Submission

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3 Hearing on "Arbitration and Competition"

OVERVIEW

The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 3 for its Hearing on the general topic of Arbitration and Competition. It is noted that a number of the issues raised broaden the title of the topic to include Alternative Dispute Resolution ("ADR") which can take various forms such as mediation and expert determination. In these comments, BIAC will respond on the specific issues raised in relation to arbitration but, for the reasons which will be explained, other forms of ADR are considered by BIAC to offer greater versatility in managing and resolving issues in the sphere of competition law. Accordingly this is where the emphasis of the BIAC comments will be. One other preliminary point to make is that BIAC does not believe that any form of ADR can be a substitute for regulatory authorities developing appropriate policies and deciding infringement cases. Equally ADR is not a suitable vehicle for investigating and determining the facts of any case. BIAC would also like to emphasise that the requirements of business for legal certainty make it essential that key competition cases are decided openly and transparently rather than through confidential informal proceedings.

1. ARBITRATION AS A WAY TO RESOLVE COMPETITION CASES

During the Hearing, we could discuss what types of competition cases are or could be amenable to arbitration, provide examples of competition issues which have been subjected to arbitration and discuss the courts’ case law on arbitrability of competition issues. The discussion could also address the question of whether "public law" disputes can or should be subject to arbitration. The answer to this question has changed over time in some jurisdictions and it would be interesting to see where various jurisdictions currently are on this issue.

1.1 BIAC supports the use of arbitration as an available option to parties, either ad hoc or pursuant to prior arbitration agreements, to settle disputes generally. It welcomes the recognition of the Commission of the value of arbitration in the context
of disposal undertakings in merger cases.\(^1\) It does not consider that competition law issues are, or should be, incapable of being arbitrated.

1.2 As a matter of fact, competition issues regularly occur in arbitrations and are determined by arbitrators. This extends to the application of Article 101(3) TFEU even though the technical basis for the arbitrators’ jurisdiction is still occasionally debated. BIAC supports the existing EU and US jurisprudence in this area requiring, in essence, that, since competition law is a matter of public policy, arbitrators are obliged to take it into account in making awards.\(^2\)

1.3 The public policy issue can resurface either in relation to the challenge to an award (to the extent permitted under national law)\(^3\) or on enforcement of an award. BIAC supports the recent trend in decisions in the competition area\(^4\) to respect the arbitral process and not to interfere by rehearing the competition point but only to consider the issue if there is a credible argument that the award is clearly inconsistent with competition law.\(^5\) Its views are reinforced in this respect by the fact that the award only has effect between the parties and has no effect on the position of public agencies or third parties.

1.4 However, in practice, competition law issues have traditionally arisen peripherally in arbitrations usually where an argument has been made that a given clause of a contract that is in issue in an arbitration is unenforceable for competition reasons. BIAC is not aware of any tradition of using arbitration in the wider field, such as to determine compensation claims for breaches of competition laws.

1.5 It is possible that a widely drafted arbitration clause (say in a long term supply relationship) could apply to require a claim that a counterparty had caused loss through anti competitive behaviour to be arbitrated. Equally, two parties could chose ad hoc to have such a dispute resolved privately. It is particularly unlikely that such a damages action would give rise to any policy issues; and almost impossible for that to be the case where it was a ‘follow on’ claim consequent on a finding of infringement by the Commission or a National Competition Authority. There can be no objection to such a process.

1.6 However, BIAC does not consider that arbitration is generally well suited to follow on cases. In a classic cartel case, there are multiple potential defendants as well as multiple claimants. Arbitration’s (usually) bilateral, consensual basis make it unsuitable for resolving such disputes. In particular, arbitration tribunals will generally not have case management powers necessary for coordinating the

---

\(^1\) In addition, the Commission has entered into arbitration agreements itself.


\(^3\) *Eco Suisse*, op cit.

\(^4\) There are difference of nuance between the tests that may be applied in this respect between US and differing EU courts.

\(^5\) *Thales*, op cit, *Mitsubishi Motors Corp.* op cit.
procedures involved in multiple cases with different parties, appearing before different panels: only the domestic courts can have such powers (and, even they, in some jurisdictions, do not have all the necessary powers) Moreover, where the claims arise in a follow on action context (i.e. after a prior decision of infringement by an authority), the issues that remain to be determined (essentially damages) are better resolved by the other less formal and more flexible ADR techniques rather than by trying to create a purpose built multi-party arbitration system.

