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THE FIRST CASES UNDER THE COMMISSION'S CARTEL SETTLEMENT PROCEDURE: PROBLEMS SOLVED?

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I. Introduction

On 19 May 2010, the European Commission announced its first settlement in a cartel case. On 20 July, it announced a second. The two announcements straddle the second anniversary of the introduction of the settlements procedure in June 2008.[1] In 2008, commentators including this one expressed concerns as to the design of the new procedure and suggested the Commission would have to show flexibility if it was to succeed.[2] This article examines what these first cases tell us about how the operation of the settlements process and whether prove the doubters wrong, or at least suggest that the Commission has worked the kinks out of the system.

II. The Two Settlements

1. DRAM

The first settlement concerns a cartel in the market for DRAM (Dynamic Random Access Memory), the most common form of memory chip used in computers and servers.[3] The cartel involved the sharing of secret information and the coordination of prices and quotations to major customers. Under the settlement, ten DRAM manufacturers acknowledge having cartelized the market in Europe for a period of just under four years, between 1 July 1998 and 15 June 2002.[4] The Commission imposed fines collectively totaling over €330 million, with fines on individual parties ranging from € 146 million (Samsung) to € 1.8 million (Nanya).

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1 Commission Press Release, IP/08/1056, 30 June 2008.

2 Sean-Paul Brankin, *All Settled: Where Are The European Commission's Settlement Proposals Post Consultation?*, Competition Law Journal (2008).

3 Commission Press Release, IP/10/586, 19 May 2010.

4 The ten manufacturers are Micron (the immunity recipient), Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya, *Id*.

The Commission's investigation was initiated in 2002 by an immunity application from one of the manufacturers, Infineon.[5] The settlement process took something over a year (as part of an investigation lasting around eight years in total). Settlement discussions started in early 2009 and a statement of objections ('SO') was issued in February 2010.[6]

The cartel was also the subject of proceedings by the Department of Justice ('DoJ') in the US, in which several of the parties entered into plea agreements resulting in the payment of fines totaling $ 729 million (€ 580 million).[7] Infineon was also the immunity applicant in the US proceedings.

2. Phosphates

The second settlement concerned a cartel in the market for animal feed phosphates, chemicals used in feed for cattle, pigs, poultry, fish and pets.[8] This was a so-called 'hybrid' case, since one of the cartelists, Timab, refused to settle. As a result, the Commission pursued both the settlement process and an ordinary cartel procedure in parallel and adopted two decisions: (i) a streamlined settlement decision in relation to the five parties that agreed to settle and (ii) a standard-form decision in relation to Timab. It seems that Timab initially participated in the settlement process, but dropped out once informed by the Commission of the likely range of fines.

The cartel, which involved both market sharing and price fixing, was in operation for over three decades, from at least March 1969 to February 2004. The Commission imposed fines totaling €176 million on the six parties, with individual fines ranging from € 84 million to € 2.8 million. Timab's fine was € 60 million.

The Commission's investigation was initiated by a leniency application from one of the cartelists, Kemira in 2003. It is unclear precisely when the settlement process started, but statements of objections were sent to the parties in November 2009.

According to the Commission, the cartel was geographically limited, covering only part of the EEA (albeit a large one), and there appears to have been no parallel US investigation.

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5 *Id.*

6 Commission Q&A, Memo/10/201, 19 May 2010.

7 DoJ Press Releases, 2 December 2004, 21 April 2005, 13 October 2005, 16 November 2006.

8 Commission Press Release, IP/10/985, 20 July 2010.

III. The Settlement Process

The Commission describes its settlements process as having six steps or phases:[9]

