euros	100 million to 1 billion euros	1 billion to 10 billion euros	10 billion to 100 billion euros	> 100 billion euros
Turnover size as a percentage of turnover achieved from infringement	10 to 15 per cent	15 to 20 per cent	20 to 25 per cent	25 to 30 per cent	> 30 per cent

In the case of negligent infringements, half the relevant turnover size is applied, given that the statutory framework of fines is also halved.

- (9) As far as the turnover size amounts to half the statutory maximum, it is used as the baseline value when setting the fine. If the turnover size is more than half the statutory maximum, the baseline value amounts to half the statutory maximum. The amount by which the turnover size exceeds half the statutory maximum is taken into account when conducting the overall appraisal in accordance with para. 14.
- (10) The turnover achieved from the infringement is generally defined as that turnover which the undertaking in question generates from those goods and/or services which are linked to the infringement, insofar as it reflects the impact of the infringement on the domestic market. It can be estimated in line with generally applicable rules.
- (11) In cases in which the infringement lasted less than 12 months, the Bundeskartellamt bases its calculation of the turnover achieved from the infringement on a period of 12 months, regardless of the actual duration of the infringement. The last 12 months before the infringement ceased are generally relevant in this respect.
- (12) In the case of a market-sharing cartel which exceeds the geographical scope of application of the Act against Restraints of Competition, the domestic impact and thus the turnover achieved from the infringement can be determined by estimating the total turnover from goods or services linked to the infringement for the entire relevant geographical market not covered by the scope of the Act against Restraints of Competition, determining the share of each individual undertaking involved on the basis of its turnover on that market and applying that share to the aggregate turnover of the same undertaking on the domestic market.

- (13) In those cases in which no turnover was achieved from an infringement on account of things not going according to plan, those revenues which would likely have been achieved if things had in fact gone according to plan are used when determining the baseline value. In those cases in which undertakings achieved no turnover from an infringement within the meaning of paras. 10 and 12 owing to agreements being reached, the fine for these undertakings is set taking account of the criteria detailed in para. 14, in derogation of para. 9 without determining a baseline value.

3. Overall appraisal

- (14) A comprehensive overall appraisal is subsequently conducted in order to classify a specific infringement within the statutory framework of fines. Where a baseline value was determined, the overall appraisal is conducted using the baseline value and taking account of all the relevant criteria for setting the fine, unless these have already been applied when determining the baseline value. Taking Section 81d GWB as the point of reference, the following can, in particular, be considered as criteria for setting a fine:

- Offence-related criteria: The nature and duration of the infringement; the amount of the total turnover achieved through the infringement by the undertakings involved; the quality of the infringement (e.g. the size of the geographical markets affected by the infringement; the overall importance of the undertakings involved in the infringement on the markets affected; the importance of the products and services affected by the infringement); and the manner in which the infringement was carried out (e.g. the degree of organisation among those involved). In the case of serious horizontal restraints of competition such as price fixing and quota, sales area and customer allocation agreements, the fine will, as a rule, be higher than the baseline value.

- Offender-related criteria: The undertaking's role, within the group of undertakings involved, in the commission of the infringement; the undertaking's position on the market affected; the amount by which the turnover size exceeds half the statutory maximum; the specific features of the degree of value creation; the degree of intent or negligence; previous infringements; adequate and effective precautions taken before the infringement was committed to prevent and uncover infringements; and positive post-offence conduct on the part of the undertaking (esp. efforts by the undertaking to uncover the infringement which has occurred, to make restitution for the infringement and the damage caused, and precautions taken after the infringe-

ment occurred to effectively prevent and uncover corresponding infringements in future). Account is taken of an undertaking's economic circumstances – in addition to scenarios of lacking economic viability where an undertaking's economic existence is at risk – by applying the aforementioned factors (in particular turnover and the undertaking's market position).