2. **ARBITRATION AND OTHER ALTERNATIVE DISPUTE RESOLUTION (ADR) MECHANISMS, SUCH AS MEDIATION**

The Hearing could explore which ADR mechanisms are available to address competition matters other than arbitration. For example, should mediation be considered in competition cases that originate from contract disputes? Should private parties pursue ADR mechanisms before referring a competition concern to public enforcement by competition authorities or courts?

2.1 BIAC considers that there are a range of ADR systems which should be considered to address disputes prior to seeking public enforcement by the courts. In a bilateral dispute, that is one of the options available to the parties and they will avail themselves of that option if it is useful, essentially as preferable to the costs and delays inevitable in seeking damages through the courts. There is no inhibition that prevents the parties pursuing such a route where it makes sense for them; and there is no need to make specific provision for measures in this respect though, of course, in certain jurisdictions they already exist.

2.2 However, BIAC does not see how it would be consistent with public policy to require parties to pursue ADR mechanisms before referring a competition concern to an authority.

2.3 Particular issues do though arise in cartel damages claims, and similar actions. In this section, BIAC presents a proposal for the use of ADR in this context.

*Private sector remedies are an important policy objective both to remedy loss and to increase the disincentives to undertakings to participate in cartel activity.*

2.4 This is well established as a matter of public policy and needs no further support.

*Although on an upward trend, the history of such claims being brought, and run through to, and succeeding at, trial has been poor in Europe.*
2.5 Even in the UK, the lack of real success of the football shirts claim\(^6\) and the slow, difficult and expensive processes, albeit leading eventually to settlements, in cases like the vitamins cartels\(^7\) have highlighted the issues.

2.6 There are very real technical problems including the lack of established jurisprudence, even on key issues such as governing law, the variety of procedural points that can be taken, the time taken to get to decision on critical points, problems in gaining access to evidence, the relative inability of individual consumers to fund small claims and the difficulty of intermediate corporates to sue because of pass through defences.

2.7 The result is complex litigation, with unrealistic claims from claimants and expensive, inefficient processes for defendants.

2.8 In the USA, with its different enforcement culture, with very different dynamics, the position is, of course, the reverse. Extensive class action litigation occurs in the context of anti-trust claims and very large compensation claims are paid. The issues are very different from in Europe. Given that US litigation is expensive and not necessarily the most efficient, or fairest, way of resolving such disputes, the ADR proposal summarised in this paper should be of potential assistance and benefit in that jurisdiction also.

\textit{It is in the interests of claimants, be they consumers, SME’s or major companies, to have a cost effective method of resolving their cartel claims. It is also attractive to companies embroiled in a cartel to have a quick and low legal/transaction cost method to resolve such claims, provided the results are ‘fair’. This is consistent with enforcement objectives because an unpredictable civil damages exposure is a disincentive to self-reporting and cooperation and therefore works against those policy objectives.}

2.9 BIAC considers that a well judged ADR approach could be a more attractive and efficient process than alternatives that have been considered. In particular, these include changing the legal system to facilitate class action processes which are generally thought to be expensive, open to abuse and to lead to unintended consequences.

2.10 It is of particular importance in the cartel area because the disputes are with immediate, intermediate or ultimate customers whose goodwill and trading relationships are, of value to the business. Those relationships, and the associated brand, can be damaged by protracted litigation with collateral consequences.

\textit{Mediation is generally well understood and has a credible record of success in resolving issues between undertakings particularly where trading relationships are involved, as in cartels. However, a more directional and less consensual approach}

---

\(^{6}\) Argos Ltd and another v Office of Fair Trading; JJB Sports plc v Office of Fair Trading [2006] EWCA Civ 1318

\(^{7}\) Case COMP/E-1/37.512. (2003/2/EC)
would be required to reflect the multi-party nature of such claims and to avoid the impracticality of running a traditional mediation process in that environment.

