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**Jerónimo Maillo**[1]

El presente trabajo se enmarca dentro del proyecto de investigación DER2015-66359-P "Retos en la lucha contra los carteles: más eficacia, mejores prácticas internacionales y nuevas tendencias" financiado por el plan nacional de I+D+i del Ministerio de Economía y Competitividad (Secretaría de Estado de Investigación, desarrollo e innovación). Con una duración de 3 años, el objetivo del proyecto es analizar y evaluar la lucha contra los cárteles en España. Más información en la sección investigación del Instituto Universitario de Estudios Europeos www.idee.ceu.es

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# Índice

# 1. Introduction

The so-called hard core cartels are agreements between competitors, usually secret or with concealment elements, for fixing prices, selling or production quotas or for market sharing. There is no doubt that cartels are a "cancer" for the economy and it is crucial to develop efficient mechanisms to prevent, detect and impose effective and dissuasive sanctions. The fight against cartels is now one of the top priorities of all competition authorities in both developed and developing countries.

In Europe, the fight against hard-core cartels prioritized public (administrative) enforcement, although private enforcement and antitrust damages claims have been promoted in the latter years. Public enforcement is driven by competititon authorities: the European Commission (EC) and National Competition Authorities (NCAs) of the 28 Member States, working in a network, the European Competition Network (ECN). Procedural rules are different at European and National level, although some aspects have been harmonized. Within public enforcement at EU level, new techniques have been launched in the last decades to foster effectiveness and deterrence.

One of these innovations has been the EU cartel settlement procedure. It was first established in 2008 by two legal instruments: EU Regulation n. 622/2008 and the Commission Notice on the conduct of settlement procedures in cartel cases.[1]

In short, the new administrative procedure opens to the parties the possibility to close the case quicker and receive a fine within a range accepted by each party with a 10% reduction, in exchange of recognizing their infringement and their liability and cooperating with the Commission to expedite and finalise the case.

It is now almost ten years since the Settlement procedure was launched, a reasonable time to assess its results. This is the main aim of this paper: to fully understand how it has worked and developed, whether it has met its goals or deviate from them and to what an extent, to comprehend the relationships and interactions between leniency and settlements in practice and to assess whether the possible risks have been materialized or kept under control.

In order to achieve its aim, the paper proceeds first to briefly describe the settlement procedure, then it tries to build a framework for the analysis of the results by focusing on its conception, main goals and perceived risks/concerns, and finally, looking into the practice, it tryes to assess its results drawing the main lessons from these first ten years.

# 2. The design of the settlement procedure and its main differences with the standard procedure

The settlement procedure could be structured in three main steps: initiation phase (exploration of settlement possibilities), statement of objections (verification of common understanding) and final decision. It is beyond the aim of this paper to describe in detail the procedure, something that has already been done elsewhere but I will proceed to briefly stress the key points of these three steps as I consider it necessary to understand the rest of the paper.[2]

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1 Commission Regulation (EC) 622/2008 of 30 June 2008 amending Reg. (EC) 773/2004, as regards the conduct of settlement procedures in cartel cases, OJEU L 171/3, 2008; and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Art. 7 and Art. 23 of Council Reg. (EC) n. 1/2003 in cartel cases, OJEU C 167/1 2008. Minor amendments to the Notice were published in August 2015: Communication form the Commission- Amendments to the 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) 1/2003 in cartel cases, OJEU C 256/12015.

2 For further details, see EC Settelements Notice, especially paras. 5-33 and, among others, K. METHA and M. L. TIERNO CENTELLA, "EU Settlement Procedure: Public Enforcement Perspective", in C.D. EHLERMANN and M. MARQUIS (eds.) (2010) Antitrust Settlements under EC Competition Law, Oxford, Hart Publ., pp. 391-421.

## 2.1. Exploring settlement possibilities

To start with, it is important to stress that the EU settlement procedure may only commence after the Commission has carried out a full investigation of the case (has reached the stage of being ready to draft a Statement of Objections) and has formally decided to initiate proceedings. The Commission has many tools to investigate the case, including requests for information, leniency policy, downraid inspections…). Settlements are not another investigative tool but an alternative way to develop and resolve a cartel case. As a clear signal in this regard, the Commission is oblidged to initiate proceedings no later than the date on which it requests the parties to express in writing their interest to engage in settlement discussions.[3]

The Commission may invite the parties to engage in settlement discussions but it can go forward only upon a written request of the parties concerned. The parties may transmit the Commission their interests in settlement discussions but the final decision is upon the Commission who has a great discretion to decide. Therefore, there is no right to settle for companies. The Notice indicates some of the factors that the Commission may consider to assess the likeliness of reaching a common understanding of the case between the Commission and the companies concerned and therefore achieving procedural efficiencies, such as number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts, possibility of setting a precedent, or risk of distortion or destruction of evidence…[4] An open list of factors which the Commission will examine on a case by case basis taking into consideration all the circumstances, its experience and its priorities.

