



# The EU Cartel Settlement Procedure: The First Years Experience and Challenges

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# Key Elements of the EU Cartel Settlement Program

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- Fast-track process created in 2008 to achieve procedural efficiencies and, ultimately, enhanced deterrence. Final pillar of the EU's cartel enforcement policy
- Commission discretion whether to pursue settlement discussions
- Commission preference that all implicated companies participate
- Ability to opt out at any time prior to settlement submission
- 10% fine discount, in addition to any leniency reduction, in return for admitting liability and waiving certain procedural rights
- Following initial meeting, access to the main Commission evidence used to establish objections, liability, and fines
- No “horse trading,” but less adversarial process, a better forum for advocacy to the EU staff on the merits before it becomes entrenched (liability, scope, duration, value of sales, level of fine, etc), and an ability to signal which issues are essential to the company
- While settlement discussions are without prejudice, ultimate settlement requires that companies “*unequivocally acknowledge liability for infringement*”
- Streamlined Statement of Objections (and Decision) with only summary description of infringement
- Process now generally takes c. 8-12 months. Process in principle confidential
- Highly circumscribed rights of appeal given admission of liability and acceptance of fine

# How The Process Works

## Investigation and Exploratory Steps

### Exploratory Steps Regarding Settlement

- Before drafting a SO, Commission may “test the waters” to gauge interest in settling. Companies may also express interest in a hypothetical settlement (incl. after issuance of SO)
- If companies agree to proceed with settlement, Commission will open proceedings and issue a formal invitation to enter discussions, to which companies must respond within 2 weeks. Closes leniency window

## Bilateral Rounds of Settlement Discussions

### 1<sup>st</sup> Bilateral Discussion: Commission’s Case

- Commission outlines its case individually to each party that has chosen to participate in settlement discussions. Parallel bilateral discussions take place with each participating company
- Controlled access to key documents and leniency statements at Commission premises

### Advocacy Stage

- Participating parties may meet the Commission or submit written papers/oral statements in an effort to move the Commission’s initial position on key issues
- Areas for discussion may include duration, scope, value of affected sales, liability, etc.

### 2<sup>nd</sup> Bilateral Meeting: Response to Advocacy

- Commission presents its conclusions on the evidence/arguments submitted by the companies, with a goal of reaching a common understanding on the key issues that will impact the fine (i.e., “case overview” and “value of sales”)
- There may be some scope for continuing advocacy after this point but it is likely to be limited

### 3<sup>rd</sup> Bilateral Meeting: Indication of Fine

- Commission informs each party of the settlement fine (within a very narrow range), essentially on a “take-it-or-leave-it” basis, and may give some indication of the basis of its calculation
- Commission presents a draft settlement submission that it expects the companies to confirm and adopt within a fixed time period (at least 3 weeks)

# How The Process Works (II)

## Settlement Submission

### Negotiation of Settlement Submission

- If a company accepts the level of settlement fine, there is only limited scope to negotiate the language of its draft settlement submission (comprising the previously agreed “case overview” plus standard boilerplate), which ultimately impacts the wording of the Commission’s decision.
- Text must include: admission of liability, confirmation that the company has been sufficiently informed of charges, waiver of procedural rights, and indication of maximum acceptable fine

### Conditional Settlement Submission

- “Point of no return” unless Commission issues a Streamlined SO that departs from the facts or legal qualifications agreed in the settlement submission

## Statement of Objections

### Commission Notification of Streamlined SO

- Streamlined SO issued based on settlement submission (far shorter and less detailed than normal SO, which is generally thought helpful vis-à-vis customers and private plaintiffs)
- Includes description of infringement (possibly omitting details of customers)

### Parties confirm Streamlined SO

- Each company confirms Streamlined SO corresponds to content of its settlement submission and that it remains committed to settlement procedure
- Company is not tied to process if Streamlined SO does not reflect its settlement submission

## Decision

### Adoption of Settlement Decision

- Advisory Committee meets to consider draft streamlined final decision (which is based on individual settlement submissions and streamlined SO)
- If College of Commissioners agrees, adoption of streamlined final decision (like SO, decision is far shorter and less detailed than normal, which is helpful vis-à-vis customers/private plaintiffs)

# What's In It For The Commission?

## Objectives and Benefits

Objectives	Screening Criteria
<ul style="list-style-type: none"><li>▪ Efficiency gains &amp; cost savings<ul style="list-style-type: none"><li>– Settlement process and decision in a single language</li><li>– Reduced drafting (shorter SO and decision) and no translations</li><li>– Reduced time spent on preparing access to file</li><li>– Absence of oral hearing and interpretation</li><li>– Reduced likelihood of subsequent appeals</li></ul></li><li>▪ Enhanced deterrence<ul style="list-style-type: none"><li>– Procedural efficiencies ensure more (and quicker) decisions</li><li>– Higher risk of detection (by triggering additional leniency applications and freeing up resources for <i>ex officio</i> investigations)</li><li>– Complement to leniency and fines</li></ul></li></ul>	<ul style="list-style-type: none"><li>▪ Probability of reaching a common understanding<ul style="list-style-type: none"><li>– Number of parties involved</li><li>– Number of successful leniency applicants</li><li>– Foreseeable conflicting positions between parties</li><li>– Expected extent of contestation of the facts</li></ul></li><li>▪ Prospect of achieving procedural efficiencies<ul style="list-style-type: none"><li>– Scale of burden involved in providing access to non-confidential versions of documents from file</li><li>– Need for inter-agency cooperation</li></ul></li><li>▪ No precedent value</li></ul>

