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Compliance in competition law**

ABSTRACT: This study aims to examine the operation of competition law compliance from two perspectives. First, it examines how competition regulation's compliance mechanism works from the perspective of promoting compliance. Subsequently, it highlights the difficulties associated with corporate competition compliance. Furthermore, it describes how to avoid automatic fine reduction while recognizing compliance efforts.

KEYWORDS: competition law, corporate compliance, ex-ante and ex-post prevention, deterrence, fine reductions.

1. Introduction

There are two approaches to compliance. First, it can be examined in relation to the regulation itself, how it ensures compliance, and what coercive forces influence adherence to it. Second, the issue of compliance can be examined from the perspectives of those affected by the legislation: how they can comply with the legislation, what difficulties they encounter, and how these difficulties can be overcome. In this article, I discuss both approaches.

2. Working of the compliance mechanism in competition law

Compliance has to do with the prevention of harm. The prevention of harm is always more beneficial to society than the subsequent treatment of its occurrence. Pre-empting harm creates public value if it operates strategically, and if it eliminates the causes of harm or its recurrence. Sparrow pointed highlighted this in the field of social regulation (health,

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safety, welfare, working conditions, and environment) when he placed radical solutions to real problems at the heart of public agency actions (e.g., reducing the number of car accidents, which is not necessarily limited to sanctioning speeding).¹ In this sense, proper prevention involves preventing the recurrence of a given problem by identifying and addressing the causes of the damage. The purpose of competition law is to eliminate harmful market cooperations, concentrations, and abuses of power.

2.1 Prevention as compliance mechanism in competition law

Ex-ante prevention seeks to prevent future harm through regulatory action, and unlike ex-post prevention, it is not based on specific, past harmful market behaviour. There are two types of ex-ante prevention: prior authorisation (as in the case of merger control) and the pre-emptive setting of rules for the future. The latter is not based on past market behaviour but on a specific rule of conduct expected from a certain degree of market power in the future, which typically seeks to counterbalance market power (e.g., the obligations of the telecommunications regulation based on significant market power or the Digital Markets Act²).

Ex-post prevention is motivated by specific market behaviours that have occurred in the past. It is also possible to impose behavioural and structural remedies for the future under the framework of ex-post prevention; however, in this case, unlike in the case of ex-ante prevention, remedies are based on past market behaviour. Imposing prohibitions and fines are also part of ex-post prevention. However, fines are not the only compliance tools in competition law. There are two distinct views on the purpose of fines. The first considers retribution itself to be the ultimate goal of punishment; the second (in line with Bentham's philosophy) focuses on the prevention of future crimes through deterrence (consequentialist theory).³ Most competition authorities also position themselves as

¹ Sparrow, 2000.

² Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (DMA). Available at: <https://eur-lex.europa.eu/eli/reg/2022/1925> (Accessed: 26 April 2023).

³ Huizing, 2020, p. 62.

consequentialists,⁴ enforcing competition laws to achieve prevention through deterrence.⁵

Ex post prevention tools also comprise behavioural and structural remedies. The behavioural or structural remedies imposed within the framework of ex-post prevention are based on past market behaviour. These corrections may also have a preventive effect. Article 9 of Regulation 1/2003 enables the Commission to conclude an antitrust proceeding by making commitments made by a company legally binding to a commitment decision. Such a decision does not establish an infringement of the EU competition law but legally binds the concerned company to respect the commitments offered. The EU Commission (EC) has strategically used remedies in the energy sector (sometimes structural remedies) to prevent the recurrence of market problems. Since 2004, almost one-third of all EC commitment decisions under Article 9 of Regulation 1/2003 have dealt with market conduct in the energy sector.⁶ Since the liberalisation of the EU energy markets, competition law enforcement has been active in the sector to promote more competitive gas and electricity markets in Europe by accepting divestiture remedies⁷ and facilitating market integration, as well as the exchange of energy between Member States.⁸

Prevention is both specific and general, as a specific enforcement measure aimed to prevent future harm from occurring as a result of a

⁴ Huizing, 2020, pp. 61-86.

