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European Commission Extends Its Settlement Procedure to Abuse of Dominance Cases

Mark Powell (White & Case) · Friday, September 30th, 2016

On 20 September 2016, the European Commission ("Commission") issued its first settlement decision under Article 102 TFEU following the introduction of Regulation 1/2003 and reduced the fine of Altstoff Recycling Austria ("ARA") by 30% in exchange for its cooperation. ARA's fine was thus reduced to €6 million.

In addition to the press release, the Commission also issued a short Note on the reduction of fines for cooperation in antitrust cases other than cartels.

Background to the case.

In July 2011, the Commission opened an investigation for possible foreclosure in the Austrian market for the management of packaging waste, following which it reached the preliminary view in July 2013 that ARA had abused its dominant position in the relevant market by hindering competitors from entering or expanding on these markets.

The Commission established that ARA has a dominant position in the provision of waste collection and recycling services for household users. The company has developed a nationwide collection infrastructure which consists of containers and bags, as well as related collection services set up on a contractual basis by companies collecting waste and municipalities for and on behalf of ARA. This network is required under Austrian Law and cannot be duplicated. Competitors who want to enter or expand in the market are, therefore, dependent on receiving access to this infrastructure.

The Commission states that it has evidence that between March 2008 and April 2012, ARA refused to give access to this infrastructure to its competitors.

Framework for the reward of parties' co-operation in antitrust cases outside cartels.

In antitrust cases other than cartels, the normal way of terminating an Article 102 investigation in a "cooperative way" is by way of a Commitment Decision according to Article 9 of Regulation 1/2003. Under such a procedure, the company offers commitments to solve the Commission's antitrust concerns, as a result of which the Commission closes the case without the finding of an infringement. However, according to the Commission, some cases are not suitable for such a solution either because the infringement of the competition rules has already terminated (i.e., there is nothing to solve any longer) or the Commission wishes to establish the finding of an infringement and impose a fine with a prohibition decision adopted under Article 7 of Regulation

1/2003 (so-called “Article 7 Decision”).

Unlike in cartel cases, where the Commission can reward companies agreeing to settle with a 10% fine reduction (under the settlement procedure), there is no specific framework for co-operation in the procedure leading to an Article 7 Decision in abuse of dominance cases.

ARA’s co-operation with the Commission leads to a 30% reduction in fine.

In the case of ARA, the Commission granted a fine reduction of 30% in exchange for:

- its acknowledgment of the infringement;
- its agreement to certain administrative efficiencies (such as potentially a language waiver); and
- its implementation of a structural remedy.

In this case, ARA offered to divest the household collection infrastructure. According to the Commission, such a structural remedy will prevent the company from excluding its competitors from access to that infrastructure, thereby ensuring that such an infringement cannot be repeated in the future.

Another factor named by the Commission that may lead to a fine reduction is the disclosure of evidence.

In a factsheet about the case, the Commission specifically indicated that it applied paragraph 37 of the Commission’s 2006 Fining Guidelines, which foresees that “the particularities of a given case or the need to achieve deterrence in a particular case” may justify departing from the general fining methodology.

Unlike in cartel cases, where the fine reduction is capped at 10%, paragraph 37 allows the Commission to decide on an ad hoc reduction of the fine, depending on the extent and timing of the co-operation in the specific case and the potential benefits of procedural efficiencies and effective enforcement.

A model for the future?

It remains to be seen whether this will be a model for future Article 102 cases. Many Article 102 cases are resolved through an Article 9 commitment decision, but in those cases where any remedy falls short of addressing each of the Commission’s concerns or where the conduct is clearly in the past, this cooperation route could be an option. It is worth noting that similar procedures already exist at a national level (see for example the “non-contestation des griefs” procedure in France, foreseeing a fine reduction of up to 25%, subject to certain conditions).

However, whether the percentage reduction–in this case 30%–will be sufficient to offset any potential negative consequences of acknowledging the infringement, such as an increased exposure to civil claims, will require very careful review.

The post, “The European Commission extends its settlement procedure to abuse of dominance cases under Article 102 TFEU—fine imposed on Altstoff Recycling Austria reduced by 30% in exchange for its co-operation with the Commission,” originally appeared in the Kluwer

Competition Law Blog.

This entry was posted on Friday, September 30th, 2016 at 5:53 pm and is filed under International Competition Law, Monopolization
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