

# COMPETITION AND REGULATORY DISPUTES: READY FOR MEDIATION?

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An article considering the advantages of, and challenges in, using mediation to resolve competition law and regulatory disputes.

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## SPEEDREAD

This article looks at mediation in the context of competition law and regulated industries, particularly the potential for using mediation to help solve inter-company disputes, smooth the path towards effective regulation and help in the relationship between companies and consumers. Mediation is also likely to become a useful tool in antitrust damages settlements.

Mediation is a flexible and confidential process in which a trained neutral mediator actively assists parties to achieve a negotiated settlement of a dispute, with the parties in ultimate control of the decision.

The advantages of using mediation to resolve disputes include accelerated timing, lower costs, greater control over procedure and choice of mediator, and the creativity that mediation allows. It is also a process that supports the relationship between the disputing parties; in both competition and regulatory contexts it is likely that the parties will continue to deal with each other post-dispute, and taking the dispute out of mainstream litigation into mediation can help preserve and rebuild valuable commercial relationships. In the context of regulatory matters, the very nature of mediation, with its focus on the parties' interests rather than positions, may also draw parties back to an approach that resonates with more effective incentive-oriented regulation, where pursuit of public objectives might otherwise have resulted in blunt command-and-control regulation. More broadly, mediation methods can be employed to enable a dialogue between regulators and regulated entities about the direction of regulatory policy reform.

In terms of challenges, the article considers how long-term competing interests of parties can weaken the chance of settlement and the importance of a mediator possessing process expertise combined with subject matter knowledge. Other challenges include timing, sequencing and complexity of process and the perception that entering into mediation implies weakness.

## INTRODUCTION

If it can be said, echoing von Clausewitz, that disputes are in a sense the continuation of competition by other means (see *Rory Macmillan, "The Liberalisation of ICT Dispute Resolution", Trends in Telecommunication Reform 2010, chapter 2* (<http://macmillankeck.pro/media/pdf/The%20Liberalization%20of%20ICT%20Dispute%20Resolution%20-%20Macmillan%20Trends%20Chapter%20for%20GSR%20-%20101104.pdf>)), then one

might also observe that there is a continuum between dispute resolution, on the one hand, and compliance and enforcement of competition law, and introducing and enforcing regulation, on the other hand. Both competition law and economic regulation adopt similar tools. Competition law's stated goal is to make markets work well by preserving the conditions for effective competition, ultimately for the benefit of consumers. One of the central objectives of economic regulation in the regulated sectors is to address aspects of market failure and ensure fair competition.

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The potential for disputes to give rise to matters of, broadly, “competition policy” is increasing. Private enforcement of competition law is being encouraged as a means of resourcing better enforcement and compliance. Competition is being introduced or increased in sectors that, until recently, have been relatively monopolistic or subject to more limited competition (for example, water; payment systems). Economic regulation is supplanting previous regulatory systems characterised by limited intervention in the form of price controls and prescriptive measures (for example, civil aviation and again water). The limits of existing competition are being tested and reassessed by market developments and policy goals in more mature sectors (such as energy and ICT). Moreover, this is happening on a global scale.

As the potential for and occurrence of disputes increases, the broadening of approaches towards alternative forms of dispute resolution is perhaps inevitable. Beyond the courts and decisions of regulators, adjudicatory systems of dispute resolution such as arbitration that lead to decisions binding on the parties share many characteristics with traditional court enforcement. Comparatively less attention has been given to alternative dispute resolution (ADR) through other means which do not necessarily result in a decision that binds the parties, such as dispute resolution through facilitation (e.g., Ombudsmen) and mediation. Meanwhile, such options are increasingly being pursued, and this article focuses on mediation in particular.

Mediation is a flexible and confidential process in which a trained neutral person, the mediator, actively assists the parties to achieve a negotiated settlement of a dispute, with the parties in ultimate control of the decision to settle and its terms (*Suzanne Rab, “The Journey to Settlement”, Competition Law Insight, 9 December 2014*).

Drawing upon their experience of cases and observations on the areas of their practice (competition law and regulation in different regulated sectors), the authors explore in this article both the advantages of mediation to resolve competition law and regulatory disputes, and the challenges. The article first discusses mediation in the context of competition law. It then considers the role of mediation in regulated industries, and the scope for it to help in solving not only inter-company disputes, but also to smooth the path towards effective regulation and to help in the relationship between companies and consumers. The article synthesises the advantages of mediation in competition and regulatory cases and concludes with a section about the challenges that await the mediator in such cases.

## MEDIATION AS AN ADJUNCT AND AN ALTERNATIVE TO PUBLIC ENFORCEMENT OF COMPETITION LAW

Until recently public enforcement through an investigation by a competition authority was the main mechanism for resolving competition law disputes in Europe. However, public and private enforcement are now increasingly viewed as complementary. This raises a question about the role of ADR, including mediation in resolving individual competition disputes.

It is an issue that has been emerging for several years, with, for example, the OECD exploring the potential use of mediation in competition matters (*see section 3, OECD Hearings, Arbitration and Competition 2010 <http://www.oecd.org/competition/abuse/49294392.pdf> and Renato Nazzini, “Litigating, arbitrating and mediating competition law disputes”, CDR News, 6 February 2009 (<http://www.cdr-news.com/categories/arbitration/litigating-arbitrating-and-mediating-competition-law-disputes>)*).