At this stage, the parties' written declaration communicating its interest in the settlement, does not imply an admission of having participated in an infringement or of being liable for it but just an interest and willingness to loyally explore settlements possibilities.[5]

After this written request, there will usually be several rounds of bilateral discussions in search of a common understanding about the facts, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, the evidence supporting the case and an estimation of the range of likely fines[6].

The Commission has again a big discretion to decide the appropriateness and the pace of the bilateral discussions with each undertaking.[7] In the first round, the Commission presents its assessment and the discussion with the companies is usually focused on the key elements of the infringement such as facts and its classification, gravity, duration, liability and even some factors on which the amount of the fine will be based (e.g. value of sales, mitigating or aggravating circumstances). In the second round the Commission will verify that a common understanding exists. In the third round, the Commission will reveal the estimation of the range of likely fines that might be imposed.[8]

Upon the parties' request, the Commission may grant them access to non-confidential versions of any specified accessible document listed in the case file. The parties can also resort if necessary to the Hearing Officer to guarantee that due process and their rights of defence are fully safeguarded.

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3 EC Settlements Notice, para. 9.

4 *Ibid.*, para 5.

5 *Ibid.*, para 11.

6 *Ibid.*, para. 16.

7 *Ibid.*, para. 15.

8 BELLIS, J. F. (2016) "Five years of Cartel Settlements: an Assessment of the Benefits for Settling Parties", in J.M. BENEYTO and J. MAILLO (eds.), The Fight Against Hard Core Cartels in Europe. Trends, Challenges and Best International Practices, Bruylant, Brussels, pp. 303-327.

Along all these discussions, both the Commission and each of the companies concerned can, at any moment, decide not to settle and revert to the standard procedure. In case one or more of the settling candidates opt out of the settlement procedure, the Commission may settle with the remaining parties and follow the standard procedure for the rest (so-called hybrid cases). However, the Commission may also decide to stop the settlement procedure for all the parties.

When progress is significant and the Commission considers that a basic common understanding has been reached it may impel the parties to commit by granting them a final time-limit of at least 15 working days to introduce a formal settlement submission.

This formal settlement submission should contain: an acknowledgement of liability (clear and unequivocal), the maximum amount of the fine which the parties would accept, the parties' confirmation that they have been sufficiently informed and that therefore they do not envisage requesting access to the file or requesting to be heard again in an oral hearing and the parties' agreement to receive the statement of objections and the final decision pursuant to the Settlement procedure (agreed official language and abbreviated version).

The formal settlement requests cannot be revoked unilaterally by the parties which have provided them but they are conditional upon the Comission respecting the settlement requests framework (mainly the liability scope and the maximum fine).[9]

## 2.2. Veryfing the 'common understanding'

The Commission has to issue a statement of objections also in a settlement procedure as it is deemed to be a mandatory preparatory step before adopting any final decision. The statement of objections always determines the maximum scope of the final decision as the latter cannot raise new issues or extend them without giving the parties a new possibility to contest them. The difference with the standard procedure is that now the parties had had the possibility to know the Commission's objections and estimated range of fines in advance, before the formal Statement of objections, and had already discussed with the Commission the main elements of the infringment and the fine. They have also issued a formal settlement submission laying down their position and commitment regarding all these aspects. Therefore, all the procedure has been accelerated and the controversial part has been anticipated; at this step, provided the Statement of objections reflects the settlement request, the reply of the parties should logically be a simple confirmation that the statement of objections corresponds to the contents of their settlement submissions.

The Commission is still free to change its mind and abandon the settlement procedure. However, if the statement of objections does not correspond to the settlement submissions (or the parties do not unequivocally confirm their agreement to the statement of objections), the standard procedure will have to be used: the parties concerned would no longer be bound by their settlement submissions and will have the right to a new defence, including a new Statement of Objections, the possibility to access the file and to request an oral hearing.[10]

## 2.3. Resolving the case

No other steps are required as the parties have waived their initial right to access the file and request and oral hearing. Without further ado, the Commission can adopt its final decision. Logically, the final decision should respect the statement of objections and correspond to the settlement submissions.

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9 EC Settlements Notice, paras. 21 and 22.

10 *Ibid.*, para. 27.

