

QUESTIONS FOR National Reporters of LIDC Oxford 2011

Question A: Fines in Antitrust

What are the most important factors that should determine the level of fines imposed for infringements of competition rules? Should there be a binding framework determining the level of fines? Who should decide?

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1. General Background

It is the purpose of the report to analyse and compare the approach of the various national jurisdictions in their fine procedure, and to identify

- the most important factors (e.g. cooperation, compliance programmes, impact of the infringement, previous infringements and/or deterrence etc) determining the level of fines imposed for infringements of the competition rules,
- the importance of a binding framework determining the level of fine and
- the best placed body to decide e.g. judges, competition authorities, ministers and /or some other independent body.

For this purpose questions will first relate to the legal framework and the relevant institutions and secondly turn to "normative questions and recommendations against the background of the practice applied in your jurisdiction.

Please note that it is intended to give a specific emphasise to a broader approach taking into account also a wider criminal law/human rights perspective since a concern that has been expressed in this area is that fining procedure and methodology in the field of anti-trust may have become detached from the procedure and methodology that apply to other economic infringements or economic crimes. In particular, there are concerns that the procedures used may not reflect standards required when imposing penalties for other types of infringements/crimes or be consistent with national/international human rights standards, and that the amount of fines now imposed may have become disproportionate in relation to other types of economic infringements/crimes committed by corporate bodies.

2. Legal Framework

2.1 *Institutions*

- Which bodies are responsible for deciding the amount of the fine imposed for an infringement of competition law (“infringements”)? (Please describe hereunder also the degree of independence from other public enforcement bodies and indicate also whether the same body investigates and decides over the fine; please describe whether an appeal is possible and to which body/institution (administrative body, independent tribunal etc..).

The body responsible for deciding the amount of the fine imposed for an infringement of competition law in Germany is the Federal Cartel Office (“Bundeskartellamt”). The Federal Cartel Office is an independent higher federal authority under the authority of the Federal Ministry of Economics and Technology. The Federal Cartel Office is subject to general directives of the Federal Ministry of Economics and Technology (e. g. the intensifying of the control of abusive practises on vertical price-fixing and -recommendations, the treatment of foreign-to-foreign mergers). However, it is fully independent in taking decisions on individual cases and fines. The Federal Ministry of Economics and Technology attaches great importance to the independency of the Federal Cartel Office. This is consistent with the judiciary procedure followed by the Decision Divisions through which the Federal Cartel Office reaches its decisions.

The decision making body of the Federal Cartel Office is composed of twelve Decision Divisions (“Beschlussabteilungen” B1-B12), which are mainly organised according to the different sectors of economy, while B11 and B12 are only engaged in prosecution of cartels. Within each Decision Division, two associate members and the chairman of the respective division decide upon cases concerning cartels, mergers and abusive practises. The Decision Divisions are fully autonomous in their decision-taking and are not subject to any instructions or directives. The Decision Divisions are responsible both for the investigation of cases and fining. They are assisted by a special unit (“Sonderkommission Kartellbekämpfung - SKK”) in carrying out and analysing the results of search operations. Other departments supporting the Decision Divisions are the General Policy department, which advises the Divisions on special competition law and economic issues, the Litigation Department, which advises the Divisions on legal matters and prepares court appeal proceedings and the Central Services Department, responsible for the internal administration of the Federal Cartel Office.

The Federal Cartel Office may use two different legal proceedings in dealing with restraints of competition. In the frame of an administrative proceeding (“Verwaltungsverfahren”), it may order to put an ending to the infringing conduct. In case of infringements leading to very strong distortions of competition, the Federal

Cartel Office will carry out regulatory offence proceedings (“Ordnungswidrigkeitsverfahren”) and also impose a fine.

Fines can be appealed to the Federal Cartel Office. If the Federal Cartel Office upholds the fine, the case will be transferred to the Higher Regional Court of Appeal (Oberlandesgericht – OLG) in Düsseldorf having jurisdiction. The decisions of the Higher Regional Court of Appeal may be appealed to the Federal Court of Justice (“Bundesgerichtshof” – BGH).

2.2 *Nature of the Rules governing the assessment of fines*

- What procedural rules are in place to govern the determination of fines? (administrative procedure, court procedure etc).

