Corporate Policy of Compliance with Competition Law*

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Summary: This text deals with the notion and significance of preventive active adherence to law, i.e. compliance, in the area of protection of competition in the practice of corporate companies. Discussed are both advantages and possible issues of compliance programme application, desirable context thereof, conditions for its successful application including the position of competition authorities towards them.

Keywords: compliance – compliance programme – competition – protection of competition – competition law

1. Content of the notion of compliance

Policy of active preventive compliance[1] with legal rules regulating behaviour of undertakings in all or almost all business sectors, but also with legally non-regulated rules of ethics, is nowadays considered a common element of governance of undertakings also in the Czech Republic. It serves especially as means of prevention of severe sanctions from the part of regulatory authorities that may result from breaking the law in areas such as regulation of international trade, money laundering, protection of privacy and data, but also in the area of protection of competition. Another purpose of corporate compliance policy is increase in the

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1 Despite number of years application of corporate compliance policy in the Czech Republic, no stable Czech equivalent of the word "compliance" has yet come into use. This of course does not help intelligibility and appeal of the compliance policy for laymen. However, one may argue that especially in the corporate practice a number of various other notions such as "CEO, fee, closing" and "leniency" in the competition law field has already been adopted into Czech language.

value of the company as a sought-after business partner not representing a risk of breaking the law and its transmission to the co-operating parties – and on the other hand, providing means of monitoring and evaluation of the aforesaid risk on the part of business partners. Last, but not least, effective corporate compliance with e.g. labour law and rules of ethics aimed against discrimination, harassing or bossing contributes to the appeal of a company for employees thus motivated to increase their employer's performance. The notion of compliance may be thus divided into external compliance with legal rules binding the company and internal compliance with company's documents governing attainment of the former goal. Depending on the capabilities of the company to implement the compliance policy one may distinguish levels of compliance varying from "simple" adherence to the rules to their integration into internal and external position and behaviour of employees. Reaching the highest and after all any level of compliance depends especially on the ability of the company to present the rules to its employees regardless of their education and professional orientation, explain importance of the rules for the company and themselves, and of course the ability to apply the rules coherently in practice.

This and all the above-mentioned is especially true for complex topic of compliance with law on protection of competition. The following text deals with the importance of competition law compliance and conditions for achieving thereof.

2. Importance of compliance with competition law

Competition law is a highly specialised legal discipline with a significant overlap to economics and with universal applicability to actions of undertakings. Nowadays, virtually all developed and many developing countries apply some more or less advanced and at the same time globally unified[2] form of the competition law pillars, i.e. prohibition of agreements distorting competition and abuse of dominant position, control of mergers and acquisitions and in case of the EU countries also control of state aid. Any undertaking can thus be practically sure that its business will be subject to competition law in any jurisdiction where it decides to operate. In the European Union, which, together with the U.S., is one of the leading jurisdictions setting trends in protection of competition, the so-called Modernisation package of 2004 concerning application of Article 101 and 102 of the Treaty on Functioning of the EU explicitly transferred the responsibility for

[2] By means of numerous international organisations dealing with protection of competition law and standardizing its globally applied rules, e.g. especially OECD or ICN – the International Competition Network.

assessment of compliance with competition law to undertakings themselves[3]. The companies must thus, similarly to most competition jurisdictions, rely on their own knowledge of competition law or know-how of the consultant companies covering all the jurisdictions where they operate and their respective case law of competition authorities and courts, including the trend-setting EU institutions. Such absolute responsibility for compliance with competition law is intensified by the fact that there is a wide scale of regular operations of an undertaking on the market by which it is possible to unwillingly or even in "good faith" break the competition law. In line with individual areas regulated by competition law the typical risks are as follows:

