ARBITRABILITY OF COMPETITION LAW (ANTITRUST) DISPUTES

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Abstract
The expansion of arbitral competence in handling competition law/antitrust matters can be seen as a global trend, however not an entirely uniform one. In certain states the legitimate interest of the state in controlling or preventing monopolies and other market practices is readily appreciated. The main test for each arbitral tribunal is if the competition law/antitrust dispute is arbitrable under the applicable law. The arbitrability determines whether certain types of disputes can be submitted to arbitration or *a contrario* whether they fall within the exclusive jurisdiction of the courts. There are nevertheless situations when the existence of mandatory court jurisdiction impacts arbitrability. This is so when considerations of international public policy dictate the mandatory jurisdiction of the court. Historically, courts would not enforce of contractual arbitration clauses covering competition law/antitrust disputes, even if the parties had specifically agreed to arbitrate this kind of matters. Fortunately, the underlying premise that competition law, respectively the antitrust issues are *per se* non arbitrable is no longer universally accepted. The theory and practice of the courts both in the European Union and the United States, at least *in dicta*, has proven that in the context of international commercial arbitration "second look" is possible. In this respect the jurisprudence of the Republic of Macedonia does not have specific indications as for the arbitrability of the competition law and antitrust in particular. However, it is important to note that there is a tendency worldwide of increasing the role of international commercial arbitration in the enforcement of the domestic competition law..

***Keywords**: antitrust, arbitrability, competition law, dispute resolution, Macedonia*

1. Preface

The tension between antitrust laws and international arbitration derives from their fundamental opposition along the public-private dichotomy. Antitrust laws seek to protect public interests by preserving free competition in the markets. Public antitrust or competition agencies commonly enforce these laws by imposing fines, injunctions, or even criminal penalties pursuant to domestic antitrust laws. By contrast the international arbitration is a form of private, contractual, ordering, aimed at dispute resolution (Korzun, 2016, p. 869-870).

The debate here is in fact whether the administrative law matters can be resolved by arbitration or whether the party autonomy is excluded in such cases.

Prior to the landmark decision *Mitsubishi Motors v. Soler Chrysler-Plymouth,* the United States courts were reluctant to permit arbitration of antitrust claims. This stance was changed and the courts affirmed that arbitrating antitrust claims would not violate the United States public policy. The Court, in the *Mitsubishi Motors* decision, expressed "a strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes" (*Mitsubishi Motors* v. *Soler Chrysler-Plymouth*, 473 U.S. 614, 105 S. Ct. 3346 (1985)). The *Mitsubishi* decision left the question open whether domestic antitrust claims could be arbitrated, which distinction was additionally discarded as well (Rogers, Landi, 2001, p. 3).

On the other hand, in the European Union, the Court of Justice (CJEU) has never directly held that claims implicating EU competition law are arbitrable. The CJEU indirectly took up the question in *Eco Swiss China Time Ltd.* v. *Benetton International NV*., where it suggested the possibility that disputes concerning antitrust claims may be resolved by means of arbitration (*Eco Swiss China Time Ltd.* v. *Benetton International NV*., case C- 126/97). Despite the fact that the CJEU did not expressly affirm the arbitrability of competition claims, the vast majority of the commentators regard the *Eco Swiss* as inferring that the Court considers them as arbitrable in principle, even if EU competition law implicates public policy (Rogers, Landi, 2001, p. 4-5). On the point of arbitrability, the position of the European Commission is less clear. Although it has refrained from taking any steps to encourage the arbitration of competition law disputes, in the past it has not excluded the possibility of arbitrating such disputes (Commission Decision of 12 July 1989 (89/467/EEC)).

In the aftermath of these landmark decisions it is now principally recognized throughout Europe that EU and domestic antitrust claims are arbitrable in the same way United States antitrust claims are arbitrable. Note must be taken that not all cases of antitrust disputes are arbitrable. There are certain exceptions that involve a significant public interest and over which the state intends to retain control. The main obstacle to using arbitration to resolve the antitrust disputes is the issue of (in) arbitrability. Following this reasoning the aim of this article is to make comparison

between the solutions of the issue of arbitrability of antitrust disputes used in the Republic of Macedonia and the analyzed foreign case law and scholarly opinions. In this regard the authors are trying to find the right balance between the foreign experience and the domestic context in which it should be implemented.

