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EU Competition Law as ordre public in International Commercial Arbitration

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1 Introduction and approach

1.1 Introduction

The topic for this thesis is the interaction and relationship between international commercial arbitration and EU competition law. The main question is to what extent EU competition law is to be seen as “ordre public” in international commercial arbitration. An ordre public exception can influence both the arbitrability of a dispute and interfere with the enforcement stage of an arbitral award. Furthermore, courts and tribunals can have an obligation to apply legal areas that are considered to be ordre public ex-officio. The European Court of Justice (ECJ) has rendered several rulings on the role and competence of arbitrators when a dispute is brought before an arbitral tribunal with potential implications for the EU rules on competition. The theory written on the topic is comprehensive. One of the most reviewed decisions from ECJ is the so called *Eco Swiss* decision from 1999.¹ This preliminary ruling has been extensively discussed in literature and it has also been interpreted by national courts in Europe with different outcomes.

This thesis has two main objectives, which is going to contribute to resolve the main question.

Firstly, the thesis will analyse the term “EU ordre public” and the concept “EU competition law as ordre public.” I see it as necessary to first examine whether or not it is possible to talk about an “EU ordre public” to later analyse if EU competition law is part of a potential understanding of “EU ordre public.” EU competition law as ordre public is going to be analysed in light of the above mentioned *Eco Swiss* case and commentaries that have been written about the case. An aspect that is going to be discussed is the interpretation of the term “ordre public” in the Convention on recognition and enforcement of foreign arbitral awards from 1958 (The New York Convention).² Furthermore, I will try to find out why the ECJ consider it as necessary that EU competition law is ordre public in light of the Convention on recognition and enforcement.

¹ Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* (1999) ECR I-3055

² United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

For the questions concerning EU ordre public and EU competition law as ordre public, both the question of arbitrability of competition law, as well as the enforcement stage of an award, will be relevant.

The second main aim is to give an outline of the situation that has developed after the *Eco Swiss* decision. In other words; how has the decision been interpreted and how has it been used in similar cases up until present day? The thesis will present two main approaches that have been presented in the literature, namely the “minimalistic” and the “maximalist” approach. Also important when analysing the development after the *Eco Swiss* decision is the relationship between an arbitral tribunal, national courts and the EU institutions, in particular the European Commission. There has been a discussion in the literature, especially after the Regulation 1/2003,³ also called the “Modernisation Regulation,” came into force, on how a potential relationship or cooperation between arbitral tribunals and the European Commission should look like. Lastly, the thesis will discuss to what extent or how far an obligation goes for the arbitrators to apply EU competition law ex-officio after the *Eco Swiss* ruling.

For these questions both the enforcement stage and also the question whether an arbitral tribunal is obligated to test competition law questions ex-officio, will be relevant.

There are many interesting questions and potential problems that arise when discussing the relationship between EU competition law and international commercial arbitration. One of the reasons is the nature of these two institutions. On the one hand, both EU competition law and arbitration function within a free market. On the other hand competition law restrains the private autonomy of the market, whereas private autonomy can be claimed to be the most important feature of international commercial arbitration. In the end remarks of the thesis I will give some reflections on the nature and history of the concepts presented in the paper.

In the following I will first present the approach and methodology of the thesis. Then, in chapter 2, I will give an outline of the background for the most important terms and concepts

³ Council Regulation (EC) No 1/2003 (2002) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

of EU competition law and international commercial arbitration. In chapter 3 the thesis will discuss the questions on EU ordre public and the EU competition law. Then, in chapter 4, the thesis will provide an analysis of different developments in the relationship between EU competition law and international commercial arbitration after the Eco Swiss case.

1.2 Approach and methodology

The legal foundation for this thesis is going to be the New York Convention and the EU law and Regulations on competition law. EU competition law is regulated in the Treaty of the Functioning of the European Union (TFEU)⁴ and in the Treaty of the European Union (TEU).⁵ There has also been given Regulations and Guidelines on the interpretation of the Treaties. In the following I will use EU secondary law when it is relevant for the understanding of the questions raised.

The New York Convention has been one of the most successful international treaties.⁶ It has contributed to a growth in using arbitration as a method of resolving disputes and parties are willing to engage in arbitration because of the great certainty that an award is going to be obtained and enforced.⁷ The New York Convention is ratified by all Member States of the European Union.⁸ Within the scope of this thesis the most interesting intersection between the New York Convention and EU competition law is the definition of “ordre public” that has to be justified through the interpretation of art. 5 (2) in the New York Convention. The question that arises is whether or not EU competition law can be subsumed under the term “ordre public” in the Convention.

I will also use case law from both Europe and the USA to highlight and exemplify questions and issues concerning the relationship between EU competition law and international commercial arbitration as well as for the interpretation of the EU Treaties and the New York Con-

⁴ Treaty of the Functioning of the European Union (TFEU) in force 1958

⁵ Treaty of the European Union (TEU) in force 1993

⁶ Moses (2012) p. 229

⁷ Moses (2012) p. 229

⁸ Parties listed at the end of the Convention text compared with list of EU Member States per 24th of April 2014

vention. I will not focus on case law from one country in particular, but use examples that I find suited to illustrate the questions asked in this thesis.

I have chosen to focus solely on EU law on competition and not involve questions concerning EEA law and the legal situation in Norway on competition law and arbitration. The reason is that a discussion of EEA rules on competition law would be a parallel discussion of the EU competition law, because the main rules on EU competition law are regulated in the primary law of the European Union. It would therefore be a whole other process to go into the EEA Treaty and EU/EEA secondary law to find its regulations on competition law.

2 Background and Definitions

2.1 The Convention on the recognition and enforcement of foreign arbitral awards of 1958

In this sub-chapter I will give a short outline of the provisions in the New York Convention that I see relevant for this thesis.

The main purpose of the Convention is already outlined in the convention title, namely the recognition and enforcement of foreign arbitral awards. The definition of “foreign award” is given in art. 1. According to art. 1 (1) an award shall be recognized and enforced in any other state than where it was made. Article 1 (3) presents a reservation, where contracting states can decide to only recognize and enforce awards rendered in other contracting states. Around two-thirds of the contracting states employ this reservation.⁹ I will not go further into the distinctions in art. 1 (1) concerning the definitions on “non-domestic arbitral award” or parties nationality, because I do not see this as essential for the main question that is being raised in this thesis.

Article 3 of the convention contains the “general obligation” to recognize awards, according to the rules laid out in article 3-6.¹⁰ A distinction is made between the situations where the Convention alone is controlling the enforcement, and where the law of the seat of arbitration

⁹ Van de Berg (2008) p. 2

¹⁰ Van de Berg (2008) p. 12

governs the enforcement. Considering the latter there are, according to Van de Berg, three possibilities for the Contracting states; enforcement according to rules laid out in an enforcement act, enforcement procedures for foreign award in general and enforcement procedures as for a domestic award. Article 4 sets up a minimum of condition, which the party that is seeking enforcement has to fulfil. Furthermore, article 4 (1) states that the party has to hold an original award or duly certified copy and the original or certified copy of the arbitration agreement.¹¹

Article 5 (1) and (2) provides narrow exceptions for when awards can be refused enforcement.¹² In the context of this thesis the most important provision in the New York Convention is art. 5 (2), because it is in this paragraph the exceptions on public policy is presented. The interpretation of art. 5 (2) will be outlined in chapter 2.4 below.

2.2 EU competition law – legal foundation

The European competition law is regulated in the TFEU part 3, art. 101- 109.¹³ Prior to the renaming of the “Treaty establishing the European Community” (EC Treaty),¹⁴ to “Treaty of the Functioning of the European Union”, the EU competition law was regulated in the EC Treaty art. 81 and 82 (ex art. 85).

Article 101 (1) states that:

“The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;

¹¹ Van de Berg (2008) p. 12

¹² Van de Berg (2008) p. 13

¹³ Whish (2012) p. 50

¹⁴ Treaty establishing the European Community (1957)

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

Article 101 (2) states that all agreements or decisions that are prohibited according to art. 101 are to be considered void.

Article 101 (3) present a “legal exception” for when agreements according to paragraph 1 can be accepted. Paragraph 3 lists four conditions that have to be met before the agreement or decision can be considered legal.¹⁵

According to article 102 it is also illegal to abuse a dominant position in the market.

According to TEU art. 5 the division competence between the EU and the Member States is defined through the principle of subsidiarity. The division of competence has, after the Treaty of Lisbon (2007), been specified in TFEU art. 2 - 4. According to art. 3 (1), (b), the EU has “exclusive competence” in matters concerning “the establishing of the competition rules necessary for the functioning of the internal market.”

In general; “competition law” is concerned with anti-competitive agreements, abusive behaviour, mergers and public restrictions of competition.¹⁶

Davies and Partasodes list what they see as the main objectives for EU competition law, namely; consumer welfare, protection of the competitive process and market integration.¹⁷ For the context of this thesis it is the latter objective which is of most interest. The primary objective of the internal market is to secure the free movement of goods, persons, service and capital within the borders of the Union, see TFEU art. 26 (2). The four freedoms create the fundament of the single market. The market is furthermore established on the principles of “mutual recognition,” see art. 53 (1) TFEU, and the articles in chapter 3 (especially art. 114 and 115) of the TFEU: ”Approximation of laws.”