- Prohibited agreements – both among competitors – such as agreements and joint projects with third parties, memoranda, associations, exchange of information or procuring thereof for other undertakings etc.; and in relations among suppliers and customers, typically in agreements on sale and purchase
- Abuse of dominant position on the market – all the actions by dominant undertakings that go beyond regular business practices and that cannot be replicated in acceptable time and at acceptable costs by (as efficient) competitors and causing damage to customers
- Mergers and acquisitions – identification of all the relevant jurisdictions, timely notification to the competition authority/authorities, execution of control over the acquired entity only after approval by the competition authority
- State aid – identification of accepted (or granted in case of publicly owned undertakings under specific circumstances) economic advantage as state aid, acceptance or giving out the funding only following verification of the compatibility of the aid with the internal EU market and/or following positive decision by the European Commission
- Unannounced inspections in business premises – preparedness of employees, dealing with sensitive documents and communication concerning competition topics

It is advisable to bear in mind that a company may easily face the afore-mentioned risks both in position of a wrongdoer, which is usually accentuated in the compliance context, but also in the position of a victim, when the abovementioned anticompetitive practices may be targeted at and cause damage to the company. At the same time, the bar for breaking the competition law is set quite low, as it is possible to commit a breach already by e.g. non-distancing from an anticompetitive

[3] In contrast with the previous regime allowing applications to the European Commission for assessment of undertakings' agreements compliance with competition law, or application for exemption from prohibition of anticompetitive agreements respectively.

proposal or by mediation thereof even in simultaneous non-participation in the illegal conduct, or as a result of possible responsibility for behaviour of contractual or even third independent parties. In every corporate company there is a high number of potential law-breakers – employees and business partners responsible for individual business transactions, whose behaviour is at the same time attributable to the given company. Despite this fact and related below described severe material and procedural fines and remedial measures, a rather low awareness of concrete notions, obligations and rights resulting from competition law is still typical for corporate companies' employees in the Czech Republic, perhaps with exception of the highest management[4]. In contrast, it is the group of high or middle managers responsible for individual business transactions that may face most frequently the situations prone to possible breach of competition law and that also may face most frequently the related sanctions including the criminal ones.

Given the afore-mentioned facts and existence of so-called object breaches of competition law resulting in *per se* punishability of least agreements on fixing prices or sharing the markets regardless of the market share of the tortfeasors or damages caused, it is possible to argue that certain level of competition law compliance seems to be advisable even in the smallest company. The need for competition law compliance grows with the size of the company and related number of activities subject to competition law, and so do the advantages of organising the internal rules into a competition law compliance programme.

3. Formal expression of competition law compliance – competition law compliance programmes

A formal expression of corporate company's emphasis on adherence to competition law is called for already by the above-illustrated fact that a question for virtually every business transaction is where and not whether there is an element in it relevant from the competition law perspective. Companies acquainted with importance of competition law[5] must be aware of the fact that their employees cannot follow rules they do not know; the companies cannot be sure whether

[4] In the author's opinion the reasons for this situation include generally relatively low frequency (typically units per year) of competition authorities' antitrust decisions resulting from the difficulty of proving a breach of competition law especially in the domain of cartels and abuse of dominant position and also subjective or objective difficulties of media explaining complex topic and importance of competition law in a way understandable to general public.

[5] Such knowledge is considered an obligation for large undertakings by the European Commission and competition authorities alike.

an employee, business representative or even an independent third party would not engage them in a breach of competition law; they also cannot be sure that the breaches of competition law would be worthwhile compared to the fruits of their own autonomous efforts for competition on the merits; and, among others, the companies must be aware that they would not be able to resolve their breach of competition law *ex post* without facing at least some of the consequences available in public or private law domain. All these facts provide incentives for a corporate company to introduce and/or confirm internal rules for compliance with competition law. Moreover, such a step is nowadays often no longer voluntary, as it is required as a precondition for a business transaction by business partners, especially the foreign ones.

As regards situation in the Czech Republic, the factors supporting introduction of competition law compliance include also coming into force of the Act on Criminal liability of legal persons[6] which under certain circumstances enables exculpation of those entities that prove having done their utmost for prevention of a crime. The criminal offences according to the Act do not include breaches of competition law[7], yet the possibility of exculpation incentivised broad introduction of corporate programmes of compliance with criminal law and other legal obligations including regularly and quite logically competition law compliance rules. Moreover, in the area of competition law compliance there is now an outlook to introduction of a general duty for companies to operate at least a basic system of internal reaction to breaches of competition law as a result of adoption of the EU Directive "on Protection of whistle-blowers" [8]. Still, for the time being, there is no legal obligation or incentive in the Czech Republic to introduce a competition law compliance programme and to take it into account in assessing and sanctioning anticompetitive behaviour; details are presented below. Regardless of that, and in any case, introduction of a competition law compliance programme brings following possible advantages and on the contrary non-introduction following possible disadvantages.