- Investigation as usual – during which parties may express an interest in settlement;
- Exploratory steps re settlement – during which the Commission writes to the parties seeking confirmation of their interest in settlement;
- Bilateral rounds of settlement discussions – during which the Commission's assessment of the case, an estimate of the range of likely fines and the evidence relied on is disclosed to each party on a bilateral (one-to-one) basis, in order to allow parties to "assert their views on the potential objections" and make an informed decision whether to settle;[10]
- Settlement submissions – each party then decides whether or not to make a formal settlement submission in which it must (i) acknowledge the infringement (ii) indicate the maximum fine it is willing to accept (iii) confirm that it has had sufficient disclosure and the opportunity to make its views known (iv) waive its rights to access to file and an oral hearing and (v) agree to receive the SO in the same language as the other parties;[11]
- Sending of the SO – if settlement submissions are made, the Commission issues a streamlined SO and the parties confirm that it reflects their settlement submissions;
- Adoption of a decision – finally, a streamlined decision reflecting the SO is adopted by the College of Commissioners (which retains discretion not to accept the settlement negotiated by the Commission staff).

In the DRAM case, it seems that in practice the settlement process was initiated by the Commission rather than the parties.[12] The bilateral discussions then took place in three rounds of meetings over six months:

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9 Commission Notice on the conduct of settlement procedures in cartel cases, OJ C 167, 2008, p.6 (the 'Commission Notice').

10 Commission Notice, *supra*, para 16.

11 Commission Notice, *supra*, para 20.

12 Cleary, Gottlieb, Steen & Hamilton, *Commission Issues Its First Cartel Settlement Decision In The DRAM Case*, Alert Memo, 28 May 2010.

- In the first round the Commission informed each party of the key features of the case (nature of the infringement, duration of that undertaking's involvement, attribution of liability within the corporate group), presented its evidence and granted access to key documents from the case file. The undertakings were then allowed to submit arguments and observations.

- In the second round the Commission gave feedback on the party's arguments and comments.

- In the third round the Commission disclosed the range of fines (but not the proposed methodology). It then set a deadline for settlement submissions.[13]

It seems that, in DRAM, the settlement submissions were completed by the end of 2009, although the Commission's decision was not adopted until May 2010.

IV. The Issues with the Settlement Process and How They Have Been Addressed (or Not)

The main concerns expressed at the time of the introduction of the settlements process fell into two categories:

- is the procedure sufficiently fair and transparent; and

- is the deal on offer sufficiently generous.

Both were important, but concerns as regards the generosity of the deal on offer were particularly strong.

1. Process

The main areas of concern regarding the procedure were (i) the limited clarity likely to be offered in relation to the level of fines and (ii) the lack of certainty as to how the Commission would treat hybrid cases.[14]

In relation to fines, the worry was that the Commission only proposed to disclose an estimate of the "range" within which a party's fine would come.[15] Depending on the width of that

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[13] *Id*.

[14] In my 2008 article, *supra* footnote 2, which was written prior to the adoption of the procedure, I also raised concerns in relation to the proposal to require settlement submissions to be in writing. This issue was however dealt with in the adopted procedure, which allows settlement submissions to be made orally.

range, and given the degree of discretion the Commission has in calculating fines, this could leave parties in considerable uncertainty as to the exact fine they would actually receive and, as a consequence, the merit of settling the case.

In relation to hybrid cases, the concern was that, in deciding which cases were suitable for settlement, the Commission had indicated its intention to take account of (i) the likelihood that the Commission and "all parties" would reach a common understanding and (ii) the prospect of achieving procedural efficiencies.[16] This suggested the Commission would be reluctant to pursue so-called 'hybrid' cases, in which some but not all parties are prepared to settle. This, in turn, seemed likely to reduce the incentive of parties to settle. Parties reluctant to settle might be more willing to hold out if their non-participation potentially removed the risk of any settlement being reached.[17] Conversely, parties that might otherwise be willing to settle might be reluctant to participate in a process involving their admitting to an infringement if there was a risk that, having done so, they might not receive the benefits of settlement because the Commission had decided not to settle on the basis that other parties had held out.