¹⁵ Whish (2012) p. 151

¹⁶ Whish (2012) p. 2-3

¹⁷ Davies (2011) p. 346

A functioning competition law is claimed to be vital in the EU internal market to prevent segmentation, which can occur when the interstate trade is involved.¹⁸

The competence allocation between the EU organs on competition matters are regulated in TFEU art. 103 – 105. According to TFEU 103 (1) the appropriate regulations or directives concerning art. 101 and 102 should be laid down by the Council after proposal from the Commission and after consulting the European Parliament. Furthermore, art. 105 describes how the Commission, in questions concerning competition law, shall investigate cases when there is suspicion that Member States are undertaking measures that are against the principles laid down in article 101 and 102. The Commission is also involved in international cooperation concerning competition and cooperates with competition authorities around the world.¹⁹

It has also been claimed that the EU competition law is an “extraterritorial” set of rules. Extraterritoriality is a doctrine where a law enforcement authority seeks to enforce its law outside its territory.²⁰ In an EU perspective the question is therefore whether the European Courts and the Commission can impose sanctions on companies outside the EU when they undertake actions that violate the EU competition law. If so, what is the legal basis for such jurisdiction? The Commission presents its view in the “Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (101 and 102 TFEU).”²¹ The Commission states:

“Articles 81 and 82 may also apply to agreements and practise that cover third countries provided that they are capable of affecting trade between Member States.”²²

In other words the Commission will have jurisdiction in cases where the competition within the EU will be influenced by agreements or mergers between contracting parties outside the territory of the Union.

¹⁸ Davies (2011) p. 347

¹⁹ Whish (2012) p. 53

²⁰ Davies (2011) p. 352

²¹ Davies (2011) p. 352

²² Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [Official Journal C 101 of 27.4.2004] paragraph. 100

According to the Guideline on the effect on trade paragraph 101, it is sufficient for establishing Community law jurisdiction:

“(…) that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Community. Import into one Member State may be sufficient to trigger effects of this nature.”²³

This view from the Commission has been supported by the ECJ. In case law there has been developed two different doctrines. The first called the “single market entity doctrine”, which states that parent companies and subsidiaries are seen as a single economic entity. In the case “Dyestuff”²⁴ from 1972 three non-EU companies were involved in price fixing through their subsidiaries that were located in the EU. The second doctrine, the so called “implementation doctrine,” refers to a situation where an illegal agreement is implemented in an EU state.²⁵ An example on this doctrine is the case *A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)*.²⁶

2.3 International commercial arbitration and EU law

2.3.1 In general

Arbitration is a private system of dispute resolution. Parties that decide to arbitrate, resolves the dispute outside any judicial system. An arbitral award, like a judgment by a national court, is in most instances final and binding. This again makes the award enforceable in a national court.²⁷ Arbitration means that the parties can choose where and by which rules any dispute arising from a given contract should be resolved, they can also decide who they want as arbitrators. International commercial arbitration has become the norm for dispute resolution in most international business transactions.²⁸

²³ Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [Official Journal C 101 of 27.4.2004] paragraph 101

²⁴ Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* 1972, ECR-619

²⁵ Davies (2011) p. 353 Reference to the two doctrines is taken directly from Davies

²⁶ Davies (2011) p. 353, see Joined Cases 89/85, 104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *A. Ahlström Osakeyhtiö and others v. Commission (Wood Pulp)* 1993, ECR I-1307

²⁷ Moses (2012) p. 1

²⁸ Moses (2012) p. 1

Within the EU, arbitration law remains part of the jurisdiction of the Member States. Therefore problems and even conflict can arise concerning the relationship between EU substantive law and where to draw the line, in particular, to the principle of procedural autonomy of the Member States' national laws.²⁹ However, Laurence Idot observes that the EU and the Member States have developed their position on arbitration over time. Both the EU and the Member States are now more in favour of using arbitration as dispute resolving mechanism than before.³⁰

Although an arbitral proceeding is situated outside a formal national court system, it has been questioned whether or not an arbitral tribunal has the right to request a preliminary ruling from the ECJ according to TFEU art. 267. In the *Nordsee case*³¹ from 1982 the ECJ answers the question negatively. An arbitral tribunal is not to be considered a "court" according to TFEU art. 267 (2). Rolf Trittmann writes that this position was repeated in the *Eco Swiss* ruling (1999) and again in the preliminary ruling *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages and Culture SA* from 2005, see paragraph 16 of this decision.³² Furthermore, Trittmann sees it as unrealistic that the ECJ will change its position in later rulings.³³

On the other hand, the Court in the *Nordsee* ruling did point out that they would accept an indirect preliminary request. That means that an arbitral tribunal can request a national court for help in a difficult question they think should be asked the European Commission. Trittmann points out that this possibility comes across as rather theoretical. He argues that the use of national courts as a link between a tribunal and EU organs would cause a considerable delay, and therefore offers no practical solution.³⁴ I will not go further into the practical implications of this debate. The legal situation seems to be clarified in the *Nordsee* ruling.

²⁹ Idot (2010) p. 75

³⁰ Idot (2010) p. 76

³¹ Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, (1982) ECR 1095.

³² Case C-125/04 *Guy Denuit and Betty Cordenier v. Transorient – Mosaïque Voyages and Culture SA*, 2005, ECR I-923

³³ Trittmann (2006) p. 60.

³⁴ Trittmann (2006) p. 60

2.3.2 International commercial arbitration and EU competition law

Komninos writes that arbitrators mostly come across competition issues incidentally. In most cases where it occurs, the competition law question is raised by the defended in a contractual dispute.³⁵ The contract typically contains an arbitration clause and any claims arising from it can be brought to arbitration and the defendant will then argue that the contract, or part of it, is a nullity. It is more difficult to imagine it the other way around, namely that a co-contractor claims reparation because his counter party violated the competition rules. Komninos states that in most of these rare cases there exists an arbitration agreement. On the other hand, it is rare to see a non-contractual liability case be decided by arbitrators.³⁶

Komninos lists up a number of questions concerning the application of EU competition law by arbitrators. First of all he points out that arbitral tribunals are not state organs. That means that they do not have in their mandate to safeguard public interests and public policy as such. Furthermore an arbitration tribunal has no forum, no lex fori, since “(...) its seat cannot be properly considered a forum (...)”³⁷ Komninos also states that arbitrators are not bound by any particular conflict of laws, private international law rules or by any mandatory rules. At the same time he notes that arbitrators do not work in a vacuum. Most importantly if the arbitrators rule against the EU competition law the award would not be enforced, because it would represent a breach with public policy in the Union Member States.³⁸

When talking of arbitrators application of EU competition law one has to make some distinctions. First, when the tribunal considers that the applicable law is the national law of a member state, there is no doubt that the competition law of that country, which again equals EU competition law, has to be taken into account. On the other hand, when the applicable rules are the law of a third country or if they decide on the grounds of for example the UNIDROIT principles³⁹, the tribunal is not under legal duty to apply EU competition law. However also here they may apply them when certain conditions are met: Firstly, when the applicable law

³⁵ Komninos (2012) p.6

³⁶ Komninos (2012) p. 7

³⁷ Komninos (2012) p. 16

³⁸ Komninos (2012) p. 16-17

³⁹ UNICITRAL Model Law on International Commercial Arbitration (1985)

provides an “universal bilateral conflicts rule applicable to competition law.”⁴⁰ Swiss law on private international law, for example, contains a regulation like the one describe above. Secondly, they can use EU competition law when the applicable system for conflict of laws gives the opportunity to do so. Lastly, the tribunal can take EU competition law into account if they see it as appropriate based on the possibility to get the award enforced. This can even happen ex officio.⁴¹ I will return to the question on ex-officio testing of competition law in chapter 4.4.

Furthermore, it has been stressed that it could be desirable, although not necessary that the Commission gives a Notice (Guideline) on cooperation with arbitrators. This could possibly both provide a more structured dialogue and increase the transparency of the cooperation between the Commission and the arbitrators. But the Commission will not be legally bound to answer requests from arbitrators, this is due to the fact that art 4 (3) in TEU doe not allpy to arbitrators.⁴² Some authors have stressed that the Commission should be allowed to participate and monitor the arbitration process. Mourre quotes Carl Nisser and Gordon Blanke who write that the Commission has a “vested interest” in controlling that the arbitrators apply the EU competition law correct. Also, important for the Commission, is that the EU competition law is applied uniformly within the single market.⁴³ The mentioned authors also talk about a duty for the arbitrators to request for the Commission’s opinion on the correct interpretation, if disagreement or doubt occurs between the arbitrating parties.⁴⁴ Mourre on the other hand opposes the view that the Commission should interfere in the arbitration process, without the parties’ consent.⁴⁵

It is also not certain that it is the Commission that has the right interpretation of the competition law regulations. Furthermore there does not exist any evidence from the Commission itself that it wants to exercise such a control mechanism with arbitral proceedings.⁴⁶

⁴⁰ Komninos (2012) p. 17

⁴¹ Komninos (2012) p. 17-18

⁴² Komninos (2012) p. 26

⁴³ Mourre (2011) p. 54

⁴⁴ Mourre (2011) p. 54

⁴⁵ Mourre (2011) p. 58

⁴⁶ Mourre (2011) p.55

2.4 Public policy and arbitration

According to the New York convention article 5 (1) (2), there exist exceptions for when enforcement of an arbitration award can be refused by a competent authority in the country where recognition and enforcement is being sought. The exceptions are narrowly defined and they are also to be considered exhaustive.⁴⁷

Article 5 (1) provides five defences against the enforcement of an arbitration award. These grounds for non-enforcement are; Parties possible incapacities, lack of proper notice, that the arbitrators go beyond the scope of their given competence and that the composition of the arbitral authority or the procedure was not in accordance with the arbitration agreement. These grounds have to be proven by the respondent.⁴⁸

Article 5 (2), which is the important provision in this thesis, provides two further defences, namely lack of arbitrability, or in other words, the subject matter of the dispute is not possible to solve in arbitration according to the laws of the country which law is applicable, see article 5 (2) (a). Article 5 (2) (b) contains an exception where the recognition of an award would violate the ordre public in the country where it is to be enforced. Both reasons can be defined as “public policy” exceptions.⁴⁹ Article 5 (2) (b) gives the competent authority of a country the right to refuse enforcement on the grounds that the award is contrary to the public policy of that country. The convention gives no further explanation or definition of what is meant by “public policy.” Although this give courts in convention states the possibility to refuse awards they find should not be enforced, national courts have interpreted this possibility as a narrow defence. This has contributed to the fulfilment of the “pro-enforcement” purpose of the convention.⁵⁰

Is it possible to give a definition of the term “public policy” or “ordre public” within the framework of the New York Convention? Furthermore, what are the practical implications of

⁴⁷ Moses (2012) p. 217

⁴⁸ Van de Berg (2008) p. 13

⁴⁹ Van de Berg (2008) p. 18

⁵⁰ Moses (2012) p. 228

the public policy exception? These two questions are going to be analysed in the next paragraphs.

