PRIVATE ENFORCEMENT
AND
ANTITRUST CONSENSUAL DISPUTE RESOLUTION IN EUROPE[1]

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Abstract: Articles 18 and 19 of the Damages Directive 2014 include, in development of the provisions of recitals 5 and 48 of the same, the possibility of resolving issues relating to claims for damages by individuals affected by the infringement of antitrust rules, through out-of-court settlements or Consensual Dispute Resolution. These include not only arbitration or mediation processes, but also any other possible process that allows these issues to be resolved outside the courts, whether or not the action has been brought before them. This raises the long-standing problem of the possibility of applying competition law (as public policy rules in the Treaty on the Functioning of the European Union) in these alternative procedures, proceedings or negotiations and the transnational effects that can be obtained from this. This paper analyses these aspects, concluding that there are unresolved problems that will have to be resolved in the coming years in their practical application[2].

Keywords: Consensual Dispute Resolution, competition, antitrust, settlements, Damages Directive, commitments, arbitration.

K13, K21, K41

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[2] This paper is a brief summary based on the one published under the following title and journal in Spain: 'Los acuerdos extrajudiciales en las reclamaciones privadas de daños por infracción de las normas de la libre competencia: (el tercer pilar)'. La Ley. Mediación y arbitraje, Nº. 11, 2022.

1. Alternative remedies in private antitrust claims.

As a study to this effect states[3], for a long time it was considered impossible to arbitrate competition law precisely because of its characteristic features[4] or because of the concern that it would circumvent the rules of free competition[5]. We will have to wait for the courts to rule on this for the matter to change. Today it is already provided for in EU Directive 2014/104[6], in the EC Practical Guide on the quantification of damages in actions for damages[7] and in the harmonised rules of all European countries that have already implemented it. In this sense, the aforementioned Guide will delimit the three areas that may be important in this respect: stating, on the one hand, that the international jurisdiction of national courts is usually determined by Council Regulation (EC) Nº 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which is now Regulation (EU) Nº 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which entered into force for the most part on 10 January 2015. On the other hand, the substantive law applicable in a given case will often be determined by European Union Regulations, and in particular Article 6 of Regulation (EC) Nº 864/2007 on the law applicable to non-contractual obligations. In this regard, the applicable procedural rules will generally be those in force in the country of the court seised (lex fori). Finally, actions for damages may also be heard by arbitration tribunals and courts of non-EU countries.

We must necessarily refer to one of the earliest decisions on the subject, which was *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc*. by the U.S. Supreme Court in 1985[8]. It recognised for the first time that a US federal antitrust claim was arbitrable in international matters. The Court of Justice of the European Union (CJEU) recognised the arbitrability of competition law first in 1994[9] (to be discussed later as to the applicable law) and then in 1999 in the *Eco Swiss Case*[10]. In this case, they were brought in the context of an action brought by

[3] Moisejevas, Raimundas, "The Damages Directive and Consensual Approach to Antitrust Enforcement (December 31, 2015)". *Yearbook of Antitrust and Regulatory Studies* vol. 2015, 8(12), p. 181-194, https://ssrn.com/abstract=2866276 or http://dx.doi.org/10.2139/ssrn.2866276

[4] *American Safety v. McGuire* 391 F.2d 821 (1968) summarises the historic position held internationally for much of the 20th century: "a claim under the antitrust laws is not a purely private matter. Antitrust violations can affect hundreds of thousands, perhaps millions, of people and inflict staggering economic harm. We do not believe that Congress intended such claims to be resolved anywhere other than in the courts. ... The widespread public interest in antitrust enforcement, and the nature of the claims that arise in such cases, combine to make it ... antitrust claims ... inappropriate for arbitration". https://scholar.google.es/scholar_case?case=12800333568084745088&q=American+Safety+v.+MaGuire&hl=en&as_sdt=2006&as_vis=1

[5] R. Kovar (1982*): Droit Communautaire de la Concurrence et Arbitrage; in: Etudes Offertes à B. Goldman, Litec, p. 110.*

[6] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

[7] https://ec.europa.eu/competition-policy/antitrust/actions-damages_en

[8] *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.,* 473 U.S. 614 (1985) decision by the United States Supreme Court.

[9] CJEU 27.04.1994, C-393/92 Almelo, ECLI:EU:C:1994:171. https://curia.europa.eu/juris/showPdf.jsf?text=&docid=98695&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=2194424

[10] C-126/97 Eco Swiss China Time Ltd v. Benetton International NV [1999] ECR, I-3055

Benetton International NV seeking to obtain a stay of enforcement of an arbitration award which had ordered it to pay *Eco Swiss China Time Ltd* damages for the unlawful termination of a licensing contract concluded with the latter, claiming that the award was contrary to public policy within the meaning of Article 1065(1)(e) of the Wetboek van Burgerlijke Rechtsvordering ("Code of Civil Procedure") in view of the nullity of the licence agreement from the point of view of Article 81 EC (now 101 TFEU). From there, the CJEU came to validate this arbitration, although it should be borne in mind that it can be appealed before the Courts (although for exceptional reasons) and it is there and in the control of public order where the latter must intervene, even raising preliminary questions (given that the arbitrator is not recognised as having standing) beforehand and considering that competition law is public order law. It follows that, in so far as a national court must, in application of its domestic procedural rules, uphold an action for annulment of an arbitral award based on non-compliance with national public policy rules, it must also uphold such an action based on non-compliance with the prohibition imposed by Article 81(1) EC.

In the application of restrictive practices infringing vertical agreements and block exemptions, the decisions in *Audi v. Skandinavish 2006*[11] *, Brünsteiner Authohaus Hilger v. BMW* also from 2006[12] or the 2007 decision in *Peter Petschenig, Toyota Frey Austria*[13], referred interchangeably to a remedy before the courts or by arbitration bodies. And it has also been recognised in various decisions of the ICC (International Chamber of Commerce[14]), an example of which is *ICC Case No. 16974/FM/GZ,* according to which an arbitral tribunal can resolve disputes between private parties in the context of the obligations and commitments arising from the Commitments [i.e. the terms and conditions of the implementation agreement or the failure to conclude the same] (para. 217).

In Spanish law, the Provincial Court of Madrid (Camimalaga Case in 2013[15]), the approach was based on a business relationship of a distribution contract that had been unilaterally terminated by the supplier. In reaction to this, the defendant filed a standalone claim for damages before the Madrid Courts, which was rejected at first and second instance, considering that it was a matter that could be arbitrated and even, according to the Court, also possible in mediation. For

CJEU 09/07/2006. C-125/05.
https://curia.europa.eu/juris/document/document.jsf?text=&docid=63672&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=2518782

[11] CJEU 09/07/2006. C-125/05.
https://curia.europa.eu/juris/document/document.jsf?text=&docid=63672&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=2518782

[12] CJEU 11/30/2006. C-376/05 y C-377/05
https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:62005CJ0376&qid=1649662154719&from=EN

[13] CJEU 01/26/2007, C-273/06.
https://curia.europa.eu/juris/document/document.jsf?docid=61788&text=&dir=&doclang=FR&part=1&occ=first&mode=lst&pageIndex=0&cid=2520668

[14] ICC Nº. 7673(1993), Regarding the application of Swiss law to the matter and also ICC Award Nº. 14042(2010 in the same sense applying Swiss law; ICC Award No.8423(1998) where not only the possibility of arbitration is considered but also on the validity or invalidity of the contract. ICC Award No. 10433(2001) and also ICC Award No. 11502(2002), where arbitration is recognised in cases of Article 101 TFEU. To be found in ICC.

