Competition Law Insight
Business intelligence | informa

www.competitionlawinsight.com

Wildcard strategy

The emerging cooperation procedure in non-cartel investigations

by **Marjolein De Backer** and **Maria Loudjeva**

In the past four or five years, the European Commission (the Commission) has adopted a new procedure in non-cartel investigations: in four cases it has lowered the fines of companies which acknowledged liability, provided additional evidence and/or facilitated the adoption of a remedy. This emerging "antitrust-cooperation" or "non-cartel cooperation" procedure has gone relatively unnoticed and the available guidance is limited. This article distils the principles which the Commission appears to apply and identifies a number of areas which require clarification before the procedure can become mature. Until then, companies accused of abusing their dominant position or committing a vertical infringement under art 101 of the Treaty on the Functioning of the European Union (TFEU), will face uncertainty when balancing the pros and cons of cooperation.

Cooperation rewards in cartel versus non-cartel cases

Until recently, the Commission terminated non-cartel investigations in one of three ways: (i) it closed the investigation without finding an infringement; (ii) it adopted an infringement decision ordering the undertaking to terminate its behaviour and to pay a fine; or (iii) it adopted a decision without finding an infringement while accepting commitments to remedy the concerns. The finding of an infringement was therefore necessarily combined with a fine and without any prospect of a reduction in exchange for cooperation. This contrasts with cartel proceedings where fines can be reduced on the basis of leniency and/or settlement procedures.

The new antitrust-cooperation procedure thus introduces an opportunity for companies accused of non-cartelistic anti-competitive behaviour to see their fines reduced. From the Commission's perspective, the main incentive appears to be administrative efficiencies. In February 2016, Commissioner Vestager gave a speech at a GCLC conference in Brussels where she noted that antitrust cases can take very long and that while the "[...] guidelines allow us to reduce fines for companies that cooperate [...] it's been more than a decade since the Commission last used that possibility outside cartels". She advocated rewarding companies for their cooperation and not long after her speech the Commission applied this in the *ARA* case (AT 39759 *ARA Foreclosure*, 2016).

Limited precedents

So far it has been very rare for companies to be rewarded for their cooperation in non-cartel cases. In recent years there have been four cases where the Commission tried to develop a framework. Looking further back in the past there have been a few instances where the Commission recognised on an ad hoc basis the need to reward companies for their cooperation.

In 1987, the Commission took into account Hilti's cooperation in the investigation of the company's tying practices on the nail market (IV/30.787 and 31.488 – *Eurofix-Bauco v Hilti*). The decision describes Hilti's cooperation as follows. Hilti suspended its tying practices during the investigation, admitted guilt and implemented a compliance programme. In *Tetra Pak* (1991, IV/31043 – *Tetra Pak II*) the Commission's decision mentions that the fine calculation accounted for Tetra Pak's cooperation but no further details are disclosed. Finally, in 2001 the Commission recognised that Nintendo and one of its distributors, John Menzies, had provided information that went beyond their obligation to reply to requests for information and which had allowed the Commission to bring forward the cases identifying unlawful restrictions on parallel exports (COMP/35.587 PO Video Games, COMP/35.706 PO Nintendo Distribution and COMP/36.321 Omega – Nintendo.) The vertical nature of the infringement meant that the companies could not benefit from the application of the leniency notice but even so the commission applied the leniency notice's rationale when calculating the fine, awarding John Menzies and Nintendo reductions of 40% and 25%, respectively.

In contrast to these ad hoc cases, more recent reductions for cooperation in non-cartel investigations have been

presented by Commission officials on the conference circuit as a more formal initiative. The procedure is based on a broad provision in the 2006 Fining Guidelines: para 37 allows the Commission to depart from its guidelines where it is justified by "the particularities of a given case or the need to achieve deterrence in a particular case".