Public policy is an important term in international arbitration and it can be relevant on several stages of an arbitration process.⁵¹

To be able to distinguish between the questions presented in the introduction (chapter 1.1), which is going to be analysed in chapter 2 and 3, I find it advantageous to outline different situations where *ordre public* may interfere with an arbitration process. I will differentiate between the arbitrability of a subject matter and the public policy questions that can arise at the stage of enforcing an arbitral award. Within both of these categories there is also a question whether the arbitrators should raise the question of potential *ordre public* conflict *ex-officio*.

The first barrier of public policy in an arbitration process is the question whether a case can be subject matter for arbitration or if it must be refused by the tribunal, or national courts, in accordance with national law, see The New York Convention art. 5 (2) (a). The “national law” in this context is the law of the state where the parties have chosen the seat for arbitration. The arbitrators are faced with the choice of law between the law of the seat (*lex fori*), the law chosen by the parties, the law of the enforcing jurisdiction or another law, but arbitrators mostly decide on the law of the seat.⁵²

Moses writes that in most jurisdictions, although it varies, criminal matters, child custody and family matters and bankruptcy are not arbitrable. In addition disputes concerning the validity of a patent will not be a subject for arbitration.⁵³ On the other hand Mourre writes that the bankruptcy of a party no longer means that the case cannot be settled by arbitration. He refers to “most jurisdiction” when stating that matters in bankruptcy no longer should or could be refused by arbitration tribunals.⁵⁴ Furthermore, cases that involve fraud and corruption are

⁵¹ Belohlavek (2009) p. 1115

⁵² Moses (2012) p. 72

⁵³ Moses (2012) p. 32

⁵⁴ Mourre (2011) p. 11

now increasingly admitted. The same goes for embargo regulations, but here you also have decisions to the contrary for example from Italy.⁵⁵

Moses sums up the question of arbitrability by stating that today most disputes are to be considered arbitrable, except the areas listed above.⁵⁶

If looking at the question of arbitrability in light of the chance of getting an award enforced, Moses states that:

“Arbitrators have generally not wanted to refuse to arbitrate because the dispute was not considered arbitrable in the enforcing State.”⁵⁷

The reasons can both be, that in many cases parties voluntarily pay the award and secondly, an award can often be enforced in more than one state, so that it is possible to find assets somewhere else, if one should have problems in the first state where enforcement is sought.⁵⁸

Issues on arbitrability are mostly raised before national courts, when a party either wants to avoid arbitration or they seek to avoid an arbitration award to get enforced. However, a complaint can also be raised directly to the arbitration tribunal and the arbitrators then have the competence to decide whether they see the case as arbitrable or not. If the parties do not raise a question concerning the arbitrability, the question is therefore whether or not the tribunal has to examine it on their own initiative. This question has been widely debated.⁵⁹

So how should the arbitrator decide whether he has the duty or not to raise this question of arbitrability on his own motion?⁶⁰ The answer to this question will rely on an evaluation of different purposes. Mourre lists up different circumstances that have to be taken into consideration by the arbitrators. First of all the arbitrators have an obligation to treat the parties

⁵⁵ Mourre (2011) p. 12

⁵⁶ Moses (2012) p. 32-33

⁵⁷ Moses (2012) p. 73

⁵⁸ Moses (2012) p. 73

⁵⁹ Mourre (2011) p. 14

⁶⁰ Mourre (2011) p. 15

equally. That means that they should not contribute to create an unbalanced relationship between the parties. Furthermore the arbitrators have a duty to render a valid award, meaning within the jurisdiction of the seat of arbitration. These two arguments pull in the direction that the arbitrators should not raise question concerning arbitrability ex-officio, unless the dispute is proved by the law of the country where the tribunal has its seat.⁶¹ On the other hand the arbitrators also have a duty to make the best effort to get the award enforced. This means they have to try the question of enforcement up against the mandatory rules of ordre public in the country where the award is to be enforced. The problem that occurs here, as mentioned above, is that the arbitrators cannot always know where the award is going to be enforced, because there is often more than one state where it is possible to try to enforce the arbitration award.⁶²

Gary Born further observes that there exists a risk that the application of the ordre public doctrine can be “unpredictable” and “expansive”. On the other hand, he states the doctrine has only been used in exceptional cases, to a limited extent.⁶³ National courts have only used it when there are:

“(…) clear violations of fundamental, mandatory legal rules, not in cases of judicial disagreement with a tribunal’s substantive decisions or procedural rulings.”⁶⁴

For example in French law the possibility to annul an arbitration award is narrowed down to those cases where:

“A public policy argument can be accepted only when the enforcement of the award would violate in an unacceptable way our public policy, such violation having to affect in a manifest manner an essential rule of law or a principle of fundamental importance.”⁶⁵

The quote is taken from the case *Thales Air Defence vs. G.I.E Euromissile* (Paris Cour d’ Appel, decision from 18.11.2004, 2002/60932). According to Born, French courts have only annulled arbitration awards, based on public policy in rare cases concerning insolvency proceed-

⁶¹ Mourre (2011) p. 15

⁶² Mourre (2011) p. 15

⁶³ Born (2014) p. 3320

⁶⁴ Born (2014) p. 3321

⁶⁵ Born (2014) p. 3322

ing, mandatory investment regulations and bribery.⁶⁶ The same approach one can also find in case law from Germany. Only in “extreme cases” can arbitration awards be set aside by national courts. In a case from the Bavarian Hoge Court from 2004 it is pointed out that such “extreme cases” could be when the award is contrary to good morals, it breaches a rule which represent the basis of the social or economic order or when the award is obtained by fraud.⁶⁷

Margaret L. Moses cites a judgment from U.S. Second Circuit Court of Appeal (*Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*) on the understanding of the ordre public exception in the New York Convention:

“the Convention’s public policy defence should be constructed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice”.⁶⁸

This narrow interpretation of public policy is generally adopted by courts in developed jurisdictions.⁶⁹

3 EU ordre public and EU competition law

3.1 Introduction

The question that is going to be discussed in this chapter is EU competition law as ordre public in light of the *Eco Swiss* decision. Furthermore, it will be discussed why the ECJ see it as necessary to define EU competition law as ordre public and how EU competition law fits in as “ordre public” according to the New York Convention. To be able to analyze the question of EU competition law as ordre public, I find it necessary to first outline to what extent it is even possible to apply the term “EU ordre public.”

⁶⁶ Born (2014) p. 3323

⁶⁷ Born (2014) p. 3323

⁶⁸ Moses (2012) p. 228 the case from U.S Second Circuit Court of Appeal is directly quoted from Moses, for reference to the judgment see also

http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=714

⁶⁹ Born (2014) p. 3324

3.2 EU Ordre Public?

“All founding Member States of the EU have a concept of *ordre public*.”⁷⁰ But does there exist an EU ordre public?

Catherine Kessedjian states that it was clear to the Founding Fathers of the EU that the content in the public policy rules should be left to the Member States and therefore the EC Treaty did not contain a definition or a method for when ordre public could be applied.⁷¹ Moreover, in the case *Yvonne van Duyn v. Home Office*⁷² the ECJ recognized that the Member States have the competence to define the national ordre public, the Court stated that public policy is a territorial concept, that may evolve over time.⁷³

This decision did, on the other hand, not fir stand long. In 1977 the ECJ rendered a new judgment, *Regina v. Pierre Bouchereau*:

“In so far as it may justify certain restrictions on the free movement of persons subject to community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which an infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.”⁷⁴

In this decision the Court sets up two conditions for when a Member State can justify an exception from the obligation to apply EU law. Firstly, not every violation is adequate to represent a breach; there must be a real and severe enough danger. Secondly, the public policy rule must protect a fundamental interest in the society concerned.⁷⁵

⁷⁰ Corthaut (2012) p. 16

⁷¹ Kessedjian (2007) p. 28

⁷² Case 41/74 *Yvonne van Duyn v. Home Office* (1974) ECR- 01337 (01351)

⁷³ Kessedjian (2007) p. 28

⁷⁴ Case 30/77 *Regina v. Pierre Bouchereau* (1977) ECR-1999 (quote from ECR- 2014)

⁷⁵ Kessedjian (2007) p. 29

Kessedjian sums up the situation in this way:

“(...) it is clear that the member states can only protect their most fundamental values, which are at the core of their legal system, to be understood in a highly restrictive matter.”⁷⁶

Does this mean that the EU is defining its own *ordre public*, by drawing up the lines for the public policy of the Member States?