The determination of fines is regulated in Sec. 82 – 86 Act against Restraints of Competition (ARC – “Gesetz gegen Wettbewerbsbeschränkungen – GWB”) and in the Regulatory Offences Act (“Ordnungswidrigkeitengesetz – OWiG”).

- To what extent is the level of fines determined by legislative rules (e.g. prescribing maximum levels of fines, the approach to be adopted in assessing fines)?

Sec. 81 (4) ARC sets the maximum level of fines to EUR 1 m for individuals. If an undertaking or a group of undertakings is fined, the fine may not exceed 10 % of the worldwide turnover generated in the business year preceding the decision. However, the Federal Cartel Office may additionally skim off the profits resulting from the infringement from the involved undertakings. The approach to be adopted in assessing fines is laid out in binding guidelines.

- Are there other (further?) guidelines as to the level of fines or as to the methodology to be used in assessing fines?

The Federal Cartel Office has adopted guidelines on the setting of fines, which concretise the assessment of the fines. The guidelines are based on Sec. 81 (7) ARC. The fines are composed of a basic amount, which depends on the nature of the infringement and of an additional amount, which is fixed according to the factors like deterrence and the existence of aggravating or extenuating circumstances.

- Who issues the guidelines? Are they binding for the body who determines the fine? Is there a requirement to consult the public on the guidelines and/or do they have to be approved by the legislature or by government ministers?

The guidelines are issued by the Federal Cartel Office. They are binding to the Federal Cartel Office according to the principle that the administration is bound by its own decisions. The Federal Cartel Office is independent in its decision to adopt guidelines. The guidelines do not need to be approved by the legislature or by government ministers.

- To what extent is the competition authority or a judicial tribunal hearing an appeal, required to follow the guidelines in determining the level of fines in any particular case?

The guidelines are binding for the Federal Cartel Office only. The Higher Regional Court of Appeal is not bound by the guidelines and casts an independent decision on the fine, of course. It is bound only by the provisions of the Act against Restrictions of Competition and the Regulatory Offences Act.

- To what extent do they reflect or relate to procedures used in national law to determine penalties or fines payable for other types of economic crimes/infringements (such as fraud/environmental law/consumer protection)?

The guidelines themselves do not reflect or relate to procedures used to determine penalties or fines payable for other economic infringements. Fines imposed by the Federal Cartel Office are administrative decisions, whereas penalties imposed by courts for most other economic crimes such as fraud fall under criminal law and therefore are subject to different procedures. A parallel may only be seen insofar, as the fines imposed by the Federal Cartel Office fall under the Regulatory Offences Act, which applies to all kinds of offences not falling under the criminal code and its supplementary legislation and therefore also covers some economy-related offences. However, a relation or similarity between the procedures followed in the assessment of fines for infringements of competition law and the procedures followed in case of other economic infringements covered by the Regulatory Offences Act cannot be deducted from this.

- Is there a leniency program in place and what is the legal basis for the determination of the criteria for leniency (legislative rules, other binding/non-binding guidelines)?

A leniency program has been laid down in binding guidelines by the Federal Cartel Office (Bekanntmachung Nr. 9/2006 über den Erlass und die Reduktion von Geldbußen

in Kartellsachen – Bonusregelung). However, it is directly applicable only to horizontal agreements.

- Are there any rules that permit or require fines also to individuals?

Individuals can be fined up to the amount of EUR 1 m according to Sec. 84 (4) ARC. This maximum level does not include any profits gained from the infringement, which the Federal Cartel Office may additionally skim off.

- What are the overall objectives of fining policy (e.g. to deter further infringements by the undertaking concerned, further infringements by other undertakings, or, to mark the seriousness of the infringement) and are those objectives made transparent (e.g. legislative materials, recitals etc.)?

Avengement and deterrence are the foremost objectives of the fining policy of the Federal Cartel Office. These objectives reflect in the procedures for the calculation of the fines laid down in the Federal Cartel Office's guidelines.

