

Due Process, Transparency And Procedural Fairness in Asian Antitrust

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Introduction

The new year allows us to predict where some of the more interesting developments may happen in Asian antitrust in 2015. I will devote this column to issues of due process and transparency (procedural fairness). First, I begin with a discussion on defining procedural fairness. Then I explain why this is a particularly hot topic for Asian antitrust in 2015. Finally, I explore the benefit for increased procedural fairness in Asian antitrust. The push for increased transparency and due process comes not merely from the business community but from antitrust authorities themselves. Best practices involving due process and transparency are emerging and these best practices seem to clash with the practices of some jurisdictions in Asia. Some of these pressure points may become explosive in 2015, but Asian antitrust authorities have time and opportunity to improve their systems of due process and transparency before such concerns reach a crisis point.

What is procedural fairness?

In her keynote at the American Bar Association Antitrust in Asia conference in June 2014, Federal Trade Commission Chairwoman Edith Ramirez explained, “Good process leads to effective decisions and bolsters the legitimacy of competition enforcement. In contrast, deficient process contributes to suboptimal decisions and breeds disrespect for competition law and for competition agencies.”¹ She then articulated four aspects of procedural fairness that are central to the practice of transparency and due process in the United States:

[Procedural fairness permits] legal representation for the parties under investigation, including allowing the participation of local and international counsel; notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies; facilitating direct and meaningful engagement between the parties and the investigative staff and decision-makers; and ensuring internal checks and balances on decision-making within the agency.²

Concerns regarding the need for procedural fairness in antitrust (whether mergers, cartels or other conduct) are not unique to the US experience. Rather, the issues associated with procedural fairness have been echoed in various international antitrust organizations. In 2012, the OECD Competition Committee released a report on Procedural Fairness and Transparency, based on a 2010 roundtable.³ Similarly, the International Competition Network (“ICN”) released a report in 2013 on Competition Agency Transparency Practices.⁴ The business community has also pushed for increased procedural fairness. The ICC issued a recommended framework for international best practices in competition law enforcement proceedings highlighting seven different themes for best practices.⁵ Within Asia, ASEAN released its ASEAN Regional Guidelines on Competition Policy, which devoted an entire chapter to issues of due process.⁶ More recently, the ICN established an Investigative Process Project, which is co-headed by the US FTC and the European Commission’s DG Competition. The US antitrust agencies hosted a Roundtable on

Investigative Process in 2014 in which representatives from many countries attended. A report from this ICN group will be unveiled at the 2015 ICN meeting in Sydney.

Why a focus on procedural fairness for 2015 in Asia?

Procedural fairness has been an important issue in global antitrust for some time.⁷ This is not to suggest that potential problems with procedural issues are limited merely to Asian jurisdictions. Procedural concerns have emerged at times in the United States⁸ and Europe.⁹ However, issues of procedural fairness and transparency have emerged most noticeably in reports regarding Chinese antitrust by the US Chamber of Commerce,¹⁰ and US-China Business Council (USCBC)¹¹ and a statement by the European Union Chamber of Commerce in China.¹² These documents raised concerns both on process and substance regarding Chinese antitrust. The types of due process concerns raised in these reports relate to the lack of effective representation, the use of industrial policy by third parties, and procedural tools that do not allow for the most effective advocacy to lead to efficient outcomes.

Though China remains a focus point for the need to improve due process, what has been less public but just as concerning is that many of these concerns regarding due process are not distinct to China. As other authorities increase their enforcement activity taking ever complex and high-profile cases, the often inadequate procedural safeguards and lack of due process come into sharper focus. For example, we have seen high profile cases with procedural fairness issues raised in India, Korea, and Taiwan. Procedural fairness becomes particularly important in Asia relative to other regions because antitrust authorities are investigating complex cases and, in some cases, imposing significant remedies. The lack of effective procedural fairness impairs effective competition law and policy. It also makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement.

