Arbitration under Commitments of the EC Merger Regulation

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Arbitration under Commitments

Introduction

- To date: use of arbitration in more than 30 cases
- First case Elf/Minol of 1992
- Nearly all past cases involve access to networks, key technology, infrastructure, film content, etc.
- US experience: use of arbitration by FCC in satellite tv case (GM/Hughes/News Corp.) concerning prices, terms and conditions of platform access
- No procedure completed with commercial arbitral award on the merits
- Decision of Agecom in Newscorp/Telepiù

Remedies Policy – Access Commitments

Commission’s Remedies Notice of 2000:

- Whilst being the preferred remedy, divestiture is not the only remedy acceptable to the Commission.
- Change in the market structure resulting from a proposed concentration can lead to major barriers or impediments to entry into the relevant market. Such barriers may arise from control over infrastructure, or key technology including patents, know-how or other intellectual property rights. In such circumstances, remedies may aim at facilitating market entry by ensuring that competitors will have access to the necessary infrastructure or key technology.
- Approach confirmed by CFI in Gencor and ARD: remedies structural as they aim at resolving a structural problem, namely market access by third parties.
Monitoring of Commitments

Effective monitoring and implementation of such commitments required, involving potentially unlimited number of players

>>> Mechanism for self-enforcement

- Dispute resolution has to lead to quick and final settlement
  - To ensure effective implementation of commitments
  - To quickly remove competition concerns

Specific tasks of implementation

Disputes may concern terms and conditions of access as defined in commitments:
- Non-discriminatory manner
- Fair/reasonable and transparent terms
- Price formula
- Technical issues of cooperation with third parties
  - Effective monitoring and implementation of such commitments required, involving potentially unlimited number of players
- Close to tasks of regulatory agency

Legal Framework/1

Merger Regulation: Commission has exclusive competence:
- Assessment of transactions
- Monitoring of enforcement of commitments

Arbitration:
- No delegation of Commission’s powers, does not affect statutory powers of Commission
- Essential part of the commitments submitted by merging parties

Arbitration confirmed in CFI judgment ARD/Commission of 30 September 2003
Legal Framework/2

- Twofold nature of arbitration clause:
  - Part of the commitments
  - *Erga omnes* offer to third parties
- Twofold nature of arbitration proceedings:
  - Arbitration resolves dispute between private parties by private law instruments
  - Implements commitments and Commission decision

Legal Framework/3

- Leads to "parallel" responsibilities:
  - Commission responsible for overall monitoring of commitments
  - Responsibility to oversee arbitration, Commission can in particular take action if merging party does not comply (ARD)
  - Arbitral tribunal responsible for resolving dispute
  - Arbitral tribunal not a regulator, cannot substitute it for the Commission, e.g. review clause
- Consequences for the arbitral procedure:
  - Maintain independence of arbitral tribunal
  - Co-operation with Commission

Types of Arbitration

- Commercial arbitration included in a fully-specified contract:
  - Reuters/Telerate
  - Shell/DEA
- Arbitration via regulatory agencies:
  - Newscorp/Telepiù
  - Alcatel/Finmeccanica/Alcatel Alenia
  - T-Mobile/tele.ring
- Specific features for "commercial" arbitration for monitoring remedies
Types of Cases

- Different types of cases: recent examples:
  - Airline cases: Air France/KLM; Lufthansa/Swiss; Lufthansa/Eurowings
  - Licences of technology: Alcan/Pechiney II; Alcatel/Finmeccanica/Alcatel Alenia Space
  - Other access: News corp/Telepiù; DaimlerChrysler/Deutsche Telekom/JV; Piaggio/Aprilia

Axalto/Gemplus – Assessment and Remedies

- Competition problems
  - Using combined technology/patent families to stop licensing to competitors or to increase their costs via “patent attacks”
  - Using strong positions in over-the-air (“OTA”) platforms for management of SIM cards and SIM cards themselves to discriminate against other SIM cards suppliers
- Remedies
  - Non-exclusive licence of the Patent Families on fair, reasonable, and non-discriminatory terms and conditions
  - Disclosure of interoperability information to any competitor
- Monitoring:
  - Monitoring Trustee
  - Fast track arbitration procedure

Axalto/Gemplus – Details of arbitration clause

- Mediation period of 10/15 working days upon written request by third party
- Proposal by Monitoring Trustee within 8 working days
- Requesting party may serve Notice afterwards
  - All issues of fact and law
  - Shall contain a single proposal for licence
  - Comments on appropriateness of Trustee proposal
- Answer within 10 working days
  - All issues of fact and law
  - Single proposal for licence
  - Appropriateness of Trustee proposal
Axalto/Gemplus – Details of arbitration clause

- Tribunal consisting of three arbitrators
  - Two nominated by parties in request and answer
  - Chairman nominated by the two, or, if failure to agree, by Arbitral Institution
- ICC rules, in English, Paris
- Fast-track procedure: all procedural deadlines to be shortened as far as admissible and appropriate
- Collection of evidence
  - May request information from parties, including past licences
  - May appoint experts
  - May ask Trustee for assistance
- Burden of proof: prima facie rule

Axalto/Gemplus – Details of arbitration clause

- Involvement of Commission
  - Receives all written submissions by parties
  - Receives all orders, interim and final awards
  - Can file amicus curiae briefs
  - Can be present at hearing
  - In case of disagreement on interpretation of commitments, Tribunal may ask the Commission
  - May publish final award
- Applicable laws:
  - Commitments, Commission Decision
  - EC Merger Regulation
  - EU law
  - French law

Axalto/Gemplus – Details of arbitration clause

- Decision of the Tribunal
  - Shall specify action
  - Tribunal can select one of proposals in entirety
  - But also impose alternative clauses or royalty between the royalties proposed
  - Decisions taken by majority, if no majority by chairman alone
  - Final and binding decision of dispute
  - Judgment to be rendered in one month, if both parties agree within three months