- (15) Generally speaking, a fine of no more than double the baseline value is deemed adequate to serve as a warning to comply with obligations. To serve as a sufficient warning, the fine may also exceed double the baseline value, in particular where it would otherwise be extremely low in relation to the statutory framework of fines. Imposing the maximum, or almost the maximum, statutory fine is reserved for very serious infringements.
- (16) Once the fine has been set in accordance with paras. 1 to 15, reductions of the fine may be granted on the basis of a leniency recipient's cooperation.
- (17) Where the undertaking demonstrably lacks economic viability which threatens its existence, the fine set in accordance with paras. 1 to 16 may, by way of exception, be reduced if payment in instalments, deferred payments or other payment facilities are not sufficient and a fine appropriate to the infringement would be causally responsible for jeopardising the undertaking's continued existence.
- (18) Finally, a fine may be reduced as part of a mutual settlement agreement.

Bonn, 7 October 2021

Mundt

President of the Bundeskartellamt

**Guidelines for the Setting of Fines in
Cartel Administrative Offence Proceedings
– Explanatory Notes –**

Date: 4 October 2021

I. Principles

Note 1: In its ruling of 26 February 2013 (“Grauzement”, KRB 20/12, WuW/E DE-R 3861), the Federal Court of Justice held that the provision introduced under the 7th Amendment to the Act against Restraints of Competition (as published on 7 July 2005 and promulgated in the Federal Law Gazette on 12 July 2005 (Federal Law Gazette I, p. 1954)) – that is the old version of Section 81 (4) sentence 2 GWB (now Section 81c (2) GWB) – is constitutional because it violates neither the prohibition of retroactive effect nor the principle of clarity and definiteness. In its ruling the Federal Court of Justice interprets the provision as setting an upper limit within a framework of fines. Accordingly, it differs from the capping threshold applied under European competition law (Article 23(2) sentence 2 Regulation (EC) No. 1/2003). It is no longer necessary to quantify the specific impact of an offence on the market when applying the turnover-related upper threshold for fines (Düsseldorf Higher Regional Court, decision of 22 August 2012, V – 4 Kart 5 + 6/11 OWi, among others, WuW/E DE-R 3662, 3670; Recommendation for a Decision and Report by the Committee on Economic Affairs and Labour, Draft of the 7th Amendment to the Act against Restraints of Competition, Printed Paper 15/5049, p. 50).

Note 2: In each specific individual case, the fine is then set within this statutory framework of fines of 10 per cent of the total turnover after classifying the infringement which has occurred. Setting the individual fine substantiates the abstract statutory threat of a fine on the basis of the principles applicable to and criteria for setting fines.

Note 3: More firmly establishing in law those factors which are relevant to the setting of fines, taking account of the turnover achieved from the infringement (*tatbezogener Umsatz*) as set out in Section 81d (1) sentence 2 GWB, promotes greater harmonisation of the methods for setting fines with the European Commission and the EU Member States’ competition authorities, which are concurrently responsible for enforcing Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). At national level, it creates a standardised starting point for setting fines in administrative and judicial proceedings to enforce antitrust provisions with sanctions.

Note 4: The aim in drawing on the turnover achieved from the infringement as the connecting factor for the objective wrongdoing associated with an infringement is to ensure that, in line

with the principle of proportionality, the administrative fine is appropriate to the offence- and offender-related facts and circumstances and is justified from both a specific and a general deterrent perspective. One particular aim is to ensure that the sanction is not disproportionate to those possibilities available to an undertaking for gaining competitive advantages on account of a concrete act and for causing disadvantages to third parties or the economy as a whole (“gain and harm potential”). The Bundeskartellamt takes as its starting point a typical gain and harm potential of 10 per cent of the turnover achieved from the infringement during the infringement period. Taken together with the size of the undertaking, this typical gain and harm potential forms the starting point for determining the baseline value for setting the fine, as presented in detail in paras. 8ff.

Note 5: This procedure is in line with the consistent past decisions of the Federal Court of Justice, according to which the gain and harm potential can be calculated on the basis of the turnover achieved from the infringement and represents a suitable point of reference for classifying the infringement within the statutory framework (Federal Court of Justice, decision of 17 October 2013, 3 StR 167/13, juris para. 39). The Federal Fiscal Court also confirmed the Federal Court of Justice’s decision, stating that: “Using the turnover achieved from the infringement as the overriding connecting factor expressly takes account of the relevance of the wrongdoing emanating from the act in question when determining its share of the punishment; what is decisive is the corresponding potential inherent in the act itself.” (Federal Fiscal Court, judgment of 22 May 2019, case no. XI R 40/17, juris para. 38). Using the turnover achieved from the infringement as the connecting factor for the objective wrongdoing of a specific infringement also guarantees that it is possible to impose a sanction which is appropriate to the impact of the infringement on the domestic market (see Section 185 (2) GWB).