2.11 Follow on cartel claims tend to have similar issues (overcharge, pass through, definition of class of claimants and defendants etc). This aspect dramatically narrows the issues for consideration. However, given the number of parties likely to be involved, any such mediation would have to be more of an expert assessment process rather than a traditional mediated negotiation. It would be ‘evaluative’ and produce a solution that was binding, or at least not cost free for the parties to reject.

Given the complexity of multiple party cartel claims, there needs to be a mixture of incentives and structures to facilitate an expert assessment or evaluation solution. National Competition Authorities (NCAs) could provide the structures and the incentives. Since most cartel investigations involve a whistleblower and, at least, some leniency arrangements, and encouraging such applications is often part of anti-trust policy, BIAC suggests that these objectives should be linked. NCAs could sponsor and incentivise an assessment system in a variety of ways.

2.12 BIAC believes that the NCAs are the best placed to be the sponsors of such a system for skills, knowledge and costs reasons. However, the scheme itself would need to have a clear degree of independence from the NCA for credibility and policy reasons: its processes would follow NCA decisions, but it would have to be clear that it was concentrating only on inter partes compensation unaffected by any wider policy issues. Although there have been issues with other such systems in the past, there is no a priori reason why sufficient independence should not be established.

2.13 The elements of the evaluation system are discussed below. Threshold issues arise as to what the incentive structure and mechanics should be. There are several possible variants, e.g.

Option 1: Incentivise cartelists by requiring them to submit to an evaluation scheme as a requirement of an application for leniency or immunity.

2.14 It is thought that this would only be a marginal or theoretical disincentive to leniency/immunity seekers because they already have to accept and assess their damages exposure to third parties in taking those decisions. To the extent that the proposal is actually attractive in managing that risk, it should not be a disincentive but, rather, an incentive.

2.15 It could be argued that, to the extent that such a scheme is a benefit, it should not need to be further supported (or pushed) by being linked to immunity/leniency applications. However, having the scheme as a formal and mandatory part of the NCA process gives it credibility, volume and norming potential that would make it effective as a process.

2.16 To prevent abuse, proper engagement with the evaluation process, through to its conclusion, might be made part of the on-going cooperation obligation with the NCA under the leniency program. This would not give rise to major difficulties of drafting or implementation by comparison with the width, and onerous nature, of the current cooperation obligation.
Option 2:  However, BIAC prefers that cartelists be incentivised by offering an enhanced discount in the leniency process to encourage them also to accept the evaluation process. This incentive would not, of course, be available to successful immunity applicants (who would have full protection). However, it would be relevant to leniency applicants (since they would still pay some level of fine) or immunity applicants who, in the event, did not obtain immunity but only achieved a degree of leniency (for the same reason).

2.17  To the extent that the incentives under Option 1 do risk adverse consequences or it is unattractive to impose a mandatory process, it would be possible to create an alternative, or further, incentive in the form of a “super leniency” whereby the fine discount attractions of leniency were enhanced for those that also entered into the evaluation process. Although this would not benefit successful immunity applicants (who have a 100% deduction, in any event), they usually have sufficiently strong drivers for their decision to make their immunity (i.e. whistle-blowing) application. But, by incentivising other participants, it would be attractive to the NCAs in encouraging further cooperation and to participants by offering a global solution to the administrative and civil exposures.

2.18  There might be concerns that NCAs would increase fine levels to remove the financial benefit; but the same issue arises in relation to other aspects of the leniency programme and it is not thought to be an issue there.

2.19  There would have to be effective sanctions (as under the cooperation obligation) to prevent parties signing up to this approach and then not participating in a meaningful way in the evaluation. However, the loss of more than 100% of the discount offered (i.e. some of the leniency protection) would be one such control to add to the risk of creating an adverse finding from the expert reflecting the lack of engagement with the process.

2.20  A variant in either process could be that the evaluation commitment, or right, remained even if leniency were refused for some reason unrelated to the evaluation.

The NCA would establish a lightweight and low cost evaluation structure, using simple and standardised procedures

2.21  The evaluation system should run independently of the NCA to ensure that there was no confusion between (i) the investigation and administrative fine and (ii) the (subsequent) compensation process. It would develop its own detailed processes (which would not be prescribed by the NCA, or, at least, not otherwise than at the level of broad principles) which would evolve with the body of experience.

