USING ALTERNATIVE DISPUTE RESOLUTION IN COMPETITION LAW – EUROPEAN MODEL[1]

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Abstract. Nowadays, in parallel with the growth of competition, cases of infringement of competition law by undertakings are inevitable, and the timely and efficient resolution of disputes deriving therefrom is of utmost importance in active trading conditions. Considering the above, the present article analyses the urgency and potential of the means of alternative dispute resolution as favourable and efficient mechanisms in the area of competition law. On the basis of the European model and practice, the present article examines the effectiveness and procedural matters of the applicable principles of alternative dispute resolution, namely negotiation/conciliation, mediation, and arbitration, within the framework of disputes arising in the case of infringement of competition rules. Moreover, the peculiarities of competition law and the importance of regulating it differently will also be analysed.

Keywords: competition, alternative dispute resolution, private enforcement

INTRODUCTION

The Deep and Comprehensive Free Trade Agreement[2] has focused on two key areas for Georgian business, namely alternative dispute resolution and competition[3]. For the past few years, a regulatory legislative framework has been formed in both areas in one way or another. Now, it is time to examine the issues related to their practical implementation.

No one questions the role and importance of mediation, arbitration, and, generally, alternative dispute resolution in the so-called private enforcement of competition law[4]. Neverthe-

1. Special thanks to my junior colleague and friend, *Nana Turmanidze*, for her contribution to the process of writing this article.
2. The Ministry of Economy and Sustainable Development of Georgia, *Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union*. Available at: http://www.economy.ge/index.php?page=economy&s=7 (Accessed: 4 March 2022).
3. Chapters 10 and 14 of the Deep and Comprehensive Free Trade Agreement (DCFTA) with the European Union.
4. *Rodger, B.* (2014) *Private Enforcement Context and Project Background* in: Rodger, B. (Editor). *Competition Law. Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, Alphen Aan den Rijn, p. 13.

less, to date, the involvement of these mechanisms in the protection of competition has not been of high quality.

The publicly announced direction of the approximation of Georgia to European legislation and practice makes the study of the European model of interaction between competition law and means of alternative dispute resolution relevant in our country as well.

1. NEGOTIATIONS/CONCILIATION

The benefits of alternative dispute resolution in the case of competition disputes are the same as in general cases, namely efficiency, cost, flexibility, and speed[5].

At the outset, it should be mentioned that a significant amount of disputes between undertakings arising from competition law are settled amicably[6]. It is not surprising, since victim companies often file lawsuits against the infringers of competition rules after the infringements have been identified by relevant bodies (the European Commission, the competition authorities of the Member States). When the qualification of an action and the existence of infringement are no longer disputable, the parties have only to negotiate the amount of compensation, which substantially increases the probability of conciliation.

Resolving the issue of compensation for damages incurred due to an infringement of competition rules by agreement between the parties not only effectively ensures the enforcement of competition law, but also saves significant expenses that would have been incurred by both parties as a result of court proceedings[7].

In pre-Brexit United Kingdom, the role of the means of alternative dispute resolution in dealing with competition disputes (referring to private enforcement disputes in major B2B cases) was considered to be quite significant. A study found that, in 2000-2005, 43 disputes arising from the infringement of competition rules were settled amicably between the parties. Moreover, the study also found a rather interesting trend whereby so-called 'weak parties' to vertical agreements look for major suppliers among the participants of a cartel that has already been identified, and if they find one, they apply to it directly and commence negotiations requiring compensation for the inflicted damages and amendments to the relevant clauses of the agreements. Negotiations and their results are confidential, but the prevalence of such practices indicates their effectiveness[8]. In 2012, the government agencies of the

5. *Tsertsvadze, G.* (2010) *Alternative Dispute Resolution (General Overview)*. Tbilisi, p. 193.
6. *Ashton, D.* (2018) *Competition Damages Actions in The EU, Law and Practice*. Second Edition. Cheltenham: Edward Elgar Publishing, p. 6.
7. Hodges, Ch. (2014) *Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?* in: Rodger, B. (Editor). *Competition Law Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, Alphen Aan den Rijn, p. 216.
8. Hodges, Ch. (2014) *Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?* in: Rodger, B. (Editor). *Competition Law Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, Alphen Aan den Rijn, p. 256.

United Kingdom unambiguously and unequivocally expressed a positive attitude towards the use of alternative dispute resolution in resolving competition disputes. The United Kingdom is making every effort to strengthen the use of alternative dispute resolution in the area of competition law[9].

