

Reflections on the Role of the European Commission as Amicus Curiae in International Arbitration Proceedings

Carl Nisser and Gordon Blanke*

 Amicus curiae; Competition law; Confidentiality; Dispute resolution; European Commission; International commercial arbitration

1. Introduction: preliminary reflections

The present article sets out best practices that the European Commission (the “Commission”) and the international arbitrator (the “arbitrator” or the “arbitral tribunal”, as the case may be)¹ would—in

* Carl Nisser is a Permanent Consultant to SJ Berwin LLP, London, as well as the Swedish Member of the International Chamber of Commerce (“ICC”) Task Force for Arbitrating Competition Law Issues as well as of the ICC Commission on Arbitration and the Commission on Competition. Gordon Blanke MCI Arb is a member of the ICC Task for Arbitrating Competition Law Issues as well as the ICC Commission on Competition and the ICC UK National Committee. He currently practices as a solicitor with the International Arbitration Group of SJ Berwin, LLP. The present article summarises the major aspects of a “Draft Best Practice Note on the European Commission Acting as Amicus Curiae in International Arbitration Proceedings”, which the authors have submitted to the ICC Task Force for Arbitrating Competition Law Issues for the latter’s consideration. For the avoidance of doubt, the views expressed in the present article are those of the authors alone and do not reflect the views of nor in any way bind the ICC Task Force or any other ICC related organisation nor the ICC itself nor indeed SJ Berwin LLP.

1 For the purposes of the present article, the terms “arbitrator” and “arbitral tribunal” are used interchangeably, unless otherwise specified.

the authors’ view—be well advised to apply by way of guidance in their mutual dealings within the course of international arbitral proceedings.² A number of these best practices may, at first sight, seem controversial to the extent that they have not yet been tested in real practice.³ Accordingly, the present guidelines only seek to set out what the authors *consider* to be best practice in terms of the Commission’s involvement as amicus curiae⁴ in international arbitration proceedings. For the avoidance of doubt, the proposed best practices are not meant to bind either the Commission or the Arbitrator, and are hence to be understood as mere guidelines to facilitate and guarantee the successful employment of arbitration as a mechanism in EC competition law related arbitral proceedings, such as specified below.

As a note of caution, for the purposes of the present article, the term “amicus curiae” is to be read broadly as encompassing any involvement of the Commission in remedy related and ordinary EC antitrust arbitrations.⁵ For the avoidance of doubt, the term, therefore, embraces both the Commission’s *active* as well as *passive* involvement in international arbitration proceedings to the extent that in addition to answering requests for assistance by the arbitral tribunal, the Commission may like to make contributions to the proceedings in defence of the Community public interest of its own motion. This definition of the amicus curiae concept thus stays in line with the meaning given to it within the framework of the Modernisation Regulation⁶ and the Commission Notice on the co-operation between the Commission and the Member State courts in EC antitrust related matters,⁷ both of which are—however—confined in their application to a litigious context and do therefore not extend to the conduct of arbitral proceedings.

2 Comprising both ad hoc and institutional arbitral proceedings.

3 Please, note that the authors are not aware of any instances in which the European Commission has in fact acted as amicus curiae in arbitral proceedings to date.

4 Latin for “friend of the court”. In the context of international arbitration proceedings, for reasons of semantic consistency, it might be more appropriate to speak of the Commission’s role as “amicus arbitri” (latin for “friend of the arbitral tribunal”). For further detail on the definitional scope of the amicus curiae concept for the purposes of the present article, see below.

5 For a definition of “remedy related arbitrations” and “ordinary EC antitrust arbitrations”, see sections 2.1 and 2.2 below.

6 i.e. Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty, [2003] O.J. L1/1. By analogy, see especially Art.15 of the Modernisation Regulation.

7 i.e. the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Arts 81 and 82 EC, [2004] O.J. C101/54.

2. Reflections on background and objectives

In today's global economy, international arbitration has moved to the forefront of alternative dispute resolution ("ADR"), including with regard to the adjudication of the correct implementation or the non-implementation of especially behavioural⁸ commitments⁹ in EC antitrust and merger control proceedings.

The following sections of the present article discuss the essential parameters for the reflections undertaken at s.3 below on the desirable content of the actual best practices proposed by the authors.

2.1. Remedy related arbitrations¹⁰

Over recent years, the Commission has come to form a discrete practice of using arbitration clauses as a mechanism for enforcing third party rights derived from the above-mentioned commitments (the "arbitration commitment")¹¹ in the aftermath of the Commission's original commitment decisions (the "commitment decision") (hereinafter referred to as "remedy related arbitrations").

In this sense, international arbitration has appeared to be an ideal tool to provide for the parties' medium and long-term compliance with the behavioural

commitments which they have undertaken in order to obtain from the Commission either clearance of their proposed merger¹² or an individual exemption of their anti-competitive agreement¹³ under the relevant EC antitrust¹⁴ and merger control¹⁵ provisions.