The public enforcement regime has its imperfections. First, competition authorities do not have unlimited resources and will decide which cases to pursue based on their administrative priorities. This means that cartels and other ‘hardcore’ infringements remain at the top of the policy agenda. Other cases, particularly abuse of dominance cases, tend to be pursued more selectively. This is understandable where the resources involved in pursuing such cases to the standard that will stand up to judicial scrutiny may be disproportionate to the perceived benefits.

Thus, for example, on 13 April 2011, the Office of Fair Trading (OFT) announced that it had issued an *infringement decision* ([www.practicallaw.com/3-501-5561](http://www.practicallaw.com/3-501-5561)) to Reckitt Benckiser and imposed the fine of £10.2 million (*OFT press release 53/11 (<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2011/53-11>)*).

This was the last occasion where the UK competition authorities fined a company for abuse of dominance. Critically, Reckitt Benckiser entered into an early resolution agreement with the OFT and accepted an abbreviated procedure in return for a reduced fine.

Second, up to now, the UK competition authorities and the European Commission have not been able to award monetary compensation to victims of anti-competitive practices. The fines imposed are administrative penalties that are paid to the public purse. The possibility of securing commitments from the investigated party, such as under the procedure in

Article 9 of Regulation 1/2003, allows for behavioural remedies that can achieve a more market-led outcome and changes in commercial practices. However, commitments do not provide direct compensation to the parties affected by the anti-competitive behaviour. Further, there is no finding of infringement on which the parties could base a so-called 'follow-on' damages claim. In any event, as the Commission's ongoing abuse of dominance cases against *Google* ([www.practicallaw.com/1-608-9665](http://www.practicallaw.com/1-608-9665)) and *Gazprom* ([www.practicallaw.com/6-521-2391](http://www.practicallaw.com/6-521-2391)) illustrate, in some cases, commitments acceptable to the Commission and the affected parties can be hard to find.

### Mediation as an adjunct to public enforcement

Mediation and ADR have been used as an adjunct to public enforcement. In merger cases where the European Commission accepts commitments as a condition for approval these can be supported by provisions for mediation if the merging parties do not comply with the commitments. For example, the Commission used a pure mediation commitment to resolve disputes arising from the implementation of a gas release programme in the *DONG/Elsam/Energi E2* ([www.practicallaw.com/4-201-4480](http://www.practicallaw.com/4-201-4480)) case. Mediation was also used to support the remedies package in the *T-Mobile/Orange* ([www.practicallaw.com/4-501-5990](http://www.practicallaw.com/4-501-5990)) merger.

### Mediation as an alternative to public enforcement

In the US, with its history of private enforcement of antitrust claims, court-ordered mediation and antitrust mediation have become relatively common. The mediation of settlement negotiations over the hiring of Silicon Valley workers against Apple, Google, Intel and Adobe is but one recent example. Even hardcore cartel cases may be the subject of mediation, as seen in recent court-ordered mediation in the eBook price fixing case brought against Apple and five publishers (Macmillan, Hachette, HarperCollins, Simon & Schuster, and Penguin) (see Andrew Albanese, "*Judge Orders Mediation in Latest E-book Price-Fixing Suit*", (<http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/63679-judge-orders-mediation-in-latest-e-book-price-fixing-suit.html>) *Publishers Weekly*, 14 August 2014).

In Europe, over the last decade the balance between public and private means of addressing competition disputes has been shifting towards private enforcement whereby parties harmed by competition law violations can bring an action for damages for breach of

competition law. As any dispute between private parties can be settled between them amicably, there is, therefore, scope for significant use of mediation in competition disputes.

Ever since *BRT v SABAM* it has been clear that Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are directly applicable and produce direct effects (*Case 123/73 ECLI:EU:C:1974:25*). Therefore, in principle, national courts of the member states have long been able to enforce EU competition law directly and even in 'standalone' claims where a relevant competition authority has not already found that there has been an infringement. In the UK, 'follow-on' claims (consequent upon a finding of infringement by the European Commission or UK competition authority or sector regulator with concurrent competition powers) have been heard by the Competition Appeal Tribunal (CAT) or in England and Wales by the High Court.

With the adoption of the Consumer Rights Act 2015 and the EU Directive 2014/104 on Antitrust Damages (*OJ 2014 L349/1*) there has been further impetus for private enforcement. The Consumer Rights Act 2015 allows the CAT to hear stand-alone cases, grant injunctions and apply a fast track regime aimed at SMEs. It also introduces a new opt-out collective settlement regime in the CAT, a new role for the Competition and Markets Authority (CMA) in certifying voluntary redress schemes and an opt-out collective actions regime. This regime aims to encourage businesses that have infringed competition law to enter into negotiations with affected parties through voluntary ADR. These reforms come into force on 1 October 2015.

The EU Directive on Antitrust Damages is designed to ensure that "anyone who has suffered harm caused by an infringement of competition law...can effectively exercise the right to claim full compensation" (*recital 12*). The broad aim of the Directive is to address barriers to the effective enforcement of competition law in the majority of member states and to establish minimum standards and approaches in the procedural rules. On 11 June 2013, the Commission adopted an EU framework for collective redress as a 'soft law' recommendation to seek to promote minimum standards in this area across the member states (*OJ 2013 L201/60*).

