PRIVATE ENFORCEMENT OF COMPETITION LAW – THE ROLE OF MEDIATION

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Competition litigation is set to increase as claimants become more aware of their rights. Indeed, that pace will quicken as further competition law reforms take effect and individuals who are harmed have more effective rights of redress. The aim of this article is to identify the major practical and legal issues that should be taken into account when considering mediation.

WHY MEDIATE?

My experiences have led me to conclude that mediation offers an excellent forum for resolving these complex, and what would otherwise be very expensive, claims. Such claims can thereby be resolved in private whilst preserving confidentiality. It is thus possible to avoid what the defendant may regard as unwanted scrutiny by the press or the competition regulators. Mediation can also preserve ongoing commercial relationships, whereas litigation often damages them.

If the dispute were to be left to the civil courts to decide, the outcome can often be difficult to predict as most High Court judges are on unfamiliar ground when dealing with competition cases. On the other hand, mediation leaves the parties in control of the process, and the outcome.

WHEN TO MEDIATE

If there is a dispute, it is as important in a competition case as any other to identify the client's commercial objectives. Once these are identified, it is necessary to come up with a strategy to manage the dispute. That strategy will vary, depending on whether the claimant is an innocent victim or is also implicated in the anti-competitive behaviour. It will also vary depending on whether the defendant has already been the subject of adverse decisions of competition regulators or courts. For the purposes of this article, I have approached the question of mediation from the perspective of a dispute involving innocent claimants, where there has not been any relevant adverse decision by a competition regulator or court affecting the defendant.

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If the client's objectives (or a principal objective) are to resolve the dispute, then negotiation and mediation should be placed at the heart of the strategy from the outset. Failure to do so will mean that the opportunity to negotiate or mediate the dispute to a satisfactory resolution may be lost. This is simply because of the importance of secrecy to defendants in these types of cases: from a defendant's perspective, much of the damage has been done as soon as the allegation has become public and settling the claim with unseemly haste may damage its reputation further. Often, given the public relations and regulatory consequences, defendants have little alternative than to fight on. Accordingly, mediations are most effective before the dispute has been made public, court proceedings have been instituted or complaints lodged with regulators.

HOW TO MEDIATE

The following are useful checklists for the benefit first of claimants, secondly, defendants, and thirdly, both claimants and defendants.[2]

1 Checklist for claimants

- For small and medium-sized businesses, taking on a large company and asserting breaches of competition law are both time consuming and costly. Accordingly, if there are others who have suffered similarly, they should band together and speak with a united voice.
- Establish a negotiating committee that comprises an odd number, preferably no more than three. Ensure that it has full authority to seek advice and to represent the entire group.
- Put together a fighting fund and share the financial burden.
- Some claimants may be in an ongoing commercial relationship with the defendant. Those who have ceased trading or have even gone into liquidation as a result of the anti-competitive practices should be invited into the group, as this adds to the group's critical mass and provides tangible evidence of the effect of the anti-competitive behaviour. Also, those who have ceased trading can benefit from any goodwill the defendant may have towards those who still have commercial relationships with it. That goodwill and association may provide them with an invitation to the negotiating table when they would stand no chance by themselves.
- Work through a fully thought-out strategy. Depending on the type of case, prepare in final draft form:

  (1) a complaint to the EC Commission and/or Office of Fair Trading;
  (2) a statement of case fully particularising the claim;
  (3) letters to local MPs and MEPs; and
  (4) press releases for use as the campaign unfolds (use a good public relations company or a law firm with that capability).

[2] Competition litigation involves complex factual and legal issues. Professional advice should always be taken on the application of the law, and the tactics to be adopted, in any particular case.

- The best approach then is to let the defendant know that you have all the bullets ready to fire, but not to pull the trigger until you have the opportunity to sit down and negotiate, whether directly or, preferably, through mediation.
- The defendant will want to keep all the bullets in the gun, no matter how 'confident' it might be that the claim is unfounded.
- The simple fact is that if there is any substance to the allegations and the regulators take up the complaint, the potential fines which can be levied by the EC Commission or the Office of Fair Trading can make the value of the claimants' claims appear modest.
- The defendant will be more inclined to settle, and settle quickly, the more organised and efficient the claimants appear to be, and depending on the extent to which the defendant wants to continue to trade with the claimants.
- It is vital that the value of the claimants' claims is realistic and will withstand close scrutiny. Engage a forensic accountant to audit the figures, comment on the claim and play devil's advocate, even if the claimants have put together their quantum figures using in-house accountants.
- Consider using econometric analysts to assist in defining the relevant product and geographic markets.
- Ensure that there is clear agreement between the claimants as to how the proceeds of any settlement are to be divided, before a settlement is achieved. This will help avoid the possibility of any disputes between the claimants after the event. Also, the process of distributing any funds to claimants must be transparent and should be properly audited.

2 Checklist for defendants

- Take allegations of anti-competitive practices seriously and undertake an audit to access the risk. External legal advisers should do this task, so as to preserve legal professional privilege insofar as possible.
- A defendant should not underestimate the ability of small businesses to unite behind a common cause.
- Probe, test and challenge any weaknesses in the claimants' case. Obvious areas include the definition of the relevant product and geographic markets, the quality of evidence supporting the allegation of anti-competitive conduct and quantum of loss.
- Make sure the commercial people with the ongoing commercial relationships remain involved and do not abrogate all responsibility to the legal team.

3 Checklist for both claimants and defendants

- Choose an experienced mediator who has the requisite skills and experience of this type of case or similar complex cases. If the mediator is not familiar with competition law, he or she should be assisted by a pupil mediator who is.
- Be thoroughly prepared.
- Be creative as to possible solutions and be realistic as to the outcome.
- If not already present, claimants should consider introducing, if possible, a non-competition law-based claim as an escape route for the defendant. Few people would look

twice at a settlement resolving a breach of contract claim or agency dispute.

- If there are confidentiality provisions, such as in a mediation agreement or a settlement agreement, where there are multiple claimants and defendants, each should individually sign a notice specifically confirming and recording their understanding of the confidentiality provisions.
- Finally, a note of caution – any settlement agreement must be competition law-compliant. If not, all the parties to it might be susceptible to scrutiny by the competition regulators and exposed to potential fines. This is one reason why the mediator ought to be familiar with competition law or have support from someone who is.