Private antitrust enforcement in arbitration proceedings: theory and practice

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I. Introduction: Arbitration and Jurisdictional Theory

It has been widely acknowledged that arbitration within today's global economy constitutes one of the most effective means of private law enforcement.[1] Parties in commercial transactions, especially those with a purely international character, have increasingly indulged into referring their disputes to arbitral tribunals instead of courts. The ability conferred upon them to choose their own set of rules to be applied and in general the control they enjoy over the schedule and costs of the proceedings accompanied with the flexibility to fashion their own remedial solutions and, therefore, to manage the risks involved more efficiently, are among the most important issues that have influenced the recent trend towards more arbitration-clause agreements.[2]

However, in sharp contrast to the jurisdictional authority of ordinary courts, which emanates from and is limited by the binding procedural and substantive rules of each national legal system, the arbitration as an alternative method of private dispute resolution derives its authority and legitimatization from the express will of the parties involved to deduct from the state judicial function the settlement of a specific private dispute. In other words, arbitration is the mechanism by which the State, to whom the judicial function pertains, delegates part of its jurisdictional power to private parties.[3] Accordingly, there is a need for clarity regarding the exact boundaries within which an arbitrator may legitimately exercise his jurisdictional power in the light of the fact that arbitration constitutes a parallel and from an effects-based approach an equivalent procedure compared to the state judicial control.[4] Hence, the main characteristics of arbitration reveal a high level of similarity towards the judicial trial and review process: the subject of both procedures is the substantive settlement of a private dispute, a process which is activated by private enforcement actions, judged

[1] Willheim, Johannes P. (2002) "*Enforcement of EC Competition law in Arbitration Proceedings*", Global Counsel Competition Law Handbooks 2002, p.87 (available also at: www.practicallaw.com, visited at 19/11/2004)
[2] Ibid, p.88
[3] Koussoulis, Stelios (2000), *Jurisdictional Issues in International Arbitration*, p.9
[4] Kalavros, Konstantinos (1988), *Substantive Issues of Arbitration Law*, p.13

by an independent institution under a well-defined procedure, governed by the fundamental principles of equity and justice and leading to an enforceable and legally binding decision.[5]

In this context, the jurisdictional role of the state has a two facet dimension. On one hand, the state maintains its monopoly over the enforcement of the ensuing awards, independently of whether the relevant award has been issued by an arbitral tribunal or a court. On the other hand, however, there is a great concern that certain disputes should be exclusively adjudicated by the competent state organs, thus creating another area of state jurisdictional monopoly.[6] This concern has by large fuelled the discussion regarding the arbitrability of certain disputes and has interlinked in very interesting dimensions the concepts of arbitration and public order rules prevailing in (national and/or international) legal systems. The logic behind the concept of arbitrability lies upon the idea that the intervention of a public order rule, namely a rule that reflects some fundamental societal, economic and political principles which are not allowed to be modified, waived or altered in their substance by the free will of the parties to a private transaction, may render a dispute as inarbitrable.

II. Arbitrability and Competition Laws

1. The "public order" nature of competition laws

The concept of arbitrability has been substantially considered within the evaluation of competition-law rules, as their high importance for the operation of an economic, societal and political system chosen by the law-maker and mainly their direct interventionist role, have triggered many courts and commentators to consider whether antitrust claims are admissibly and legitimately arbitrable. Traditionally, courts have treated competition law rules as *"a charter of freedom that may be fairly compared to a constitutional provision"*[7] or referred to *"the extraordinary magnitude of the value choices made by the Congress"*[8]. In a much quoted dictum, the US Supreme Court has colourfully described the "public order" nature of antitrust laws:

> *"…Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the*

[5] Ibid, p.48 The main differences between the arbitration and the judicial process would include: the unique institutional nature of courts as statutory bodies within a public-law organized system and the duty imposed by law on courts to apply a specific set of rules regarding both the substantive and procedural issues of the dispute in question, Kalavros (1988), p.48-51.
[6] Koussoulis (2000), p.9
[7] *Appalachian Coals v. United States,* 288 U.S. 344, 359-360
[8] *United States v. Philadelphia National Bank,* 374 U.S. 321, 371

preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms…"[9]

Within the same spirit, the European Court of Justice has declared that:

"…according to Article 3(g) of the EC Treaty [now after amendment, Article 3(1)(g)], Article 85 of the Treaty [now after amendment, Article 81] constitutes ***a fundamental provision*** *which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market"* and later *that: "… the provisions of Article 85 of the Treaty may be regarded as a matter of* ***public policy*** *…" (emphasis added)*[10]*.*

2. The evaluation of arbitrability of competition law disputes

The evaluation of the arbitrability of a competition law dispute is mainly influenced by (a) the state policy for or against the arbitration itself as a settlement mechanism of any given dispute,[11] and (b) the application of public order rules in arbitration proceedings.[12]

(a) The evolution of state attitude towards arbitration

Arbitration has not always been a widely accepted settlement mechanism. Early cases represent classical examples of a judicial hostility and mistrustful stance towards arbitration. In the most prominent example of that era, the *Wilko* case of 1953, the US Supreme Court declared the reasons that justify the inefficiency of arbitration proceedings and, consequently, the inarbitrability of disputes arising out of the context of the Securities Act of 1933: the inadequacy of arbitrators to conceive the legal meaning of the statutory requirements of the said Act, the possibility that their award may be without explanation of their reasons and without a complete record of their proceedings, the limits of the judicial review under the Federal Arbitration Act, taken as a whole, led the Court to defend the proposition that arbitration is an inferior mechanism.[13] This hostile attitude had inevitably a negative

[9] *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610
[10] C-126/97 *Eco Swiss China Time Ltd. V. Benetton International NV,* ECR [1999] I-030055, para.36 and 39
[11] Samuel (1989), *Jurisdictional Problems to International Commercial Arbitration,* p.125-126
[12] Ibid, p.126 See also Born (1994), *International Commercial Arbitration in the United States,* p.322
[13] *Wilko v. Swean,* 346 U.S. 427

impact on the determination of the nature and the range of disputes that courts were ready to accept as arbitrable.

Thus, the *Wilko* decision heavily influenced the "arbitrability issue", but at the same time it also raised significant doubts in the US case-law and theory regarding the coherent application of its dicta. However, one had to wait more than 20 years to have the negative climate towards arbitration reversed, particularly in the seminal *Scherk* case which arose within the context of the Securities Exchange Act of 1934.[14] The *Scherk* decision of the US Supreme Court accepted the arbitrability of the relevant disputes on the ground that the provisions of the1934 Act were substantially different from those in the 1993 Act and mainly due to the truly international character of the agreement between the parties involved, which urged for this contractual forum-and-law selection in order for the orderliness and predictability of this international business transaction to be achieved. Under these circumstances, the Court declared that for it to refuse to enforce an international arbitration agreement would be *"a parochial refusal"* which *"would not only frustrate these purposes [i.e. the orderliness and the predictability of international business transactions] but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation"*.[15]

By its reasoning, the *Scherk* decision created a more favourable environment towards arbitration which was reflected in the so-called "new" or "second" trilogy of cases:[16] the *Moses*, the *Southland* and the *Byrd* cases.[17] Thus, new directions arose regarding arbitration in general and the concept of arbitrability in particular.[18] Therefore, it could be argued that the evaluation of the arbitrability concept reflects the historical movement from an era of hostility and restrictive evaluation of the arbitration itself towards a more liberal and expanding regime regarding the role and usefulness of arbitration, especially within the context of an increasingly interdependent global economy. This attitude change towards arbitration, from *Wilko* to *Scherk* and the subsequent trilogy, resulted inevitably to the enhancement of the width and depth of the arbitrability concept.[19]

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[14] *Scherk v. Albert-Culver Co.*, 417 U.S. 506
[15] Ibid, 417 U.S. 506, at 516
[16] Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VaLR, (1985) 1305 *et seq.*, Koussoulis (2000), p.13
[17] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, *Southland Corp. v. R. Keating*, 104 S. Ct., 852 and *Dean Witter Reynolds v. Byrd*, 470 U.S. 213
[18] Koussoulis (2000), p.14
[19] As Hirshman states it: *"In … the Trilogy, the Supreme Court … indicated that issues of arbitrability would be decided as a matter of federal law in accordance with the federal policy favoring arbitration"*, supra n.15, p.1307.