It seems that the concerns in relation to both clarity on fines and hybrid cases have been, at least to some extent, addressed. As regards certainty on fines, the fact that all but one of the 16 undertakings involved in the two settlements felt they had sufficient certainty on fines to pursue settlement itself suggests that this aspect of the system is working. Further confirmation is offered by the fact that, in the phosphates case, two of the settling parties (FMC and Tessenderlo) were able to make provisions in their annual accounts in relation to fines which were reasonably close to the final figure.[18]

As regards hybrid cases, the fact the Commission has already pursued a hybrid case is a useful step in the right direction. It is perhaps worthy of note, however, that the case was only a partial hybrid, in that Timab initially participated in the settlement process, withdrawing only when the level of its likely fine became apparent. In other words, a party might still hope to frustrate settlement by refusing to participate in the process from the beginning. The

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(continued)

15 Commission Notice, *supra*, para 16.

16 Commission FAQ, Memo/08/458, at Q4. See also Commission Notice, para 5.

17 A major part of the incentive to settle is the risk of holding out, not obtaining the benefits of settlement, and having to defend your case in the face of guilty please from the other parties.

18 MLex Comment, *First 'hybrid' case shows EC desire to make settlements work, but Timab to appeal*, 20 July 2010 (the provisions were € 17 million and € 97 million, respectively, while the actual fines were € 14.4 million and € 84 million).

Commission may therefore need to further build on its record of pursuing hybrid cases in order to tackle this issue.

2. Generosity of the deal

Although, when it introduced the new process, the Commission went to significant lengths to emphasize that settlements were not US-style plea bargains,[19] the reality is that settlements are bargains, and ones that involve guilty pleas. The essence of the process is that cartel participants agree to admit their involvement (and waive various procedural rights) in return for a reduced fine. The effectiveness of the settlement process therefore depends on the attractiveness of the deal on offer to cartelists.

By international standards, the deal on offer is not a generous one. The only guaranteed reward is a 10% fine reduction.[20] Recent settlements in the UK have involved 35% reductions in fines.[21] In the US, settling parties obtain reductions of 30% to 50% from the bottom of the sentencing guidelines.[22] Moreover, the reality is that in most other jurisdictions, the authorities are willing to negotiate (to some extent) over issues such as the scope and duration of the infringement. Concessions on these issues can in practice lead to much more significant reductions in the penalty (and the exposure to third party litigation) than the headline percentage fine reduction. In contrast, the Commission has repeatedly emphasised that it "neither negotiates nor bargains".[23]

This lack of generosity matters, because cartelists that admit their infringement suffer significant costs. To work effectively, the settlement process must offer benefits that outweigh these costs, which include:

- an increased likelihood of a finding of infringement;

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[19] Commissioner Neelie Kroes, *Assessment of and perspectives for competition policy in Europe*, Speech/07/722 ("The settlement procedure is therefore very different to the US plea bargaining system").

[20] Commission Notice, *supra*, at para 32. In addition, to the 10% reduction, the Commission undertakes that any increase in fine for deterrence will not exceed a multiplication by two (*id*). However, not all parties will be liable for a deterrence increase (which is based largely on the size of the undertaking) and even those who are might in any event have received a multiplier of two or less.

[21] *Dairy Products* (unreported) and *English Welsh and Scottish Railway Limited*, Decision of the Office of Rail Regulation of 17 November 2006, available at: http://www.oft.gov.uk/shared_oft/ca98_public_register/decisions/EWSrail.pdf.

[22] In France, settling parties have obtained reductions of up to 90% (Decision no. 04-D-65 of 30 November 2004, *La Poste*). In the Netherlands reductions of only 15% (still 50% higher than the 10% on offer from the Commission) were offered to parties to the construction industry settlements.

[23] Commission Press Release, IP/08/1056, 30 June 2008. See also Commission FAQ, Memo/08/458, 30 June 2008 ("[t]he procedure will not give companies the ability to negotiate with the Commission … [t]he Commission will not bargain about evidence or its objections".).

- effective loss of the opportunity to appeal; and
- increased exposure in other jurisdictions.

The increased likelihood of a finding of infringement arises because cases that are not settled may simply not be pursued. Like any other authority, the Commission will not pursue every case that comes to its attention. Indeed, Commissioner Kroes, who introduced the settlement process, made it clear that its purpose was in part to avoid the Commission becoming overwhelmed by the volume of cases resulting from the success of the Commission's leniency program.[24] By offering to admit the infringement and waive procedural rights like access to file (which impose a significant burden on the Commission), settling parties make it much easier for the Commission to adopt a decision in their case and, as a result, make such a decision more likely. In simple terms, offering to settle can make your case a soft target.