12 By way of example, see Case IV/M.235, *Elf Aquitaine-Thyssen/Minol*, September 4, 1992, [1992] O.J. C232; Case IV/M.214, *Du Pont/ICI*, September 30, 1992; Case COMP/M.259, *British Airways/TAT*, November 27, 1992, [1992] O.J. C326/10; Case COMP/M.616, *Swissair/Sabena II*, July 20, 1995, [1995] O.J. C200/10; Case COMP/M.623, *Kimberley-Clerk/Scott*, January 16, 1996, [1996] O.J. L183/1; Case IV/M.877, *Boeing/McDonnell Douglas*, July 30, 1997, [1997] O.J. L336/16; Case COMP/M.938, *Guinness/Grand Metropolitan*, October 15, 1997, [1998] O.J. L288/24; Case IV/M.1185, *Alcatel Thomson CSF-SCS*, June 4, 1998, [1998] O.J. C272/5; Case IV/M.1578, *Sanitec/Sphinx*, January 1, 1999, [2000] O.J. C294/1; Case IV/M.1309, April 28, 1999, [1999] O.J. C109/4; Case COMP/M.1601, *Allied Signal/Honeywell*, December 1, 1999, [2001] O.J. L152/1; Case COMP/M.1684, *Carrefour/Promodès*, January 25, 2000, [2000] O.J. C164/5; Case COMP/JV.37, *BskyB/Kirch Pay TV*, March 21, 2000, [2000] O.J. C110/45; Case COMP/M.1795, *Vodafone Airtouch/Mannesmann*, April 12, 2000, [2000] O.J. C141/19; Case COMP/M.1846, *Glaxo Wellcome/Smithkline Beecham*, May 8, 2000, [2000] O.J. C170/6; Case COMP/M.2050, *Vivendi/Canal+/Seagram*, October 13, 2000, [2000] O.J. C311; Case COMP/M.1751, *Shell/BASF/JV-Project Nicole*, March 29, 2000, [2000] O.J. C142/35; Case COMP/M.2389, *Shell/DEA*, December 20, 2001, [2003] O.J. C15/35; Case COMP/M.2530, *Südzucker/Saint Louis Sucre*, December 20, 2001, [2003] O.J. L103/1; Case COMP/M.2533, *BP/E.ON*, December 20, 2001, [2002] O.J. C276/31; Case COMP/M.2621, *SEB/Moulinex*, January 8, 2002, [2002] O.J. C49/18; Case COMP/M.2803, *Telia/Sonera*, July 10, 2002, [2002] O.J. C201/19; Case COMP/M.2416, *Tetra Laval/Sidel*, January 13, 2003, [2004] O.J. L43/13; Case COMP/M.2876, *NewsCorp/Telepiù*, April 2, 2003, [2004] O.J. L110/73; Case COMP/M.2903, *DaimlerChrysler/Deutsche Telekom/JV*, April 30, 2003, [2003] O.J. L300; Case COMP/M.3083, *GE/Instrumentarium*, September 2, 2003, [2004] O.J. L109/1; Case COMP/M.3225, *Alcan/Péchiney (II)*, September 29, 2003; Case COMP/M.3280, *Air France/KLM*, February 11, 2004, [2004] O.J. L60/5; and Case COMP/M.3570, *Piaggio/Aprilia*, November 22, 2004.

13 By way of example, see Decision 78/253, *Campari*, December 23, 1977, [1978] O.J. L70/69; Decision 89/467, *UIP*, July 12, 1989, [1989] L226/25; Decision 93/403, *EBU/Eurovision*, June 11, 1999, [1993] O.J. L179/23; Decision 99/329, *P&I Clubs*, April 12, 1999, [1999] O.J. L125/12; and Decision 99/781, *British Interactive Broadcasting/Open*, September 15, 1999, [1999] O.J. L312/1. Please, note, however, that with entry into force of the Modernisation Regulation as of May 1, 2004, the Commission has ceased to be empowered to grant individual exemptions under Art.81(3) EC. For the purposes of the present article, however, it should be borne in mind that remedy related arbitrations might still be triggered by arbitration clauses included in remedy packages under Art.81(3) EC before that date.

14 See Art.81(3) EC.

15 See Council Regulation 139/2004 on the control of concentrations between undertakings, [2004] O.J. L24/1 replacing Council Regulation 4064/89 on the control of concentrations between undertakings, [1989] O.J. L395/1,

8 Please note that the use of international arbitration in the context of structural commitments is negligible and has, to date, only occurred twice, namely in Case COMP/M.2268, *Pernod Ricard/Diageo/Seagram Spirits*, May 8, 2000, [2002] O.J. C16/13; and Case COMP/M.1671, *Dow Chemical/Union Carbide*, May 3, 2000, [2001] O.J. C245/1. Given the infrequent occurrence of such cases in real practice, the present article focuses on the EC Commission's role as amicus curiae in arbitral proceedings on the correct or non-implementation of behavioural commitments by the parties concerned. Further, in the context of structural remedies aiming at the divestment of the contracting parties' assets or (parts of their) business, rather than to arbitration, the Commission would normally resort to the nomination of a so-called monitoring or divestiture trustee to deal with the effective sale of the assets or business concerned. For further detail, see Best Practice Guidelines for Divestiture Commitments, at <http://europa.eu.int>

9 For a definition of behavioural, as opposed to structural remedies, see the Commission Notice on remedies acceptable under Council Regulation 4064/89 and under Commission Regulation 447/98, [2001] O.J. C68/3.

10 See M. Blessing, *Arbitrating Antitrust and Merger Control Issues* (Helbing & Lichtenhahn, Swiss Commercial Law Series, 2003). See also G. Blanke, *The Use and Utility of International Arbitration in EC Merger Remedies* (Europa Law Publishing, forthcoming in April 2006).