Regarding the fine, it would be calculated according to the 2006 EC Guidelines on fines (therein included the cap of 10% of the companies' turnover) and then apply the foreseen 10% reduction for settling the case.[11]

The Settlements Notice also states a second advantage for the settling parties regarding the calculation of the fine: any specific increase for deterrence will not exceed a multiplication by two.[12]

Furthermore, it also confirms that the settlements reductions can accumulate to possible leniency reductions.[13]

In theory, DG Competition may decide to change its position after listening to the Advisory Committee of National Competition Authorities of the EU Member States or that the College of Commissioners may decide not to adopt the draft decision. Although this possibility is not excluded, it would be very rare and limited to very extraordinary circumstances. If that happens, it means that the settlement procedure is abandoned and the standard procedure will have to be used with a new Statement of Objections and possibilities for the parties to access the file and to request an oral hearing. Logically, the parties will not be bound by their settlement submissions which could not be used as evidence in the new procedure.

# 3. Characterising and analysing key aspects of the EU settlement procedure

## 3.1. Which conception? A general overview

It is very important to stress that the EU settlement procedure is not a plea bargaining procedure and/or an investigative tool like in the US. In the EU, it is applied only after full investigation of the facts and after the decision to initiate proceedings has been taken. Therefore, it is more a way to expedite and ease the termination of what the Commission already considers a "clear" case. Indeed the Commission opens the Settlement procedure when it has already gathered all the evidence and it is ready to address the Statement of Objections to the parties. The Commission is looking for a shorter duration of the procedure, a conditional waiver of certain procedural rights by the parties in exchange of quick informal discussion on the infringement and on the factors to calculate the fine, less strict language requirements, a shorter and less detailed Statement of Objections and final decision, and very likely paving the way to no judicial review or much more limited judicial review.

In this regard, the words pronounced in 2005 by the at the time Competition Commissioner Neelie Kroes are still very revealing of what the Commission felt was lacking in the EU system and how to fill up the lacuanae. She said: "unlike some other systems – that of our American colleagues, for example – there is no arrangement [in the EU] for simplified handling of cases in which the parties to the cartel and enforcer concur as to the nature and scope of the illegal activity undertaken and the appropriate penalty to be imposed".[14] This 'simplified handling' was especially important in cartel cases because litigation in cartel cases mainly related to circumstances having a bearing on the amount of the fine and liability, much more than on whether the conduct was ilegal. Furthermore, cartel investigations were comparatively more frequent and often entailed a heavier procedure in view, among other things, of the multiplicity of parties and languages involved and the jurisdictional issues they raise (e.g. discovery). Simplification and lowering the burden of complex and long formal procedures were therefore the focus of the new tecnique.

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11 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003, OJEU C 210/2, 2006.

12 EC Settlement Notice, para. 32 in relation to EC Guidelines on fines, para. 30.

13 EC Settlement Notice, para. 33.

14 N. KROES, *The first hundred days*, address before the 40th anniversary of the Studienvereinigung Kartellrecht (Apr. 7, 2005), *available at*: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=HTML&aged=0&language=EN&guiLanguage=en

It is also important to understand that at that time the EU system already had developed a leniency program that rewarded with inmunity to fines the first cartelist that comes, self-incriminates and gives sufficient evidence to the EC of the cartel, provided all the other conditions were met. This program also contained the possibility of substantial fine reductions (up to 50%) for the second-in companies if they provided significant added value useful to condemn the cartel. This was already a very powerful tool to investigate and gather evidence against cartels; a tool that was succesful and should be protected to avoid disincentivising it. The new tool, the EU settlement procedure, was a sort of complement, with different and much more limited goals and scope, and correspondingly also a more limited fine reduction. There was no need to conceive it as an investigatory tool and/or to activate it very early. On the contrary, it should be clearly separated from leniency and should be activated later, when the investigation is already completed so that any bargaining process is prevented.

At first sight, the differences with the US system were large: in the US, the leniency was limited to rewarding with inmunity the first comer; for the second-in, plea bargaining was open and coming and settling earlier was promoted. Very important sanction reductions (criminal fines for corporations and imprisonment for individuals) could be obtained by settling the case through a plea agreement. Settlements were conceived as an investigatory tool and for second-in cartelists, their only opportunity to substantially reduce final sentencing. Plea bargaining was recognised as key to the US' successful anti-cartel program.[15] Some US commentators (from the Antitrust Division of the DoJ) criticize the European design, enumerate some weaknesses and did not have great expectations of success for the new EU settlement procedure.[16]

Has this conception been respected? Has it in practice become closer to a bargaining process? Have the weaknesses materialised and prevented the success of the EU settlement procedure?

## 3.2. Main goals

The ultimate goal should always be to increase overall deterrence but there are two instrumental and more inmediate subgoals that can contribute to overall deterrence: on one hand, to achieve procedural efficiencies and, on the other hand, to create further incentives to apply for leniency.