2.22  Evaluators could be drawn from a panel of experienced economists, accountants and lawyers, who would have access to prior decisions. The process might be supported by a very small secretariat, although this could be outsourced. It would publish decisions, possibly through NCA channels, and its general approach to, and principles for, evaluation to assist with transparency and predictability.

2.23  Evaluation would not take place until the administrative process had been closed by a decision, so that facts had been established. Those facts would be taken
as given in the evaluation and not subject to challenge. Thought would have to be given to the impact of any appeal of the administrative decision. Where an appeal was material to compensation issues (say because it impacted on the duration of a cartel), it is likely that any evaluation process would be stayed. However, that would likely be the case, in practice, in litigation processes, at least as regards a final hearing and hence the ADR process is in no worse position in that respect.

2.24 The evaluation process would focus on the issues that usually bedevil negotiations to settle such as measure of damages, pass through and the assumptions and economics underlying overcharge calculations. It would develop relatively recognised norms for dealing with these issues.

2.25 However, each particular process would need to take account of the facts of the specific case and the precise parameters would depend on the merits of the case and the negotiations conducted by the parties.

2.26 The precise process would be to be determined at a later stage, if this approach was supported, but would involve the right to make submissions and to negotiate. It would have many of the elements of a traditional expert appraisal process and of a mediation.

2.27 The evaluation process would be open to non leniency seeking defendants to join if they were named in the decision.

2.28 The process should be self financing through an entry fee charged to companies or a small levy on settlements paid.

The evaluation would lead to a clear financial proposal, based on the merits, for consideration by the parties.

2.29 If there were not such a conclusion, the process would be nugatory: there would have to be an end point to keep to a prompt time table, to prevent frustration, to concentrate minds and to ensure that the incentives to complete the process worked. There are, however, options as to what the impact of the proposal would be.

2.30 However, notwithstanding the attractions of finality, BIAC would not go so far as to recommend that such a relatively informal process should be binding on claimants and the defendant.

2.31 The process would in any event need to have some express link to a reference point, such as that it would be entirely for the ‘expert’ to determine but the overriding goal was to find a basis for compensation that reflected a conclusion that would be available before the courts (or an equivalent specialist tribunal functioning as a court). However, in a repeat process, there is the risk of systematic bias. For example, a process could become too friendly to ‘one side’, adopting an approach on a critical issue (say evidence of purchases or of the economics of pass-through) which started to produce results which were out of alignment with what a court (the relevant benchmark) would produce.
2.32 Even in cases where the parties do agree that the process is to be final BIAC would recommend that there should be some wider control mechanism to deal with ‘creep’ in terms of law or quantum of claim, whether to favour claimants or defendants in any particular case. A process would lose credibility if it were giving results identifiably different from that from a court and would suffer from adverse selection by claimants. A control process would have to be objective and effective. That control could take a variety of forms ranging from a consultative panel giving guidance where such a bias was detected to the right to challenge a decision before the court on limited criteria, to provide some control.

Alternative 1: The proposal would not be binding on either party. However, reflecting an approach that can be adopted in English litigation, that proposal would have force in that if there were further litigation between the parties and the claimant won but did not recover more than the proposal, he would be liable for all of the defendant’s costs of the subsequent proceedings. Conversely, if the claimant recovered more than the proposal, he would recover the judgment sum plus a form of penalty or surcharge (as in an enhanced interest rate on the sum due) plus costs to penalise a cartelist who ‘wrongly’ failed to accept a proposal.

2.33 This approach would not work so effectively in those jurisdictions where each party is liable for its own costs. There would have to be a development of a specific penalty/incentive structure to be implemented, in those jurisdictions. This would make implementation of this option more complex.

2.34 However, this approach would have the benefit that parties, particularly defendants (by reference to Options 1 and 3) would have some control on their risk of maverick decisions. It would also provide for some automatic control by the courts which would help to keep evaluation outcomes norming around the (determinative and appropriately qualified) court based jurisprudence. It would reduce the risk of ‘capture’ by either ‘side’ biasing the system.

Alternative 2: The proposal would be binding on the defendant only, but the claimant would be at risk of costs in the event of failure in litigation, as in Alternative 1.