These trends could lead to two distinct roles for mediation, over and above the general role that mediation can play in private enforcement of competition law. The first involves the infringer and

those who have suffered loss jointly applying to the CAT to approve a settlement on an opt-out basis. While a follow-on case will obviously be attractive because there is no need to prove infringement, the reforms are intended to encourage more standalone actions including on a collective basis. Nevertheless, small claimants and particularly SMEs are unlikely to have the resources to fund litigation to judgment, particularly where their individual claims are relatively low value. Mediation may thus offer an attractive route towards settlement. It is worth recalling that the UK reforms were fuelled by the recognition that the existing system for representative actions before the CAT was not fit for purpose. This was highlighted by the *litigation by the Consumers' Association (now Which?) against JJB Sports plc* ([www.practicallaw.com/1-237-2979](http://www.practicallaw.com/1-237-2979)) following the OFT's decision in *Replica Football Kits* ([www.practicallaw.com/0-102-3388](http://www.practicallaw.com/0-102-3388)). The parties eventually reached a settlement. JJB agreed to pay compensation to consumers who had purchased one of the football shirts in question.

The second route is the so-called 'certifying redress scheme': the CMA would be able to approve (as binding) voluntary commitments in respect of compensation schemes put forward by a business offering compensation (monetary or non-monetary) for an infringement. The CMA is to publish its final guidance (approved by the Secretary of State) about the criteria to be adopted for certification. A draft was consulted on in March 2015 (see *Practical Law Competition, Legal update, CMA consults on draft guidance on approval of voluntary redress schemes* ([www.practicallaw.com/1-602-5305](http://www.practicallaw.com/1-602-5305))). Although the final guidance is awaited, it seems clear already that a relevant factor will be whether the scheme was established following a reasonable process. The CMA could even offer a reduction of 10% in the level of the fine if the business has offered redress.

## MEDIATION IN REGULATORY NEGOTIATION AND DISPUTE RESOLUTION IN REGULATED SECTORS

In regulated sectors, there is scope for mediation in regulatory negotiations, which often precede the introduction of regulation, or a change to existing regulation; in inter-company disputes; and in consumer disputes.

### Mediation in regulatory negotiation

The introduction of regulation, or of changes to make regulation more effective, often meets with fierce

resistance. Even without thinking of areas that are very emotionally charged (such as environmental or health and safety regulation), regulatory reform is often adversarial in character. It typically involves mutually antagonistic coalitions which communicate little and may even see communication as a sign of weakness.

In these cases, public dissemination of reform proposals and industry consultation by the policy maker or regulator is not always sufficient to lead to a good regulatory outcome. Regulated companies may become distrustful of public agency motives and withhold valuable information that would inform better targeted regulation; policy makers and regulators may become frustrated and seek to reinforce their authority both in the exercise of legal powers and before the media.

Regulatory negotiation occurs where government, regulators and interested parties jointly explore and seek to reconcile their differences through a closer engagement of discussions, information exchange, advocacy and positioning. The involvement of an independent mediator as a neutral third party can be transformative, particularly for well-defined issues with only a few groups representing the different sides of the debate.

For example, in two cases, each mediated by one of the authors, the governments of small island states sought to liberalise the telecommunications sector in the face of exclusive licences held by Cable & Wireless. Initial efforts by the governments were counterproductive, in one case resulting in litigation that stayed all further reform until the exclusivity hurdle could be overcome. Mediation brought together the governments and the operators and resulted in agreements on the parameters of liberalisation. The matters resolved included compensation for the shortening of exclusivity, the sequencing of licensing new entrants, a grace period to allow price rebalancing in anticipation of competition, the withdrawal of the government from ownership in the sector, and the introduction of a well-balanced regulatory framework with a new independent sector regulator.

### Mediation in inter-company regulatory disputes

Disputes in regulated industries often centre on issues of interconnection and access (to a network (e.g., in telecommunications, electricity or gas, rail and transport); to a platform (e.g., in payment systems); or to a source of necessary input (e.g., inset appointments in water)). In these disputes, the incumbent which owns the network or input necessary for another company to

compete is often only partly privatised, meaning that the State can be an interested shareholder.

The introduction of competition in sectors that until recently have operated as monopolies or the increase in competition in sectors that have been relatively sheltered from competition, such as the water sector or payment systems, increases the scope for inter-company disputes. In some sectors, traditional price regulation is being superseded by less prescriptive, goal oriented economics regulation (water again, and airport regulation). This also creates scope for more inter-company disputes in regulated sectors.

One important feature in these disputes is the market power that the incumbent operator(s) often has, compared with the weaker position of more recent market entrants. In some sectors (e.g., in the telecommunications sector) this has given rise to the introduction of procedures that envisage that, if the parties cannot come to a negotiated solution, then the regulator will act as an adjudicator to resolve the matter.

So, for example, in the telecommunications sector, Article 20 of the Framework Directive 2002/21 (*OJ 2002 L108/33*) imposes an obligation on the regulator to resolve inter-operator disputes (including failures to reach agreement on negotiated wholesale matters) within four months of the dispute being referred to them. The regulators have the option to refer the parties in dispute to alternative means of resolution (including, specifically, mediation), if they consider this a more effective way to resolve the dispute. Even in this case, either party has the option to refer the dispute back to the regulator after four months.

In the UK, these provisions have been implemented in the Communications Act 2003 (*sections 185-191*), interpreted and supplemented by Office of Communications (Ofcom) guidance. For instance, one interesting way in which Ofcom dealt with disputes arising with BT for Local Loop Unbundling (LLU) was by way of creating a separate Telecoms Adjudicator with a dual role, as an independent third party neutral facilitator enabling the industry to reach agreement, and (in the early period) as an adjudicator. The Telecoms Adjudicator has performed an important role in ensuring the success of the LLU process. In other European countries, the implementation of Article 20 of the Framework Directive included a reference to mediation as a matter of course.