Corthaut is arguing that it is inevitable and also necessary for the EU to have its own *ordre public*. This argumentation is based on the reasoning that it is natural to have a legal protection of EU rights, which includes EU political, economic, social and culture order.⁷⁷ Furthermore, some parallel can be drawn from international law and the legal orders of the Member States to establish an EU *ordre public*. However, Corthaut acknowledges that there are some implications, both theoretical and methodological, with the justification of an EU *ordre public* by using this parallel to international law and the public policy of the Member States.⁷⁸

To be able to find and address these implications Corthaut lays out four possibilities for the relationship between the *ordre public* of the Member States and the *ordre public* of the EU. First there is the group of EU specific *ordre public*, then you have the category of *ordre public* that the Member States and the EU are likely to share, which can be linked to the core values in the EU Treaties. Thirdly, you have the category of *ordre public* in some Member States that the EU is willing to tolerate. Lastly, it is the *ordre public* of certain Member States which the EU does not accept, or that are not compatible with a membership of the Union.⁷⁹

For the context of this thesis it is the first category that is of most interest, namely the specific EU *ordre public*. First of all it is clear that EU is not a national state like its Member States, but it can still have some of the same motivation to protect both its institutions and the political foundations. EU has for example provided its own list of terror organizations, beyond the one made by the Member States and the UN. Corthaut writes that from a more day to day per-

⁷⁶ Kessedjian (2007) p. 31

⁷⁷ Corthaut (2012) p. 35-36

⁷⁸ Corthaut (2012) p. 39

⁷⁹ Corthaut (2012) p. 45

spective it is the ordre public character of the functioning of the institutions that are important. ECJ has systematically treated rules on competence and the essential procedural requirements as ordre public. This perception also leads to an ex-officio testing of these questions by the ECJ.⁸⁰

If looking at more substantive EU law, EU ordre public can possibly be found in four sets of rules: Firstly, the protection of the European currency. The protection of the Euro as a stable currency is seen as an economic ordre public that is enforced through criminal law. In questions concerning the Euro, EU law prevents the interference of the Member States, through the exclusive competence of the EU to protect the Euro as a stable and trustworthy currency.⁸¹ Secondly, competition law, which also falls under the economic ordre public. Thirdly, fundamental rules on state aid are also to be considered as ordre public. Fourthly, Corthaut argues that the four freedoms or at least the free movement of persons deserves the same status as ordre public. He points out that the recognition of EU citizenship provides the citizens of an EU Member State with something else than their national citizenship, and can therefore be considered as a specific EU ordre public.⁸²

The fields of law that Corthaut points out as potential specific EU ordre public, or where an EU ordre public can be developed, are not all areas where the EU has exclusive competence according to TFEU art. 3. Although competition law and the monetary policy falls within the provision in TEU art. 3 and therefore gives the EU exclusive competence, do the Member States and the EU have shared competence on issues on the internal market for example, see TFEU art 4. (2) (a). On the other side, it seems that all the areas that Corthaut points out as potential EU ordre public rules, are fields of law where the EU act either partially or exclusively on competence provided from the Member States. Within these areas it seems obvious that the Member States cannot have their own public policy, because they, with the relocation of competence, also give up the competence to define ordre public.

⁸⁰ Corthaut (2012) p. 46

⁸¹ Corthaut (2012) p. 46

⁸² Corthaut (2012) p. 46-47

Although it seems clear that EU competition law, and maybe some other areas are or should be considered EU *ordre public* it is still unclear how far reaching the term “EU *ordre public*” goes. Furthermore, the question of the possibility to find a way to analyse which rules and regulations that should be considered *ordre public* in accordance with the New York Convention remains open. In this discussion, it is also important to recognize, that the EU is an international organization, with supranational elements. This fact is interesting because of the EU’s legal position when talking about applying the rules laid out in the New York Convention, where the Member States are among the contract parties and not the European Union itself. This in turn raises new questions of whether the EU itself can be party to international treaties, which are based on agreements between national states. Furthermore, is the EU automatically bound by all treaties that the Member States have signed? These are, on the other hand, questions outside the scope of this thesis.

Corthaut furthermore states that the *Eco Swiss* decision leaves a double message in the context of defining EU law as *ordre public*:

“The EU competition rules are to be equated with rules of public policy in the sense of the New York Convention, and thus of Dutch law. Accordingly, we are left with a double message: competition law is fundamental, but the ultimate reason why it can be invoked lies with national law. Nevertheless, the case is rightly understood as also revealing an aspect of the EU *ordre public*.”⁸³

With this introduction of the *Eco Swiss* case, the thesis will now go on to discuss EU competition law as *ordre public*.

3.3 EU competition law as *ordre public* - *Eco Swiss*

The *Eco Swiss* case manifested the view that competition law is *arbitral*, see New York Convention art. 5 (2) (a). In the US this was already discussed and manifested in the *Mitsubishi Motors Corp. V. Soler Chrysler – Plymouth, Inc.* case from 1985.⁸⁴

⁸³ Corthaut (2012) p. 197

⁸⁴ *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

In this case the court holds that:

“As in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.”⁸⁵

It is important to distinguish between the questions, whether competition law is to be considered arbitrable or not, on the one hand, and on the other hand to what extent a violation of the competition law would represent a breach of ordre public, and therefore one would not get to enforce the award. When talking about ordre public at the stage of enforcement of an arbitral award, it is a question of whether or not the content in the award violates the public policy in the country where the award is sought to be enforced, see The New York Convention art. 5 (2) (b). It was the question of enforcement that the Court had to decide upon in the *Eco Swiss* decision.

In short the ECJ preliminary ruling was based on a request from the Hoge Raad der Nederlanden in a case pending before the Netherlands Supreme Court. The dispute was an agreement between Eco Swiss China Time Ltd and Benetton International NV. The main question before the court was the interpretation of Article 85 of the EC Treaty (now article 101 TFEU).

The Hoge Raad der Nederlanden referred five more specific questions to the court on the interpretation of Article 85 of the EC Treaty.⁸⁶ The Advocate General Saggio sums up the request from the Dutch Court in this way:

“The questions seek to ascertain whether arbitration tribunals are required to apply that provision of their own motion and whether national courts have the power to annul arbitration awards on the ground that they are contrary to the Community rule on competition.”⁸⁷

⁸⁵ *Mitsubishi v. Soler Chrysler-Plymouth* 473 U.S. 629

⁸⁶ Paragraph 1 of Advocate General Saggio's opinion 1999, *Eco Swiss v. Benetton International*

⁸⁷ Paragraph 1 of Advocate General Saggio's opinion 1999, *Eco Swiss v. Benetton International*

The background for the dispute was a contract between the two above mentioned parties concluded in 1986. The contract gave Eco Swiss the right to market watches from “Benetton from Bulova” for eight years. Benetton terminated the contract three years prior to the date set up in the agreement. Eco Swiss therefore initiated arbitration proceedings according to the arbitration agreement in the contract. On 4th of February 1993 the tribunal made a partial final award that stated that Benetton had to compensate the Eco Swiss’s loss due to, what tribunal found, was an unlawful termination of the contract. The parties did not come to an understanding concerning the quantum of the restitution. The tribunal then, on a new request from Eco Swiss, made a final arbitral award on 23rd of June 1995 where they ordered Benetton to pay USD 23 750 000 to Eco Swiss.⁸⁸

Benetton then appealed the decision to the Netherlands Court (Rechtbank te’s Gravenhage). Benetton claimed that the arbitration award was contrary to public policy because the contract between Eco Swiss and Benetton represented a violation of Article 85 of the EC Treaty.⁸⁹ Neither the parties, nor the arbitrators had raised questions based on the fact that the licensing agreement might be contrary to EC regulations on competition during the arbitral proceeding.

The case was later brought before the Dutch Supreme Court that again referred five questions to the ECJ for its opinion. The Supreme Court concludes, in the process before the ECJ, that national competition law is not considered mandatory rules which could raise problems of incompatibility with public policy and again causing problems in enforcing an award.⁹⁰

The Court concludes (ECR - 3096) that:

“A national court to which application is made for annulment of an arbitration award must grant that application if it considers that the award in question is in fact contrary to Article 85 (...)”.

Furthermore there must exist domestic rules that require such grant of annulment where the award fail to observe national rules of public policy.

⁸⁸ Paragraph 5 of Advocate General Saggio’s opinion 1999, *Eco Swiss v. Benetton International*

⁸⁹ Paragraph 6 of Advocate General Saggio’s opinion 1999, *Eco Swiss v. Benetton International*

⁹⁰ Paragraph 7 of Advocate General Saggio’s opinion 1999, *Eco Swiss v. Benetton International*

The main reason for the decision is laid out in paragraph 36 of the judgment. According to the court, article 85 (later art. 81 and then art 101) is a fundamental provision which is important for the:

“(...) accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market. The importance of such a provision led the framers of the Treaty to provide expressly, in Article 85 (2) of the Treaty, that any agreements or decisions prohibited pursuant to that article are to be automatically void.”

In conclusion an award that infringes with the competition law, will be seen as a breach with ordre public, and can therefore not be enforced in European Union member states.

3.4 Criticisms

Mads Magnussen writes in an article printed in “Tidskrift for forretningsjus” from 2000, that the most surprising in the *Eco Swiss* case is that the court concludes in a question like the one asked by the Netherlands Supreme Court without giving any other reasoning than the one given in paragraph 36 of the judgment.⁹¹ Paragraph 36 of the ruling is quoted on page 22 of this thesis.

