# THE EUROPEAN COMMISSION SENDS STRONG SIGNAL AGAINST PARALLEL IMPORT RESTRICTIONS

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**EU Antitrust, Competition, and Trade Regulation Alert**

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On 23 May 2024, the European Commission (Commission) imposed a €337.5 million fine to one of the world's leading manufacturers of chocolate, biscuits, and coffee products for restricting cross-border trade in these product markets in the EU internal market.

The Commission found that the fast-moving consumer goods (FMCG) manufacturer in question breached EU competition rules under both Article 101 of Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements and concerted practices, and Article 102 TFEU, which prohibits the abuse of a dominant position.

In particular, the Commission found that the FMCG manufacturer:

- had implemented no less than 22 anticompetitive agreements or concerted practices in breach of Article 101 TFEU by: (i) limiting the territories or customers to which seven wholesale customers could resell its chocolate, biscuits and coffee between 2012 and 2019; and (iii) preventing ten exclusive distributors in certain EU Member States (Member States) from replying to unsolicited sales requests from customers (also known as “passive sales”) located in other Member States, without prior authorization from the FMCG manufacturer between 2006 and 2020.
- had also abused its dominant position under Article 102 TFEU by: (i) refusing to supply its chocolate tablets to end customers and a broker in order to prevent their sale to specific territories, i.e. Austria, Belgium, Bulgaria, and Romania, where these chocolate tablets were sold at a higher price between 2015 and 2019.

The Commission found that the combined effect of these infringements was the portioning of the internal market, which enabled the FMCG manufacturer to maintain higher prices and profits in certain Member States at the expense of consumers who ended up paying higher prices in the affected EU countries.

The FMCG manufacturer reportedly relied on the cooperation procedure, which involved acknowledging its liability for the infringement and actively cooperating with the Commission during its investigation, which resulted in a 15% reduction of the original fine which would have otherwise been even higher than €337.5 million.

The case was an ex-officio investigation that started at the Commission's own initiative in 2019 via unannounced inspections / dawn raids.

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## COMMENT

The key takeaways from this case are summarized below:

First, the preservation of a single market in the EU is and remains one of the top enforcement priorities of the Commission. The Commission has aggressively enforced unjustified parallel trade restrictions, both under Article 101 and 102 TFEU. This is not the first enforcement action of this type in the FMCG sector. In May 2019, the Commission fined a global beer producer EUR 200 million for restricting parallel imports of its beer from the Netherlands to Belgium, which the Commission found to be an abuse of dominance. The beer producer in question had implemented measures that prevented supermarkets and drinks wholesalers from importing their beer into Belgium, through labelling, reduction of volumes sold to Dutch wholesalers or even refusal to deal with Dutch retailers who did not agree to refrain from selling to Belgium.

The Commission has also taken initiatives on the regulatory front to preserve the EU single market. In 2018, the Commission adopted the Geo-blocking Regulation (Regulation (EU) 2018/302) that aims to prohibit restrictions by online sellers to restrict online cross-border sales. In addition, on 24 May 2024, just one day after the adoption of the decision against the FMCG manufacturer, the Commission launched a consultation to craft new policy instruments to tackle territorial supply constraints (TSCs).

Second, the fact that this is an ex-officio case shows that despite the drop in leniency applications, the Commission has developed strong investigation capabilities to step-up its enforcement of EU competition rules through other intelligence resources. The 2019 beer case was prompted by a beer merger during which the EC reviewed hundreds of thousands of internal documents. This particular case is reportedly an ex-officio case, but it cannot be ruled out that the EC relied on intelligence gathered from prior merger cases or public resources to carry out its investigation.

Third, the significant amount of the fines imposed by the Commission in the past few years reveals that fines in the hundreds of millions will not be uncommon for large global companies. The Commission is sending a clear signal that it will not hesitate to exponentially increase the amount of the fine to ensure deterrence, not only for the FMCG company in question, but also for other players who might attempt to restrict parallel imports.

Fourth, the use of the cooperation procedure raises interesting strategic questions as to whether and when the defendant company should use the cooperation procedure. The Commission stated that the FMCG manufacturer benefited from a 15% reduction of the fine, but nevertheless, the fine even post-reduction still amounted to EUR 337.5 million, which is one of the highest ever imposed for cross-border sales restrictions. A fine reduction of only 15% contrasts with the level of fine reduction granted by the Commission in other cases where defendant companies in cases also involving cross-border sales restrictions in the EU relied on the cooperation procedure and benefitted from much more significant fine reductions between 40-50% (two fashion cases and a consumer electronics case). The Commission will decide on the fine reduction on a case-by-case basis, but a key factor for the reduction amount is the stage in which the defendant companies decide to cooperate, as this has a direct impact on the value of the information provided to the Commission. The head of the Commission's Unit in charge of the investigation into the FMCG manufacturer, indicated that the defendants' cooperation with the Commission took place late in the investigation. This is the most plausible reason for the relatively limited fine reduction of only 15%. This raises strategic considerations for companies when deciding to engage with the Commission on the cooperation procedure as this would require a careful balancing exercise between the pros of the cooperation

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procedure, i.e. the fine reduction, against the increased risk of exposure to private damage actions, which would be increased as a result of the explicit acknowledgment by the defendant company of its the infringement.

Companies willing to optimize their pricing in the EU should be extremely cautious in designing and implementing their sales strategy across the EU in compliance with EU competition rules. Our Antitrust, Competition, and Trade Regulation team has extensive expertise in the design and implementation of EU-compliant distribution systems and sales strategies for global companies.

## KEY CONTACTS



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