Even in the telecoms sector, which has witnessed early liberalisation within the context of an EU Framework,

market developments are testing the effectiveness of traditional dispute resolution systems. Article 20 of the Framework Directive, for example, covers disputes between operators relating to obligations in the Telecommunications Package. With the development of services offered by Over-The-Top providers (OTTs, such as Whatsapp) in competition with the traditional telecommunications operators, disputes can arise that are outside the system of Article 20 and equivalent regulatory systems. The regulated providers are increasingly of the view that this is unfair and that such OTT providers should be subject to equivalent regulatory systems. In these cases, a skilled mediator with subject matter expertise can help the parties deal with the gulf between these parties' expectations.

The approach to access disputes under Article 20 of the Framework Directive has a recent analogy in the UK payments sector. The new Payment Systems Regulator (PSR) was created under the Financial Services (Banking Reform) Act 2013 (FSBRA) and obtained its full regulatory powers on 1 April 2015. The PSR has the power to require the operator of a regulated payment system or a payment services provider (PSP) with direct access to the system, to grant access (*section 56, FSBRA*). It may also require change to the fees, charges, terms and conditions of an agreement relating to a regulated payment system (*section 57, FSBRA*). The legislation envisages a dispute resolution function for the PSR in resolving disputes over access that resembles that of Ofcom. Interestingly, the PSR's *Powers and Procedures Guidance* (<https://www.psr.org.uk/sites/default/files/media/PDF/PSR%20Powers%20and%20Procedures%20Guidance.pdf>) makes clear that parties to commercial disputes over access to payment systems must seek to resolve their dispute by commercial means before raising it with the PSR (*at paragraph 8.3*).

### Mediation of consumer disputes

Mediation is also useful in disputes between companies in regulated sectors and final consumers. Most regulators have a duty to protect consumers: access to an effective system for resolution of disputes is one way to protect and empower consumers (see UKRN discussion paper "*Reviewing the benefits of and options for Alternative Dispute Resolution in regulated sectors*" (<http://www.ukrn.org.uk/wp-content/uploads/2014/07/Alternative-Dispute-Resolution.pdf>)), while also benefiting the company. Indeed, mediation of consumer claims is more conducive to a simple and final outcome than disputes between regulator and regulated entities and inter-company disputes. Consumer claims often arise in relation to discrete

issues that, when addressed, allow the consumer to close or normalise the relationship.

With mediation, the consumer gains a forum to be heard in a more informal setting and the opportunity to vent anger and obtain an apology, as consumers sometimes require resolution mostly at an emotional level. UKRN research shows that often consumers seek a chance to be heard and can be satisfied with an apology by somebody in charge at the company who listens to them and takes responsibility and ownership of the problem.

Still, consumers often seek genuine redress, and the challenge facing regulated companies is to give priority and allocate value to the claims. One of the great difficulties in the regulated sectors, particularly for large utilities, is the sheer scale and effort of handling consumer complaints. The value of individual claims may be low but collectively they are significant. There may be millions of consumers, and their expectations are always rising. Mediation can help the regulated entity understand the situation, probe its genuineness and seriousness, and assess its options.

The benefits will only be achieved if consumers have the confidence that the mediation service they access is independent, transparent and result oriented. Mediation schemes and Ombudsman schemes for mediation of consumer disputes require an expenditure of public resources for their approval and on-going monitoring and assessment. This is now recognised at the EU level, with Directive 2013/11 on Consumer ADR (*OJ 2013 L 165/63*) to resolve disputes between consumers and traders, in all sectors (the only sectors that are excluded are healthcare and further and higher education). This Directive is to be implemented in member states by July 2015 and requires the member states to ensure that they have in place ADR schemes for consumer disputes which meet requirements of accessibility, expertise, independence and impartiality and transparency, amongst others. Authorities in the member states are required to publish lists of ADR entities that meet the requirements. The member states can decide whether to extend the application of the Directive to schemes where the solution is binding on the parties, but the Directive will apply to all voluntary schemes that involve reaching a solution by mediation.

Often ADR schemes for disputes between consumers and companies are administered by an Ombudsman with both a facilitator/mediator role and an adjudicatory role. In these cases, the Consumer ADR directive will impact the Ombudsman services even

though the member state can decide to limit its application to voluntary schemes. Under the Online Dispute Resolution (ODR) Regulation, an EU platform will be set up for online dispute resolution (*Regulation 524/2013 OJ 2013 L165/1*). All ADR entities will be required to offer ODR services and all traders that operate online sales. The world of mediation will expand to resolve disputes in a simpler, hopefully cheaper, online environment.

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### PARTICULAR BENEFITS OF MEDIATION FOR COMPETITION AND REGULATORY DISPUTES

The main benefits of mediation are well known. In particular, these include accelerated timing, lower costs, greater control over procedure and choice of mediator, and the creativity that the process of mediation allows. Mediation offers features that are particularly well-suited to competition disputes and disputes in regulated sectors of the economy (see *Gordon Blanke and Renato Nazzini, "Litigating, Arbitrating and Mediating Competition Law Disputes: An Update", International Arbitration Attorney*).

#### Time and cost saving

Public enforcement of competition cases (when available) are measured in years and not months. Appeals against findings of infringement are possible, further delaying case closure. Regulatory adjudications are targeted for four months under the Framework Directive, but often take longer. In contrast, depending on their complexity, mediations can be conducted in a day or a few days, although it may be unrealistic to expect that a mediation can lead to the settlement of highly complex disputes in just a few days (see *Challenges for mediating in competition and regulated industry disputes: Timing, sequency and complexity of process*, below).

