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Commission Issues Its First Cartel Settlement Decision In The DRAM Case

On May 19, 2010, the European Commission (the "Commission") issued its long-awaited first cartel settlement decision. The Commission introduced the settlement procedure in June 2008 with a view to simplifying the administrative proceedings and reducing litigation in cartel cases,[1] but no settlement had so far been successfully concluded. Cleary Gottlieb represented Hynix Semiconductor, Inc. in the settlement proceedings.

The settlement decision imposes a total of €331,273,800 in fines on ten producers of Dynamic Random Access Memory ("DRAM") chips used in computers and servers. The participants are found, between July 1, 1998, and June 15, 2002, to have engaged in a network of mostly bi-lateral contacts through which they exchanged pricing information and coordinated prices and quotations for DRAMs sold to major PC or server manufacturers in the EEA. All participants agreed to follow the settlement procedure and received a 10% settlement discount as provided by the Settlement Notice.[2]

The DRAM decision represents a success for both the Commission and the settling companies. It shows that the settlement procedure can be made to work in practice, including in complex cases with a large number of companies involved. It also suggests that the settlement procedure might allow companies to obtain greater benefits in terms of fine reduction than the mere 10% discount provided for by the Settlement Notice. While the settlement procedure remains a work-in-progress, with the Commission likely to tweak the process in future cases to reduce the overall timing and

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1 On June 30, 2008, the Commission published the legislative package introducing a "settlement procedure" in cartel cases consisting of the Settlement Notice (Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167/1, July 2, 2008) and of a Commission Regulation (Commission Regulation (EC) No 622/2008 of 30 June 2008, amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases, OJ L 171/3, July 1, 2008).

2 Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167/1, July 2, 2008.

to address other teething problems, it would seem to hold real promise for defendants and Commission alike.

I. SETTLEMENT PROCEDURE

The Settlement Notice sets out the framework for "*rewarding cooperation in the conduct of Commission proceedings commenced in view of the application of Article [101 TFEU] to cartel cases*."[3] In a nutshell, the Settlement Notice provides for the granting of a 10% fine reduction to any undertaking involved in a Commission cartel investigation that agrees to have its case treated under the settlement procedure rather than under the general procedure. The settlement procedure consists of the following principal steps:

- Companies subject to a cartel investigation indicate their interest in exploring with the Commission the possibility of a settlement.

- In its discretion, the Commission decides whether the case is appropriate for settlement and, in the affirmative, invites all involved undertakings to enter into bilateral settlement discussions in which the Commission and undertakings discuss potential objections, liability, and the anticipated fine level on the basis of disclosure by the Commission of (at least some of) the evidence on which its preliminary views are based. Interested companies indicate in writing their desire to pursue settlement discussions.

- If these discussions are productive, each settling company submits a formal settlement submission that acknowledges its participation in an infringement of Article 101 TFEU, describes the nature and scope of the infringement, and indicates the maximum amount of the fine it would be prepared to accept.

- The Commission issues a streamlined Statement of Objections ("SO") in line with the acknowledgements made by the settling firm(s) in their settlement submissions, to which the firms reply simply by confirming that the SO reflects the settlement submission.

- Finally, the Commission issues a streamlined final decision in line with the acknowledgements made by the settling companies in their settlement submissions and replies to the SO.

[3] Settlement Notice, para. 1.

II. DRAM CASE

The investigation into alleged anti-competitive conduct in the DRAM case started in the United States in June 2002, when the San Francisco Federal Grand Jury issued a subpoena requesting a number of DRAM manufacturers to produce all documents relevant to an investigation by the Antitrust Division of the Department of Justice ("DOJ") into alleged anti-competitive conduct in the DRAM sector at a worldwide level. The DOJ investigation was triggered by an amnesty application lodged by U.S. DRAM producer Micron, which obtained full amnesty from fines and criminal prosecution. Between 2004 and 2006, each of the other major worldwide DRAM manufacturers, namely Infineon, Hynix, Samsung, and Elpida, reached guilty plea agreements with the DOJ and agreed to pay substantial fines. The DOJ also obtained jail terms for a number of executives of each of Infineon, Hynix, Samsung, and Elpida.

