

## LEGAL AND POLITICAL SCIENCE

## CARTEL SETTLEMENT IN EUROPEAN UNION

Student, Paata Phutkaradze  
Institute of International Relations  
Taras Shevchenko National University, Ukraine

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## ABSTRACT

This article points out the first steps of the cartel settlement and Leniency Program in European Union and positive sides of the mentioned tool for the companies participating in the anticompetitive agreements. Cartel Settlement and Leniency Program played an enormous role for the market to be undistorted and free from any type of anticompetitive practices. It is also worth to mention that introducing of Settlement notice as well as Leniency Program played crucial role for Commission and as well for undertakings to find fastest way out from the anticompetitive practices to settle and protect free and undistorted competition on the market. Both tools are very beneficial and useful for competition and its further development.

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**Introduction.** European commission initiated an administrative settlement notice in 2008, which enables parties to settle the case. Since the adoption of the legal document there were around 28 cases that settled by the Parties as of now and which gives opportunity to the parties to review the case, cooperate with the EC and decide whether to settle or not, as this is not the obligatory rather than commission generally tries to agree settlement with the parties to the case and also has discretion to discontinue settlement discussions as well.

It is also important to point out that Leniency program and Settlement procedure are very important tool for the investigation and decision making, but EU meanwhile draws a distinction between the settlement and leniency program. Leniency is a tool to investigate to get information on anticompetitive practices, which will help them to uncover the cartel agreements, while settlement procedure is a way to make decision and settle the case on time and is used once the investigation process is completed.

**Introducing and Further Development.** On 26 October 2007, the European Commission submitted for public consultation the so-called 'settlements package', consisting of:

- A draft Settlements Notice,<sup>1</sup> setting out the specifics of the settlement procedure and providing guidance for the legal and business community to enable companies to rely on a basic framework, to anticipate the kind and extent of cooperation expected from them in order to settle, and to estimate the individual benefits in settling;
- A proposal for a Regulation to amend Commission Regulation No 773/2004 in order to introduce the necessary adjustments to accommodate the settlement option by introducing variants in the provisions dealing with initiation of proceedings, participation of complainants in proceedings, access to the file and oral hearings. It further allows the choice for a different sequence of procedural steps, advancing certain ones in anticipation of the notification of the Statement of Objections ('SO').

The commission analyzed 51 contributions received after public consultation and has revised the package in consultation with EU Member States' competition authorities and finally it was adopted

in 2008. The Commission has waited around two years before testing its new cartel settlement procedure, which was adopted in 2008.<sup>1</sup> It is a relatively new enforcement tool, which the commission introduced in order to enable them to direct its attention to a larger number of suspected cartels. Cartel settlement is suitable for companies willing to admit their liability in exchange of an expeditious procedure and a 10% reduction in their cartel fines. The commission's main goal in setting up the settlement procedure is to reduce length of investigations where possible, thereby to save up the commission's resources to pursue other investigations. It is important to point out that leniency program and cartel settlements procedure is not same, as the Commission leniency<sup>2</sup> is an investigation tool. It aims at discovering cartel cases and collecting evidence to discharge the Commission's burden of proof. The "Leniency Notice" rewards companies who voluntarily disclose to the Commission the existence of a cartel and bring evidence to prove the infringement. The reduction of the fine varies widely depending on the timing and significant added value of the information and evidence provided. In contrast, settlement aims at simplifying and expediting the procedure leading to the adoption of a formal decision, thereby allowing for procedural savings and the internal redeployment of enforcement resources. The "Settlements Notice" rewards concrete contributions to procedural efficiency. All parties settling in the same case will receive equivalent reductions of the fine (10%), because their contribution to procedural savings will be equivalent.