2.3 *General Methodology used in determining the amount of the fine*

- Please briefly summarise the methodology used to determine the amount of the fine (only key factors)

According to the guidelines of the Federal Cartel Office, the fines are composed of a basic amount, which depends on the nature of the infringement and of an additional amount, which is fixed according to factors like deterrence and the existence of aggravating or extenuating circumstances. The basic amount takes into consideration the gravity and the duration of the infringement. It can amount to up to 30 % of the domestic turnover the undertaking concerned generated from the selling of the product or service related to the infringement in case of horizontal or vertical restraints of competition such as abuse, obstruction or boycott. In case of an infringement in the field of merger control, the basic amount can amount to up to 30 % of the turnover the involved undertaking generated on the domestic markets affected by the merger. The Federal Cartel Office may estimate turnovers.

The gravity of the infringement depends on its nature, its impact on the market, the market share of the companies involved and the size and importance of the affected market. The basic amount is reduced for negligent infringements.

For reasons of deterrence, an additional amount of up to 100 % of the basic amount can be added to the fine. Aggravating circumstances that may also be taken into consideration when determining the amount of the fine are intent, gross negligence, repeated offence, an active role in the cartel (cartel leader or initiator), degree of

organisation of the cartel, threat of retaliation. Extenuating circumstances are positive comportment after the infringement (e.g. compensation of third party losses), coerced participation or passive role in the cartel or the authorisation of the infringement by an authority or legislative rules.

- Does the methodology vary depending on whether the infringement is unilateral (e.g. monopolisation/abuse of dominant position, failing to notify a merger) or multilateral (e.g. cartels)?

According to the guidelines on fining issued by the Federal Cartel Office, the same methodology shall be applied to both multilateral infringements (e.g. cartels) and unilateral infringements (e.g. infringement of merger control regulations), except for the calculation of the relevant turnover.

- Is there a maximum fine that may be imposed? If so, how is that maximum amount determined?

Sec. 81 (4) ARC sets the maximum level of fines to EUR 1 m for individuals. In case of the fining of an undertaking, the fine is capped at 10 % of the worldwide turnover generated in the business year preceding the decision according to Sec. 81 (4) ARC. However, the Federal Cartel Office may additionally skim off the profits resulting from the infringement from the involved undertaking.

- Insofar as the fine depends on the seriousness of the infringement, explain whether and (if so) how the following factors are assessed and taken into account:

- the role played by the undertaking in the infringement

Is being assessed and considered as an aggravating or extenuating circumstance, augmenting or diminishing the fine.

- the effects of the infringement;

Are being assessed and considered in the calculation of the basic amount of the fine.

- duration of the infringement;

Is being assessed and considered in the calculation of the basic amount of the fine.

- the persons affected by the infringement (e.g. consumers or vulnerable groups);

Ultimately, it may be assumed that all infringements of competition law are harmful to consumers and therefore indirectly taken into account in the decision. However, the group of persons affected in the individual case is neither assessed nor taken into account for the determination of the seriousness of the infringement.

- the size of the affected market/relevant economic market;

Is being assessed and considered in the calculation of the basic amount of the fine.

- the existence of a genuine compliance policy at the time of the infringement;

Is neither being assessed nor taken into account as extenuating circumstance.

- the involvement of senior management in the infringement;

Members of senior management taking part in an infringement of competition law may be individually fined. However, the involvement of senior management in the infringement as such does not have an effect on the assessment of the seriousness of the infringement.

- any intention by the undertaking (or employees involved) to harm competition, or recognition that competition would be or would be likely to be harmed;

Is being assessed and considered as an aggravating circumstance, augmenting the fine.

- whether the infringing conduct could reasonably have been regarded as lawful or was of a type not previously found to be an infringement;

Is being assessed and considered as an extenuating circumstance, diminishing the fine.

- the leading or subsidiary role played by the undertaking in the infringement;

Is being assessed and considered as either an aggravating or extenuating circumstance, augmenting or diminishing the fine.

- previous infringements of competition law and or other serious economic crimes or infringements?

Previous infringements of competition law are being assessed and considered as an aggravating circumstance, augmenting the fine.

- co-operation (other than taking advantage of a leniency program) with, or obstruction of, the investigation, or by a decision not to contest the competition authority's allegations

Co-operation or obstruction outside the leniency program is not directly a factor in the assessment of the seriousness of the infringement according to the Federal Cartel Office's guidelines. However, it can be assumed that the Federal Cartel Office takes into account co-operations or obstructions positively or negatively in their overall assessment.

- measures taken by the undertaking since the infringement to prevent future infringements (e.g. to introduce a more effective compliance programme) or to compensate victims of the infringement?