2. Defining the arbitrability

The word arbitrability derives from the Latin *arbitration* and the suffix *bills* meaning capability (Zoroska-Kamilovska, 2015, p. 89). The simplest definition of the arbitrability is the capability of resorting a dispute to arbitration, which in fact does not say much for this legal term (Zoroska-Kamilovska, 2015, p. 89).

However, in legal theory it is considered that the issue of arbitrability addresses the question of whether a dispute is legally amenable to resolution by arbitration (Kneževic, Pavić, 2009, p. 184). In the absence of arbitrability that is in the event of finding of in-arbitrability the resolution of the dispute is reserved to national court or a designated governmental administrative authority (Halket, 2012, p. 56).

The consideration of arbitrability for the arbitral tribunal "is to some extent analogous to a subject matter jurisdiction analysis for a court; it is an evaluation of the adjudicator`s legal authority to decide the dispute*"*. It is thus a threshold of vital importance to those already undertaking the arbitration (Halket, 2012, p. 57). The core issues in this analysis are the existence, validity and scope of the arbitration agreement and whether matters which are the subject matter of the dispute may, under the applicable law, be adjudicated in an arbitration proceeding.

In the continental legal systems, the question of arbitrability is connected with the question of whether the claim can be subject of party autonomy. In the common law legal systems this important question is defined on the basis of court decisions and very rarely can one find legal provisions which regulate the issue of arbitrability (Gavroska, Deskoski, 2007, p. 573-590). In comparative law, there are two main approaches to the definition of arbitrability: first, any claim involving economic interest and second, any claim over which the parties are entitled to conclude a settlement. An arbitration agreement is valid only to the extent that it covers a dispute that is arbitrable (Kaufmann-Kohler, Rigozzi, 2015, p. 100).

On the ground that arbitrability is a condition of jurisdiction, the Swiss Supreme Court has ruled that an objection of lack of arbitrability must be raised prior to any defense on the merits (Supreme Court Decision 4A_370/2007). Therefore, a party who fails to object to the lack of arbitrability before the arbitral tribunal cannot subsequently raise this ground in annulment proceedings against the award.

The arbitral tribunal and the court hearing a challenge against the award will review the arbitrability under the *lex arbitri* (Kaufmann-Kohler, Rigozzi, 2015, p. 99). The court where the recognition and enforcement is sought will apply its own

law to arbitrability (Article V(2)(a) of the New York Convention on recognition and Enforcement of Foreign Arbitral Awards - NYC).

In theory there are two major types of arbitrability: objective and subjective. However, there are also other thematic considerations from the aspect of the territorial and institutional boundaries of the arbitration, such as institutional arbitration, domestic and international arbitration etc., which will not be analyzed in this Article (Galliard, Fouchard, 1999, p. 91).

2.1 Objective arbitrability

The objective arbitrability (*rationae materiae)* assesses the existence of arbitrability from the point of view of whether the objective nature of the dispute allows it to be assessed by arbitration. In fact, this means that the parties are allowed to take the dispute out of the competence of the court and resort to arbitration (Deskoski, 2016, p. 162).

However, each state creates boundaries to the autonomy of the parties by providing exclusive competence of the domestic court for certain types of disputes. T,hus these disputes are considered as in-arbitrable. The legal norms defining the objective arbitrability are of an imperative nature and, in most cases, they provide exhaustive list of disputes that cannot be deemed arbitrable. In this regard Hanotiau as well as other eminent scholars consider that the objective arbitrability is a condition for the validity of the arbitration agreement (Lemley, Leslie, 2015, p. 53).