[15] AAP Madrid, Sec. 28 del 10/18/2013 (ROJ: AAP M 1988/2013) and AJM, Commercial Court 11, 05/04/2011 (ROJ: AJM M 89/2011).

this, the Court argues that agreements to submit to international arbitration are perfectly legal and have their legal coverage in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, made in New York on 10 June 1958 (which is universally applicable for Spain, that is to say, even against non-contracting States) and in the European Convention on International Arbitration, made in Geneva on 21 April 1961. Both doctrine and jurisprudence consider, it will be affirmed, that the recognition of the effectiveness and validity of the arbitration agreement that operates as a presupposition for the recognition and enforcement of the arbitration decision is derived from these rules, since the contrary would be meaningless[16].

In the study carried out for this purpose in the United Kingdom[17] market between 2000 and 2005, 45 settlements have been confirmed, of which, however, there is no external information because they do not come from a Court of Justice. This obviously prevents us from being aware of the volume that can be reached or is already being reached. In another study carried out in the United States between 1998 and 2005[18], settlements amounted to 40 cases, half of which were for single or standalone actions[19].

However, the situation is evidently more complex than what a simple European rule could establish, as we shall see, to favour alternative dispute resolution, something that some authors[20] have even contemplated from the position of interpreting Article 18 of the Damages Directive not in terms of equality of instruments (mediation/neutral negotiation/intervention on the one hand and arbitration and litigation on the other) but in understanding that what is requested is that arbitration and litigation remain subsidiary in this attempt to resolve the conflict of claims for damages and can only be used if a prior agreement between the parties is not reached that avoids these procedures, This is essentially achieved precisely by the avoidance of costs, speed and uncertainty of the outcome of a trial[21]. And beyond that, the possibility of a collective approach is defended on the basis that collective ADR is expressly included in the Damages Directive in various recitals. Thus in recital 5th it already announces that litigation is only one facet of private enforcement alongside the plural "alternative avenues" which we can also see more specifically in recital 48 when referring to the desirability of achieving a "once and for all" solution for defendants and that "infringers and injured parties should be encouraged to agree on compensation for the harm caused by an infringement of competition law through out-of-court dispute settlement mechanisms, such as out-of-court settlements or agreements

[16] This is linked to the international jurisdiction in the case. To this end, he will state that *Since article 22.2 of the Organic Law of Judicial Power authorises the extension of jurisdiction in favour of the Spanish Courts, the submission to foreign judicial bodies must be admitted, as stated in case law (judgments of the 1st Chamber of the SC of 13 October 1993 and 29 September 2005)*

[17] B. Rodger, 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000–2005" (2008) ECLR 96–116.

[18] R.H. Lande, J.P. Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases" (2008) 42 USFL Review 879–918. La disminución en ese periodo y posterior de acciones colectivas en USA también ha sido puesta de manifiesto : M.T. Vanikiotis, "Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom" (2014) 37(5) *Fordham International Law Journal* 1639–1682.

[19] Unlike follow-on actions, standalone actions arise from the private initiative of an individual or company and do not stem from a decision of the competition agency that has previously sanctioned a company for infringing the competition rules.

[20] M. Driessen-Reilly, "Private damages in EU competition law and arbitration – a changing landscape" (2015) *Arbitration International*, *http://dx.doi.org/10.1093/arbint/aiv007.*

[21] B. Rodger, "Why not court? A study on follow-on actions in the UK" (2013) 1(1) *Journal of Antitrust Enforcement* 104–131.

(including agreements that can be declared binding by a judge), arbitration, mediation or conciliation. These out-of-court dispute resolution mechanisms should cover as many injured parties and infringers as the law permits[22].

2. Consensual Dispute Resolution.

Article 19 of the Damages Directive will then include the so-called effects of consensual dispute Resolution actions for damages and therefore sets up a regime in which the possible agreements made by the different infringers and some of those affected are projected into the future with the declared intention of promoting out-of-court settlements as the raison d'être of this regulation. Paragraphs 51 and 52 of the Explanatory Memorandum of the Damages Directive refer to and explain them in a very specific way:

(51)To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement. That might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to its non-settling co-infringers when the latter have paid damages to an injured party with whom the first infringer had previously settled. The corollary to this non-contribution rule is that the claim of the injured party should be reduced by the settling infringer's share of the harm caused to it, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. That relative share should be determined in accordance with the rules otherwise used to determine the contributions among infringers. Without such a reduction, non-settling infringers would be unduly affected by settlements to which they were not a party. However, in order to ensure the right to full compensation, settling co-infringers should still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim. The remaining claim refers to the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured

[22] An example of class actions that were settled jointly is the Lufthansa Cases T-9/11 Air Canada, T-28/11 Koninklijke Luchtvaart Maatschappij, T-36/11 Japan Airlines, T-38/11 Cathay Pacific Airways, T-39/11 Cargolux Airlines International, T-40/11 Latam Airlines Group and Others, T-43/11 Singapore Airlines and Others, T-46/11 Deutsche Lufthansa and Others, T-48/11 British Airways, T-56/11 SAS Cargo Group and Others, T- 62/11 Air France-KLM, T-63/11 Société Air France and T-67/11 Martinair Holland v Commission. As some authors explain (Bergman & Sokol 2015, n 53), p. 312.), Lufthansa became the target of 20 class actions in the US and one in Canada. The company decided to engage in class ADR and to seek an out-of-court settlement for different reasons: (1) a cost-benefit analysis, and (2) despite having paid 85 million euros in settlements, some of which were considered "exaggerated figures" by the plaintiffs, Lufthansa believed that by voluntarily settling the claims even before the infringement decision was rendered, it not only saved money by avoiding class action proceedings, but also protected its reputation in the airline industry. See. H. Bergman & D.D. Sokol, "The Air Cargo Cartel: Lessons for Compliance ", in Beaton-Wells & Tran (eds), Anti-Cartel Enforcement In A Contemporary Age: Leniency Religion (Hart Publishing 2015).

party. The latter possibility to claim damages from the settling co-infringer exists unless it is expressly excluded under the terms of the consensual settlement.

(52)Situations should be avoided in which settling co-infringers, by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, pay a total amount of compensation exceeding their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, national courts should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.