Procedural fairness should not be conceptualized as merely preventing downside risk for an antitrust authority. Rather, there are tangible benefits to antitrust authorities fully embracing it. These benefits include:

- Better information gained from evidence gathered through improved procedural fairness can help an antitrust authority shape its competition policy and enforcement prioritization.
- It allows cases to move more smoothly through the pipeline with more predictability on timing and key stages for both merger and conduct cases. This allows the antitrust authority to improve the management of its case pipeline and better allocate agency resources.
- Better process means fewer appeals (since appeals will need to focus on the merits). The improved quality of process will lead to better and more robust decision making. This, in turn, means a stronger authority. In practice, this also frees up resources for more enforcement as fewer resources will be tied up in defending the decisions on appeal.

- Better due process means more demonstrable benefits to consumers because of greater political legitimacy for the enforcement of decisions both domestically and internationally. Assuming the authority is right to take enforcement action in the first instance, procedural fairness means a better final decision able to withstand scrutiny, which better showcases the authority's activities as pro-consumer.

There is reason to believe that in a number of jurisdictions in Asia, procedural fairness issues will play a larger role in 2015 than they have in the past. I outline below why there may be an increase in such occurrences:

- Procedural fairness issues have not yet been worked out in the law – Some Asian antitrust regimes are relatively new. Neither law nor practice in these jurisdictions have tested out the extent of procedural safeguards. The lack of sufficient experience in implementing best practices for procedural fairness issues makes the likelihood of abuses of due process more likely.
- An increased focus on issues of fairness based on a series of reports in China (even though this is not just a China problem) – The increased focus on procedural fairness more generally in the international community has highlighted the potential for stories to emerge about due process concerns. Increasingly the business press has been tuned in to this issue as have non-antitrust parts of government such as trade ministries.
- High profile cases are subject to greater political pressure – Sometimes antitrust authorities investigate high profile firms. Though it is legitimate to investigate such firms for potential anti-competitive conduct, a system that lacks procedural safeguards and effective transparency creates situations in which political pressures to act against high profile companies (in either merger or conduct cases) may be more pronounced even when the evidence suggests that there is no consumer harm.
- Greater global integration on mergers and cartel cases – As more antitrust authorities undertake a better job of integrating investigations and working together both formally and informally, antitrust authorities will begin to recognize more when their practices on transparency and due process fall outside the international norm for best practices.
- Abuse of dominance cases where procedural fairness concerns have been raised – With a number of dominance cases involving foreign firms underway across Asia, due process concerns are heightened as Asian jurisdictions have undertaken investigations of complex business behaviors for which the economic issues are sophisticated and for which much of the existing case law in their jurisdictions is not directly on point. In such situations, due process is particularly useful in getting information and deciding whether or not to drop an investigation or litigate, and what effective remedies might be.
- Third parties abusing procedural issues to punish competitors and includes the possibility for abuse based on industrial policy concerns – Systems with limited procedural fairness are ripe for abuse of third parties who might use antitrust

strategically. A number of companies may front local firms to raise concerns to antitrust authorities as a way to punish more efficient rivals around the world as a way to raise the costs of their efficient competitors.¹³

- More investigations against international companies – A number of jurisdictions in Asia are undertaking investigations of multinational firms, who are repeat players in the world of antitrust. These firms are likely to have a sense of best practices regarding transparency and due process across a number of antitrust systems and may find some antitrust systems in are not measuring up to global best practices in antitrust or even best practices in the same country in other areas of regulation, which have embraced more substantive procedural fairness protections.
- The ICN will culminate three years of work on transparency and due process in a report that will be delivered at the ICN annual meeting in Sydney. The report is likely to endorse transparency and due process and cause for action to support such practices and principles in the investigative process.
- DG Competition has hired a third party firm to survey practitioners on due process in Europe relative to the United States.
- The *Global Investigations Review* survey will publish a Due Process Guide 2015, which will compare antitrust authorities with other regulatory agencies in terms of effectiveness of due process and transparency.

The problem with the lack of transparency and due process?

At its core, transparency and due process are inputs that lead to better outputs. These inputs allow testing of anti-competitive theories of harm and the empirics/facts that may or may not back up these theories. Having better processes through transparency and due process improves performance outcomes. The output that we can measure is better case outcomes. Procedural fairness leads to more information about how to undertake investigations and when to drop such investigations when the facts do not line up with theory. It also creates circumstances for good cases when theory and fact line up to suggest harm to consumers. These cases provide greater precedential value (because they are correctly decided) and greater legitimacy. These better outcomes are a function of the ability to treat the various stakeholders involved in an investigation, fairly and effectively, particularly the party/parties, their lawyers and economists.