As Commission's Vice President and Competition Commissioner Joaquin Almunia noted that "This first settlement decision is another milestone in the Commission's anti-cartel enforcement. By acknowledging their participation in a cartel the companies have allowed the Commission to bring this long-running investigation to a close and to free up resources to investigate other suspected cartels". As the procedure is applied to new cases it is expected to speed up investigations significantly. It is important to briefly point out settlement procedure, which can be seen in Article 10a of regulation 773/2004. Parties wishing to engage in Settlement discussions will have a time-limit no less than 2 weeks to declare their will to participate in. Accepting the invitation and request settlement discussions, they will take place on a bilateral basis with the Commission. Article 10 (a) and Article 15 of the regulation requires the commission to inform the parties main elements while offering settlement, such as:<sup>3</sup>

- 1) The Charge sheet against them;
  - Facts alleged;
  - The classification of those facts;
  - Gravity and duration of cartel;
  - The attribution of liability;
  - An estimation of the range of likely fines;

After granting by the commission to the parties to introduce a final settlement submission, each party prepares and makes a submission, which should contain:

- 1) An acknowledgement of the party's liability for the infringement and of their involvement in it (object, duration, main facts, etc);
- 2) An indication of the maximum amount of the fines the parties would accept to be imposed;
- 3) The parties request to handle the case through the settlement procedure and their confirmation that: they have been sufficiently informed of the objections the commission envisages asserting against them, they will request neither access to the file nor an oral hearing and agree to receive the SO and the final decision of the commission. It is necessary to point out that in some cases party can be accepted to oral submissions, which will be recorded and transcribed.

After submission by the parties, Article 10 (1) of the regulation requires the commission to issue an SO (statement of objection) to each party, which should contain the information necessary to enable the parties to collaborate that it reflects their settlement submissions. After replying by party to the SO confirming its commitment to settlement procedure the commission will adopt a final decision consulting with Advisory Committee. The commission introducing final fine for party/undertaking will reduce it by ten percent in recognition of the settlement of the case.

The first settlement decision was adopted on 19 May in 2010 in the case DRAM cartel, where participants received reductions in their fines under leniency program and a further 10 percent reduction,

<sup>1</sup> Christopher Harding and Julian Joshua, *Regulating Cartels in Europe*, (Second Edition, 2010), 315

<sup>2</sup> Van Bael and Belis, *Competition Law of the European Community*, (Fifth Edition, 2005)1128-1132

<sup>3</sup> Regulation 773/2004 EC, 1<sup>st</sup> of July 2008, The conduct of settlement procedures in cartel settlement Article 10 and 15

as they agreed to settle. Between 2002-2009 the commission investigated a cartel in the production of memory chips used in computers, which was also investigated in the U.S. Producers were: Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. Although one of the companies involved is European, at the time of the cartel all of the participants sold their products to buyers in Europe. So this kind of link with Europe subjected them to European competition rules. During the course of the cartel, these ten memory chips makers exchanged secret information, which they used to coordinate the prices for DRAMS<sup>1</sup> sold to major PC or server manufacturers. There was a single and continuous infringement of Article 101 of the TFEU and Article 53 of EEA Agreement. Companies were fined over EUR 331 million for fixing prices. Although the first company was Micron to come clean before the Commission in 2002 under the leniency program, received full immunity. This company made same action in U.S, where it received an amnesty as well from federal criminal charges. Micron was not the only company tried to get immunity under leniency program, a few more producers Infineon, Hynix, Samsung, Elpida and NEC, but since they were late, they could not be entitled to full immunity. The settlement discussions in this case were done during 2009 after parties agreed to engage in discussions to settle. As the procedure requests, they introduced formal settlement submissions admitting their liability for infringement. SO (statement of objection) were given to all companies and was confirmed by them as well, resulting the commissions knocking substantial chunks off the final fine: Infineon was granted a 45% reduction; Hynix received a 27% reduction; while Samsung, Elpida and NEC were waived 18% off the fine, furthermore, as they settled the case and collaborated with the commission received additional 10% reduction.

There was another case involving cartel settlement procedure and it would be an interesting overview, furthermore to see how new tool of the commission worked out in this specific case.