[6] Act No. 418/2011 Coll. on Criminal liability of legal persons and procedure against them.

[7] Certain analogy may be seen in meeting the conditions of active repentance in line with the Criminal Code No. 40/2009 Coll. by announcing existence of a cartel agreement in line with the conditions of Leniency programme pursuant to the Act No. 143/2001 Coll. on Protection of Competition.

[8] Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of persons who report breaches of Union law.

3.1. Possible advantages of applying a competition law compliance programme

Universally valid contribution of creating and implementing corporate competition law compliance programme consists among others in: optimisation of preconditions for compliance with the law in force and reducing the risk of breaking the law and subsequent sanctions; increase in awareness of the risk and consequences of breaking the competition law among employees, suppliers, customers and competitors and thus reducing the likelihood of business specific breaches of law and related sanctions; timely detection of possible breaches of competition law by the undertaking/group or business partners and competitors; prevention of possible criminal liability of employees; elimination or reduction of costs related to causing damages, conducting legal disputes, fines, negative publicity; preserving and spreading good reputation of the company and higher appeal for consumers, suppliers and job applicants; qualified and effective negotiation with competition authorities including investigations of competition law breaches, better suitability for alternative solutions of competition law breaches (e.g. settlements and leniency); finally, depending on the jurisdiction (see examples below) more or less hypothetical possibility of consistent and seriously meant application of a competition law compliance programme being taken into account by competition authorities in setting the fines for anticompetitive behaviour.

3.2. Possible disadvantages of non-existence or non-application of a competition law compliance programme

Contrary to the above-mentioned, non-existence or non-application of a competition law compliance programme resulting in breach of competition law may in individual cases bring for example: non-validity of the faulty provision or an agreement as a whole from their very beginning and prohibition of performance thereof; imposition of a fine by competition authorities up to usually 10 % of annual turnover and possibly also penalties for breaking specific obligations; imposition of remedial measures in cases investigated by the European Commission consisting in modification of behaviour of a company or even dissolution thereof; enforcing damages caused by breaking competition law in civil proceeding; criminal penalty for persons involved in hard core cartels on price fixing or sharing markets; clawback of state aid including interests; labour law penalties, including notices, for persons responsible for anticompetitive behaviour; damage to reputation of a company/group and related loss in value of shares and profit due to aversion of potential business partners to trade with a company having

breached law; high costs of legal defence needed during the competition law cases lasting usually several years.

3.3. Corporate practice in the area of competition law compliance programmes in the Czech Republic

Competition law compliance programmes, or commitments to adhere to competition law, are nowadays publicly presented by big corporate companies across the economy. With respect to the proportion of small and medium enterprises (SMEs) to undertakings active in economy (9 of 10) [9] it seems appropriate that even smaller companies used sufficiently robust and tailor made version of competition law compliance programme, among others for the following reasons: SMEs may find themselves in a position of an offender but also a victim of breaking competition law; SMEs may easily succumb to illusion that they are "under the radar" of competition law and therefore fail to adhere to it; they may be an easy target of competition authorities as a result of "naive" or "good will" anticompetitive behaviour; SMEs may be more likely involved in competition issues due to non-recognizing anticompetitive actions of third parties e.g. business partners, associations or employees; SMEs have limited financial and personal capacities for monitoring the development of legislation, activities of regulators and taking into account the topic of compliance. Despite the afore-mentioned, but perhaps just exactly for the sake of it, small, medium and large companies alike should deal with the question of needful topics of their competition law compliance programme in the light of their business activities.