As we have pointed out, the framework in which this precept operates is that of the promotion of out-of-court settlements as a means of dispute resolution. This is, according to the authors who have worked on the subject[23], either in a framework of institutional conflict resolution such as arbitration or mediation, or simply through negotiations and bilateral or multilateral agreements between the interested parties. It has even been argued that in the face of complex arbitration procedures, mediation would be one of the most appropriate instruments in this type of claims[24], although it is perhaps more interesting to consider, with the Gov-UK document of 2012 (section 6.7, pg. 41) that "Given the range of options covered by ADR, it would be difficult to impose a specific type of ADR: mediation, arbitration and early neutral evaluation can all have their uses in different cases and it would be inappropriate to prescribe one of them for all cases. Moreover, a mandatory requirement to engage in ADR where one or both parties are determined to take the matter to court could prove to be a waste of time and money. This is especially true in participatory processes, such as mediation, which are based on a mutual willingness to reach a resolution, but it also applies to any form of ADR, if one of the parties enters the process determined not to accept the judgment."

Because the first thing we must determine is that "consensual dispute resolutions" implies much more than a reference to ADR ('alternative dispute resolution') used for any out-of-court settlement scenario to be situated in something broader, with or without the intervention of an institution or outsider involved in a particular dispute[25]. And so paragraph 48 of the Directive refers to them broadly as out-of-court settlements or agreements (including agreements that a judge can declare binding), arbitration, mediation or conciliation. Or as we noted above with Gov-UK-2012 (supra note 47) , alternative dispute resolution (ADR) encompasses a range of mediation and conciliation approaches designed to resolve cases in a manner favourable to all

[23] Modzelewska de Raad, Małgorzata, "Consensual Dispute Resolution in the Damage Directive. Implementation in CEE Countries (June 30, 2017)." *Yearbook of Antitrust and Regulatory Studies (YARS*), vol. 10(15), p. 49-67, 2017, Available at SSRN: https://ssrn.com/abstract=3120449

[24] Moisejevas, "The Damages Directive and Consensual Approach …"

[25] Idot, L. (2010). "Arbitration and Competition", en *OECD Report Competition Law and Policy,* http://www.oecd.org/competition/abuse/49294392.pdf p. 51–52

parties before they reach a formal court, or at least before the work of such a court has been completed, including mediation, arbitration, early neutral evaluation and conciliation.

3. The use of arbitration in these cases.

It is therefore evident that one of the institutions that can be used in these cases of private claims for damages is arbitration. However, we must point out that even in those cases where arbitration is not based on law, but on equity, competition law must be taken into consideration and taken into account under penalty of nullity. This can be deduced from the decision of the CJEU in the Almelo case[26], which states that the courts ruling on an appeal against an award are obliged to rule in accordance with European Union law, particularly with regard to competition law[27]: *This interpretation given by the Court of Justice is not affected by the fact that a court, such as the Gerechtshof, rules as amiable compositeur under the arbitration agreement concluded between the parties. By virtue of the principles of the primacy and uniformity of application of Community law, read in conjunction with Article 5 of the Treaty, the court of a Member State before which an appeal has been brought, under national law, against an arbitral award is bound, even if it rules in equity, to comply with the rules of Community law, in particular the rules on jurisdiction.* And this would extend, according to some authors[28], to the application of the rules of EU Regulation 1/2003 and the instruments included therein to ensure harmonised application throughout the territory of the European Union[29].

In this application, we must distinguish between cases in which there is a contractual clause of submission to arbitration and one of the parties to the contract is the one who infringes competition law[30], and those cases in which after the infringement has occurred, the parties submit to arbitration. In the latter case there would be no problem to understand, without prejudice to what we will add later, that arbitration is possible. In the first case, the discussion

[26] CJEU 04/27/1994, C-393/92 Almelo, ECLI:EU:C:1994:171. https://curia.europa.eu/juris/showPdf.jsf?text=&docid=98695&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=2194424

[27] In the same vein Landolt, Ph. (2011). "Chapter 15: The Application of EU Competition Law in International Arbitration in Switzerland", in G. Blanke and Ph. Landolt (Eds.), EU and US Antitrust Arbitration: A Handbook for Practitioners (pp. 545-565). Alphen aan den Rijn, The Netherlands: Kluwer Law International "EU competition law must apply even if the award is made on the basis of ex aequo et bono or non-EU law". Certainly this could go against the doctrine of the Spanish Constitutional Court which departs from a review limited to the reasoning and not to the substantive. TSC 9/2005, of 17 January FJ 5, STC 17/2021, of 17 February, FJ 2 , STC 46/2020 , of 15 June ; STC 15 March 55/2021 and 65/2021, of 15 March. In the same sense and taking up all this doctrine, pending publication in the BOE, 4 April 2022 , Appeal for Protection 4731/20.

[28] Modzelewska, "Consensual Dispute…."

[29] In the same sense, the Spanish Supreme Court has ruled that what is decided in the arbitration clause is the path but not the need for the application of ius cogens. The SSTS (Supreme Court) of 18 April 1998 , 17 April 2001 and 30 November 2001 , have pointed out that the arbitration agreement does not affect the "ius cogens" nature of the applicable legal rules, but only the procedural channel for resolving disputes.

[30] In this sense we should think that if such a clause has been agreed and the cartel has remained secret the question would again be equally doubtful. In this sense CDC v. Kemira,Helsinki District Court, 4/07/2013. In the same sense Kemirav. CDC,Gerechtshof ,Amsterdam, 21/07/2015.

has arisen in terms of the interpretation of whether this clause can be previously established for competition cases. Some courts have ruled on this issue in different ways. Thus, certain European courts[31] have rejected the possibility of its application to competition cases, while others[32] have even accepted it on the grounds that it does not contradict European case law. Thus, in the *Hydrogen Peroxide case* of 2015[33], the question of jurisdiction was raised with respect to contracts containing jurisdiction clauses on the one hand and arbitration clauses on the other. Although the Court does not refer to the latter, it considers them to be included in its analysis and draws two conclusions that should be highlighted (paragraphs 70 and 71): Indeed, since such a dispute was not reasonably foreseeable for the injured undertaking when it gave its consent to that clause, since it was unaware at the time of the unlawful cartel in which the other contracting party was participating, that dispute cannot be considered to have its origin in the contractual relations. Therefore, such a clause would not validly exclude the jurisdiction of the referring court. On the other hand, a clause referring to disputes concerning liability arising from an infringement of competition law and designating a court of a Member State other than the State of the referring court would require the latter to decline its own jurisdiction, even if that clause would lead to the exclusion of the special rules of jurisdiction provided for in Articles 5 and/or 6 of Regulation Nº 44/2001. In other words, the specific provision for this would entail a specific conferral of jurisdiction or arbitration whenever this has been expressly provided for in cases of jurisdiction[34].

