

## ANTIMONOPOLY COMPLIANCE<sup>1</sup> IN THE REPUBLIC OF ARMENIA

ARSEN HOVHANNISYAN, MARTIN KHACHIKYAN

The article discusses the legal regulations related to antimonopoly compliance programs in the Republic of Armenia and the necessary actions to ensure their effective implementation.

The circumstances and factors that business entities should take into account when drafting antimonopoly programs were also discussed.

Through the implementation of warning and prevention procedures, it is possible to practically improve the compliance of business entities with the antimonopoly legislation, because the application of milder measures of administrative responsibility by the authorized body provides a unique opportunity to correct and prevent possible violations.

Acceptance of the antimonopoly compliance program does not imply its implementation, because a number of business entities can stipulate the acceptance of the act as a tool for reducing the fine imposed in the event of a possible violation of the antimonopoly legislation in the future, as a result of which it is necessary that the Commission for the Protection of Competition is not limited only to the presence of a compliance program at the business entity, but also through other appropriate mechanisms, find out whether the relevant business entity is guided and was previously guided by the compliance act adopted by it, or whether its existence is formal.

The article also singles out the conditions, the simultaneous presence of which will make it possible to ensure the effective implementation of the antimonopoly compliance program.

**Key words:** *compliance, compliance program, antitrust law, fair competition, freedom of economic activity, competitive development*

In order to improve economic market relations, in addition to the legal norms regulating the given sector, it is also necessary to take actions aimed at preventing possible illegal behavior by business entities.

For years now, a number of states have developed various tools to prevent antitrust behavior. Antimonopoly compliance is among the mentioned tools.

In the legal literature, the concept of compliance: its goals, functions, areas of application, consequences of implementation, etc. is interpreted in different ways.

According to D. Malikhin and O. Franskevich, compliance means acting in accordance with public requirements for a person carrying out business activities. They characterize it as a form of self-regulation based on legal norms regulating public relations by state bodies. According to E. Markovkina, compliance is the self-monitoring of a person carrying out business activities, which is

<sup>1</sup> The term "anti-monopoly" is used as an internationally recognized term and does not characterize the nature of the legislation of the Republic of Armenia on the protection of competition.

based on his own interests and does not contradict the legislation<sup>2</sup>.

In the field of protection of economic competition, the introduction of compliance and its effective enforcement is of significant importance due to the importance of natural and fair competition in economic relations.

In the most general definition, competition can be characterized as a "conflict" between market economy participants for the best conditions for the production and sale of goods<sup>3</sup>.

Competition is the economic law of a market economy. There are also other definitions of competition in the theoretical literature. A. Marshall believes that competition consists of one competing with another especially in the case of buying and selling something<sup>4</sup>.

D. Reimer and F. Bayer state that competition is present in all cases when several businesses face each other in the market, pursuing the same goal in the economic sphere<sup>5</sup>.

Shershenevich notes that "the public idea of competition is that the striving of each economy to maintain its own existence ultimately leads to the best satisfaction of society's needs."<sup>6</sup>

Competition is characterized as the efforts of two or more persons acting independently of each other, aimed at attracting the customers of a third party by offering the most favorable conditions for the purchase of goods<sup>7</sup>. Competition in a broad sense is the competition between different people to achieve a certain goal, competition in entrepreneurial activity is the competition between business people for the best conditions for the production and sale of goods<sup>8</sup>.

The principles of freedom of economic activity and free economic competition, together with the right to property, are a prerequisite for the stable existence of civil society, the economic basis of human freedom. Freedom of economic activity is the fundamental principle of the market economy and acts as an objective prerequisite for the formation and development of free economic relations.

Through the introduction of an antitrust compliance program and its effective enforcement,

- business entities get the opportunity to avoid problems and comply with the law,
- business entities save their money and reputation,
- the necessary environment for normal competition is provided through the consistent implementation and control of the project.

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<sup>2</sup> **Попондопуло, Владимир Ф., Дмитрий А.Петров.** 2020. «Комплаенс как правовой инструмент минимизации рисков и профилактики правонарушений». Вестник СанктПетербургского государственного университета. Право 1: стр. 105. (available at 26.03.2023 <https://doi.org/10.21638/spbu14.2020.107>).

<sup>3</sup> **Кабисов А.Р.** Соотношение конкуренции и монополии в период перехода к рыночной экономике, М., 2001, Дисс., с. 98.

<sup>4</sup> **Маршалл А.** Принципы экономической науки. М.: Издат. группа Прогресс, 1993, Т. I, с. 60.