Magnussen states that the consequence of requesting that national courts should accept EC Competition law as ordre public, does in fact mean an extended opportunity to annul arbitration awards. This again can have an impact on the final and binding character of an arbitration award. Furthermore, he observed that it does not seem that the Court distinguishes between different violations of the competition rules. In his opinion the Court’s statements in the judgment, concerning the nullity seems to relate to every violation of art. 85.⁹² Furthermore, does Trittmann make the observation that it would be preferable if the competition authorities supported the arbitration tribunal, by for example the providing of information. This could in turn represent a “quality assurance” (Qualitätssicherung) and one would avoid that arbitration tribunals and national courts solve cases differently.⁹³

⁹¹ Magnussen (2000) p. 86

⁹² Magnussen (2000) p. 87

⁹³ Trittmann (2006) p. 68

Whish and Baily observes that it, on the one hand, appears to be the case that arbitrators cannot refer cases to the European court of Justice under Article 267.⁹⁴ (See also the *Nordsee* case above). However, on the other hand there have been examples of the Commission starting investigating cases after the case has been settled by an arbitral tribunal.⁹⁵ This means that the Court prior to the rendering of the award does not get the opportunity to give their opinion, but they see it as necessary to perform a “post-award control”. In my opinion this can lead to a reduced predictability and it can disregard the arbitration institute as a process that has the capability of rendering final and binding awards in matters concerning competition law.

It should be noted that there do exists several authors that interpret the decision rather restrictively. Rolf Trittman states that it should only be possible to annul an award on the grounds of ordre public when the infringement of the competition law is clear at first glance and the tribunal has not gone into it, even though they had good reason for doing so based on the facts or when an obvious breach is not taken into consideration. It should also be possible to deny enforcement in cases where the parties and the tribunal have worked together to hide a competition law violation.⁹⁶

Eilmansbergen also writes that the court makes it clear that not every application of the competition regulation that is based on an incorrect interpretation should be seen as a breach with ordre public. The court states that the award must be annulled only when the award itself represents an infringement of the EU competition law.⁹⁷ This means that there does not exist a violation of the art. 81 (later TFEU art. 101) when the arbitrators apply the competition rules wrongly, only when they fail to apply the relevant competition law, they risk the annulment of the award.

Mads Magnnussen points out that an understanding of the *Eco Swiss* decision that leads to the use of the ordre public doctrine whenever an arbitral tribunal has interpreted a difficult and

⁹⁴ Whish (2012) p. 326

⁹⁵ Whish (2012) p. 325

⁹⁶ Trittman(2006) p. 67

⁹⁷ Eilmansberger (2006) p. 27

complex competition question wrong, would be difficult to consolidate with the general view that the arbitral award has to represent a qualified violation with public policy to be annulled.⁹⁸

Komninos states that public policy only comes into play in situations where the violation is “serious” and it violates substantive competition law. Furthermore, one has to distinguish between the public policy nature of a rule and the procedural issues that arise in the interaction between arbitration tribunals, the ECJ and other EU institutions. The question whether a rule should be considered as *ordre public* is something else than that a decision from an authority or court is binding for the arbitration tribunal. In the *Eco Swiss* ruling the ECJ did not discuss whether decisions from the Commission are binding for an arbitral tribunal, when they declared EU competition law as *ordre public* it was based on an argumentation that the European market should be free from such market behaviour as in the *Eco Swiss* case.⁹⁹

One also has to distinguish between the fact that a tribunal departs from a decision given by the Commission and to what extent an arbitral award violates public policy.¹⁰⁰ After the *Eco Swiss* decision it is clear that EU competition law under given circumstances should be considered *ordre public*. However, where the line is to be drawn on the severity of the breach with competition law, and therefore *ordre public*, is another question.

3.5 Discussion

In this sub-chapter I am going to discuss why the ECJ comes to its conclusion in the *Eco Swiss* case, or more specific; why does ECJ see the need for the competition rules to be *ordre public*?

As seen above the articles on competition in the TFEU are to be considered as automatically binding for the Member States, at the same time the EU has “exclusive competence” in matters concerning “the establishing of the competition rules necessary for the functioning of the internal market”, see TFEU art. 3 (1) (b). Furthermore, agreements that violates the rules laid

⁹⁸ Magnussen (2000) p. 87-88

⁹⁹ Komninos (2012) p. 30

¹⁰⁰ Komninos (2012) p. 31

out in TFEU art. 101 (1) are to be considered void according to art. 101 (2). But this provision does not automatically come into force if both parties to an arbitration proceeding wish to avoid these rules, and the arbitration tribunal do not address the issue. With this background it could be claimed that the idea that competition law should be considered as *ordre public* is based on an EU principle of effectiveness. Without the possibility to control arbitration awards and arbitrators dealing with competition questions it would possibly be impossible to bypass the, in the eyes of the Union, fundamental competition rules, which again could harm the function and effectiveness of the single market.

A possible consequence for the EU if the competition law was not to be considered *ordre public* is that the whole single market idea would be threatened. That is at least what the ECJ argues in *Eco Swiss*, see paragraph 36 in the ruling. The European internal market is regulated in article 26 in the TFEU. The internal market means that there do not exist any internal frontiers and the free float of goods, capital, services and workers has to happen without any constraints, see art. 26 (2).

So how is the competition law, in general, without focusing on arbitration processes in particular, essential for the creation of the single market? The *Courage* case from 2001¹⁰¹ is a preliminary ruling on request from the Court of Appeal of England and Wales. The background for the dispute was an arrangement between a brewery and a company that had different roles in the hotel and restaurant business. The bars (where the company *Inntrepreneur Estates Ltd* (IEL) was leaseholder) became part of this merger and had to buy their beer from the brewery (*Courage*). Pub owner B. Crehan and IEL made a contract where Crehan should buy beer from *Courage* within the already fixed arrangement between *Courage* and the leaseholder. *Courage* later sues Crehan for lacking payments. Crehan defended himself by stating that the agreement between the breweries represented a violation of art. 85 (later TFEU art. 101) and raised a counter claim for compensation.

On the relief question, the court concludes that a party that is engaged in a contract that represents a breach with art. 85 (now art. 101), can rely on this violation and seek compensation from the other party.

¹⁰¹ Case C-453/99 *Courage Ltd v. Bernard Crehan* (2001) ECR I-6314

This decision shows that a violation of the EU competition law has direct impact on private parties and not only state institutions. Private parties can be liable after the EU competition law without making reference to national law. The fact that individuals have rights and obligation directly according to EU law, and in particular EU competition law, was made clear already in the *Van Gend en Loos* case from 1963.¹⁰² The obligation in practice means that private parties cannot contract themselves out of EU law duties.¹⁰³ This definition of EU competition law gives the rules the impression of being mandatory rules. Cathrine Kessedjian writes that mandatory rules created within an international legal order may qualify as *jus cogens*.¹⁰⁴

Without the opportunity to seek relief based on a violation against the competition law, the competition rules would be insignificant. There would be no incentive not to break the rules. So it seems obvious that the violation of the competition rules can lead to liability and it is therefore clear that it is important for the EU to have strict control and to show capacity to act on questions concerning competition.

This again has led to the situation where private parties are to be considered directly bound by the mandatory law in the EU Treaties. In this sub-chapter I have highlighted why the ECJ and the EU sees the competition law as essential to the functioning of the internal market and how this has affected the legal situation developed by the ECJ.

3.6 EU competition law and the New York Convention article 5 (2)

The next question is whether or not the argumentation from the European Commission and the ECJ can justify and explain why EU competition law is *ordre public* in light of the New York Convention art. 5 (2) (b). The Court in the *Eco Swiss* case does, without any further discussion, conclude that EU competition law falls within the scope of “*ordre public*” in the mentioned article in the New York Convention, due to the “fundamental provision” that art. 85 represent, see paragraph 36 and 39 of *Eco Swiss* ruling.

¹⁰² Case 26/62 5th February 1963 *Van Gend & Loos*

¹⁰³ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 324

¹⁰⁴ Kessedjian (2007) p. 26

As shown above there is no clear definition of what the term “ordre public” means, other than the “narrow interpretation adopted by courts in developed jurisdictions.”¹⁰⁵

Furthermore it is, through the *Eco Swiss* case, settled that EU competition law is arbitrable. So, how can the same set of rules be considered ordre public at the stage of enforcement? It seems that the ECJ and the European Commission want that disputes that contain questions on EU competition law to be resolved in arbitration, but at the same time they wish to reserve themselves from the situation where the competition law is wrongly interpreted or not taken into account at all. In both situations the EU competition law intervenes in an arbitration process, either by saying that EU competition law has to be tested ex-officio or by claiming that arbitrators do have the mandate to interpret the rules on competition in an arbitration context, but there are only the EU organs that can provide a correct understanding of these rules.

This can make the situation difficult to anticipate for both parties and arbitrators, which again leads to an uncertain situation regarding the chance to get an arbitration award enforced.

The whole meaning of the New York Convention is to make it transparent and possible to get awards enforced. One also has to bear in mind that the exceptions in art.5 are meant to be narrow exceptions.¹⁰⁶ The purpose of the New York Convention therefore speaks against that EU competition law should be considered ordre public. Furthermore, there has in the last three decades been a general trend towards an expansion of which legal fields that should be considered arbitrable,¹⁰⁷ with this background it can be asked if not the EU has indirectly limited the access to arbitration by widening the term of ordre public at the stage of enforcement. Furthermore, does the Hoge Raad, in the main proceeding before the Court in the *Eco Swiss* case (paragraph 24, I – 3088 ECR), state that:

“(…) in Netherlands law, the mere fact that, because of the terms or enforcement of an arbitration award, a prohibition laid down in competition law is not applied is not generally regarded as being contrary to public policy.”