3.4. Criteria for selection of necessary topics of a corporate competition law compliance programme

A tailor-made competition law compliance programme should reflect the specifics of the daily business of a given company, so that it was possible to set detailed rules for situations following from the nature and regular operation of the business. Varying according to the size of the company and relevance for its activity the typical topics of the programme may include: prohibited agreements both among competitors (including exchange of strategic information and protection of competition in submitting bids to call for tenders) and suppliers and customers, especially as regards so called restrictions of competition by object, i.e. agreements of fixing prices, sharing markets and groups of customers and

[9] Source – Ministry of Industry and Trade https://www.mpo.cz/assets/cz/podnikani/male-a-stredni-podnikani/studie-a-strategicke-dokumenty/2018/10/Zprava_MSP_2017.pdf

also agreements on limitation of output; abuse of dominant position depending on the share of the company on the relevant market (even a small company may hold such a position on a niche or an emerging market); concentrations of undertakings (especially timely notification to competition authorities and awaiting their approval of the transaction); state aid; cooperation with competition authorities including especially preparedness for unannounced inspection in business premises; principles of communication on competition law topics; methodology of handling documents related to transactions material from the point of view of competition law.

At the same time, it is advisable to evaluate realistic capability of a company to deal with certain topics internally. For example carrying out economic analysis of an abuse of dominance demanding specialised know-how and time may be beyond possibilities of a small company in position of a victim of the abuse. Moreover, from the point of view of a regular employee the most practical topics may in fact be the rules for (non)exchanging strategic information and communication with competitors in general (e.g. in associations), rules for handling sensitive documents and preparedness for unannounced inspections. Every competition compliance programme should contain also at least basic procedures for monitoring of risks and related obligations to report and consult of them, including all planned material transactions, with company's competition law compliance expert or department where available.

3.5. Preconditions for efficiency of a competition law compliance programme

Standards of competition law compliance programmes are for the time being, with the below-mentioned exceptions, generally not prescribed by legislation and oscillate among the outlined pillars of competition law providing space for creativity of individual companies. The purpose of a competition law compliance programme should however always consist in prevention of breaking the law. Companies should therefore be always interested in truthful explanation of the competition law issues and strive for prevention of gold plating, i.e. introduction of imaginary duties or rights not resulting from the law in force. One may with certainty say that there is no ideal realistic scope of competition law compliance programme – as regards its specific topics, one may expect that in case of large companies it will cover the whole spectre of the abovementioned areas of protection of competition. A competition law compliance programme should provide transparent support of healthy effort of a company to achieve economic results on the basis of its own efficiency. The course of the effort to prevent breaches of competition law should be recorded in company's internal documents ideally

capable of explaining to competition authorities why a breach of competition law occurred despite the compliance endeavour.

Discussions on efficiency of competition law compliance programmes focus regularly on their ideal content, form, but not so much their optimum way of implementation. At the same time it is true that even competition law compliance programmes perfect as to their form and content do not have to be sufficient for ensuring competition law compliance. The utmost importance should be attributed to creation of internal trust of employees in the programme and their will to put it into practice in daily business of a company. Competition law compliance cannot be imposed unilaterally – acceptation and voluntary performance by its addressees, i.e. employees of the company, is of essence. Preconditions for success of competition law compliance include also introduction of the competition compliance programme to new employees during their admission training in a generally comprehensible way, followed by regular trainings focused on specific activity of groups of employees, and finally assistance of the experts responsible for competition law compliance in day to day transactions. Employees must be given enough internal information resources and choice of means for reporting compliance incidents including possibility of anonymous reporting.

3.6. Recommendations resulting from discussions of the Section of Competition Compliance of the Czech Compliance Association (CCA)[10]

CCA during its meetings deals with aspects of competition law compliance programmes in various areas and from various points of view of competition law application. It results from the hitherto discussions that competition law compliance programmes should be adopted ideally by all corporate companies in extent corresponding to their detected possible risks of breaking competition law and the jurisdiction where they operate, in a form exactly and comprehensibly communicating the competition rules and risks of anticompetitive behaviour in daily practice to the risk-specific groups of employees on all their levels. It is imperative to involve the management of the company into implementation of the competition law compliance programme, achieve identification of employees with the values of the programme and ensure effective system for monitoring, reporting and solution of detected competition compliance incidents. Detecting the risks of the incidents, improving the procedures for prevention thereof and corresponding trainings should take place regularly in sufficiently short

