Antitrust Arbitration in Europe (Part I): Improving Private Enforcement by Removing Procedural and Evidential Barriers in Arbitration

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The Member States of the European Union ("EU") had a task that a very few has managed to complete: to implement the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 ("Damages Directive" or "Directive") by 27 December 2017. According to the website of the EU Commission, only ten Member States have thus far transposed the Directive in their national laws, whereas the remaining 18 countries are in different stages of the implementation process.

This Directive is the first EU legislation that addresses directly the private rights of actions for antitrust damages, and it was envisioned as a means for leveling the field among EU Member States by providing procedural, evidential and substantive minimum to be implemented in national legal frameworks. Namely, the main reason for a centralization of antitrust claims in only a few EU jurisdictions (for example, in the UK, the Netherlands, Germany, and France) was found to be a direct consequence of the claimant-advantageous procedural and substantive laws in these countries, among other features of their legal systems.

This attempt of achieving the uniformity not only encompasses private actions brought before national courts, but it also actively promotes and facilitates the use of other dispute resolution mechanisms, i.e. "consensual dispute resolution", to use the (somewhat unclear) terminology of the drafters of the Directive. However, while the position of the EU Commission is clearly to send a signal that there is a need for promotion of alternative dispute resolution mechanisms in this area, it does not provide clear guidelines as to how this is to be achieved.

Research shows that only Finland considered the possibility of the application of reformed laws on arbitration. This was not done explicitly in the act itself, but rather in the Government Bill. Still, it is certainly welcomed when a Member State takes a step further. The drafters of the Directive have not left parties without any incentive to arbitrate their disputes either. Article 19 of the Directive provides that "*the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement of competition law inflicted upon the injured party*", and that "*[a]ny remaining claim of the settling injured party shall be exercised only against non-settling co-infringers*".

Still, whereas the topic of antitrust arbitration is widely discussed in regards to the application of antitrust/competition laws by arbitral tribunals, thus far only a few authors have written about arbitrating antitrust damages claims. Perhaps the thought of arbitrating this type of claims could have been easily dismissed three weeks ago; however, in the meantime, the English High Court has changed this course by deciding on 28 February 2017 to stay the proceedings on antitrust damages claims which were commenced by Microsoft before this court due to an arbitration clause (Microsoft Mobile OY (Ltd) v Sony Europe Limited et al., [2017] EWHC 374 (Ch)). The Microsoft case offered a novel perspective as to whether arbitration clauses encompass antitrust damages claims that will be discussed in a follow up post (Part II). This post is aimed at pointing out which procedural and evidential barriers can be found within the existing arbitration framework when it is observed through the lens of the Damages Directive and private enforcement of antitrust damages claims in general.

Collective Redress: Designing Complex Antitrust Arbitration

Antitrust violation results with scattered harm for a large number of victims on a different level of a distribution chain, i.e. the harm can be caused both to direct purchasers and to indirect purchasers, who suffered the harm passed-on through overcharge. Hence, collective redress plays an important role in private antitrust damages actions.

Antitrust damages proceedings would involve multiple claimants on one side and (possibly) multiple respondents (competition law infringers) on the other side. These parties could, but not necessarily would have had concluded arbitration agreements with each and every one of them. Arbitration would in that regard be bipolar in a sense that there would be a group of claimants and a group of respondents, but not all of them would necessarily be in contractual relations and their contracts would not necessarily contain same arbitration agreements or designate same arbitral institutions.

The Damages Directive, however, did not oblige Member States to introduce procedural mechanisms for collective redress. Collective redress was, nevertheless, mentioned in both the Green Paper and the White Paper, which preceded the Damages Directive, and was also recommended by the Commission in 2013 to be introduced at a horizontal level.

Simply put, in order for antitrust arbitration to become a competitive dispute resolution mechanism for antitrust disputes, the effective and efficient rules on bipolar multi-party, multi-contract proceedings should be introduced. Otherwise, private claimants may have little if no incentive to pursue such claims individually due to the costs and legal risks involved.

Probably the first thing that comes to one's mind is the conflict between collective redress and the consensual nature of arbitration. However, the recent development in regards to corporate disputes in Russia has shown that these two are not incompatible at all. Besides, the arbitration legal framework already provides for several procedural tools in this regard: arbitration rules usually contain a provision on complex arbitrations, i.e. multi-party and multi-contract claims. Still, without an adequate framework, the involvement of multiple parties in antitrust arbitration will heavily depend on the consensual nature of arbitration.

While awaiting the change of the procedural framework either through the extended application of implementing laws to arbitration or through tailor-made arbitration rules, there is at least one interim solution which can be offered as a middle step. This is the suggestion to create alternative vehicles which will bring such claims instead of multiple claimants. An example of such a vehicle is the Cartel Damages Claims ("CDC"). The CDC is a special purpose vehicle which main task is aggregating individual claims from numerous cartel purchasers and lowering the economic barriers for the enforcement of these claims by enforcing them in its own name and on its own account against cartel members on a Europe-wide basis.

Vehicles such as the CDC could function in the arbitration field as well (perhaps they already do). This would not only lower economic barriers but also procedural barriers since it would, at least on a claimant's side, reduce the number of parties, and in that way it would ease access to justice and foster the private enforcement system for antitrust damages claims. Recent developments regarding the third party funding industry in relation to arbitration which shows that the lines between third party funders and law firms are becoming blurred open possibilities for this and other types of similar vehicles to be developed for the purposes of aggregating claims in arbitration.

Information Asymmetry and Disclosure: Expanding the Evidential Standard in Arbitration

The disclosure rules imposed by the Damages Directive are more or less novel to most civil law countries in the EU, but they are also recognized by the EU Commission as best-suited rules for this type of proceedings as

> "it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence". (Recital 15 of the Directive)

In this type of proceedings, the importance of disclosure should be recognized in arbitration as well, where it should outweigh the usual expectation of the parties to have expedited proceedings.

In order to fully understand why there is a need for the reform of the rules on disclosure of evidence in antitrust arbitration, one needs to look at what is received within the procedural "box" when parties agree to arbitrate their antitrust damages claims. In short, the current stance on the discovery/disclosure of evidence in arbitration is that although arbitrators are usually vested with such an authority under the umbrella of broad discretion, the climate regarding discovery in international arbitration has so far been rather unaccommodating.

The scope of application of the provisions in implementing laws should, therefore, be expanded on arbitration as well, or at least provided in a set of rules for antitrust arbitration. Furthermore, it would be important to establish the scope of persons to whom such an order for disclosure can be addressed by an arbitral tribunal, i.e. whether the tribunal would have the power to order disclosure to a person who is not a party to the dispute. This is perhaps one of the biggest disadvantages of arbitration when it comes to the resolution of private antitrust damages claims, as national courts will usually have much wider powers when making orders against third parties. Hence, it is necessary to determine whether the assistance of national courts to arbitral tribunals can be developed in this area.

On the other hand, consequences stemming from the lack of extension of the rules limiting disclosure to arbitration dealing with private antitrust claims may raise severe questions regarding the subsequent court review of an award. One such consequence may arise in a case when the tribunal orders disclosure of evidence that should not be disclosable according to the Directive, such as leniency statements and settlement submissions. At this point it is not clear in the doctrine and in the practice whether arbitral tribunals ordering disclosure of these or other restricted documents would be violating public policy, and risking setting aside of an arbitral award in that regard. Hence, it needs to be considered whether it is necessary, given the importance of, for example, leniency programs, to protect these documents more effectively from disclosure in arbitration.

To be continued…