11 For the avoidance of doubt, the arbitration clause constitutes one of the commitments given by the contracting parties within the framework of the commitment decision and is, therefore, for ease of reference, referred to as the arbitration commitment.

In addition, according to the Modernisation Regulation, where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Arts 81 and 82 EC, it may by decision require the infringing parties to bring such infringement to an end by, inter alia, undertaking behavioural commitments addressing the Commission's competition concerns.¹⁶ The Commission's incorporation of international arbitration into the remedy mechanisms in these cases raises the issue of the appropriateness of the Commission's involvement as *amicus curiae* in remedy related arbitrations, especially given that the ultimate responsibility for the correct implementation of the remedies concerned remains with the Commission.

2.2. Ordinary EC antitrust arbitrations

In light of the recent modernisation of EC antitrust law, which has given rise to the procedural decentralisation of the antitrust rules and the self-assessment of private companies under Art.81(3) EC,¹⁷ the Commission has formalised its involvement as *amicus curiae* in antitrust proceedings before the Member State courts.¹⁸ In this context, it is, however, important to note that neither the Modernisation Regulation nor the Commission Notice make express reference to the Commission's role as *amicus curiae* in EC antitrust arbitrations, which arise from EC competition law disputes that have not been investigated by the Commission, neither on complaint by a third party nor on its own initiative¹⁹ (hereinafter referred to as "ordinary EC antitrust arbitrations"). Nor do arbitral tribunals form part of the European Competition Network ("ECN").²⁰ Nevertheless, the privatisation of the EC antitrust rules is likely to spur a more pronounced use of international arbitration at the national level with a view to avoiding unnecessarily inflexible and drawn-out court proceedings.²¹ Coupled

with the international arbitrator's implied *ex officio* duty to raise EC competition law issues in the making of arbitral awards,²² this raises the question of the desirability of the Commission's involvement as *amicus curiae* in ordinary EC antitrust arbitrations.

2.3. The public/private divide: balancing the European Community interest against the inherently private nature of arbitral proceedings

In assessing the appropriateness and desirability of the Commission's involvement as *amicus curiae* in arbitral EC competition law proceedings, it is to be borne in mind that by their very nature, EC competition law proceedings as such ultimately seek to protect the European Community interest and are therefore pursued in defence of the public interest more generally.²³ Thus, in both remedy related and ordinary EC antitrust arbitrations, the Commission may have a vested interest in ensuring that the arbitral tribunal give appropriate consideration to the correct application of the EC antitrust and merger control provisions and that the dispute at hand be adjudicated in light of the *raison d'être*, i.e. the intended competitive impact of the remedies such as envisaged by the Commission in the commitment decision. Moreover, in the making of the final award, the tribunal, for its part, may well benefit from drawing on the Commission's expertise in EC antitrust related matters more generally and the Commission's familiarity with relevant merger-related files in particular.

Such considerations have to be balanced against the *strictly private and confidential nature* of the underlying arbitral proceedings. Although the confidentiality of such proceedings is recognised as one of the core principles of international arbitration, it is arguable that the Commission's potential role as *amicus curiae* in remedy related arbitrations does not raise any issues of confidentiality *to the extent* that in such cases, the Commission has sanctioned the recourse to arbitration by the parties involved as part of the original remedy package and is thus fully aware of the competition

corrected version in OJ L257/13, Regulation as last amended by Regulation 1310/97, [1997] O.J. L180/1, corrigendum in O.J. L40/17 (hereinafter referred to as the "Merger Regulation").

¹⁶ See Arts 7 and 9 of the Modernisation Regulation.

¹⁷ See the Modernisation Regulation.

¹⁸ See in this context in particular the Commission Notice.

¹⁹ These include classical Arts 81 and 82 EC cases.

²⁰ The ECN has been set up to facilitate close co-operation among national competition authorities ("NCAs") and the European Commission in order to ensure an effective and consistent application of Arts 81 and 82 EC. See the European Commission's Notice on co-operation within the network of competition authorities, at <http://europa.eu.int/comm>

²¹ To this effect, see G.Blanke, "The Role of EC Competition Law in International Arbitration—A *Plaidoyer*" (2005) 16(1) E.B.L.R. 16(1) 169.

²² See Case C-126/97, *Eco Swiss China Ltd and Benetton International NV*, [1999] E.C.R. I-3055; [2000] 5 C.M.L.R. 816, on the implied *ex officio* duty on part of the international arbitrator, see in particular L. Idot, case note on *Eco Swiss* [1999] Rev. Arb. 642. Also see G. Blanke, cited above.

²³ For a definition of the European Community interest, see Case T-24/90, *Automec Srl v Commission (Automec II)* [1992] E.C.R. II-2223; [1992] 5 C.M.L.R. 431 at [71] *et seq.*

issues at stake in any event.²⁴ One should, further, recall that the contracting parties have undertaken a binding commitment to submit to arbitration as part of the commitment decision where a third party calls upon a standing erga omnes offer to arbitrate.²⁵ The third party, in its turn, by calling upon it, accepts that offer at its own free will, thus subjecting itself voluntarily to the Commission's involvement in the prospective arbitration to the extent specified in the underlying arbitration commitment.

