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Article

Rereading Fisher & Ury

Identifying the Advantages of Mediation in the Specific Setting of a Competition Law Dispute

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1 Introduction

To analyse the advantages of mediation as a means of resolution of private competition disputes, it is helpful to look backwards to the underlying principles upon which modern mediation has been built. Leading mediation institutions in Europe such as the Centre for Effective Dispute Resolution ("CEDR") in London and the Centre for Mediation and Arbitration of Paris ("CMAP") were founded in the 1990s. Adoption of the EU's Mediation Directive goes back to just 12 years ago, in 2008. But the fundamental underpinnings of what we are calling today 'modern mediation' derive from the development of methods of 'principled negotiations' at the Harvard Negotiation Project as from 1977 and the publication, in 1981, of the first edition of the book which crystallised that work: *Getting to Yes: Negotiating Agreement without Giving In*, by Roger Fisher and William Ury,[1] known to mediators everywhere as the 'Fisher & Ury'. As a first approach, the idea that there would be advantages to recourse to mediation in the specific setting of certain competition law disputes should correspond to the negotiation method as formulated by Fisher & Ury in their seminal work. And it does.

2 Fisher & Ury: Basic Principles of the Method

Rereading Fisher & Ury on a regular basis is a salutary exercise. As a reminder, here are the four fundamental underlying principles of the method in what the authors call in their preface to the third edition of the work (published in 2011) the 'negotiation revolution': (i) Separate People from the Problem; (ii) Focus on Interests, not Positions ('Don't Bargain Over Positions'); (iii) Invent Options for Mutual Gain; (iv) Insist on Using Objective Criteria.

The Fisher & Ury method allows one to focus on the specific advantages of mediation as a dispute resolution tool. Indeed, the recourse to mediation in a competition law setting procures the same various advantages that we associate with mediation, irrespective of the matter in dispute. Mediation is time and cost-effective. The procedure is confidential: both with regard to information that a party does not want to be revealed to the other party but also the mediated settlement and indeed the existence of the mediation procedure itself with regard to the outer world. The parties find together a solution that they consent to. Failure in mediation does not set the parties backwards: it simply brings them back to the status quo. More often than not, at least according to CMAP and CEDR for mediations under

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1. Fisher R. & Ury W. (2011). *Getting to Yes: Negotiating Agreement without Giving In* (Revised 3rd ed.). By Fisher, Ury and Bruce Patton. London, Penguin Books.

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their administration, the recourse to mediation leads to a successful outcome.[2]

Beyond those advantages, there is one particular advantage which corresponds eminently to the spirit of the Fisher & Ury negotiation method and which seems to be particularly relevant in the case of private competition law disputes, and that is the decisive and strategic advantage of the possibility for the parties to craft options based on interests and which could, thus, lead the parties *to maintain their commercial relationship post settlement, rather than put an end to the relationship and destroy value*. It is true that Fisher & Ury were writing about interests-based negotiation, not about mediation method. But it is also true that their work has been seminal to the development of what we are calling 'modern mediation'. And to the extent that mediation, as a method, has the distinct advantage, of allowing to maintain business relationships, it is relevant to competition-related disputes, in that, by definition, such dispute involves competitors clients, suppliers or other business partners (licensors, joint venturers, etc.), so that the question of saving the business relationship through and beyond settlement of the dispute naturally arises. As already mentioned, rereading Fisher & Ury is an eminently salutary exercise for an antitrust lawyer looking to resolve competition-related disputes through mediation. Here are some pertinent observations coming from *Getting to Yes: Negotiating Agreement without Giving In*:[3]

