Commission adopts first settlement procedure in a cartel case

On 19 May 2010 the European Commission used a new settlement procedure for the first time to reach a decision in a cartel case. It imposed fines of EUR 331 million on 10 producers of Dynamic Random Access Memory chips (DRAMs), giving each party a 10% reduction of its fine for settling.

The settlement procedure

The Commission formally adopted this settlement procedure (which is based on Articles 7 and 23 of Regulation 1/2003) on 30 June 2008 (see EU Newsletter dated 4 – 10 July 2008). This allows the Commission to give parties to a cartel investigation the option to participate in settlement discussions before the Statement of Objections (“SO”) has been issued. If the Commission decides that a case is suitable for settlement, it will set a time-limit for the parties to declare that they wish to engage in settlement discussions. Prior to this each party will have engaged in bilateral settlement discussions with the Commission, in which the Commission sets its case, the supporting evidence and the maximum fine it could impose. Each party expresses its views with a view to reaching a consensus with the Commission on the facts. Each party’s formal submission to the settlement procedure is a covenant to settle and, once the Commission presents these facts to the parties in the SO, they must each acknowledge the facts, accept their liability, commit to settle and pay a fine not exceeding the maximum the Commission could impose. The 10% reduction in the fine for following the settlement procedure is a fixed proportional reduction for all cases. This standard reduction is independent of a number of other factors the Commission can use to fix the initial level of the fine (as specified in the Commission’s Fining Guidelines), as for ordinary cartel decisions.

The benefit of the settlement procedure is that it cuts the length of the Commission’s administrative proceedings and reduces the likelihood of appeal, so reducing overall costs. These savings can be allocated to other cases which should help reduce the current backlog of antitrust cases and generally improve the efficiency of antitrust enforcement. It also benefits the companies involved, most obviously through the reduced fine, but also because they gain quicker resolution (which can minimise reputational loss). Moreover, they obtain a streamlined (shorter and less detailed) decision which may make it more difficult for third parties to bring follow-on damages actions.

Decisions adopted under the settlement procedure can still be appealed by parties before the General Court. That said, since the parties expressly and unequivocally acknowledge their involvement in the cartel as part of the settlement, in practice the volume of such appeals should be reduced.

The DRAM Decision

The 11 addressees of the DRAM decision had participated in a secret cartel involving sharing of information at least between 1998 and 2002. The Commission found that the cartel allowed them to coordinate price increases for DRAMs, which had the knock-on effect of inflating prices in the computer systems in which the chips were used. One of the producers, Micron, was granted full immunity from fines for bringing the case to the attention of the Commission.
Commission in 2002. Several other companies involved were granted leniency in varying degrees, based on their cooperation with the Commission investigation. The fixed 10% reduction granted under the settlement procedure is granted in addition to any reductions for leniency.

Although Micron brought the case to the attention of the Commission in 2002, formal settlement discussions only started in 2009 when the parties indicated that they would be interested in settlement. It then took around 15 months to settle from the initiation of settlement proceedings. However, the Commission anticipates that as the procedure is used more frequently it will become increasingly expedient. Competition Commissioner Almunia has indicated that he envisages future cases being settled in six months, or less. This first case has been exploratory and started to build up trust in the new procedure. The Commission considers it a milestone in its anti-cartel enforcement programme.

The future of the settlement procedure

Asked whether DRAM sets a precedent for all future cases, or whether it is a stand-alone case, Almunia responded that two factors will be taken into account before a case can be settled this way: whether the companies involved are ready to settle, and whether the Commission considers it a case suitable for settlement. The Commission is not under an obligation to settle and may decide to apply the ordinary procedure if, for example, it feels that there is a lack of common understanding between the parties (which would reduce the prospect of achieving procedural efficiencies).

The Commission has also confirmed that the procedure can be used where some parties wish to settle and others do not. In these ‘hybrid cases’ parties would be segregated into groups, with one group going through the settlement procedure and the other through the ordinary procedure.

Almunia has confirmed that there are “several more cases in the pipeline”. The response from the parties involved in the DRAM case has been positive with regards to the level of disclosure received from the Commission and their faith in the proceedings. However, the full extent of the administrative efficiencies (including for the parties) can only really be evaluated once the deadline for appeals expires, and more cases have also been concluded through this procedure.

Sources

Commission fines DRAM producers € 331 million for price cartel; reaches first settlement in a cartel case (IP/10/586, 19.05.2010)

Commission adopts first cartel settlement decision – questions & answers (MEMO/10/201, 19.05.2010)
Merger Control

Notifications
1. **Simplified procedure case**
   > Sun Capital/Beauty Business (M.5866, 18.05.2010).

Phase I Clearances
2. **Unconditional clearance**
   > Dalkia Česká Republika/NWR Energy (IP/10/573, 17.05.2010).
3. **Unconditional clearances: simplified procedure**
   > Oaktree/Aleris (MEX/10/0519, 19.05.2010).
   > Coca-Cola Enterprises/Coca-Cola Drycker Sverige/Coca–Cola Drikker (MEX/10/0519, 19.05.2010).
   > Oak Hill/Cinven/CVC/ Avolon (MEX/10/0519, 19.05.2010).

Antitrust
4. **Copper plumbing tubes apples: General Court reduces the fines originally imposed on IMI and Chalkor** – In its judgments of 19 May 2010 the General Court upheld the fines imposed on four of the undertakings (Wieland-Werke, Boliden, Outokumpu and KME). However, the General court reduced the fines imposed on IMI and Chalkor for their participation in the copper plumbing tube cartel, from €44.98m to €38.556m and €9.16m to €8.2467m respectively. The Court held that the Commission had: (i) not proved to the requisite legal standard that IMI’s participation in the cartel was uninterrupted; and (ii) infringed the principle of equal treatment when calculating the fines imposed on both IMI and Chalkor (CJE/10/46, 19.05.2010).

5. **Commission confirms unannounced inspections in the sector of stretch film for agricultural use** – The European Commission confirmed that on 28th and 29th April 2010 Commission officials carried out unannounced inspections at the premises of companies active in the bale wrap industry and on related markets in several Member States. Bale wrap is plastic stretch film used for the packaging and preservation of silage, hay or straw. The Commission had reason to believe that the companies concerned may have violated EU antitrust rules that prohibit cartels and restrictive business practices and/or abuse of a dominant market position (respectively Articles 101 and 102 of the Treaty on the Functioning of the EU) (MEMO/10/190, 12.05.2010).

State Aid
6. **Commission publishes working document on phasing out bank guarantees** – On 18 May 2010, the European Commission published a staff working paper on the phasing out of bank guarantees after 30 June 2010. The Commission considered that the fee for guarantees should be raised across Member States, and that a viability test should be introduced for banks who are dependent on government debt guarantees. The Commission considered that these new requirements should be the first steps in a gradual phasing out of government guarantees for banks which are no longer required, due to the recovery of the financial markets (Staff Working Paper, 18.05.2010).
7. **Commission adopts Recommendation on harmonised consumer complaints system** – On 12 May 2010, the European Commission adopted a Recommendation introducing a harmonised methodology for classifying and reporting consumer complaints across the EU. The consumer complaints classification system is intended to ensure that organisations across the EU which collect consumer complaints can use a comparable classification method and report their data to the Commission. The classification criteria recommended by the Commission includes: (i) the selling method that is the subject of the complaint; (ii) the type of business involved; (iii) the type of complaint; and (iv) the product category (IP/10/567, Recommendation and Staff Working Document, 12.05.2010).