There are many points in antitrust enforcement in which procedural fairness may emerge. Before becoming CEO of Hong Kong's Competition Commission, Stanley Wong identified six distinct stages for enforcement action in which due process issues may emerge, "initiation, investigation, prosecution, decision on the merits, and decision on sanctions (if any)."¹⁴ In each of these areas transparency and due process can create better outcomes. Procedural fairness at each of these levels allows for better decision-making by agencies – when

processes are fair, parties must focus on stronger substantive arguments. This is where the focus of what antitrust/competition law should be – is there harm to consumers? When agencies are fair, they allow for meaningful discussion to get to this fundamental question.

The lack of effective transparency and due process threatens to undermine effective antitrust enforcement across Asia. It also has a broader economic impact on a given jurisdiction and the region as a whole making it more difficult to advise clients as to how to create efficient business strategies that do not run afoul of antitrust laws. This uncertainty may hurt the ability of firms to do business in the region.¹⁵

Conclusion

Transparency and due process are issues that will be at the forefront for Asian antitrust in 2015. The ability of Asian jurisdictions to improve their procedural fairness will improve their ability to do better in their substantive enforcement policy. Such improved enforcement will lead to better economic outcomes for the region and its consumers.

¹ Edith Ramirez, Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address by FTC Chairwoman Edith Ramirez, Antitrust in Asia Conference, ABA Section of Antitrust Law and Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, Beijing, China, May 22, 2014 available at http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachin_akeynote.pdf.

² Id. Procedural fairness has been a significant issue for both US agencies. See Christine Varney, Procedural Fairness, 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, September 12, 2009 (“Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.”).

³ OECD, Procedural Fairness and Transparency (2012), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf>.

⁴ ICN, Competition Agency Transparency Practices (2013), available at <http://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1560&context=facultypub>.

⁵ ICC Commission on Competition, Recommended framework for international best practices in competition law enforcement proceedings (2010), available at <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedin>

[gs/](#) (highlighting Transparency, Engagement, Confidentiality, Due process/fairness, Non-discrimination, Accountability and the Role of the courts).

⁶ ASEAN, ASEAN Regional Guidelines on Competition Policy, (2010), available at <http://www.asean.org/resources/item/asean-regional-guidelines-on-competition-policy-3>

⁷ Diane P. Wood, *Antitrust at the Global Level*, 72 U. Chi. L. Rev. 309, 315 (2005).

⁸ See e.g., J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Reflections on Procedure at the Federal Trade Commission (Sept. 25, 2008), available at <http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf>; D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 Geo. Mason L. Rev. 1055, 1079 (2010).

⁹ See e.g., Jaime Flattery, *Balancing Efficiency and Justice in EU Competition Law: Elements of*

Procedural Fairness and their Impact on the Right to a Fair Hearing, 7 Competition L. Rev. 53 (2010); David Anderson & Rachel Cuff, *Cartels in the European Union: Procedural Fairness for Defendants and Claimants*, 34 Fordham Int'l L.J. 385 (2011); Kyriakos Fountoukakos and Camille Puech-Baron, *What Happens in Luxembourg Stays in Luxembourg: Confidentiality Issues in Competition Law Proceedings Before the EU Courts*, 5 J. Euro. Competition L. & Practice 331 (2014).

¹⁰ US Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy*, available at

https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf.

¹¹ U.S.-China Business Council, *Competition Policy and Enforcement in China* (2014), available at <https://www.uschina.org/reports/competition-policy-and-enforcement-china>.

¹² European Chamber releases statement on China AML-related investigations, 2014-08-13, available at <http://www.eurochamber.com.cn/en/press-releases/2132>.

¹³ D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. Cal. L. Rev. 689 (2012); R. Preston McAfee & Nicholas V. Vakkur, *The Strategic Abuse of Antitrust Laws*, 1 J. Strategic Mgmt. Educ. 3 (2004); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247 (1985).

¹⁴ Stanley Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, ICN Blog, Apr 23, 2014, available at <https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach>.

¹⁵ D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & Bus. 1 (2013).