The situation seems, however, fundamentally different in ordinary EC antitrust arbitrations, which by definition do not arise within the framework of a previous Commission decision and do, therefore, unlike remedy related arbitrations, not formally provide for any Commission involvement. In such a case, at no point in their relationship are the contracting parties likely to have entered into any commitments to submit any of their future disputes to the Commission's scrutiny. This, however, will not absolve the duteous and conscientious international arbitrator from rendering an award that is enforceable in the EC Member States, whose courts are bound by the duty of loyal co-operation with the EC institutions under Art.10 EC²⁶ and are subject to the principle of the supremacy of EC law.²⁷ One would like to believe that for that purpose, the arbitrator may like to consult the Commission on certain technical issues of EC competition law in order to avoid a non-exsequatur of his final award before a Member State court²⁸

24 For the avoidance of doubt, it should be noted that even in remedy related arbitrations, serious issues of confidentiality may arise to the extent that the Commission may be investigating the merged parties' performance of the commitment decision in parallel proceedings or that the merged parties may appeal the commitment decision to the European Court of First Instance ("CFI").

25 For the purposes of the present article, a "standing erga omnes offer to arbitrate" is defined as an offer by the merging or contracting parties to any third party (competitor) to draw upon the offer and thus trigger an arbitration that is binding on the merging or contracting parties, as the case may be. By way of example, see *UIP*, cited above; *Elf/Minol*, cited above; *Du Pont/ICI*, cited above; *Allied/Honeywell*, cited above; *Dow Chemical/Union Carbide*, cited above; *BP/E.ON*, cited above; and *General Electric/Honeywell*, cited above.

26 See Case 80/86, *Kolpinghuis Nijmegen* [1987] E.C.R. 3186; [1989] 2 C.M.L.R. 18 at [12].

27 See Case 6/64, *Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] E.C.R. 1141; [1964] C.M.L.R. 425; and Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA (II)* [1978] E.C.R. 629; [1978] 3 C.M.L.R. 263.

28 By way of caution, please, note that this is not meant to imply that the Member State courts have the power to review the arbitrator's final award on the merits, quod non. However, in cases of a blatant misinterpretation of the EC competition rules by the international arbitrator, it would most probably

and request that the Commission appear as *amicus curiae* in the arbitral proceedings.

2.4. The uniform application of EC competition law

Recourse by the arbitral tribunal to the Commission for the correct interpretation of EC competition law or the remedies underlying the commitment decision may also be considered to be in the interests of the uniform application of EC law and thus to support the creation of a legal and economic level playing field across the internal market, one of the fundamental objectives of the European Community. In this context, it should be recalled that an arbitral tribunal does not qualify as a "court or a tribunal of a Member State" within the meaning of Art.234 EC and is, hence, not eligible to make a preliminary reference to the European Court of Justice (the "ECJ").²⁹

For the avoidance of doubt, however, it should be noted that, the Commission's interpretations are not legally binding on the arbitral tribunal to the extent that *only* the ECJ's interpretations are endowed with the force of law.³⁰

2.5. The arbitrator's independence

The Commission's involvement as *amicus curiae* in both remedy related and ordinary EC antitrust arbitrations may, at first sight, throw into doubt the arbitrator's independence. In this context, it should be emphasised, however, that the arbitrator is in no way bound by the duty of loyal co-operation with the EC institutions under Art.10 EC and is, therefore, arguably free to ignore the Commission's contributions to the arbitral proceedings as *amicus curiae*. In any event, the Commission, for its part, may reasonably be expected to respect the

not be outside the national court's power to refuse, in reliance on the principle of supremacy and the court's duty of loyal co-operation with the European institutions, to enforce the arbitral award to the extent that a blatant misinterpretation might well be considered tantamount to not giving any consideration to the relevant competition law issues at all and therefore to a breach of the arbitrator's implied duty to raise EC competition law issues *ex officio*.

29 See Case 108/81, *Nordsee v Reederei Mond* [1982] E.C.R. 1095; Case C-393/92, *Commune d'Almelo v Energiebedrijf Ijsselmij* [1994] E.C.R. I-1477; and Case C-125/04, *Denuit v Transorient* [2005] E.C.R. I-923; [2005] 1 C.M.L.R. 48.

30 The ECJ being the highest legal instance in the Community legal system, with an appeal lying against a Commission decision to the CFI and against the judgment of the CFI to the ECJ as the final instance of appeal.

arbitrator's independence to the extent that the final award is, in any case, likely to remain unenforceable if containing blatant misinterpretations of or ignoring crucial EC law provisions.³¹

With regard to remedy related arbitrations, more specifically, however, it is suggested that the arbitrator may well be obliged to consult the Commission and comply with its recommendations to the extent laid down in his mandate, which, in turn, is based upon the specific requirements of the Commission's role as *amicus curiae* such as specified in the original remedy package underlying the commitment decision. Such obligations may well assist the arbitrator in rendering an award that is enforceable throughout the internal market and to the extent that he remains free to reject his mandate, it would seem incontrovertible that the arbitrator, in fact, preserves his independence.³²

By contrast, as regards ordinary EC antitrust arbitrations, the Commission's involvement as *amicus curiae* may—in light of the Commission's duties as public prosecutor in Community-related matters—be perceived as an intrusion into the parties' private proceedings without their prior consent. Despite the potential absence of express provisions regarding the Commission's assistance of the arbitral tribunal as *amicus curiae* in the original arbitration agreement (the "arbitration agreement"), the terms of reference or the arbitrator's mandate, it is, nonetheless, suggested that the arbitrator remains subject to a general duty to use

