

Newsletter, 28 June 2013

## New Fining Guidelines of the Federal Cartel Office

### Implementation of the Federal Court of Justice's decision in the cement cartel case

**The Federal Cartel Office ("FCO") has published new guidelines on the method of setting fines on 25 June 2013 ("Fining Guidelines").<sup>1</sup> The new guidelines take into account the turnover achieved in the cartelized market during the infringement period and the infringer's group turnover in the year preceding the authority's decision. Thus, size of the involved company as well as gravity and duration of the infringement are decisive for the amount of the fine. While these factors were also key criteria of the superseded guidelines of the FCO in the setting of fines, the new Fining Guidelines, give more attention to the company's size.**

#### Background

Pursuant to Sec. 81 (4) sentence 2 of the Act against Restraints of Competition ("ARC") a fine imposed on a company involved in a cartel can amount to up to 10% of its group turnover achieved in the business year preceding the FCO's decision. In its decision in the cement cartel case the Federal Court of Justice acknowledged that this provision for the determination of fines under German antitrust law is constitutional on the condition that it is applied as framework for assessing the fine and not as a capping threshold.<sup>2</sup> In line with Art. 23 (2) sentence 1 of Regulation 1/2003, the FCO's old guidelines<sup>3</sup> interpreted the 10% rule as a capping threshold, meaning that a fine calculated on the basis of the old fining guidelines was capped at 10% of the company's group

turnover in case it exceeded this amount. Because of the Federal Court of Justice's interpretation of Sec. 81 (4) sentence 2 ARC the amendment of the filing guidelines was necessary.

#### Principles of the new Fining Guidelines

The FCO will set future fines on the basis of the interpretation of Sec. 81 (4) sentence 2 ARC as turnover based framework for the fine. Within the scope of the FCO's margin of assessment, this framework will be specified according to individual determining factors pursuant to Sec. 81 (4) sentence 6 ARC and Sec. 17 (3) Act on Regulatory Offences. Starting point is the turnover relevant to the infringement, i.e. the domestic turnover achieved in the cartelized market during the infringement period. This turnover takes into account the company's position in the affected market as well as the "profit and damage potential". At the same time, having also regard to the total turnover allows for the "punishment sensitivity" for the specific company to be considered.

#### Setting of the fine in detail

##### *Determining the statutory framework of the fine*

In a first step the statutory upper limit of the framework of the fine is determined. Pursuant to Sec. 81 (4) sentence 2 this is set at 10% of the company's group turnover achieved in the business year preceding the FCO's decision. Thus, the turnover of the economic unit as a whole is to be taken into account.<sup>4</sup>

##### *Determining of the level of the fine within the statutory framework*

The level of the fine within the statutory framework is determined referring to the turnover relevant to the infringement<sup>5</sup> and the total turn-

<sup>1</sup> FCO, press release of 25 June 2013. The new Fining Guidelines can be obtained from the [FCO's website](#) in German language. As of this newsletter's date an English version of the Fining Guidelines had not been published yet.

<sup>2</sup> See decision of the Federal Court of Justice dated 26.02.2013, [KRB 20/12](#); [press release](#) of 10.04.2013; see also [Commeo Newsletter](#) of 17.04.2013 (in German only).

<sup>3</sup> Notice no. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 ARC against undertakings and associations of undertakings, para. 18.

<sup>4</sup> FCO, Fining Guidelines, para. 8.

<sup>5</sup> FCO, Fining Guidelines, para. 10.

over. In detail, 10% of the turnover relevant to the infringement (domestic turnover achieved in the cartelized market during the infringement period) will be multiplied by a factor predetermined in the FCO's Fining Guidelines. This factor is dependent on the company's overall turnover in the business year preceding the FCO's decision and ranges between 2-3 for companies with a total turnover below EUR 100 million, and exceeds a value of 6 for companies with a total turnover exceeding EUR 100 billion.<sup>6</sup>

In case the statutory framework (i.e. 10% of the company's total turnover) is not exceeded, the value calculated on such basis defines the upper limit of the individual framework of the fine and serves as the starting point for the further determination of the fine (option 1). If the statutory framework is exceeded, then 10% of the company's total turnover will be set as upper limit and starting point for the further determination of the fine (option 2). Thus, in this case the assessment framework is not reduced.<sup>7</sup> The FCO, however, reserves the right to increase the value calculated on the basis of the turnover relevant to the infringement as well as the multiplication factor in exceptional cases if the infringement provides for an "obviously and significantly higher profit and damage potential".<sup>8</sup>

Once the starting point for the further determination of the fine is calculated, the FCO will take account of individual determining factors, i.e. offence and offender related aggravating and mitigating factors which are already known from the FCO's previous fining guidelines, in an overall assessment. Offence related factors include in particular the nature and duration of the infringement, the significance of the markets or the degree of organisation within the cartel. Offender related factors include, inter alia, the role of the participant within the cartel, his position in the relevant market, or the degree of intent/negligence.<sup>9</sup> In the case of price-fixing and quota cartels, territorial and customer agreements the fine will generally be set in the upper range of the calculated framework.