2.35 There are precedents for one way binding determination, for example in the financial services area. It could, however, make the process excessively favourable to claimants. Moreover, BIAC believes that the proposed process should already be sufficiently attractive for claimants. Such an approach is very unattractive for defendants who would be faced with claimants who could game the system effectively.

2.36 In addition, there are the advantages and disadvantages that arise under alternative 1.

Not all cartelists would necessarily be part of the ADR solution

2.37 This may not matter. Contribution claims have not been a material feature to date. If the risks become material, there are settlement techniques to address those issues.
2.38 Moreover, an evaluation scheme is likely, in practice, to set a benchmark for other settlements and thereby support the wider objectives.

_The evaluation would be open to all claimants who chose to participate, irrespective of their position in the value chain. This would enable pass through claims to be considered at the same time._

2.39 This is one of the major attractions of the system. Multiple actions by different levels in the value chain create severe problems in litigation. This proposal is an effective way to resolve these economic issues in one forum.

2.40 This approach ought to be highly attractive to claimants, operating as a low cost route to a likely pay out within a reasonable period. This has not been the experience of claimants to date.

2.41 There would be no formal class action structure but the process would have to provide for the evaluator to be able to manage claims arising from a particular cartel in an efficient way from a case management perspective.

3. **ADVANTAGES AND DISADVANTAGES OF ARBITRATION**

_The Hearing could explore the advantages offered by an arbitration procedure (e.g., certainty of decision and of timing; binding outcome; choice of arbitrators with specific industry expertise; time and money savings; privacy and confidentiality) and its possible disadvantages (e.g., the possibility of compromise decisions by arbitrators; whether arbitration awards add expense and delay, without necessarily excluding eventual public litigation; inability to appeal arbitral awards)._  

3.1 BIAC submits that these issues are ones of general application. The choice is a matter frequently debated between proponents of each system. It turns, to a significant degree, on the comparison between the actual arbitration process selected and the alternative national court system at one level and on the nature of the dispute and relationship between the parties on the other.

3.2 There are few competition specific issues relevant to this choice that are not addressed elsewhere in this paper. However, where there is an arbitration clause in place between the parties (i.e. long term supply arrangements, joint ventures, some energy contracts, other commercial agreements, etc) it will usually cover competition issues that arise in the enforcement of those arrangements. In such circumstances, absent consent of both parties to change the arrangements, there is, in fact, no choice to be made.

3.3 Where there is no arbitration clause in place, which will frequently be the case (e.g. parties will not have traded with some cartel members, or did so on terms which did not include arbitration or were foreclosed or whatever), it is probably less likely that the parties will agree to ad hoc arbitration. As discussed above, arbitration will rarely be appropriate for multi party cases in any event.
4. **Relationship Between Public and Private Enforcement and Arbitration**

The Hearing could explore to what extent arbitration procedures are developing in various Members’ jurisdictions, and the relationship of arbitration to public enforcement by competition agencies and/or courts. There is also the question of what mechanisms could be put in place to ensure consistency between arbitral awards and competition law. Are arbitrators bound by courts’ judgments or competition agencies’ prior decisions in relevant jurisdictions?

4.1 BIAC considers that this question touches on an important theoretical issue as regards EU competition law, albeit one that does not seem to have give rise to problems in practice. Different, but also interesting issues, also arise in cases under US law.

4.2 As regards the EU, Regulation 1/03, which specifically gives the courts the ability to take decisions in relation to the application of Article 101(3), contains provisions for coordination between the court’s processes and those of the competition authorities. These are designed to avoid inconsistent decisions generally and, in particular, to enable the views of the authorities to be expressed to the court and to support the court processes on technical issues. Although difficult to apply, and not very heavily used, these are important parts of the legal structure for the enforcement of competition law. They are consistent with the underlying duties of cooperation between the courts and Community institutions established under the Treaties.

4.3 However, none of these processes apply to arbitration. Moreover, the route of a preliminary reference to the Court of Justice is not available from a commercial arbitration. Accordingly, arbitrations proceed, to a degree, in isolation from the procedures being followed by the authorities. In that respect, they theoretically carry a higher risk of divergence from agency decisions than do EU court decisions.