There are a number of advantages for an undertaking that infringes competition rules to negotiate confidentially and pay compensation: a) such actions usually comply with the high standards of business ethics. This is a kind of 'doing the right thing', which is often determined by compliance programmes[10]; b) most large companies protect and even improve their reputation by negotiating and compensating for the remedy of anti-competitive practices. Relatively small companies or market participants that are not known for their good reputation seldom make such decisions, as it is unthinkable and unacceptable for them to pay money voluntarily when no one is forcing them to; c) a voluntary action and active participation in negotiations may reduce the sanctions imposed/to be imposed by competition authorities. Such allowance may amount to quite significant sums, which is usually the case; d) lastly, by participating in negotiations voluntarily, the legal costs to the companies are significantly reduced, as they would have been much higher in the case of the commencement of court proceedings against them. Studies show that mediation, as a rapidly expanding and evolving method of alternative dispute resolution, can assist the parties in conducting the above-stated negotiations more efficiently[11].

2. MEDIATION

Tcross the European Union (EU) the last decade stands out especially in terms of the significant increase in the role and importance of mediation and other similar means of dispute resolution[12].

One of the models that is quite common in Europe entails the following: a) a dispute is settled amicably by a panel of several mediators, who are selected from the list offered by a private mediation provider; b) the consent of all parties is required. The parties must agree not only on the use of mediation, but also on whether the agreement reached through mediation will be legally binding on the parties; c) it will be used only in the case of so-called „follow-on claims"[13]; d) a panel of mediators will have to adopt a specific procedure for each

9. Ibid., p. 264.
10. Official website of the European Union, compliance – the responsibility of a company (companies) to develop and implement appropriate programmes for ensuring compliance with its (their) competition rules. Available at: <https://ec.europa.eu/competition-policy/antitrust/compliance_en> (Accessed: 4 March 2022).
11. Hodges, Ch. (2014) *Fast, Effective and Low Cost Redress: How Do Public and Private Enforcement and ADR Compare?* in: Rodger, B. (Editor). *Competition Law Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, Alphen Aan den Rijn, pp. 262-263.
12. Ibid., p. 263.
13. Official website of the European Union, follow-on claims – the right of a claimant to claim damages after the competition authority establishes the infringement of competition law. Available at: <https://ec.europa.eu/competition-policy/antitrust/actions-damages_en> (Accessed: 4 March 2022).

specific case. The above must be done in such a way as to attract other potential claimants and engage them in the negotiations; e) only public information may be submitted to the panel[14]. The idea of the latter requirement is vague. As a rule, mediation is a confidential process, and ensures the confidentiality of submitted data anyways.

A rather interesting mechanism has been developed in the Netherlands for settling group lawsuits in the field of competition law. Here, the issue of regulating group lawsuits through mediation is governed by a special law. According to this law, the claimant's representative (usually an association or other type of non-governmental organisation) engages in the negotiations with the relevant defendants and reaches an agreement. The Court of Appeals then makes public the information about the agreement reached, and appoints a hearing in which the interested parties can participate. After the hearing, the court, if it deems it appropriate, approves the settlement and determines a timeframe for the members of the association (or individual claimants) to either agree to the approved settlement or file a separate lawsuit against the defendants. Statistics prove the success of this process. From 2005 to 2014, the six largest cases were settled amicably using it[15].

The provided examples are impressive enough for Georgian judges and business lawyers to pay attention to them. Introducing such procedures in Georgia would probably be the best solution. Arbitration

In the second half of the twentieth century, the application of rules of European competition law by arbitrators was very rare. The arbitrators were mainly hindered by the obvious public legal nature of these rules. They found it difficult to determine by reference to these rules the invalidity of agreements or to award compensation for damages[16].

However, the role of arbitration as one of the mechanisms of private enforcement in competition law is no longer controversial[17]. The U.S. Supreme Court decision in *Mitsubishi Motors Corp v. Soler Chrysler Plymouth* 1985 is one of the most well-known and high-profile decisions in the history of arbitration. The court ruled by five votes to three that the arbitration agreement included in the international contract was real and enforceable even if the arbitral tribunal had to resolve a dispute under the competition law of the United States of America[18]. In 1996, the Court of Justice of the European Union unequivocally ruled in the *Eco Swiss* case that a dispute arising out of the infringement of competition rules could be reviewed by arbitration[19].