# What's In It For Defendants?

## Pros & Cons of Settling

### Pros

- 10% fine reduction in addition to any reduction under the Leniency Notice
- Early access to the Commission's legal case and the key evidence on which it is based (including nature, scope, and duration of the alleged cartel violation and the identity of the other defendants) – better sense of timing
- Less adversarial proceeding with more opportunity for open exchange and a better forum for advocacy on scope, duration, etc
- If Commission wants to settle, it may be more receptive to defense arguments than in normal proceeding, thereby lowering level of fine
- Avoidance of full Statement of Objections and Decision, which provides somewhat less detail/roadmap to private plaintiffs
- Can always “walk away from the table” if Commission demands are unattractive
- Early resolution saves legal fees and prolonged management distraction

### Cons

- Ultimate settlement requires “unequivocal acknowledgement of the parties’ liability for the infringement summarily described”
- Decision likely adopted sooner than under “normal” procedure – accelerated payment of fine
- Admission of culpability may have negative implications for parallel proceedings in other jurisdictions and/or follow-on damages litigation (including timing of litigation)
- Limited access to Commission file, although not normally a great disadvantage in practice
- Very limited right of appeal given admission of liability and acceptance of streamlined Statement of Objections

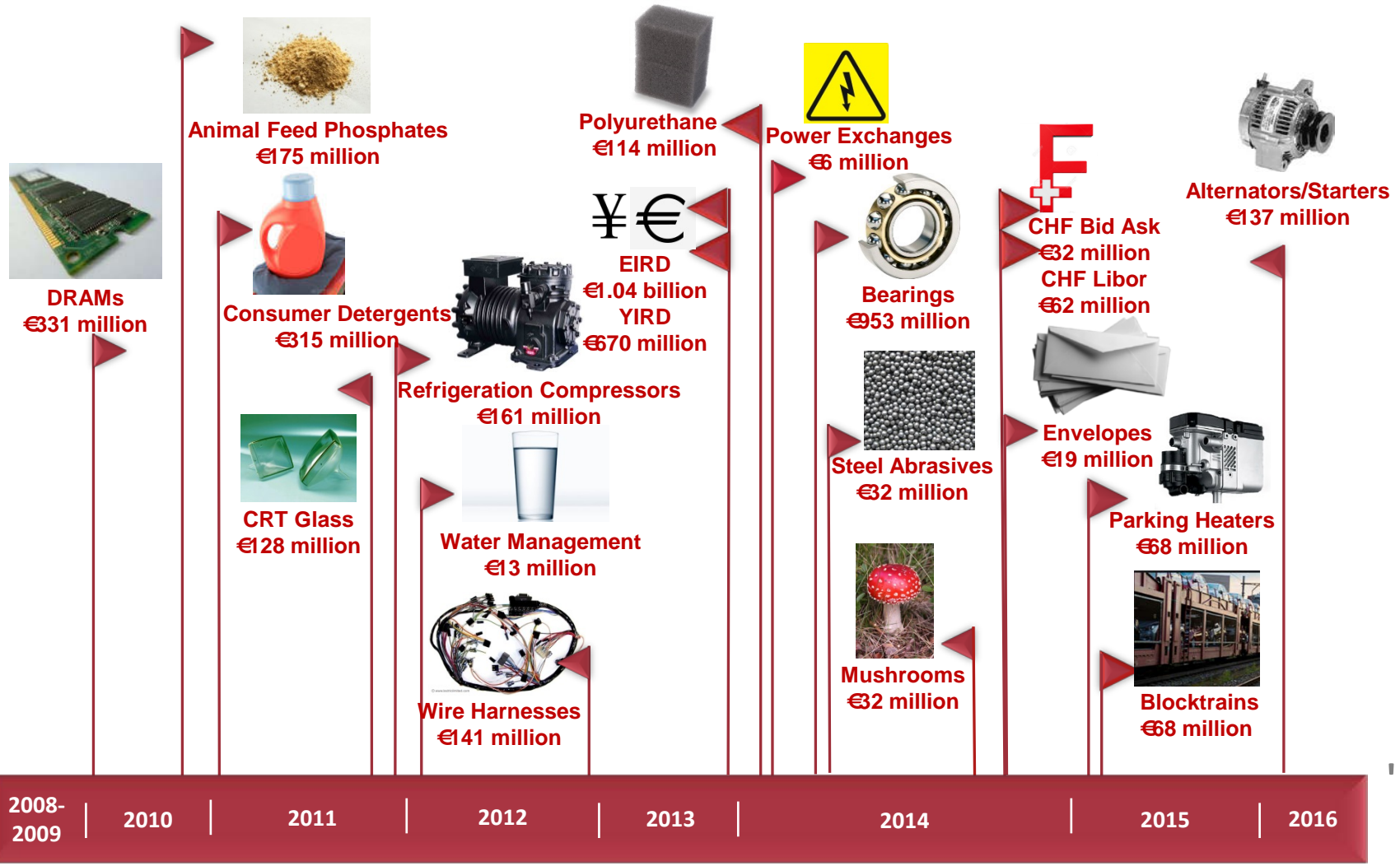
# Settlement Cases To Date

- After an initial ramp-up period, 20 cases (involving 84 companies) have been settled since 2010 -- eight of which in 2014 alone
  - 25% of settlements are hybrids (with the number of “hold-outs” ranging from 1 to 3)
  - Settlement talks thus far broke down in one case only (*Smart Card Chips*)
  - Appeals pending in 4 cases. Two settling companies appealed (*EIRD* and *Envelopes*). Two “hold outs” appealed (*Animal Feed Phosphates* and *YIRD*).
- In 2013, former Commissioner Alumnia predicted that half of EU cartel cases will be concluded with settlement in the future. This may turn out to be conservative:

Year	Total Cartel Decisions	Of Which Settlements	% Of Total Cartel Decisions	Total Cartel Fines (€M)	Settlement Fines (€M)	% Of Total Cartel Fines
2010	7	2	29%	2,868	506	18%
2011	4	3	75%	614	604	98%
2012	5	2	40%	1,876	154	8%
2013	4	2	50%	1,883	1,710	91%
2014	10	8	80%	1,689	1,250	74%
2015	5	2	40%	365	117	32%
2016*	1	1	100%	137	137	100%
<b>Total</b>	<b>36</b>	<b>20</b>	<b>56%</b>	<b>9,432</b>	<b>4,478</b>	<b>48%</b>

\* Between January 1 – March 8, 2016

# Settlement Cases To Date (II)



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'16



# Settlement Cases To Date (III)

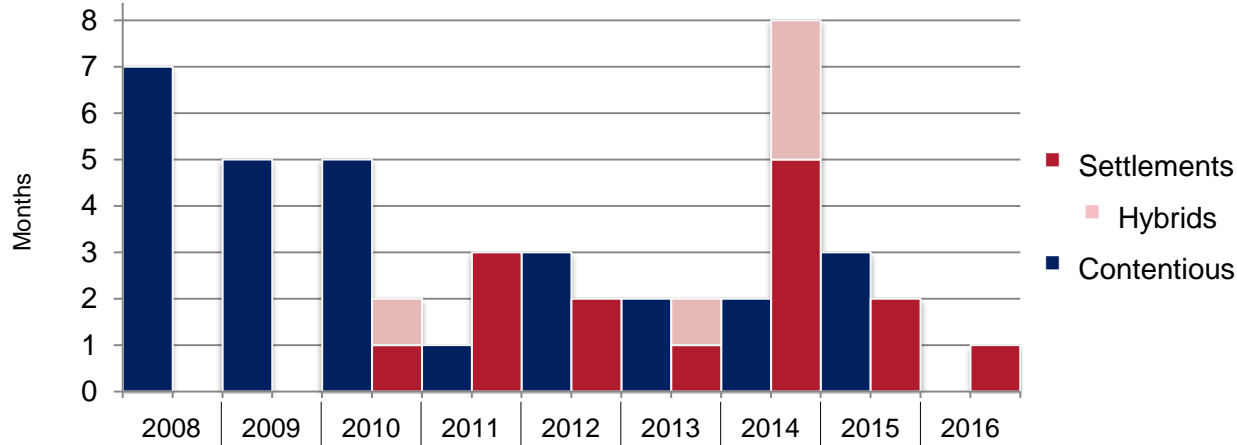
Case	Date	Number of Settling Parties	Duration of Settlement Negotiations*	Total Fine	Duration of infringement	Notes
DRAM	May 2010	10	8 months	€331m	c. 4 years	Not all companies were leniency applicants
Animal Feed Phosphates	July 2010	5 out of 6 (Hybrid)	9 months	€175.6m	Nearly 35 years	Non-settling company received a full SO and Decision. Appeal by hold-out (Timab) rejected. Appeal to CJEU pending. Not all companies were leniency applicants
Consumer Detergents	Aug. 2011	3	7 months	€315m	3.25 years	All were leniency or immunity applicants
CRT Glass	Oct. 2011	4	12 months	€128m	c. 5 years	Not all companies were leniency applicants
Refrigerator Compressors	Dec. 2011	5	10 months	€161m	c. 2.5 years	All were leniency or immunity applicants
Water Management	Jun. 2012	3	13 months	€13m	c. 2 years	Not all companies were leniency applicants
Wire Harnesses	Jul. 2012	5	8 months	€141m	9 years at its longest	All were leniency or immunity applicants
Euro Interest Rates	Dec. 2013	4 out of 7 (Hybrid)	Not known	€1.04b	2.5 years at its longest	All settling parties were leniency or immunity applicants. Not all companies settled. Appeal by settling company (Société Générale) pending. Non-settling companies received full SO.
Yen Interest Rates	Dec. 2013	6 out of 7 (Hybrid)	Not known	€669.7m	10 months as its longest	Not all companies were leniency applicants. Not all companies settled. Appeal by hold-out (ICAP) pending. Non-settling company received full SO.