The most important legal documents that define the arbitrability, the New York Convention on recognition and enforcement of foreign arbitral awards of 1958 (NYC) and the United Nations Commission on International Trade (UNCITRAL) Model Law on International Commercial Arbitration (UNCITRAL Model Law), do not contain any indications as to which disputes are to be considered as arbitrable. The Article II of the NYC provides that "each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration" (Article II (1) of the NYC). Read in conjunction with the Article I (3) of the NYC "any State may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration" and decline recognition and enforcement under the Article V (2) "(a) should the subject of the dispute is not capable for being solved by arbitration". On the other hand, the UNCITRAL Model Law does not contain any reference to the arbitrability, however provide in its Article 1 (5) that "the objective arbitrability is not unlimited, thus it need to be reviewed in the context of the corrective mechanisms

which are considered in the state legislation" (Article 1(5) of the UNCITRAL Model Law).

According to Professor Deskoski, the reason for the exclusion of the scope of the objective arbitrability in the international arbitration conventions, is the difference in the legislations and the perception of the concept of arbitrability (Deskoski, 2016, p. 162). In this regard Redfern and Hunter state that the limitations of the arbitrability are in fact limitations of the *order public* towards the arbitration as a dispute resolution method (Redfern, Hunter, 2009, p. 117). These points towards the conclusion that the *order public* is one of the limiting number of factors of the party autonomy to submit all disputes to arbitration and every state has different interpretation of the notion of *order public*. When discussing about the objective arbitrability the key factor is the nature of the dispute. Traditionally speaking the states reserved their "monopolies" over the administrative law disputes, the competition law disputes and intellectual property disputes. This Article aims of proving the trend in changing the boundaries of objective arbitrability including and enlargement of the scope of disputes that can be assessed by arbitration.

2.2 Subjective arbitrability

The subjective arbitrability (*rationae personae*) refers to the capacity of the parties to conclude arbitration agreement (Kaufmann-Kohler, Rigozzi, 2015, p. 98). The subjective arbitrability answers the question who can be subject to arbitration (Deskoski, 2016, p. 149). The basic rule in this regard is that the arbitration is open to any entity, legal and physical person (Zoroska- Kamilovska, 2015, p. 98).

In this regard the disputed question is whether the state and the legal persons from the public law can be parties to arbitration agreement. The new trends in the arbitration law undoubtedly show that the states and other entities founded or controlled by the state are parties in the international transactions and thus in international arbitration as well (Deskoski, 2016, p. 151).

In the NYC the capability of the state to be party to an arbitration proceeding is not directly addressed. However, the wording of the Article I (1) "disputes between legal and physical persons", is considered in the sense that the arbitration agreements in which the state is one of the parties are not excluded from the NYC (Deskoski, 2016, p. 152).

Unlike the NYC, the European Convention for International Commercial Arbitration from 1961 explicitly provide in Article II "(1) possibility of the persons form the public law to be subject to arbitration" (Article II (1) of the European Convention for International Commercial Arbitration).

There are many discussions on doctrinal level on the grounds of subjective arbitrability, however the modern tendencies show greater openness to arbitrability to all parties including the states.

3. Comparative overview of the arbitrability of antitrust disputes

The freedom of the market and entrepreneurship are the corner stones of the modern globalized economy. In this regard it is in each state`s best interest to protect the free market competition with legal provision that is in its essence mandatory rules and considered as part of the *order public* (Deskoski, 2016, p. 164). Taking into consideration the mandatory nature of these provisions, it has been considered in the past, that only a competent court/administrative body is entitled to assess the behavior of the parties that is contrary to the rules of competition law (Lew, 2009, p. 241). Thus, the parties were not allowed to include these matters in their arbitration agreement.

In the antitrust disputes the question of arbitrability very rarely represents an obstacle from the subjective point of view. However, it is important to mention that the basic principle of the international commercial arbitration, the party autonomy, in these types of disputes is limited by public interest. Exactly the limitation of party autonomy on the basis of existence of public interest causes the antitrust disputes not to be arbitrable in certain cases. However as shown from the conducted research, the antitrust disputes and disputes involving competition law matters have generally been recognized as arbitrable in the past decade.

