
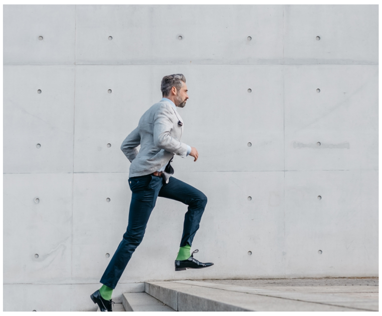


Competition, Consumption & Prices, Company Law, Regulation

Antitrust Law: Compliance Must Be Worth It

18.09.2026

At a glance

- The regulations accompanying the partial revision provide important clarifications to antitrust law, but at the same time, key achievements of the reform are also being jeopardized.
- The inclusion of the compliance defense in the law is welcome. However, the requirements for it are so stringent that compliance measures would hardly ever be taken into account in practice—contrary to the stated intent of Parliament.
- Corrections are also needed regarding sanctions and merger control, where the draft places an unnecessary burden on companies.

Today marks the end of the public comment period on the ordinances accompanying the revised Antitrust Act. The preliminary draft contains welcome adjustments and clarifications. However, the new compliance defense risks becoming a dead letter: The proposed requirements are so stringent that hardly any company is likely to meet them.

It is encouraging that, with last year's partial revision of the Antitrust Act, lawmakers incorporated the "compliance defense" into the law. Companies that attempt to prevent antitrust violations through compliance measures should have this taken into account when sanctions are imposed. Those who seriously invest in prevention should not immediately treated like a company that takes no action. However, the implementing regulations—the public comment period for which ends today—do not address this concern.

Excessively High Barriers Jeopardize Compliance Defense

The Federal Council ties the reduction of sanctions to a whole series of conditions, all of which must be met simultaneously. Some of these are virtually impossible to meet in practice. For example, a compliance program is supposed to count only if it uncovered or put an end to the violation. This means that precisely those cases for which the compliance defense is intended fall through the cracks: A company has done everything reasonably possible, and yet individual employees still circumvent the internal rules. economiesuisse therefore calls for compliance programs to be evaluated holistically rather than based on a rigid checklist. Only in this way can the incentive that Parliament sought to create be achieved.

Sanctions and Merger Control Also Need to Be Addressed

The draft also gives authorities too much leeway when determining penalties. Companies must be able to anticipate what they can expect in the event of a violation. The penalty must therefore be based on the company's specific circumstances and must not be arbitrarily expanded.

There is also a need for correction in the area of merger control, which the legislature has aligned with European law through the partial revision. The ordinance requires extensive information when a merger is notified, including details on markets that are not even affected by the proposed transaction. This results in a high administrative burden without providing any significant insights into the companies' competitive position or the protection of competition. The simplification for international mergers also risks coming to nothing: if the EU is already reviewing a transaction, it does not need to be additionally notified in Switzerland under certain conditions. However, without a binding deadline by which the Swiss authorities can still require a notification, it remains unclear to companies whether they can rely on this exemption.


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