4.4 In the USA, the experience has rather been of arbitrators keen to apply anti-trust law, to the same degree and in the same manner as other bodies of law whether on a purely private basis or as part of the mandatory body of law to which they need to have regard.

4.5 As in Europe, there are no procedures for coordination between the anti-trust authorities and the arbitration world. Under ICSID arbitrations (which frequently, but not necessarily, take place in the USA) there are provisions for amicus curiae briefs which might be a route for agencies to participate in an arbitration if they had the awareness and interest. However, ICSID is a rather specialised system and not likely to be relevant in anti-trust matters. Other, more relevant, arbitration systems to not have that capability.

---

4.6 In the USA, as indeed elsewhere, it is possible for arbitrators to hear private party expert witnesses on anti-trust issues, including agency policy matters, if relevant. However, such practitioners are independent experts and not representatives of the agencies. BIAC is not aware of the agencies appearing in such a capacity and anticipates that there would be great reluctance on their part to do so. This is particularly so in the USA; in Europe, this approach is, perhaps, a little less ‘unthinkable’ given the structures that have already been established for coordination with the Courts. However, the agencies would still face the (likely insurmountable) obstacle that being heard in an arbitration in that capacity would be to appear on a partisan basis, called by one party, rather than on a party-neutral basis, advising, or dealing directly in their own right, with the tribunal. BIAC would expect this to be a such an obstacle, even in Europe, that it is difficult to imagine any circumstances when it might occur.

4.7 Arbitrators are, however, applying the law. In normal course, binding authorities will be followed; persuasive decisions and opinions will be accorded their usual weight and taken into account in the arbitrators’ decision making process. Accordingly, an arbitral process should reflect the decided body of general law, both as to binding precedents and as to persuasive authority.

4.8 However, inherent in this approach is the risk that an arbitration panel (looking ‘retrospectively’ at the legal record) may diverge slightly from the authorities’ evolving, prospectively focused, practice. An example would be a wider competition issue which is manifesting itself in many different cases, such as long term energy contracts or tying or discounting arrangements in supply contracts but not yet the subject of decisions.

4.9 This risk has particular manifestations in the USA. The anti-trust agencies run enforcement through the courts rather than using administrative processes, as in the EU. US arbitrators tend to pay particular attention to court decisions, which are the law, and not to agency pronouncements, which are policy. This tendency accentuates, in the US, the risk of a gap between arbitral awards and the broader trend of anti-trust development.

4.10 There is, therefore, a higher risk of arbitral awards being inconsistent with the authorities on-going activities and policy directions than is the case with cases before the courts. Moreover, that risk is likely to be higher in the USA than in the EU.

4.11 BIAC considers, however, that despite this analysis of the theoretical issues involved, this risk has not posed difficulties in practice. In keeping with the role of arbitration as a private settlement of a matter between two parties, this limited risk is something that the parties have accepted in their opting for an arbitration dispute resolution process.

4.12 In egregious cases in the EU, this timing delay (i.e. arising from the period needed for agency pronouncements – of whatever form – to become of sufficient legal effect), or lack of coordination, could theoretically give rise to an award that was sufficiently inconsistent with recent authority decisions and policy as to give rise to challenge (in those jurisdictions that permit challenge) or problems on enforcement. However, BIAC is not aware of this occurring in practice.
Accordingly, BIAC does consider this issue, in the various jurisdictions in which it is relevant, as more of theoretical than practical interest. This is within the level of risk that parties can appropriately take when choosing to have their disputes resolved in private, on a bilateral basis, without any legal impact on the position of third parties.

5. **ARBITRATION REGARDING REMEDIES IN PUBLIC COMPETITION CASES**

We could also examine the role and use of arbitration clauses with respect to enforcing remedies in competition agencies' enforcement proceedings. It would be interesting to have a discussion on various jurisdictions' use of arbitration as remedial mechanisms in public enforcement proceedings.

5.1 BIAC supports arbitration as a system for resolving issues arising from structural solutions in merger cases and other similar situations.

5.2 However, it questions whether it has a wider role in relation to enforcement proceedings associated with the more traditional enforcement of prohibitions on anti-competitive agreements or abuse of a dominant position.