"every effort" to render an enforceable award,³³ which may well require the accurate application of the EC competition law provisions.³⁴ Such duty is bound to meet the "legitimate expectations" of the contracting parties when opting for arbitration.³⁵

Furthermore, for the avoidance of doubt, it should be noted that under a number of institutional arbitration regimes and national arbitration laws, the power granted to the arbitrator in conducting the arbitral proceedings is sufficiently broadly formulated so as to leave it to the discretion of the arbitrator or the arbitral tribunal to invite and/or accept *amicus curiae* briefs from the Commission.³⁶

2.6. The *res judicata* principle

In both remedy related and ordinary EC antitrust arbitrations, the Commission remains free to instigate parallel proceedings, notwithstanding already pending arbitral proceedings in the same matter. In accordance with Art.211 EC, the Commission, hence, safeguards its prerogative as the general supervisory authority in charge of the correct implementation of EC law and is, in this sense, not bound by the *res judicata* principle.

Even though not bound by the *res judicata* principle in this context, the Commission may wish to endorse, by taking a decision to that effect, the arbitrator's final award in particular in remedy related arbitrations in order to ensure its enforceability before the Member State courts as a Community act.

2.7. The traditional party autonomy rule

In both remedy related and ordinary EC antitrust arbitrations, the Commission and the sitting arbitrator or arbitral tribunal may be well advised to

31 By analogy, see the Commission Notice, para.19. For the sake of completeness, note, however, the recent decision by the Paris Court of Appeal in *Thalès Air Defence v Euromissile e.a.* of November 18, 2004, which sets a very strict standard for the non-enforcement of an arbitral award which ignores relevant competition law issues in French jurisdictions. For a case comment, see Denis Bensaude, "Thalès Air Defence BV v GIE Euromissiles: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law" (2005) 22 J. Int'l Arb. 239. For an alternative commentary, see Thierry Tomasi, "The Paris Court of Appeal Looks at a Request for the Annulment of an Award for Breach of EC Competition Law: A First Application in France of the Principles Laid down by the ECJ in *Eco Swiss*" (2005) 2 Int. A.L.R. 55; and Alexis Mourre, Case note on *Thalès v Euromissile* (2005) *Revue Trimestrielle* (avril-mai-juin) 357. For reflections on the implied *ex officio* duty within the context of this judgment, see also G. Blanke, "A Réplique to Denis Bensaude's 'Thalès Air Defence BV v GIE Euromissile: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law'" J. Int'l Arb. (2006), forthcoming in June 2006.

32 In other words, the international arbitrator is, thus, free to reject his mandate if he does not consider the Commission's involvement as specified in the original remedy package appropriate and fears that the Commission may encroach upon his independence as an arbitrator when serving its role as *amicus curiae*.

33 See above.

34 See above.

35 In other words, when going to arbitration, the contracting parties can be reasonably expected to have intended to obtain an enforceable award as a final outcome of the arbitral proceedings. To this effect, see also Y. Derains, "Specific issues arising in the Enforcement of EC Antitrust Rules by Arbitration Courts" in C.-D. Ehlermann and I. Atanasiu (eds), *European Competition Law Annual 2001: Effective Private Enforcement of EC Antitrust Law* (Oxford Portland Oregon, 2003), pp.323–339, especially at pp.329 *et seq.*

36 By way of example, see the general rule laid down in Art.35 of the ICC Rules and Art.32(2) of the London Court of International Arbitration ("LCIA") Rules.

respect the traditional party autonomy rule underlying arbitral proceedings subject to the specificities of such arbitrations, as well as the arbitrating parties' right against self-incrimination in EC competition law proceedings.³⁷

2.8. The "de minimis" approach

In light of the above considerations, depending on the experience of the individual arbitrator or arbitral tribunal, the Commission's role as *amicus curiae* in international arbitration proceedings may be kept to a minimum. An experienced arbitrator or arbitral tribunal can arguably be expected to comply with his or its mission to the Commission's full satisfaction even without the latter's involvement.

3. Reflections on proposed best practices

The following sections of the present article consider what best practices the European Commission and the arbitrator are best advised to adopt in their mutual dealings in international arbitration proceedings.

3.1. Information to be communicated to the Commission

In light of the general public interest nature of any EC competition law proceedings, it is arguable that to a certain degree, the arbitral tribunal should keep the Commission informed of the arbitral procedure in both remedy related and ordinary EC antitrust arbitrations.

3.1.1. Remedy related arbitrations

Thus, in line with the Commission's practice in remedy related arbitrations,³⁸ it would appear that the arbitral tribunal may be obliged to keep the Commission informed to the extent specified in the arbitration

³⁷ See Case 374/87, *Orkem* [1989] E.C.R. 3355; [1991] 4 C.M.L.R. 502; and Joined Cases C 238, 244–245, 247, 250, 251–252 & 254/99 P, *Limburgse Vinyl Maatschappij NV v Commission* [2002] E.C.R. I-8375; [2003] 4 C.M.L.R. 10, at [273] *et seq.*

³⁸ See in particular *Piaggio/Aprilia*, cited above. See also (for less involvement of the Commission) *Daimler Chrysler/Deutsche Telekom/JV*, cited above; *Allied Signal/Honeywell*, cited above; *Matra/Aérospatiale*, cited above; and *Alcatel/Thomson CSF-SCS*, cited above.

commitment. It is, therefore, asserted that the arbitral tribunal should relate any relevant information to the Commission without undue delay, including copies of the following:

- (i) the mandates of the arbitrators involved (hereinafter referred to as the "mandates");
- (ii) the request for arbitration;
- (iii) the answer to the request for arbitration;
- (iv) any and all orders made by the arbitral tribunal;
- (v) the terms of reference (hereinafter referred to as the "terms of reference") and the procedural timetable;
- (vi) any and all orders for *interim* relief; and
- (vii) the final award (hereinafter referred to as the "final award").