Mediation can also save costs. Even a successful party in litigation is unlikely to recover its full costs. Although arbitration is generally viewed as providing a 'litigation-lite' alternative, costs can sometimes be high. Mediation is inexpensive by comparison because it does not necessarily involve protracted disclosure, experts and lengthy submissions. Since the costs are typically shared between the parties, it is by far the cheaper option.

#### Control over outcome

Mediation puts the parties in control. They choose the mediator based on his expertise which maximises the

prospects of an acceptable solution. The 'walk away' option of mediation means that the parties do not have to commit themselves to the judgment of a decision-maker they did not choose and so there is less risk of a bad decision. In cases involving complex issues of untested law or economics, the outcome of a court case or public enforcement can be very uncertain, and the level of expertise of the decision-maker variable. With mediation, the parties avoid creating a legal precedent that will have consequences in future cases and may also assist other litigants in private actions.

Of course, there are limits to this freedom. Outcomes must be designed to avoid or minimise future intervention from competition or regulatory authorities - they must not themselves violate the law. Mediators have to be attentive to ensuring that a settlement does not amount to a vertical or horizontal anti-competitive agreement or an abuse of a dominant position.

Often in sector-specific disputes there is an overlap between application of the competition rules and of regulation. Any creative settlement needs to be fully compliant with the limitation imposed by generally applicable laws and regulations. Recent cases on the potential anti-competitive effects of patent dispute settlements in the technology sector are an important alarm bell for anybody involved in mediating disputes, particularly if evaluative mediation and transformative mediation are undertaken.

### Relationship-supporting process

While oft-recounted mediation stories conclude happily with two companies mending their fall-out with a win-win future collaboration (perhaps exploiting a patent right for greater shared profit), in reality many commercial mediations mark the end of a relationship, often accompanied by a monetary claim. Indeed, what often makes a deal possible is settlement finality. The settlement closes the painful history that has bogged down collaboration, drained corporate resources and exacerbated executive stress.

In contrast, in both the competition and regulatory contexts, it is far more likely that the parties involved will continue to deal with each other for the longer term - whether they are regulator and regulated entities, market participants providing wholesale inputs to (or acquiring them from) one another, or competitors in the same market. For instance, many competition law disputes reflect ongoing commercial relationships such as a supplier-distributorship deal. Quite often the parties want to draw a line under past conflict but will have a mutual interest in continuing

business together, or at least are compelled to do so by dependency on inputs from the other party. By taking the disputes out of mainstream litigation, mediation can offer a platform to rebuild and preserve valuable commercial relationships.

In the regulatory context, although it is often the case that a large company in the sector has a measure of market power, there often exists a symbiotic relationship between the incumbent and the other party in dispute, each being dependent on the other. Even in the communications sector, with the advent of new players in competition with traditional telecommunications provider, a measure of dependence between OTTs and telcos exists.

Attention to relationships is particularly important to minimise the friction caused by what are often structurally competing interests. Mediation does not pretend that the parties involved are the best of friends. But it does aim to secure a respectful process in which differences and, most importantly, their underlying causes can be aired and worked out between the parties. The protocols of mediation, the 'ground rules' set out at the commencement of the process, and firm process management by the mediator, help to keep all parties focused on constructive dialogue and exploration.

### Interest-focused approach

The very nature of mediation, with its focus on the parties' interests rather than positions, draws the parties back to an approach that resonates with incentive-oriented regulation where pursuit of public objectives might otherwise have resulted in blunt command-and-control regulation. The interest-focused approach lends itself to more enlightened thinking than the binary choice between the parties' respective legal claims. In a competition matter, a dispute over a broken dealership agreement might be resolved through a joint venture in a new product line expanding both parties' customer base and profits (or at least avoiding worse alternative scenarios). Or a competition law long-term gas supply agreement dispute might be settled with revised take-or-pay conditions and a new payment formula reflecting changed economic circumstances.

Information asymmetries between regulator and regulated entities often result in a stand-off that interest-based negotiation, facilitated by mediation, can help resolve. Ratcheted price caps on baskets of services, for example, can serve a regulated business' incentive to increase profit by reducing costs while

also advancing the regulator's objective of extracting for consumers an increasing portion of the surplus resulting from the cost reductions. More broadly, mediation methods can also be employed to enable a dialogue between regulators and regulated entities about the direction of regulatory policy reform. A broad application of mediation approaches was tried in CEDR's 2014 *"Dialogue with the regulator"* (<http://www.cedr.com/articles/?item=Dialogue-with-the-Regulator>) which brought together financial regulators and financial institutions to explore their respective interests with the facilitation of CEO Karl Mackie.

Governments and regulators often lack the detailed expertise required to introduce legislation that would be technically robust and enforceable and the companies at the receiving end are often mistrustful of the legislator or the regulator. The presence of a neutral third party mediator often represents the difference between legislation which may be difficult or in some cases impossible to enforce and legislative changes supported by the parties subject to it.

### Creative space for innovation

Mediation offers a space for creativity, which can be extremely valuable in the competition and regulatory policy context. The involvement of a disinterested but curious and proactive third party mediator can change perspectives about the nature of the solutions the parties are pursuing.

Mediation can be useful for designing structural remedy or even be instituted as part of monitoring a behavioural remedy adopted as a result of a competition dispute. Mediation can also be useful in merger cases. For example, mediation was used to find solutions to US Department of Justice concerns in the merger between American Airways & US Airways (see *"AMR, US Airways, U.S. Agree to Mediator in Antitrust Case"* (<http://www.bloomberg.com/news/articles/2013-10-29/amr-us-airways-u-s-agree-to-mediator-in-antitrust-case>), Bloomberg Business, 29 October 2013, and *"American, US Airways Agree to Mediation with DOJ Over Merger"* (<http://www.travelpulse.com/news/airlines/american-us-airways-agree-to-mediation-with-doj-over-merger.html>), Travelpulse, 29 October 2013).

