

Competition & Regulatory Newsletter

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Guess decision prompts European Commission to issue informal guidance on cooperation in non-cartel antitrust investigations

On 17 December 2018 the European Commission [announced its decision](#) to fine Guess circa €40 million for anti-competitive agreements to block cross-border sales. The Commission granted a 50 per cent reduction in the fine to reflect Guess's cooperation with the Commission and issued a fact sheet alongside its [press release](#), setting out a framework for how cooperation in non-cartel antitrust investigations can reduce sanctions, providing guidance for future cases.

The Guess decision

Guess designs, distributes and licenses clothing and accessories under several trademarks including "GUESS?" and "MARCIANO". In Europe it operates a selective distribution network, whereby authorised retailers sell its products. The Commission found that from 1 January 2014 to 31 October 2017 Guess had distribution agreements in place requiring permission for sale of Guess merchandise online, restricting sales to consumers located outside certain territories, preventing retailers setting prices independently and prohibiting use of its brand names and trademarks in online search advertising. The Commission found that these restrictive terms denied European consumers the ability to shop freely across borders and allowed Guess to partition the European markets.

Guess's cooperation with the Commission

In its press release, the Commission stated that Guess's fine of € 38,821,000 reflects a 50 per cent reduction for cooperation with the investigation "beyond its legal obligation". Guess not only expressly acknowledged the facts and infringements of EU competition rules, and provided evidence with "significant added value". More particularly, it revealed an infringement of EU competition rules not yet known to the Commission - a prohibition on the use of its brand names and trademarks for the purposes of online search advertising. As stated in the Commission factsheet, the reduction in the fine reflected the timing of

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Guess's cooperation (both in terms of the acknowledgment of liability and the evidence) as well as the extent to which the evidence strengthened the Commission's ability to prove the infringement.

Non-Cartel related Cooperation Framework

This is the third time the Commission has reduced sanctions for cooperation in non-cartel antitrust investigations. It previously made reductions of 30 per cent in the 2016 [Altstoff Recycling Austria \(ARA\) case](#) and 40-50 per cent in the four 2018 [RPM Consumer Electronics cases](#). Its most recent decision has now prompted the Commission to issue a fact sheet of informal guidance explaining the framework for cooperation in non-cartel related cases and clarifying its main parameters.

Rationale for rewarding cooperation

The guidance indicates that rewarding cooperation through reduced penalties is intended to simplify the investigatory procedure and encourage efficiency and accuracy in the decision making process. This mirrors the well-established leniency and cartel settlement frameworks employed in cartel cases. Acknowledgement of liability (including the facts and their legal qualification) may aid the Commission's investigatory process sufficiently to merit a reduction in sanctions, which can then be further reduced by the voluntary provision or clarification of evidence and the design and implication of remedies. However, the Commission is clear that there is neither a right nor an obligation to cooperate and the suitability of any given case to cooperation will be assessed on a case-by-case basis.

Procedural steps

According to the Commission's fact sheet, the procedural steps followed in *Guess* were 'inspired' by those outlined in the cartels settlement notice. Guess expressed its willingness to cooperate on a basis that would lead to acknowledgement of the infringement. The Commission then provided it with a range of likely fines on the basis of which it indicated its willingness to accept liability. Guess's acknowledgement and subsequent submission of evidence allowed the Commission to streamline both its Statement of Objections and decision, generating time and cost efficiencies.

Determining the level of reduction

The level of reduction for acknowledgment of an antitrust infringement will be based on an overall assessment of the extent and timing of the cooperation and the resulting procedural efficiencies. The Commission's informal guidance states that cooperation after issuance of a Statement of Objections is likely to 'generate less efficiency gains', implying that a reduction of the fine is less likely where cooperation takes place at later stages in proceedings.

Conclusion

The informal cooperation framework issued by the Commission is aimed at closing the gap between the Article 9 Regulation 1/2003 commitments procedure (where no infringement decision is made or fine imposed), and the well-established cartel settlement procedure. It remains to be seen whether the Commission will issue any formal guidance. The scale of discounts granted in precedent cases (up to a

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substantial 50 per cent) indicate the Commission's desire that the Procedure is an attractive option for parties under antitrust investigation.