In the United States with the support of the executive branch, Congress and the court, arbitration has become an increasingly popular method of dispute resolution (Brand, 1993, p. 181). In its beginnings this trend did not exist without limitations. Namely, the enforcement of the arbitration agreements that involve certain public law or statutory matters was rejected by the United States Court of Appeals for the Federal Circuit in the case *Farrel Corp. v. United States International trade Commission* (949 F.2d 1147 (Fed. Cir. 1991), *cert. denied*, 112 S. Ct. 1947 (1992)). The reasoning behind this decision, which reversed the administrative body`s decision to terminate adjudication in the face of an arbitration agreement between the private parties, was that the contract clause calling for arbitration of "all disputes arising in connection with the present Agreement" required that the International Trade Commission terminate an investigation conducted under the section 337 of the Tariff Act of 1930 (Brand, 1993, p. 182).

The *Farrel* decision is troubling for those who believe that contracting parties should have unlimited autonomy to select arbitration as a forum for dispute settlement in international transactions (Brand, 1993, p. 182). On the other hand, the concept of arbitrability under the Article II (1) of the New York Convention and the US Federal Arbitration Act of 1925 "relates to public policy limitations upon arbitration as a method of settling disputes" (Article II (1) of the NYC). Thus, in the United States, respect for party autonomy in the selection of a forum for dispute settlement underlies the law on arbitration (*The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

Although there are certain exceptions, nowadays in the United States the

dominate standpoint in today`s arbitration theory and practice concerning the arbitration of antitrust disputes is the one stipulated in the decision *Mitsubishi Motors v. Soler Chrysler-Plymouth decision* (473 U.S. 614, 105 S. Ct. 3346 (1985)). The Mitsubishi decision recognized that United States courts of appeals, "uniformly had held that the rights conferred by the antitrust laws were 'of a character inappropriate for enforcement by arbitration" (473 U.S. 614, 105 S. Ct. 3346 (1985)). It concluded, however, that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties` agreement, even assuming that a contrary result would be forthcoming in a domestic context (473 U.S. 614, 105 S. Ct. 3346 (1985)). Although the *Mitsubishi* Court acknowledged the risks of submitting statutory United States antitrust issues to Japanese arbitrators in Japan, it expressed confidence in the ability of the parties and of the arbitral body they had agreed upon to select arbitrators to apply correctly the United States antitrust law (Brand, 1993, p. 188).

In Europe, steps to allow arbitration of antitrust claims were taken later and apparently with great reluctance (Rogers, Landi, 2001, p. 4). As noted in the preface of this Article the CJEU tackled the question of arbitrability of antitrust claims in the case *Eco Swiss China Time Ltd.* v. *Benetton International NV*. (*Eco Swiss China Time Ltd.* v. *Benetton International NV*., case C- 126/97). In the summary of the judgement it was implicitly stated that even though the competition law implicates public policy, the competition claims are in principle arbitrable. Since the CJEU imposes on national courts the obligation to review arbitral awards in order to ensure the correct application of EU competition law provisions, it seems logical that the competition law subject-matter should be included among the arbitrable ones (Geradin, Villano, 2016, p. 9). Otherwise, arbitral tribunals facing competition law issues would see their awards vulnerable to being set aside or declared unenforceable on the paradoxical ground they failed to apply the very competition rules they are not entitled to apply (Geradin, Villano, 2016, p. 9).

Following this reasoning, in Italy most scholars agree with the decision of the United States courts and with the prevailing interpretation of the *Eco Swiss* case (Rogers, Landi, 2001, p. 5). Accordingly, Professor Luigi Radicati di Brozolo considers that these decisions establishing the arbitrability of antitrust disputes can also be applied to Italian law (Bozolo, 1999, p. 673). Similarly, Professor Aldo Berlinguer affirms that the opinion in favor of the arbitrability of antitrust claims "can be considered definitively imposed with respect to both international and national arbitration" (Berlinguer, 1999, p. 86). Also, Professor Francesca Caporale`s reasoning is that "competition law as such cannot be excluded from the range of disputes which may be decided by arbitral tribunals and the denial of the arbitrability of antitrust claims based on the argument of the mandatory nature of competition law is groundless" (Caporale, 2000, p. 10008). This opinion has been gradually accepted