Note 6: Re: para 5: *“The fines set on the basis of these guidelines serve only to punish the infringement which has occurred. Besides punishing an infringement, the Bundeskartellamt reserves the right to skim off the economic benefit achieved on account of the anticompetitive conduct either by ordering disgorgement of that benefit beyond the ambit of these guidelines or by conducting a separate procedure (Sections 32, 34 GWB).”*

Under the German law of cartel administrative offences, the criterion provided for under Section 17 (4) OWiG, that is the skimming off of profits, is – in derogation of the general law on administrative offences – placed at the discretion of the competition authority (Section 81d (3) GWB).

II. Setting of fines

Re: para 8: *“The baseline value is determined on the basis of the so-called turnover size (Umsatzgröße), that is the turnover achieved from the infringement as a function of the size of the undertaking (total turnover):*

<i>Undertaking’s total turnover pursuant to Section 81c (2) sentence 2 GWB</i>	<i>≤ 100 million euros</i>	<i>100 million to 1 billion euros</i>	<i>1 billion to 10 billion euros</i>	<i>10 billion to 100 billion euros</i>	<i>> 100 billion euros</i>
<i>Turnover size as a percentage of turnover achieved from infringement</i>	<i>10 to 15 per cent</i>	<i>15 to 20 per cent</i>	<i>20 to 25 per cent</i>	<i>25 to 30 per cent</i>	<i>> 30 per cent</i>

“In the case of negligent infringements, half the relevant turnover size is applied, given that the statutory framework of fines is also halved.”

Note 1: The total turnover and the turnover achieved from the infringement are easier to estimate than other reference values such as additional proceeds (a criterion which used to be applied). This is important as regards the transparency and predictability of the threatened sanction (see Federal Court of Justice, “Grauzement”, loc. cit., margin no. 72f., in relation to total turnover). Section 81d (1) sentence 2 no. 1 GWB already provides that, when taking account of the turnover achieved from the infringement, the magnitude alone is sufficient; this opens up the possibility of using a rough estimate.

Note 2: When determining the turnover achieved from the infringement, the Bundeskartellamt applies Section 38 (1) GWB, with the proviso that the revenues from the supply of goods and services between affiliated companies form part of the turnover achieved from the infringement if they are linked to the infringement. The special provision relating to undertakings in the credit and insurance industry (Section 38 (4) GWB) applies.

Note 3: The concrete percentage within the relevant range is determined on the basis of the total turnover. Reference is thus made to the undertaking’s total turnover generated in the business year preceding the authority’s decision, as required by Section 81c (2) GWB. The point of reference is the economic unit, which may comprise several legal persons, partnerships and, possibly, natural persons.

Note 4: An administrative fine of several times the gain and harm potential may be appropriate from a preventive perspective. The larger the undertaking, the less sensitive it will be to any punishment and the greater the indication for using a higher baseline value when setting the fine.

Re: para 9: *“As far as the turnover size amounts to half the statutory maximum, it is used as the baseline value when setting the fine. If the turnover size is more than half the statutory maximum, the baseline value amounts to half the statutory maximum. The amount by which the turnover size exceeds half the statutory maximum is taken into account when conducting the overall appraisal in accordance with para. 14.”*

Note: Limiting the baseline value to half the statutory maximum guarantees that sufficient leeway is available when conducting the overall appraisal.

Example 1: Where an undertaking has generated a total turnover of 1 billion euros in the business year preceding the authority’s decision, the statutory framework of the fine is 100 million euros in the case of an intentional infringement. According to para. 8, the value of 20 per cent of the turnover achieved from the infringement is to be used. If the undertaking has achieved a turnover from the infringement of 40 million euros, the turnover size is 8 million euros (20 per cent of 40 million euros turnover achieved from the infringement). The 8 million euros amounts to less than half the statutory maximum of 100 million euros, which is why 8 million euros can be used as the baseline value when setting the fine.