The first case was *ARA* in 2016, which concerned an Austrian waste management business blocking competitors from entering the Austrian market for management of household packaging waste. Although the ARA investigation had reached an advanced stage of the Commission's process, the company assisted the Commission in designing an appropriate art 7 remedy which was rewarded with a 30% reduction of ARA's fine. The procedure was also used in the Commission's decisions against Asus, Denon & Marantz, Philips and Pioneer in July 2018 – the "*four Consumer Electronics*" cases (AT 40465 (Asus), AT 40469 (Denon & Marantz), AT 40181 (Philips) and AT 40182 (Pioneer). The four manufacturers were found to have engaged in illegal resale price maintenance. The parties offered to cooperate with the Commission before the statement of objections (SO). However, as in the *Nintendo* case the vertical nature of the infringement meant that the companies could not benefit from the application of the leniency notice. Nevertheless the Commission awarded the manufacturers fine reductions in the range of 40 to 50% in order to reward their cooperation. The companies cooperated by: (i) providing additional evidence which significantly strengthened the Commission's case; (ii) acknowledging the infringement of art 101 TFEU; and (iii) waiving certain procedural rights, resulting in administrative efficiencies, ie no access to file or oral hearing post-SO subject to the Commission reflecting the companies' cooperation submissions in the SO and the decision.

In December 2018, the Commission fined Guess €40m for restricting retailers from online advertising and cross-border sales to consumers in other member states (so-called "geo-blocking", AT 40428 – *Guess*). The Commission awarded Guess a reduction of 50% for the company's cooperation for providing value-added evidence which not only helped the Commission to strengthen its case, but also revealed unlawful behaviour that was previously unknown to the Commission. Guess also waived certain procedural rights, ie no access to file or oral hearing post-SO, unless the Commission would not have reflected its cooperation submission in the SO and the decision.

Most recently, the Commission awarded MasterCard a 10% fine reduction for acknowledging post-SO that it had restricted merchant access to cross-border card payment services (AT 40049 *MasterCard II*, January 2019).

Emerging principles

According to conference presentations by Commission officials, the Commission is exploring the way forward with this new non-cartel cooperation procedure in pending cases. In particular the fact sheet supplementing the *Guess* press release gives some guidance. On this basis the principles which are developing can be summarised as follows:

- **Types of cases.** The *Guess* fact sheet remains vague about this point, mentioning only that the Commission will assess, on a case-by-case basis, whether a matter would be suitable for this form of cooperation, taking into account the probability of reaching a common understanding with the company within a reasonable time frame. In the same way as cartel settlements, the probability of procedural efficiencies is likely to be a key factor.
- **Types of cooperation.** In cartel cases two forms of cooperation can be identified: leniency and settlement. Each type of cooperation serves a different purpose and applies a separate set of conditions. Leniency aims at discovering the existence of a cartel. Companies who bring the necessary evidence allowing the Commission to prove an infringement are rewarded for doing so. The timing and significant added value of the evidence determines the level of fine reductions. In contrast, settlements are a tool to simplify and speed-up the procedure, which saves Commission resources. A settlement reduction therefore rewards contributions to procedural efficiency and each party to a settlement receives the same fine reduction because their contributions to the procedural savings are considered to be identical.

  Based on the *Guess* fact sheet, the non-cartel cooperation is a hybrid between settlement and leniency although procedural savings seems to be the primary underlying purpose: the new non-cartel cooperation procedure concerns situations where "companies are willing to acknowledge their liability for an infringement (including the facts and their legal qualification)". This is similar to cartel settlements where the fine reduction rewards the procedural efficiencies achieved by an early admission of liability, although as demonstrated by *MasterCard II* this can also occur post-SO.

  The *Guess* fact sheet adds that, in addition to admitting liability, companies could choose to expand their cooperation by "voluntarily providing or clarifying evidence or by helping in the design and implementation of remedies". Any type of cooperation which goes beyond the admission of guilt therefore seems to be a surplus rather than a conditio sine qua non as evidenced by *MasterCard II*.

  Based on the *Guess* fact sheet it can, however, not be excluded that the Commission will reward other types of cooperation "outside the framework of this cooperation process involving an acknowledgment of the infringement". When a company is not prepared to admit guilt but discloses evidence, the Commission may still apply a fine reduction but – based on the available guidance – this will be lower than when the cooperation involves the admission of the infringement.
- **Fine reduction calculation.** According to the *Guess* fact sheet, any fine reduction will be based on "an overall assessment of the extent and timing of the cooperation given and the procedural efficiencies gained in each individual case". Based on this principle, the earlier

companies start cooperating the larger the reduction will be. In practice this means that cooperation prior to the SO will be awarded with larger reductions because the Commission will be in a position to adopt an SO and a decision which are "more streamlined than what would have been the case outside this cooperation framework". However, cooperation can still take place after the SO has been notified. ARA, for example, only started cooperating after the SO had been issued but was rewarded for its help in the remedy design. Such later cooperation is likely to receive a lower fine reduction because the Commission expects that it "would generate less efficiency gains and less added value".