[10] See https://www.czech-ca.cz/ The below presented opinions reflect the discussion within the CCA Competition Compliance Section in presence of leading Czech experts on competition law.

periods respecting the nature of company's business. Competition compliance programmes should be focused on the company in question and its culture, identify the jurisdiction(s), field(s) of activity and structure of the market(s) relevant for the company. It should reflect results of possible previous investigation(s) of the company by competition authorities – in case of antitrust record, the management of the company may be more willing to support corporate compliance. The form and wording of competition law compliance programme must respect the nature of its addressees, nevertheless "popularisation" leading to distortion of the message needs to be avoided. Competition law compliance programme should be able to "entertain" and appeal the target employees to the topic and explain the types of cases in which they may deal with competition law. It is important to set procdedures for situations where likely breach of law has been detected and adequate rules for communicating these situations to competition authorities. Regular reporting to the management of the company is necessary with respect to their responsibility for conducting the business. Company's compliance experts must cooperate with the employees responsible for activities relevant from the perspective of competition law compliance programme. Identification and assessment of compliance risks should be carried out by respective managers of the afore-mentioned employees in consultation with the experts.

4. Approach of competition authorities towards corporate competition law compliance policy and competition law compliance programmes

With respect to the effort necessary for meeting all the above-mentioned requirements, corporate companies tend regularly to claim that one of the purposes, if not the most important one, of introducing and operating a competition law compliance programme is the possibility to apply for reduction of a fine imposed by a competition authority for a possible breach of competition law. The author of this article deals with the questions of justifiability of these claims in the end of the text, in any case he is convinced that the goal of seriously meant corporate competition law compliance should be that the company did not have to ever negotiate with with a competition authority about the influence of its competition law compliance programme on the amount of the fine for its anticompetitive behaviour. In other words, introduction of competition law compliance programme just for the purpose of achieving reduction in a possible fine in fact indicates, in the opinion of the author, an expectation of a fine coming up in the future and at least subliminally grants approval to an action in breach of competition law. At

the same time, the author of this Article is convinced that the effort and resources spent by corporate companies and their potential for active prevention of breaking competition law should be adequately used and stimulated by the public sector.

Competition authorities in general seem to acknowledge the potential of competition law compliance programmes for increasing awareness of companies' employees about the rules of protecting competition and for more effective prevention and solution of potential competition issues, however, at the same time they usually emphasize that a compliance programme does not serve as a means for exculpation or reduction of fines. Among supporters of this so far prevailing attitude we can find the European Commission[11], Czech Office for the Protection of Competition[12], or German Bundeskartellamt[13]. On the other hand, several other respected competition authorities have already commenced to incentivize operation of competition law compliance programmes by offering reduction of possible fines by 10–15 % or even more. For example, French Competition Council announced in 2012 that it may reduce fine by up to 10% in a settlement procedure in case of company's willingness to introduce or improve an existing compliance programme. UK's OFT in its Communication on calculation of fines of 2012 informed that evidence of clear and undisputed commitment to compliance and corresponding steps towards identification and mitigation of risks may lead to reduction of a fine up to 10 %[14]. Italian Competition Authority informed in its Communication on calculation of fines of 2014 that adoption and enforcing a specific and adequate competition law compliance programme may be taken into consideration in reducing a fine up to 15 %[15]. For further illustration examples of requests by Italian Competition Authority conditioning reduction in fine follow, largely overlapping with requests of the other two above-mentioned competition authorities: full involvement of the company's management; identification of employees responsible for operation of the programme; carrying out risk analysis taking into account the relevant business sector and operational context; adequate training programmes taking into account economic importance of the company; creating system of incentives for securing compliance with the programme and a system deterring from the non-compliance with the programme; implementation of monitoring and audit system.

