

Arbitration and European Competition Policy: Traditional and New Roles

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1. Introduction

Intuitively, European competition policy and transnational arbitration seem to be worlds apart. We associate publicly visible disputes related to the European Commission's efforts at controlling both the anticompetitive impact of state aid, provided by governments to both state-owned or private business, and the competition-hampering behaviour of companies. An example of the former is a June 2002 Commission decision according to which Deutsche Post AG had to repay €572 million used to subsidize price undercutting in commercial parcel services. An example of the latter is the European Commission's decision of February 2008 to fine Microsoft for another €899 million for failure to comply with its anti-trust decision of March 2004.

It is obvious that these publicly visible, costly, long-lasting and potentially reputation-damaging disputes are at odds with basics tenets of arbitration. Alongside the growth in international trade, commercial arbitration has become the universally accepted method for settling international commercial disputes. The importance of arbitration as a mode of governance finds expression in estimations according to which about 90 per cent of all cross-border contracts contain an arbitration clause. Private commercial arbitration offers a number of advantages over litigation in state courts. Foremost among these advantages is the high degree of procedural flexibility in the choice of location and arbitrators. At least three further attributes traditionally mentioned as part of the comparative advantage of private dispute resolution to litigation in public courts: confidentiality, time- and cost-effectiveness.

Given the tension between the underlying logics of the two areas, it is not surprising that the history of the relationship between the

European Commission and transnational arbitration has been characterized by mutual distrust. On the one hand, the European Commission competition directorate's distrust of private dispute resolution was supported by some arbitration centres in non-EC Member States that advertised dispute resolution off the shore of European competition provisions. On the other hand, the Commission's suspicion met the reluctance of many arbitrators to accept foreign or European competition laws. As the autonomy of the parties had top priority, arbitrators saw themselves committed to the will of the parties and their choice of law governing their contract.

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Since the mid 1990s, however, the relationship between the European Commission and European competition policy and transnational arbitration has changed significantly. Not only have competition issues been increasingly accepted as arbitrable at both the national and the European level, the mutual distrust between the Commission and arbitration has turned into a mutual embrace. As arbitrators consider the examination of potential violations of EC competition laws as their official duty, the strategy of companies to evade EC competition law by resorting to arbitration is a thing of the past. At the same time, we find that the Commission not only accepts companies' decision to submit potential disputes to independent arbitration but also directly imposes arbitration as a means of dispute resolution in merger decisions. What explains the change in the relationship and what are its implications?

2. A New Approach to Enforce Decisions

Control of mergers and acquisitions, the realm that today tends to attract most visibility and media attention, was omitted in the Treaty of Rome, basically because it was not thought of as a matter of priority by the Member States. From the very beginning, however, the Commission conceived mergers, acquisitions and joint ventures as a potential source for anti-competitive behaviour. Given the omission of merger provisions in the Treaty, it tried in the 1970s and 1980s to use Articles 85 and 86 EEC (today, respectively, Articles 81 and 82 TEC) as instruments to challenge certain mergers that it considered to be restrictive of competition. Although it was on several occasions backed by judgments of the European Court of Justice (ECJ), the Member States only agreed in 1989 to introduce a first European merger control regulation (Council Regulation 4064/89).

In the 1990s the Commission became increasingly aware of the need to devote its resources to fighting cartels. However, its statutory obligation to review thousands of (mostly harmless) agreements notified to it in accordance with Council Regulation 17/62 kept its hands tied and precluded it from pursuing clandestine cartel agreements, which had a much more negative impact on market com-

Further reading

This policy brief is based on research carried out within the NEWGOV project no. 10 on "Private Dispute Resolution: Legitimate and Accountable?". The main interest of the project is in exploring modes and patterns of governance in the resolution of disputes arising from cross-border economic exchange both within Europe and at the international level. Based on the assumption that territorially restricted laws inevitably lead to constitutional uncertainty in transnational trade, questions of interest are: What institutional solutions have been established to solve such disputes? Where are these solutions located and who has established them? What are the conditions for their emergence and operation? How do different solutions relate to each other?