The limited case precedent indeed confirms that the Commission will grant higher fine reductions for early cooperation: the companies in the *Guess* and *four Consumer Electronics* cases cooperated before the SO and received fine reductions ranging from 40% to 50% which, in cartel cases, is the highest range of reduction companies can receive under the leniency notice. ARA, on the other hand, which only cooperated after the SO, received a reduction of 30%. MasterCard's reduction was even lower, at 10%, which likely reflects that MasterCard's cooperation was limited to an admission of guilt post-SO.

While it is understandable that early cooperation would generate greater rewards, it remains unclear what level of reduction may be expected. For example, will the Commission apply a minimum or maximum level of reduction? Under the leniency programme, companies can receive full immunity if they are the first ones to disclose an infringement otherwise unknown to the Commission. The maximum reward for others providing evidence with significant added value in cartel cases is 50%. The reduction for settlement in cartel investigations is much lower, ie 10%. The recent precedent cases, in which the companies cooperated before the SO, do not reveal how the Commission balanced the different cooperation elements: evidence and the level of "added value", admission of guilt, etc. It is worth noting though that Guess revealed an infringement of which the Commission was not aware yet and was therefore perhaps awarded one of the higher reductions.

Finally, as explained by the *Guess* fact sheet, companies who potentially reach the legal maximum amount for a fine (10% of total turnover) can benefit from the reduction for cooperation.

- **Procedural steps.** Based on the *Guess* fact sheet non-cartel cooperation procedures appear to be "inspired by the cartels settlement notice". In the same way as under the settlement notice, the Commission initiated the non-cartel cooperation procedure after Guess had clearly indicated its willingness to cooperate on a basis that could lead to acknowledging liability. Guess subsequently received targeted access to evidence on which the Commission intended to rely in its decision; and Guess was given the opportunity to express its views orally and/or in writing. Once a common understanding was reached and after Guess confirmed its intention to acknowledge the infringement as set out by the Commission, Guess was informed of the range of likely fines. On this basis, Guess indicated its willingness to acknowledge the infringement subject to the imposition of a maximum fine and that the Commission's SO and decision would reflect Guess' cooperation submission. Guess had the opportunity to confirm this was the case. While these procedural steps are visibly inspired by the cartel settlement procedure, this is based on practice rather than a codified procedure and it remains unclear what procedure has to be followed when cooperation occurs after the SO. In such a case cooperation will likely be limited to acknowledging liability and helping in the design and implementation of remedies. Since a non-cartel cooperation procedure ends with an infringement decision, the remedies cooperation appears to occur in the context of art 7 rather than art 9 of Regulation 1/2003 which, as discussed below, leaves open questions of third-party rights.

Welcome development but uncertainties remain

The antitrust cooperation procedure is a welcome development as it creates opportunities for companies to obtain a fine reduction for non-cartel infringements. Until recently, the only way to influence the fine for companies accused of committing such infringements was to offer commitments. However, not all cases are suitable for a commitment decision, eg the infringement may have been terminated already. In particular in such cases, companies may want to cooperate so as to obtain a fine reduction and not spend years under investigation. That said, where cooperation on remedies is an option, companies will need to balance this with an art 9 commitment process which avoids a fine without admitting an infringement unlike the cooperation procedure in which companies must recognise their liability. This is particularly important in light of potential follow-on damages actions.