(b) The national sensitivities of "public order" concepts

As previously explained, the "public order" concept is inevitably linked to national core values reflecting public-law choices of a constitutional character, among which competition laws serve as an illuminating example. Within the arbitrational context, the coherent enforcement of these values has highlighted the national concerns for the proper delineation of the arbitrability of claims arising out of such public order legislative regimes. The previous paragraphs have proved the common route, fate and interdependence of the state attitudes towards arbitration in general and arbitrability in particular: the more liberal and favourable the attitude towards arbitration, the more expansive the role for arbitrators. However, equally crucial has been the fact that the application of the "public order" rule itself in arbitration proceedings has been gradually modified. One of the most striking examples of this evolving attitude towards the implications of "public order" in arbitration emanates from the French legislation and its subsequent interpretation by the courts.

Article 2060 of the French Civil Code forbids the conclusion of arbitration agreements for any dispute that affects public order. This rather vague wording led initially French courts to consider the concept of public order as *the* determinative factor of the arbitrability of any given dispute: courts used to preclude arbitration in all areas regulated by public order (compulsory) rules.[20] The trend, however, towards a more favourable attitude towards arbitration in general led gradually to the re-evaluation by the French courts of the application of the public order concept in arbitration proceedings. In the *Societe Almira* case,[21] the *Cour d' appel* reversed the previous case-law: according to this new case-law interpretation, the application of the public order concept does not render automatically a private dispute as inarbitrable; the only implication is that arbitrators are precluded from the recognition and enforcement of the consequences that the public order rule breached stipulates. Despite the enormous impact that the *Societe Almira* case had on the subsequent evaluation of the issue of arbitrability in France, it still kept open the enforcement reach of arbitrators when applying a public order legal rule. The gap closed irrevocably in the *Labinal* case which ordered that in the antitrust field the *Societe Almira* rule could be interpreted as precluding the arbitrators from imposing only the administrative and criminal sanctions that the applicable in any case antitrust legislation defines.[22]

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[20] Koussoulis (2000), p.21. See also, Mezger, *L' arbitrage commercial et l'ordre public*, Revue trimestrielle de droit commerciale, (1948) 611, at p.612.

[21] *Cour d' appel de Paris, Societe Almira Films,* RevA 1989, 711 *et seq.,* 715, with comments by Idot, 719-722

[22] *Cour d' appel de Paris, Labinal,* RevA 1993, 645

The same attitude towards the public order nature of antitrust law had been already endorsed by the US Supreme Court in the famous *Mitsubishi* case of 1985.[23] The Court rejected the old-fashioned mistrust and hostility towards the arbitrability of antitrust claims and confirmed a policy favouring the arbitral settlement of disputes arising from federal statutes of a public order nature. However, the Court proceeded with two important qualifications: firstly, it recognised that the public order nature of the US antitrust laws had to be respected by the arbitrators even though the parties had chosen the Swiss law as applicable, for it was the breach of the US antitrust laws that "created" the relevant claim, and secondly, it also recognised the possibility for a state control carried out at the recognition of the award phase in which a court may be asked to review whether the antitrust laws had been properly applied and fully respected.

The same qualifications have been also approved by the ECJ in two preliminary reference cases. The first qualification of the *Mitsubishi* decision was actually considered in the *Nordsee* case, where the ECJ confirmed that EC competition law, as public order rules, should be respected and applied by any arbitral tribunal, in any case that a private commercial transaction involves a restriction of competition that significantly affects trade between member states and irrespectively of the choice of law the parties involved have opted for:

> *"…Community law must be observed in its entirety throughout the territory of all the member states; parties to a contract are not, therefore, free to create exceptions to it".*[24]

The fundamental character of the EC competition law provisions has also been confirmed in the *Eco Swiss* case,[25] where the ECJ was confronted with the question as to whether the arbitrators were obliged to apply EC competition law *ex officio,* namely to apply EC competition law even though neither party had raised such an issue during the arbitration proceedings. The ECJ did not consider the issue directly, as this was a case referred to it under Article 177 of the Treaty by a national court before which the losing party took the position that there had been a violation of public policy. However, the ECJ, reflecting the second qualification of the *Mitsubishi* case, recognised in essence the public order nature of EC competition law and most

[23] *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth,* 473 U.S. 614
[24] Case 102/81 *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei etc.*, ECR [1982] 1095, para.14
[25] See supra, note 9.