Determining the effects of settlements on deterrence can be a very complex exercise. A number of factors would have to be taken into account, including among others the level of fine reduction granted, the ability of competition authorities to investigate more cartels and bring more cases, the effects of settlements on leniency programs and on civil litigation.[17] If used well, settlements should increase deterrence of cartels.[18] However it depends very much how they are designed and how they are applied. For instance, the settlement policy will likely result on bringing more cases with lower fines instead of fewer cases with higher fines; which of the two options is better is not crystal clear and a delicate balance should be found by the competition authority on the fine reduction and the achieved efficiencies.

- First: Procedural efficiency. This is the more inmediate and evident aim pursued by the Commission: to free European Commission's resources for other tasks or for dealing with more cases.

How this efficiencies will be achieved? Three main issues should be considered:

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15 OECD (2011), "Plea bargaining: settlement of cartel cases", *OECD Journal: Competition Law and Policy*, Vol. 11/2, available at http://dx.doi.org/10.1787/clp-11-5kg9qgf2cp9s p. 117. See also A. HAMMOND & R. PENROSE, *Proposed criminalisation of cartels in the UK*, Office of Fair Trading UK (2001), p. 30.

16 O'BRIEN "Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions", US Department of Justice (2008) and OECD (2008) *Experience with Direct Settlements in Cartel Cases*, US Report, pp. 70-78.

17 OECD (2011), cit. supra, p. 128.

18 *Ibid.*, p. 129.

1) By an accelerated and simplified administrative procedure.

The Commission expected to obtain an important simplification of the procedure in comparion with the standard one by eliminating some of the unnecesary steps and shortening or doing others in a less formalistic and detailed way. For instance, by informally anticipating discussions with the companies concerned and reaching a common undertanding with them, the Commission expected to shorten the Statement of objections and the reply by the companies, supressed the need of access to the file and a hearing, reducing the language translation burden and shortening as well the final decision. As a result of all this, it expected to obtain a relevant reduction on the length of the admministrative procedure and the resources used therein.

2) By eliminating or at least substantially reducing the likeliness and/or the scope of judicial review.

In the EU system, it is not posible to waive the right of appeal. All decisions taken by the Commission under Regulation (EC) N°1/2003 are subject to judicial review in accordance with Article 230 of the Treaty on the Functionning of the European Union (TFEU). Moreover, as provided in Article 229 of the same Treaty and Article 31 of Regulation (EC) N°1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003. Therefore, a company which is the subject of a Commission decision based on a settlement which it has made with the Commission can still appeal the Commission Decision to the General Court.

However, once defendants feel that they have received a good deal, their incentive to litigate further may be very limited and, even if they do it the scope of their litigation will be very limited.[19] Furthernore, it will be difficult to persuade the court to quash a decision that has been framed in the terms agreed on the settlement submission by the parties.[20]

3) By reducing the risk of mistakes that may be used to quash the decision later on.

Informal discussions between the parties and the European Commission will likely increase possibilities to prevent mistakes that can lead to uphold an appeal of the decision, and thus lead to an annulment or reduction of the fine. As the companies have an interest and an incentive to finalise by a settlement, they will likely be sincere during the informal discussions and use all the arguments they have to convince or influence the Commission. This incentives may not exist or at least have a different dimension in a standard procedure where there is not guilty plea by the companies concerned.

- Second: Further incentivise leniency applications and also complement leniency proceedings.

The incentive is important as leniency is a key tool to fight cartels and the origin of a great share of cartel infringement decisions in most developed jurisdictions. Moreover, in most leniency cases, the infringement is rather clear and what may be discussed is its scope, gravity and other factors needed to determine the fine. Many of the standard procedure steps are useless in this type of cases and can be then set aside with the companies'agreement. Possibilities to informally discuss the abovementioned key factors, and do it as early as posible, is what matters to all the parties, including above all the companies concerned.[21]

How leniency could be protected and incentivise and how to strike the right balance between settlements and leniency was a crucial issue: the design should create sufficient incentives to settle and should be perceived as an additional possible benefit to leniency applicants. It should never be perceived as a disincentive

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19 *Ibid.*, p. 130 . See also W.P.J. WILS, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, 29 World Competition (2006), p. 345, especially 366.

20 In the same sense in other jurisdictions, there is discussion on the convenience of interference of the Court on the bargaining agreement: see OECD (2011) cit. supra, p. 126.

21 BELLIS, a lawyer in many cartel cases before the EC, explains very well that many of the steps foreseen in the standard procedure had no sense in this type of clear cartel cases, especially for the leniency applicants: "the infringement was uncontested and the only issue that remained open was the size of the fine. An this was precisely the issue on which no meaningful debate could take place because, at that time, the statement of objections contained no information about what fine the Commission intented to impose. […] any detail, such as whether the Commission would or not consider aggravating cirumstances, was absent. Under such circumstances, the response to the statement of objections and the ensuing hearing were largely devoid of purspose since they could not address the sole issue that still mattered at that point, namely the parameters for the determination of the fine". BELLIS, *cit.* supra, p. 304.

to leniency, especially for the second-in. This was a big concern and was very present when designing the EU settlement procedure. Without prejudice to all this, the settlement should also be open and attractive to other companies who have not received leniency in leniency cases and to infringers in no leniency cases.