The intensification of the tendency of decentralisation of competition law enforcement by

14. Ibid., p. 265.
15. Ibid., p. 266.
16. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p.1082.
17. Ibid., pp. 1075-1076.
18. *Lowenfeld, A. F.* (2005) *Lowenfeld on International Arbitration*, *Collected Essays Over Three Decades*. Juris Publishing Inc., p. 123.
19. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p.1083.

Regulation 1/2003[20] has given a greater role and importance to the review and resolution of competition disputes by arbitration. In practice, there are still certain procedural matters regarding which there is not a unified approach. The inclination for uniform approaches across the EU and the supranational nature of the arbitration procedure allow for the rather bold prediction that arbitration will be able to create a unified legal platform for resolving competition disputes, one that will be free from national differences[21].

Arbitration and competition rules may intersect in several areas: a) the application of Articles 101 and 102 of the TFEU[22] by the arbitral tribunal for the private enforcement of competition rules[23]; b) private enforcement in connection with the implementation of an action, which is related to the control of mergers, or the regulation under Article 9 of Regulation 1/2003; c) private enforcement of issues related to aid granted by States (Article 107 of the TFEU)[24].

Depending on the specificities of competition law and the style of the arbitrators themselves, competition rules may be applied differently in arbitration disputes. The role of arbitrators in arbitration is passive compared to competition law judges. Arbitrators only assess the facts and evidence presented to them by the parties, and they cannot be more actively involved in that process on their own initiative. However, there are arbitrations and arbitrators where the role of an arbitrator in the so-called 'fact finding procedure' is much more active. If there is no objection to the applicable procedural law and arbitration rules (and the parties agree to it) an arbitrator can independently raise the issue of the application of competition rules. In conclusion, the arbitral tribunal must take into consideration the practices and approaches of both the place of the arbitration and where the arbitration award is to be served and enforced[25].

The competences of arbitrators in terms of the enforcement of competition law can be quite broad. The arbitration may oblige the parties to perform certain actions, as well as to make certain changes to the agreement under dispute, or to modify the entire agreement, in order to comply with the competition rules. Moreover, a party may be obliged to compensate for damages or pay a fine that exceeds possible compensatory damages (extra compensatory damages). Which of the broad powers listed above can and cannot be used by arbitrators depends on the arbitration practices and the laws of the Member States[26].

There is an opinion that arbitrators in the territory of the EU are obliged to raise the issue of the application of competition rules on their own initiative. In ICC practice, the issue of the application of competition rules by an arbitrator on his/her own initiative has never been

20. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
21. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p.1112.
22. TFEU – Treaty on the Functioning of the European Union.
23. Articles 101 and 102 of the Treaty on the Functioning of the European Union regulate the agreements restricting competition and the abuse of a dominant position.
24. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p. 1076.
25. Ibid., p. 1093.
26. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*, Third Edition. Oxford: Oxford University Press, p. 1095.

questioned[27]. The enforcement of a decision made in ignorance of these rules may be jeopardised on the basis of resistance to public order. Once an arbitrator decides to apply competition rules when reviewing a particular dispute, he/she must inform the parties thereof and ensure appropriate conditions for them to be able to express their opinions. Without adhering to the principle of procedural equality, the enforcement of a decision may be compromised. Even if the parties agree to resolve a dispute without the application of the relevant legal norms, i.e. *ex aequo et bono*, this does not exempt an arbitrator from the direct application of the competition rules, when necessary[28].

The issue of the liability of an arbitrator is particularly important. According to one of the opinions, if an arbitrator has not applied Articles 101 and 102 of the TFEU, but their application could have led to the annulment of an agreement and to associated legal consequences, the arbitrator may be considered an undertaking who infringed the competition law himself/herself, and the relevant liability may be imposed on him/her. In similar situations *the Treuhand* case is often referred to, where Treuhand was also considered to be an infringer. Although Treuhand was a consultant and had not been working directly in the respective area, it had been coordinating the activities of the cartel members and facilitating them in earning maximum and illegal profits by infringing competition rules. Therefore, it is considered that by analogy with the said decision, an arbitrator may also be considered 'an undertaking' that infringes the rules of competition law. There are two ways an arbitrator can avoid such liability: a) by refusing to participate in the respective case due to a lack of sufficient qualifications, and by providing relevant explanations to the parties in this regard; and b) by making a conditional decision on the infringement of competition rules, by calling on the parties to apply to the relevant competent authority for the identification of competition irregularities, and by further changing/modifying his/her decision in accordance with the decision of those authorities and using the latter as evidence in the process of making a final decision on the case[29]. The second procedure seems much more inflexible, vague and less practical; parties are unlikely to be interested in an arbitral decision that may be changed later for some reason.