importantly, the duty of member state courts when reviewing arbitral awards, to order annulment in case there is a breach of community competition law provisions:

> *"It follows that where [the] domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty".*[26]

3. Concluding Remarks

The above analysis leads to some concluding remarks:

(a) The issue of the arbitrability of antitrust claims has been heavily influenced by the evolution of the state attitudes towards arbitration in general. This evolving and interdependent relationship is best illustrated by the US Supreme Court jurisprudence which reveals most of the fluctuations arbitration encountered in its historical course.[27]

(b) The public order concept has been gradually removed from the so-called "positive" facet of the arbitrability concept, which is internationally regulated by Article 2(1) of the New York Convention.[28] Said article refers to arbitration agreements *"concerning a subject-matter capable of settlement"*.[29] This provision, following the favourable trend towards arbitration, is being widely construed[30] and indeed, encompasses and extents arbitrability to all previously debatable issues[31] with the exception of civil rights.[32]

(c) On the other hand, public order considerations have gained an increasingly significant role in relation to the "negative facet" of the

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[26] Supra, n.9, para.36 and 37
[27] Koussoulis (2000), p.10
[28] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed in New York, on 10th of June 1958.
[29] Analogous provisions may be found in national legislations, e.g. Article 867 of the Hellenic Code of Civil Procedure which defines as arbitrable private disputes that can be freely disposed by the parties in the underlying transaction.
[30] Koussoulis (2000), p.19
[31] Ibid, p.17 See also, Plant (1994), *"Arbitrability of Intellectual Property Issues in the United States"*, 5 AmRInt'lA 11-27 and McCormack (1994), *"Recent U.S. Legal Decisions on Arbitration Law"*, 11 Int'lA 73-74
[32] Samuel (1989), p.13

arbitrability.[33] This aspect of the arbitrability concept reflects the national concerns regarding the recognition and enforcement of arbitral awards and is internationally regulated by Article 5(2)(b) of the New York Convention which precludes the recognition and enforcement of an arbitral award if there is a breach of public policy rule on the country where enforcement is sought. Accordingly, an arbitral award in an antitrust dispute (and any dispute arising from an alleged breach of any public order rules) may be annulled due to the fact not that the dispute deals with those public order concepts, but due to the fact that public policy itself has been breached or not respected by the arbitral award.[34]

III. Practical aspects of EC competition law arbitration

1. Preliminary Reference and procedural power of arbitrators

One of the vital needs recognized by the EC Treaty itself has always been the uniform application of EC competition law throughout the entire community. Consequently, Article 234 (previous Article 177) permits member states courts and other tribunals to ask the ECJ for a preliminary ruling on the construction and the interpretation of the Treaty or the validity of other subordinate legislation. ECJ's judgments on that ground are less descriptive compared to its primary jurisdictional function, as the ECJ is not required to apply the law to the facts of the case presented to it but gives a rather abstract ruling which can serve as authoritative guidelines for the national court which has the task of ultimately deciding on the merits of the case.[35] However, preliminary reference cases have been extremely helpful to the issue of the uniform application of EC law, whereas in the particular field of EC competition law some of its most prominent authorities have their origins in such preliminary reference rulings. This well-established proposition is expected to be reinforced after the cumulative effects that may be felt due to the accession of ten new member states and the Modernization Regulation which, as will be analysed below, confers to member state courts and competition authorities the ability to apply EC competition rules in their entirety (and especially Article 81 par.3).

Within the context of arbitration proceedings, the outcome of a specific case may depend upon the interpretation of EC competition law. In such a case, there has

[33] Koussoulis (2000), p.20
[34] In a purely national context, see e.g., Article 897(6) of the Hellenic Code of Civil Procedure which orders the annulment of an arbitral award in case there has been a breach of public order rules.
[35] Korah, Valentine (2000), *EC Competition Law and Practice*, p.25