⁵ ICN: Report to the 7th ICN Annual Conference, Setting of Fines for Cartels in ICN Jurisdictions, Kyoto, (2008).

⁶ PaRR (2018). *PaRR Statistics: One-third of EC commitment decisions in the energy sector*, Available at: https://app.parr-global.com/intelligence/view/prime-2601673?src_alert_id=117053 (Accessed: 26 April 2023).

⁷ In 2013 the Commission accepted the commitment offered by CEZ to divest part of its generation assets (power plants) (800-1000MW) to a suitable purchaser (competitor) in the Czech Republic. (CEZ, a.s. (Case AT.39727) Commission Decision C(2013) 1997 [2013]). In 2009 RWE (RWE AG (RWE Gas Foreclosure) (Case COMP/39402) Commission Decision 2009/C 133/08 [2009] OJ L 133/10), a dominant firm in the gas transmission market by virtue of its network in Germany undertook to divest its German gas transmission system business. In 2008 E.ON (E.ON AG (German Electricity Wholesale Market) (Case COMP/39388) Commission Decision 2009/C 36/08 [2008] OJ L 36/8) undertook to divest one fifth of its generation capacity, and unbundle the entire high-voltage transmission system business from the distribution network controlled by the company in Germany. In 2010 ENI (ENI Spa (Case COMP/39315) committed to divest its international gas transmission pipelines that bring gas from Russia and Northern Europe to a suitable buyer in Italy.

⁸ EU, 2017.

particular market player's behaviour (direct prevention) could also send a message to market players, deterring them from engaging in harmful market conduct (indirect). Therefore, the success of specific (direct) prevention is the key to general (indirect) prevention. General prevention can help prevent harm.⁹ However, without specific prevention measures, this general preventive effect cannot materialise. The complementary nature of specific and general prevention is much more important for ex post prevention than for ex ante prevention. This is because ex-ante regulation provides greater preventive guarantees given that market players are informed in advance about the behavioural requirements they are expected to abide by.

Conversely, ex-post prevention only provides a preventive mechanism based on the complementary work of general and specific prevention, also known as deterrence-based prevention. However, notably, ex-ante prevention can also have a deterrent effect (see merger control prohibitions or interventions that may also affect future potential mergers).¹⁰

2.2 Deterrence as a preventive effect of ex-post intervention

As mentioned, ex-post prevention depends on the complementary relationship between specific and general preventions; its success is contingent on the perception of risk. In the case of ex-post prevention, however, the threat arises from the regulatory intervention itself (fine, behavioural, or structural remedy) or from the credibility of the threat. The more credible the threat of intervention, the more likely the recipients of the norms believe that sanctions cannot be avoided in the event of an infringement. This relies on the perception of risk, which, in this case, is the high probability of regulatory intervention. According to Gal, the preventive deterrence effect is determined by the severity of the sanctions and the probability of detection.¹¹ Consequently, a fine is optimal if it expresses not only the damage caused (including the cost of enforcement), but also the likelihood of detection.¹² The more vividly an example is associated with an intervention, the more threatening it appears. Therefore, they are closely linked to specific and general deterrence. The more visible that specific prevention is to those market players, for example, in the form of the elimination of specific behaviours with fines and behavioural and structural

⁹ Davies, Mariuzzo and Ormosi, 2017.

¹⁰ Seldeslachts et al., 2007.

¹¹ Gal, 2000, pp. 91-132.

¹² Smuda, 2021.

remedies, the greater the deterrent effect (this is also known as an indirect mechanism).¹³ Recent behavioural science research also confirms that widespread communication regarding the imposition of fines increases the sense of danger of being caught, despite the fact that the chance of detection is not very high.¹⁴ Consequently, ensuring effective communication regarding the imposition of fines is important.¹⁵ The genuine threat of imposing a fine may discourage businesses from behaving anti-competitively in the future. In terms of the competition law toolbox, in addition to fines leniency has a deterrent function by increasing uncertainty among cartel members. Leniency intends to reinforce the prisoner's dilemma by undermining internal trust with the increased risk that one of the parties involved unilaterally reports enjoying the benefits of the leniency program.¹⁶