The Commission investigation started at around the same time as the US case, but proceeded slowly over the years, despite the fact (as is now evident) that the Commission was receiving cooperation from the five largest DRAM producers under the Leniency Notice. It may be that, when it became clear around mid-2007 that the new settlement procedure was in the pipelines and would be adopted soon, the Commission decided to wait until the adoption of the new procedure with a view to using the DRAM case as a test case.

The main procedural steps leading up to the settlement of the DRAM case were as follows:

- In early 2009, the Commission contacted informally the various companies involved with a view to "testing the waters" as to whether they would be interested in engaging in settlement discussions.

- After receiving positive feedback from the various companies involved, the Commission initiated proceedings pursuant to Article 11(6) of Regulation 1/2003 and formally requested the parties to express their interest in engaging in settlement discussions.

- Once the participants' expressions of interest were secured, the actual settlement discussions started. In the DRAM case, the settlement discussions were structured as three sets of bilateral meetings between the Commission and each party, which took place between May and November 2009:

    - A first settlement meeting, during which the Commission presented to each party separately the key features of its case (*e.g.*, the nature of the infringement, the duration of that company's involvement in the cartel, and the attribution of liability among the various companies of

the same group) together with the evidence on which the case was based. Immediately after the first meeting, the Commission also granted each party access (at the Commission premises) to a selection of key documents from the case file, including all leniency statements.

- A second settlement meeting, during which the Commission provided each party separately with feedback on the arguments and observations that they submitted following the first meeting and partial file access.

- A third settlement meeting, during which the Commission disclosed to each party separately the range within which its fine would ultimately fall, but without disclosing the fine calculation methodology that the Commission intended to apply (*e.g.*, the Commission did not disclose the exact percentage of the company's value of sales that it would use to determine the gravity amount of the fine and/or the entry fee or the amounts of any fine reductions that the Commission would grant on account of mitigating factors and/or under the Leniency Notice).

- After the third settlement meeting, the Commission set a time limit within which the parties were required to present a formal settlement submission. As prescribed by the Settlement Notice,[4] the settlement submission had to include: (1) an acknowledgement in unequivocal terms of the facts at the basis of the infringement and of their legal qualification; (2) an indication of the maximum fine level that the company would be willing to pay (corresponding to the higher end of the range disclosed by the Commission during the third settlement meeting); (3) a confirmation that the company had been sufficiently informed of the Commission's objections and had been given sufficient opportunity to make its views known; (4) a confirmation that the company did not envisage requesting full access to the file or requesting to be heard in an oral hearing; and (5) an agreement to receive the SO and the final decision in English.

  By the end of 2009, all parties introduced formal settlement submissions meeting these criteria.

- In early 2010, the Commission notified an SO to the settling parties, all of which then confirmed that the SO reflected their submissions and that they remained interested in following the settlement procedure.

- On May 19, 2010, the Commission adopted the settlement decision.

[4] Settlement Notice, para. 20.

III. KEY LESSONS

The experience in the DRAM case should be instructive as to future settlement cases in several respects. In particular:

- Contrary to the prevailing trend in recent years, the fines imposed by the EU were lower than those imposed in the United States, both in terms of the overall level of fines, as well as the fine imposed on each cartel participant subjected to fines in both jurisdictions.[5] This may in part be explained by the fact that the EU DRAM market is only approximately 60% of the size of the U.S. market.

- The Commission accepted that, in the case of three companies, mitigating circumstances existed and granted corresponding fine reductions of 5% for Hynix and 10% for Toshiba and Mitsubishi.[6] Since the Commission has not agreed to reduce fines on account of mitigating circumstances in recent cartel cases, this may indicate greater flexibility on the Commission's part in the context of settlement proceedings. It also suggests that the settlement procedure might allow companies to obtain greater benefits in terms of fine reduction than the mere 10% discount provided for by the Settlement Notice.