been some discussion whether, in the light of the similarities explained above between arbitration and state judicial control, an arbitral tribunal is entitled to request the ECJ to issue such a preliminary reference decision. The question was raised directly before the ECJ in the *Nordsee* case, quoted above.[36] The ECJ acknowledged the strong argumentation regarding the similarities between the activities of an arbitral tribunal and those of an ordinary court inasmuch as *"… the arbitrator must decide according to law and his award has, as between the parties, the force of res judicata, and may be enforceable if leave to issue execution is obtained"*.[37] However, the court concluded that *"those characteristics are not sufficient to give the arbitrator the status of a "court or tribunal of a member state" within the meaning of Article 177 [now 234] of the Treaty"*, mainly due to the fact that there is not a sufficiently close link between the arbitration proceedings and the state.[38] The ECJ, though, went one step further when it also acknowledged that the course of arbitration proceedings can be subject of a preliminary ruling in cases where national courts or tribunals within the meaning of Article 234 are called to examine and interpret questions of community law *"either in the context of their collaboration with arbitration tribunals, in particular in order to assist them in certain procedural matters or to interpret the law applicable, or in the course of a review of an arbitration award"*.[39] In such cases, it is for the national courts and tribunals to ascertain whether it is necessary to refer the case to ECJ.[40] However, the availability of the first option, namely the collaboration between arbitral tribunals and national courts or tribunals, is to be considered within the national (procedural and substantial) legislation context. Thus, it is left to national legislation to define the terms and conditions of such collaboration.

2. The Modernization Regulation and its implications in arbitration proceedings

On 1st May 2003, Council Regulation (EC) 1/2003 of 16th December 2002 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty[41] became effective, replacing its legendary predecessor Regulation 17/62. The key changes the new Regulation introduced could be summarized as follows: first, the system of prior notification and authorization is abandoned, which means that private undertakings no longer need to notify their respective agreements to the Commission in order to avoid the risk of nullity (Article 81 par.2) or to avoid fines, but

[36] See above, n.23
[37] Ibid, para.10
[38] Ibid, para.10 and 13
[39] Ibid, para.14
[40] Ibid, para.15
[41] OJ L1, 16.12.2002, p.1

have to assess their commercial agreements themselves.[42] This new approach is the institutional formulation of a system that had been already tested within the context of the application of various Block Exemption Regulations (e.g. Regulation 2790/99 regarding the application of Article 81(3) on vertical restraints); secondly, Regulation 1/2003 also abandons the prior centralized notification and authorization system regarding the application of Article 81(3). Under the new regime, Article 81(3) can be directly invoked by parties before a national court or competition authority which can decide whether its conditions are fulfilled and grant an exemption from the application of Article 81(1).[43] Finally, Regulation 1/2003 provides a mechanism of close cooperation between the Commission, national courts and national competition authorities in order to ensure the uniform application of EC competition laws in an enlarged EU.[44]

These changes have raised new issues regarding the role of arbitration. On the one hand, there have been concerns that the new competition regime which abolishes the Commission's monopoly over the application of EC competition laws will inevitably have short-run undesirable side-effects regarding the uniform application of EC competition law throughout an enlarged European Union of 25 member States.[45] These side-effects are expected to be especially felt in the new acceding States of Central and Eastern Europe, since their national courts and competition authorities are ill-equipped and not that experienced in applying the often complicated – legally and factually – EC competition laws. That assumption, being in practice realised, will inevitably lead to more commercial agreements being concluded under the condition that any future dispute will be resolved within arbitration proceedings. However, a trend to even more arbitration agreements naturally raises the question of the possible direct applicability of Article 81(3) by arbitral tribunals, since Regulation 1/2003 does not contain any express provision regarding arbitration despite the fact that both at a community and national level the significant role of arbitration as an alternative and private dispute resolution mechanism is recognised.

In order to assess the issue in question, we have to evaluate the rationale of EC competition law reform and the legislative history that led to the adoption of Regulation 1/2003. Hence, one of its rationales included the encouragement of the

[42] Article 1(2) of Regulation 1/2003
[43] Articles 5 and 6 of Regulation 1/2003
[44] Article 12-16 of Regulation 1/2003
[45] Willheim, Johannes (2004), *Coping with Euro-defenses in International Franchise Systems: Advantages of Submitting Franchise Disputes in the EU to Arbitration*, The University of Chicago Law School, Franchise Law Seminar, Winter Quarter 2004, p.4 (available at: www.aija.org/pdf3/antitrust-franchisepaper-01.pdf)