Although there are forward-looking studies on the extent to which imposed cartel fines fall short of what is optimally expected,¹⁷ there are additional means to further enhance ex-post deterrence. A study carried out by the European Union identified two main ways in which the deterrent effect of competition enforcement could be increased: through more private damages actions and the introduction of individual sanctions for competition law violations.¹⁸ The CMA also argued that ensuring personal responsibility for compliance with competition laws (including the disqualification of directors) could further enhance the deterrent effect of enforcement.¹⁹ A key result of a survey conducted in the US was that private enforcement seemed to play a larger role in creating a deterrent effect than public enforcement did.²⁰

The effectiveness of ex-post deterrence can be further improved through enforcement guidelines (soft law) and clearer reasoning of decisions. The intricate reasoning underlying complex competition cases

¹³ Broulík, 2019, pp. 115-127.

¹⁴ Moncuit, 2020, p. 230.

¹⁵ Moncuit, 2020, p. 232.

¹⁶ Spagnolo, 2000.

¹⁷ Smuda, 2021

¹⁸ Feinberg, 1985, pp. 373-384.

¹⁹ Letter from Andrew Tyrie to the Secretary of State for Business, Energy and Industrial Strategy. [Online]. Available at: <https://www.gov.uk/government/publications/letter-from-andrew-tyrie-to-the-secretary-of-state-for-business-energy-and-industrial-strategy> (Accessed: 26 April 2023).

²⁰ Beckenstein and Gabel, 1982, pp. 459-516.

does not facilitate compliance.²¹ (Hawk and Denaeijer, 2000) According to Broulík, there is tension between case-by-case enforcement (where accuracy matters) and general deterrence (where predictability is paramount).²² Consequently, when reviewing the decisions of competition authorities, courts need to consider the impact of adjustments to the statement of reason they require on clarity, predictability, and, ultimately, general deterrence.²³ However, this is challenging. During the past decade, there has been no doubt that the introduction of restrictions on competition by objects has increased deterrence and, consequently, compliance, which, in turn, has affected the behaviour of market participants. As a result of the strengthening of compliance, competition authorities have begun investigating not only less clear-cut behaviour but also behaviours exerted on markets that operate within more sophisticated and complex business environments. Considering the above factors, it is unsurprising that the question of identifying restrictions on competition by object arises in complex service markets such as insurance (see the Hungarian Allianz case²⁴) or the financial sector (see the Hungarian MIF case²⁵ or the Commission's CB case²⁶). The above difficulties in assessing restrictions on competition by object have been encountered not only by the Hungarian authority but also by the Commission²⁷ and other Member-State competition authorities.²⁸ However, there is no doubt that the Hungarian competition cases referred to for preliminary rulings on this issue have made a significant contribution to the development of European competition law. Both Hungarian cases referred to the European Court of Justice for a preliminary ruling concerning the insurance and financial sectors, which are complex markets.

²¹ Hawk and Denaeijer, 2000.

²² Broulík, 2019, p. 125.

²³ Broulík, 2019, p. 126.

²⁴ Judgment of the Court (First Chamber) In Case C-32/11, ECLI:EU:C:2013:160, 14 March 2013.

²⁵ Judgment of the Court (Fifth Chamber) In Case C-228/18, ECLI:EU:C:2020:265, 2 April 2020.

²⁶ Judgment of the Court (Third Chamber) In Case C-67/13P, ECLI:EU:C:2014:2204, 11 September 2014.

²⁷ Judgment of the Court (Third Chamber) In Case C-67/13P, ECLI:EU:C:2014:2204, 11 September 2014.; Judgment of the Court (Fourth Chamber) In Case C-307/18, ECLI:EU:C:2020:52, 30 January 2020.

²⁸ Judgment of the Court (Fourth Chamber) In Case C-345/14, ECLI:EU:C:2015:784, 26 November 2015.