In this regard, two groups of issues should be taken into consideration:

1) The reduction of the fine for settlings parties should be modest but contribute to generate a sufficient incentive to settle. It should be compatible with leniency benefits.

The greatest concern was that if the reduction was too large, some of the second-in leniency applicants could be disincentivise to apply, something that would likely be detrimental to complete the collection of evidence and facilitate the final decision. If the leniency and settlements reduction were cumulative and the latter one was also large, that might also affect the inducement to apply for inmunity (only open to the 1st comer). According to the EU leniency program, second-in may obtain a reduction of up to 50% (2nd)[22], 30-20% (3rd) and 20% (the rest), provided they can give significant value added information to the EC.

Due to this concern, the settlement reduction was set at a level of 10% for all the settling parties. This obviously maintains an important distance between leniency reductions and settlements reduction, therefore maintaining the incentive to apply for leniency.

Furthermore, as both reductions can cumulate, leniency applicants that have already accepted the guilty plea may seem it as a natural finality of their case and an additional reward for leniency application as they have already done (or are willing to do) most of what is needed (guilty plea and loyal cooperation to the EC all along the procedure).

Some commentators suggested that the reduction was poor and will not create sufficient incentives so that this may prevent success of the EU settlement procedure or at least it was a very clear weakness.[23] They invoked that there should be a correlation between the average expected reduction on appeal and the level of reduction for settling the case. As some studies have stated that the average was 18%, a 10% was considered very low and should have been increased to at least a 20% or more.[24] In support of the same claim, some invoked as well experiences in other successful jurisdictions like the US where much more significant reductions were usually the outcome of plea bargaining.[25]

However, some previous experiences at national level in Europe suggested that 10% could be enough.[26] The US experience was not comparable as the more substantial reductions in plea agreements included not only benefits for settlements but also for what in the EU would be benefits for second-in leniency applicants. And it is also important to remind that leniency and settlements reductions are cumulative in the EU. Furthermore, one should never forget that the fine reduction is just one of the benefits that the settlement offers to the companies. Early termination, faster legal certainty and a possibility to influence the final decision through informal discussions are also among the important reasons to opt for a settlement.

Whether by all these reasons, by a caution not to damage the succesful leniency program, or by both of them, the level of reduction was definetely set at 10% as we have seen.

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22 The same reduction may apply to a 1st comer who get to the EC and provide significant value added but only once the investigation is already advanced.

23 See the ABA's opinion in OECD (2008), *cit.* supra, p. 74.

24 C. VELJANOVSKI, Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission, 27 ECLR (2006), p. 510, especially 512, suggesting that in 30 European Commission cartel cases since 1999, the average reduction in fines on appeal was approximately 18%.

25 See S. D. HAMMOND, *The U.S. Model of Negotiated Plea Agreements: A Good Deal With BenefitsFor All*, address before the OECD Competition Committee, Working Party No. 3 (October 17, 2006) *available at* http://www.usdoj.gov/atr/public/speeches/219332.pdf. See also O'BRIEN, *cit.* supra.

26 See the Dutch experience in OECD (2011), p. 120.

2) Further savings and other benefits for the settling parties.

As mentioned above, the fine reduction is just one of the benefits that the settlement offers to the companies and although relevant it might not be the most important one. Some of the other benefits that a settlement can bring to the parties are the following:

- Earlier termination of the procedure and correlated savings. The settlements of the case will likely imply a shortening of the administrative procedure and also very likely no need to appeal. Less duration means less legal advising and less litigation costs. The amount of the earnings can be easily larger tan the fine reduction.

  In addition to the savings, earlier finality clarifies the situation of the company, allows the management to focus on business and eliminates uncertainty for the company and the market. Therefore, this increase in certainty might be very important for developing economic activities and very much valued by the companies concerned.

- Possibilities of informal discussion (a constructive dialogue) with the Commission with regard to the scope, duration, gravity, and the factors to calculate the fine. In the standard procedure, the companies will have to wait to the Statement of objections to know the first complete assessment of the case by the Commission and still then no references will be found to the fines. The amount of the fine would be known only when the Commission announces its final decision. In many cases, but very especially in cartel cases in which the fine is often the sole terrain of controversy, it is a great advantage to get to know earlier the Commission's view and have the possibility to discuss it. Informal exchanges of views may clarify certain aspects, avoid certain possible mistakes and lead to a lower fine. The chance of influencing the Commission at an earlier stage and getting a 'common understanding' of the case and the fine might be the most relevant benefit for the companies. Of course, this will depend very much on how these bilateral rounds of exchange of views are developed, how persuasive the companies are and how open the Commission is to change its mind. However, if the Commission, although firm (no negotiations), is open and receptive enough to arguments and different assessments regarding duration, gravity, deterrence multiplier and mitigating circumstances, it is for sure that the final decision may end up with a much lower fine; and all this, without an appeal that takes time and imply costs.