Example 2: Where an undertaking has generated a total turnover of 100 million euros in the business year preceding the authority’s decision, the statutory framework of the fine is 10 million euros in the case of an intentional infringement. According to para. 8, the value of 15 per cent of the turnover achieved from the infringement is to be used. If this undertaking has achieved a turnover from the infringement of 200 million euros, the turnover size is 30 million euros (15 per cent of 200 million euros turnover achieved from the infringement). The 30 million euros amounts to 300 per cent of the statutory maximum of 10 million euros, which is why, according to para. 9, the baseline value is to be limited to half the statutory maximum, that is 5 million euros. The amount by which the value is limited (i.e. 25 million euros in this example) is used as an offender-related criterion when conducting the overall appraisal as per para. 14.

Re: para 11: *“In cases in which the infringement lasted less than 12 months, the Bundeskartellamt bases its calculation of the turnover achieved from the infringement on a period of 12 months, regardless of the actual duration of the infringement. The last 12 months before the infringement ceased are generally relevant in this respect.”*

Note: This rule serves to ensure that a sufficient preventive effect is achieved, even in cases in which the infringement period was less than 12 months.

Re: para 12: *“In the case of a market-sharing cartel which does not fall within the scope of application of the Act against Restraints of Competition, the domestic impact and thus the turnover achieved from the infringement can be determined by estimating the total turnover from goods or services linked to the infringement for the entire relevant geographical market not covered by the scope of the Act against Restraints of Competition, determining the share of each individual undertaking involved on the basis of its turnover on that market and applying that share to the aggregate turnover of the same undertaking on the domestic market.”*

Note: Market-sharing cartels may, potentially, not achieve any separate turnover from an infringement, for example if the entire territory of the Federal Republic of Germany is assigned to one of the participants. Para.12 regulates how a hypothetical turnover achieved from the infringement can be determined for such market-sharing cartels, and at the same time ensures that account is only taken of that turnover which is achieved on the domestic market.

Re: para 13: *“In those cases in which no turnover was achieved from an infringement on account of things not going according to plan, those revenues which would likely have been achieved if things had in fact gone according to plan are used when determining the baseline value. In those cases in which undertakings achieved no turnover from an infringement within the meaning of paras. 10 and 12 owing to agreements being reached, the fine for these undertakings is set taking account of the criteria detailed in para. 14, in derogation of para. 9 without determining a baseline value.”*

Note 1: Para. 13 concerns cases in which all or some of the undertakings involved achieve no turnover from the infringement (in the case of market-sharing cartels only outside the scope of para. 12).

Note 2: In those cases in which, based on an agreement, no turnover is achieved from the infringement, no baseline value is calculated pursuant to para. 9 when setting the fine for the undertaking concerned; only the criteria referred to in para. 14 are applied. In the case of cover quotes submitted in the context of agreements relating to bidding behaviour in tender procedures, which are particularly relevant in practice, the respective contract value (the protected bidder's revenues) is of particular importance since it constitutes the turnover related to the infringement as a whole.

Example 1: No turnover is achieved from the infringement owing to things not going according to plan, for instance, in the case of a bid-rigging agreement where a third party which was not party to the agreement was awarded the contract or the bid-rigging was not carried out.

Example 2: No turnover is achieved from the infringement based on an agreement, for example, where one or more tenderers submit a cover quote as part of a single agreement.

Re: para 14: *“A comprehensive overall appraisal is subsequently conducted in order to classify a specific infringement within the statutory framework of fines. Where a baseline value was determined, the overall appraisal is conducted using the baseline value and taking account of all the relevant criteria for setting the fine, unless these have already been applied when determining the baseline value. Taking Section 81d GWB as the point of reference, the following can, in particular, be considered as criteria for setting a fine: [...]”*

Note 1: Whether, how and to what extent a particular criterion has an effect on the fine set in a specific instance is dependent on the facts of the individual case.

Note 2: Filing a leniency application as set out in para. 16 is a separately regulated means available to undertakings for uncovering the infringement which has occurred.