also by other Italian courts. There are several landmark decisions in this regard. The first significant decision was rendered by the Court of Appeal of Bologna, which recognized the validity of an arbitration clause of a contract concerning a non-competition agreement, finding that competition claims arising out of the agreement were arbitrable (Judgment of the Court of Appeal of Bologna of 11 October 1990 (1993) Riv. arb., at p. 77). *Corte di Cassazione* took up the issue in case no. 7733, where it held that controversies concerning the freedom of private enterprises, as recognized by the Italian Constitution, including antitrust matters, are arbitrable in principle (Judgment of the Supreme Court no. 7733 of 1 August 1996 (1997) Giust. civ., at p. 1373). The Court of Appeal of Milan in the case *Istituto Biochimico,* confirmed these precedents stating that the earlier skepticism about the arbitrability of antitrust claims was completely unjustified (*Istituto Biochimico Italiano v. Madaus AG*, judgement of the Court of Appeal of Milan of 13 September 2002 (2003) Dir. ind., at p. 346).

Since the early 1960s, German courts have upheld the position that allows competition law-based claims to be referred to arbitration. As the Bundesgerichtshof observed "in the presence of a valid arbitration agreement, the arbitral tribunal can resolve between the parties in a legally binding way also the dispute regarding antitrust law, regardless whether it is a main or a preliminary matter" (GH, 25 October 1966, Schweißbolzen, KZR 7/65)

Similarly, the Paris Court of Appeal correspondingly found that "arbitrators may apply EC competition law provisions and where appropriate draw consequences of wrongful conduct" (*Société Aplix v. Société Velcro, Appel Paris*, 14 October 1993 [1994] *Rev. Arb.* 165). In this decision the Paris Court of Appeal expressly reaffirmed the standpoint that the international disputes relating to damages from breach of the EC competition law can be discussed in front of arbitration (Deskoski, 2016, p. 167).

Spanish courts share a comparable view and the Audiencia Provincial de Madrid in the *Combustibles del Cantabrico S.L. v. Total Spain S.A.* case ruled that "in principle, nothing prevents the parties to refer to arbitration disputes that are regulated by EU law. No EU law provision confers to State-appointed judges' exclusive jurisdiction over the application of EU law. This interpretation would lead to the absurd conclusion of the disappearance of arbitration as a viable dispute resolution method, given that in a number of areas of private law, especially in the commercial law, it is difficult to find a subject-matter that is not affected, at least to some extent, by EU law" (Audiencia Provincial de Madrid in the *Combustibles del Cantabrico S.L. v. Total Spain S.A.*,Judgement no. 324/2004). This position was recently confirmed in *Camimalaga S.A.U. v. DAF Vehiculos Industriales S.A.U* (Audiencia Provincial de Madrid in *Camimalaga S.A.U. v. DAF Vehiculos Industriales S.A.U,* Judgement no. 147/2013).

The arbitrability of the antitrust claims was also affirmed by the Commercial

Division of the English High Court that stated "there is no realistic doubt that such competition or antitrust claims are arbitrable; the matter is whether they come within the scope of the arbitration clause, as a matter of its true construction*"* (*ET Plus SA v. Jean-Paul Welter & The Channel Tunnel Group Ltd* [2005] EWHC 2115).

In Switzerland, the arbitrability extends to any dispute with a "value measurable in financial terms for one of the parties at least" (Supreme Court Decision 1P.113/2000 of 20.09.2000). The Swiss legislators intended to make international arbitration widely available which implies that the notion should be interpreted as extensively as possible (Kaufmann-Kohler, Rigozzi, 2015, p. 101). Under the Article 177 (1) of the Swiss Private International Law Act, the competition law and the unfair competition matters are arbitrable without any limitation.

The arbitrability of antitrust disputes was also evaluated by some International Chamber of Commerce (ICC) arbitral tribunals. The vast majority of tribunals have reached the same conclusion, including case no. 7673/1993, where the arbitrators reasoned, "there are no reasons why an Arbitral Tribunal should not have the same authority as ordinary courts to decide over the consequences of an alleged abuse of a dominant position.... The tribunal is in the matter of competition law therefore in the same position when dealing with a claim based on Article 86 as it is when facing a claim which involves Article 85 of the Treaty of Rome" (ICC case n. 7673/1993, (1997) *Riv. arb.*, p. 431; See also the ICC cases 6106 and 7097).