# Settlement Cases To Date (IV)

Case	Date	Number of Settling Parties	Duration of Settlement Negotiations*	Total Fine	Duration of infringement	Notes
Polyurethane Foam	Jan. 2014	4	13 months	€114m	c. 5 years	All companies were leniency or immunity applicants
Spot Power Exchanges	Mar. 2014	2	5 months	€6m	7 months	Neither party was a leniency applicant
Bearings	Mar. 2014	6	9 months	€953.3m	c. 7 years	All companies were leniency or immunity applicants
Steel Abrasives	Apr. 2014	4 out of 5 (Hybrid)	10 months	€30.7m	c. 6 years	Not all companies were leniency applicants. One company did not settle and received full SO.
Mushrooms	Jun. 2014	3 out of 4 (Hybrid)	Not known	€32m	c. 1.3 year at its longest	Not all companies were leniency applicants. Not all companies settled.
Swiss Franc Libor	Oct. 2014	2	Not known	€61.7m	c. 1.3 year	All companies were leniency or immunity applicants. All companies settled
Swiss Franc Derivatives	Oct. 2014	4	Not known	€32.4m	c. 5 months	Not all companies were leniency applicants. All companies settled
Envelopes	Dec. 2014	5	9 months	€19.5	c. 4.5 year	All companies bar one were leniency applicants. All companies settled. One settling company (Printeos) appealed.
Parking Heaters	Jun. 2015	2	6 months	€68.1	c. 10 years	All companies bar one were leniency applicants. All companies settled.
Blocktrains	Jul. 2015	3	8 months	€49.2	c. 8 years	All companies were leniency or immunity applicants. All companies settled.
Alternators and Starters	Jan. 2016	3	10 months	€137.7	c. 5.5 years	All companies were leniency or immunity applicants. All companies settled.

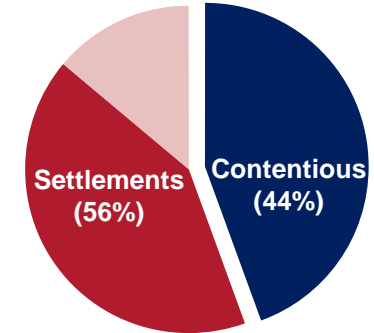
# Has The Procedure Met Expectations? In Terms Of Uptake?

**Number Of Cartel Decisions (2008-Present)**

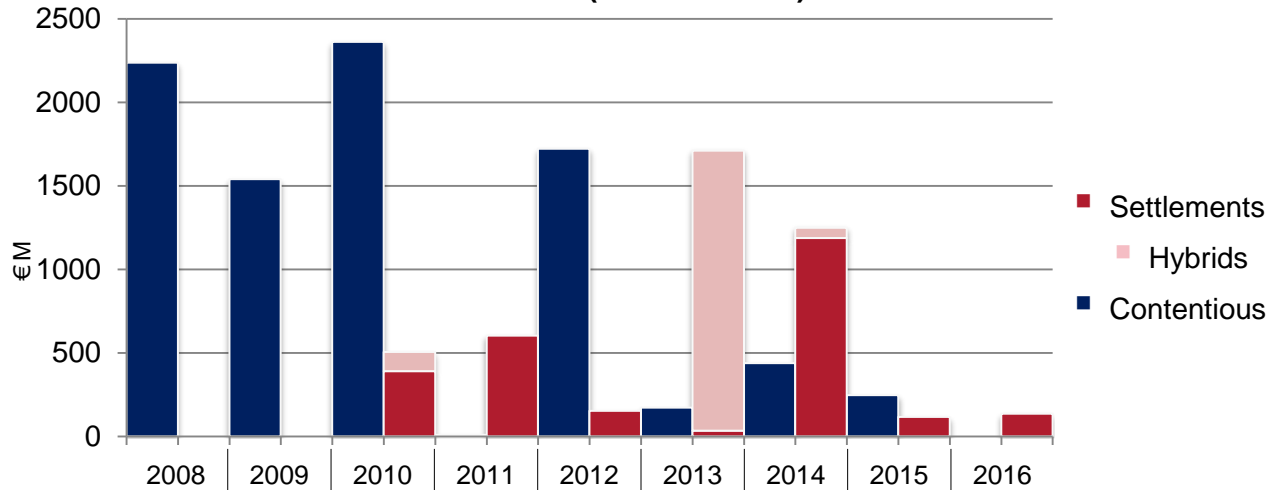


**Cartel Decisions (2010-Present)**

Hybrid (25% of settlements)

