In Conversation With Suzanne Rab on Mediating Competition Law Disputes

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We first worked together in the competition law department of an international law firm. 14 years have since passed – at a spirited pace – and we now find ourselves, for an assortment of reasons and opportunities, working in mediation. On a rainy summer's day in London, I met with Suzanne Rab, a barrister at Serle Court Chambers specialising in EU and UK competition law and regulation with a busy practice as a mediator, to talk about her experience in, and enthusiasm for, the mediation of competition law disputes.

In this, the first of a two-part series, Suzanne shares her insights into the contribution which mediation can make to competition disputes and identifies opportunities for untapped potential for mediation in this niche area.

Anna: *Are there any discernible trends in the use of mediation for competition disputes?*

Suzanne: *As mediations are held in private and are confidential there is a lack of publicly available data. Therefore, to speak of trends we have to look beyond the published data to the practical experiences.*

*However, even without hard data on actual usage of mediation, what we can identify – with the impetus given to the private enforcement of competition disputes from the UK Consumer Rights Act 2015 and EU Directive 2014/104 on damages in competition law cases – is a notable shift in emphasis from public enforcement (i.e. by a regulator) to private enforcement of competition disputes (i.e. by the parties affected by breaches of competition law who bring actions for damages or other relief, including injunctions). And the shift to the private enforcement of competition disputes offers a role for mediation in the resolution of these actions, few of which will reach a final decision given the pressure on the parties to settle, not least lest they be penalised in costs for unreasonably refusing to pursue alternative dispute resolution. In this context, mediation can be seen as an **alternative** to the public enforcement of competition disputes.*

*At a more general, and visible, level, a recent development is the use of mediation as an **adjunct** to the public enforcement of competition law and regulatory disputes. This has been seen, for example, in merger cases in which a regulator, such as the European Commission, approves a merger subject to commitments. These may include so-called behavioural commitments where the merging parties agree to maintain supply arrangements with third parties. Where the regulator may previously have stipulated that arbitration be used in the event of non-compliance by the merging parties with these commitments, we are now seeing a provision on mediation or quasi-adjudication. For example, the UK Competition Commission has accepted extensive behavioural remedies in a merger-to-monopoly situation in the merger of Arqiva (a subsidiary of Macquarie Broadcast Ventures Ltd) and National Grid Wireless Group. The parties were the only two broadcast wireless transmission network operators in the UK. The remedies package was underpinned by supporting provisions including a commitment that the new company would allow access at fair prices and the establishment of an Adjudication Scheme to decide disputes between the new company and third parties.*

A new scheme created by the UK Consumer Rights Act 2015 offers potential for the use of mediation in competition disputes. Under the voluntary consumer redress scheme, a party found to be in breach of competition law can receive a 10% reduction in its fine if it agrees to provide redress to consumers harmed by the breach. Crucially, the terms of the redress must be satisfactory to the UK's Competition and Markets Authority or the relevant sector regulator. Here there appears to be a role for mediation in assisting the parties to determine a redress mechanism which will meet with regulatory approval.

In your recent articles you have written on the benefits of mediation in competition law disputes. Could you provide us with some examples, from your experience both as mediator and counsel, of these benefits?

1. Mediation as a relationship-supporting & creative process

Many competition disputes relate to bread and butter commercial disputes such as distribution agreements under which one party, say a manufacturer, engages a distributor to enter into or expand its operations on a market. Disputes in these scenarios, which involve parties operating at different levels in the supply chain as opposed to agreements between competitors, do not tend to be a high enforcement priority for the authorities unless they involve major market players or blatant limitations in cross-border sales. However, the underlying commercial arrangement may be significant to the parties and what might matter very much is to ensure that the relationship continues, albeit in a modified way. Mediation can bring parties together to work out what a future relationship might look like. It allows for creativity, and a reality check. I would be the last to say that contracting counterparties who have turned adversaries will become friends in the course of a mediation but the flexibility mediation offers can help the parties draw a line under their past differences and move on. This assumes, always, a willingness to compromise on both sides.

A recent mediation in which I was involved illustrates these points. The dispute arose from an exclusive distribution agreement. In return for the distributor committing to agreed sales levels the manufacturer agreed to sell to only one distributor for resale in the allocated territory. This had been a long-standing agreement that had been renewed many times. In the later years of the contract, and due partly to the depressed economic climate, the distributor's sales started to suffer and he could not meet the agreed volume commitments. The manufacturer felt that the distributor had taken his foot off the pedal and wanted to terminate the relationship with immediate effect. The contract lead at the distributor, nearing the end of his career, felt that he was due compensation because of the long-standing relationship. However, the legal analysis as to whether any compensation was due was not straightforward. Of course, the dispute was not simply about money; and the distributor also hoped to see the relationship transition rather than end abruptly overnight.