Measures like the compensation of victims are taken into account. However, the introduction of a compliance programme after the occurrence of an infringement is not viewed as an extenuating circumstance by the Federal Cartel Office.

- Insofar as the fine depends on the size or economic power of the undertaking, explain whether and (if so) how the following factors are assessed and taken into account: -
 - the turnover of the undertaking in the affected markets;

Is being assessed and considered in the calculation of the basic amount of the fine and in the cap of the fine. The calculation of the basic amount of the fine is based on the domestic turnover the undertaking generated from the selling of the products or services related to the infringement during the time of the infringement. The cap of the fine is set at 10 % of the global turnover generated in the business year preceding the decision.

- the overall size of the undertaking in the jurisdiction concerned;

As stated above, the fine is assessed according to domestic turnover.

- the overall size of the undertaking worldwide;

As stated above, the cap of the fine is set at 10 % of the global turnover.

- other measures of size or economic power such as profitability/assets;

Are not taken into account.

- the turnover of parent companies/subsidiary companies?

Is being assessed and considered in the calculation of the basic amount of the fine, if it is related to the infringement. Turnover of parent companies and subsidiaries is also assessed and considered when calculating the cap of the fine.

- Is the size/economic power of the undertaking assessed at the time of the infringement or at the time of the fining decision? What happens if the undertaking has grown or shrunk in size since the date of the infringement, or (by reason of acquisitions or divestments) forms part of a larger or smaller group of companies than it did at the time of the infringement?

The size of the undertaking is assessed insofar, as the global turnover of the undertaking in the business year preceding the fining decision sets the cap for the fine.

- Please describe any adjustment made for "failing firms" (i.e. cases where the undertaking concerned cannot pay the fine or cannot do so without causing damage to innocent third parties such as creditors or employees)? How does the body responsible for determining the amount of the fine deal with cases where a "failing firm" argument is made? Are there any cases where a competition fine has led to the insolvency of an undertaking?

The Federal Cartel Office's guidelines on fining state that the economic performance of the fined undertaking shall be taken into account when measuring the fine (see Sec. 18 Regulatory Offences Act and Para. 24 of the guidelines on fines). In case an undertaking proves it is not able to pay the fine over a short or middle term without risking insolvency, the Federal Cartel Office may issue a debtor warrant or grant a deferral. A reduction of the fine is only being considered if the fined undertaking proves that it will not be able to pay the fine in the long run without risking insolvency.

- Is there any evidence that the level of fines has increased over recent years? If so, to what extent has that been the result of changes in legislative rules or published guidance, or has it resulted from a change in decision-making practice by the competition authority?

According to the statistics of the Federal Cartel Office, the level of fines fluctuates strongly from year to year. However, the latest statistic shows that the level of fines since 2007 was significantly higher than in previous years. According to the Federal Cartel Office bulletin of 2007/2008, this is due to a renewed legal framework, the introduction of a leniency program and the establishment of a new Decision Division, dealing exclusively with hardcore cartels.

- Are competition fines, and the procedures by which they are determined, consistent with international human rights standards (insofar as they apply to corporate bodies)?

Yes.

2.4 *Comparison of Methodology used in competition matters versus other serious economic crimes or infringements*

- Are there any common rules to be applied to infringements of competition law and other serious economic crimes or infringements?

Not apart from the fact that the fining of competition law infringements is partially regulated in the Regulatory Offences Act, which also applies to other infringements with potential economic effects. However, most of the serious economic offences such as fraud, capital investment fraud, embezzlement, abuse of trust, offences in the state of insolvency and corruption fall under the criminal code and are therefore subject to different procedures altogether.

- Is there any evidence that the level of fines imposed for competition infringements is out of proportion to the level of fines imposed for such serious economic crimes or infringements?

Penalties imposed according to the criminal code and fines imposed according to the Regulatory Offences Act and the Act against Restraints of Competition cannot be compared because of the different nature of the laws. As a tendency, however, you can say that the level of fines for competition infringements is rather high.

2.5 *Other Material Aspects of the Rules governing the assessment of fines*

- To what, if any, extent is the competition authority, or a judicial tribunal hearing an appeal, required in determining the level of fines
 - to apply a consistent approach to different undertakings involved in the same infringement

The Federal Cartel Office must apply the regulations of the guidelines, the Act against Restraints of Competition and the Regulatory Offences Act to each case, which ensures a consistent approach to all undertakings involved in the same infringement.