In a regulated sector, policy makers might traditionally aim to achieve an outcome (e.g., improve quality of service) through tight standards backed up by complaints procedures and enforcement measures. Yet this may be institutionally burdensome for both regulator and regulated entities and fail to take into

account constraints on investment in infrastructure capacity or other causes of the underlying problem. Mediation involving regulator and regulated entities may uncover structural problems and associated incentives and thereby find a better way to shift regulated entities' behaviour towards the desired public policy outcomes. Impediments to investment may be addressed through releasing regulatory pressure in other areas or providing certainty about particular economic regulation necessary to reduce the risk premium. A service provider's lack of attention to consumer experience may be improved by addressing information asymmetries between service provider and consumers through better dissemination (e.g., in marketing materials) of quality of service indicators or improved competition rather than tighter quality of service requirements or higher fines.

### Reality-testing outcomes

Good mediation includes careful and respectful vigorous reality testing of parties' positions and their proposed solutions in order to ensure that the parties have considered from all angles whether they will really achieve their desired outcomes. It is like a rapid, focused risk assessment carried out with the assistance of an impartial outsider.

Mediation is thus an excellent process in which problems identified by behavioural economics, such as optimism bias, status quo bias and bounded rationality, can be managed (see, for example, Thaler, R., & Sunstein, C. (2008). *"Nudge: Improving decisions about health, wealth and happiness"*, New Haven, CT: Yale University Press). The opportunity offered by mediation to imagine alternative scenarios in a safe context - assured by the mediator's stewardship of the process and confidential environment - allows underlying institutional culture issues to be addressed.

Such factors lay behind the agreement, mediated by one of the authors, between Vodafone and the Government of Fiji for the introduction of competition to the Fijian telecommunications sector. Vodafone shifted from a defensive attitude to its legacy rights and recognised the opportunity to grow its business under a predictable regulatory framework. Vodafone Fiji's financial performance since the mobile services market was opened to competition has far exceeded anything it enjoyed previously. Likewise, British Telecom's performance over the last two decades has been achieved partly by adopting a more positive attitude to a competitive marketplace in the UK than many other European incumbent operators.

**Confidentiality in a media-dominated environment**

Due to their public nature, most regulated industries face significant media scrutiny. The temptation of journalists to cast the regulatory narrative in terms of the good guys and the bad guys leads to caricatures of regulated entities as unaccountable monopolies run by fat cats, and regulators as weak willed, incompetent mandarins. In this climate, pandering to media pressure for sound bites can easily undermine relationships and reduce prospects for agreement by dialogue. Naturally the competing principle of transparency of public agency decision-making makes it important to disclose the outcomes reached and the reasons for them. Nevertheless, the opportunity to resolve regulatory matters in the privacy of a mediated process can be a relief, allowing space to get to the heart of the issues at stake, making it possible to achieve agreement.

Particularly in cases of public ownership of the incumbent, both parties to an inter-company dispute may have an interest that the dispute be resolved without reaching the limelight. The company may not wish to be seen to take the public shareholder through the courts, and would be fearful of possible retaliation, and the public shareholder would not wish to have its own expertise called into question in a public forum. Mediation can offer a level of confidentiality that serves all parties’ interests.

**Multi-jurisdiction cases**

In many cases, competition disputes involve large companies that are active in many countries. Co-ordinating competition authority and judicial proceedings across borders is notoriously challenging. Both the authorities and market participants face lengthy procedural hurdles and uncertainties over outcomes (including how an outcome in one market will affect another) that weigh heavily on all involved. Mediation is relatively easily jurisdiction neutral. It can cover as many countries as the parties want, providing that a settlement will be accepted as enforceable in each jurisdiction.

**CHALLENGES FOR MEDITATING IN COMPETITION AND REGULATED INDUSTRY DISPUTES**

**Structural difficulties of mediating in the competition and regulated context**

As mentioned previously, the long-term competing interests of the parties make mediation useful to

nurture and protect relationships among parties. However, they can also weaken the chance of settlement. Mediation depends on building a minimum level of trust that at least the other party can be depended on to fulfil its end of the bargain. The long-term structural set of relationships in competition and regulatory disputes, with the parties often engaged in a long term struggle for legal or market territory, can make such mediation harder in some ways than in other cases. One of the authors, when chairing an arbitration tribunal hearing a dispute involving a complaint about abuse of dominance in the Caribbean, tried a pre-hearing mediation session. It hit a brick wall as the dynamic between the parties - that anticipated 15 years of fierce competition to come - had hardened them against all constructive dialogue. For this reason, in the context of regulated industries, mandatory institutional mediation/facilitation processes such as the LLU scheme in the UK, with continuity of parties and recurring issues for resolution, may well have a greater impact than *ad hoc* mediations.

Long-term mediation processes can work. One of the authors chaired a mediation involving a European government and two major international telecom operators over a three-year period, working out an interconnected chain of multiple claims from third party wholesale international carriers and terminating operators exceeding EUR100 million. Clearly established arrangements for communication, including monthly meetings, and constancy in the mediator’s manner, enabled amicable resolution of all of the claims.