- Limiting, to a certain extent, a negative impact for settling parties on follow on damages claims. The settling parties acknowledge liability for the infringement (so there is binding proof of the infringement), with practically no possibilities to appeal against the decision on substance, and thus no possibility to ask for the suspension of actions on national courts. Moreover, these actions come sooner because of the accelerated procedure. Provided the antitrust damages actions are credible, this may go against settling the case. To reduce or nuance this disincentive, some measures have been taken or considered:

First, protection of settlement submissions.

To avoid that third parties use settlement submissions in which the settling party has plead guilty, recognised the infringement and give details about it, some protection has been built for them. On the one hand, the Commission will accept that settlement submissions are provided orally (although they will be recorded and transcribed at the Commission's premises). On the other hand, although the Commission will sometimes give access to settlements submissions to other parties, other National Competition authorities (NCAs) and courts, access will be subjected to certain condition and refused to others such as complainants. The addressees of a statement of objections who have not requested settlement will be granted access if they engage not to make copies and commit to use them solely for the purposes of judicial or administrative proceedings

for the application of the Community competition rules at issue in the related proceedings.[27] NCAs will have access only if they ensure a similar level of protection and National courts will only recieve them with the consent of the relevant applicants. [28] The logic behind this protection is not to prevent damages actions against settling parties but simply that the disclosure of settlement submissions expose cooperating undertakings to a worse position than those of co-infringers not cooperating with the competition authorities, therefore creating a big disincentive to settle.[29]

Second, shorter statement of objections and final decision.

As an agrement has been reached between the Commissoin and the settling parties, the Commission may adopt a shorter statement of objections and above all a shorter final decision.[30] This may imply that the decision contains less information on the infringement and this might be useful when third parties are assessing follow on actions on damages. However one should recognise that this effect will likely be limited, especially once the new rules of Directive 2014/104/EU facilitating disclosure of evidence have been transposed into national law.

Has it been sufficient to create the right incentives or has it revealed as too low? Was it right for leniency applicants? Has the EC struck the right balance between leniency and settlements? Was it sufficient to non leniency applicants?

# 4. Ten years of practice: which lessons?

## 4.1. A statiscal overview: a very clear general conclusion

In the period going from 2010 (where the 1st settlement decision was taken) to 2017, the Commission has adopted 48 decisions condemning cartels, 24 of which have been settlement decisions, so 50% of the cases had been closed through a settlement. These are in themselves very significant numbers. They clearly show that the new tool has received a very good welcome by companies and has been fostered and very significantly used by the Commission.

Furthermore, a deeper look at these rough numbers notably increase its importance. For instance, if we focus on the last 3 years, from 2015 to 2017, the statistics tell us that 18 cartel decisions were adopted by the Commission, 7 of which are settlement decisions. However, analysing the 18 decisions, we can see that 6 cases were decisions against a non-settling party that followed a previous settlement decision; 2 cases were amending or re-adoption of decisions, without substantial changes, after an annulment of a previous decision by the ECJ for mainly procedural reasons. This means that only 3 cases were closed with a standard decision.

The percentage of cases in which a settlement takes place is, thus, much more significant than what the statistics show at first sight. It is clearly prevailing, more than doubling the cartel cases in which there is only a standard decision, during this period 2015-2017. Therefore, we may even say that settlement has become the

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27 EC Settlements Notice, para. 35. Moreover, in para. 36, sanctions are foreseen for the violation of this commitment.

28 Ibid., paras. 37 and 39. See also Article 6.6 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJEC L 349/1, 2014) laying down that "Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose any of the following categories of evidence: […] (b) settlement submissions".

29 Whereas n. 26 of Directive 2014/104/EU.

30 WILS (cit. supra, at p. 366) also suggests that a decision closing a proceeding after a settlement would require less reasoning. While it may be correct that such a decision would not have to be as elaborate and detailed as a decision in contested proceedings, it would still appear that the competition authority should have an incentive to include a detailed description of the infringement and the defendant's participation in the infringement in a settlement, to which the defendant would have to agree, to reduce the chances of a successful appeal. See also OECD (2011), *cit.* supra, p. 130.

general rule and standard decisions had been limited in recent years to non-settling parties in hybrid cases and to very few other (marginal) cases.