- to have regard to the level of fines imposed for similar competition infringements in previous cases?

Since the level of fines imposed by the Federal Cartel Office largely depends on the turnover of the undertakings involved in the infringement, one undertaking might be fined higher than another for a similar infringement.

The Higher Regional Court of Appeal in Düsseldorf does not have to have regard to the level of fines imposed for similar competition infringements, as the Federal Court of Justice held.

- to have regard to the level of fines imposed on corporate bodies for other serious economic crimes or infringements (e.g. in the areas of fraud/environmental law/consumer protection)?

No, the Federal Cartel Office is not required to and does not regard the level of fines imposed for other serious economic crimes or infringements. The same applies for the Higher Regional Court of Appeal.

- to take into consideration the amount of fines already imposed (or likely to be imposed) on the same corporate body or bodies for the same infringement(s)?

The amount of fines already imposed on the same corporate body or bodies is taken into consideration insofar, as a repeat offence presents a aggravating circumstance augmenting the fine for the second infringement according to the guidelines.

- Is it possible to appeal against the amount of the fine to an independent judicial tribunal? If so: -
 - On what grounds may such an appeal be brought?

It is possible to appeal against the fine as a whole or only against the level of the fine. The appeal may be brought on the ground that a legal error was committed or that the facts have not been assessed properly. The grounds of appeal do not have to be stated in the appeal of the fine to the Federal Cartel Office.

- What approach is adopted by the appeal tribunal (e.g. is the appeal confined to correcting errors of law or manifest errors of appreciation, or is it a redetermination of the fine *de novo*)?

The Higher Regional Court of Appeal reviews both facts and correct application of the law. The Higher Regional Court of Appeal will carry out its own independent investigations and taking of evidence, if it deems it necessary. It is entitled to fully reassess the fine and is not bound to the findings of the Federal Cartel Office. The Higher Regional Court of Appeal casts a new and independent decision on the fine.

- Does the appeal tribunal have power to increase the amount of the fine, and, if so, when is that power used?

The decision of the Higher Regional Court of Appeal is independent from the fine imposed by the Federal Cartel Office. The Court's decision does not constitute an amendment, confirmation or abolishment of the original fine, but a completely new decision. Insofar, the Higher Regional Court of Appeal may in fact impose a higher fine than the Federal Cartel Office.

- Is there a right of further appeal to a superior court, and if so on what grounds?

Further appeal against the decisions of the Higher Regional Court of Appeal can be made to the Federal Court of Justice ("Bundesgerichtshof" - BGH). The Federal Court of Justice only reviews the correct application of the law. Appeal to the Federal Court of Justice can only be made on special grounds, see Sec. 79 (1) Regulatory Offences Act. The appeal must be admitted by the Federal Court of Justice, see Sec. 80 Regulatory Offences Act.

- Is the procedure used to determine the amount of the fine in anti-trust cases consistent with constitutional/international human rights standards?

In 2009, the Higher Regional Court of Appeal held that the current application of Sec. 81 (4) S. 2 ARC as a cap, according to which the fine may not be higher than 10 % of the total turnover of the undertaking, is not consistent with German constitutional law.

According to Community Law, the provision stating that the fine shall not exceed 10 % of the turnover has to be interpreted as a cap, meaning that in the event the assessed fine exceeds it, the fine must be cut back to 10 % of the total turnover of the concerned undertaking. This interpretation is hitherto followed by the Federal Cartel Office according to its guidelines. The Higher Regional Court of Appeal held, that the interpretation as cap would imply that the theoretical maximum level of the fine was unlimited, which would be in breach of the constitutional principle of clarity and definiteness of the wording laid down in Art. 1, 2 and 20 of the Basic Constitutional Law. Therefore, the court interprets Sec. 81 (4) ARC not as a cap, but as the maximum level of fining. The maximum level fine shall only be imposed for gross violations of competition law according to the Higher Regional Court of Appeal. The Federal Cartel Office stated that it will not give up its present interpretation of Sec. 81 (4) ARC as a cap as for now.

It has to be awaited, how the Federal Court of Justice will interpret the provision in question.