The subsequent discussion on this has been fostered by the idea of whether this assessment of the law of jurisdiction in arbitration proceedings when they are submitted to the court for review by challenge, can or should be assessed ex officio or whether it is the parties who have to allege it[35]. And beyond this, we could also ask ourselves whether the fact of a subsequent claim

[31] Judgment District Court of Amsterdam de 04.06.2014, CDC Project 13 SA v. Akzo Nobel NV and others., Case nº. C/13/500953/HAZA 11-2560; Judgment District Court of Central Netherlands 27.11.2013, East West Trading BV v. United Technologies Corp. and Others; Judgment District Court in Helsinki of 04.07.2013, CDC Hydrogen Peroxide SA v. Kemira Oyj. Cited by Živković, P. (2017). "Antitrust Arbitration in Europe (Part II): Improving Private Enforcement by Removing Procedural and Evidential Barriers in Arbitration." *Kluwer Arbitration Blog*: http://kluwerarbitrationblog.com/2017/06/03/antitrustarbitration- europe-part-ii-scope-effect-arbitration-clauses-microsoft-case/ (20.07.2017).

[32] Judgment English High Court of 28.02.2017, Microsoft Mobile OY (Ltd) v. Sony Europe Limited et al., No. EWHC 374.

[33] CJEU 21.05.2015, Case C-352/13 CDC Hydrogen Peroxide SA v. Akzo Nobel NV et al., ECLI:EU:C:2015:335.
For an analysis of this judgment, see Sadrak, Katarzyna, "Arbitration Agreements and Actions for Antitrust Damages after the CDC Hydrogen Peroxide Judgment (2017)". Yearbook of Antitrust and Regulatory Studies, Vol. 2017, 10(16), Available at SSRN: https://ssrn.com/abstract=3159994. According to this author, the issue is still unresolved.

[34] This is how it was also seen in the AAP of Madrid, Civil section 28 of 25 September 2015 (ROJ: AAP M 717/2015) which distinguishes between actions arising from the contract and non-contractual actions in jurisdiction. In this case it considered that the matter was not subject to arbitration in a clause such as the following: "All or any disputes arising out of or in connection with this agreement or any of its clauses...". This was not the case in the cases decided by the same Court and by the commercial court a quo (AAP, Civil section 28 of 18 October 2013 (ROJ: AAP M 1988/2013 and AJM, Mercantile section 11 of 04 May 2011 (ROJ: AJM M 89/2011), where the clause was as follows: "All Disputes whose resolution is not submitted to arbitration in accordance with Clauses 15. 4 and 15.5 shall in the first instance be submitted exclusively to the courts of justice of s'Hertogenbosch (The Netherlands)". In this case the Provincial Court will welcome the referral to arbitration regime in a mixed clause stating that "In any event, since it is insisted that, despite this undeniable nexus, the actions would be based on non-arbitrable subject matter, we must point out that it cannot be the rules cited by the appellant (specifically EC Regulation 1/2003 - Article 6 - and EC Regulation 1400/2002 - Articles 3.6 and 5.a) that support its approach."

[35] There is a wide-ranging doctrinal discussion on this issue, which is developed in this option on the possibility of its assessment ex officio. In this sense and in favour of it Pavelka, T. (2012). "Antitrust Arbitration Review. The Czech Do It Differently: but how

between the co-infringers regarding the amount corresponding to one of them who has paid and who claims the quota of the others, or even the legal claim that could be raised subsequently for not having respected, between the signatories, the said competition rules, can and should be taken into account by the Courts after the existence of an arbitration award.

And it is from there that the approach also focuses on the evidence and the sources of evidence and the need to use the standards, rules, burdens and access to them, on the basis that it is an alternative composition, but which can be constructed only from an arbitration clause or with a complete development of the arbitration. In this sense, we must take into account the arbitration rules to which the parties submit themselves, especially in these cases where the range of competences is spread not only by virtue of the international nature of the cases but also by virtue of the transnational nature of the effects and the assumption of jurisdiction in virtue of this[36].

4. Mediation and the defence of competition.

For the OECD-2010 report[37], we could consider two types of disputes related to competition law: follow-on or collective claims for damages and disputes relating to ongoing business relationships that may occur in a specific sector. Mediation may be particularly important if companies seek to re-establish a normal relationship and continue to generate profits but, in line with the report, although mediation shares some common features with arbitration (the lack of court involvement, the confidentiality of the proceedings and a neutral third party conducting the process), mediation raises a number of issues that are different from arbitration and more difficult to reconcile, we would add, with the regime of effects that the Damages Directive seeks to give to private claims arising from antitrust infringements. Unlike the arbitration process, a mediator does not issue any judgement or award, and if the parties cannot reach an agreement, the result is a frustrated mediation without agreement.

Although it is very difficult to document the existence of such mediations, very prominent public mediations are often cited, such as the successful mediation in the UK between the British Marine Federation and British Waterways[38] over the market for marinas and moorings

much?,"disponible en https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166073 2012, pg. 10 . A more in-depth development can be found in Derains, Y. (2001). "Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts. In C. Ehlerman, I. Atanasiu (eds), European Competition Annual 2001: Effective Private Enforcement of EC Antitrust Law. Also in Geradin, Damien, "The Power of Arbitral Tribunals to Raise Public Policy Rules Ex Officio: The Case of EU Competition Law (June 15, 2016)". TILEC Discussion Paper No. 2016-027, Available at SSRN: https://ssrn.com/abstract=2796015 or http://dx.doi.org/10.2139/ssrn.2796015

[36] The IBA Rules on the Taking of Evidence in International Arbitration (2010) do contain this type of possible evidence, www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx , but not in UNCITRAL, Arbitration Rules 2010, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf , ni tampoco las ICC, Rules of Arbitration, https://iccwbo.org/dispute-resolution-services/arbitration/rulesof-arbitration

[37] OECD, Hearings, Arbitration and Competition, DAF/COMP(2010), p. 10, disponible en: http://www.oecd.org/competition/abuse/49294392.pdf.

[38] https://www.boatingbusiness.com/news101/industry-news/257052.article

on inland waterways; and the failed mediation between the bookmakers and Turf TV[39] over the sale of television pictures.

The parties to the mediation have the same responsibilities as they would have if they were reaching any other agreement. Competition law acts as the backdrop against which the mediator works, much as money laundering regulations form part of the legal backdrop and these principles must not be offended. However, the mediator only has a duty to uphold competition law in a limited sense, i.e. by ensuring that the parties do not facilitate an illegal or anti-competitive contract.

It will be difficult to reconcile mediation with the provision of evidence other than what the parties want, even taking into account the principles of the Damages Directive which foresee the aforementioned access to sources of evidence and the cooperation of the competition authorities.

Once the agreement has been reached, the effects should follow the regime that we will explain below. Failing this, the parties may resort to arbitration, where appropriate, or judicial proceedings for their claim.

