UNDERTAKINGS' COMPLIANCE PROGRAMS IN EUROPEAN UNION COUNTRIES

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ABSTRACT
The European Union competition rules concern undertakings' competitive behavior and apply directly to all Member States. No implementation in the national regulation is required. This fact determines companies to know better both the EU provisions and the national ones, because they are directly applied by the European Commission as well as by national competition authorities.

KEYWORDS: *competition, compliance, undertaking, legislation, dominant position*

JEL CLASSIFICATION: *L21, L25, L44*

1. INTRODUCTION

Undertakings take into consideration the establishment of necessary programs in order to ensure the compliance with the European Union competition law for preventing in such a manner the violation of the rules in force. These programs are typically called compliance programs. In practice, they are often developed according to past violations of law or even after the moment when the fines were imposed. Such programs are increasingly considered essential elements of good corporate governance.
There is a vast literature in the field concerning the economic implications of compliance programs of the undertakings in EU countries. Among the named studies we mention those of (Baker, 2003), (Carree, Gunster & Schinkel, 2010), (Klein, 2010), (Gual & Mas, 2005), (Motta, 2004), and (Monti, 2007).
The authors consider the compliance programs of the undertakings are very useful from these perspectives: demonstrate the commitment to responsible conduct, reduce the likelihood of violations, reduce the likelihood of heavy penalties if violations occur and make the organization more efficient.
(Belami & Child, 2008) consider that the complexity and cost of a compliance program can vary with the size of the organization. There is no need to reinvent the wheel when creating a program. A good place to start the process is to consult with others in your field to learn what they have already done. One can consult the professional association to find out how many of its members have compliance programs and how theirs were created.
In their book, (Church & Ware, 2000) made a compliance manual that lays out exactly what procedures all employees must follow. They mentioned that, among other things, a good compliance manual defines in clear language the purpose of the compliance program, along with the professional and ethical standards that all employees are expected to follow.

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2. EUROPEAN UNION COMPETITION RULES

European Union competition rules apply to "undertakings", an expression defining any entity engaged in the economic activity. Business groups, such as trade associations and other industrial groups, while they generally pursue legitimate purposes and operate as a business-friendly forum are also obliged to comply with the European Union competition rules.
Thus, there are two basic types of behavior prohibited by the EU competition rules: anticompetitive practices and the abuse of dominant position.

2.1. Anticompetitive practices

The anticompetitive contacts among undertakings that, irrespective of their form, are able to distort competition are presently prohibited. Such contacts may take various forms and they do not require the formal acceptance of undertakings involved in the agreement.
Examples of anticompetitive practices are price fixing, market sharing, customers' allocation, output limitation and bid rigging. These types of cartels are qualified as "hardcore" cartels which mean competition restrictions because they do restrict competition by their nature.
Information exchange between competitive companies in terms of future prices or quantities which are sold may also constitute a "hardcore" violation. More generally, any exchange of confidential and strategic information between competitors could raise competitive problems.
This refers to all types of information that reduces market uncertainty, for example those concerning production costs, lists of customers, the turnover, sales, output capacity, the quality of products, marketing plans and so on.
Moreover, even unilateral disclosure of strategic information by one of the undertakings, by means of the e-mail, phone calls or meetings with competitors may be considered a problematic issue.
The agreements between the undertakings at different levels of the supply chain, usually the distribution agreements between suppliers and distributors, aiming at establishing prices or sharing artificially the internal market, are also illegal.
For example, a supplier cannot force its distributors to refuse selling their products to customers that reside outside a particular territory. In addition, he cannot impose to its distributors a resale price for a certain product.

2.2. Abuse of dominant position

Dominant position is not prohibited per se, either on the Community market or on Romanian one. Economic undertakings holding such a position are subject to the above mentioned rules only if they abuse by resorting to anticompetitive facts.
Undertakings that have a significant position on the market (in general, a market share exceeding 40%) could be considered as holding a dominant position. They do have a particular responsibility not to engage in behaviors that might be abusive, such as:
a) Imposing directly or indirectly, sale or purchasing prices or other unfair trading conditions;
b) Limiting production, distribution or technological development to the prejudice of consumers;
c) Applying for trading partners a number of unfair conditions to equivalent transactions, thereby causing to some of them, a disadvantage in their competitive position;
d) Making the conclusion of contracts subject to the acceptance by partners of some clauses stipulating supplementary obligations which, neither by their nature nor by commercial usage, have no connection with the object of these acts.
All undertakings are subject to the competition rules, without differences in terms of their size. A small company has no excuse not to comply with the applicable laws in the European Union or with the national competition rules, because of its size.