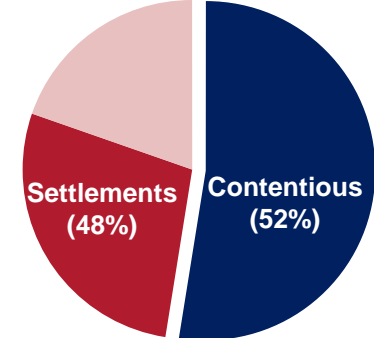


**Level of Cartel Fines (2008-Present)**



**Cartel Fines (2010-Present)**

Hybrid (40% of settlements)

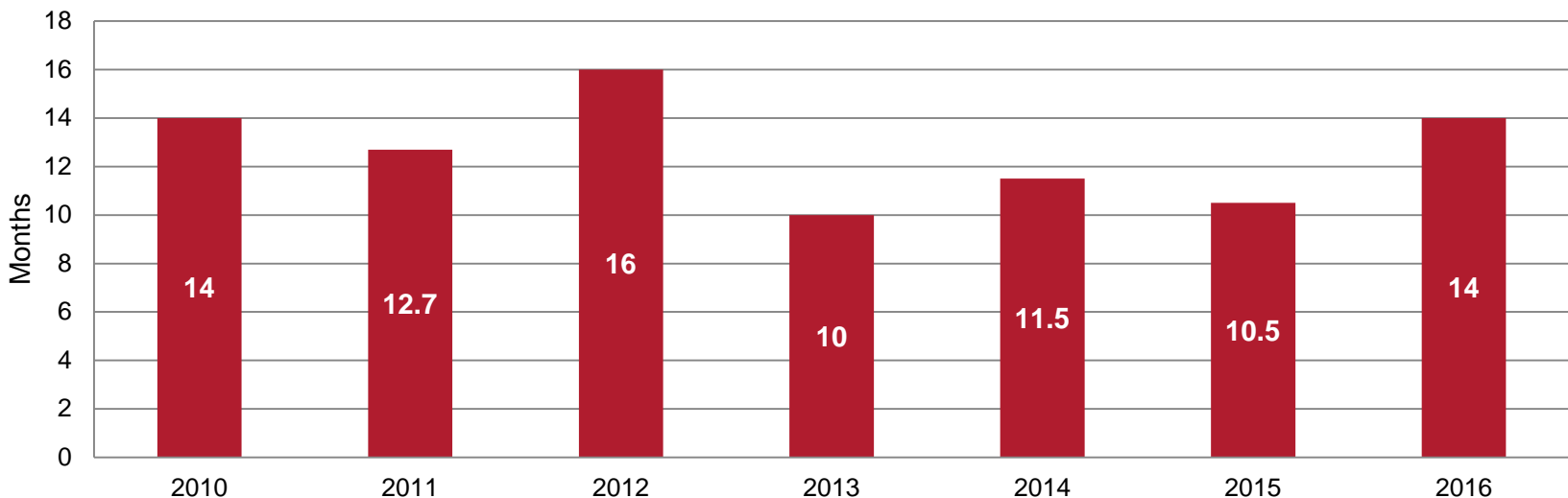


# Has The Procedure Met Expectations?

## Shorter Procedures?

- Average duration of cartel procedures is said to have decreased by two years since introduction of the EU cartel settlement procedure (*Laina et al.*)
- Shorter procedures are driven by substantially shorter post-investigation phase (from 1<sup>st</sup> settlement meeting to Settlement Decision). Research suggests no significant reduction in duration of the investigation phase (*Hüschelrath et al.*)
- Duration of settlement process has averaged 12 months since 2010, with no noticeable downward trend. Query whether further acceleration is feasible or desirable.