- Look forward, not back … You will satisfy your interests better if you talk about where you would like to go rather than about where you come from. Instead of arguing with the other side about the past …, talk about what you want to have happen in the future. Instead of asking them to justify what they did yesterday, ask 'Who should do what tomorrow?'[4]
- A major block to creative problem-solving lies in the assumption of a fixed pie: the less for you, the more for me. Rarely if ever is this assumption true. First of all, both sides can always be worse off than they are now. Chess looks like a zero-sum game; if one loses, the other wins-until a dog trots by and knocks over the table, spills the beer, and leaves you both worse than before … Even apart from a shared interest in averting joint loss, there almost always exists the possibility of joint gain. This may take the form of developing a mutually advantageous relationship, or of satisfying the interests of each side with a creative solution.[5]
- How important is it to maintain a good working relationship? If the other side is a valued customer or client, maintaining your ongoing relationship may be more important to you than the outcome of any one deal. This does not mean you should be less persistent in pursuing your interests, but it does suggest avoiding tactics such as threats or ultimatums that involve a high risk of damage to the relationship. Negotiation on the merits helps avoid a choice between giving in or angering the other side.[6]
- Where are you in the negotiation? Bargaining over positions tends to inhibit looking for joint gains. In many negotiations, the parties end up with outcomes that "leave a lot of gold on the table." Bargaining over positions does the least harm if it comes after you have identified each other's interests, invented options for mutual gain, and discussed relevant standards of fairness.[7]

3 Perceived Obstacles to the Recourse by Undertakings to Mediation as a Means of Resolution of Competition Disputes

Given the confidentiality of mediation, from start to finish, it is difficult to credibly conclude on obstacles to recourse to mediation as a means of resolution of private disputes in a competition law setting. Personal experience shows enthusiasm around the possibility of recourse to mediation in competition disputes, particularly with regard to the prospect of favouring the maintenance of commercial relations beyond resolution of the dispute. Personal experience also shows that it is difficult to hope for such advantage where dispute resolution comes through a court ruling or an arbitral award. Personal experience also shows that it is difficult for undertakings and their lawyers to take that 'leap of faith' and embrace mediation in the context of a competition dispute, with all of its economic and legal complexity. But beyond personal experience, it takes a market study to better understand the obstacles to recourse to mediation in such context. One such study does exist.

The study relevant to this issue has just been published in French by a legal think tank, *Le Club des Juristes*, in collaboration with CMAP. The report on the results of the study was published in February 2019, and is entitled *Médiation et Entreprise: L'opportunité de l'autodétermination: une liberté créatrice de valeur*[8] (the 'Report on France'). The report was written by an ad hoc committee of expert lawyers/mediators, academics and professionals specialised in mediation. It was based on in-depth interviews of various business leaders, general counsel of multinational companies headquartered in France, as well as lawyers and judges, and nourished by institutional and professional experience.

2. Cf. statistics set out by each organisation individually at www.cmap.fr and www.cedr.com.
3. All citations are from the above-referenced third edition.
4. Fisher & Ury, pp. 54 and 55.
5. Id., p. 72.
6. Id., p. 154.
7. Id., p. 155.
8. Translation: *Mediation and Business: The Opportunity for Self-Determination: The Freedom to Create Value*.

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The Report on France sets out in-depth analysis of how undertakings make strategic decisions in the choice of method of dispute resolution, including the decisions leading to the choice of a mediation alternative to judicial or arbitral dispute resolution. The report includes some key considerations on (i) a certain dissatisfaction with judicial remedies, given the expectations of undertakings; and (ii) structural and psychological obstacles to recourse to mediation as a means to resolve business disputes.

An observation that judicial procedures 'correspond less and less to the expectations of undertakings'. For cases of business disputes between undertakings having an established relationship, the perceived disadvantages of recourse to the courts are, in general, not surprising: duration of the procedure and its cost, risks (companies embrace predictability, not risks), the chronophagic use of internal resources, time and energy, the public nature of the justice system (in a world where business secrets proliferate). But the most striking description of a disadvantage is set out under the heading, *Damage caused to relationships*. The report notes:

> By substitution for the system of communication used between the parties before the emergence of the dispute, a system which is based on conflict, contestation, accusation, claims for indemnification and the negation of one's own responsibility, the court case breaks relationships which become almost impossible to renew. And yet, an undertaking can only exist through the relationships which it weaves together with its suppliers, its customers, its employees, its peers, the institutions which govern and protect it, etc. Any destruction of any one of those relationships is a loss.[9]