A number of uncertainties remain and until these are addressed, most companies will likely be reluctant to enter into an informal cooperation procedure. In particular:

- **Interplay with admission of guilt and private damages litigation.** Companies may have appropriate assurances that their submissions will be protected from disclosure in follow-on damages claims. This is explicitly foreseen for leniency and settlement submissions in art 6(6) of the EU Damages Directive, which defines settlement submissions broadly in art 2(18) to cover any submission acknowledging guilt; the provisions in relation to leniency statements are limited to cartel procedures. Since the new non-cartel cooperation procedure appears to require admission of guilt, the protection of settlement statements is likely

sufficient if constructed appropriately although there is no formal recognition of settlements outside of cartel procedures since the Settlement Regulation (662/2008) only applies to cartels.

- **Rights of defence of the "infringing party" and "complaining party".** The supposed infringer must be able to understand the case brought against the company and be adequately informed about the infringement. The Commission must ensure that a "cartel-settlement" type procedure is followed to guarantee respect of the rights of defence. Inclusion of a statement by the infringer that "its rights of defence were sufficiently safeguarded" as in the *Guess* case is insufficient and a clear framework securing such fundamental rights is required. The right to appeal is unaffected although it is rather theoretical since the admission of guilt necessarily limits the potential scope of an appeal.

  It also remains to be seen how the Commission will incorporate the rights of complainants in the cooperation procedure. One area of particular concern is cooperation about commitments. According to the Commission's best practices for art 101 and 102 TFEU proceedings, complainants and interested third parties have the right to comment as part of a market test under art 9 commitments. However, as mentioned above, the cooperation procedure leads to the adoption of an infringement – not a commitment – decision and eg, in *ARA* there is no trace of a "market test". The non-cartel cooperation procedure should not become a means to circumvent the normal art 9 commitment procedure which includes a market test.
- **Cooperation with multiple parties.** The debate about multiple settling parties and possible hybrid situations where some but not all cartelists sign-up to a settlement also needs to be addressed in the non-cartel cooperation procedure. In particular, in vertical situations where the upstream and downstream participants may have different interests as to cooperating with the Commission.
- **Legal certainty.** From a more holistic perspective, as the non-cartel cooperation procedure develops, it must ensure greater legal certainty than presently provided by the limited precedent and guidance. As already mentioned above, it remains unclear which cases are suitable, what level of discount can be applied and how this will be calculated for the different types of cooperation. It is therefore disappointing that the Commission does not plan to issue specific guidelines about the process but at present only intends to develop the cooperation procedure through case law.

  Further, the Commission alludes to forms of cooperation outside the "framework of this cooperation process". However, nothing is known about the process which could apply to pure leniency type non-cartel cooperation without any admission of guilt. In this case, for example, no formalised protection against disclosure for "non-cartel leniency statements" exists under the EU Damages Directive.

  Finally, in the same way that there is no one-stop-shop for leniency (see, case C-428/14), the non-cartel cooperation procedure will not prevent national authorities from investigating the conduct.

The non-cartel cooperation procedure is overall a welcome evolution. Apart from the benefit of fine reductions, both companies and the Commission will profit from quicker investigations. The antitrust cooperation procedure may also simplify the remedy process and help the Commission identify a more suitable remedy leading to a quicker and more effective termination of the infringement. However, a number of uncertainties must be clarified in regulation and/or guidelines to provide companies the necessary legal certainty and to ensure their rights of defence. These important questions are answered insufficiently by decisional practice alone.

Marjolein De Backer *and* ***Maria Loudjeva*** *are associates at Dechert LLP in Brussels.*

Competition Law Insight is published by Informa Law, Christchurch Court, 10-15 Newgate Street, London EC1A 7AZ. *Competition Law Insight* alerts you to new opportunities and potential pitfalls in areas such as mergers, joint ventures, distribution agreements, international enforcement and technology licensing, whilst also covering overlapping policy areas that are helping to shape the framework of antitrust law and policy. For our full range of legal titles visit about.i-law.com.

Client Services: Please contact Client Services on tel: +44 (0)20 7017 7701; +65 65082430 (APAC Singapore), or email clientservices@i-law.com

Editorial queries: Please contact Kate Clifton on tel: +44 (0)20 3377 3976, or email kate.clifton@informa.com

Informa Law is an Informa business, one of the world's leading providers of specialist information and services for the academic, scientific, professional and commercial business communities.

Registered Office: 5 Howick Place, London SW1P 1WG. Registered in England and Wales No 1072954.

Print managed by: Paragon Customer Communications.