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petition. The legislative framework thus proved to be inadequate.

In light of that situation, decentralization became an ever-more appealing option for the Commission, and in the last fifteen years the Commission has pursued a fundamental overhaul of its merger control policy. Following a period of public consultations concerning the Commission's proposals, the Council of Ministers adopted a new legal framework for the enforcement of Articles 81 and 82 TEC in December 2002. Entering into force in May 2004, the new legal framework of Regulation 1/2003 implies a new approach to the implementation and enforcement of the merger control policy that is based on the concepts of decentralization and modernization. The merger control framework was likewise reformed: following an interim amendment of the 1989 merger regulation in 1997, a new merger regulation (Council Regulation 139/2004) based on the concepts of decentralization and modernization also entered into force in February 2004.

'Decentralization' refers to the devolution of powers to apply Article 81 TEC to the national authorities and national courts. In the words

of then-Competition Commissioner Monti: “The task of policing anti-competitive behaviour and handling complaints will be better shared by the European family of competition authorities: the national competition authorities and the Commission, linked through the European competition network” (Monti 2004: 1).

The concept of modernization captures the new priorities of the Commission's enforcement agenda such as private enforcement. Private enforcement refers to court cases initiated by private parties before national courts, in contrast to cases before and initiated by the Commission (or a national competition authority). In this respect, certain key judgments of the ECJ, as well as the US experience with roughly 90 per cent of competition enforcement consisting of private actions before courts, led the Commission to the conclusion that law enforcement can be a powerful policy instrument.

3. Arbitration and the New Enforcement Policy

According to the new enforcement regulation (Regulation 1/2003) that took effect in 2004, companies whose agreements or practices raise competition concerns may avoid the risk of fines by assessing the competitive impact of their agreement or practice themselves and to suggest correctives that might mitigate the harm to competition. The Commission investigates the companies' self-assessment and may or may not add commitments in its final decision. Frequently, the Commission refers to the imposition of commitments as an alternative to prohibiting and sanctioning anticompetitive activities. Similarly, in the merger context a transaction that might otherwise be prohibited might be saved if the parties are willing to offer concessions.

The Commission's means to restore or preserve competition in the relevant markets are called ‘remedies’. There are two forms of remedies. Structural remedies are the more dramatic alternative. They may involve the obligation to sell parts of a company in order to structurally ensure that a merger will not imply a dominant position in a market. Such divestment obligations have the advantage that the resulting monitoring costs are relatively low. But divestment is not always an op-

tion. Access of competitors to key infrastructures or technologies may require a different approach. Examples of this problem and its solution are the Commission's acceptance of a package of commitments offered by Vivendi/Canal+/Seagram, which included access for competitors to Universal's films; BSkyB/Kirch Pay TV's commitment to grant competitors access to conditional access system to Kirch's Pay TV services; and the commitment imposed on Vodafone Airtouch/Mannesmann not only to sell their cable network but also to ensure non-discriminatory roaming tariffs and wholesale services.

To formulate commitments that should ensure market competition is one part of the story; to ensure compliance is another. This problem is particularly salient in the case of behavioural remedies, which require the commitment of merging units to an agreed behaviour. The Vodafone/Mannesmann example is a good case in point: the structural commitment to sell the cable network was relatively easy to monitor. In contrast, to ensure that competitors of the merging entities will have non-discriminatory access to the network of the merging entities is much more precarious. As the Commission faces significant constraints with respect to its own resources for purposes of monitoring and controlling compliance with its decisions, its rationale for encouraging private enforcement of EC competition laws becomes apparent.