When arbitration deals with the issues of compensation for damages caused by the infringement of competition rules, in a so-called „follow on damages" case the arbitral tribunal is obliged to take into consideration a decision of the Commission or the competition authority of one of the Member States, as an item of evidence. There is no record that could give prejudicial power to such decisions in the final outcome of the arbitration[30].

In accordance with the practice established by the *Masterfood* case, the courts of EU Member States, when considering the issue of the revocation of an arbitration award or its recognition and enforcement, are obliged to give priority to the previous decisions of competition authorities (which are valid and have not been appealed) if they are related to a dispute be-

27. Ibid., p. 1097.
28. Ibid., p. 1097.
29. Blanco, L. O. (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p. 1096.
30. Ibid., p. 1097.

tween the same parties. In practice, tribunals rely on and share the spirit of the Commission's decisions. The only thing the party has to do is to prove a direct causal relationship between the infringement established by the Commission and the damages it seeks to compensate[31].

Parallel proceedings are permissible with respect to both the court and the arbitral tribunal. In other words, there is no objection to the case being heard by the Commission or a competition agency and, at the same time, the same dispute being reviewed in court or by arbitration. It is much more problematic if a dispute is being reviewed in court in parallel with the arbitration[32]. The situation would be further complicated if we assume that a dispute was being reviewed in the Court of Justice of the European Union, where the decision of the Commission was being appealed and, in parallel, the same dispute was being reviewed by arbitration. It would probably be closest to common sense if the arbitral tribunal suspended its proceedings, and then took into account the final assessment of the court in its eventual decision-making process.

According to another opinion, the arbitral tribunal should wait for the final decision of the Commission and then make its own decision, unless the case before the Commission is an *acte clair*[33]/[34].

Arbitral tribunals do not have the right to send so-called 'preliminary references' to the Court of Justice of the European Union in accordance with Article 267 TFEU. However, taking into account the requirements of law applicable to the place of arbitration, an arbitral tribunal is not limited to seeking an opinion/position from the Court of Justice of the European Union, the European Commission, or the competition authorities of Member States. The response of these authorities depends on the legislation of the respective States and the willingness of the authorities to cooperate[35]. An arbitral tribunal cannot oblige them. The private autonomy of the parties precludes the arbitral tribunal from doing so in the absence of the consent of the parties[36].

There are 'minimalists' and 'maximalists' in respect of judicial control of arbitration awards, and neither courts nor the academic community have a unified and established universal position regarding the issues discussed above. Arbitrators are always advised to be especially careful when applying and interpreting competition rules in an arbitration award[37]. There is nothing unusual about it. Competition law is considered an integral part of public order, and its misinterpretation or negligent application may lead to highly undesirable consequences in relation to the final outcome of the arbitration proceedings.

31. Ibid., p. 1099.
32. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p. 1098.
33. *Acte clair* is a doctrine of European Union law, which states that if a judgement or rule of law is clear enough, a Member State has no duty to refer a question for a preliminary ruling to the Court of Justice of the European Union.
34. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p.1099.
35. Ibid., p. 1099.
36. Ibid., p. 1101.
37. *Blanco, L. O.* (Editor). (2013) *EU Competition Procedure*. Third Edition. Oxford: Oxford University Press, p. 1105.

CONCLUSION

The present brief overview also demonstrates how significant and interesting the European model of interaction between alternative dispute resolution and competition law might be for Georgia. Georgian business lawyers still have much to discuss on this issue, especially since some examples, if rarely, can already be found in Georgian legal practice. This, however, would constitute a separate research subject.

SUMMARY

Within the framework of this article, research and analysis of the European model of alternative dispute resolution demonstrates that the use of such methods in competition law provides for the existence of an effective dispute resolution mechanism, and is quite interesting for business.

In addition to the general benefits of alternative dispute resolution, such as cost-effectiveness and simplification of process, the establishment and development of a legal platform similar to the European model in Georgia would ensure the existence of best and diverse legal practice.

The popularity of the European model is growing and becoming more attractive for business entities due to the fact that the review and resolution of competition disputes through conciliation, mediation, or arbitration, allows them to choose by themselves how to resolve disputes related to the infringement of competition rules.

Georgia, taking into consideration the publicly announced direction of its approximation to European legislation and practice, still has an interesting journey ahead in this respect.

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