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Competition Compliance Programmes – Note by Germany

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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1. Introduction

1. Compliance with competition law has become an issue of growing importance over the last couple of years as fines for infringements of competition law are constantly increasing. In Germany, two major developments reflect this increasing importance: firstly, the new rules implemented by the 10th amendment to the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB)¹ on how compliance programmes are to be taken into account when setting fines and secondly, the launch of the new Competition Register. Following the Bundeskartellamt's contribution to the 2011 OECD Roundtable on “Promoting Compliance with Competition Law”, this document mainly sheds a light on these two legislative tools related to competition law compliance.

2. Background

2. Since 2011 the Bundeskartellamt has continued to impose heavy fines for violations of antitrust law. In 2014, for instance, it imposed a fine of 281.7 Mio. Euros in total on undertakings of a sugar cartel, the highest single fine being 195 Mio. Euros.² In 2019, the Bundeskartellamt fined the members of a cartel of quarto plates manufactures with 646.5 Mio. Euros in total, 370 Mio. Euros being the highest single fine imposed.³ In 2020, undertakings participating in an aluminium cartel were fined 175 Mio. Euros, a fine of 145 Mio. Euros was imposed on a single undertaking.⁴

3. The ongoing focus on cartel enforcement and the increase in fines have thus continued to draw attention and awareness to efficient and effective compliance programmes within the business community. Compliance programmes do not only prevent undertakings from infringing competition law but also, they contribute to uncover and terminate infringements more effectively. Lastly, they help undertakings to become aware more quickly of potential infringements and hence to increase their probability to benefit from leniency rules. The Bundeskartellamt therefore strongly supports all compliance measures. Lastly, enforcers can consider effective compliance measures as mitigating circumstances when setting fines (as will be described below).

4. Amongst the variety of potential compliance measures undertakings have to choose the ones most suited to the size and sector of their business. The Bundeskartellamt cannot set any general rules in this respect; however, key principles regarding the general

¹ Available at: http://www.gesetze-im-internet.de/englisch_gwb/.

² Press release available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2014/18_02_2014_Zucker.html.

³ Press release available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/12_12_2019_Quartobleche.html.

⁴ Press release available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/23_12_2020_Alu_Schmieden.html.

assessment of fines are laid out in the Bundeskartellamt's "Guidelines for the setting of fines in cartel administrative offence proceedings".⁵

3. Consequences of effective compliance on the setting of fines – new rules implemented by the 10th amendment to the German Competition Act

5. It has been recognized in antitrust practice that effective compliance implemented *after* the infringement took place might be considered as mitigating circumstance in the setting of fines. Any measures taken by the undertaking concerned effectively prevent and detect infringements in the future are eligible for consideration. The new amendment to the German Competition Act in January 2021 established an explicit legal basis to this practice. It determines (Section 81d (1)) that precautionary measures taken after the infringement to prevent and detect infringements in the future may be considered as circumstances to be weighed in the setting of fines.⁶ An important indicator, for instance, for the seriousness of compliance measures after the infringement is that the undertaking has actively cooperated in the investigation of the offence.

6. New, however, is the option for enforcing authorities to consider precautionary measures taken *prior* to the infringement when setting fines. The German Competition Act (Section 81d (1)) stipulates that adequate and effective precautions taken prior to the infringement to prevent and detect infringements may also be taken into account in a mitigating manner.

7. The type and scope of compliance measures depend on the case at hand and, in particular, on the type, size and organisation of the individual undertaking, the specific risks of the undertaking's business, the number of employees, the regulations to be observed and the risk of their violation.

8. As a rule, compliance prior to the infringement can be assumed to have been effective if the measures taken led to the infringement being uncovered and reported. However, compliance measures prior to the infringement cannot be taken into account if a person responsible for the management of the company was involved in the infringement.

4. Competition Register ("Wettbewerbsregister")

9. The second development worth mentioning is the launch of the Competition Register in early 2021. This new tool helps to fight white collar crimes and increases compliance with competition law by providing public contracting authorities, sector contracting entities and concession grantors with information enabling them to assess whether an undertaking can or must be excluded from award procedures in Germany for having committed economic offences.

⁵ The Guidelines are currently being revised; a revised version will be accessible here shortly: <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.html?nn=3591462>. In addition to elaborations on compliance measures prior to infringement, key amendments will concern the handling of cases in which the antitrust violation was committed by a person with manager responsibility in the undertaking concerned as well as cases in which an employee deliberately circumvented the installed compliance measures.

⁶ In 2016, for instance, the Bundeskartellamt uncovered a case of vertical resale price maintenance which Lego had enforced on its retailers. Lego took organisational and personnel-related steps in order to prevent any future non-compliant behaviour. The Bundeskartellamt took Lego's efforts into account and, as a consequence, lowered the fine imposed on the company.

10. Prior to the introduction of the federal Competition Register, contracting authorities could consult the Central Trade and Industry Register as well as several corruption registers in several federal states with, however, widely varying registration requirements. As for information on individuals, entries in the Federal Central Criminal Register could be requested.

11. The Competition Register, introduced by the 10th amendment to the German Competition Act and the Competition Register Act,⁷ is the first fully digitised state register in Germany. It is a highly sophisticated IT project with interfaces to many administrative authorities. The register will be maintained by a special division at the Bundeskartellamt.

12. The Competition Register enables more than 30,000 public contracting authorities to check in a single electronic search whether an undertaking has committed relevant violations of the law and therefore can or must be excluded from a public procurement procedure pursuant to Sections 123 and 124 of the German Competition Act. The Competition Register has interfaces to a number of external bodies (e.g. public prosecutor's offices). Decisions like criminal convictions, penalty orders or decisions on fines – some of which must exceed a certain minor threshold – are reported to the Competition Register electronically and enable seamless inquiries from public authorities.

13. On the one hand, the register is a very effective deterrence tool for serious economic offences: Every public authority is obliged to consult the register when awarding a contract with an estimated value of EUR 30,000 or more. Voluntary checks on lower valued-contracts are possible as well. On the other hand, the Competition Register provides incentives to prevent misconduct in the future by offering companies a “self-cleaning” mechanism. While entries in the Competition Register are automatically deleted after 3 or 5 years, undertakings may apply for earlier deletion of the entry following “self-cleaning”, i.e. demonstrating that they have taken effective compliance measures.

14. For self-cleaning measures to be successful, undertakings must demonstrate that they fulfil the following requirements: (1) the undertaking at stake compensates or commits to compensate for any damage caused by the infringement, (2) the undertaking cooperates both with the investigating authorities and the contracting authority, (3) the undertaking provides specific technical, organisational and personnel-related means to prevent further criminal offences or misconduct. The Bundeskartellamt examines whether the self-cleaning measures taken by the respective undertaking are sufficient or not.

5. Conclusion

15. The establishment of a legal basis for the practice of considering compliance measures in the setting of fines as well as the introduction of considering compliance measures prior to the infringement not only considerably increase legal certainty for the undertakings concerned, but also provide an additional incentive for undertakings to establish effective compliance programmes.

16. The Competition Register provides undertakings with a further incentive to comply with the law and to prevent violations as early as possible or, if infringements have already taken place, to implement comprehensive compliance measures.

⁷ “Wettbewerbsregister-Gesetz“, WRegG, accessible at: https://www.gesetze-im-internet.de/englisch_wregg/index.html.