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The European Commission's New Cooperation Procedure in Non-Cartel Cases

In less than a year, the European Commission has made use of its new cooperation procedure in eight non-cartel cases resulting in reductions of fines between 10% and 50%

The Commission's cooperation procedure in non-cartel cases is a *sui generis* process pursuant to which companies involved in vertical restrictions or abuse of dominance can benefit from considerable fine reductions as a reward for their cooperation, including their acknowledgement of the infringement. In the context of the *Guess* decision, the Commission published a two-page Fact Sheet¹ in which it sets out the framework for this type of non-cartel cooperation.² The procedure is inspired by the Commission's Cartel Settlement Notice³, albeit foreseeing a less formal process and not limiting the fine reductions to 10%. At the same time, similarly to the Commission's Cartel Leniency Notice⁴, the percentage of reduction depends on the timing of the company's cooperation and the value of the evidence, if any, provided by it. While its experience with the new cooperation procedure is still limited, the Commission has decided against its codification for the time being, allowing more flexibility in applying the framework in practice.

Background

The practice of rewarding cooperation by companies under investigation is of course not new to EU competition law. It is well-known and established practice that companies can receive significant fine reductions in cartel cases if they provide incriminating evidence under the Commission's leniency program. In addition to leniency, and as well on a stand-alone basis,

companies participating in a cartel can benefit from a (further) fine reduction of 10% and simpler, streamlined procedures if they admit the infringement in settlement proceedings. The application of a similar cooperation-and-reward framework to *non-cartel* cases is, however, a relatively new practice in the EU competition law world.

Although such practice has primarily demonstrated itself in decisions rendered over the last twelve months, namely in the *AB InBev*⁵ abuse of dominance case, in the *Nike*⁶, *Guess*⁷ and *MasterCard*⁸ vertical cases involving cross-border sales restrictions, and in the four parallel *Consumer Electronics*⁹ cases regarding resale price maintenance, it had already been used once in 2016 in the *ARA*¹⁰ abuse of dominance case. At that time, Competition Commissioner Vestager had delivered a speech in which she highlighted that it had been "more a decade since the Commission last used that possibility outside cartels".¹¹

The Key Aspects of the New Cooperation Procedure

In December 2018, the Commission published a Fact Sheet with the aim of providing more clarity about its novel framework. Since then,

¹ European Commission, [Fact Sheet](#), *Cooperation – FAQ*.

² See also the previous [Commeo Newsletter](#) "European Commission: Renewed Enforcement Focus on Vertical Restraints" of 30 April 2019.

³ Commission Notice on the Conduct of Settlement Procedures in Cartel Cases ([2008/C 167/01](#)).

⁴ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases ([2006/C 298/11](#)).

⁵ European Commission, Press Release, 13 May 2019, [IP/19/2488](#).

⁶ European Commission, Press Release, 25 March 2019, [IP/19/1828](#).

⁷ European Commission, Case [AT.40428](#) – *Guess*, Decision of 17 December 2018.

⁸ European Commission, Press Release, 22 January 2019, [IP/19/582](#).

⁹ European Commission, Cases [AT.40465](#) – *Asus*, [AT.40182](#) – *Pioneer*, [AT. 40181](#) – *Philips*, [AT.40469](#) – *Denon & Marantz*, Decisions of 24 July 2018.

¹⁰ European Commission, Case [AT.39759](#) – *ARA Foreclosure*, Decision of 20 September 2016.

¹¹ Margrethe Vestager [Speech](#), 'Setting Priorities in Antitrust', 1 February 2016.

Commission officials have used different occasions to promote and explain such framework to the EU competition lawyers' community.

Similar to the settlement procedure for cartel cases, the new framework requires that the cooperating company acknowledges its liability for the infringement, including the underlying facts and their legal qualification. Commission officials have stressed that such acknowledgement is the indispensable prerequisite for the cooperation procedure.

If, in addition, a company is willing to cooperate by (i) voluntarily providing or clarifying evidence¹² or (ii) designing and proposing suitable remedies¹³, this may be rewarded as well.

The cooperation procedure's resemblance to the cartel settlement procedure also extends to its main procedural steps. The new framework follows to a large extent the procedural milestones known from the cartel settlement procedure, but at the same time keeps the process less formalistic and, thus, more flexible.