3. Statistics

Year	Total amount of fines imposed by the Federal Cartel Office
1993	EUR 7 m
1994	EUR 7 m
1995	EUR 4 m
1996	EUR 10 m

1997	EUR	141 m
1998	EUR	11 m
1999	EUR	144 m
2000	EUR	20 m
2001	EUR	21 m
2002	EUR	5 m
2003	EUR	717 m
2004	EUR	58 m
2005	EUR	16 m
2006	EUR	5 m
2007	EUR	435 m
2008	EUR	314 m
2009	EUR	300 m
2010	EUR	266 m

4. Normative Questions / Recommendations

- What body should determine the level of fines (judicial/administrative)? If administrative, should the decision-maker be separate from the team that investigated the infringement?

The body determining the level of fines should be administrative. It should be fully independent and its decisions should be fully revisable (as it is the case e.g. with the Federal Cartel Office, but not with the European Commission).

- To what extent should the methodology used/level of fines be determined by, or be subject to the approval of, the legislature or politically-accountable government ministers, or should the level of fines and methodology used be left to independent competition authorities or courts?

The determination of the level of fines and the used fining methodology should be left to the independent administrative body only.

- What role should courts play in supervising the fining decisions of independent competition authorities? To what extent should they have regard to guidelines issued by competition authorities?

Courts should be able to fully revise the fining decisions of the independent competition authorities. The courts must not be bound by the guidelines followed by the competition authority according to the basic principle of separation of powers.

- To what extent should the level of fines reflect the size of the undertaking concerned? If so, how should “size” be measured? If turnover is to be used, what measure of turnover is appropriate (relevant market/overall turnover; year of infringement/year of fining decision)?

To take into account the size of the undertaking in calculating the fine is reasonable in principle. However, the turnover should not be used to measure the size because of the existing differences in profit margins. There rather should be an orientation towards the skimming off of extra profits (for reasons of deterrence, e.g. an amount equating to 2 or 3 times the extra profits could be skimmed off).

- How should the seriousness of an infringement be judged? To what extent should the anti-competitive intentions of the undertaking or its employees be relevant?

The anti-competitive intentions of the undertaking or its employees should be taken into account as aggravating circumstances, thus augmenting the fine.

- To what extent should the actual effects of the infringement be relevant? Should the amount of the fine exceed the harm caused (or likely to have been caused) by it, in order to provide suitable deterrence bearing in mind a low likelihood of detection?

The actual effects of the infringement should be considered. If e.g. none of the cartel participants actually follows the agreement, it should be taken into account

that no real damage occurred from the cartel. The amount of the fine should exceed the damages caused for reasons of deterrence.

- To what extent should the level of fines in competition cases be consistent with the level of fines imposed for other economic crimes/infringements (fraud/environmental law/consumer protection)?

If another economic crime affects consumers in the same manner as a competition case, the fines should be on the same level. However, it must be kept in mind that the fines imposed in competition cases are based on the Regulatory Offences Act, whereas most other economic crimes are punishable under criminal law. The most important difference is that criminal law does not arrange for the punishment of corporate bodies as does the Regulatory Offences Act. Criminal law is only applicable to individuals. The fines imposed under criminal law are calculated according to the social circumstances of the individual and cannot be compared to the fines imposed under the Regulatory Offences Act because of their completely different legal nature.

- To what extent should fines on an undertaking reflect its behavior after the infringement, such as co-operation/non-co-operation with the investigation/introduction of compliance measures/disciplinary action against employees involved/payment of compensation to victims?

As a matter of principle, the behavior of an undertaking should be taken into account as aggravating or extenuating circumstance and reflect in the imposed fine. The introduction of a compliance program after the infringement should not be considered as an extenuating circumstance. However, the existence of an extensive compliance program at the time of the infringement should be taken into account positively, because the undertaking showed a serious effort to prevent competition infringements committed by its employees. In such cases, corporate negligence might not be given.

- If competition fines are now high compared to fines for other economic crimes/infringements, is there any factor (such as the relative difficulty of detection) that might justify that difference, or is the difference not justifiable?

As mentioned before, in Germany the fines imposed under criminal law and the fines imposed under the Regulatory Offences Act are of a different legal nature and therefore cannot be compared.

5. Contact Details and Time Table

Please kindly make sure that your reports are sent to us before 10 March 2011. Of course any questions beforehand are very welcome.

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