5. Early Neutral Evaluation (ENE)

Early neutral evaluation can be conceived as a non-binding form of alternative dispute resolution. In it the neutral, who is likely to be a retired judge or a legal professional, listens to the submissions of each party and then gives his or her opinion on the likely outcome if it goes to trial. This opinion is without prejudice to the outcome and has no binding effect. Some US courts and Bar Associations already embrace it as such[40]. Taking for example the Vermont setting[41], in this and after the opportunity for a limited test, the litigants meet with an impartial and neutral evaluator selected by the parties. The evaluator is an experienced lawyer with knowledge of the subject matter of the litigation. The parties are required to submit to the evaluator a report of their respective positions. After reviewing the briefs, the evaluator meets with the parties and discusses the merits of the case, including the strengths and weaknesses of the parties' positions. The evaluator is then responsible for submitting to the Court a brief report summarising the outcome of the evaluation session. Due to the need for confidentiality, the evaluator does not disclose or include in the report any professional opinion or assessment that may be provided to the parties, nor the content of the substantive issues discussed during the NES session. Following the NES process, in many cases the parties agree to settle the case

[39] https://www.cms-lawnow.com/ealerts/2008/12/turf-tv-part-2-victory-for-the-bookmakers?cc_lang=en

[40] Examples include the Northern District of California, the District of Vermont and the Superior Court of Orange County, California. The NES can also be used in federal and state government litigation. For example, the website of the U.S. Equal Employment Opportunity Commission includes a list of government agencies that offer an NES programme, and the California Bar Court, which hears attorney discipline cases, also offers an NES programme. In our country, the prior attempt before the Dean provided for in some bar statutes when there is a problem between lawyers of the same bar may also be an example.

[41] https://www.vtd.uscourts.gov/early-neutral-evaluation-ene

before judicial intervention. In cases where no agreement is reached, the evaluator is in a position to assist the court in clarifying the evidentiary issues and narrowing the scope of the dispute.

Of course, in these cases, apart from the effects that we will later see in the event of an agreement, the situation is still a voluntary composition that the parties can reject, but for the purposes of claiming damages, it may involve a professional opinion that will later be difficult to use in court as evidence if it is not duly authorised and regulated in the law, something that currently could only pass for a documentary as far as the report is concerned and for a testimonial (not an expert opinion) as far as the professional who has intervened is concerned.

6. Conciliation within the procedure.

Perhaps one of the most interesting issues that may arise in order to avoid litigation is the issue of conciliation within the scope of judicial proceedings, which in the Spanish legal system is provided for in the preliminary hearing (arts. 19 and 414 LEC 1/2000).

One of the cases that can be highlighted once the lawsuit has been filed and the proceedings have begun is that of *Microsoft*[42], the DOJ and different states, where up to three mediations were attempted, with a period of more than three years having elapsed and having to adapt the object of the mediation given that what had previously been considered a restrictive market practice had become, with the passage of time, something commonplace derived from the use of software. In the above case the parties, at the initiative of the judge, tried to find an amicable solution by negotiating face-to-face and secured a stay of proceedings. However, these efforts were not as successful as desired. After informing the Court that the negotiations had failed, they requested that Professor Eric D. Green be appointed as mediator for another round of settlement discussions. On the last day of the three-week period allowed for mediation, the mediators were able to inform the court that Microsoft, the United States and most of the federal states had reached an agreement. This settlement was submitted to the court in the form of a proposed final judgment, which was subsequently revised slightly[43]. Another case currently pending is the *Pork Antitrust Litigation in Minnesota*[44]. In this case, a class action is settled by

[42] Zimmer, Daniel and Höft, Jan, Alternative Dispute Resolution in Antitrust Cases? On the Role of Mediation in US Antitrust and EU and German Competition Law (April 15, 2013). European Competition Law Review (E.C.L.R.) 2013, 434-442, Available at SSRN: https://ssrn.com/abstract=2749037

Revised Proposed Final Judgment, Microsoft, 231 F. Supp. 2d 144 (Civ. No. 98-1232), Disponible en http://www.justice.gov/atr/cases/f9400/9495.pdf.

[43] Revised Proposed Final Judgment, Microsoft, 231 F. Supp. 2d 144 (Civ. No. 98-1232), Disponible en http://www.justice.gov/atr/cases/f9400/9495.pdf.

[44] Pork Antitrust Litigation, Case No. 0:18-cv-01776 (the Direct Purchaser Plaintiff Action) in the U.S. District Court for the District of Minnesota. Véase aquí https://porkantitrustlitigation.com/assets/docs/New%20Docs/Order%20Granting%20Claims%20Process.pdf

agreement and a settlement administrator is appointed as part of the proceedings, establishing a timetable from opposition to approval by the Court and full payment.

Similarly, the mediation model has been used on occasion by the European Commission in its commitment decisions, as in the *DONG/Elsam/Energi E2 case*[45]. This was a ruling on a merger where the Commission itself refers the parties, in case of disagreement, to the mediation procedure: "In case a third party has reason to believe that DONG has not complied with the commitments, a mediation procedure will be launched. The mediation procedure shall be supervised by the monitoring trustee, who shall have the right, under certain conditions, to appoint additional professionals to assist in the mediation process".

One of the sections that had been under discussion was that of the possible homologation of the agreement by the judicial authority. From there we must turn to paragraph 48 of the Directive where this possibility is expressly recognised for agreements that the judge makes binding, which could not be otherwise, bearing in mind that even in the administrative procedure the commitments (and the one we have seen for mediation) are also binding.

7. The stay of proceedings derived from attempts at out-of-court settlements.

The wording of Article 18 of the Directive is different from the implementation that has been made, as instance, in Spain in Article 81[46] LDC and must be completed with Article 74.4 LDC. The former refers to the suspension of legal proceedings already initiated, while the wording of Article 18 distinguishes between cases prior and subsequent to the commencement of the action, which will necessarily affect the interruption of the statute of limitations, but not only that. It is thus stated that it has to be ensured that the period for bringing an action for damages is suspended until the end of any out-of-court dispute settlement procedure that may take place. The suspension of the time limit will only apply in relation to the parties who are or were involved or represented in the out-of-court settlement of the dispute. On the other hand, it states that, without prejudice to national rules on arbitration, Member States must ensure that national courts hearing an action for damages may stay proceedings for a maximum of two years if the parties to the proceedings are pursuing out-of-court settlement of the dispute relating to the claims in that action for damages.

When the rule refers to "any out-of-court dispute settlement procedure", in the first case, it is not referring to a specific one but to any possible one prior to the proceedings, where (in accordance with the second criterion) the rules of arbitration will apply in its case and therefore

[45] Case COMP/M.3868-DONG/Elsam/Energi E2.
Available : https://ec.europa.eu/competition/mergers/cases/decisions/m3868_20060314_20600_en.pdf

[46] The courts hearing an action for damages for infringement of competition law may stay the proceedings for a maximum of two years if the parties to the proceedings are pursuing an out-of-court settlement of the dispute relating to the claim.

its termination in accordance with the same if it is carried out or the suspension provided for therein for a maximum of two years.

