



European Commission

Competition

Putting the Settlement Procedure into Practice: the DRAMs Decision

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Settlement Procedure

- A reliable legal framework was set up to increase the overall efficiency of cartel enforcement in the EU : the settlement package (amendments of the procedural Regulation and publication of a Settlement Notice).
- Objective: Simplification of administrative procedure leading to adoption of cartel decision; enable the Commission to handle faster and more efficiently cartel cases. Savings of litigation costs.
- It comes with reduction of fines for the companies and allows for early awareness of likely liability.



Settlement: the basics

- Applies only to cartel cases
- If Commission offers settlement, it is the parties' free choice whether they want to settle or not
The Commission can only formally open settlement discussions or settle upon parties' explicit request
- Ordinary procedure remains in place and will apply by default (i.e. if settlement is not explored or not reached)
- An alternative course in appropriate cases: a legal framework to channel legitimate choices to obtain efficiencies
- Complementary to leniency programme - fine reductions from leniency and settlement are cumulative



Objectives and benefits

For Commission

- **Efficiency gains**
 - Drafting and Translations
 - Access to file
 - Oral hearing and interpretation
 - Less appeals
- **Reinforcing effectiveness / deterrence**
 - More decisions
 - Higher risk of detection
 - Complement to leniency & fines

For Companies

- **Direct financial benefits**
 - Fine reduction (10%) cumulative with leniency
 - Savings in litigation/defence
- **Benefit of finality**
 - Shorter procedure: provides early “exit” route (corporate governance)
 - Early awareness of likely liability
- **Free choice**



EU settlements in a nutshell

- Bilateral discussions including hearing the parties on the potential objections, on the evidence supporting them and on liability and fines before the adoption of the SO.
- If settlement discussions lead to a common view between the parties and the Commission, the parties introduce a “settlement submission” and the SO and Decision reach the equivalent conclusions.
- The administrative procedure is considerably streamlined from the presentation of the settlement submission to the adoption of the Decision. Litigation is less likely.
- In view of its objectives, the settlement procedure is not appropriate in all cases.



Suitable cases

- **To achieve the objectives sought:**
 - Likelihood of reaching a settlement
 - Procedural efficiencies
- **Internal operational screening before exploring settlements, e.g.:**
 - Number of parties concerned / Parties' spontaneous interest to settle
 - Number of successful leniency applicants
 - Expected degree of contestation
 - Impact of aggravating circumstances
 - Parties' foreseeable conflicting positions
 - EU/EEA cases or cases already decided in other jurisdictions
 - Novel legal issues
 - ...



Putting EU settlements into practice Transitional phase / initial cases

- Settlement discussions are taking place in pending cases. Confidentiality.
- In the initial phase, eligible also cases with an “ordinary” draft SO ready and/or the full file screened for confidentiality.
 - No delay if settlement not reached
- Settlements are not an end in and of itself. The ordinary procedure will apply:
 - by default (if settlements are not explored)
 - as fall-back option (if settlement not reached)
- DRAMs decision of 19 May 2010: first pure settlement case



Summary of the DRAMs Cartel

- **10 undertakings / 24 companies:** Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Elpida, Toshiba, Mitsubishi and Nanya;
- were involved in a **scheme and/or network of contacts and secret information sharing** by which **they coordinated their conduct on general pricing level and quotations to major PC/server Original Equipment Manufacturers (OEMs)**, ultimately amounting to price coordination to such clients;
- on the market for **DRAMs** (Dynamic Random Access Memory), i.e. **memory chips used in computers and servers**; covering the EEA
- The overall cartel lasted from **1 July 1998 until 15 June 2002.**



Overview of the DRAMs Procedure

- Case triggered by an **immunity application** from Micron on 29 August 2002: conditional immunity granted in December 2002;
- Majority of companies enter into a **plea agreement in the US** between 2004-2006;
- **5 leniency applications to the Commission** between December 2003 and February 2006: Infineon, Hynix, Samsung, Elpida and NEC;
- **No inspections in our jurisdiction;**
- **Settlement discussions** between end March 2009 – end November 2009;
- In December 2009, all parties introduced **settlement submissions, clearly and unequivocally acknowledging their respective liability** for the infringement;
- All parties confirm that SO content reflected their submissions;
- **Decision** adopted on 19 May 2010.



Putting the settlement procedure into practice

- DRAMs is first case: pure settlement scenario
- One year process: test case and high learning curve
- Thorough « hearing » of case, COMP charges, parties arguments
- Utmost respect of rights of defence/procedure
- Streamlined SO and decision: words matter!
- Future challenges: hybrid cases; avoiding free-riding



EU settlements in practice : overview of the procedure (1)

I. Investigation as usual

- Parties may express their interest in a 'hypothetical' settlement

II. Preparation for Settlement Phase

- Screening for suitable cases (point 5 of the Notice)
- Letter to all companies (and MS): initiation of proceedings in view of settlement (Art. 11(6)), request to express their interest (joint representation for undertakings)
- Leniency window closes

III. Bilateral rounds of settlement discussions

- Participating does not imply an admission of guilt or duty to settle
- Disclosure and exchange of arguments on potential objections, liability, fines
- Disclosure of evidence supporting potential objections, liability, fines
- Disclosure of other evidence upon reasoned request
- Commission retains discretion as to the opportunity, order and pace of disclosure and discussions
- Discussions are bilateral, frank and non usable as evidence



EU settlements in practice: overview of the procedure (2)

IV. Settlement

- Settlements submissions by the companies jointly represented (template settlement submission)
- Parties cannot be asked to acknowledge anything formally or to accept the prospect of a certain level of fines unless they have been able during the discussions to effectively exercise their rights to be heard on the envisaged objections, and unless they have been informed of the range of fines that they may incur

V. “Settled” Statement of Objections

- Notification of streamlined SO endorsing company’s settlement submissions, where appropriate
- Company’s reply to SO confirming that it endorses its settlement submission

VI. “Settlement” Decision pursuant to Articles 7 and 23 of Council Regulation n° 1/2003

- Streamlined final decision



EU settlements are designed not to interfere with leniency

- **Different and complementary tools**
 1. Leniency is an investigation tool
 2. Settlements aim at procedural savings
- **Some mechanisms are required:**
 1. Leniency window closes when settlement window opens
 2. Protection of corporate statements applies to both
 3. Specific frameworks (leniency/settlements notices)
- **The reward for settlements is:**
 1. Inferior to the leniency reward for the third company “in”
 2. Applicable with or without leniency
 3. Cumulative with leniency, when both apply
 4. Equivalent for all cartel members who settle



Protection of corporate statements in cartel cases

LENIENCY STATEMENTS

- Oral statements possible
- Access to *other parties* to the proceedings:
 - Only at Comm. premises,
 - No copies
- No disclosure:
 - In private damages actions
 - To 3rd parties (Reg. 1049)

SETTLEMENT SUBMISSIONS

- Oral submissions possible
- No access to *other parties* if all settle
- Access to *other parties* which do not settle:
 - Only at Comm. premises,
 - No copies
- No disclosure:
 - In private damages actions
 - To 3rd parties (Reg. 1049)



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Questions