¹⁰⁵ Born (2014) p. 3324

¹⁰⁶ Moses (2012) p. 217, see also Van de Berg (2008) p. 13

¹⁰⁷ Mourre (2011) p. 7

This shows that it is not certain that Member States consider competition law as part of their ordre public. That can also be supported by the discussion above, where only a few legal fields still are to be considered as national ordre public, and competition law is not mentioned.

On the other hand it is possibly so that international ordre public goes further than a national understanding of the concept. As shown above, Kessedjian, states that mandatory international law may qualify as *jus cogens*.

Based on the arguments presented here it is difficult to decide whether the EU goes too far in claiming that EU competition law is ordre public, when the ECJ claims that the rules on competition are significant for the functioning of the European internal market. Also taken into consideration that there does not seem to be an explicit definition of the term “ordre public” in the New York Convention it is difficult to conclude evidently on whether or not the EU goes too far in defining EU competition law as ordre public in the *Eco Swiss* case.

This chapter has discussed the questions of the existence of an EU ordre public and EU competition law in light of the *Eco Swiss* decision. In the following chapter, the thesis will look at the developments after 1999 and analyse the current questions on EU competition law and arbitration.

4 Development after *Eco Swiss*

4.1 Introduction

What has happened with the relationship between EU competition law and international commercial arbitration after the *Eco Swiss* decision?

After the *Eco Swiss* case questions on enforcement of arbitral awards, that are claimed to represent a violation of EU competition law, have been raised before courts in different Member States. In the following the thesis is going to take a closer look at the two approaches presented in the literature on the understanding of EU competition law in an arbitration process. Then the thesis is going to analyse the relationship between the EU institutions, authorities of the Member States and arbitration tribunals in light of the Modernisation Regulation. Lastly, the thesis will look at the potential obligation of an arbitral tribunal to test a question on com-

petition law ex-officio. This last question is linked to the question on how different approaches have emerged after the *Eco Swiss* case and how these approaches can explain to what extent an arbitral tribunal should test a question on competition law ex-officio.

4.2 The minimalistic and maximalist approach

In 2004 the French court of appeal dealt with the case *Thales Air Defence vs. G.I.E Euromissile* (also mentioned above). The facts in this case were similar to those of the *Eco Swiss* case. It was again a question of the cancellation of an exclusive license agreement. The losing party in the arbitration brought the case up for the court of appeal with the reasoning that the award infringed French ordre public. The Court, on the other side, did not find a “manifest” breach with EU competition law as French ordre public and therefore they found no reason to set aside the award. After the French ruling it has been claimed that the legal situation is even more uncertain than before.¹⁰⁸

The same approach was followed in a case before the Higher Regional Court of (Oberlandesgericht) Thüringer from 2007. The court did not find that the arbitral award was inconsistent with art. 101 TFEU. But they did, however recognize that EU competition law was part of German ordre public. Furthermore, they pointed out that the agreement also could be a case falling under the exception in art. 101 (3). Also important, the court stated that a German court cannot “revisit the merits of the case” in the examination of the validity of the arbitral award.¹⁰⁹ In Italy the courts (Florence Court of Appeal 21-3-2006 *Soc. Nuovo Pignone v. Schlumberger SA* and Milan Courts of Appeal 5-7-2006 *Terra Armata Srl v. Tensacciai Spa*) have stated that they are satisfied when the arbitrators have taken competition law “sufficiently” into account.¹¹⁰ In Sweden the Svea Hovrätt, in a ruling on 4th of May 2005, concludes that “only in obvious cases” are EU competition law considered as ordre public.¹¹¹

¹⁰⁸ Trittman (2006) p. 59 *Thales Air Defence* case is directly quoted from Trittman

¹⁰⁹ Komninos (2012) p. 39-40 The case from Thüringer Oberlandesgericht is directly quoted from Komninos

¹¹⁰ Komninos (2012) p. 40 The cases from Florence and Milan Court of Appeal are directly quoted from Komninos

¹¹¹ Komninos (2012) p. 40 The case from Svea Hovrätt is directly quoted from Komninos

The approach chosen by these states, after *Eco Swiss* is in the literature called the “minimalistic approach.” On the other hand there is the “maximalist approach.”¹¹²

According to the maximalist approach, EU competition law should be interpreted more widely when it comes to defining it as *ordre public*. This way of interpreting the *Eco Swiss* case places emphasis on the “EU principle of effectiveness.”¹¹³ This view has not been well represented among the courts of the Member States. One of few examples is the Dutch case *Marketing Displays International Inc. V. VR Van Raalte Reclame BV*. The winning party in the arbitration wanted to enforce the award in the Netherlands, but Dutch courts refused to order enforcement because the award was contrary to art. 101 TFEU. The Dutch court stated in the judgment that the exclusive agreement upheld in the award had market-sharing elements, which represented a breach with EU competition law, and therefore a violation of *ordre public* in the Netherlands.¹¹⁴

As shown above, in chapter 3.4, several authors have argued that the *Eco Swiss* case should not be interpreted so that every breach with EU competition law represents an *ordre public* violation. The view of the authors mentioned in the chapter above is presumably correlating with the “minimalistic approach”. Komninos also supports this view.¹¹⁵ He emphasises the importance of understanding *ordre public* in the same way when talking about enforcement of arbitral awards, as when discussing enforcement of court rulings within the EU. Free movements of awards, is, like free movements of judgments, important for EU integration and promotion of the four freedoms.¹¹⁶

I find it logical that free movements of both judgments and arbitral awards within the EU internal market is beneficial for the European integration. First of all it leads to unity of arbitration law within the EU and it makes arbitration proceedings more predictable. But the argument that court rulings and arbitral awards were to be treated in the same way does not solve

¹¹² Komninos (2012) p. 37-38

¹¹³ Komninos (2012) p. 40

¹¹⁴ Komninos (2012) p. 41-42 The Dutch case *Marketing Displays International* case is directly quoted from Komninos

¹¹⁵ Komninos (2012) p. 42

¹¹⁶ Komninos (2012) p. 45

the question to what extent EU competition law is to be seen as *ordre public*, because that can potentially affect both the enforcement of judgments and awards.

I have not found any subsequent decision from the ECJ on how the *Eco Swiss* case should be interpreted. In the following the thesis will analyse the relationship between EU and national competition authorities and arbitrators to see if that can clarify the situation further.

4.3 The Modernisation Regulation (1/2003)

Rolf Trittman asks to what extent arbitral tribunals can or should cooperate with competition authorities when a dispute raises questions concerning competition law. Furthermore, if yes, what would such cooperation look like?¹¹⁷ These questions are going to be analysed by looking at some of the changes that came with the Modernisation Regulation in 2004 (Regulation 1/2003).¹¹⁸

EU competition law was modernised and developed through the 1990s. The need for modernisation and radical change;

“in particular the law on vertical agreements on horizontal cooperation agreements and on the obtaining of “individual exemptions” under article 101 (3) TFEU”.¹¹⁹

This change was called upon by among others, Commission officers.¹²⁰

Article 101 (3) opens, as outlined above, for exceptions from the prohibitions presented in art. 101 (1) and (2).

Before the Modernisation Regulation came into force the exception regulations on art. 101 (3) (previously art. 81 (3) EC Treaty), were outlined and interpreted in the Council Regulation 17/62.¹²¹ Article 4 of the 17/62 Regulation stated that when parties seek application of art. 85

¹¹⁷ Trittman (2006) p. 57

¹¹⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

¹¹⁹ Whish (2012) p. 52

¹²⁰ Whish (2012) p. 52

¹²¹ EEC Council, Regulation No 17 First Regulation implementing Articles 85 and 86 of the Treaty

(3) of the Treaty of Rome (later art. 81 (3) and thereafter art. 101 (3)) they must notify the Commission. According to art. 9:

“(…) the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.”

A decision rendered by the Commission according to art 85 (3) could only to review by the ECJ, see art. 9 (1).

Dempegiotis observes what he sees as “a new era in the interface between competition and arbitration in Europe.” He uses the developments that emerged with the Modernisation Regulation, to indicate the change. The Regulation abolished the monopoly that the Commission had enjoyed to apply art. 81 (3) TFEU, it established the ex-post control of art 82 (3) and also the explicit provision of the full direct effect of art. 81 and 82 Dempegiotis sees as an indication of the EU’s:

“(…) desire to move towards decentralisation in the enforcement of these articles and subsequently perhaps towards the enhancement of the role of private enforcement within the EC competition law regime.”¹²²

In the Regulation 1/2003 it was made clear that the Commission shares the competence with the Member States national competition authorities and national courts.¹²³ Article 6 in the Regulation states that national courts of the member states now need to exercise art. 81 and 82 EC Treaty ex-officio: “National courts shall have the power to apply Articles 81 and 82 of the Treaty.” The Regulation also gives the private parties more formal freedom, due to the ex-post control, because they no longer have to notify the Commission in order to get an exception according to TFEU art. 101 (3). As a result, the Guidelines given by the Commission on competition issues becomes important for the parties in the evaluation of their plan to fall under the exception presented in art. 101 (3).¹²⁴ The Guidelines are not legally binding, but if the parties choose to follow the line in a given Guideline, there exists a legitimate expectation that

¹²² Dempegiotis (2008) p. 136

¹²³ Whish (2012) p. 76

¹²⁴ Davies (2011) p. 351

the Commission will act in accordance with its own Notice.¹²⁵ The system today is no longer an “exception” but a “directly applicable exception.”¹²⁶ In practice that means that art 101 (3) is applicable alongside art 101 (1) without the need to give a notification prior to the agreement.¹²⁷

The first question that occurs when discussing the role of arbitrators is what it means that arbitral tribunals are not mentioned in the Regulation?¹²⁸ How should that be interpreted?