<sup>5</sup> **Ерёменко В.** Законодательство о пресечении недобросовестной конкуренции капиталистических стран. М., 1994, с. 4.

<sup>6</sup> **Шершеневич Г.Ф.** Курс торгового права, Ч.II. Спб, 1908., стр. 109:

<sup>7</sup> **Chevalier F.** Unfair Competition// Industrial property in Asia and the Pasific, 1988, N 22, p. 41.

<sup>8</sup> Հայաստանի Հանրապետության Սահմանադրության մեկնաբանություններ, **Չ. Հարությունյանի** և **Ս. Վաղարշյանի** խմբ., Եր.: «Իրավունք», 2010, էջ 411:

The key to any successful compliance programme, whether it relates to antitrust or another topic, is to reach the stage where the behaviour required under the programme is an indistinguishable part of the company culture.<sup>9</sup>

In the sense of the legislation on the protection of economic competition, compliance can be defined as a set of actions aimed at complying with the legislation and legal acts regulating the sector, as well as preventing possible violations.

According to D.N. Rodinova, the main objective of the co-compliance program is to reduce the likelihood of antitrust violations by assessing risks and implementing countermeasures<sup>10</sup>.

According to N. V. Medvedeva, the antimonopoly compliance standard is a minimum set of requirements, the implementation of which will help reduce the number of violations of antitrust laws in the conduct of activities by authorities. This document establishes a set of measures aimed at the introduction of preventive measures and the creation of a system for prompt response to situations of risks of violations of the antimonopoly law<sup>11</sup>.

Competition compliance programmes have the greatest potential with concerning to preventing and uncovering hard core cartels. Competition compliance programmes are more likely to prevent some types of misconduct than others. Programmes are not especially well-suited to conduct that is known to require complex legal and economic analysis as well as in-depth inquiries into facts and market effects, such as abuse of dominance and monopolisation. On the other hand, programmes can be very helpful in preventing and exposing hard-core cartel conduct, which is illegal per se and which lay people can more easily understand. Hard core cartels, however, also represent a monitoring challenge because they are deliberate and conspiratorial violations in which deception and secrecy are used to hide the illegal activity<sup>12</sup>.

Compliance with the law has become particularly important in the field of antitrust law, where the proliferation of laws across the globe has been unprecedented. Existing antitrust laws are constantly evolving and new laws are being adopted. Sanctions for antitrust violations are often substantial and reputational damage to companies as a result of an adverse antitrust finding is massive<sup>13</sup>.

Having an effective culture of compliance with competition law will help a business to avoid the many adverse potential consequences of competition law infringement including the following:

- financial penalties of up to 10 percent of group turnover
- adverse reputational impact (business and personal) associated with

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<sup>9</sup> The ICC Antitrust Compliance Toolkit, p. 4 (available at 30.03.23 <https://compliance.concurrences.com/en/compliance/2020/corporations-initiatives/the-icc-antitrust-compliance-toolkit>)

<sup>10</sup> **Родинова Д. Н.** Антимонополичный комплаенс как важная часть системы предупреждения антимонопольных нарушений // Вестник БГУ. – 2017. – Вып. 3. – с. 92.

<sup>11</sup> **Medvedeva N. V.** Antimonopoly complains in the system of development of competition // Power and Administration in the East of Russia. 2019. No. 1 (86), p.p. 4 (available at 30.03.2023 <http://vlastdviu.ru/download/rio/j2019-1/7%20%D0%9C%D0%B5%D0%B4%D0%B2%D0%B5%D0%B2%D0%B0%20%D0%9D.%20%D0%92..pdf>).

<sup>12</sup> OECD Policy document DAF/COMP (2011)20 Promoting Compliance with Competition Law 2011, p. 14 (available at 26.03.2023 <http://www.oecd.org/da/competition/Promotingcompliancewithcompetitionlaw2011.pdf>):

<sup>13</sup> International Chambers of Commerce. “The ICC Antitrust Compliance Toolkit”, 2013, p. 4 (available at 24.03.2023 <chrome-extension://efaidnbmnribpajpcglefindmkaj/https://iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf>).

having committed a competition law infringement

- director disqualification orders for the directors of infringing companies
- criminal convictions for those individuals involved in a cartel
- considerable diversion of management time and the incurring of legal costs in order to deal with investigations by competition authorities
- the unenforceability of restrictions in agreements that infringe the law, and
- lawsuits from those who have suffered harm as a result of the infringement.