Average Duration Of Settlement Process (2010-Present)\*



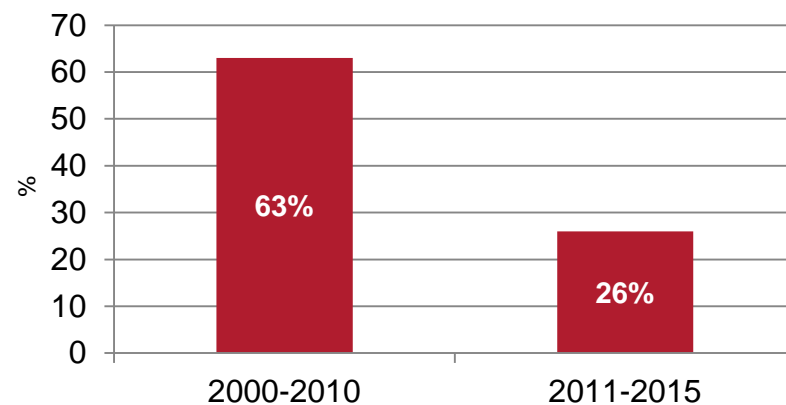
\* From first settlement meeting to decision. Based on publicly available information

# Has The Procedure Met Expectations?

## Fewer Appeals?

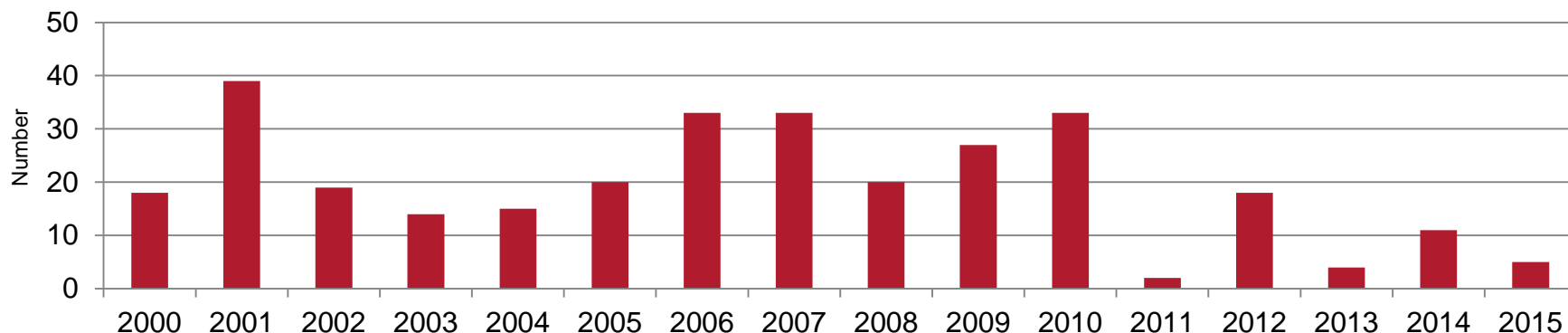
- Settlements have led to a significant decrease in the number of appeals filed against EU cartel decisions
- Econometric research purports to show the introduction of cartel settlements avoided 10-47 appeals in 2011-2015 (*Hellwig et al.*)

Share of Cartel Decision Addressees That Appealed (2000-2015)



Source: *Hellwig et al.*

Number of Appeals Against EU Cartel Decisions (2000-2015)