In relation to all this, we should distinguish two types of consensual alternative dispute resolution. On the one hand, we find those that will give us a final answer from those that either are not accepted or do not necessarily (such as mediation) produce one. When we obtain a final response, we do not speak of a suspension but of a solution and therefore the time limit provided for in the rule or the interruption of the time limit for claiming lacks effectiveness.

It is only in those cases in which a final answer is not obtained and which allow the initiation or continuation of the judicial procedure for claiming damages that this maximum limit of two years is specifically foreseen, which, moreover, is based on a configuration that places the subsequent action to initiate or continue in the parties and the decision to suspend in the Court[47].

From this point onwards, a series of problems will arise in this respect concerning the dies a quo or initial day for the resumption, the possibility of other affected parties or infringers taking part in the suspended proceedings, the harmonisation of the expiry of the proceedings and the period granted for negotiation, the possibility of establishing a shorter period than two years by the court, the possibility of precautionary measures while negotiations are taking place, etc.

8. Analysis of the effects of out-of-court settlements on private damage claims.

As we have seen above, paragraph five of the Explanatory Memorandum of the Directive seeks to encourage the settlement of private damage claim disputes by means of alternatives to judicial proceedings, thus setting up a system that encourages out-of-court settlements (Consensual Dispute Resolution) by giving benefits to the offenders involved in them. This is similar - but external and subsequent - with regard to settlements or leniency programmes within the sanctioning procedure. And it does so whether the same occurs prior to a possible judicial claim, or if this occurs or is attempted within the proceedings but before the latter are finally terminated.

As some author already discussed rightly points out "Consensual dispute resolution can be considered the third pillar of competition law enforcement, alongside public enforcement and the resolution of claims before a state court[48]." But this must be considered in the light of the effects that may be raised in subsequent proceedings either by others affected against infringers or between infringers themselves to claim from others the corresponding share according to the

[47] Where the proceedings have been adjourned for mediation, at the end of the mediation, either party may request that the adjournment be lifted and that a date be set for the continuation of the hearing.

[48] Modzelewska , "Consensual Dispute…" op. Ct. Pg. 65

principle of relativity. This is where we come to Article 19 of the Directive, from which we distinguish the different paragraphs.

On the one hand, it regulates that Member States shall ensure that, following an out-of-court settlement, the claim of the injured party participating in the settlement is reduced by the proportionate share that the settling co-infringer has in the harm that the infringement of competition law caused to the injured party.

It should be borne in mind that it is a settlement through such intra- or extra-judicial procedures, which will entail an amount of compensation for the damage that does not necessarily have to be the amount that an expert report might have indicated in this or any other case. Therefore, the settlement is for that amount and any remaining claim of the injured party (of that party) who has reached an out-of-court settlement can only be pursued against co-infringers with whom no settlement has been reached. Accordingly, the injured party claims against the offender and reaches an agreement with him and if the amount covered is not the full amount, he can continue to claim from the remaining co-infringers who will not have the possibility, when they pay, to claim that part from the one who has reached that agreement.

Thus, underlining the above, the co-infringers with whom an agreement has not been reached will not be able to demand from the offender who participated in the agreement a contribution in the remaining claim that has not been paid to the injured party with whom the agreement was reached. But a new nuance will arise in this case when the co-infringers who have not reached an out-of-court settlement cannot pay the damages corresponding to the remaining claim of the injured party who reached the settlement; in this case the injured party can demand the remaining claim from the co-infringer with whom the out-of-court settlement has been reached even in spite of the settlement unless an express exclusion has been established in the consensual agreement reached by the parties.

The way to calculate the amount that a co-infringer can recover from another co-infringer (on the assumption that it will be a new procedure between other parties) is set out in the last paragraph of the provision and takes into account what is called "relative liability for the damage caused". The rule tells us that for its calculation the damages paid in the context of a previous out-of-court settlement in which the respective co-infringer has participated must be taken into account. This does not mean that they can be recovered in respect of the one who has paid in the agreement, since he is subject to the previous rule, but that it must be reduced by the amount actually paid and from there calculate the quotas that correspond to the rest of the co-infringers.

In this approach, we should also bear in mind that it is qualified in a complex way (Articles 11 and 12 of the Directive): 1. In order to avoid overcompensation, Member States shall put in place appropriate procedural provisions to ensure that compensation for consequential damage at any level of the supply chain does not exceed the damage for the extra cost incurred at that

level.[49] 2. When the infringer is a small or medium-sized enterprise (SME[50]) not previously sanctioned and as long as it has not directed the infringement or coerced others to enter, the infringer will only be liable to its own direct and indirect buyers according to its market share (less than 5%) and provided that this could lead to the economic non-viability of the company or the total loss of its assets. 3. - If it is a leniency applicant thus benefited[51], it will only be liable for the damage of its suppliers or direct or indirect buyers and not others, unless the latter cannot obtain full compensation from the rest of the co-infringers, in which case they can claim for the rest, albeit according to their relative liability[52]. On the other hand, the amount of the contribution of an infringer (in claim of another infringer who has paid more than what corresponds to its relative liability) that has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it has caused to its own direct or indirect purchasers or suppliers.

9. Conclusion. On the effectiveness of the system.

We could say, with one author[53], that "... relying solely on regulators to enforce competition law rules will never be sufficient. Private enforcement" of antitrust rules has long been the main enforcement mechanism in the United States, and is now increasingly crucial in the European Union. Ordinary courts can sometimes be an effective forum in competition cases where the facts are straightforward, the remedies sought are conventional, and where the existence of an infringement has been previously determined by the regulator. But in many situations, both in the EU and in the US, arbitration of competition disputes offers real advantages. It allows parties to select arbitrators with expertise in competition and antitrust law and economics, which unfortunately remains an exception for many national judges. It allows for greater procedural as well as procedural flexibility, as well as a less public forum for resolving matters that may be of the greatest commercial sensitivity. Competition law also has as one of its main distinguishing features the fact that the issues requiring resolution often concern the present and the future rather than the past. This is particularly the case when the issues to be resolved arise in the field of merger control, when recourse to arbitration is increasingly seen as one of the mechanisms for controlling the non-structural remedies imposed on merging entities". The idea, as we have seen in the interplay of the 5th and 48th sentences of the Directive, is to

[49] To this end, a Passing-On Guide was also approved in 2019. https://ec.europa.eu/competition-policy/document/download/8699ed8a-7a3c-4a57-b5d3-01fca4cb423c_en?filename=damages_actions_quantification_practical_guide.zip

[50] As defined in Commission Recommendation 2003/361/EC

[51] For Ribelles JM, "Acciones follow on....." ob cit. pg. 56, only those who obtain total exemption from the payment of the fine and not mere reductions, i.e. the first whistleblower, would benefit from it and from this limitation.

