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.