5.3 Indeed, BIAC sees a fundamental logical inconsistency between (i) the concept of arbitration as a private dispute resolution mechanism, operating (usually) within a tightly defined relationship with national courts as regards both the challenge to an award or its enforcement and (ii) the wider issues associated with public enforcement proceedings.

5.4 The objectives and the processes are entirely distinct. Other than in limited situations, which are analogous to private party disputes, such as occur in structural solutions in merger cases, the process should be kept separate to avoid damaging both.

6. **POWERS OF ARBITRATION AND APPLICABLE RULES**

Finally, the Hearing could explore the extent to which the parties to an arbitration procedure can themselves determine what competition rules should be used in the arbitration. For example, should competition laws of relevant jurisdictions apply as mandatory rules, in the sense that they are applicable irrespective of whether the parties have chosen a different applicable rule?

6.1 This topic raises some highly technical issues of arbitration law, such as what system of substantive law should a panel apply to what issue and, indeed, whether, and how, an arbitration can take place other than under a recognised system of law.

6.2 BIAC submits that parties should be entirely free to chose the system of law that governs their relationships and hence to be applied in any arbitration between them. That approach incorporates the concept that competition law, like other laws relating to the illegality of certain provisions (for example a criminal purpose to a
contract), may apply, depending on jurisdictional tests, to a given set of circumstances and have an effect on how the chosen system of law is to apply. In principle, therefore, even if arrangements which were governed by a legal system that had no competition law were such that, as a matter of Community law, they were void because the activities of the parties met the necessary jurisdictional tests for the application of Community Competition law, an arbitral tribunal should apply that competition law. It believes that to be a generally accepted statement of arbitration practice.

6.3 A corollary of this approach is that parties should not be able to contract out of competition law. This conclusion is supported by case law in Europe establishing that competition law is part of public policy. It is also consistent with case law in the USA and the ‘second look’ doctrine that has been established, albeit if rarely, if ever, actually applied.

6.4 It must be contrary to public policy, and hence a ground of challenge to an arbitral award, and to its enforcement, if the parties were to provide that a doctrine which was a child of public policy should simply be excluded from the consideration of their disputes. To the extent that the doctrine in question, competition law, was relevant to the dispute in issue but formally excluded from consideration (as opposed to simply not argued or considered in depth), the award would be challengeable as a matter of public policy, if competition law was engaged by the facts of the matter.

6.5 BIAC considers that this position is broadly the case across EU and US jurisdictions. Interestingly, it has been argued by some commentators, that arbitrators would regard the risk of interference with their awards on competition law or public policy grounds as greater under EU law (or that of its member states) than under US law. This may result in a tendency for arbitrators to be marginally more sensitive to the requirements of EU competition law than US law. This in turn may mean that they are more willing to ensure that any decision reached is acceptable under both EU and US law, thereby reducing the risk of challenge,

7. CONCLUSIONS

7.1 BIAC believes that as with all other forms of legal proceedings all available tools should be fully utilised in order to achieve the most effective level of enforcement of competition laws. This wider objective must include maximising the resources of the competition authorities, appropriate levels of deterrence for infringements and effective remedies for those adversely affected by infringements.

7.2 Whilst there can be some confusion concerning the applicability of ADR techniques in competition matters the general benefit of such techniques is speedy, low cost and effective resolution of claims and this is as relevant in competition cases as in any others.

7.3 BIAC would like to see a more organised and convergent approach to ADR methodology by competition authorities in the interests of achieving more effective

9 See Ecosuisse, op cit
enforcement and a fairer allocation of the recoveries achieved. It is beyond the scope of this paper but there are wider policy issues which merit consideration in this area such as the possible need for more emphasis on achieving redress for injured parties rather than in imposing huge fines on "deterrence" grounds.

7.4 Equally there needs to be greater recognition that ADR is not a panacea and will not be appropriate where decisions need to be taken, fact finding determinations made and/or policy developed. There is nevertheless considerable scope for ADR techniques to be developed in the competition area in line with general best practices in other areas of dispute resolution. This would be greatly welcomed by the business community both in accelerating the resolution of many competition issues which arise and providing more effective redress for those adversely affected by infringements; it could also help to "free up" the resources of competition authorities.