Komninos does not see it as problematic that arbitration is not being mentioned in the Regulation. If the intention with the Modernisation Regulation was to bar arbitrators from applying article 101 (3), this would have been expressed explicitly. Article 101 has been applied by arbitrators before the Regulation 1/2003 came into force, therefore it is fully accepted that the arbitrators have the competence to apply art. 101 (3) TFEU.¹²⁹ For the following I will follow this reasoning from Komninos.

The question to what extent an arbitration tribunal has to involve the Commission or national competition authorities in an arbitration proceeding has in the literature been discussed in the light of art. 16 in the Modernisation Regulation - “Uniform application of Community Competition law.”¹³⁰

Trittmann states that it has been discussed in the literature to what extent art. 16 of the Regulation 1/2003 can be used to solve the problem. Article 16 instructs the courts of the Member States to follow the decision already made by the Commission, under art. 81 and 82 of the Treaty, when the subject matter has already been brought up before the Commission.¹³¹ This

¹²⁵ Davies (2011) p. 351

¹²⁶ Blanke (2011) “International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU” p. 1062

¹²⁷ Blanke (2011) “International Arbitration and ADR in Remedy Scenarios Arising under Articles 101 and 102 TFEU” p. 1063 (Based on a quote from Bellamy and Child expressed in Blanke)

¹²⁸ Trittmann (2006) p. 61

¹²⁹ Komninos (2012) p. 11

¹³⁰ Council Regulation 1/2003 art. 16

¹³¹ Trittmann (2006) p. 62

applies both for national courts and national competition authorities, according to art. 16 (1), (2) of the Regulation.

One of the counter arguments of using art. 16 in arbitration, is that the whole point of the arbitration processes is that the tribunals and the arbitrators should be independent from a national court system. If one should interpret EU regulation in a matter that includes tribunals, it may work against the very concept of arbitration. This can be further underlined by looking to the provisions in the EU Treaties concerning the Member States' obligation to cooperate, see art. 4 (3) TEU. The "sincere cooperation" according to art. 4 (3) TEU (art. 10 in the EC Treaty) does not automatically apply to the arbitration tribunals.¹³² Trittmann concludes that there does not exist an obligation for the arbitrators to keep the national competition authorities or the European Commission informed on cases concerning arbitration. Although he sees it as preferable to follow the decisions from the Commission to be sure that the award has a certain chance to get enforced. At the same time there does not exist an obligation to inform national competition authorities about the content of the award. Trittmann compares it to the duty national courts have, at least in Germany, to notify competition authorities on cases concerning competition law issues. See "Gesetz gegen Wettbewerbsbeschränkungen" (GWB) § 90.¹³³ Furthermore, can information about the award only be forwarded to the Commission if both parties to the arbitration give their consent.¹³⁴

To sum up, it can seem that a complete independence from national courts and the European Commission is not possible for arbitral tribunals due to the risk of not getting the award enforced. That means that the arbitrators probably have to find the balance between the mandate given by the parties and the fact that existing case law from EU authorities can be relevant if conflict emerges when trying to enforce the award.

What are the consequences if an arbitration tribunal renders an award that goes against something the Commission has decided in a previous case? Are the national courts bound to set aside arbitration awards when an award is not in accordance with a decision by the Commis-

¹³² Trittmann (2006) p. 62

¹³³ Gesetz gegen Wettbewerbsbeschränkungen (GWB) (1957) § 90

¹³⁴ Trittmann (2006) p. 63

sion? Can it also be argued that art. 16 gives national courts an autonomous legal basis for reviewing an award independently, without concerning public policy grounds?

Komninos states that if the latter is the case, then the interpretation of art. 16 (1) goes too far. Firstly, it would violate the fundament of an arbitration award, namely that it is supposed to be final and binding. Secondly, it would also influence the right to free movement of arbitration awards in the Union. The result would be that an award would run the risk of not getting enforced in another state. This approach would also be in conflict with the New York Convention.¹³⁵

Furthermore, both the European Commission and an arbitral tribunal have an interest in having a climate for cooperation. One of the reasons that arbitrators should seek cooperation with the Commission in cases involving EU competition law is that it can help maintain arbitration as the alternative judicial forum that it is, and not try to alienate the Commission by showing any disrespectful attitude towards it.¹³⁶

Komninos also observes:

“At the same time, it would not serve the Commission’s purpose to further the decentralised civil enforcement of EU competition law, and it might alienate arbitrators, with the possible repercussion that the latter would rather suppress a difficult competition law issue, instead of running the risk to decide it wrongly themselves and consequently to expose their award to annulment.”¹³⁷

Furthermore the Commission has a central role in enforcing EU law and a negative approach to arbitrators who seeks assistance would not be in accordance with the Commissions role.¹³⁸

Komninos concludes that due to the increasing application of art. 101 (3) by arbitrators and the fact that competition authorities are in favour of arbitration tribunals handling cases concerning competition law, could mean that the Commission will cooperate more often with

¹³⁵ Komninos (2012) p.31

¹³⁶ Komninos (2012) p. 23-24

¹³⁷ Komninos (2012) p. 24

¹³⁸ Komninos (2012) p. 24

arbitral tribunals in appropriate cases.¹³⁹ The information that the arbitrators can request is among others; factual information on for example the identity of the undertakings involved or whether the Commission has a certain case pending before them, and if the Commission has reached a decision in the given case. It is for the arbitrators to decide whether or not such request for information or assistance is desirable. Komninos furthermore observes that this is a sensitive issue, while the parties have submitted their case to an arbitral tribunal, and therefore the arbitrators should abstain from seeking assistance from the Commission.¹⁴⁰ This observation leads me to the last topic that is going to be discussed in this thesis, namely, the potential obligation for the arbitrator to test question on competition law *ex-officio*.

4.4 Arbitrator's responsibility - Competition law Ex-officio

To what extent should an arbitral tribunal investigate possible competition law complications without any of the two parties invoking it? In other words; should an arbitral tribunal test questions on competition law *ex-officio*?

Diederik de Groot writes that the *Eco Swiss* decision has been used as argument that arbitrators have an *ex-officio* obligation to apply EU competition law, even if the Court did not explicitly give the arbitration tribunals such an obligation.¹⁴¹ On the other hand Mourre writes that the Court chose not to answer the question on *ex-officio* testing of competition issues in the *Eco Swiss* decision, although the question was raised by the Dutch court in their request to the ECJ.¹⁴²

Especially by some continental jurists, the fact that international commercial arbitration relies on the agreement of the parties is given particular importance.¹⁴³ Furthermore:

“The arbitral proceedings are seen as an expression of the will of the parties and, on the basis of party autonomy (*l'autonomie de la volonté*) it is sometimes argued that international commercial arbitration should be freed from the constraints of national law and treated as denationalised or delocalised.”¹⁴⁴

¹³⁹ Komninos (2012) p. 24-25

¹⁴⁰ Komninos (2012) p. 25

¹⁴¹ De Groot (2011) p. 571

¹⁴² Mourre (2011) p. 17

¹⁴³ Redfern and Hunter on International Arbitration (2009) p. 18

It has, on the other hand been shown that also arbitrators have to take EU law into consideration although it is not directly applicable for them. The main reason is that the arbitrators can be obligated to render an enforceable award. For example the ICC rules art. 41 provides an example for when the arbitrators are bound to “make every effort” to render an enforceable award:

“In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law”.¹⁴⁵

Redfern and Hunter comments that it would be difficult to see how this could be otherwise; no arbitrator can guarantee that an award is going to be enforced in the state where the winning party seeks the enforcement. But what is expected, they continue, is that the arbitrators do their best:

“(...) to ensure that the appropriate procedure is followed and, above all, that each party is given a fair hearing.”¹⁴⁶

Also Komninos seems to be supporting this view. He states that arbitrators have a fundamental concern, namely to render an enforceable award. That means that they have to take mandatory rules into consideration to avoid the award being set aside because of *ordre public*.¹⁴⁷

Trittmann does not consider the arbitrators to have a general duty to investigate whether or not there exists a violation of competition law on its own motion. This argument is based on an antithetic interpretation of the German Civil Code (ZPO).¹⁴⁸ Trittmann does however draw a line between situation where the arbitration tribunal close their eyes for potential conflict with competition law, and those situations where they do not have any concrete suspicion that such infringement exists. Linked to the question on raising competition law issues on their own motion, is the question on where the tribunal should get its information in such an investiga-

¹⁴⁴ Redfern and Hunter on International Arbitration (2009) p. 18

¹⁴⁵ ICC rules art 41

¹⁴⁶ Redfern and Hunter on International Arbitration (2009) p. 623

¹⁴⁷ Komninos (2012) p. 48

¹⁴⁸ Zivilprozessordnung (ZPO) (1950) § 1042 (4)

tion. On the one hand they are obligated towards the parties, if not otherwise decided by the parties themselves, to keep information about them confidential. Furthermore, it has been shown that competition authorities are not able to provide requested information because they do not have the work capacity.¹⁴⁹

De Groot states that it makes sense to place a legal duty on arbitrators to apply TFEU art. 101 and also 102 ex-officio, when the tribunal has its seat in an EU jurisdiction or when the award is to be enforced in an EU jurisdiction.¹⁵⁰ But one also have to make a distinction between the situation where national courts in their review can control whether the arbitration tribunal did or did not apply the competition law, in cases where they should have done it and the situation where they also can review whether the tribunal did apply the competition law correctly.¹⁵¹ The author of the article, De Groot, further states that it would be clearly unacceptable for the national courts to control the arbitrator's interpretation of competition law, because different courts also judge cases differently, and sometimes they do make errors. The same apply for arbitration tribunals.¹⁵²

Furthermore, Blanke describes three situations where arbitrators should take mandatory rules into account, also when they are not asked to do so by the parties. Firstly, where the parties choose a specific law, with the sole purpose, to avoid mandatory rules, that without their active choice of law would be applicable. Secondly, in the situation, "where the performance of the contract is affected by the invoked mandatory rules, and there is a close link between performance and the rules at issue." Thirdly, Blanke refers to the situation where the enforcement of the award would be at risk, because mandatory rules were not taken into consideration.¹⁵³ The three conditions listed by Blanke seem to be alternative, both because Blanke uses the word "and" (see top of page 180, in Blanke (2005)) and due to the fact that the first two conditions seem to be different just in the degree of conciseness of the parties in "avoiding" mandatory rules. This means that also in situations where the enforcement of the award would be at risk the arbitrators should apply the mandatory rules in question.