Note 3: Account may be taken of precautionary measures which were taken to prevent and uncover corresponding infringements (compliance). The nature and extent of the requisite precautionary measures are dependent on the individual case and, in particular, on the type of undertaking, its size and organisational structure, the provisions to be complied with and the risk of them being infringed.

One mitigating factor of which account can be taken is whether the undertaking had already taken all the objectively necessary precautionary measures before the time of the commission of the infringement in question in order to effectively prevent infringements under competition law (pre-offence compliance). Pre-offence compliance is generally to be assumed to be effective if the precautionary measures which were taken led to the infringement being uncovered and immediately reported. Further, the effectiveness of pre-offence compliance is not precluded by the precautionary measures not having led to the infringement being uncovered and reported merely because the person concerned flouted the undertaking's compliance code of practice to an exceptional degree and deceived his or her supervisors in a targeted manner in order to achieve a personal advantage. It is not, however, possible to take account of pre-offence compliance where a person responsible for the management of an undertaking was involved in the infringement. This is generally the case where either directors or board members of the companies concerned or of other group companies which are higher up in the company hierarchy than the companies concerned are involved.

A second mitigating factor of which account can be taken as part of an overall appraisal of positive post-offence conduct is whether any precautionary measures were taken after the commission of the offence to effectively prevent and uncover the relevant infringements (post-offence compliance). The Bundeskartellamt particularly gives due consideration to mitigating factors if the undertaking has convincingly demonstrated which precautionary measures were taken to effectively prevent future comparable infringements and it is clearly discernible that the undertaking is committed to complying with the law. An important indicator of the seriousness of any post-offence compliance is whether an undertaking actively cooperates in clarifying the facts. Moreover, when assessing an undertaking's seriousness account is also taken of any efforts to make restitution for the damage caused. Actively cooperating in clarifying the facts and efforts to make restitution for the damage caused are, at the same time, aspects of positive post-offence conduct which are to be assessed separately (double function).

Re: para 15: *“Generally speaking, a fine of no more than double the baseline value is deemed adequate to serve as a warning to comply with obligations. To serve as a sufficient warning, the fine may also exceed double the baseline value, in particular where it would otherwise be extremely low in relation to the statutory framework of fines. Imposing the maximum, or almost the maximum, statutory fine is reserved for very serious infringements.”*

Note 1: As a rule, after weighing up all the aggravating and mitigating circumstances, it is unlikely that the baseline value will be more than doubled. Nevertheless, especially with a view to the size of an undertaking, a fine must always also achieve a minimum level of the requisite specific deterrence. That is why, in cases in which the fine would be at the lower end of the statutory framework of fines, it may be necessary to set a larger fine. This can lead to a fine which is significantly higher than the baseline value – although it is still very low compared to the size of the undertaking. The amount of the fine is always calculated in the individual case, owing to the need to issue a sufficient warning.

Note 2: Similarly, a fine may also be significantly lower than the baseline value following the overall appraisal. Particularly in cases in which both an exceptionally high turnover was achieved from the infringement and there are seriously mitigating circumstances – for example the undertaking's role within the group of participants or, by way of exception, a manifestly significantly lower gain and harm potential, for instance owing to an atypically low degree of value creation – it may be necessary to impose a significantly lower fine.

Re: para 16: *“Once the fine has been set in accordance with paras. 1 to 15, reductions of the fine may be granted on the basis of an immunity recipient's cooperation.”*

Note: As regards the granting of leniency, see Sections 81hff. GWB as well as Notice no. 14/2021 on General Administrative Principles relating to the Exercise of Discretionary Powers in the Conduct of the Procedure for and Application of the Leniency Regime in accordance with Sections 81h to 81n of the Act against Restraints of Competition (Guidelines on the Leniency Programme) of 23 August 2021 (available on the Bundeskartellamt's website).

Re: para 18: *“Finally, a fine may be reduced as part of a mutual settlement agreement.”*

Note: As regards the Bundeskartellamt's guidelines on reaching a settlement agreement, see the Information Leaflet on the Bundeskartellamt's Settlement Procedure in Fine Proceedings of 2 February 2016 (available in German only on the Bundeskartellamt's website).