The Statistics of the Vienna International Arbitration Center for 2015, 2016 and 2017 do not have any indication for special competition law/antitrust disputes (http://www.viac.eu/en/service/statistics) . The same indication is contained in the statistics of the Milan Chamber of Arbitration for 2016 (https://www.camera-arbitrale.it/upload/documenti/cam-arbitration-facts-and-figures-2016.pdf). This however does not mean that they are not fallen under the categories contained in the statistical reports such as intellectual property, licensing, general trade and other disputes. This is due to the fact that the competition law disputes are often connected with other branches of law.

4. The arbitrability of competition law/antitrust disputes in the Republic of Macedonia

In the legislation of the Republic of Macedonia, the arbitrability *ratione materiae* is also determined by a general clause in the Law on International Commercial Arbitration – LICA (*Official Gazette of the Republic of Macedonia no. 39/06).* In the Article 1 (2) the LICA provides that the international commercial arbitration handles disputes on the basis of the agreement of the parties for the rights for which they freely dispose. In this regard the LICA does not define the concept of "commercial matters" and this enables any difficulties to be overcome with the classification of the dispute as "commercial" (Zoroska-Kamilovska, 2015, p. 93). In regards to the subjective arbitrability the Article 1 (7) of the LICA provides that the

capability of concluding arbitration agreements is allowed not only with the Republic of Macedonia but also with the legal persons founded by the Republic of Macedonia, the units of the local self-government etc.

Also, the Rulebook of the Permanent Elected Court-Arbitration in the Article 17 provides that the arbitral tribunal is competent to solve any dispute that is agreed upon by the parties to be solved by arbitration (http://www.mchamber.mk/data/webdata/documents/pravilnik.pdf). The parties can agree for the disputes for which the parties can freely dispose and which are legally excluded from the competence of the courts to be handled by the arbitration. The Arbitration tribunal can handle disputes with or without international element. It is important to stress that in front of the Permanent Elected Court-Arbitration there were no competition law/antitrust disputes.

The competition law in the Republic of Macedonia is regulated by the Law on Protection of the Competition - LPC (*Official Gazette of the Republic of Macedonia no.* 145/10, 136/11, 41/14 and 53/16). This Law regulates "prohibited forms of prevention, restriction or distortion of competition, measures and procedures regarding the restrictions of competition" (Article 1 of the LPC). The purpose of this Law shall be "to ensure free competition on the domestic market in order to stimulate economic efficiency and consumers' welfare" (Article 2 of the LPC). The provisions of the Law are applicable to both private and public legal persons. Article 6 of the LPC provides that the supervision of the protection of the competition in the Republic of Macedonia is performed by the Commission for protection of the competition. In accordance with the LPC the three basic areas of distortion of the competition can be classified as contracts, decisions and restricted practices that limit the competition; abuse of dominant position and control of concentrations (Pepeljugoski, 2009, p. 218).

In accordance with the Article 28 of the LPC the "Commission for Protection of Competition shall control the application of the provisions of this Law, the Law on State Aid and the by-laws adopted based on these Laws, it shall monitor and analyze the conditions on the market to the extent necessary for the development of free and efficient competition, conduct administration and adopt decisions in administrative procedures in accordance with the provisions of this Law and the Law on State Aid" (Article 28 (1) of the LPC). The Commission for Protection of Competition is the competent misdemeanor body for the misdemeanors determined with the provisions of this Law (Article 28 (2) and 30 of the LPC). In this regards the Commission for Protection of Competition is competent to pass decision in misdemeanor procedure and administrative procedure relating for the effective enforcement of the Law (Article 45 of the LPC). "The Commission for misdemeanor matters, while conducting the misdemeanor procedure, shall appropriately apply the provisions of the Law on General Administrative Procedure, except if it is not otherwise stipulated

by the Law on misdemeanors and the LPC" (Article 31 of the LPC). "The misdemeanor procedure before the Commission for misdemeanor matters shall be initiated *ex officio*, at the request of the Secretary General of the Commission or at the request of a natural or legal person having a legitimate interest in determining the existence of a misdemeanor" (Article 32 (1) of the LPC).