¹⁴⁹ Trittmann (2006) p. 63-64

¹⁵⁰ De Groot (2011) p. 610

¹⁵¹ De Groot (2011) p. 589

¹⁵² De Groot (2011) p. 589

¹⁵³ Blanke (2005) p. 179-180

Dempegiotis also supports the view that arbitrators after the *Eco Swiss* case have an implicit and *de facto* duty to consider, raise and apply EC competition law when it is relevant for a case before an arbitral tribunal. The reason is to preserve the quality, effectiveness and enforceability of the award.¹⁵⁴

Can there also be another reason why arbitrators should take EU competition law into account?

It has, in the literature, been discussed to what extent arbitration on EU competition law questions can be classified as “international arbitration” at all.¹⁵⁵ Blanke argues that the new term “supranational arbitration” covers the concept of what he calls “EU remedy – related arbitration.”¹⁵⁶

According to Blanke the defining difference between international arbitration and supranational arbitration is the need for protection of the “Union public interest”, and the supranational arbitrator therefore has to:

“(…) compromise the sacrosanct party autonomy rule as well as the strict precepts of privacy and confidentiality reified by the international commercial arbitrator.”¹⁵⁷

Because the EU rules on competition law are imperative at the enforcement stage, the arbitrators have to take them into account in the arbitration proceeding. If not, they risk that the award is denied enforcement in EU Member States, as stated above. Furthermore, a certain degree of cooperation between a supranational arbitrators and the European Commission is essential to be able to render an enforceable award. The Commission is also more inclined to recognize arbitration on competition law issues if they are included in the process.¹⁵⁸ Even if the arbitrator is not directly bound by the principle of “loyal cooperation” or the “doctrine of

¹⁵⁴ Dempegiotis (2008) p. 143

¹⁵⁵ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 295

¹⁵⁶ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 296

¹⁵⁷ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 329

¹⁵⁸ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 329

supremacy” which the court of the member states are,¹⁵⁹ Blanke considers it as part of the mandate for arbitrators to cooperate with the European Commission.¹⁶⁰ The way that the Commission participate in an international commercial arbitration process is atypical. But it has to be seen in the light of the mentioned supremacy character of the EU competition law.¹⁶¹

At the same time, Blanke emphasis the careful balance that has to be maintained between the autonomy of the arbitration tribunals and the primacy of EU competition law.¹⁶²

An important issue that occurs in this discussion is the weighting between the goal to render an enforceable award and the tribunals’ obligation to follow their mandate given by the parties. As stated above international commercial arbitration is a system of private dispute resolution where the parties, to a great extent, can decide the premises of the process. Although the arbitrators shall be neutral towards the parties, it is of course common that the parties choose arbitrators that they trust will do a good job. This is often combined with the competence the arbitrators have in a given area or that they are known for having a high integrity. At the same time is it important for the arbitrators to do a “good job” for the parties. By that I mean that they are depending on new appointments to be able to continue as international arbitrators. If an arbitrator becomes famous for consulting the European Commission in all matters that may interfere with EU law, without informing the parties that could be a factor parties would take into consideration when choosing its arbitrators. This shows that to a certain extent, there is a mutual relationship between arbitrators and parties of a dispute. This again makes it more problematic for arbitrators than for national judges to consult with the Commission on EU competition law questions ex-officio.

¹⁵⁹ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 329, see also p. 327

¹⁶⁰ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 329-330

¹⁶¹ Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 328

¹⁶² Blanke (2011) “The Supranational Dimension of Arbitrating Competition Law Issues within the EU” p. 326-327

The question, whether national courts shall address EU competition law issues ex-officio, seems to be solved; according to paragraph 31 of the *Manfredi* case from 2004¹⁶³ the Court refers to the *Eco Swiss* case and states:

“Moreover, it should be recalled that Articles 81 EC and 82 EC are a matter of public policy which must be automatically applied by national courts” (see Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraphs 39 and 40).

But to what extent the same applies for arbitration tribunals still seems to be an open question. There are relevant arguments pointing in both directions. Although there can be situations where EU law can be an obstruction for enforcing an arbitral award it is possible to claim that “Arbitrators are still the “masters of the arbitral proceedings.””¹⁶⁴

5 End remarks

According to Komninos,

“Arbitration and competition law are quite a strange pair. They can be regarded as inherently contradictory and incompatible, but also as inherently complementary and compatible to each other. They are inherently contradictory and incompatible, because arbitration is the creation of private autonomy.”¹⁶⁵

Komninos furthermore states that both EU competition law and international commercial arbitration mean to attain a single market.¹⁶⁶

Thomas Eilmansberger writes that it is impossible to give a complete picture of the development of arbitration on competition issues within the European Union. For that, the legal situation in Europe, both for competition law and arbitration, is too fragmented and lack consistency.¹⁶⁷ Historically the European Commission has been worried that private arbitration tri-

¹⁶³ Case C-295/04 *Manfredi* (2004) ECR I-6619

¹⁶⁴ Komninos (2012) p. 48

¹⁶⁵ Komninos (2012) p. 2

¹⁶⁶ Komninos (2012) p. 3

¹⁶⁷ Eilmansberger (2006) p. 11

bunals would interpret the competition regulations too widely, so that agreements that harm competition could be accepted.¹⁶⁸

This situation has changed considerably over the last years. It is now widely accepted that competition issues can be raised before an arbitral tribunal.¹⁶⁹ Ferdinand Hermanns also comments that the original scepticism the Commission had towards arbitration tribunals ruling in issues concerning competition has been replaced by a conception that the tribunals in many situations are well suited to deal with the competition questions raised. Especially on the merger control area the Commission has realised that the tribunals can be of great help also considering issues of work capacity.¹⁷⁰ Furthermore Katharina Hilbig refers to Joachim Pfeffer and Eilmansberger and points out that an arbitration process can be an advantage for the parties in competition law issues. The reason is not that the national courts lack the competence in such cases, but rather that the arbitration tribunals are braver (“mutiger”) when they apply art. 81 (3) and 82 EC Treaty.¹⁷¹ Hilbig observes that national courts tend to apply the regulations in art. 81 and 82 more schematic than an arbitration tribunal.¹⁷² It has also been claimed that the resolving of questions concerning competition law in an arbitration process is wise, because then the parties can appoint specialists to the job as arbitrators.¹⁷³

Moreover has the US Supreme Court in the *Mitsubishi case* stated that not only is competition law arbitrable, arbitrators are probably more suited than a national court to deal with questions on competition because they are able to devote both time and attention to the case and because they are more flexible concerning the framing of the procedures and the use of different approaches from both civil and common law traditions.¹⁷⁴ I consider this reasoning also to be relevant when observing the developments and changes in the attitude towards arbitration and competition law within the EU.

¹⁶⁸ Eilmansberger (2006) p. 13

¹⁶⁹ Eilmansberger (2006) p. 13

¹⁷⁰ Hermanns (2006) p. 33

¹⁷¹ Hilbig (2006) p. 70

¹⁷² Hilbig (2006) p. 70

¹⁷³ Trittman (2006) p.68

¹⁷⁴ Mourre (2011) p. 28

To sum up, in the *Eco Swiss* ruling from 1999, the European Court of Justice states that EU competition law is to be recognized as *ordre public* in the EU member states. After the *Eco Swiss* decision there is also no doubt that competition law is arbitrable. At the same time there are still unsolved questions regarding the relationship between the EU competition law and international commercial arbitration because of new EU regulations and decisions rendered by EU Member States courts. One of the questions that remains unanswered is how widely the *Eco Swiss* decision should be interpreted, in terms of how intense the review of arbitration awards shall be.

Furthermore, it is clear that EU competition law is an important field for the functioning of the European single market. The ECJ claims that the single market cannot be maintained without the competition law as *ordre public*. But the ECJ has not given a definite answer to what extent EU competition law is to be seen as *ordre public* in an arbitration proceeding. This again can, and has, led to different standards and approaches in the EU member states.

Eilmansberger however, comments that the majority view in the literature seems to assume that arbitration tribunals in reality are forced to taking EU competition law into consideration. The result of ignoring the law and regulation on EU competition can be that you meet obstacles trying to enforce the arbitral decision in an EU Member State.¹⁷⁵

I have, during my work with the thesis, not been able to find out when the new book “International commercial arbitration and EU competition law” by Assimakis P. Komninos and Luca Radicati di Brozolo is going to be published. This book, according to its title, may contribute to highlight important aspects of the questions raised in this paper.

¹⁷⁵ Eilmansberger (2006) p. 21-22

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