2.3. Several explanations of competition rules

The European Commission is working hard to make it easier for businesses to become more familiar with the rules that have to be respected.

Certain types of agreements are exempt from the general prohibition if their restrictive nature could be justified by benefits brought to the consumers as well as to the economy as a whole. However it is unlikely that "hardcore" practices mentioned above, provide such benefits.

Undertakings are expected to evaluate by themselves and to verify whether their behavior complies with competition rules and, in this respect, we may consider looking for legal consultancy.

General guidelines used for establishing whether an agreement is considered exempted or not are provided by the Commission. In their great majority, these regulations exclude restrictions regarding certain categories of agreements (for example, in the case of research and development, specialization or distribution) up to a certain level of market power, defined as market share, with particular conditions to be accomplished. Regulations and instructions concerning horizontal or vertical agreements between undertakings are applied when there is a violation suspicion of Article 101 belonging to the Treaty on the Functioning of European Union.

In the block exemption, the European Commission has developed guidelines for horizontal or vertical agreements as part of the competition policy at the EU level.

Concerning the abusive behavior, the Commission has published guidelines for its priorities on applying the Article 102 of the Treaty.

Moreover, the formal decisions of the Commission as well as those of the European Court of Justice are publicly available and the Commission is expected to publish the official opening and closing procedures on its site and/or by means of a press release.

Finally, the Commission publishes an annual report on competition policy as well as a number of information brochures.

3. THE ACCOUNTABILITY AT CORPORATE LEVEL

3.1. The benefits and effectiveness of compliance

An important reason for undertakings to comply with competition rules, outside of being seen by others as doing business ethically, is the potential high cost of non-compliance.

An active strategy for supporting compliance with laws in force and business ethics could increase company's reputation and its attractiveness for the purposes of promotion and recruitment. This might raise employees' satisfaction at the workplace, contributing in a constructive sense to their feeling of belonging to an undertaking. The staff which is aware of what could constitute an illegal behavior will be also more attentive to the behavior of its competitors or business partners.

A company could do more to ensure itself that a certain fair business environment is maintained by bringing to the attention of competition authorities the potential of violating competition rules. This fact could be done firstly by notifying the Commission or a certain national competition authority of any suspected infringement of laws. Secondly, the undertaking could apply for the leniency program to obtain immunity or fines' reduction, in the case in which the respective company was involved in a violation of law. The leniency program is usually applied for detecting the most serious infringements, such as cartels. Last but not at least, the undertaking could make a complaint whenever it is the victim of an anticompetitive agreement established between the other companies or if it has suffered damages as a result of the abuse of dominant position exercised by a company on the market.

Any effort made by an entity for ensuring that it complies with the EU competition rules is praiseworthy but, what matters in the end is that the rules be respected. When it comes to taking practical measures, undertakings should be interested in the fact that their efforts will be evaluated according to their results, in other words, they will be judged based on their success in avoiding law infringement. Thus, the abstract or formal compliance commitment will not lead to concrete results

and any credible compliance program must be built on a solid foundation, be supported by management commitment and by a "top-down" type compliance culture.

3.2. The costs of non-compliance

The European Commission ensures the effectiveness of applying these rules within the entire European Union, investigating the suspect infringements and addressing enforceable decisions to undertakings in order to stop law violations, in parallel with applying fines.
The decentralized system which was imposed at the level of the Union has determined that the activity of applying provisions in the competition field by national authorities empowered to apply in parallel the EU rules, to be added to the similar activities of the Commission, within a single framework, by means of consistency and uniformity in the application process.
National courts also play a significant role. They may declare null an agreement, if it refers to the infringement of European Union competition rules. Further, courts may judge compensation claims resulting from the violation of competition rules and award the respective compensation to the plaintiff.