But given the relative disadvantages of public proceedings, i.e. delays or procedural obstacles, the Commission has come to favour private arbitration as an alternative. For example, in 2002 the Commission's decision to accept the acquisition of Finnish-based telecommunications group Sonera Corp. by the Swedish Telia AB after the parties agreed to both a number of structural remedies (including the legal separation between their fixed and mobile networks or the divestment of Telia's nationwide cable TV business in Sweden) and behavioural remedies (including the commitment to grant competitors non-discriminatory access to their networks). Under the header of “fast track dispute resolution”, the Commission's decision provided that third parties may take recourse to an arbitration procedure in case of dispute concerning the non-discrimination obligations. It explicitly

states that arbitration also provides for a faster alternative to the procedure provided by the national regulatory authorities.

There are basically two ways in which the European Commission refers to arbitration as a means to resolve disputes in competition matters. First, it may accept the commitment of companies to submit a dispute with a competitor to an independent arbitrator. In this respect, the Commission accepts the traditional mode of arbitration, according to which parties voluntarily agree to rely on arbitration rather than on litigation. In a different approach, the Commission may directly impose the obligation to resort to arbitration as a condition for the clearance of a merger request. With respect to the latter, the Commission frequently exercises very detailed guidance, for instance by prescribing arbitration clauses that entail provisions about the place, cost and time of an arbitration, by requiring approval of the arbitrator by the Director General of the Commission's competition directorate, by participating as a 'friend' of the arbitral tribunal (*amicus curiae*) or providing information upon request by the arbitrator(s).

4. EC Competition Policy and the Transformation of Transnational Arbitration

The final question is how to assess the evolution from an era of mutual hostility to one of an increasing acceptance and interaction that characterizes the relationship between European competition policy and arbitration. From the perspective of the Commission, the possibility of arbitration creates quite a convenient situation. The fact that arbitral awards are binding both for the parties to a dispute and for national enforcement authorities is in keeping with the Commission's instrumental interpretation of arbitration as a means to ensure compliance with its merger decisions and their clauses to ensure competition. At the same time, the Commission itself is not bound by the award, and rather remains free to make its own assessment of the performance of a merged entity and its competition-distorting impact. Along these lines it is plausible to argue that the Commission embraced arbitration not only as a legal, quick and efficient way to put an end to possible infringements. What is more, the incorporation of ar-

bitration allows for exercising more guidance in control matters.

The more commitments to arbitration have become an integral part of the remedy package of the Commission's decision in merger cases, the more the Commission has 'tuned' transnational arbitration, in both procedural and substantive terms, to its needs. The instrumentalization and incorporation of private transnational arbitration into the EC's policy of private enforcement changes the character of arbitration. Traditional arbitration agreements rest on the parties' voluntary agreement to submit a dispute to a private arbitration panel rather than to a public court. By contrast, arbitration in European competition matters primarily benefits not the contracting parties but third parties and their interest in the protection against market-abusing behaviour by a merged entity. Furthermore, given the Commission's authoritative role, arbitrators lose a significant degree of autonomy in such arbitration procedures. This loss of autonomy, and the transformation of arbitration into an instrument of the Commission, are the price arbitrators have to pay for their readiness to operate in the market of EC competition policy.

Bibliography

- Blanke, Gordon (2006), *The Use and Utility of International Arbitration in EC Commission merger Remedies. A Novel Supranational Paradigm in the Making?* Groningen: European Law Publishing.
- Goyder, D.G (2003), *EC Competition Law*. 4th. ed. Oxford: Oxford University Press.
- Lehmkuhl, Dirk (2008). "Institutional Politics In Soft Governance. Decentralisation and Private Enforcement in EC Competition Policy". In: *Governance and Policy-Making in the EU*, edited by I. Tömmel and A. Verdun. Boulder, CO.: Lynne Rienner.
- Monti, Mario (2004), "The EU gets new competition powers for the 21 century." Interview with Mario Monti, Commissioner responsible for competition. *Competition Policy Newsletter*, Special ed. 1.