

Antitrust Law

A good thing we talked about it?

Fines in the millions for price collusion that violates competition law

It was recently reported in the press that a large European carrier had been fined around EUR 400 million for price agreements relating to fuel surcharges. This case was the latest reminder to sector members of how dangerous it can be to make special agreements – and that the days of regulation and associated privileges under antitrust law are gone for good. The various individual steps in the deregulation and liberalization process in the EU were completed in November 2007. The rules of EU antitrust law now also apply without restriction to air traffic, meaning that tariff consultations, for example, need to be viewed from a completely new legal perspective.

In addition, the situation has been made more difficult for companies because the procedural rules under European antitrust law changed on May 1, 2004. Before then, agreements between individual companies and business associations could be reported to the European Commission; the resulting decision by the authority gave the companies legal certainty as to whether their cooperation was admissible under competition law. Since May 1, 2004, however, the so-called principle of legal exception applies, i.e. companies themselves have to decide whether their conduct is compatible with antitrust law. However, experience has shown that it is often not easy to determine the dividing line between conduct that is permissible under antitrust law and conduct that violates it.

Self-assessment calls for keen risk awareness and the utmost caution, as a wrong assessment can lead to huge disadvantages for the company concerned. The mere fact that an antitrust authority investigates possible agreements (e.g. about prices or price components) not only leads to considerable unrest within the company but frequently also has undesirable public consequences. Property searches, seizure of goods and similar visible measures by antitrust authorities are always attractive topics for the media. In addition, the very suspicion of violations of antitrust law can have a major impact on the value of the company, as has recently been seen from the share prices of various companies affected.

If checks of this kind confirm that antitrust law has been violated, the companies may be fined considerable sums of money, which may amount to as much as 10 percent of the global annual sales of the companies concerned. In cases involving a foreign connection, such as the USA, it is almost impossible to estimate the potential repercussions. Sanctions and damage claims can quickly add up to several billion.

Fines and prison sentences may also be imposed on employees involved in agreements which violate antitrust law. However, it is not only agreements between companies which had previously not worked together that are risky ventures under antitrust law. The mere continuation of existing cooperation arrangements and alliances is fraught with numerous new risks as a result of the change in the legal situation since May 1, 2004. Companies are now left alone to assess whether their conduct is – and/or was – in keeping with antitrust law.

It is vital for companies today to acquire sound knowledge of current antitrust law or expert advice on the subject, particularly in light of the current debate about corporate compliance. This applies particularly to carriers which operate in international and frequently very tight markets. It is extremely important for all employees who represent the company externally in any way whatever to be given clear procedural instructions and guidelines. Only with acute awareness of the problem can action be taken in time to avoid any possible grounds for suspicion which could cause competition authorities to intervene.

*Dr. Johannes Weisser, Christiane Leffers
avocado rechtsanwälte, Frankfurt am Main*