The journey to settlement

Mediating competition law disputes

*by **Suzanne Rab****

Almost all competition law cases and claims are resolved out of court. With increasing interest in Europe in private enforcement of competition disputes, it is natural to consider alternative dispute resolution (ADR) mechanisms – an umbrella term for a number of processes to settle disagreements between parties by extra-judicial means. The use of arbitration in competition cases is accepted. Comparatively less attention has been given to mediation. Mediation may briefly be described as a flexible and confidential process in which a trained neutral actively assists the parties to achieve a negotiated agreement of a dispute, with the parties in ultimate control of the decision to settle and its terms.

Why consider mediation in competition cases now?

European authorities, especially in the EU and UK, are promoting private enforcement of competition law disputes. This trend is expected to continue with the implementation of the consumer rights bill 2013 in the UK and the EU directive on damages in competition cases approved by the EU parliament in April 2014.

Parties to pending litigation will focus on preparing for the trial but part of that process will inevitably involve consideration of possible (out of court) settlement. The parties may resolve their dispute without the involvement of a third party, although in appropriate circumstances this can be useful to avoid problems and to reach a better settlement.

The use of ADR is not confined to cases where there is actual litigation or single party claims, and has been explored in the context of collective settlements. The Commission's recommendation on collective redress (June 2013) suggests that member states introduce opt-in collective redress for those harmed by competition law breaches. The recommendation provides that there must be effective means of ADR in order to complement court-based collective redress.

As part of the UK reforms, the government has decided to encourage ADR, although not make it mandatory. The reforms will introduce a new opt-out collective settlement regime for competition law claims in the Competition Appeal Tribunal (CAT). The claim by consumer organisation Which? against JJB Sports is a reminder of the challenges such cases face. The action was settled in January 2008 when JJB agreed to pay £18,000 to consumers who had bought replica football shirts. While this case was settled without formal mediation, it illustrates the potential for early settlement of competition cases, avoiding costs and attendant time and publicity. The introduction of a fast-track procedure for simpler cases is expected to make it even easier for a wider category of claimants to bring competition claims. However, such claimants will tend to have more limited resources, which may make mediation attractive.

What are the benefits (and drawbacks) of mediation?

Some of the benefits of mediation are particularly well suited to competition cases:

- Mediation can be more creative than litigation or other alternatives in reaching a solution beyond monetary compensation. This may allow the parties to continue doing business on more flexible terms than could be ordered by a court (for example, in supplier-distributor agreements).
- Competition cases before a competition authority can take years to resolve. Mediation can offer a more timely solution, saving costs and further damage to the competitive position of the businesses in the period of uncertainty before resolution.
- Large competition claims can have a significant emotional or relationship factor, especially where the parties were formerly in a close commercial arrangement. A mediation can offer the prospect of repairing relationships and setting a foundation for doing business in the future.
- Competition cases can raise novel points of law and complex economics issues. It can be in both parties' interests to avoid a precedent. This favours mediation and an outcome that focuses on interests rather than legal positions.
- Mediation can deal with cross-border cases in one forum. A claimant can deal with multijurisdictional losses and a defendant can deal with multiple claimants.

There can be a perception of a loss of image if a party considers that it may be viewed as weak or willing to compromise by deciding to enter mediation. However, this risk can be overstated. If mediation is going to be effective, this is because both parties are genuinely willing to compromise by focusing on their needs and not just their wants.

A party may consider that they will reveal information or a strategy that will be detrimental in ongoing or future legal proceedings. This risk can be minimised by the mediator ensuring that there are tight controls on confidentiality, particularly in relation to what information is imparted in individual meetings (between the mediator and Party A) and in all-party meetings (between the mediator, the parties and their advisers, as the case may be).

A party may consider that mediation is a distraction to trial preparation and that they want their day in court. However, rather than preventing the parties from having the matter resolved before a court, mediation can guarantee that will happen. The mediation may be a precursor to improved relations outside the court environment of cross-examination or it may inform or confirm the parties' belief that they want the decision to be taken out of their hands by having the dispute decided by a judge.

How does mediation in competition cases differ from other forms of ADR such as arbitration?

Mediation does not prevent the parties from pursuing other means of resolution if a satisfactory result cannot be achieved. The process is often contrasted with arbitration.

- Arbitration uses a neutral third party to hear evidence and

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reach a decision that can be binding. The mediator is not a decision-maker and works with the parties to see where their interests converge and where they can find a common position. Mediation does not ensure that there will be a final settlement or decision.