On July 2010, the commission adopted a decision relating to a proceeding under Article 101 of the Treaty Functioning European Union. It has fined producers of animal feed phosphates<sup>2</sup> a total amount of EUR 175 647 000 for operating a cartel that lasted over three decades and covered a large part of the European Economic Area territory. It is interesting that two decisions have been adopted, as one for undertakings that admitted their participation in the cartel and on the other hand a decision for the undertakings discontinuing the settlement procedure. The case started informing the commission about the cartel by Kemira on 27 November 2003. The undertaking applied for leniency program and received full immunity. Cartel agreement existed from March 1969 until February 2004, known as “CLUB” or later CEPA involving sharing the volumes of feed phosphates, market-sharing, price fixing and allocating customers<sup>3</sup>. In particular, the cartel fixed a system of quotas covering different geographic areas within Europe on the basis of which sales volumes and specific customers were allocated to the producers. On 19 February 2009, the commission formally initiated proceedings and invited the undertakings to engage in settlement discussions, on 23 November 2009, the commission adopted a set of six statements of objections addressed to all parties, except one company Timab/CFPR (and its parent company “Compagnie Financiere et de Participation Roullier”). All parties replied by confirming that the statement of objections corresponded to the content of their settlement submissions and that they therefore remained committed to the procedure. Later on Timab/CFPR also replied SO and participated in Oral hearing.

In order to determine the fines, the commission refers to the rules laid down in the 2006 Guidelines on the method of setting fines. The commission also applied the 2002 Leniency Notice and its 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). After the commission had informed the parties of the fines ranges, only one company Timab industries (with Compagnie Financiere et de Participation Roullier) decided not to continue settlement procedure and became part of ordinary decisions.

This case is different from DRAMS case as two decisions were adopted, but the cartel settlement procedure was used for 4 undertakings, which agreed to settle and got 10% reduction of fines pursuant to Article 10a (2) of Regulation 773/2004. Another decision in this case was for company Timab, as it did not continue settlement procedure and became part of ordinary decision. The fine was imposed pursuant to Article 23(2) of Regulation (EC) NO 1/2003 amount of EUR 59850000 jointly and severally by Timab Industries S.A. and Compagnie Financiere et de Participation Roullier.

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<sup>1</sup>Eur-lex.europa.eu, official journal, case DRAMS, OJ 2011, C180/15

<sup>2</sup> Eur-lex.europa.eu, official journal, case Animal Feed Phosphates, OJ 2001, C 111/13

<sup>3</sup> Europa.eu, Animal feed phosphates

The EU's leniency programme is particularly effective in initiating Article 101 one cases since the first company that provides robust of anticompetitive activities are exempted from paying fines<sup>1</sup>. The European Commission has underlined that company seeking for the leniency program and providing the relevant information cannot get directly reduction of the fine, rather the provided documents and information shall be a significant value to the case, which was already pointed out in the case of Case T-251/12 EGL Inc. V Commission.<sup>2</sup> Firms choose to apply for leniency since the decisions implied by the commission can sometimes be highly severe<sup>3</sup>. For instance, companies that are found guilty of anti-competitive activities are required to fines of over €896 million per firm<sup>4</sup>. The fines implied can be as high as €1.3 billion for each of the companies that are found of breaking competition law. Applying for leniency is one of the limited that companies operating in the EU can use to avoid the fines. However, after applying for the leniency, the firm is expected to ensure that the infringement does not continue.

The European Union first adopted a Leniency Program in the year of 1996. Hence by the year of 2002 only 16 decisions were taken under the program<sup>5</sup>. The program was further refined by the revisions performed during the years 2002 to 2006. It fully exempts a firm that first admits participating in the cartel and provides relevant evidence that would enable the Commission to conduct targeted inspections of the alleged cartel or to establish a violation of Article 101. The program may also benefit another firm involved in the cartel, unless it has forced another economic agent to join the cartel.

**Conclusions.** It is beneficial to use the settlement procedure for the companies and for the commission as well, because the 10 percent reduction in fines along with the reduction under leniency program seems quite attractive for the undertakings, while commissions objective is also to increase efficiency, from which experience shows that companies and the Commission has equally benefited.

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<sup>1</sup> Jaspers, J. D. "Leniency in exchange for cartel confessions." *European Journal of Criminology* (2019)

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<sup>3</sup> "About The Cartel Leniency Policy - European Commission", Ec.Europa.Eu, Last modified, 2019, <https://ec.europa.eu/competition/cartels/leniency/leniency.html>.

<sup>4</sup> Ibid.

<sup>5</sup> Connor J.M, Cartel Fine Severity and the European Commission: 2007-2011, *European Competition Law Review*, 2013. P 1-2