Where the commitment decision does not contain such an information requirement and neither any of the mandates nor the terms of reference provide for the communication to the Commission of any of the information specified at (i) to (vii) above, it is suggested that the Commission may request the arbitral tribunal to provide any or all of that information without undue delay. Given the preservation of the Commission's powers under Art.8 of the Merger Regulation in remedy related arbitrations, the arbitral tribunal is expected to act upon such a request by the Commission.

3.1.2. Ordinary EC antitrust arbitrations

As regards ordinary EC antitrust arbitrations, in light of the party autonomy rule in international arbitration proceedings and the Commission's initial exclusion from the proceedings, it would appear essential that the arbitral tribunal does not relate any of the information specified at (i) to (vii) above to the Commission without the *express prior consent* of the parties to the arbitration (the "arbitrating parties"). The arbitral tribunal should then request the arbitrating parties' prior consent before divulging any information to the Commission, if considering that the Community public interest would otherwise be at risk. For the avoidance of doubt, if the arbitrating parties do not so consent, the Commission and the arbitral tribunal should respect the arbitrating parties' right against self-incrimination for the purposes of the arbitral proceedings and the tribunal should refrain from relating any of the information specified at (i) to (vii) above to the Commission.

3.2. Commission requests for further information about the arbitral proceedings

In *exceptional circumstances*, drawing upon its prerogative as the general supervisory authority in charge of the correct implementation of EC competition law under Art.211 EC, the Commission may request to monitor both remedy related and ordinary EC antitrust arbitrations more closely to the extent specified below.

3.2.1. Remedy related arbitrations

As outlined above, in remedy related arbitrations, the arbitral tribunal may be obliged to grant the Commission access to further information relating to the contents of the ongoing arbitral proceedings in order to enable the Commission to fulfil its obligations to oversee the contracting parties' compliance with the commitment decision. The arbitral tribunal should relate the requested further information to the Commission, including copies of the following:

- (viii) the memorials submitted by the arbitrating parties;
- (ix) any or all other written submissions, documents and reports (such as witness statements and expert reports) made by the arbitrating parties to the arbitral tribunal;
- (x) ordinary procedural orders made by the arbitral tribunal; and
- (xi) verbatim transcripts of the hearings conducted before the arbitral tribunal (hereinafter referred to as the "hearings").

Where neither the commitment decision nor any of the mandates or the terms of reference provide for the Commission to make a request for further information such as specified at (viii) and (xi) above, the Commission should be allowed to request the arbitral tribunal to provide such information without undue delay. Again given the preservation of the Commission's powers under Art.8 of the Merger Regulation in remedy related arbitrations, the arbitral tribunal should act upon such a request by the Commission.

3.2.2. Ordinary EC antitrust arbitrations

As regards ordinary EC antitrust arbitrations, in light of the party autonomy rule in international arbitration proceedings, the Commission's initial exclusion from the proceedings and the arbitrating parties' right against self-incrimination, the arbitral tribunal is advised not to relate any of the information specified at (viii) to

(xi) above to the Commission without the *express prior consent* of the arbitrating parties. Instead, the arbitral tribunal is advised to request the arbitrating parties' prior consent before divulging any such information to the Commission, if considering that the Community public interest would otherwise be at risk. For the avoidance of doubt, if the arbitrating parties do not so consent, the Commission and the arbitral tribunal should respect the arbitrating parties' right against self-incrimination for the purposes of the arbitral proceedings and the arbitral tribunal should refrain from relating to the Commission any of the information specified at (viii) to (xi) above.

3.3. Commission request for participation in hearings before the arbitral tribunal

There is a strong case for arguing that in the interests of safeguarding the Community public interest and in order to fulfil its obligations as the general supervisory authority in charge of the correct implementation of EC competition law under Art.211 EC, the Commission may request participation in any hearings conducted before the arbitral tribunal either as an observer of the arbitral proceedings or as an *amicus curiae* in its own right. However, the case for the Commission's *per se* involvement in the hearings may have to be tempered in light of the traditional constraints of privacy and confidentiality underlying international arbitration proceedings.

3.3.1. The Commission as observer

As to the Commission's request to participate in any of the hearings as an observer, the arbitral tribunal should deal with such a request by analogy to the requests mentioned previously,³⁹ according to the Commission observer status for any of the hearings, subject to the conditions of approval specified with regard to remedy related and ordinary EC antitrust arbitrations respectively. If such approval is obtained, the Commission should be free to dispatch an observer to any of the hearings concerned.