In opposition to these observations (and perhaps not surprisingly), the Report on France proposes that mediation constitutes an 'almost-perfect' adaptation to the needs of undertakings, '*as a point by point counterpoint to the elements of dissatisfaction with judicial dispute resolution*.' The arguments are well known but that it not what interests us in the present instance. What is of interest are the reasons for which mediation has *failed* to develop within the business environment in France, in a way which would correspond to its perceived advantages for management and general counsel of leading French multinationals. The report characterises the dichotomy between theory and reality as 'mysterious, incomprehensible, indeed shocking'.[10]

In this spirit, the report identifies a number of obstacles within the structure and decision-making processes of major French multinational undertakings which have contributed to limitations on the development of mediation as a significant means of dispute resolution in practice. Although the obstacles analysed pertain to business disputes in general, they are eminently relevant to disputes deriving from the application of the competition rules. Some of this analysis relates to French culture in general, and French business culture in particular. For instance, the authors of the Report on France opine on the *very vertical and hierarchical nature of French culture … which leads to methods based on confrontation …* and to *having disputes settled by a third party invested with authority, whether judge or arbitrator, and to favor such method as opposed to compromise*.[11] These types of 'cultural' considerations may or may not be true. But other types of findings on institutional obstacles may be more telling. For instance, various interviewees referred to factors of 'polysemy and confusion' around the term 'mediation', which can refer to various types of procedures and thus create, by reference, uncertainty as to what the term actually represents in concrete terms. The report found that the proliferation of *mediateurs* and mediation centres in France cast discredit on the method itself: interviewees criticised mediation procedures in terms of *image*, saying, for instance 'mediation, it's a jungle' and 'there are more mediators out there than mediations'.[12] But the most telling observation comes from an analysis of decision-making methods within the legal department of an undertaking in connection with new litigation scenarios. The analysis of the Report on France takes into consideration the risk of perceived error by in-house lawyers in proposing recourse to mediation, as well as the difficulty of explaining to management the nuances of mediation as opposed to a judicial or arbitral procedure based on a 'promise of victory' approach.

This passage of the Report on France is particularly telling:

> When faced with such reticence, to propose [recourse to] mediation would seem to constitute a perilous exercise. It presents, in certain difficult situations, an accentuated risk, to the extent that a ruling by the courts or an arbitral award presents the advantage of being able to blame an unfavourable outcome of the judge, the arbitrator or even the *avocat* [who argued the case]. Contrariwise, mediation involves a direct and active engagement of the representatives of the undertaking. In the case of recourse to mediation, the initiators and actors of such solution and the lawyers, will have to assume responsibility for their choice and be in a position to explain it. How can you demonstrate that the settlement obtained at the conclusion of the mediation was the best of all possible solutions for the undertaking? The undertaking's head of legal affairs and/or its *avocat* will often find themselves in such uncomfortable position of responsibility. In order to avoid such risk, many will abstain from proposing mediation … And thus, we are at the heart of the paradox, often cited yet never truly elucidated. On the one hand, it is impossible to imagine more efficient, more relevant means of dispute resolution

9. Pages 15-16 of the Report on France.
10. Id., Report, p. 17.
11. Id., Report, p. 19.
12. Id., pp. 15-23.

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to settle a conflict rather than voluntary mediation. On the other hand, its use is too sporadic within undertakings for reasons which derive from both considerations of risk of loss of power as well as of its exercise.[13]

In 2014, to mark the 5-year anniversary of the Mediation Directive, the DG for Internal Policies of the European Parliament published a commissioned study which it entitled: *Rebooting the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU* (the 'Mediation Study').[14] The authors of the Mediation Study came from the ADR Center, an independent body, and not the European Parliament itself as an institution. The Mediation Study was based on Member State–specific questionnaires, for which 816 expert contributions were received, which allowed to conclude that the volume of mediations observed in the EU Member States did not correspond to the objectives of the Mediation Directives. As the Mediation Study notes, there is a 'disconnect between the benefits of mediation and its current very limited use in the EU Member States, known as the "EU Mediation Paradox"'.[15]

4 Four Ways to Overcome the Perceived Obstacles: How the Fisher & Ury Method Can Help

What solution, then, to the 'EU Mediation Paradox' with regard, in particular, to competition disputes?