2.3. Limitations of compliance in competition law

Competition laws create public value if they precede or eliminate market power, which is detrimental to consumer welfare. In this respect, an assessment of the deterrent effect of competition laws must consider the different ways in which market power can be created. There are ‘natural’ market powers that need to be controlled through long-lasting regulation that substitute the competitive market outcomes in terms of price and quality (see e.g., network industries).²⁹ Breaking down natural monopolies and making their markets competitive (through competition within and between networks) require ex-ante regulation that goes beyond competition law.³⁰ There are also situations with emerging market powers in which the ex-post imposition of fines proves ineffective and harm continues to occur (e.g., abusive behaviours). Therefore, giant firms are not fazed when large fines are imposed on them for abusing their dominant position and do not fear a loss of reputation.³¹ The recital of the DMA³² also explicitly acknowledges that competition enforcement occurs ex post and often requires an extensive, case-by-case examination of complex facts.³³ For instance, after 6 years of investigation, the Commission obliged Microsoft, which had a market share of 60%, to grant access to its competitors.³⁴ Two years later, when the Commission had to compel Microsoft to fulfil its obligation by imposing a penalty payment, the company already had a market share of 74%.³⁵ Another recent example is Google, where, after a seven-year investigation, the Commission imposed a fine on the undertaking to favour its own price comparison service. In this case, Google's obligation to correct anti-competitive business practices does not appear to have solved its

²⁹ Viscusi, Harrington, and Vernon, 2005, p. 401.

³⁰ Tirole, 2004.

³¹ Tirole, 2004.

³² Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828 (DMA), Available at: <https://eur-lex.europa.eu/eli/reg/2022/1925> (Accessed: 26 April 2023).

³³ DMA Recital 5.

³⁴ Case COMP/C-3/37.792, Commission Decision C(2005) 4420 OJ L 166/20 [2008] para 499.

³⁵ Ibid. 355.

competitors' problems, as it was not well targeted by the measures taken.³⁶ These examples show that in the case of significant or lasting market power, the deterrent effect of ex-post competition law interventions can be reduced, even though they are the only temporary (pending ex-ante regulation) regulatory tool available.

3. Corporate competition compliance

In the second part of the study, I present the difficulties and advantages of corporate competition compliance.

3.1. Challenges in corporate competition compliance

Compliance with abstract competition rules has always been challenging. Compliance is also a resource matter. Thus, large companies have an advantage over SMEs. Large companies tend to be much more compliant, and SMEs have a significant share of cartel infringements. Another adverse effect on SMEs is that cartel cases are becoming increasingly complicated due to the strengthening of large companies' compliance, which, in turn, adversely affects the ability of SMEs to comply. Moreover, the following circumstances work against compliance:

- high recidivism³⁷ stemming from infringing companies' optimism that they are unlikely to be caught again,³⁸ or undertakings may overestimate the low probability that cartels will be detected at all;^{39 40}
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³⁶ Reuters (2019). EU's Vestager says Google's antitrust proposal not helping shopping rivals. [Online]. Available at: <https://www.reuters.com/article/us-eu-alphabet-antitrust-idUSKBN1XH2I8> (Accessed: 26 April 2023).

³⁷ Barennes and Wolf, 2011, p. 423; Wils, 2012.

³⁸ Moncuit, 2020, p. 233.

³⁹ Deloitte (2007) *The Deterrent Effect of Competition Enforcement by the OFT*, [Online]. Available at: https://webarchive.nationalarchives.gov.uk/ukgwa/20140402181127/http://www.of.gov.uk/shared_of/reports/Evaluating-OFTs-work/oft962.pdf (Accessed: 26 April 2023). The survey showed a ratio of 1 to 5 (i.e. five times the deterrent effect) in terms of merger control and cartel enforcement in the UK for the period 2000-2006.

⁴⁰ Combe, Monnier and Legal, 2008.

⁴¹ According to the authors, the annual probability of being caught is between 12.9% and 13.3%.