What was the solution after mediation? An end to the exclusive distribution agreement and its replacement with a non-exclusive distribution agreement with revised sales volume commitments. The distributor would receive a payment in recognition of past performance. And – critically – an agreement from the contract lead at the distributor to stand back from the day-to-day running of the account and allow a younger and more energetic employee, from the same company, to stand up as part of a renewed sales effort. This was not a solution which could have been ordered by the court. The negotiation of the new agreement also allowed for the involvement of a competition lawyer to ensure that the new provisions were watertight under EU competition law to reduce the risk of future disputes.

2. Avoidance of precedent setting

Many competition disputes, especially those involving intellectual property or access to infrastructure, can involve allegations of the abuse of a dominant position. Such an allegation can't get off the ground unless there is a correct definition of the market and the defendant is dominant in a relevant market.

Given that the defendant will typically be the stronger market player, a simplistic reaction to such a scenario might be that the defendant calls all the shots and the other party will have limited scope to reach a satisfactory settlement. But, a number of factors complicate this:

• any finding of dominance by a court or competition authority will have legal significance by establishing a precedent for future cases;

• a published decision will tend to have reputational consequences which the defendant may be keen to avoid by having the dispute resolved out of the public eye; and

• a fear of the "thin edge of the wedge' – once it is known that one party is bringing a case, even before they have secured a victory, this may prompt others to bring cases, particularly licensees in IP cases or purchasers in distribution networks.

Cases involving the tension between IP rights and competition law can be controversial, a particular example being the Samsung and Motorola cases before the European Commission on standard essential patents. They raised the issue of whether, and in what circumstances, it can be an abuse of dominance for a rights-holder to seek an injunction to enforce its rights. These cases take place in a very specific context and they are pushing the boundaries in terms of the application of competition law to IP rights. Yet I am certainly aware of the influence of these cases and of how they have emboldened opportunistic litigants to see whether they might extend the points of legal principle to the specific facts of their dispute. When there is no exact legal precedent that deals with the issue, the situation may be ripe for mediation depending on the parties' assessment of the risks of winning their case before a court or competition authority.

3. Mediation can sometimes offer a more timely solution

It's true that mediation does offer timing benefits when compared to other routes of resolution of competition law disputes. A complaint to a competition authority may take several months at the administrative stage, and even years as can be seen from the example of the EU Google Shopping search case: a complaint was made against Google in 2010 and the case is still not resolved despite multiple rounds of commitments which have proved to be unsuccessful.

Follow-on litigation in the courts may only bring compensation years after the original damages were sustained. Parties will have to allow for all appeal routes to be exhausted. Even with the fast track procedure under the UK Consumer Rights Act, the duration of a case will be measured in several months not weeks.

Mediation, by contrast, puts parties in control and allows them to work with the process to try to advance the areas of dispute. But, I would not necessarily say that you should proceed with the assumption that you will solve a competition dispute in a standard mediation day. In a case where the competition issues are the principal element, you are going to need to have parties' preferences or risk calculations to be fairly developed before they are able to take an informed decision on the offers presented by the other side. For example, for a dispute about a refusal to license a trademark, this practice will tend to raise a competition law claim only if the defendant is dominant in a relevant economic market. Before the parties can decide what is their best alternative to a negotiated outcome (or "BATNA") through mediation at least some thinking will need to be done around the correct definition of the market. However, this is not to say that the parties need to have a fully fleshed out competition case backed up by economic evidence before mediation can be useful. Mediation can have a useful role to play in isolating the issues of genuine dispute and therefore providing a more streamlined route to resolution.

Competition disputes take place on a dynamic level in that a practice that was lawful when it was first entered into may turn out to be anti-competitive and unlawful over time. Sometimes public enforcement cannot deliver a satisfactory outcome at all –because the case is not an enforcement priority. In other cases, the timing of public enforcement can be a key strategic lever in bringing about a resolution through mediation.

And what about any drawbacks of mediation in competition law disputes?

To be continued… In the second part of this series, Suzanne will answer this question and will continue to explore the particularities of mediation in this niche area of disputes.

Suzanne Rab's articles on the mediation of competition law disputes include: S. Rab, E. Lecchi, R. Macmillan 'Competition and regulatory disputes: ready for mediation?' 3rd June 2015 and available at Practical Law Company, and S. Rab 'The journey to settlement, mediating competition law disputes' Competition Law Insight, 9th December 2014.