Effective competition law compliance has greater benefits than just avoiding the adverse consequences mentioned above. Other potential advantages of an effective competition law compliance culture include the following:

- the early detection and termination of any infringements that have been committed by the business allowing, in appropriate cases, immunity or leniency applications to be made, potentially helping to reduce or eliminate financial penalties
- taking appropriate steps to comply with competition law might result in an up to 10 per cent reduction in the amount of the financial penalty imposed by the Office of Fair Trading for a competition law infringement, depending upon the circumstances
- employees being able to recognise the potential signs that another business might be infringing competition law, particularly in situations where their own business might be the victim of such an infringement and might decide to take appropriate action
- employees being confident of 'the rules of the game' and able to compete vigorously for business without fear of infringing competition law, as well as recognising when they should seek legal advice on potential competition law issues, and
- an effective culture of competition law compliance is an essential part of an ethical business culture, which can provide reputational advantages.<sup>14</sup>

Recently in the Republic of Armenia, the term compliance is often discussed, it became more relevant after it was introduced as a new institution in the competition protection legislation.

Among the powers of the Commission for the Protection of Competition in the Republic of Armenia is also the implementation of measures to prevent violations of the legislation on the protection of economic competition, which also includes the approval of guidelines and other documents of an advisory nature related to economic competition.

According to some theoreticians, it is not possible to achieve widespread acceptance of the compliance program through legislative reforms, because it is more appropriate to provide incentive norms to inspire business entities<sup>15</sup>.

By issuing various guidelines and/or organizing meetings with business entities, the Competition Protection Commission tries to make the provisions of the competition protection legislation available to the widest range of people and the importance of maintaining them.

Until 2023, there was no legal regulation that would promote the imple-

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<sup>14</sup> United Kingdom Office of Fair Trading Guidance document 1341. How your business can achieve compliance with competition law 2011. pp.5-6 (available at 26.03.2023 [http://oft.gov.uk/shared\\_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf](http://oft.gov.uk/shared_oft/ca-and-cartels/competition-awareness-compliance/oft1341.pdf)).

<sup>15</sup> Глубокая Ю. Антимонопольный комплаенс в США и Европе. По какому пути пойдет Россия? // Конкуренция и право. – 2015. – № 4. – с. 34.

mentation of antimonopoly compliance in their activities by economic entities, but on May 23, 2022, the Commission for the Protection of Competition published the "Guideline on the Implementation of Antimonopoly Compliance" (hereinafter: the Guideline), where antimonopoly compliance is defined as a set of measures aimed at an economic entity to carry out activities in accordance with the legislation on competition protection.

The implementation of the antimonopoly compliance program by economic entities implies the adoption of an internal legal act from a legal point of view.

The requirements for the antimonopoly compliance program should be clearly defined by the regulatory and supervisory bodies of the sector because only if such guidelines and the requirements in it are clearly formulated, it is possible to create an objective and real opportunity for business entities to adopt and maintain the compliance program.

According to I. V. Knyazeva, the key to the success of a compliance program is also that the program becomes an integral part of the company's corporate culture over time<sup>16</sup>.

Therefore, the existence of the Antimonopoly Compliance Guide of the Republic of Armenia is very important, because the guideline defines both the circumstances that business entities must take into account, and the conditions imposed on the content of the internal legal act adopted by business entities.

Especially, when developing the compliance program, the business entity's field of activity and its features, the competitive risks recorded during the activity, the characteristics of the product market structure where the business entity operates, the fact that the business entity has a monopoly or a dominant position must be taken into account<sup>17</sup>.

According to the Guideline, the compliance program/act must contain the competitive risks recorded during the activity of the economic entity, a list of measures aimed at reducing the risk of violation of the economic competition legislation (risk determination, risk assessment, reducing the risk occurrence probability, periodic risk assessment), information on the system for ensuring the implementation of the antimonopoly compliance program and etc.

At the same time, the Guideline states that in case of changes in the legislation on the protection of competition, the compliance program is subject to alignment with the existing legislation<sup>18</sup>.

Thus, we can record that the antimonopoly compliance enforcement policies and procedures of the Republic of Armenia, through their real and effective implementation, can contribute to the improvement of the competitive environment, which in the end will also contribute to the revitalization of investment activities.

A number of states, in order to bring the behavior of business entities into compliance with competition legislation and to ensure the practical applicability

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<sup>16</sup> **Knyazeva, I.V., Dozmarov, K.V.** (2020). Antitrust Compliance Programme – Prevention of Risks of Violation of Competition Law by the Company. ECO. No. 4. p.127 (In Russ.). (available at 28.03.2023 <https://competitionsupport.com/wp-content/uploads/2020/03/Knyazeva-Dozmarov.pdf>).