- anticompetitive practices are not associated with the same level of stigma as white-collar crime or tax evasion.⁴²

If shareholders fail to create a corporate culture that requires compliance with the law, the manager of the company is likely to ignore the seriousness of the violation;⁴³

- If managers of companies have a high tolerance for risk, they will likely opt for an infringement strategy⁴⁴ as they will be tempted by the possibility of destroying competitors, restoring market dominance, and making additional profits by overcharging consumers.⁴⁵

Therefore, promoting compliance is necessary, because it may help reveal and end conduct at an early stage.⁴⁶ Some authors argue that compliance programs can also enhance the effectiveness of leniency policies.⁴⁷ It has been argued that a company that can better detect potential infringements internally is also in a better position to report infringements to competition authorities before other cartel members.^{48 49}

3.2. How to encourage competition corporate compliance

The mere adoption of a compliance programme should not in itself lead to immunity or the total reduction of fines in any case as this would allow companies to maximise the profits and benefits stemming from illegal conducts, and thus competition compliance would become a “*cheap insurance policy against competition liability*.”⁵⁰ An automatic fine reduction in the case of compliance programs that existed before the finding of an infringement may also incentivise companies to implement ‘cosmetic’ compliance programs.⁵¹

Based on international experiences, only genuine ex-ante compliance efforts should be recognised, which means that the company must be able to demonstrate how its competition compliance regime resulted in the

⁴² Sokol, 2012, pp. 217-218.

⁴³ Moncuit, 2020, p. 231; Combe and Monnier, 2020, pp. 35-60.

⁴⁴ Bernile and Bhagwat, 2017, pp. 167-206.

⁴⁵ Moncuit, 2020, p. 236.

⁴⁶ Moncuit, 2020, p. 56.

⁴⁷ Thépot, 2016, p. 5.

⁴⁸ Thépot, 2016, p. 6; Geradin, 2013, pp. 325-346.

⁴⁹ However, Geradin states that compliance programmes only contribute to effective leniency programmes if they allow early detection of infringements.

⁵⁰ Wils, 2012, p. 70.

⁵¹ Wils, 2012, p. 70.

detection and termination of infringement and the discovery of new or value-added evidence in the case in question. In this case, authorities may further reduce the fine by an extra 5-10 percent.

Ex-post recognition of compliance can be used to improve the attractiveness of cooperation and/or administrative burden-saving procedures such as settlements or non-full immunity leniency. A fine can be reduced by a few percent (up to a maximum of five) in the case of a company that adopts or upgrades an existing compliance program to ensure effective competition compliance for the future in a settlement and/or leniency application for a fine reduction, or if the company has compensated for the damages caused by its infringement during the procedure. The granting of a fine reduction in the case of ex-post compliance could be made conditional on the compliance program in question meeting an established international minimum standard, the use of innovative solutions (e.g., applying modern technologies), and guaranteeing that the program is viable.

Recognition of compliance may raise the question of whether such recognition can only be positive. I am confident that if a company deliberately breaches its compliance program adopted in a previous competition procedure, this can be regarded as an aggravating circumstance. The question is what can be regarded as a deliberate breach, or what should a competition authority do when it learns that an ex-ante compliance program has been used to hide an infringement. For example, when a competition authority is in possession of evidence that the compliance program in question was effective, and the responsible officers of the company received information on the wrongdoing, it neither stopped the infringement nor reported it to the competent authority.

The informant reward mechanism raises several questions: Based on experience, informants normally do not provide high-quality first-hand evidence; therefore, a limited percentage of informant applications is sufficient to trigger a cartel investigation.⁵² Consequently, it is desirable if a potential informant subject to a company's compliance program first reports his/her findings to the competent compliance officer(s), unless such an informant would suffer adverse consequences. Furthermore, it is important for the company to have sufficient resources to collect and submit evidence according to the competition authority's needs. If this is not the case, then it is preferable for potential informants to have a direct line of communication with the competent competition authority, provided that companies may be

⁵² Tóth, 2016.

tempted to hide the infringements reported to them by informants from the authority.

Finally, compliance programs as a mitigating factor could discriminate SMEs that do not have sufficient resources to develop compliance programs. It is important to consider how we can ensure that ex-post and ex-ante considerations of compliance programs do not discriminate against SMEs.

4. Summary

This study examines competition law compliance from two perspectives. First, I examine how competition regulation compliance mechanisms work from the perspective of promoting compliance. Therefore, deterrence is crucial in this regard. However, I highlight the difficulties associated with corporate competition compliance in addition to highlighting their positive effects. Consequently, I describe how they can be encouraged to avoid the automatic reduction of fines while recognising their outstanding compliance efforts.

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