As recent developments in the UK show, this is not a theoretical risk. In 2007, the UK Office of Fair Trading ('OFT') announced that it had concluded "early resolution agreements" (settlements) with six large supermarkets and dairy processors.[25] The six admitted collusion in relation to the retail prices of milk, butter and cheese during 2002 and 2003, and agreed to pay fines totaling in excess of £116 million.[26] In 2008, the OFT announced a further early resolution agreement under which a seventh company admitted involvement, bringing the total agreed fines to over £120 million.[27] This was, however, a hybrid case. Two supermarkets, Tesco and Morrisons, declined to settle and continued to fight the case.[28] The case continued for a further two years. Then, in April 2010, the OFT announced that it was dropping its entire case against Morrisons and all but one of four allegations (cheese in 2003) against Tesco.[29] Moreover, as a result of the "detailed representations and new evidence received" (presumably from Tesco and Morrisons) the OFT had concluded that it had insufficient evidence to establish an infringement against any of the other parties in relation to milk in 2002 or butter in 2003 and, as a result, it would be repaying around £50

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[24] Commissioner Neelie Kroes, *The First Hundred Days*, Speech/05/2005, 7 April 2005 ("the Commission therefore risks becoming the victim of its own cartel-busting success … we may need to look at how some form of plea bargaining procedure").

[25] OFT Press Release 170/07, 7 December 2007. The six were Asda, Dairy Crest, Safeway, Sainsbury's, The Cheese Company and Wiseman.

[26] *Id*.

[27] OFT Press Release 22/08, 15 February 2008. Lactalis McLelland was the additional party.

[28] A tenth company, the processor Arla, was the immunity applicant in the case and, as such, had admitted its involvement in the infringement prior to the settlements.

[29] OFT Press Releases 45/10 and 46/10, both of 30 April 2010.

million in fines to the parties that had entered into early resolution agreements.[30] These facts leave little room for doubt that settling parties are at risk of accepting infringement findings that could otherwise be avoided.[31]

The effective loss of the opportunity to appeal is also potentially significant.[32] A review of all Court of First Instance (now General Court) judgments on appeals in the period 1998 to 2007 found that the average reduction in fine achieved was 19.3%.[33] In recent cases the average reduction may be lower. Changes in the Commission's procedures for fine calculation since the introduction of its 2006 fining Guidelines may also have reduced the chances of obtaining reduced fines on appeal. Nonetheless, a reduction in fines of only 10% for settlement still looks quite ungenerous when weighed against the possible gains on appeal.

Finally, the risk of increased exposure in other jurisdictions potentially includes private litigation seeking treble damages in the US and the exposure of key staff to criminal liability and imprisonment in the US and UK. These risks will, however, be highly fact specific and will vary from case to case.

Again, it seems that the Commission has sought to address the concerns. In particular, it appears that the Commission may effectively be granting settling parties benefits beyond the 10% fine reduction provided for in its Notice. The lawyers that advised one of the settling parties in DRAM point to the following facts:[34]

- In marked contrast to recent trends, the fines imposed by the Commission in the DRAM case are significantly lower than those imposed by the US DoJ. This was true of both the total and the individual fines. The Commission's total fines were € 331 compared with the DoJ's $ 729 million (€ 581 million) and individual fines were also lower: for example Samsung, which received

30 OFT Press Releases 45/10I, *supra*.

31 For further thoughts on this case, see Andreas Stephan, *OFT dairy price-fixing case leaves sour taste for co-operating parties in settlements* [2010] ECLR 11, p. 432.

32 Parties are not technically required to waive their right to appeal as part of settlement, but this should not disguise the fact that the ability to launch an effective appeal is likely to be lost in practice. In addition to admitting the infringement, parties will indicate the maximum fine they are prepared to accept, effectively acknowledging the appropriateness of the amount. In the circumstances, finding productive arguments on appeal is likely to be difficult. Interestingly, in the DRAM case, none of the parties appealed the Commission's decision following the settlement.