3.3.2. The Commission as *amicus curiae* in its own right

As to the Commission's request to participate in any of the hearings as an *amicus curiae* in its own right, the arbitral tribunal is best advised to deal with that request

³⁹ See ss.3.1 and 3.2.

by analogy to the requests mentioned previously,⁴⁰ admitting the Commission as *amicus curiae* for any of the hearings, subject to the conditions of approval specified with regard to remedy related and ordinary EC antitrust arbitrations respectively. If such approval is obtained, the Commission should be free to dispatch an observer to the hearings concerned. For the avoidance of doubt, if no such approval is obtained, the Commission would arguably have no right to appear before arbitral tribunal; instead, it would probably be free to cancel the arbitration proceedings if it has a reasonable concern that the Community public interest would otherwise be at stake. To the contrary, in ordinary EC antitrust arbitrations, the Commission would not appear to have a right to cancel the arbitral proceedings, without prejudice, however, to instigating proceedings on its own initiative where it considers a parallel investigation by the Commission necessary in order to safeguard the Community public interest.

As *amicus curiae* in its own right, the Commission should be minded to testify to the correct application of EC competition law or the correct interpretation of the commitment decision, as the case may be, only. Accordingly, in the making of the final award, the arbitral tribunal should not take into account statements made by the Commission which go beyond the mere interpretation of how to apply certain EC law provisions or how accurately to interpret the commitment decision, by probing into a discussion on the merits. The discussion and a final decision on the merits should be reserved to the arbitral tribunal.

3.4. Assistance by the Commission to the arbitral tribunal

Given the legal and factual complexity of both remedy related and ordinary EC antitrust arbitrations, the arbitral tribunal, in case of doubt, should be free to make certain interpretation and information requests to the Commission for the sake of clarification.

3.4.1. Interpretation request by the arbitral tribunal to the Commission

In line with Commission practice,⁴¹ the arbitral tribunal, in case of doubt or a disagreement between the arbitrating parties, should be free to request the

Commission to suggest a correct interpretation of the commitments underlying the commitment decision or of the correct application of discrete EC law provisions.

For that purpose, the arbitral tribunal should make the request for interpretation to the Commission, irrespective of the arbitrating parties' prior consent. In reply, the Commission should revert to the arbitral tribunal with an appropriate interpretation of the commitments underlying the commitment decision or the accurate interpretation of the EC competition law provision concerned without undue delay. Unless otherwise provided for in any of the mandates, the terms of reference or the arbitration commitment or upon the arbitrating parties' express request, the arbitral tribunal should not be bound by the interpretation provided by the Commission, given that only the ECJ's interpretations have force of law.⁴²

3.4.2. Information request by the arbitral tribunal to the Commission

The arbitral tribunal, in case of doubt, should request the Commission to provide certain information (such as research reports and market analysis studies) with a view to assisting it in gaining a better understanding of the commitments underlying the commitment decision or of the market environment surrounding the arbitrating parties' EC competition issues.

For that purpose, the arbitral tribunal should make the request for information to the Commission, irrespective of the arbitrating parties' prior consent. In reply, the Commission should revert to the arbitral tribunal with the requested information without undue delay. For the avoidance of doubt, the arbitral tribunal should not be obliged to make use of all or part of that information in any way.

In either of the above-referred requests, the arbitral tribunal would only be required to indicate the exact commitments or provisions of EC competition law of which it requests the Commission to provide an interpretation and motivate the request by indicating the reasons for which it deems the requested interpretation to be vital to the resolution of the dispute subject to the arbitral proceedings. For that purpose, it is advised to enclose a brief non-confidential summary of the dispute concerned to enable the Commission to verify the importance of the requested interpretation to the resolution of the dispute at hand. The Commission, in

⁴⁰ *ibid.*

⁴¹ See, e.g. *Piaggio/Aprilia*, cited above; *Air France/KLM*, cited above; and *GE/Instrumentarium*, cited above.

⁴² See, e.g. *GE/Instrumentarium*, cited above, where the arbitration commitment expressly requires the arbitrator to follow the Commission's interpretation.

turn, should only be obliged to provide the requested interpretation to the extent reasonable within the framework of the arbitral proceedings concerned.

3.5. *Amicus curiae* briefs submitted by the Commission to the arbitral tribunal

Drawing upon its prerogative as the general supervisory authority in charge of the correct implementation of EC competition law under Art.211 EC, the Commission may arguably be entitled to submit *amicus curiae* briefs at any time during the arbitral proceedings in both remedy related and ordinary EC antitrust arbitrations.

More specifically, in line with the Commission's practice in remedy related arbitrations,⁴³ the Commission may arguably submit *amicus curiae* briefs at any time during the arbitral proceedings. Such briefs may relate to any subject-matter in connection with the commitment decision. Most probably, the Commission will make like submissions only when the coherent application of Arts 81 and 82 EC or the merger control provisions so requires. That being the objective of its *amicus curiae* brief, the Commission would be best advised to confine its observations to a legal and economic analysis of the commitment decision and the facts underlying the case pending before the arbitral tribunal.

Unless otherwise provided by any of the mandates, the terms of reference or the arbitration commitment or upon the arbitrating parties' express request, the arbitral tribunal should not be bound by the *amicus curiae* briefs submitted by the Commission.

With regard to ordinary EC antitrust arbitrations, the Commission should be allowed to submit *amicus curiae* briefs at any time during the arbitral proceedings, provided the Commission is aware of these latter ongoing. Such briefs may relate to any subject matter in connection with the EC antitrust disputes underlying the proceedings. Most probably, the Commission would make like submissions only when the coherent application of Arts 81 and 82 EC so requires. That being the objective of its *amicus curiae* brief, the Commission could be expected to confine its observations to a legal and economic analysis of the antitrust issues at stake and the facts underlying the case pending before the arbitral tribunal.