<sup>17</sup> Compliance-guideline. 2022 p. 19, (available at 27.03.23 <http://competition.am/wp-content/uploads/2022/05/Compliance-guideline.pdf>).

<sup>18</sup> Compliance-guideline. 2022 p. 19-20, (available at 27.03.23 <http://competition.am/wp-content/uploads/2022/05/Compliance-guideline.pdf>).

of the legislative regulations, provide incentive norms for those business entities that have implemented antitrust compliance.

The percentage reduction of the amount of the fine when imposing a fine on an economic entity can be included among the incentive norms if the economic entity has accepted the anti-monopoly compliance.

A number of European Union countries are considering reducing the amount of sanctions at the national level in cases where the company has adopted an antitrust compliance program and maintains it. In the UK and France, in the presence of a compliance program, a 10% reduction is applied when imposing a fine on the relevant companies, and in Italy, it is 15%<sup>19</sup>.

As a result of the legislative reforms implemented in the Republic of Armenia on February 1, 2023, changes were made in the methodology of choosing the measure of responsibility and calculating the fine, and among the circumstances mitigating the measure of responsibility, in particular, in the presence of a compliance program, a percentage reduction should be applied to the applicable fine;

- When calculating the fine, 10% is reduced if the compliance was accepted and submitted to the Competition Protection Commission by the business entity prior to initiating proceedings on the offense, and if the business entity committed an offense for the first time after the compliance was introduced.
- When calculating the fine, 5% is reduced, if the compliance was accepted by the business entity after the initiation of proceedings regarding the offense in the field of economic competition and before the decision to apply a measure of responsibility was submitted to the Commission for Protection of Competition.

Envisioning the implementation of antimonopoly compliance as a basis for reducing the fine, at the same time, the lack of proper control over the actual implementation of this compliance can lead to situations when business entities implement the compliance solely to avoid large fines.

In order to exclude such situations, it is necessary for the Competition Protection Commission not to limit itself to the existence of a compliance program at the economic entity, but to find out through appropriate mechanisms whether the relevant economic entity is guided and previously guided by the compliance act adopted by it, or whether its existence is formal.

Along with antimonopoly compliance providing a condition for the reduction of fines assigned by the Competition Protection Commission, effective mechanisms are needed to find out the actual application of that compliance.

The requirements reflected in the Guidelines submitted to antimonopoly compliance are only indicative in nature and cannot be binding for the business entity, as the Guidelines are not a normative legal act.

At the same time, the Guide stipulates that the business entity can submit the antimonopoly compliance plan project to the Competition Protection Commission to receive a conclusion.

It is noteworthy that applying to the Commission for the Protection of Competition in order to obtain a conclusion is a right for business entities, not a

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<sup>19</sup> Румянцева Ю. Н. Антимонопольный комплаенс как часть комплаенс-программы соблюдения законодательства Российской Федерации // Пролог: журнал о праве / Prologue: Law Journal. – 2019. – № 2. с. 56.

duty, and the risk of negative consequences of not applying must be borne by the business entity.

The guidelines for the application of liability measures by the Competition Protection Commission only state that the existence of a compliance program or its acceptance during the initiated proceedings may be sufficient to reduce the amount of fines.

That is, to discuss the issue of reducing the amount of the fine, the Competition Protection Commission must be satisfied with the existence of the compliance document without having an opportunity to take actions aimed at revealing the compliance of the program with the competition protection legislation, because the submission of the compliance plan is sufficient to reduce the amount of the fine.

Summarizing the study, we find that to ensure the effective enforcement of antimonopoly compliance, the simultaneous presence of the following conditions is necessary;

- In the case of submitting an antimonopoly compliance plan for the purpose of reducing the amount of the fine, the Competition Protection Commission should have the authority to assess the compliance of the plan with the requirements of the law and the Guidelines and reduce the amount of the fine only in the case of a plan that meets the requirements.

- The Competition Protection Commission must have the objective ability to monitor compliance with the compliance program approved and submitted by business entities after the reduction of the fine, as well as after receiving the positive conclusion of the Competition Protection.

- If the existence of a compliance program is the basis for the reduction of the fine, the decision to apply a measure of liability must contain an order to the economic entity to comply with the compliance program. the economic entity will be held liable, in case of non-compliance,.