33 Cento Veljanovski, *European Commission Cartel Prosecutions and Fines 1998 – 2007*.

34 Cleary, Gottlieb, Steen & Hamilton, *supra*, fn 12.

the largest individual penalty in both jurisdictions, was fined € 146 million by the Commission and $ 300 million (€ 241) by the DoJ.[35]

- In addition to their 10% settlement reductions, settling parties in the DRAM case obtained 90% of the maximum reduction available under the Commission's leniency notice, an unusually generous level of reduction.[36]

- The Commission also granted significant reductions for mitigating circumstances under its fining guidelines: Hynix obtained a 5% reduction and Toshiba and Mitsubishi 10% reductions. Fine reductions for mitigating circumstances have been a relatively rare occurrence in recent cases.

The pattern seems to be confirmed by the fine reductions in the phosphates case. Again the parties – with one notable exception – appear to have received generous reductions under the leniency notice: Tessenderio, the first in line after the immunity recipient, received the maximum possible 50% reduction and two other parties (Ercos and Quimitécnica/José de Mello) each received 25% reductions.[37] The notable exception was Timab, the undertaking that chose not to participate in the settlement, which received only a 5% reduction.[38]

Indeed, it seems that the Commission may have become involved in something at least approaching the negotiation with the settling parties that occurs in other jurisdictions. The same lawyers involved in DRAM describe the lessons from the settlement process as follows:

> "Based on the experience in the DRAM case, in terms of substance, the key issues on which the debate is likely to focus during the settlement discussion are, not surprisingly, the existence of a (single and continuous) infringement, as well as the scope of the alleged infringement (in terms of product, customer, and geographic dimensions), the duration of the alleged anti-competitive conduct, the need to adjust the basic amount of the fine upwards or downwards on account of aggravating or

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35 The other companies which received fines from both the Commission and DoJ were (i) Hynix, € 51 million and US$ 185 million (€ 149 million) (ii) Infineon, € 57 million and US$ 160 million (€ 129 million) (iii) Elpida € 8 million and US$ 84 million (€ 67 million).

36 Infineon, which was first in line after the immunity recipient Micron, received a 45% reduction (from a possible 50%), Hynix, the second in line, received a 27% reduction (from a possible 30%) and each of Elpida, Samsung and NEC, all of which were in the third band, received an 18% reduction (out of a possible 20%).

37 Commission Press Release, *supra*, fn 8.

38 *Id*.

mitigating factors, and/or the value of the applicant's cooperation under the Leniency Notice."[39]

Finally, it seems that – in each of the two settlements – the risk of increased exposure in other jurisdictions was particularly low. In DRAM, a worldwide cartel, the DoJ had already entered into plea agreements with cartel participants, so parties were already exposed to litigation risk in the US. Further, in May 2010, only days before the EU settlement was announced, the DRAM cartelists formally settled a US class action brought by indirect purchasers (having settled with direct purchasers in the US some years previously[40]).[41] In phosphates, in contrast, it seems that the cartel was effectively limited to a geographic area within the EEA.[42]

V. Conclusions

The fact it has taken almost two years to achieve the first settlements suggests that those who had doubts about the design of the Commission process were not altogether wrong. Nonetheless, the Commission's success in these first cases is to be welcomed. Moreover, it is still early days in the development of the Commission's settlements practice and there are signs that the Commission is moving in the right direction. It has pursued its first hybrid case and seems to be implementing the settlements procedure in a more flexible and cooperative manner than its initial statements might have suggested. The Commission may, however, need to go further in the same direction if settlements are to become a more regular feature of its cartel enforcement.

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39 Cleary, Gottlieb, Steen & Hamilton, *supra*, fn 12.

40 Abigail Rubenstein, Settlement Looms In DRAM Antitrust Battle, Law 360, 26 February 2010 ("Direct purchaser plaintiffs have settled with the various DRAM manufacturers for more than $300 million").

41 DRAM Antitrust Litigation, Class Action Information: http://www.dramantitrustsettlement.com/dram/Default.htm

42 Commission Press Release, *supra*, fn 8.