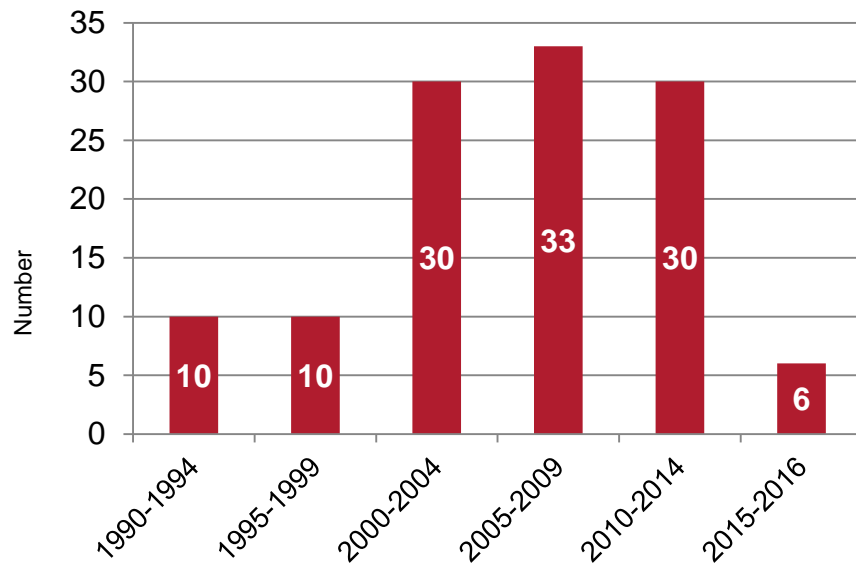
Source: *Hellwig et al.*

# Has The Procedure Met Expectations?

## “Virtuous Circle Of Enforcement”?

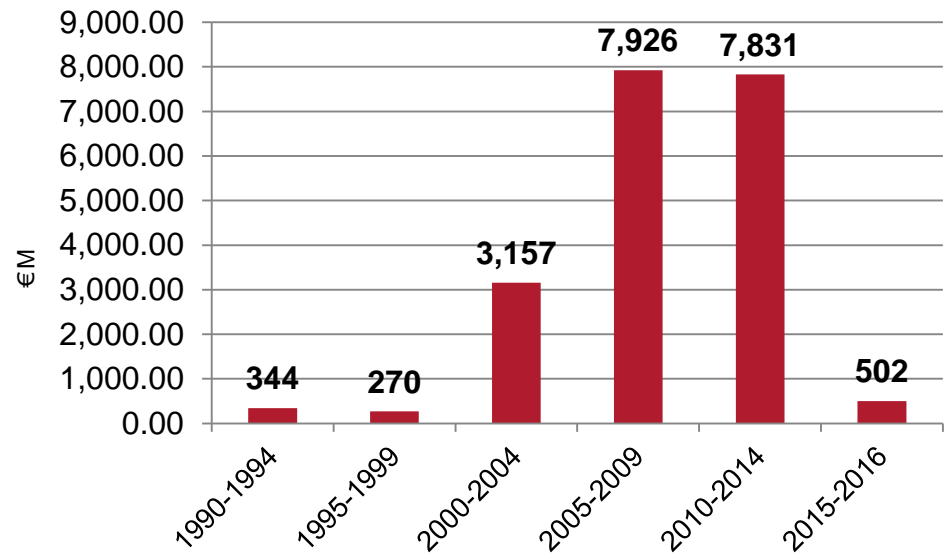
- Unclear whether procedural efficiencies are translating into increased enforcement and enhanced deterrence
- No notable increase in cartel decisions, total annual fines, leniency applications, or *ex officio* investigations
- But it may too early to tell

Number Of Cartel Decisions (1990-2016)



Source: DG COMP

Level of Cartel Fines (1990-2016)



Source: DG COMP

# Has The Practice Dispelled Initial Concerns?

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- While some thought a 10% settlement discount too low to be attractive, the EU cartel settlement program has proven to be a flexible tool that enables the early pragmatic resolution of relatively straightforward cases.
  - Key to this success is the perception that benefits go beyond the 10% settlement discount
- Concerns were expressed about settling parties being required to waive procedural rights (limited access to file, no oral hearing, etc.) and privilege against self-incrimination
  - *Timab* confirms the lawfulness of the settlement procedure
  - Parties are under no obligation to settle and remain free to opt out any time prior to settlement submission or if the Streamlined SO or Decision does not reflect the settlement submission
  - But freedom implies adequate knowledge (including of counterfactual) and no improper compulsion
- Concerns were expressed that liberal use of settlements might shield EU cartel enforcement from judicial scrutiny
  - Nearly half of cartel decisions remain contentious, and remain subject to a large number of appeals
  - Acceptance of liability and fine limit the scope of appeals from settlements – but 2 settling parties and 2 “hold-outs” have appealed (*Animal Feed Phosphates*; *EIRD*; *YIRD*, *Envelopes*)
  - Appeals by settling parties focus on the level of the fine
  - Could appeals by settling parties lead to loss of 10% settlement discount?
    - Cf. withdrawal of 10% leniency discount for not substantially contesting the facts under the 1996 Leniency Notice (*Tokai Carbon*)

# Challenges Involving Hybrid Settlements

- Proliferation of hybrid cases poses a challenge to the system – the Commission must win against the “hold-outs” in court, and “hold-outs” must not be perceived to be able to “free-ride” on the other defendants’ settlement
  - Three of seven parties opted out in *EIRD*
  - One hold-out in each of the four other hybrid cases
- Hybrid cases are in tension with the objective of achieving procedural efficiencies
  - Commission must conduct the contentious procedure against hold-outs
  - But Commission must be able to run hybrid cases to avoid being “held hostage” by hold-outs
- Impartiality towards hold-outs?
  - Risk that the Commission may use against hold-outs information gained in settlement discussions?
  - Hold-outs’ rights when a settlement decision against other parties is adopted prior to their receipt of an SO?
    - Hold-outs keep their defenses
    - *Crédit Agricole* in *EIRD* and *ICAP* in *YIRD* complained to Ombudsman about the Commission’s alleged lack of impartiality and neutrality, particularly towards hold-outs
- Impact of successful appeal by hold-outs?
  - *Wood Pulp II*: settling parties that fail to appeal do not benefit from judgments favorable to hold-outs that did (compare UK’s “early resolution” experience in *Tobacco*)
- In hybrid cases, settling parties could be faced with private claims years before hold-outs (see *Deutsche Bahn v. Morgan* [2014] UKSC 24)
  - Rule of joint & several liability under Damages Directive (Art. 11(1)) exposes settling parties to liability for entire harm suffered by private plaintiffs
  - Contribution from hold-outs may need to wait years until final decision in contentious procedure
  - Refusing access to non-confidential version of settlement decisions for private claimants until publication of the decision against hold-outs (appeal in T-611/15 *Edeka*)?