[52] Member States shall ensure that, to the extent that the infringement of competition law causes harm to injured parties other than the direct or indirect purchasers or suppliers of the infringers, the amount of any contribution from a leniency beneficiary to other infringers is determined according to their relative responsibility for that harm.

[53] G. Blanke and P. Landolt , "Prólogo" en G. Blanke and P. Landolt (eds), EU and US Antitrust Arbitration: A Handbook for Practitioners (Kluwer Law International, 2011) pp. cvii-cviii.

encourage this type of remedy. Article 18.3 of the Damages Directive expressly states that "A competition authority may consider as a mitigating factor the fact that, before adopting its decision to impose a fine, compensation has been paid as a result of an out-of-court settlement" and therefore accepting that this is the case before and after the commencement of actions and for any eventuality. "

Notwithstanding the above, it is clear that some issues remain to be resolved in the application of these instruments to solve the problems that arise. For example, Article 9 of the Damages Directive is silent on the effect of decisions of national competition authorities and national courts in the case of out-of-court settlements. While it provides that an infringement of competition established by a final decision of an agency or by a court is considered irrefutable for the purposes of an action for damages brought before its national courts under Articles 101 or 102 TFEU or under the provisions of national competition law, it does not say the same for the arbitral decision or the agreement resulting from mediation, for example. At the same time, the second paragraph of the same provision states that where the decision of an agency is taken in another Member State, this final decision may be submitted to the national courts as prima facie evidence. In the view of some authors, it is unclear how an arbitral tribunal, or in any other consensual situation, should act in the same circumstances. It is also questionable, it is argued, whether, under basic principles of arbitration law, the decision of a domestic agency should have more legitimacy than the decision of a foreign agency[54].

However, a serious concern, and one that is consistently highlighted in the decisions we have seen, is the possibility of failing to apply competition law, or of circumventing it, or of not having a uniform response to the same conduct. In this sense, it has been pointed out by some authors in studies on the decisions of the Courts and particularly the rulings of the Advocates General in which they propose a review of the substance of the arbitration decisions and not simply an exceptional review. In view of this, they propose[55] a vision that goes from a minimalist to a maximalist area, as this, following the recent American doctrine[56], would only result in throwing the decisions derived from these alternative consensual means into the wastebasket.

The specialisation of the Courts is also another solution to this problem and from there the possibility of adopting decisions that lead the parties to resolve these questions before experts outside the litigation and with full guarantees.

[54] M. Driessen-Reilly, "Private damages in EU competition law and arbitration – a changing landscape'"(2015) Arbitration International , http://dx.doi.org/10.1093/arbint/aiv007.

[55] Kristóf Szeredi LL.M. "Robbing Peter to pay Paul: How effectiveness concerns about EU antitrust arbitration could harm effective enforcement". Concurrences ejournal, Awards 2020. https://awards.concurrences.com/IMG/pdf/19._robbing_peter_to_pay_paul.pdf?56480/0e67c94d17f398253641e74a43e571d6f7349328

[56] Baxter International, Inc. v. Abbott Laboratories 315 F.3d 829 (7th Cir. 2003)

10. Bibliography

Areeda y Turner, *Tratado de derecho antitrust*. *Harv. L. Rev*. 697, 1975.

Bodnar, Olivia; Fremerey, Melinda; Normann, Hans-Theo; Schad, Jannika Leonie (2021) : "The effects of private damage claims on cartel activity: Experimental evidence2 , DICE Discussion Paper, No. 315, ISBN 978-3-86304-597-5, Heinrich Heine University Düsseldorf, Düsseldorf Institute for Competition Economics (DICE), Düsseldorf. Disponible en http://hdl.handle.net/10419/235205.

B. Rodger, "Why not court? A study on follow-on actions in the UK" (2013) 1(1) *Journal of Antitrust Enforcement* 104–131.

B. Rodger, 'Private Enforcement of Competition Law, The Hidden Story: Competition Litigation Settlements in the UK 2000–2005" (2008) ECLR 96–116.

Campuzano AB y Sanjuán y Muñoz E, Mercado y *Derecho de la Competencia. Reglas de actuación y funcionamiento*. Tirant 2021

Derains, Y. (2001). "Specific Issues Arising in the Enforcement of EC Antitrust Rules by Arbitration Courts." , en C. Ehlerman, I. Atanasiu (eds), *European Competition Annual 2001: Effective Private Enforcement of EC Antitrust Law.* Oxford, Hart Publishing., p. 323.

Elyse Dorsey, Jan Rybnicek, Joshua Wright, " Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent-Seeking", *Law & Economics* #: 18-20

G. Blanke and P. Landolt , "Prólogo" en G. Blanke and P. Landolt (eds), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, 2011) pp. cvii-cviii.

Geradin, Damien, "The Power of Arbitral Tribunals to Raise Public Policy Rules Ex Officio: The Case of EU Competition Law (June 15, 2016)". *TILEC Discussion Paper* No. 2016-027, Disponible en SSRN: https://ssrn.com/abstract=2796015 or http://dx.doi.org/10.2139/ssrn.2796015

Gov-UK," Private actions in competition law: a consultation on options for reform https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf

H. Bergman & D.D. Sokol, "The Air Cargo Cartel: Lessons for Compliance", *en Beaton-Wells & Tran (eds), Anti-Cartel Enforcement In A Contemporary Age: Leniency Religion* (Hart Publishing 2015.

IBA, Rules on the Taking of Evidence in International Arbitration (2010), www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx ,

ICN (International Competition Network) "Good practices for incentivising leniency applications", Subgrupo 1 sobre Grupo de trabajo de Cárteles, 30 April 2019. Disponible en https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf

Idot, L. (2010). "Arbitration and Competition", en *OECD Report Competition Law and Policy,* disponible en http://www.oecd.org/competition/abuse/49294392.pdf p. 51–52

Kahneman D, *Thinking, Fast and Slow*, 2011.

Kristóf Szeredi LL.M. "Robbing Peter to pay Paul: How effectiveness concerns about EU antitrust arbitration could harm effective enforcement". Concurrences ejournal, Awards 2020. https://awards.concurrences.com/IMG/pdf/19._robbing_peter_to_pay_paul.pdf?56480/0e67c94d17f398253641e74a43e571d6f7349328

Landolt, Ph. (2011). "Chapter 15: The Application of EU Competition Law in International Arbitration in Switzerland.", en G. Blanke and Ph. Landolt (Eds.), *EU and US Antitrust Arbitration: A Handbook for Practitioners* (pp. 545–565). Alphen aan den Rijn, The Netherlands: Kluwer Law International

Lizana C y Pavic L, "Control preventivo de fusiones y adquisiciones frente a la legislación antimonopolios", *Revista Chilena de Derecho*, Vol. 29, n 3 pp 507-541, 2002.