When the causes of the paradox are analysed, there seems to be a belief of undertakings in the method as method and yet apprehension caused by (i) lack of experience with the mediation method and (ii) uncertainty as to the quality of the people and, in particular, the quality of the mediator. Perhaps more so than in forms of judicial (and arbitral) dispute resolution, the success of mediation depends upon the personal capacity of the mediator. It would seem that the key is thus to centre the proposal to undertakings which have a new litigation scenario in hand to have trust in a mediation procedure which is based, to a significant degree, on the personal qualities and talents of the mediator.

At the conclusion to the Mediation Study, there is a proposal for creation of an 'EU Mediation Specialist' certification (or similar designation/recognition), which would confer a guarantee to undertakings when they opt for mediation.[16]

With regard to disputes involving competition law, this point would seem to be of paramount importance. Competition law involves a high degree of complexity with regard to markets. It takes years of experience to obtain a good sense of competition law reasoning and judgement in practical (and often, innovative) situations. Competition law is highly reliant on fact, on precedent, on the guidelines, policies and practices of the competition authorities, on the logic and economics of the workings of the markets. Today, this can also depend upon a good understanding of the application of competition concepts to market situations often involving a tangle of intellectual property rights and advanced technological tools including Artificial Intelligence. In this context, it seems to be reasonable that undertakings in dispute would want a competition law expert (whether a lawyer or economist) in a competition law situation.

Familiarity with the Fisher & Ury method can go a long way towards bringing, with regard to the decision-making procedures of enterprises on how to conduct a new litigation matter, competition disputes into the realm of mediation. In comparison with the growing complexity of competition matters, particularly in a technological context, it could be salutary in some instances to step backwards and contemplate, with the help of a competition law specialist practising mediation, those basic principles deriving from Fisher & Ury which can allow to preserve rather than terminate a commercial relationship between the parties in dispute. The Fisher & Ury method has become a precious legacy for modern mediation practitioners due to the cardinal principles of, inter alia, (i) Focus on Interests, not Positions; and (ii) Invention of Options for Mutual Gain (see Section 2, above). A mediation practitioner who knows how to skilfully steer the conversation about a competition dispute into a conversation centred on interests and new joint projects for mutual gain can bring considerable benefit to the parties concerned.

5 Conclusion

Mediation is not necessarily an appropriate solution in all cases of competition law disputes where the interests of private parties are at stake. Yet, the basic principles set out in Fisher & Ury some 40 years ago help to understand the advantages of mediation in those cases of competition disputes where mediation as a method is possible. In the light of those principles, a party in favour of recourse to mediation in circumstances of a competition law dispute should carefully analyse the advantages of mediation with regard to the dispute, in accordance with criteria such as (i) potential creativity in reaching a solution beyond monetary compensation, and the potential to continue with established business relationships rather than breaking them off as a result of court (or arbitral) strife; (ii) absolute confidentiality at all stages and in all aspects of the procedure; (iii) rapidity in reaching (or not reaching) a solution ('the time of

13. Id., p. 34.
14. European Parliament, PE 493.042 (EN) (2014). Retrieved from: www.europarl.europa.eu/Studies.
15. Mediation Study, p. 6.
16. Id., pp. 219-220.

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the courts is not the time of business'); and (iv) the predictability and modicity of costs. In cases of cross-border competition disputes, mediation would seem to be advantageous in an additional way, since it can be specifically tailored, according to the will of the parties, to take into account realities of a cross-border dispute, such as recourse to co-mediation, or other means to bridge legal and cultural gaps between countries. To the extent that court (and arbitral) justice is blind, in completion cases, to individual characteristics of undertakings beyond their position in markets, mediation can also be a means to equitably compensate for discrepancies in market positions and sizes between undertakings, in the search for a solution acceptable to both parties. To realise those advantages, it is indispensable that the worlds of competition practices meet in such way that a corpus of competition/mediation specialists emerges – specialists in the law and economics of competition law – to instil general faith in mediation procedures involving complex competition issues. The basic principles set out in Fisher & Ury can help to convince in this regard, as well.

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