Newsletter, 2 September 2021

Compliance – worth it after all!

Consideration of pre-infringement compliance when calculating antitrust fines

A company's serious corporate compliance efforts in the period prior to an antitrust infringement are to be taken into account in its favor in the event of a subsequent fine. This is another novelty of the 10th amendment of the Act against Restraints of Competition ("ARC")[1] which entered into force at the beginning of this year. The so-called "compliance defense" – introduced shortly before the end of the legislative process of the ARC amendment – was adopted following the advice of the Committee for Economic Affairs and Energy within the German Parliament ("Economic Committee"). The legislator has thus taken a clear position and rejected the previously pursued and simple concept of strict liability of companies for antitrust violations of their employees. Companies are responsible for taking *"adequate and effective precautions to prevent and uncover"* antitrust violations, but are not always liable for the success of such measures.

Background

According to the Economic Committee, the main reason for introducing the compliance defense is that anticompetitive conduct is in many cases only discovered and reported following internal measures of corporate compliance. Based on the new provision, adequate and effective measures taken prior to an infringement are now rewarded by law in the context of the assessment of the fine.[2] In detail, the circumstances to be considered when determining the amount of the fine shall in particular include *"adequate and effective precautions taken prior to the infringement to prevent and uncover infringements"*.[3] In any case, the measures must be *"adequate"* – but effective of course only in terms of detection of infringements: in case of effective prevention there is no investigation at all, in the absence of detection the measures were not effective.

Legal requirements

Effectiveness

The compliance defense is applicable if the owner of a company – as the responsible party for corporate compliance – has effectively taken all objectively necessary (= adequate) precautions to prevent antitrust infringements by its employees. As explained by the Economic Committee, this is usually, i.e. in particular the case if a previously established compliance system has led to the detection and reporting of an infringement of antitrust law.[4]

At EU level, the Commission strongly rejects the application of a compliance defense.[5] In contrast, by including it in the ARC the German legislator has now apparently taken the approach that an infringement does not per se speak against the seriousness or effectiveness of corporate compliance measures. According to the explanations of the Economic Committee, the seriousness or effectiveness of corporate compliance is now only questioned if the infringement was not discovered and reported by the company's own compliance management system or if the management (e.g. board of directors or another person responsible for the management of a legal entity or partnership) was itself involved in the antitrust infringement. In the latter case, it can be assumed that the adopted measures of corporate compliance are ineffective as a whole, as the management person responsible for compliance has not followed them on behalf of the respective company owner who is obliged to do so. As a result, the goal of ensuring that all objectively necessary precautions have been taken with regard to corporate compliance is not met. However, it should be irrelevant for the application of the compliance defense if even proper (hypothetical) compliance measures either would not have prevented the infringement or would not have made it significantly more difficult. In any

[1] See Commeo Newsletter of 1/2021 (overview) and of 08/2021 (on the aspect of relative market power).
[2] BT-print 19/25868 of 13/1/2021, p. 122 (in German only).
[3] Section 81d (1) sentence 1 no. 4 ARC.
[4] BT-print 19/25868, p. 122.
[5] See Commission, Compliance matters, p. 21, 2012; cf. Pautke in Schultze, Compliance Handbook Competition Law, 2nd edition 2021, para. B 46 with further references (in German only).

case, a company's basic effort to comply with antitrust rules shall be taken into account in its favor. The fine reduction, however, may then be *"at best marginal"*.[6]

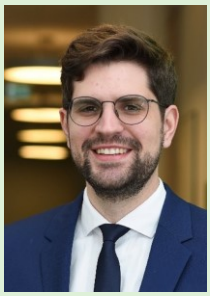
Adequacy

Moreover, in order to benefit from the compliance defense, the measures to be established in the context of a compliance management system must be adequate to prevent and uncover infringements. The necessary content and scope of corporate compliance shall be based on the type, size and organization of the company as well as on the riskiness of its business purpose, the number of employees, the regulations to be complied with and the risks of a violation in each individual case.[7] In case of small and medium-sized companies with a low risk of antitrust violations, *"a few simple measures"* may be sufficient and the purchase of corporate compliance programs or certifications may not be necessary.[8]

Comment

The partial departure from the principle "a violation indicates a compliance shortcoming" resulting from the (welcome) introduction of the compliance defense is in line with corporate reality. Despite appropriate best efforts, it is obviously not possible for companies to completely exclude antitrust violations by employees with a certain level of "criminal energy".[9] Accordingly, a hypothetical test whether compliance would have prevented violations at all or made them significantly more difficult fits in reasonably. With regard to effectiveness it should be noted that measures are already regarded as effective if they have led to the avoidance or, alternatively, the detection of an infringement. Contrary to this, the wording in the law (*"and"*) indicates that both pre-conditions must be fulfilled. However, this cannot be correct, as in both cases the purpose of the established precautions have been fulfilled. Moreover, the requirement of *"detection"* must be understood in such a way that the internal detection of an infringement is sufficient for compliance to be effective. The question of whether a company subsequently decides to report the infringement to the Federal Cartel Office ("**FCO**") after its termination must be attributed to its post-infringement behavior and is therefore irrelevant for compliance prior to an infringement.[10] In consequence, a subsequent actual report of an infringement to the FCO cannot be seen as mandatory to fulfill all objectively necessary precautions.

With regard to the adequacy of corporate compliance measures, the FCO's draft of Practical Guidelines on the Application for Early Deletion from the German Competition Register contains, according to its context, detailed comments of the FCO on corporate compliance measures in relation to the so-called "self-cleaning process" when an antitrust infringement has been included in the Competition Register. At the same time, the FCO is of the opinion that the Guidelines cannot be applied for compliance defense purposes because of a *"fundamentally"* different initial legal background.[11] Contrary to this, the purpose of compliance within the Guidelines and also within the compliance defense is concurringly directed to the aligned aim of avoiding competition law infringements. The fact that in case of self-cleaning, the antitrust infringement committed merely narrows down the necessary compliance measures does not speak against an expedient transfer to the big picture. A look at the Guidelines thus appears to be useful in any case.



Christopher Brendel **Dr. Jörg-Martin Schultze**

COMMEO Rechtsanwälte PartGmbB
Rechtsanwälte und Notar
Speicherstraße 55
D-60327 Frankfurt am Main
www.commeo-law.com

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[6] BT-print 19/25868, p. 122.
[7] Ibid., p. 123.
[8] Ibid., p. 122 et seq.
[9] Cf. *Schultze* in Schultze, Compliance Handbook Competition Law, 2nd edition 2021, para. A 5 with further references.
[10] Cf. *Schultze* in Schultze, Compliance Handbook Competition Law, 2nd edition 2021, para. A 11.
[11] FCO, Practical Guidelines for an Application for Early Deletion from the Competition Register (draft version of June 2021), recital 17 et seq. (in German only).