**Complex, multi-disciplinary disputes**

Competition disputes and cases involving regulated industries typically feature extensive economic theory applied to (often evolving) technical conditions, all housed under the roof of laws and regulations driven by public policy objectives, involving specialised administrative agencies. These are typically argued over by a cadre of specialised lawyers with support from expert engineers and economists. Even judges are challenged in mastering the issues after sitting through debate between teams of lawyers, financiers, economists and accountants with PhDs from the best universities, displaying econometric arguments, graphs, statistics and elasticity curves.

A mediator can only really perform the role usefully if he really understands the substantive issues in dispute. While the mediator’s role is not to express a view on the merits of each party’s case - still less to decide on the dispute - a major part of a mediator’s usefulness to the

parties is in reflecting back to a party its perspective, probing its assumptions, asking honest (if challenging) questions about its position and its interests. A mediator needs an integrated sense of the relevant technology, market and legal context to understand the average competition or regulatory dispute that has arisen, and to contribute to its resolution.

Much productive work in a mediation arises when the parties are brought together to exchange their perspectives with one another, facilitated by the mediator. A mediator that does not have a deep enough understanding of the issues to hold such discussions (at or at least close to the same level as the parties) is reduced to being a process manager, and is unlikely even to be able to do that well. Indeed, just to avoid discussions spinning beyond his or her understanding, a mediator may prefer to resort to an easier, but suboptimal, process relying wholly or entirely on separate, sequential meetings with the parties (known as 'caucusing'), with the mediator's role potentially further reduced to that of messenger.

While an element of caucusing is inevitable in any mediation it should be used carefully. Too much caucusing can result in significant under-exploitation of the potential of the mediation process and can risk missing untapped value in having a mediator with subject-matter expertise. There may be psychological, relationship and emotional issues in play, but fundamentally most regulatory and competition disputes have substantial amounts of money at stake based on a complex web of arguments over interpretations of fact and law.

Even though no mediator, just as no party counsel, can truly master the full range of technical and economic issues involved, a good mediator will keep focused on the useful roles that can be played by the different participants in a mediation. This will include the party representatives, their lawyers and their experts, as well as the regulator and judge responsible for the case if one has been filed.

It is often correctly observed that where mediation does not resolve disputes, it can still be immensely useful in narrowing issues. But a competition law dispute will often begin with a threshold question of definition of the relevant market within which to investigate questions of anticompetitive agreements, and dominance and associated behaviour (such as abuse, exclusionary practices, excessive pricing). Even such a threshold issue can be highly complex, depending on a complex economic analysis pursuant to a small but significant and non-transitory increase in price

(SSNIP) test to determine substitutability of products or services. Thus even narrowing the issues will be beyond a mediator without experience in the relevant regulatory field.

Particularly in regulatory negotiations and inter-company disputes, then, it is highly desirable that the mediator should have a solid understanding of the technical aspects underlying the dispute and of the legal context. Subject matter expertise alone of course is insufficient. In the *United States v Microsoft* case, mediation with Judge Posner, the leading antitrust judge in the United States, did not lead to a settlement. Subsequent mediation by two very experienced mediators, Eric Green and Jonathan Marks, did (see "*Re-examining mediator and judicial roles in large, complex litigation: lessons from Microsoft and other megacases*" (<http://www.bu.edu/law/central/jd/organizations/journals/bulr/volume86n5/documents/GREENv.2.pdf>), Eric D. Green, 86 *Boston University Law Review* 1171). Process expertise combined with subject matter knowledge is essential.

### Timing, sequencing and complexity of process

Many large competition and regulated industry disputes have such a high degree of complexity that the idea of the customary single day mediation is unrealistic. Many involve multiple parties (in the *Fiji* case, six parties, and in the *Microsoft* case multiple States in addition to the United States and Microsoft). The *Fiji* case took four days' mediation before the parties signed their settlement at 2am. The US *Microsoft* case took three weeks of intense mediation to settle.

In complex cases, major sequencing issues can arise. Mediation may be premature until key issues have crystallised to the degree that parties can make realistic, informed assessments of their prospects through regulatory and adjudicative proceedings. So, for instance, rulings on relevant market definition and even existence of market dominance may be helpful before seeking to resolve a dispute over a claim concerning abuse of dominance, exclusionary practices or excessive pricing. Before then, both parties may face too wide a range of potential outcomes to be ready to seek to resolve the matter in meditation. Thus, it is sometimes necessary for the parties' BATNA (Best Alternative to Negotiated Settlement) and WATNA (Worst Alternative) to have matured to reduce the range of uncertainty sufficiently for them to be ready to settle.

These factors can mean that there may be significant to-and-fro with the judicial and regulatory authorities