The trend and the numbers seem to converge with previous experiences in other jurisdictions such as the US or Australia, in which the settlements or plea agreements in cartel cases have also become the standard way to finalise a case.[31] For instance, in the US, several studies seem to suggest that around 90 % of the cases are settled. Hammond talks of around 10% of cartel cases that were not settled, mostly involving individuals who elected to go to trial,[32] and a US report to the OECD states that in the last twenty years, over 90 percent of the corporate defendants charged with an antitrust offence have entered into plea agreements.[33]

Although initially the European approach seemed to suggest that cartels settlements were going to be more limited than in other jurisdictions, after ten years of experience it is clear that cartel settlements have become the general rule while the standard procedure is the exception. Everything seems to suggest therefore that the announced weaknesses were not so or that, in any case, they have not prevented the success of the EU settlement procedure, because both the Commission and the companies concerned have clearly valued its benefits more than its disadvantages. Both parties have reached a 'common understanding' and have 'settled to settle' in a great majority of the cases.

## 4.2. Other key lessons of 10 years of practice

a) Has the initial conception been respected or has it in practice become closer to a bargaining process like in the US?

The design of the EU settlement procedure and its conception was based, on the one hand on a separation between leniency and settlements and, on the other hand, on its non-bargaining character. Has this been maintained?

The analysis of this 10 years of practice seems to suggest that the conception has actually been maintained but some caveats have to be put forward.

First, there has not been bargaining in the sense of openly negotiating the charges and the fines. The Commission has explored settlements only once the investigation was completed and when it already had sufficient evidence, in its opinion, to condemn the cartel. The first round of bilateral exchanges with each party has always been a first assessment of the case by the Commission. However, the Commission has been very receptive to discussion on the merits and especially on the scope and qualification of the infringement (duration, gravity proportion…)[34] and also on other factors that can be important to determine the fine such as the mitigating circumstances.[35] This can make the companies feel that they are heard and that bilateral exchanges are useful and therefore makes settlements attractive.

Second, leniency and settlements are separated, although interrelated. Exploration of settlements only starts once investigation (and therefore leniency) is completed. However, the parties and their counsels may perceived both as part of a successive package. Although they do not have a right to settlements, they know that leniency cases will likely be settled (it is where settlements had more sense) and can communicate to the Commission their interest. Not legally but they are having expectations of adding the settlement reduction to the leniency reduction.

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31 OECD (2011), *cit.* supra, p. 122.

32 *Ibid.*, p. 143.

33 OECD (2007), *Plea Bargaining/Settlement of Cartel Cases*, Polciy Rountables, DAF/COMP(2007) 38: p. 149.

34 See for instance decision on case 39611 *Waste Management products*, OJEU C 335/4, 2012 acknowledging a period of limited activity by the cartel.

35 See for instance acknowledgements of limited participation in the infringement in more than 10 cases (e.g. Case Envelopes (2014) or CRT Glass (2011) or rewarding cooperation outside of the Leniency Notice (e.g. Case Compressors and CTR Glass, both from 2011).

The distance between the two models (US and EU) might be less in practice than what an initial analysis could suggest.[36]

b) Which procedural efficiencies have been achieved? Duration of the administrative procedure? Appeals? Uniform/Hybrid?

The duration of the settlement procedures has been in average much shorter than the duration of standard procedures. Most settlement procedures (from opening to final settled decision) have been below 17 months while most standard procedures have lasted for 3 or more years. Thus, half duration and savings for legal advising of 1 year and half to two years.

Regarding appeals, there have been hardly appeals of settled decisions until now. There was only one initiated in case Euro Interest Derivatives but the applicant withdrew the demand and agreed to pay the litigation expenses.[37] This implies further savings of around additional one year and half to two years.

For settling parties, therefore the savings and efficiencies seemed to have been important.

Could we say the same for the Commission? The answer depends very much on whether the settlement had involved all the parties (one unique settled decision to close the case) or on the contrary, some infringers decided not to settle.

The European Commission had emphasised the advantages of uniform settlements (where all defendants in a case agree to settle) as opposed to "hybrid" settlements (where some, but not all defendants settle). It is argued argued that resource savings will be maximized if all parties agree to settle as otherwise the cases against at least some defendants will have to proceed on a "regular" path.

The Notice was not clear about what to do when some parties decided not to settle and it was not excluded that the Commission decided no abandon the settlement procedure for all the companies.

Altough many cases have to closed through one settled decision as the Commission wished, in several cases one or several companies dedided not to settle after the settlement procedure had been initiated and exploratory rounds had taken place. Only in one of those cases, the Commission decided to abandon the settlement procedure for all, while in most of the 'hybrid' cases, it has decided to settle with the companies that wanted to do it and follow the standard procedure against the non-settling companies.[38] It is also useful to stress that this strategy has been upheld by the General Court in the Timab case.[39]

Although hybrid settlements may not result in the same level of resource savings as settlements with all parties, considerable resource savings can still be realized if some defendants settle.

