



STUDIO SANTA MARIA ALERT - JULY 2010

The first application of the new Settlement Procedure

On 19 May 2010 the Commission adopted its first settlement decision under the new Settlement Procedure (effective from July 2008) in a cartel case, imposing on 9 of the 10 companies involved a fine totalling € 331 million, including a reduction of 10% for settling the case. The remaining company was not fined because it benefited from full immunity.

The investigation ascertained the involvement in an anticompetitive cartel of 10 producers (all non-European except for one) of memory chips or DRAMs (Dynamic Random Access Memory) used in computers and servers. The cartel operated between 1998 and 2002 and involved a network of contacts and secret information sharing through which the companies coordinated price levels and quotations in the EEA.

The Commission decided to approach the companies in early 2009, informing them about the existing objections and formally offering to engage in settlement discussions. All the parties accepted the invitation and, therefore, between May and November 2009, the discussions took place during three bilateral meetings between the Commission and each company. At the first meeting, the Commission presented to each company the key elements of the case and the evidence collected. After this meeting the parties had access to a selection of documents from the case file and received a CD-ROM containing a copy of such selection by the Commission. At the second meeting, the Commission debated with the companies about the arguments and observations submitted by each of them following the first meeting. At the third and last meeting, the Commission informed each party about its fine range, without disclosing, however, the criteria that it intended to use to calculate the exact amount. At the end of the discussion stage, all companies made formal settlement submissions admitting their liability. In February 2010, the Commission notified to the parties the Statement of Objections.

Joaquín Almunia, EU's Competition Commissioner, expressed his satisfaction over this first application of the new procedure and highlighted the advantages of the settlement procedure, both for the Commission and for the companies involved in the cartel. According to him, the parties under investigation get a resolution more rapidly, can put the episode behind them, restore their reputation and obtain a 10% reduction in the fine imposed. He also announced that there are several more settlements in the pipeline.

From the defendant's perspective, taking into account this first case, it seems that the advantages of the settlement could outweigh the disadvantages.

The main advantages for a company which decides to settle, besides the fine reduction of 10%, are:

- in the DRAMs case, the Commission granted further fine reductions to three companies recognizing the existence of mitigating circumstances; therefore, there can be a chance for companies which settle to get further fine reductions than the 10% provided for by the Settlement Notice;
- during the discussions, the company will be informed by the Commission of the likely range of fine;
- the Commission cannot order a fine exceeding the maximum amount that the company, in its settlement submission, declared it would accept to be imposed;
- if the company applied for leniency, it can benefit from the leniency reduction of fine in addition to the 10% reduction;



- both the Statement of Objection and the final Decision will be shorter and less detailed than those adopted after a full investigation; therefore, there will be less information therein that can be relied upon by a private party in a follow-on action for damages;
- like leniency statements, settlement submissions are protected from access by other parties; in particular, they are fully protected by other parties which settle and partially protected by other parties which do not settle;
- due to the shorter duration of the procedure, the company not only avoids additional costs but also limits potential damages to its reputation; considering its first application, the new procedure lasted almost one year but the Commission's purpose is to reduce the average duration to a few months.

The main disadvantages, on the other hand, are the following:

- the Commission can decide, at any time before the final decision, to abandon the settlement and revert to the normal procedure;
- even if the Settlement Notice states that, should the Commission depart from the settlement, any settlement submissions may not be used as evidence against the party, it is anyhow hard to imagine that the officials that were in the Commission's case team during the settlement can be impartial once they prosecute and decide the case in a normal procedure;
- during the discussions between the parties and the Commission there is no room for any negotiation;
- the company that decides to settle gives up its right to full access to the Commission's file and its right to oral hearing. The Commission has high discretion in granting access to file and the information that it provides during the discussions can hardly be sufficient for the defendant to have a clear picture of all the information collected by the authority. This can lead the defendant to agree to settle even where the Commission has a weak case;
- although the settlement decisions are open to appeal, the company not only admits liability, but also confirms the maximum amount of fine it would pay. Therefore, the scope of an appeal is drastically reduced;
- last but not least, by admitting liability the company can be more easily sued by third parties (and also consumers) in actions for damages, individual or even collective ones, if provided for by the competent jurisdiction.

If you have any questions, feel free to contact:

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