- In case of violation of the terms of the compliance program based on the reduction of the fine (the order issued by the decision to apply a measure of responsibility), the amount of the fine imposed should be an amount reduced (5-10 percent) from the previously applied fine.

**ԱՐՄԵՆ ՀՈՎՀԱՆՆԻՍՅԱՆ, ՄԱՐՏԻՆ ԽԱԶԻԿՅԱՆ – Հակամենաշնորհային կոմպլայենսը Հայաստանի Հանրապետությունում – Հոդվածում քննարկման առարկա են դարձել Հայաստանի Հանրապետությունում հակամենաշնորհային կոմպլայենս ծրագրերին առնչվող իրավական կարգավորումները և դրանց արդյունավետ կիրարկումն ապահովելու համար անհրաժեշտ գործողությունները:**

Քննարկվել են նաև այն հանգամանքները և գործոնները, որոնք տնտեսավարող սուբյեկտները պետք է հաշվի առնեն հակամենաշնորհային ծրագրերը կազմելիս: Նախագուշացման և կանխարգելման ընթացակարգերի ներդրման միջոցով հնարավոր է գործնականում բարելավել տնտեսավարող սուբյեկտների՝ հակամենաշնորհային օրենսդրությանը համապատասխան գործելը, քանի որ լիազոր մարմնի կողմից վարչական պատասխանատվության ավելի մեղմ միջոցների կիրառումը բացառիկ հնարավորություն է ընձեռում շտկելու և կանխելու հնարավոր խախտումները:

Հակամենաշնորհային կոմպլանենս ծրագրի ընդունումը չի ենթադրում դրա գործարկումը, քանի որ մի շարք տնտեսավարող սուբյեկտներ ակտի ընդունումը կարող են պայմանավորել որպես ապագայում հավանական հակամենաշնորհային օրենսդրության խախտման դեպքում նշանակվող տուգանքի նվազման գործիք, ինչի արդյունքում անհրաժեշտ է, որ Մրցակցության պաշտպանության հանձնաժողովը չսահմանափակվի միայն տնտեսավարող սուբյեկտի մոտ կոմպլանենս ծրագրի առկայությամբ, այլ համապատասխան մեխանիզմների միջոցով պարզի՝ արդյո՞ք համապատասխան տնտեսավարող սուբյեկտը առաջնորդվում է և նախկինում առաջնորդվել է իր ընդունած կոմպլանենս ակտով, թե՛ դրա առկայությունը ձևական է:

Հոդվածում առանձնացվել են նաև այն վավերապայմանները, որոնց միաժամանկյա գոյությունը հնարավորություն կտա ապահովելու հակամենաշնորհային կոմպլանենս ծրագրի արդյունավետ կիրարկումը:

**Բանալի բառեր** – *կոմպլանենս, կոմպլանենս ծրագիր, հակամենաշնորհային օրենսդրություն, բարեխիղճ մրցակցություն, տնտեսական գործունեության ազատություն, մրցակցության զարգացում*

**АРСЕН ОГАННИСЯН, МАРТИН ХАЧИКЯН – Антимонопольный комплаенс в Республике Армения.** – В статье рассматриваются правовые нормы, связанные с программами антимонопольного комплаенса в Республике Армения, и необходимые действия для обеспечения их эффективной реализации. Также были обсуждены обстоятельства и факторы, которые субъекты предпринимательства должны учитывать при составлении антимонопольных программ.

За счет реализации процедур предупреждения и профилактики можно на практике улучшить соблюдение хозяйствующими субъектами антимонопольного законодательства, поскольку применение уполномоченным органом более мягких мер административной ответственности дает уникальную возможность исправить и предотвратить возможные нарушения.

Принятие программы антимонопольного комплаенса не предполагает ее реализацию, поскольку ряд хозяйствующих субъектов могут оговорить принятие акта как инструмента снижения размера штрафа, налагаемого в случае возможного нарушения антимонопольного законодательства в будущем, в результате чего необходимо, чтобы Комиссия по защите конкуренции не ограничивалась только наличием у экономического субъекта комплаенс-программы, через другие соответствующие механизмы выяснить, руководствуется и ранее руководствовался ли соответствующий хозяйствующий субъект принятым им актом о соблюдении, или же его существование носит формальный характер.

В статье также выделены условия, одновременное наличие которых позволит обеспечить эффективную реализацию программы антимонопольного комплаенса.

**Ключевые слова:** *комплаенс, комплаенс-программы, антимонопольное законодательство, добросовестная конкуренция, свобода экономической деятельности, развитие конкуренции*