

POSITIVE EFFECTS OF COMPLIANCE PROGRAMS UNDER THE NEW GUIDELINES FOR FINES BY THE FCO

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In October, the German Federal Cartel Office (*Bundeskartellamt*, "FCO") published new guidelines on its leniency program and on the setting of fines in cartel proceedings.¹ The guidelines substantiate the changes in the law resulting from the 10th Amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, "ARC") earlier this year² and provide important information on how the competition authority exercises its discretion:

The FCO's Previous Position

Until recently, the FCO had not explicitly promoted systematic compliance efforts by companies since (i) the fulfillment of antitrust obligations is the sole responsibility of the companies, and (ii) an antitrust violation with an existing compliance program might indicate that the latter was not functioning (properly). To the extent that a compliance program enabled violations to be uncovered at an early stage, immunity from or a reduction in fines could have been obtained through self-reporting under the leniency program.

As a result, compliance systems were recommended to avoid organizational culpability, but were not taken into account in the calculation of fines.

While they continue to be relevant for avoiding personal liability of the company owner, who is otherwise uninvolved in the specific antitrust violation, for breaches of supervisory and organizational duties,³ the FCO has reconsidered its approach to the assessment of fines and, on the one hand, has aligned itself with the established practice of antitrust authorities such as the British *Competition and Markets Authority* and the *Competition Bureau Canada* and, on the other hand, has probably also reacted with foresight to a decision of the German Federal Court of Justice (*Bundesgerichtshof*, "BGH").⁴

Pre-Offense Compliance

In the future, pre-offense efforts to prevent and detect infringements can be taken into account in the calculation of fines, both according to the text of Section 81d ARC and according to the FCO's new guidelines on fines set on this legal basis – provided that the "objectively necessary precautions for the effective prevention and detection of antitrust infringements" have been taken.

The guidelines state that the requirement of effectiveness of a compliance management system can be affirmed if the precautions taken have led to the detection and prompt reporting of the infringement. The real news is that – deviating from its own prior position – the FCO then goes on to state that the effectiveness cannot per se be

denied merely because the precautions taken did not lead to the detection and reporting of the infringement if the acting person has disregarded the company's compliance code to an extraordinary extent and with deliberate deception of his or her superiors in order to achieve personal advantages. Thus, acknowledging that even a very good and robust compliance system can be circumvented by individuals with premeditation, the new guidelines provide that a company's compliance efforts to prevent breaches can still lead to a reduction of fines in such cases.

However, a compliance defense is excluded if a person responsible for the management of the company (e.g., managing director or board member) was involved in the infringement.

Post-Offense Compliance

Precautions taken after the offense to effectively prevent and detect corresponding offenses may in the future have the effect of reducing the fine within the framework of an overall consideration of the positive post-offense behavior.

For this purpose, the respective company must convincingly demonstrate the precautions taken to effectively prevent future comparable violations and clearly show a commitment to act in accordance with the law.

In order to draw conclusions about the seriousness of the compliance system, it will also be relevant whether the company is actively cooperating with the authorities to clarify the facts in question and to what extent the company has made efforts to repair the damage.

Key factors in the calculation of fines	Prerequisite for consideration (discretionary: “may”) mitigating criteria in the calculation
Pre-offense compliance Objectively necessary precautions for the effective prevention and detection of antitrust violations.	Effectiveness of pre-offense compliance...
	(+) ... if the precautions taken have led to the <i>detection</i> and <i>reporting</i> of the violation.
	(+) ... if the precautions taken have not led to detection and reporting solely because the acting person has disregarded the company's compliance policy to an <i>extraordinary degree</i> and by <i>deliberately deceiving</i> his or her superiors in order to <i>gain personal advantage</i> . (-) ... if a person <i>responsible for the management of the company</i> (managing directors or members of the board of management) was <i>involved in the violation</i> .
Post-offense compliance Precautions taken after the offense to effectively prevent and detect corresponding offenses in the future as part of an overall consideration of the positive post-offense conduct.	Seriousness of post-offense compliance...
	(+) ... if the company <i>convincingly demonstrates the precautions taken to effectively prevent future comparable violations</i> and a <i>clear act in accordance with the law</i> is clearly evident. For conclusions on the seriousness of the compliance system, it will be relevant to the assessment in a double benefit (as the company at the same time also independently assessable aspects of post-offense conduct): <ul style="list-style-type: none"> - <i>Active cooperation</i> of the company in <i>clarifying the facts</i> - Efforts by the company to <u>remedy damages</u>

FOOTNOTES

¹ The guideline is available only in German, [here](#).

² On 19 January 2021, the Draft Bill (ARC-Digitization Act, available only in German [here](#)) of the German federal government to amend the ARC came into force (as amended by the Economics Committee, parliament document 19/25868, available only in German [here](#)).

³ See Section 130(1) of the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*, available in English, [here](#)).

⁴ BGH, judgment of 9 May 2017, 1 StR 265/16, margin no. 118 (available only in German, [here](#)).

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