Similar to the cartel leniency program, the level of fine reductions under the new framework for non-cartel cooperation depends on (i) the *extent* of the cooperation and (ii) its *timing*. In other words, the earlier in the proceedings a company announces its readiness to cooperate and the more significant the value of the evidence that it is able to provide, the higher the fine reduction will likely be. A company may provide not only additional evidence with added value to strengthen the Commission's ability to prove the infringement¹⁴, but also evidence revealing an infringement not yet known to the Commission¹⁵ or evidence incriminating other companies¹⁶. An analysis of the most recent precedents allows an interim conclusion that cooperation *before* the issuance of the Commission's statement of objections (SO) and in which evidence is provided can be rewarded with fine reductions between 40% and 50%¹⁷, whereas cooperation *after* the issuance of a SO and in which no evidence is provided can

receive fine reductions between 10% and 15%.¹⁸

In addition to the *extent* of the cooperation and its *timing*, *procedural efficiencies* gained in each individual case will also be taken into account. This is in line with the rationale behind the cartel settlement procedure and includes, for instance, the company's waiver of certain procedural rights, such as a full access to the Commission's files.

Should the non-cartel cooperation procedure discontinue, Commission officials have confirmed that, similarly to the policy in cartel settlement cases, any evidence provided by the company will stay in the Commission's files and can be used against the company in subsequent proceedings, even if a certain reward for this evidence – outside the cooperation procedure – may still be granted.

The underpinning provision that the Commission applies for fine reductions in non-cartel cooperation cases is point 37 of the Commission's Fining Guidelines¹⁹. Pursuant to this "catch-all" provision, the Commission is free to depart from the methodology of setting fines as set out in its Fining Guidelines if the particularities of a given case justify such deviation.

Comment

In the context of its latest wave of decisions, in particular regarding vertical restraints following the E-Commerce Sector Inquiry, the Commission has taken a step into the right direction by providing initial guidance on all key aspects, including guidance on the procedural steps as well as on the relevant points for determining the reward (fine reductions) for such cooperation in non-cartel cases.

Although inspired by the cartel settlement procedure, the Commission has, for the time being, decided against the codification of this new framework in order to maintain flexibility in its application. From a company's perspective, the lack of a codified framework can increase legal uncertainty. However, it may also be in the companies' best interest to have this test phase before any type of legal framework is implemented for good. For example, a codification similar to the cartel settlement procedure may not be the most suitable framework, as the

¹² In all cited vertical cases, with the exception of *Mastercard*, the companies cooperated in providing evidence. In the *AB InBev and Mastercard* cases, the companies only acknowledged their liability for the infringement.

¹³ A cooperation on (structural) remedies has so far only become relevant in the *ARA* case.

¹⁴ For instance, the *Nike* case.

¹⁵ For example, the *Guess* case.

¹⁶ This was the case in the *Pioneer* decision, in which the company received a fine reduction of 50%.

¹⁷ To date, 50% fine reductions have only been rewarded in the *Pioneer* and *Guess* cases.

¹⁸ 10% in the *Mastercard*, and 15% in *AB inBev*, in the later also including a cooperation on remedy.

¹⁹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] [OJ 210/2](#).

non-cartel cooperation process contains considerable elements closer to the provisions of the leniency program, e.g. the relevance of the timing of the cooperation and the value of the evidence provided, as well as potentially the way to determine the reduction of the fines.

From a comparative law perspective, it is worth mentioning that some jurisdictions, such as the UK²⁰, Poland and Estonia, expressly allow the application of their leniency programs to vertical infringements. Other jurisdictions, such as Germany, limit leniency only to cartel cases, but in practice the authorities have granted analogous reductions to companies involved in vertical cases.²¹ Further, even though the ECN+ Directive only requires EU Member States to implement of a codified leniency regime for cartels, this does not prevent national legislators to expand the scope of their national leniency programs to non-cartel infringements.

It remains to be seen how the Commission will continue to use its discretion in assessing the suitability of non-cartel cases for cooperation, how much fine reduction companies can expect as a reward for their cooperation and how the different cooperation elements and the timing will play a role in determining the amount of fine reductions. Flexibility in the cooperation process and in determining the reward for the cooperation may after all also be in the interest of the affected companies.



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²⁰ In the UK, such application is limited to RPM cases.

²¹ See, for instance, the Bundeskartellamt's series of cases relating to various food retail products, referred to as the "Vertikalfall" (e.g. the [beer](#) case).