## TIPS FOR PARTIES INVOLVED IN MEDIATION AND THEIR ADVISERS

- **Preparation.** The process is less structured than litigation or arbitration. The position statements exchanged in advance of the mediation may be more or less developed than a skeleton argument. Given the complexity of the subject matter in regulatory/competition disputes, preparation is even more important.
- **Representing clients.** Lawyers must adapt their style and approach in mediations. A lawyer will be most useful in mediation if he helps the client develop a fuller sense of the probabilities and options and helps the client express its needs effectively in search of potential common ground. This can be a change from the habitual role of the adversary, but it need not compromise the vigorous defence of a client's interests. Indeed, good mediation pursues interests. The lawyer also has a crucial role in confirming settlement authority and ensuring the outcome is enforceable, which may not be a simple matter in many regulatory and competition cases.
- **Interests.** Be ready to focus on interests, not just legal positions or the antitrust theory of harm. It is not (just or only) about money either; it may be about longer term changes in behaviour.
- **Mutual gain.** The cost to one side of giving something may be less than its value in the hands of the recipient. For example, a manufacturer seeking to access a new market may value a product endorsement by a local distributor but it costs the latter nothing to give that and it could form part of a settlement package.
- **Common-ground.** Seek to identify and secure areas of agreement between the parties. Not only will this save valuable time and distraction but it may be possible to expand the areas of consensus and pave the way to settlement. For example, in a dispute about the termination of a patent licence by an allegedly dominant IPR owner, the parties accepted that the licence covered Patent A but not Patent B. The parties were able to conclude a mutually acceptable renewal for Patent A, which allowed the licensee to remain in business and gave the licensor a valuable royalty stream.
- **Negotiate.** However entrenched the parties' viewpoints, opportunities will be lost if they sit and wait until the other party makes the first move. Views can differ as to whether it is best to make the opening offer. One rule of general application is: don't wait for settlement at the 11th hour.
- **Information.** While mediation is a confidential and without prejudice procedure, share information and facts selectively. Keep in mind that the mediation may not result in a settlement and that information imparted cannot be unlearned.
- **Saving face.** The person with settlement authority will need to take ownership of the settlement and take it back to their organisation. It is best if each party can maintain reputation, credibility and emotional sensibilities intact.
- **Emotional intelligence.** Skills and attributes often undervalued in other contexts are important: candour, judgement, balance, neutrality, patience, perspective, calmness, grace under fire, dignity.
- **Settlement and the law.** The settlement agreement, like any other agreement, is subject to generally applicable law. Be careful not to resolve one competition law problem by creating another with a settlement agreement that is itself anti-competitive or not compliant with existing regulation. Recent cases involving agreements in the pharmaceutical sector reflect the European Commission's interest in provisions which are frequently referred to as 'reverse payments' (typically payments from the licensor to the licensee to delay market entry) or arrangements concluded to settle patent disputes or similar (see, for example, *Lundbeck and generic companies* ([www.practicallaw.com/3-520-6594](http://www.practicallaw.com/3-520-6594))).

Some of the more problematic areas for settlement that need to be examined for competition law compliance include asset splits between competitors; agreements to stay out of one party's market or delay market entry, transfers of value which do not make economic sense. Where the mediator in competition cases has competition law or regulatory expertise, they will be sensitive to the potential problem areas and will be able to guide the parties towards less risky solutions.

as a backdrop to the mediation process. Power imbalances are a common issue and mediators must be alert to them. For a dispute to have a good prospect of reaching a settlement, sometimes one party's power in the market may have to be counterbalanced by the other party's power in the legal or regulatory proceedings. This may mean that the case has proceeded to the stage where the weaker party in the market has a real prospect of winning in the court or before the regulator.

The existence of an already-launched law suit is common in mediation, but the proactive nature of regulation makes it all the more important that the mediator tailor the process to the unfolding judicial or regulatory proceeding. In some cases, a judge or regulator might even have a role in the mediation itself. (This occurred in the *MasterCard/ Visa case in the US* (see *In re Visa Check/ Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96 (2d Cir. 2005).)

This means that the conventional view that emphasises separation of mediation from judicial and regulatory processes may not hold in all situations. The great advantage of mediation is its adaptability to situations. The development of parallel mediation accompanying arbitration could be built into regulatory and judicial proceedings, with useful interplay between the adjudicatory/regulatory function of the regulator or court on the one hand and the exploratory/facilitative function of the mediator on the other.

### Perception challenges

Parties may have the perception that entering into mediation implies weakness in a party's case or a loss of image that weakens their options. This concern can be overstated. Mediation does not prevent a party resorting to (or resuming) coercive legal solutions through litigation or regulatory proceeding. It is 'without prejudice' to parties' legal options.

In many respects mediation actually strengthens the legal and regulatory options because, if handled by an experienced mediator, the parties will both have a fuller understanding of their best and worst alternatives to a negotiated outcome (BATNAs and WATNAs). Where a party concludes at the end of a mediation that it is indeed better for it to go through litigation or a regulatory proceeding, it will do so on a better informed basis.

### Achieving finality

There can be a risk that mediation ends up disappointing the parties if it does not result in a settlement on the day

or soon afterwards. On the whole, competition disputes have a high rate of settlement, perhaps because such cases can be finely balanced and the mediation brings important 'reality testing'. Even where mediation does not result in a settlement it can be useful in narrowing down the issues for litigation, arbitration or a regulatory proceeding. Ultimately, success is measured by the degree to which the parties achieve through the process something less wasteful than the time and cost consuming alternative of litigation or regulatory adjudication.

### CONCLUSION: A POST-SCRIPT ON TEAMWORK

Those who have honed their skills in competition law and regulation get to know one another in various guises. Practitioners get to know each other and, generally, professional respect and understanding tend to prevail. The competition and regulatory world is less characterised by anonymous adversaries than it is by fellow professionals who know and regularly engage with each other, even if they may disagree with the other's viewpoint. In the authors' experience this can be put to advantage in mediation in competition and regulatory cases. Clients need to trust the mediator and the advising lawyers need to be sensitive to the personalities on the other team. It is those human aspects of dispute resolution that can make a difference. At the very least they help make the process less painful than it might otherwise be. They may also open up the possibility of greater tactical and strategic insights through an understanding of what makes someone else 'tick' and may therefore increase the chances of a satisfactory settlement.

There are many conceivable scenarios in which competition law and regulatory issues can raise disputes and there is plenty to argue about. Mediation can be used effectively. The sheer scale and breadth of potential disputes contrasts sharply with the number of expert mediators and advisors in the field. One way or another, there is a sure place for mediation in these fields, and it can only be expected to grow.

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