Maillo J. "EU Cartel Settlement procedure: an assessment of its results 10 years later ", Documento de Trabajo. Serie Política de la Competencia. Número 57 / 2017, disponible en https://repositorioinstitucional.ceu.es/bitstream/10637/10807/1/eu_maillo_2017.pdf

M. Driessen-Reilly, "Private damages in EU competition law and arbitration – a changing landscape'"(2015) Arbitration International , http://dx.doi.org/10.1093/arbint/aiv007.

Martí Miravalls J, "La aplicación privada del derecho de la competencia sobre las particularidades de las acciones de nulidad y de daños y perjuicios". Pgs 105 y 106. Disponible en http://www.ravjl.com/bd/archivos/archivo118.pdf

Moisejevas, Raimundas, "The Damages Directive and Consensual Approach to Antitrust Enforcement (December 31, 2015)". *Yearbook of Antitrust and Regulatory Studies* vol. 2015, 8(12), p. 181-194, Disponible en https://ssrn.com/abstract=2866276 or http://dx.doi.org/10.2139/ssrn.2866276

M. Driessen-Reilly, "Private damages in EU competition law and arbitration – a changing landscape" (2015) *Arbitration International*, *http://dx.doi.org/10.1093/arbint/aiv007*.

Modzelewska de Raad, Małgorzata, "Consensual Dispute Resolution in the Damage Directive. Implementation in CEE Countries (June 30, 2017)." *Yearbook of Antitrust and Regulatory Studies (YARS*), vol. 10(15), p. 49-67, 2017, Available at SSRN: https://ssrn.com/abstract=3120449

M.T. Vanikiotis, "Private Antitrust Enforcement and Tentative Steps Toward Collective Redress in Europe and the United Kingdom" (2014) 37(5) *Fordham International Law Journal* 1639–1682.

Olmedo E. *Las transacciones (settlements) en el derecho antitrust*. Cizur Menor (Navarra): Aranzadi, 2021

Page WH "The Chicago School and the Evolution of Antitrust" *Va L. Rev*. 75 , 1989, pp 1221 a 1253.

Panadero JB, "Exclusión como preocupación de competición del núcleo", 78, *Antitrust LJ.* 527,2013.

Pavelka, T. (2012). "Antitrust Arbitration Review. The Czech Do It Differently: but how much?,"disponible en https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166073 2012, pg. 10 .

Piszcz A, "*Well Begun is Half Done: Amendments to the Polish Legal Framework for Consensual Dispute Resolution Needed After Antitrust Damages Directive (2014/104/EU)*" *Białostockie Studia Prawnicze* 2017 vol. 22 nr 4

R.H. Lande, J.P. Davis, "Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases" (2008) 42 USFL Review 879–918.

Ribelles JM, "Acciones follo won y la doctrina de la solidaridad impropia", en *AAVV* , *Acciones follow on. Reclamaciones de daños por infracciones del derecho de la competencia*. Tirant 2019, pgs.49 a 53

R. Kovar (1982*): Droit Communautaire de la Concurrence et Arbitrage; in: Etudes Offertes à B. Goldman, Litec, p. 110.*

Sadrak, Katarzyna, "Arbitration Agreements and Actions for Antitrust Damages after the CDC Hydrogen Peroxide Judgment (2017)". *Yearbook of Antitrust and Regulatory Studies*, Vol. 2017, 10(16), Disponible en SSRN: https://ssrn.com/abstract=3159994.

Sanjuán y Muñoz, E, " Infractions of the Competition as Externalities" publicado en , *European Economics: Microeconomics & Industrial Organization eJournal* , Vol 12, Issue 53, August 07, 2018 . Disponible en https://papers.ssrn.com/abstract=3211511

Sanjuán y Muñoz, E, "The principle of relative responsibility for harm in the Directive 2014/104/UE". Oxford Competition Law eJorunal, 12th April 2019. Disponible en https://oxcat.ouplaw.com/page/765; véase también Sanjuán y Muñoz, E, "The Principle of Relative Responsibility in Antitrust Damages", *Antitrust: Antitrust Law & Policy eJournal* , Vol 11, Issue 50, June 14, 2019 . Disponible en https://hq.ssrn.com/Journals/IssueProof.cfm?abstractid=3334601&journalid=1492474&issue_number=50&volume=11&journal_type=CMBO&function=showissue

Sanjuán y Muñoz, E, "La naturaleza de la acción privada de daños derivada de la infracción de las normas de defensa de la competencia", *Revista de Responsabilidad Civil y Seguro,* 10/2018, disponible en https://www.asociacionabogadosrcs.org/portal/wp-content/uploads/2018/10/ARTICULO-DOCTRINAL-Enrique-Sanjuán-y-Muñoz.pdf

Sanjuán, Enrique, "Los dictámenes e informes de las autoridades de la competencia en supuestos de defensa de la competencia (The Opinions and Reports of the Competition Authorities in Antitrust Cases) "(August 12, 2019). *Antitrust & Regulated Industries eJournals, Antitrust: Antitrust Law & Policy eJournal – CMBO.* Disponible https://ssrn.com/abstract=3441261 or http://dx.doi.org/10.2139/ssrn.3441261

,[1] OECD, *Hearings, Arbitration and Competition*, DAF/COMP(2010), p. 10, disponible en: http://www.oecd.org/competition/abuse/49294392.pdf.

Suderow J y Angulo A, "Spain", *Compatibility of Transactional Resolutions of Antitrust Proceedings with Due Process and Fundamental Rights & Online Exhaustion of IP Rights*

Editors Bruce KilpatrickPierre KobelPranvera Këllezi edited by Bruce Kilpatrick, Pierre Kobel, Pranvera Këllezi, 2016 pg. 356

UNCITRAL, Arbitration Rules 2010, https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf , ni tampoco las ICC, Rules of Arbitration, https://iccwbo.org/dispute-resolution-services/arbitration/rulesof-arbitration

Ward A , López Ridruejo M y Aguirre I , "Capítulo 8. Introducción de la figura del settlement en el ordenamiento jurídico español ", en *Anuario de Derecho de la Competencia (2020).* 1ª ed., agosto 2020

Zimmer, Daniel and Höft, Jan, Alternative Dispute Resolution in Antitrust Cases? On the Role of Mediation in US Antitrust and EU and German Competition Law (April 15, 2013). European Competition Law Review (E.C.L.R.) 2013, 434-442, Available at SSRN: https://ssrn.com/abstract=2749037

Živković, P. (2017). "Antitrust Arbitration in Europe (Part II): Improving Private Enforcement by Removing Procedural and Evidential Barriers in Arbitration." *Kluwer Arbitration Blog*: http://kluwerarbitrationblog.com/2017/06/03/antitrustarbitration-europe-part-ii-scope-effect-arbitration-clauses-microsoft-case/ (20.07.2017).