private enforcement of EC competition law according to the concept of private antitrust litigation in U.S.. Recital 7 of Regulation 1/2003 provides that: *"National courts have an essential part to play in applying Community competition rules. When deciding disputes between private individuals, they protect the subjective rights of Community law, for example by awarding damages to the victims of the infringement… They should therefore be allowed to apply Article 81 and 82 of the Treaty in full"*. On a strict analogy, if the underlying rationale is the enhancement of the role that private antitrust enforcement has to play in EU, there is nothing to compel the exclusion of arbitrators from applying Article 81 and 82 *in full*. This exclusion would only have the effect to undermine the whole logic behind arbitration as a dispute resolution mechanism which lies to the parties' intention to submit their respective disputes exclusively to arbitration, and all that within an international legal regime which favours increasingly the role of arbitration. However, it is well established that both the Commission and the Council were aware of the effectiveness of arbitration as an alternative form of antitrust enforcement and it is the Commission itself that has accepted arbitration in a number of cases, as a method of securing the compliance with commitments undertaken by companies involved in merger proceedings.[46] Accordingly, it could be argued that if the Council intended to exclude arbitral tribunals from applying Article 81(3), then it would have expressly stated it by including a relevant provision in Regulation Article 1/2003;[47] in its present form, Regulation 1/2003 offers to arbitrators the possibility of applying Article 81(3).

Otherwise, having the parties agreed to refer their respective disputes to arbitration, they would have found themselves bound not to have their commercial relationship governed by Article 81(3) at all, as no institutional body would be competent to apply it: neither the arbitrators as they would be able to enforce the prohibitions of Article 81(1) but not to save an infringing agreement under Article 81(3), nor the Commission after the Modernization Regulation. There would remain room only for national courts either in the form of parallel proceedings for a declaration of the applicability of Article 81(3) or in the form of an appeal against an arbitral award that did not take into account the said Article. However, this option would undermine the whole concept of arbitration,[48] as it would only lead to an unnecessary and unattractive bifurcation of issues.[49]

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[46] Willheim (2002), supra n.1, p.85 and 88
[47] Ibid, p.88
[48] Ibid, p.87
[49] Lomas, Paul, *"Arbitration: Jurisdiction over EC Competition law issues"*, PLC May 2004 (available at www.practicallaw.com, visited at 19/11/2004)

On the other hand, arbitral tribunals are not expressly mentioned within the mechanisms adopted to secure the uniform application of EC competition law. However, that fact alone could not rule out the role for arbitrators within the private antitrust enforcement system. For, firstly the mechanism adopted by the Regulation does not guarantee in any case a system of absolute uniformity: courts, and rightly so, will remain free to issue a judgment according to their understanding of EC competition laws reflecting their respective legal culture and tradition. The interventionist role of the Commission and/or national competition authorities before national courts with *amicus curiae* briefs can not be overestimated as these *amicus curiae* are not of a binding nature. Secondly, arbitral tribunals may establish other, less formal, means of communication with the Commission or national competition authorities, even though they will not be officially part of the network established by the Regulation.[50] Thirdly, the aim behind these mechanisms (collaboration, network, etc.), i.e. the aim of uniformity, may be said that targets less-experienced national courts pursuing the prevention of any possible local favouritism by such courts.[51] The same fear does not apply to the same degree in the context of international arbitration where specialised arbitrators may be in a better position to accommodate objectively the requirements of a fact-intensive enquiry in an antitrust dispute.

IV. Conclusion

The above analysis reveals the highly important role arbitration may play in the success of private enforcement of EC competition law. Although arbitration has mainly a corrective nature by awarding compensation for those aggrieved by anticompetitive practices, it may also have to a substantial extent the necessary deterrent effect that characterizes the public enforcement of EC competition law. On the other hand, arbitration may actually assist public agencies and/or the Commission in the sense that it may fill an "enforcement gap" allowing agencies to concentrate on more serious infringements of EC competition law that affect the competitiveness of European economy. The European institutions should recognize those possible positive effects of arbitration proceedings as an alternative private enforcement mechanism by encouraging a productive interplay between institutionalized arbitral tribunals and national competition agencies, including the Commission. The road to an optimally efficient enforcement of EC competition law goes through the simultaneous employment of public and private enforcement mechanisms and this proposition is nowadays well recognized. It remains to be seen

[50] Willheim (2002), supra, n.1, p.87
[51] Willheim (2004), supra n.43, p.22

whether the European competition law tradition will encompass all the “weapons” it can use. And, arbitration is for sure an important one.