3.2.1. Sanctions as administrative or penal fines and other repercussions

Fines applied by the European Commission to undertakings violating the EU competition rules, although they are administrative by their nature, may be substantial, up to 10% of the turnover of the respective company at the global level. It should be noted that fines are applied even if the infringement itself has no effect.
There are a series of violations of competition rules such as: price fixing, limiting production and commercialization, market share. It should be highlighted that object agreements are the most serious types of infringements.
Irrespective of their awareness, undertakings assume integrally the financial risk they face in the case in which they do not comply with the competition rules.
The risk of engaging in an anticompetitive behavior becomes considerable for an undertaking as evidenced in particular by a significant number of decisions involving the Commission's sanctions in recent years.
The national competition authorities investigate similar types of anticompetitive behaviors. The abusive conduct of dominant undertakings does represent a constant preoccupation for the Commission. This has led to a considerable number of decisions imposing fines in last years, for example in the IT sector and on recently liberalized markets or ongoing liberalization process. In this respect, it is to be noted the energy field, that of telecommunications and the postal one.
In addition to imposing certain fines to undertakings, a number of Member States provide sanctions for individuals, for example: fines or disqualifications. The laws within some countries allow deprivation of liberty penalties for persons involved in violation of competition law and/or in particular predefined types of infringements (for example, bid rigging). These sanctions can be separated or applied cumulatively. Therefore, undertaking managers acting in an illegal manner, risk imprisonment in certain Member States.
Illegal agreements are null and may attract the payment of damages. Restrictive agreements which are incompatible with the EU competition rules are automatically null. This means that one of the agreement's parties could not be required to honor a cartel that is illegal. In the case in which a violation of EU competition rules causes or caused damages to a third party, the victim is expected to claim for damages from the offender.

3.2.2. Media communication of infringements and other consequences

The Commission issues a press release whenever it finds an illegal behavior and it fines the entities which are involved. The media impact of such news could harm the undertakings' reputation and it

might be correlated to the hostility coming from the customers and clients feeling deceived and being able to apply for recovering prejudices for the damages they suffered.
Moreover, the investigations issued by the Commission or by the competition authorities may be time consuming and costly for businesses. Managers may be involved for long periods of time in discussions concerning legal issues, being less available for their core activity, generating their revenues.

3.2.3. Ensuring compliance

In order to ensure compliance with competition rules, companies should take into consideration the establishment of a strategic plan which is expected to be followed step by step. These steps are summarized below:

a) Imposing a clear strategy
In order to ensure the effective compliance with EU competition rules, undertakings should consider developing a written program tailored to its needs rather than just react to the problems when they arise. The ultimate goal of such a strategy consists in increasing the awareness of potential conflicts with competition legislation and in disseminating the appropriate knowledge to all the levels of the entity, from the simple employees up to the middle and top management.

b) Identifying risks and individual exposure
Compliance strategy should be based on a comprehensive analysis of fields where it is most likely to have violated the competition law. These areas depend on different factors such as: the activity (for example, a history of previous violations in the sector), the frequency of interactions with competitors, market characteristics.
Risk exposure can vary a lot even in function of the position held by each staff member. Employees whose specific areas of responsibility do lead to a great exposure (for example, employees who interact frequently with competitors as part of their current activity) should be aware of what is in the field.

c) Disseminating the compliance program throughout the entire organization
In the interest of respecting a compliance strategy, it is important for the organization to disseminate it across the business. For clarity reasons, the strategy is preferred to be written in all working languages of the entity, clearly formulated so as to be understood by everyone. For example, this could take the form of a manual.
Such an internal guidance should ideally contain a general description of EU legislation in competition field, as well as the purpose of its implementation and the evidence of potential costs of non-compliance. In this way, employees are expected to understand better the reason for respecting the strategy and its importance.

d) Signing of formal documents concerning employees' acknowledgement of the program and their assessment in relation to the provisions of compliance program
Safety measures taken by undertakings in relation to informing and applying compliance programs may include: written confirmation on receipt of relevant information, allowance of incentives, penalties for violating internal compliance programs.

e) Program continuous updating
Obviously, it is not enough just to put on paper a compliance strategy. If the material is made for employees, this should be regularly revised.

It should clearly identify the points in which one could require guidance by means of personnel contact, in the case of the appearance of doubts about the compatibility of certain types of behavior or agreements with EU competition regulation.
The regular training on EU competition applicable rules does play a significant role. A series of companies offer to their employees, in particular to the newcomers, training in this regard.
If the company's analysis indicated a high risk in some areas, staff training should be provided in those fields. The category of staff most likely to face risky situations that could lead to the involvement in possible delinquency refers to salesmen because of their participation to the meetings of professional associations or to the events organized in the named industry.
In any case, a compliance strategy will be more effective if a clear mechanism is applied for ensuring the compliance policy updating. Thus, the written strategy could be made accessible to employees at any time.