The decisions of the Commission for misdemeanor matters are final. "A legal action on instituting an administrative dispute before the competent court (the Administrative Court of the Republic of Macedonia) may be brought against such decisions" (Article 46 of the LPC). The unsatisfied party can appeal the judgement of the Administrative Court to the Higher Administrative Court of the Republic of Macedonia.

By analyzing the legal texts, it seems that there is an "exclusive" jurisdiction of the Commission for protection of the competition (and the courts) for these types of disputes. However, the Private International Law Act (PILA), which provides the matters of exclusive jurisdiction of the courts of the Republic of Macedonia, is rather silent in this regard. Namely the PILA does not contain any reference to the jurisdiction of the competition law (antitrust) disputes, making the competition (antitrust) law disputes part of the gray zone. Having in mind the above mentioned there is a room for debate whether these types of disputes can be solved by arbitration in the Republic of Macedonia. This should also be read into conjunction with the other relevant legal acts that regulate the field of competition law, misdemeanors and arbitration.

Support of the "exclusive" competence of the Commission for protection of the competition is found in the Law on misdemeanors. In the Article 54 (1) the Law on misdemeanors provides that the misdemeanor procedure is conducted by a competent court and in accordance with the paragraph 2 of the same Article misdemeanor body (*Official gazette of the Republic of Macedonia no. 124/15)*. In this case this is in fact the Commission for protection of the competition, respectively the Commission for misdemeanor. Thus, in accordance with the Law on misdemeanors the competition law/antitrust matters are not the rights with which the parties can freely dispose of in the sense of the Article 1 of the LICA, since they are subject of misdemeanor procedure. Furthermore, the Law on misdemeanors does not divide the fault from the sanction so that the latter can be subject of eventual arbitration procedure. Additionally, in theory it is widely accepted that the decisions of the Commission contain *inter alia* definitions of the relevant market and relevant geographical market (Pepeljugoski, 2009, p. 223-224). In this sense there is a certain level of hesitation, that of the arbitrators are allowed, whether they will be able to determine with reasonable certainty the relevant market and relevant geographical market where the breach of the LPC occurred.

It is important to note that, in accordance with the Article 58 of the LPC, if any action constituting a misdemeanor in accordance with the provisions of this Law

causes damage, the damaged party may seek indemnification in accordance with a Law (Article 58 of the LPC). In this respect any claim of damages arising out of breach of the provision of the LPC can be subject to an arbitration procedure. This is due to the fact that the case will fall under the scope of the Article 1 of the LCIA, dealing with non-contractual liability for damages. In accordance with the dominant standpoint in the theory and practice, the damages arising out of business transactions are *per se* arbitrable since they involve claims of economic interest. In this regard the parties, if agreed, can opt out of the competence of the domestic court and resort to arbitration.

The question that remains open, due to the lack of domestic practice in this regard, is not whether arbitral tribunals can apply the LPC, but whether arbitration is an adequate vehicle to handle certain claims arising from the breach of competition law. Even if not expressly excluded from the application, there is little doubt that arbitral tribunals can legitimately apply Article 7 of the LPC. Will the arbitral tribunal be able to draw the consequences attached to its (Article 7 LPC) infringement and adjudicate the claims for the compensation of damages suffered by the injured party in consequence of the infringement in the same manner as the competent Commission for protection of the competition? Most scholars internationallyconsider, however, that arbitral tribunals enjoy the same powers as the ones conferred to national adjudicators. However, unlike the fact that the arbitrability of EU competition law has been explicitly recognized by national courts, as well as implicitly by the CJEU, the Macedonian stakeholders are rather reluctant to do so, still relying on the exclusive competence of the Commission for protection of the competition.

