ARBITRATION AND COMPETITION LAW – NEW PROSPECTS OF RECOVERY FOR VICTIMS OF ANTITRUST INFRINGEMENTS

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On 17 April 2014, the EU Parliament adopted a text of the Directive 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 (the Directive). The Directive is aimed at facilitating private enforcement of European competition law by eliminating complications that infringement victims currently face when considering compensation claims. Member States will have two years from the Directive coming into force to implement it in their respective legal systems. It is to be expected that these changes will result in a significant rise of damages claims being pursued before national state courts. Furthermore, the preference for arbitration when it comes to large scale cross-border disputes is undeniable. As such, an equivalent rise of EU competition follow-on claims being submitted to arbitration would appear natural.
Under the current regime, only a fraction of antitrust infringements are followed by civil actions. The Commission estimates that in the last seven years only 25 percent of infringement decisions have resulted in damages claims. This means that a vast majority of parties who have suffered a loss as a result of a violation of European competition law fail to enforce their right to compensation. Certain victims may be unaware of the violation in the first place. In addition, some victims may have suffered minimal or no loss as a result of the violation. In any event, as things stand at present, a number of obstacles prevent victims from pursuing a claim against infringers. Apart from the general costs and risks inherent in legal proceedings, there are also complications specific to tort claims arising out of violations of EU competition law. These include, but are not limited to, the inaccessibility of evidence, the lack of harmonisation between the Member States’ respective legal systems in respect of crucial issues such as limitation periods, nature and scope of damages, passing-on defence and evidentiary value of previous liability decisions. In this context, the Directive offers new prospects of recovery for victims of antitrust infringements.

Consequently, arbitral tribunals have been dealing with disputes involving competition law issues for decades. These arbitration cases typically involve allegations that a counterpart has acted in breach of competition law, for example by abusing its dominant position in the performance (or non-performance) of the agreement. Arbitral tribunals are also often asked to determine whether a contractual provision should be invalidated on the basis that its terms allegedly contravene EU competition law. Under this scenario the allegation that the agreement in question has the object or an
effect of distorting competition on a certain market, is generally made as part of defending a claim or counterclaim.

Whilst arbitrations involving competition law issues are generally characterised as ordinary commercial arbitrations, they tend to give rise to specific questions. Because of their public policy nature, Articles 101 and 102 of the EU Treaty are mandatory and need to be applied regardless of the national law chosen by the parties as the governing law of the agreement. Further, under Article 5(ii) b) of the New York Convention, enforcement of an award may be refused if the award contravenes public policy. Therefore an award which contravenes EU competition law may be annulled or its enforcement by a national court may be denied (although enforcement can generally be refused only in exceptional circumstances). As arbitrators have a duty to render an enforceable award, they may find themselves in a situation where they need to raise competition law issues *ex officio*, which in arbitration is particularly unusual, given the consensual nature of the procedure.

The potential advantages of arbitrating competition issues have been recognised by the EU Commission. Arbitration is indeed the norm for private actions relating to an alleged breach of a commitment included in a merger clearance decision by the Commission. Most of such commitments contain arbitration clauses which are however drafted in quite a specific way. Similarly to the arbitration clauses contained in bilateral investment treaties, arbitration clauses contained in merger clearance decisions are binding on the merged entity and provide ‘interested third parties’ with a right to arbitration. Those ‘interested third parties’ consent to arbitration by commencing arbitral proceedings pursuant to those arbitration clauses. This mechanism provides a recourse for the ‘interested third parties’ adversely affected by a merged company’s failure to comply with what are essentially conditions upon which the merger had been cleared. Nevertheless, despite the frequent insertion of these arbitration clauses in clearance decisions, in practice, these arbitrations remain very rare. The first (and to date only) reported case decided in February 2012 arose out of the acquisition of sole control by NewsCorp over two Italian pay-TV broadcasters (*Reti Televisive Italiane v. Sky Italia*, ICC Case No. 16974/FM/GZ).

Whilst the Directive does not expressly contemplate follow-on claims to be pursued by arbitration rather than litigation in national courts, there is nothing in the Directive or elsewhere that prevents claimants to submit damages claims to arbitration. Damages claims may be referred to arbitration in two main ways. First, for a number of reasons, parties may agree to have such claims resolved through arbitration by way of a submission agreement. The obvious reason is confidentiality but, depending on the other fora available to the claimant, expertise of the decision makers, flexibility
and control over costs and shifting rules may be appealing as well. Second, arbitral proceedings may be commenced pursuant to an arbitration clause included in an existing agreement. This is of course only possible where there is an existing relationship between the parties, like in cases where the claimant purchased cartel products directly from a cartel member and the purchase agreement or applicable terms and conditions have an arbitration clause. In this case, the tortious nature of a claim for damages would generally not prevent the use of arbitration, provided that the claim falls within the scope of the relevant arbitration agreement. However, the law applicable to the tort claim may be different than the governing law of the contract. In this regard, Article 6(3) of Rome II Regulation – which an arbitral tribunal may or may not choose to apply to designate the applicable substantive law – provides that the law applicable to a non-contractual obligation arising out of a restriction of competition, shall be the law of the country where the market is, or is likely to be, affected.

The Directive will provide victims of infringements of EU competition law with new ammunition for the recovery of their loss. Whether the infringement materialised as a breach of merger clearance commitment or has been the subject of a decision by a competition authority, commercial stakeholders financially impacted by these violations of EU competition law will inevitably recognise the shortfall and the prospects of recovery that arbitration may bring to the table.

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