CPI EU News Presents:

A Game Changer for Germany's Competition Practice: Compliance Defense and Sweeping New Cartel Enforcement Powers in the 10th Amendment to the German Competition Act

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On January 19, 2021, the 10th amendment to the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), came into force. The amendment is mostly driven by the German legislator's intent to pioneer in the digitization of competition law and the need to transfer the EU Directive on the harmonization of competition law enforcement in the EU Member States (so-called "ECN Plus Directive") into national law. But it goes beyond, and in some aspects this reform can be regarded as a game changer for competition law practice in Germany.

Focusing here on important changes for compliance and cartel investigations, for affected companies it means "carrots and sticks": On the one hand, German law now recognizes for the first time a compliance defense, i.e. the existence of corporate compliance programs as a defense in proceedings concerning cartel fines. Companies with effective and appropriate compliance management systems may invoke this new provision for the assessment of the fine regardless of whether these compliance measures have taken place before or after the infringement (**see below 1.**). On the other hand, the reform also provides the German Federal Cartel Office (*Bundeskartellamt)* with sweeping new powers in dawn raids and cartel investigations, i.e. companies that do not cooperate (immediately) can now also be forced to cooperate in the investigations (**see below 2.**).

Other important changes – although not part of this article – mainly include additional powers for the Federal Cartel Office with regard to regulating Big Tech (https://www.competitionpolicyinternational.com/digital-avant-garde-germanys-proposed-digital-antitrust-law/), the introduction of new data access claims, as well as a significant increase of German merger control thresholds, expected to cut back on about 40 percent of merger filings over the past years.

1. The New Compliance Defense

The New Provision in Detail

Compliance pays off, and now more than ever. According to the new provision in Section 81 d (1) (2) GWB (new version), antitrust compliance efforts both before and after the infringement are now relevant for the assessment of the fine. The newly worded provision states:

> *"In the case of fines, [...] the circumstances to be weighed shall include in particular:*
>
> > *No. 4: previous infringements by the company as well as **appropriate and effective precautions taken before the infringement to prevent and detect infringements**; and*
> >
> > *No. 5: the company's efforts to detect the infringement and to repair the damage, as well as **precautions taken after the infringement to prevent and detect infringements**."*

According to the reasoning behind this amendment, compliance measures are *"appropriate and effective"* if *"the owner of a company has taken all precautions which are objectively necessary in order to effectively prevent infringements of competition law provisions by employees."* This can generally be assumed to be

the case *"if the measures taken have led to the detection and reporting of the infringement."*

Therefore, following this reasoning, the compliance defense can be taken into account to reduce fines where:

1. the precautions taken have led to the discovery and reporting of the infringement,

and

2. neither the management (such as the board of directors of a stock corporation) nor any other person responsible for the management of the company was involved in the infringement.

The assessment of compliance measures as **"appropriate"** shall be undertaken on a case-by-case basis and shall depend on the size of the company, the tendency of the company's business area toward cartelization, the number of employees, the applicable regulations and the risk of their infringement.

A compliance defense only in case of leniency applications?

It has to been seen whether the term *"precautions to prevent and detect infringements"* will be interpreted by the courts as generally requiring the companies to report the infringement to the Federal Cartel Office. While the explanatory memorandum to the amendment may indicate such an approach, the wording of the new provision itself does not mention the requirement of "reporting" the infringement. In practice, this question could arise, for example, in cases where a company either decides not to file a leniency or bonus application or files such an application, for example, only after the start of a dawn raid – i.e. where the infringement may already have been "detected."

In any case, it can be assumed that the Federal Cartel Office, among others, will certainly expect this to be an incentive for leniency applications, which have further declined last year.

2. Obligation to Cooperate during the Investigations Phase

Another game changer for German competition law practice are the new obligations of cooperation in the investigation phase, both with regard to dawn raids and requests for information (*RFIs*).