5. Resolving issues of (non)arbitrability of antitrust disputes

The issue of the existence of the arbitrability requires due consideration of theory and arbitration practice (Pepeljugoska, Pepeljugoski, 2015, p.11). The manner of resolving the arbitrability issue depends on the phase of the procedure in which the opposition for arbitrability is raised. In general, there are four possibilities to raise this opposition, respectively:

- The respondent can object in front of the tribunal the lack of arbitrability, as procedural opposition but it can also file the same opposition in front of a regular court;
- The respondent can file declaratory action (action for determining a fact) in front of a regular court and not in front of the tribunal, in order for the court to establish whether the arbitration agreement is validly concluded;
- After the tribunal will pass final decision or partial decision only regarding the competence the unsatisfied party can request annulment on the basis of lack of arbitrability;

- The party that lost can object the recognition and enforcement of the decision on the basis of in-arbitrability in front of the national courts in (potential) phase of recognition and enforcement (Pepeljugoska, Pepeljugoski, 2015, p.11).

The most important element of the theory in determining the competence of the arbitral tribunal is that if a certain competition law dispute is not contrary to public order, the arbitral tribunal can decide for its competence exclusively on the motion of the parties. "If we take into consideration the German doctrine of "*Kompetenz-Kompetenz*" the arbitral tribunal is entitled to decide for its own competence, in which situation it should firstly decide which law will be applicable" (Pepeljugoska, 2017, p. 350). Unlike the courts, the arbitral tribunals do not have *lex fori* and therefor they are not obliged to follow certain conflict of law rules in order to determine the applicable law (Pepeljugoska, 2017, p. 350). In these cases, the arbitral tribunal will be influenced by the rules regulating the procedure which can either assist or directly point to the manner of determining the applicable law. In any case starting from the general rule stipulated in the NYC Articles II (1) and V (1)(a) "the tribunal when deciding the issue of arbitrability will apply the law which is applicable to the arbitration agreement unless it is determined that the parties agreed on another applicable law" (Article V (1) (a) of the NYC).

5. Conclusion

Despite a general consensus that ADR has many advantages over litigation, such as time and cost savings, many practitioners still resort to the court system to resolve their disputes. If the administering institution is truly international and experienced in competition law, ADR may overcome many of the difficulties parties face litigating their competition law/antitrust disputes.

The core question in any arbitration process is the question of whether an issue can be submitted to arbitration or not. However, in competition law/antitrust disputes the arbitrability of the disputes does not constitute a safe assumption in all cases. The reasons for this are that even though the party autonomy is one of the most important principles generally accepted worldwide, when it comes to public policy, the party autonomy finishes. Therefore, only a limited exception of the party autonomy can be raised due to public policy issues, because the cases that tackle the issue of public policy are most often subject to exclusive court competence.

Beside the question of possible lack of arbitrability of the disputes discussed above, in the claims for damages the requirement of mutual consent decreases the parties' interest for arbitration. Since as a rule there is no prior contract between the parties in which the method of dispute resolution is provided for, it is quite unlikely that such agreement would be concluded after the decision establishing breach of the competition law is passed.

While observing the arbitrability of the EU and the USA competition rules it appears that they are considered by many as a non- problematic matter. However,

from the analyzed landmark cases we have seen that they are still raising a number of challenging questions. Most of the scholars would consider desirable for the CJEU to clarify its position on the issue of arbitrability of the competition law disputes rather than providing only implicit guidelines in order to avoid the differences in the interpretation of whether these disputes are in fact arbitrable and to what extent.

In light of the above mentioned we may rightfully conclude that the rare usage of arbitration in the field of competition law/antitrust disputes is directly linked with the lack of uniformity of process worldwide. If these issues could have been more predictable or the existing national legislation could have been reshaped the multinational companies would be in a position to consider arbitration as a legitimate alternative to court litigation. Additionally, the awareness of the national legislator for the arbitration as a dispute resolution method would increase. In this regard in certain states such as the Republic of Macedonia it is reasonable to expect that the competition law disputes would resort to arbitration. Once the cases are resorted to arbitration this would enable more consistent application of the competition law rules which would avoid the inconstancies in the case-law decisions for the same types of breaches of the LPC.

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