# Hybrid Settlements - The *Timab* Judgment

- During the settlement procedure, the EC indicated to Timab a fine range of €41-44 million:



- Following Timab's withdrawal from the settlement procedure, it abandoned its leniency statements regarding its participation in the Animal Feed Phosphates infringement for the period 1978-1993, and the EC decided not implicate Timab for this period.

- No 35% "out of leniency discount" in relation to evidence showing Timab's involvement 1978-1993.
- Reduced leniency discount (17% to 5%) corresponding to cooperation in respect of a shorter infringement period.
- The average value of Timab's sales over the shorter infringement period was much higher.



Factor	Settlement (1978-2004)	Contentious (1993-2004)
Duration:	26 years	10+ years
Real Value of Sales:	€529 M	€341 M
Average Real V of S:	€21 M	€32.8 M
Real Value of Sales x 17% Gravity	€90 M	€58 M
Average Real V of S x 17% Deterrence	+ €3 M	+ €5 M
<b>Basic amount</b>	<b>€93 M</b>	<b>€63 M</b>
Mitigating circumstances	- €33 M (35%)	- €0 (0%)
<b>Adjusted basic amount</b>	<b>€60 M</b>	<b>€63 M</b>
Leniency discount	- €10 M (17%)	- €3 M (5%)
Settlement discount	- €6 M (10%)	- €0 (0%)
<b>Fine</b>	<b>€41-44 M</b>	<b>€60 M</b>

# Hybrid Settlements - The *Timab* Judgment (II)

- Timab claimed it was “*penalized*” for having withdrawn from the settlement procedure, and that its fine in the adversarial procedure should have been capped at €44m increased by 10% (settlement discount). In upholding the Commission’s approach, the General Court held that:
  - When reverting to the contentious process, “*the Commission is not bound by the range indicated during discussions as part of the settlement procedure.*” [§96] “[T]he situation is ... that of a *tabula rasa*, in which the liabilities are yet to be determined.” [§104] “[T]he range notified during the settlement procedure is irrelevant.” [§104]
  - In “*hybrid*” cases, “*the principle of equal treatment must be observed.*” [§72] The ordinary fining guidelines “*remain fully applicable*” in relation to non-settling defendant(s): “*there cannot be any discrimination between participants in the same cartel with respect to the information and calculation methods which are not affected by the specific features of the settlement procedure, such as a 10% [settlement] reduction.*” [§74]
  - “*The settlement procedure requires, by its very nature, an exchange of views between the parties,*” and Timab had never expressed its view during the settlement procedure that the conduct in the 1978-1993 period was a separate, time-barred infringement. [§117] At the time of the final decision, “*the Commission was faced with a new set of evidence: it was no longer able to rely on [Timab’s] declarations in [its] application for leniency.*” [§90]
  - Timab could “*not claim a legitimate expectation that the likely range of fines [communicated in the settlement discussions] would be applied.*” [§124] Also, having withdrawn from the settlement process, and successfully contested the 1978-1993 period, it was “*foreseeable that a reward by way of leniency will be reviewed when the statement made as part of the leniency application relates in part to a period which has not been taken into consideration.*” [§122]
- The Commission is thus not required to adopt, in an adversarial procedure, the range of fines indicated during the abandoned settlement procedure.
  - However, at least in hybrid cases, the principle of equal treatment should mean that, all things equal, a fine range communicated in settlement discussions should in principle correspond to the fine following an adversarial procedure, save for the 10% settlement discount.
  - But the devil is in the detail, and if you start contesting things, or rowing back from your leniency statements, things will be less equal and different ranges are fair game.

# Summary & Conclusion

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- The EU cartel settlement program has proven to be a flexible tool that enables the early pragmatic resolution of relatively straightforward cases
  - Key to this success is the perception that benefits go beyond the 10% settlement discount
  - Success also depends to a significant extent on trust (and pragmatism) among case team and defendants
- Significant procedural efficiencies have been achieved, although it remains uncertain whether this will translate into increased enforcement and enhanced deterrence
  - There probably is scope for shortening the settlement process even further in most cases
- The first years of practice have largely dispelled initial concerns about the EU cartel settlement program
  - A recurring practical concern is that the Commission does not disclose the relative fine distribution to settling parties
- No apparent abuse of the cartel settlement process by either side thus far
  - Potential abuses by the Commission:
    - Holding back key exculpatory evidence?
    - Holding defendants to ransom to settle borderline cases?
    - Conversely, refusing the settlement option?

## Summary & Conclusion (II)

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- Potential abuses by defendants:
  - Refusing to enter into exploratory settlement discussions?
  - Entering the settlement process merely to see the Commission's cards and walk away?
  - Delaying the process?
  - Breaching confidentiality?
  - Joint defense discussions and coordinated positions?
  
- The proliferation of hybrid cases poses a challenge to the system – the Commission must win against the “hold-outs” in court, and “hold-outs” must not be perceived to be able to “free-ride” on the other defendants’ settlement