f) Monitoring and auditing
Monitoring and auditing can serve as a tool for preventing and detecting possible anticompetitive behaviors.
Audit aims to cover the anticompetitive behavior only after its establishment.
Both mechanisms may be combined so the appropriate procedure depends on undertaking's specific needs. In this respect, a certain form of control is considered very important in order to sustain the internal credibility of a compliance strategy. Applying a strategy of compliance is expected to prevent any kind of violation of competition law. However, when this does not happen, you can take immediate action to end the abuse. This can lead to a limitation of the effects on the competitive environment as well as of company's exposure.
Another way to limit the undertaking's exposure is provided by the use of a leniency application in the case of the Commission or of national competitive authorities, as appropriate.
At the international level, leniency programs are recognized in regulations of states such as: UK, France, Romania, Canada, Australia, Israel and Switzerland.

3.2.4. Leniency program
Mechanisms of detecting the possible violations of law provided by an effective compliance strategy can help achieve the best results of leniency program.
Designed to detect cartels between competitors – the leniency program – does offer an attractive prospect for businesses that want to cooperate with the Commission or with the national competition authorities for benefiting from fines immunity or for getting a reduction of the fine.
Total immunity may be granted to the first undertaking alleging collusion to the Commission or to other national competition authority from the Member States, by providing relevant and sufficient evidence to prove the violation of the law. Undertakings submitting their application for leniency after another competitor qualified for getting the mentioned immunity, are able to obtain a discount up to 50% of the fine imposed.
Competition authorities constantly monitor the market, on which it could be law violations, this activity leading to the official opening of investigations.
Therefore, if a company is or has been involved in a cartel, it could be the case of applying for leniency in this regard.
The Commission and national competition authorities welcome and support all the efforts of businesses within the leniency program, as this helps the undertaking to become part of a truly competitive culture in all sectors of the European economy.

In the table below we present a statistics of countries having implemented leniency programs.

Table 1. Countries having implemented leniency programs

	Leniency programs	The year of the adoption
1	Australia	2003
2	Austria	2006
3	Belgium	2007
4	Canada	2000
5	Czech Republic	2001
6	Denmark	2007
7	European Commission	1996
8	Finland	2004
9	France	2001
10	Germany	2006
11	Greece	2006
12	Hungary	2003
13	Ireland	2001
14	Italy	2007
15	Japan	2006
16	Korea	2002
17	Luxembourg	2004
18	Netherlands	2002
19	New Zealand	2000
20	Norway	2004
21	Poland	2004
22	Portugal	2006
23	Romania	2009
24	Slovak Republic	2001
25	Spain	2008
26	Sweden	2002
27	Switzerland	2003
28	United Kingdom	1998
29	United States	1993

Source: adapted from Klein (2010)

4. CONCLUSIONS

Compliance programs should not be perceived by undertakings as a formal tool for reducing fines in the case in which they are "caught". **The purpose of the compliance program is primarily, that of preventing the violation of competition rules.**
Compliance programs should be made in accordance with specifics of each company (size, sector, resources and so on), **with no single model with general applicability.**
Compliance programs are really useful for undertakings, by disclosing the applicable competition rules. The existence of compliance programs is not provided uniformly at the level of the Member States and it does not guarantee the lack of violation of competition rules.
Therefore, compliance programs do have a preventive role in correcting market behavior. If this behavior is not appropriate for respecting rigorously the rules in force, undertakings can appeal to the compliance programs for avoiding the substantial costs of non-compliance. Therefore, empowering decision makers is essential for ensuring competition and for the efficient functioning of market mechanisms.

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REFERENCES

Baker, J. B. (2003), "The Case for Antitrust Enforcement", *Journal of Economic Perspectives*, 17, 27–50

Bellamy, C. W. & Child G. D. (2008), *European Community Law of Competition*, 6th edn. Oxford University Press, Oxford

Carree, M., Gunster, A. M. & Schinkel M. P. (2010), "European Antitrust Policy 1957–2004: An Analysis of Commission Decisions," *Review of Industrial Organization*

Church, J. & Ware R. (2000), *Industrial Organization: A Strategic Approach*, Irwin McGraw–Hill, Singapore

Gual, J. & Mas, N. (2005), "Industry Characteristics and Anti-Competitive Behavior: Evidence from the EU", *University of Barcelona, Working Paper*

Klein, J. G. (2010), "Cartel Destabilization and Leniency Programs – Empirical Evidence", *OECD*

Monti, G. (2007), *EC Competition Law*, Cambridge University Press, Cambridge

Motta, M. (2004), *Competition Policy: Theory and Practice*, Cambridge University Press, New York