- Mediation is more flexible than arbitration and allows the parties to be in control of the outcome. The result of the mediation is not binding until it is included in a settlement agreement.
- Mediation is usually quicker than arbitration. The mediation itself can be convened quickly and may be resolved within a day or days, depending on complexity.

Mediation and arbitration are not mutually exclusive. For example, the parties can mediate first and then arbitrate only if the mediation does not prove successful.

Competition lawyers advising parties in the context of a mediation will need to consider the nature of the process and their role carefully. The importance of preparation cannot be underestimated. Since the process can be more free-form than proceedings before a competition authority, court or arbitrator, it is vital to be aware of the interests at stake beyond the strict legal positions. It may seem obvious but do not assume that it is "all about money" – even where an issue is presented as such. Lawyers must also be careful not to get too much in the way. The mediation is a rare opportunity for the parties to interact with each other (whether directly or through the mediator).

What types of competition case are best suited to mediation?

Some competition cases are more suitable for mediation than others. "Bet the company litigation" or cases where there is a disparity in bargaining positions can be good candidates for mediation. Mediation takes the dispute outside mainstream litigation with its associated costs, publicity and uncertainties.

Competition cases raising complex economics or IPR issues can often reach an impasse where the views of each party are far apart. The involvement of a specialist neutral (ie a mediator with competition law and economics expertise) can help achieve a resolution that realises value for all concerned.

Some private competition cases will not be an administrative priority for a competition authority (perhaps because they do not involve clear-cut infringements or are not sufficiently high profile). Mediation can present an alternative or parallel route towards a solution.

Is mediation being pursued in competition cases?

The empirical data on the use of mediation provides limited hard evidence of its use in competition cases. The mediation process is, by definition, confidential and without prejudice, which limits the scope for public visibility. However, beyond the anecdotal experience recounted by practitioners and parties, there are examples of its use and endorsement in competition cases.

Where the European Commission (the Commission) accepts commitments by merging parties as a condition for approval, these can buttressed by provisions for mediation if the merging parties do not comply with the commitments. For example, the Commission used a pure mediation commitment to resolve disputes arising from the implementation of a gas release programme in the DONG/ Elsam/ Energi E2 case. Mediation was also used to support the remedies package in the T-Mobile/Orange merger.

In the UK, mediation was used in the code of practice on supermarkets' dealings with suppliers, following the Competition Commission's investigation into the grocery sector in 2000. The code provided that the grocer must offer at its own expense the services of a mediator if disputes with a supplier arising under the code could not be resolved within 90 days.

Is there an untapped potential for mediation in competition cases?

Parties settle disputes without the assistance of a third party, whether settlement facilitator, independent expert, mediator or other third party neutral. Similarly, with authority, lawyers will settle cases on their client's behalf without the involvement of a neutral. This means that pragmatism tends to prevail in the sense that, if the benefits of mediation are sufficiently recognised or compelling, it will be used.

This raises a question of whether more should be done purposefully to address the use of mediation before something goes wrong in a commercial relationship. This would require a move away from whole-agreement dispute resolution clauses, which are silent on mediation. The inclusion of a mediation stage can, however, help control escalation of disputes or resolve them more cost-effectively.

The experience in telecoms suggests that, in the regulated sectors, there is potential in a tiered approach subjecting certain categories of disputes to the (optional) route of mediation before being subject to dispute resolution by the sector regulator. The EU Framework Directive provides a mechanism for commercial disputes to be resolved by a national regulatory authority (NRA). NRAs should have the option to refer the dispute to alternative means of dispute resolution such as mediation. If the dispute is so referred, either party may refer the dispute back to the NRA after four months if there is no resolution. The NRA should then decide on the dispute itself within four months of that referral to it.

Are businesses really likely to take up mediation?

The main goal of parties to a dispute is to spend their (valuable) time and money effectively in getting to a satisfactory outcome. Satisfaction may be achieved on a number of levels, whether substantive, procedural or emotional/psychological. Mediation is able to deliver benefits in all these areas. It can help the parties overcome deadlock. It can restore communication channels where value can be created in the parties continuing to do business with each other. Unlike litigation or arbitration, it can allow the parties to save face by deciding the outcome themselves and avoiding a precedent.

Mediation will not be suitable in all competition cases and there will be instances where a party is not willing to mediate and any attempts at it will prove counterproductive. Competition cases can and will be settled by other routes. However, simply settling a case can sometimes mean that additional value for the parties is overlooked in the process. The process of settlement can be as draining on the parties' resources (including human and reputational) as fighting a case out in court. Mediation, by contrast, can provide a route to unlocking unexpected sources of commercial value.