Other developments

Merger control

CAT finds CMA's Sainsbury's/Asda review timetable unlawful

On 14 December 2018 the Competition Appeal Tribunal (CAT) agreed with J Sainsbury plc and Asda Group Limited that the Competition and Markets Authority (CMA) had not given them sufficient time to respond to the CMA's working papers.¹ The appeal is the first time a CMA merger timetable has been challenged by judicial review.

The CMA is currently conducting an in-depth Phase II investigation into the proposed merger of Sainsbury's and Asda. As part of the process, the CMA gave the companies until 17 December 2018 to respond to 21 working papers and survey presentations containing evidence collected by the CMA. The supermarkets argued the deadline should be 21 December 2018 for the majority of their responses, with the rest to follow on 4 January 2019. They also argued that the main party hearing should be put back until they had had an opportunity to respond to the working papers.

Mr Justice Peter Roth agreed with the supermarkets that the CMA's 17 December 2018 deadline was unfair. He added that, while it is not for the courts to direct an alternative timetable, fairness did not necessarily require the deadline to be extended until 4 January 2019, as the supermarkets had suggested. The CAT also found that the scheduling of the hearing was unfair.

Antitrust

CMA responds to Citizens Advice's "loyalty penalty" super complaint

On 19 December 2018 the CMA [responded](#) to a super complaint lodged by Citizens Advice regarding alleged "loyalty penalties" in five key markets: mobile phone contracts, broadband, cash savings, mortgages and household insurance. The super complaint alleged that in these markets existing customers were facing much higher prices than new customers.

The CMA found an estimated loyalty penalty of £ 4 billion a year in these markets, and observed a number of harmful practices, including costly exit fees and requirements for auto-renewal. In light of its findings, the CMA made a number of recommendations to regulators and the government, including publishing the size of a supplier's loyalty penalty and introducing targeted pricing regulations. However, it decided not to commence a market study into the loyalty penalty across the five markets, and will review this decision in 12 months' time.

¹ The CAT has not yet published its ruling of 14 December 2018.

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SAMR fines two chlorpheniramine maleate suppliers RMB 10.04 million for abuse of market dominance

On 2 January 2019 China's State Administration for Market Regulation (SAMR) [announced](#) that it imposed a total penalty of RMB 10.04 million (circa £ 1.2 million) on two pharmaceutical suppliers of chlorpheniramine maleate (CM), namely Hunan Er-Kang Medical Operation (Er-Kang) (subsidiary of the Shenzhen-listed Er-Kang Pharmaceutical) and Henan Jiushi Pharmaceutical (Jiushi) (together, the Suppliers) for abuse of market dominance. CM is an active pharmaceutical ingredient used in 2,000 types of drugs to relieve symptoms of allergy, hay fever and the common cold.

The Suppliers were found to have a dominant position as Er-Kang was the sole agency qualified to import CM into China and Jiushi was the largest manufacturer of CM within the PRC. They were found to have colluded in the following abusive conduct: (i) sale of CM to downstream undertakings at unfairly high prices; (ii) bundling the sale of CM with other pharmaceutical excipients; and (iii) refusal to supply or equivalent conduct through imposing unacceptable supply conditions such as high deposit.

SAMR condemned the severe nature of such abuse. This led to a limited supply and a hike in prices of CM. Downstream competitors' interests were adversely affected. The supply shortage of CM and the sharp increase in the costs of procuring CM forced downstream drug manufacturers to reduce or even terminate production, thus jeopardising patient welfare.

The fines represented around 8 per cent and 4 per cent of the Er-Kang's and Jiushi's sales in the preceding year respectively. In addition, SAMR confiscated RMB 2.39 million (circa £ 0.3 million) of Er Kang's illicit gains.

This penalty was announced shortly after the recent [decision](#) against three glacial acetic acid suppliers (see our newsletter [article](#) in December 2018). In light of recent enforcement activity, the pharmaceutical sector is expected to continue to be an area of enforcement focus in China.

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