Unless otherwise provided by any of the mandates, the terms of reference or the arbitration agreement or

⁴³ See, e.g. *Piaggio/Aprilia*, cited above; and *Air France/KLM*, cited above.

upon the arbitrating parties' express request, the arbitral tribunal should not be bound by the *amicus curiae* briefs submitted by the Commission.

In order to be able to submit useful *amicus curiae* briefs, the Commission may request the arbitral tribunal to provide it with certain relevant information or to allow it to participate in any of the Hearings. Any such information requests should be dealt with by the arbitral tribunal by analogy to ss.3.1 to 3.3 of the present article.

4. General reflections

For the avoidance of doubt, in both remedy related and ordinary EC antitrust arbitrations, the following general provisions should be taken into account by both the Commission and the arbitral tribunal in their mutual dealings within the framework of EC competition law related arbitral proceedings.

4.1. *Parallel proceedings instigated by the Commission*⁴⁴

The final awards resulting from remedy related and ordinary EC antitrust arbitrations do in no way legally bind the Commission.

The Commission should thus be free to instigate parallel proceedings on complaint by a third party or on its own initiative, as the case may be, notwithstanding already pending arbitral proceedings in the same matter.

4.2. *Commission review*

In light of the Commission's prerogative as the general supervisory authority in charge of the correct implementation of EC competition law under Art.211 EC⁴⁵ and in line with Commission practice in remedy related arbitrations,⁴⁶ the Commission should be allowed to review the outcome of the arbitral proceedings on its own initiative and reach its own conclusions as to the contracting parties' compliance

⁴⁴ On parallel proceedings, see in particular R. Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (Oxford, 2004).

⁴⁵ Also see section 3.5 above.

⁴⁶ See, e.g. *Piaggio/Aprilia*, cited above; *Air France/KLM*, cited above; and *Newscorp/Telepiù*, cited above.

with the commitments underlying the commitment decision.

Likewise, in remedy related arbitrations, the Commission should be free to endorse the final award by taking a decision to that effect.

4.3. Confidentiality

The Commission should consider itself bound by the strict principles of confidentiality within the meaning of Art.287 EC for the purposes of its dealings with the arbitral tribunal as specified in the present article.

In line with Commission practice,⁴⁷ the applicable standard of confidentiality in remedy related arbitrations is that employed in EC competition law proceedings.⁴⁸

For the avoidance of doubt, however, given the confidential nature of the information obtained in the framework of both remedy related and ordinary EC antitrust arbitrations, all parties and persons involved in the arbitral proceedings, including the arbitral tribunal, counsel, party representatives, witnesses, experts, and the Commission and its representatives should respect the confidentiality of the respectively pending arbitral proceedings in accordance with the standard indicated at section 3.5 of the present article. The arbitral tribunal should take the requisite measures for protecting trade secrets and other confidential information and documents. For that purpose, the arbitral tribunal should be entitled to make protective orders accordingly or alternatively arrange for a neutral person to serve as a confidentiality advisor reporting to the arbitral tribunal, the arbitrating parties and the Commission, as the case may be, without divulging any confidential information or business secrets.⁴⁹

5. Conclusion: final reflections

The above reflections on the desirable best practices to be employed by the European Commission and the international arbitrator in their mutual dealings in international arbitration proceedings are tentative only and do not underlie any norm which has particularly been adopted in the given context. The approach taken by the authors is distilled from international arbitration experience and what the authors would believe to be acceptable business practice.

Even though some of the proposed best practices may seem to make inroads into the traditional provisions of international arbitration, such as the party autonomy rule and the precepts of privacy and confidentiality, the fact of the matter is that the requisite degree of co-operation with the European Commission suggested by the authors would assist the international arbitrator in rendering an enforceable award without the arbitrating parties running the risk of being exposed to additional or concurrent public proceedings instigated by the Commission, which would lead the parties' initial recourse to arbitration ad absurdum. One of the principal objectives underlying international arbitration as an ADR mechanism remains the speed and cost-effectiveness of the proceedings—these can only be preserved if the international arbitrator manages to avoid the multiplication of the proceedings in the public and private domain by rendering an award that is acceptable to the European Commission and does not give rise to further public proceedings.

To achieve this, a good working relationship with the European Commission would appear absolutely essential and would, in light of the confidentiality mechanisms built into the procedure, such as suggested by the authors, not necessarily impinge on the sacrosanct confidentiality and privacy of the arbitral proceedings.

47 See, e.g. *Piaggio/Aprilia*, cited above; *Air France/KLM*, cited above; *Alcan/Péchiney*, cited above; *Telia/Sonera*, cited above; *Shell/DEA*, cited above; *Vivendi/Canal+/Seagram*, cited above; and *Vodafone Airtouch/Mannesmann*, cited above.

48 See, e.g. Case 53/85, *Akzo v Commission* [1986] E.C.R. 1965; [1987] 1 C.M.L.R. 231 and the Commission Notice.

49 See the provisions made for non-disclosure of confidential information and business secrets in, e.g. *Piaggio/Aprilia*, cited above; *Air France/KLM*, cited above; *Alcan/Péchiney*, cited above; *Telia/Sonera*, cited above; *Shell/DEA*, cited above; *Vivendi/Canal+/Seagram*, cited above; and *Vodafone Airtouch/Mannesmann*, cited above.