Furthermore, the fact that settled decisions are not appealed shortens the finality of the case also for the Commission and allows for efficiencies.

c) A good relationship and right balance between leniency and settlements?

Many of the cases of settlements are also leniency cases. For instance, in the most recent period from 2015 to 2017, in 7 cases, parties have cumulated leniency and settlements reductions.[40] However, 3 cases have

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36 O'BRIEN, cit. supra, already suggested that there were more similarities than what initially one may think but still strees very imprtant differences. The present paper submits that amy of these differences have been eliminated or at least blurred by practice.

37 Order of the President of the Fourth Chamber, Extended Composition, of the General Court of 2 March 2016, case T-98/14, Société générale SA v European Commission.

38 The case in which it decided to abandon the settlement procedure for all the companies was the smart card chip case. For some other hybrid cases, see for instance the Yen interest rate derivatives (YIRD) case, the Euro interest derivatives (EIRD) case, the Mushroom case or the Truck case, among others.

39 Judgment of the General Court (Eighth Chamber, Extended Composition) of 20 May 2015, Timab Industries and Cie financière et de participations Roullier (CFPR) v European Commission, case T-456/10.

40 See Blocktrains, Parking Heaters, Rechargeable Batteries, Trucks, Car parts producers, Car Lighting systems, and Thermal systems cases.

involved leniency but not settlements.[41] Even more interesting, in the same period, there has not been one case of settlements in which leniency has not preceded it.

All this seems to confirm that leniency cases are especially appropriate for settlements although not all end up with a settlement. This makes sense as more than half the way and the hardest one (guilty plea and full cooperation with the Commission) had already been done. It also suggests that EU leniency and EU settlement procedure are being complementing each other: leniency beneficiaries will very likely make use of settlements and see this closing as the most natural one; they will likely had some expectations of using it and adding the settlement reduction to the leniency benefits.

There are no indications at all that settlements have been detrimental or disincentivise leniency applications. On the contrary, it might be that, if parties have perceived the possibility of cumulating both (plus the other benefits), this has incentivised second-in to come forward. The distance between inmunity and second-in benefits plus settlements is still too large to disincentivise inmunity applications. On the contrary, one may think that settlements are also attractive to inmunity applicants: not because they will obtain any fine reduction as they have got inmunity but because of the other benefits. Again although they cannot know if the case will be settled and have no right to it, they may perceived as positive the possibilty to add to inmunity from fines the new settlement benefits as a corollary of leniency proceedings.

d) Which level of fines and fine reductions? Has it been sufficient to induce settlements in all cases?

One of the most controversial issues in the design of the EU settlement procedure was the low level of fine reductions which for many was deemed insuficient to create the right incentives.

The ten years of practice show that this critique and the bad expectations were wrong. The 10% reduction plus the other benfits have been perceived by the infringers as sufficient incentive to settle. It is difficult to know –although one can imagine it– that it is more for the other benefits than for the 10% reduction although no one uses to reject a free sweet. Something to be considered as a possible explanation is that in practice the fine could be much lower than what it would have been (at least before an appeal) without the possibility of informally exchanging views with the Commission and reaching a `common understanding´.

Finally, it is interesting to note that the conclusion may be different in cases were leniency does not exist. For those cases, there is no clear indication that the current settlements benefits are sufficient.

e) Level of Transparency/Predictability/Flexibility?

A final reflection on transparency, predictability and flexibility is convenient.

Transparency and credibility is very important to attract settlements and also to maintain a high level of legitimation of this policy. In my opinion, a good level of both has been attained in the EU. One important contribution to transparency is the Procedural Regualtion and above all the EC settlement Notice, which is complemented by the 2006 Fine Calculation Guidelines. All these texts have provided with clear guidance to the companies and the commentators and have clearly set the general framework to deal with individual cases. Moreover, the Commission seems to have consistently applied them to individual cases. Using its margin of discretion and combining them with flexibility, the Commission has managed to convince companies of the benefits and send also clear messages on the limits of settlements.

[41] Optical Disc Drives, retail Food Packaging and Cartel batterry recycling cases.

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***Abstract:*** The fight against cartels is now one of the top priorities of all competition authorities who are very active and innovating to improve enforcement and deterrence. Within the EU, one of these innovations has been the EU cartel settlement procedure, first established in 2008. In short, it gives the parties the possibility to close a cartel case quicker and receive a fine within a range accepted by each party with a 10% reduction, in exchange of recognizing their infringement and their liability and cooperating with the Commission to expedite and finalise the case. The paper analyses key issues and draw lessons from the almost ten years of practice.

***Keywords:*** *Cartels, Settlements, Plea bargaining, Fine reduction.*

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