- All the companies involved in the DRAM cartel, other than Micron which obtained full immunity under the Leniency Notice, received the full 10% fine reduction allowed for in the settlement procedure.

- In addition to the reduction of fines obtained under the Settlement Notice, the Commission granted each of Infineon, Hynix, Samsung, Elpida, and NEC 90% of the maximum available fine reductions for which they qualified under the Leniency Notice.[7]

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5 The Commission imposed fines totaling €331 million, whilst the DOJ imposed total fines of $730 million (€581 million). Samsung received an EU fine of €146 million compared to a U.S. fine of $300 million (€241 million); Hynix received an EU fine of €51 million compared to a US fine of $185 million (€149 million); Infineon received an EU fine of €57 million compared to a US fine of $160 million (€129 million); and Elpida (including the fine imposed on each of NEC and Hitachi) received an EU fine of €41 million and a U.S. fine of $84 million (€67 million). Micron benefited from full immunity in both jurisdictions.

6 The nature of these mitigating circumstances has not yet been made public.

7 Micron received a 100% fine reduction under the Leniency Notice; Infineon, which was in the first leniency band, received a 45% leniency discount; Hynix, which was in the second leniency band, received a 27% fine reduction; and each of Samsung, Elpida, and NEC, all of which were in the third leniency band, received an 18% fine reduction.

IV. CONCLUSIONS

The DRAM decision represents a success for both the Commission and the settling companies. It shows that the settlement procedure can be made to work in practice, including in complex cases with a large number of companies involved. It is too early to predict whether the settlement procedure will fulfil the objectives of the Commission in terms of procedural economy and reduced litigation, especially in cases where certain companies hold out and refuse to settle. That said, the Competition Commissioner announced in the press conference following the DRAM decision that a decision in a hybrid case (*i.e.*, in a case where certain parties settle, whilst others refuse to do so) is in the pipelines and should be adopted in the coming months.

Though the DRAM investigation was very lengthy (and some of the procedural benefits that the Commission intended to achieve with the settlement procedure may therefore not have been achieved in the DRAM case), this may in part be attributed to the fact that the case represented a learning process for the Commission. The arrival of a new Commission and the switch of responsibilities between Competition Commissioners also contributed to slowing down the process. Commission officials have stated the Commission's commitment to reducing the duration of the settlement procedure to only a few months, from the moment when the Commission asks the companies under investigation to express their interest in engaging in settlement discussions to the adoption of the final decision. If, as expected, future cases proceed more quickly, the procedural benefits for the Commission of settling should become more apparent.

From the point of view of the companies involved in a Commission cartel investigation, based on the experience in the DRAM case there does not seem to be any apparent disadvantage for a company, whether leniency applicant or not, to at least start the process of settlement discussions if such an opportunity arises. This reflects the fact that the company, as the Commission, can pull out of these discussions at any point in time without jeopardizing its legal position. The Commission also attaches great importance to the settling companies preserving the confidentiality of both the fact that they are engaged in settlement discussions and the content of these discussions *vis-à-vis* the other parties to the proceedings and/or third parties.

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 discussions 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 a 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 mitigating factors, and/or the value of the applicant's cooperation under the Leniency Notice. Other important issues that may arise during the settlement discussions include the possibility for the Commission to grant the settling party a delay in the payment of the fine and/or

the possibility to pay the fine in instalments, as well as certain procedural issues, such as the modalities of notification of the SO and/or of the submission of the response to the SO to address possible discovery concerns.

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If you have any questions, please feel free to contact any of your regular contacts at the firm or any of our partners and counsel listed under Antitrust and Competition under the "Practices" section of our website at http://www.clearygottlieb.com.

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