New Cooperation Obligation in Dawn Raids

Up to now, the management and employees of the company concerned were only obliged to tolerate the search of their office premises and the seizure of evidence (primarily electronic data) in the event of a dawn raid by the German Federal Cartel Office. In contrast to cartel investigations by the European Commission, they were under no duty to cooperate such as through the disclosure of the location of certain documents or the password of their laptop. This has now changed.

In future, management and employees must disclose "*information that may provide access to evidence, as well as explanations of facts or documents that may be related to the subject matter and purpose of the search*" in the course of a dawn raid, subject to a fine (Section 82b (1)(1) in conjunction with Section 59b (3)(1) no. 3 GWB, new version). The right to refuse to provide information does not apply if "*the information only gives rise to the risk of proceedings for a fine by the antitrust authorities*" and the Federal Cartel Office has given a non-prosecution commitment (Section 82b (2) in conjunction with Section 59 (4)(2) GWB, new version). Since the Federal Cartel Office can withdraw such non-prosecution commitment, for example because the employee allegedly did not testify completely or correctly, this considerably restricts the *nemo tenetur*-principle as guaranteed by fundamental rights. Only future practice and case law will show how such situations will be dealt with in a dawn raid situation and following legal challenges. In light of these changes, it will be very interesting to see whether the protection of private data will arise as the new limitation for such cooperation obligations (see the recent General Court decision in *Les Mousquetaires*, Case T-255/17).

Increasing use of RFIs to be expected

Up to now, the Federal Cartel Office has only been allowed to request information and documents on turnover data and company shareholdings for the purpose of calculating fines (Section 81b GWB).

In future, the Federal Cartel Office may also through RFIs request the provision of information and the surrender of documents which form the basis of the cartel infringement (Section 82b (1)(1) in conjunction with Section 59 GWB, new version). For the Federal Cartel Office, such general investigation RFIs offer the advantage that the companies themselves will have to investigate, i.e. have to execute the often broad search terms provided by the Federal Cartel Office and surrender all hits to the authority, under threat of fines. This development comes at a time where the European Commission as well is increasingly making use of this option in its antitrust investigations already. Here, too, the *nemo tenetur*-principle is in danger of being undermined.

3. Outlook for Compliance in 2021

Only recently, in its annual review of 2020, the Federal Cartel Office noted a decline in leniency applications as a result of increased cartel damages litigation. As a consequence, the Federal Cartel Office has announced that it will explore "*innovative investigation methods such as the screening of markets*" and expand the possibilities of its digital anonymous whistleblower system.

It remains to be seen whether the changes of the 10th amendment to the German Competition Law Act will already entail the desired success and increase the effectiveness of cartel enforcement. In any event, the Federal Cartel Office seems to be already exploring further means to revive cartel enforcement.

Recognition of effective compliance programs is in line with current trends. With this new provision, Germany has followed the U.S. Department of Justice ("DOJ "). For a

long time, the DOJ had (also) resisted recognizing compliance efforts as a mitigating factor in sentencing antitrust infringements. It was not until the summer of 2019, however, that the DOJ made a surprising U-turn and declared that effective compliance systems should now be taken into account – including, in particular, when bringing charges (https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance). In an accompanying document on the "Evaluation of Corporate Compliance Programs in Criminal Antitrust Violations," the DOJ also published guidelines on the requirements which an effective compliance program must meet in order to be rewarded accordingly.

In Germany, the new provision is also in line with the wording of the government's current draft of the new German Corporate Criminal Law Act (Section 15 (3) (2) No. 6 of the government draft). There, too, the legislator provides that the court may take into account "*[...] precautions taken prior to the act of association to prevent and detect acts of association*" when assessing fines against companies.

Companies should be prepared for an increased activity by competition authorities globally from fall 2021 onwards at the latest, also in view of the current backlog of antitrust dawn raids due to the Corona pandemic. When reviewing their dawn raid procedures and antitrust compliance programs, companies should therefore pay increased attention to ensuring that these comply with new investigative powers and new requirements for appropriate and effective compliance precautions. Compliance pays off, and now more than ever.

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