As in the FCO's previous fining guidelines, the FCO can waive or reduce a fine if a company submits an application for leniency<sup>10</sup> and grant a reduction of up to 10% of the fine for an

agreement to have the proceedings terminated by settlement.<sup>11</sup>

In a nutshell, the calculation of the fine can be outlined as follows:

#### 1. Setting of the framework of the fine

10% of the turnover relevant to the infringement multiplied by factor x (depending on annual group turnover)

if <10% of the total turnover (option 1) then the calculated value is set as framework;

if >10% of the total turnover (option 2) then framework set at 10% of the total turnover

#### 2. Overall assessment within the framework

+ offence and offender related aggravating factors

- offence and offender related mitigating factors

#### 3. If applicable, reduction pursuant to leniency notice

#### 4. If applicable, reduction up to 10% for settlement

### Comment

According to the president of the FCO, Mr. Andreas Mundt, the level of fines will not change significantly under the new Fining Guidelines.<sup>12</sup> Generally, fines for smaller companies which mainly sell only one product will be lower in the future. Companies which are active in several markets and whose illegal conduct only concerns a specific product of their product portfolio will, on the other hand, face higher fines.

However, the amendment of the previous Fining Guidelines as prepared by the FCO based on the constitutional requirements has flaws: The Fining Guidelines do not sufficiently take into account that along with the "new" interpretation of Sec. 81 (4) sentence 2 ARC as a assessment framework for the fine instead of a capping threshold, all principles of sentencing within a criminal law sentencing framework must be applied by the FCO when a fine is set. In view of the principle of equality of Art. 3 of the German Constitution and the prohibition of

<sup>6</sup> FCO, Fining Guidelines, para. 13.

<sup>7</sup> FCO, Fining Guidelines, para. 14.

<sup>8</sup> FCO, Fining Guidelines, para. 15.

<sup>9</sup> FCO, Fining Guidelines, para. 16.

<sup>10</sup> Notice no. 9/2006 of the FCO on the immunity from and reduction of fines in cartel cases ("[Leniency Note](#)") of 7.03.2006.

<sup>11</sup> FCO, Fining Guidelines, para. 18.

<sup>12</sup> Pursuant to the [Activity Report 2011/2012](#) (in German only) which was published on 26.6.2013 the FCO has imposed in these two years in 34 cases fines in the amount of € 505.8 m against 108 companies and 68 individuals.

arbitrariness, two significant issues arise which need to be solved in suitable future cases:

On the one hand the FCO refers to the turnover relevant to the infringement in case the infringement period exceeds one year. If the infringement was shorter than 12 months, the Fining Guidelines (just like the old ones) take into account a period of 12 months. Lacking an objective reason, such an „extension“ of the infringement is not acceptable when a fine has to be set within an individual framework.

On the other hand, with regard to the multiplication factor a system is applied by the FCO where the factor increases by 1 if the turnover increases tenfold. At the upper end, beyond a turnover of EUR 100 billion the factor is in excess of 6, i.e. the scale is open. At the other end of the scale, small companies are significantly discriminated as the minimum factor is determined at 2 (applying for a turnover of EUR 10 million) instead of being consequently set at 1 (applying for a turnover of EUR 1 million). The taxonomy of the Fining Guidelines does not reasonably explain this discrimination.

Moreover, while the German legislator has clearly expressed the intention that Sec. 81 (4) sentence 2 ARC should be understood to bring German fining practice in line with the method of setting fines under EU law, the new Fining Guidelines depart from that. The FCO furthermore failed to align at least its rules as regards the consideration of reductions for leniency and settlements to the EU procedure. While under EU law a reduction of the fine granted for settlement is added to reductions for leniency<sup>13</sup>, the FCO for the first time explicitly points out that the reduction for settlement is granted „*subsequent*“ to possible reductions for leniency<sup>14</sup> which means in consequence that either the leniency reduction or the reduction for the settlement is de facto reduced.

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<sup>13</sup> See Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Reg. (EC) No 1/2003 in cartel cases, [OJ 2008, C 167/1](#), para. 33.

<sup>14</sup> FCO, Fining Guidelines, para. 18.