

First Cartel Settlement in the EU: Reduced Fines in Exchange for Admission of Liability

First EU Cartel Settlement

- The European Commission adopted its first settlement decision in the DRAM cartel, two years after the introduction of the settlement procedure.
- The DRAM cartel participants received reductions in their fines under the leniency program and a further 10% reduction because they agreed to settle.
- The settlement procedure offers a fast-track cartel proceeding and a guaranteed 10% reduction in fines, but in exchange for admission of liability and diluted defense rights.
- Companies are required to plead guilty to the cartel infringement, and this admission of liability can be used in private damages actions.

The European Commission (the "Commission") adopted on 19 May 2010 its first settlement decision in a cartel investigation involving ten producers of memory chips (commonly known as DRAMS). The new Competition Commissioner, Joaquín Almunia, hailed the settlement as "another milestone in the Commission's anti-cartel enforcement." The total fine is over EUR 331 million (approximately USD 410 million) and it includes a 10% reduction for the companies' admission of liability.

The DRAM Cartel

Between 2002 and 2009, the Commission investigated a cartel in the production of memory chips used in computers and servers (Dynamic Random Access Memory—in short

"DRAMs"). The same cartel was also investigated in the U.S. as early as 2002.

The cartel lasted from 1998 to 2002 and involved the following DRAM producers: Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. During the course of the cartel, these ten memory chips makers exchanged secret information which they used to coordinate the prices for DRAMs sold to major PC or server manufacturers.

Although only one of the companies involved is European, at the time of the cartel all of the participants sold their products to buyers in Europe. This link with Europe subjected them to European competition rules.

The memory chip makers were fined over EUR 331 million (approximately USD 410 million) for fixing prices. However, Micron, which was the first company to come clean before the Commission in 2002 under the leniency program, received full immunity. Micron used the same collaborative strategy in the U.S. proceedings, where it received an amnesty from federal criminal charges.

Micron was not the only company which approached the Commission for leniency. Between December 2003 and February 2006, a few more producers (namely, Infineon, Hynix, Samsung, Elpida and NEC) applied for leniency. Since they were not the first in the leniency line, they were not entitled to full immunity. However, the leniency rules empower the Commission to take into account companies' efforts to collaborate. As

a result, the Commission knocked substantial chunks off the final fine: Infineon was granted a 45% reduction; Hynix received a 27% reduction; while Samsung, Elpida, and NEC were waived 18% off the fine.

In addition, since all the producers collaborated with the Commission to settle the case, they all received an additional 10% reduction.

Settlements: Fast-Track Cartel Proceedings

The settlement procedure is a relatively new enforcement tool which the Commission introduced in 2008 (see our recent [DechertOnPoint](#)). It is not akin to U.S.-style plea-bargaining. Instead, it is a fast-track cartel procedure, suitable for companies who are willing to admit their liability in exchange of an expeditious procedure and a 10% reduction in their cartel fines. It is open to all parties (not only for leniency applicants) and is an incentive for all companies to cooperate.

Procedural efficiencies and the automatic 10% fine reduction are clear benefits of settlements. In exchange for these benefits, companies agreeing to settle must admit in unequivocal terms their liability for the infringement (including an admission of the existence of a cartel and an acknowledgement of their participation in the cartel both as to their role and the duration of their participation) and waive certain procedural rights of defense. Companies who settle their case have to give up their right to full access to the Commission's file, as well as their right to an oral hearing. Although an appeal against the Commission's decision is formally possible, it is hard to see how companies could in practice challenge a decision to which they have consented in the settlement proceedings.

While engaging in settlement discussions is often a good complement to leniency applications, the two procedures are intended to serve different aims. Leniency is an investigational tool that helps the Commission detect cartels, while the purpose of settlements is to simplify and expedite cartel proceedings and, thus, to free up Commission resources.

Using the settlement procedure, however, comes at a price. Companies should be mindful that their cooperation under the settlement procedure will be mentioned in the Commission's final decision. Therefore, settlement decisions establish the existence of a competition law violation and will serve as binding

proof of fault in any subsequent litigation. Companies contemplating settlement therefore need to assess the risk of further follow-up damages litigation at the national level. While a 10% fine reduction is tempting, it should be seen in light of the risks of being dragged into litigation by private enforcers. Private claimants will be able to rely on the companies' admission of liability to bring civil antitrust litigation.

This is a particularly important consideration in relation to the U.S., as EU cartel proceedings often trigger U.S. class actions alleging that whatever occurred in the EU affected U.S. commerce as well. This may have been less of a consideration in the DRAM case, since many of the settling companies had previously settled U.S. criminal proceedings and private actions before finalizing their EU settlements.

Settlement Is a Real Alternative for Companies Willing to Cooperate

The Commission has waited almost two years before testing its new cartel settlement procedure. The Commission is satisfied with this first use of the system and expects that settlements will enable the Commission to direct its attention to a larger number of suspected cartels.

The extent to which companies should rely on settlement procedures turns on the specific facts of their case. In situations where the facts warrant a strategy involving the company's admission of liability, settlement is probably a good choice because it allows companies to discuss with the Commission the level of the fine and the scope of the final decision. This is not pure lip service; discussions with the Commission can be an important tool for those concerned about potential follow-on private litigation. Such discussions give companies some room to influence the Commission's thinking on crucial aspects of the cartel such as the duration, the geographic scope and the products it affected, which can limit the risk of follow-on actions.

The situation is likely to be different for companies who dispute their liability or the extent thereof—for such companies a procedure which requires the unequivocal admission of liability is not appropriate.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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