[11] See https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en

[12] See https://www.uohs.cz/cs/informacni-centrum/informacni-listy.html

[13] See the relevant chapter in https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/OECD_2011.06.20-Promoting_Compliance_Competition_Law.pdf?__blob=publicationFile&v=4

[14] See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284402/oft1341.pdf

[15] See https://webgate.ec.europa.eu/multisite/ecn-brief/en/content/ica-adopts-fining-guidelines

Perhaps the biggest responsiveness towards companies applying competition law compliance programme has been shown by the Hungarian competition authority, which according to its guidelines for imposition of fines is willing to reduce a fine by up to 20 % for anticompetitive behaviour internally discovered/ceased by the company itself as a result of its competition law compliance programme and reported to the Hungarian competition authority.

5. Conclusion – food for thought on eligibility of competition law compliance programmes for reward in form of reducing fines for breach of competition law

As suggested above, the companies applying competition law compliance programmes are usually of the opinion that, despite currently prevailing opinion of competition authorities, the programmes should be considered at least potentially eligible for reward in form of reducing fine for breaking competition law. On the contrary, the usual argument of competition authorities, including the European Commission, for refusing such reward for previous application of competition compliance programme in case of finding a breach of competition law, is a logical contradiction of the very idea of rewarding something that failed, or rewarding adherence to competition law which should be a matter of course or a legal obligation anyways.

In the following text the author will strive, for the sake of instigating discussion and while simultaneously preserving all his above-mentioned opinions as to the true purpose of compliance programmes, to elaborate at least some arguments for rewarding competition law compliance programmes in the context of the current system of reducing fines for breach of competition law in the EU.

One may begin with pointing out that the above-mentioned argumentation of competition authorities, however logical and easily comprehensible, does not sufficiently deal with the argument that rewards/reductions of fines for companies based on programmes of Leniency or Settlements are available exactly in cases of failure to adhere to competition law, or more precisely in cases of severe breaking thereof, while of course they are not awarded for the breaking of law, but for the possibility to prove previously unknown breach of competition law with assistance of the offender or save resources of competition authorities necessary for carrying out the whole administrative procedure. One can argue that contribution to society resulting from long term systematic and provable active adherence to competition law may, arguably under specific circumstances even

despite possible breach thereof, be comparable with contribution of admitting a breach or enabling establishing thereof by the offender. Whereas rewarding of provable competition law compliance from its certain quality level upwards could incentivize education of companies in competition law and its intensive application including spill-over effect to other companies, rewarding offenders willing to confess and/or blow the whistle, however hardly replaceable from the enforcer's point of view, is in fact at the same time a signal that breaking law may be under certain circumstance forgiven or just slightly punished. As regards the argument of natural duty to adhere to competition law, it can be suggested that the reward for competition law compliance was not conceived as a bonus for simple absence of breaking competition law for certain period of time allegedly as a result of operating competition law compliance programme, but as a bonus only for provable systematic and efficient ensuring of compliance of individual and all relevant transactions and actions of a company with competition law rules, disturbed by unique and the compliance system exceeding breach of law. A value for society eligible for a reward could be in such a case represented by ensuring certainty or high probability of compliance of a company with competition law for certain relevant period of time, in contrast to rewarding expression of rather inconsistent or even momentary will to adhere to competition law by applicant for leniency or a settlement. Such approach would at the same time set the intensity of required compliance with competition law to a seemingly very high or even impossible level – here again one may think of an analogy to differentiating the reward according to the quality of evidence on breaking competition law in the framework of leniency programmes. In the light of these considerations the highest obstacle to rewarding the competition law compliance programmes would seem to be the (estimate of and the ways to establish) needed volume and value of evidence on competition law compliance in sufficiently long period of time, which would allow for evidencing that the level of compliance with competition law desirable from the society's point of view had been achieved, which was disturbed only by an isolated action outside the reach of otherwise effective compliance programme. Although demands of establishing such certainty seem to be high, at the same time they do not seem to be impossible or absolutely unreal, which has been confirmed by the model compliance programmes of competition authorities in respected jurisdictions (FR, IT, HU, UK) and their conditions for reducing the amount of fine. It seems advisable to explore further in expert fora and in discussions with competition authorities the above-mentioned and all other arguments for rewarding or at the very least incentivising operation of efficient competition law compliance programmes, in order for the apparent will of corporate companies to apply them, or to actively adhere to competition law, not to be wasted.