Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach

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It is an increasingly common feature today in an international gathering of competition law and policy specialists from government, industry and academia to have formal and informal discussions about procedural fairness in the enforcement of competition laws across jurisdictions. The discussion leads naturally to making comparisons about enforcement by more experienced enforcement agencies with enforcement by newer enforcement agencies. With more than 100 jurisdictions with competition legislation, discussion about procedural fairness on a comparative basis will grow.

Enforcement agencies are involved in the debate about procedural fairness of enforcement systems around the world through their participation in the work of international organizations and networks such as Organization for Economic Co-operation and Development (OECD), United Nations Conference for Trade and Development (UNCTAD), Association of Southeast Asian Nations (ASEAN) and International Competition Network (ICN).

Recently on March 25, 2014, the ICN held a one-day Roundtable on Investigative Process in Washington D.C. The Roundtable, which was hosted by the Federal Trade Commission and the U.S. Department of Justice Antitrust Division and attended by over 115 senior agency and private sector participants from over 35 jurisdictions, aimed at deepening the discussion of how different investigative practices can enhance the effectiveness of agencies' decision-making and ensure the protection of procedural rights. The Roundtable covered the transparency of agencies' investigations, opportunities for parties to engage with the agency, and protection of confidential information.

The Roundtable was a part of the ICN's Investigative Process Project, co-led by the FTC and the European Commission's DG Competition. The Project is premised on the idea that effective competition enforcement depends on investigative procedures that provide for appropriate transparency, predictability, confidentiality protections, notice, and an opportunity to be heard.

It is not surprising that the older competition enforcement agencies lead much of the debate as they have considerably more experience than newer enforcement agencies, which outnumber by a wide margin the number of older agencies. Another reason is that the older competition agencies are asked, encouraged or pressured to comment about procedural fairness by companies in their home jurisdictions which carry on business in other jurisdictions with competition law enforcement.

This is not surprising since such companies have the first hand, immediate experience of dealing with the enforcement of competition laws in other jurisdictions. Dissatisfaction of such companies about their experience with competing enforcement may stem from disagreement about the scope of competition laws or about enforcement decisions. With complaints about the scope of competition laws, there is little scope for comment since competition laws like other legislation are the product of a lengthy, legislative process and are therefore unlikely to be amended in the near future. With enforcement decisions, dissatisfaction may be attributed to the perceived lack of expertise of the enforcement agency or perceived lack of procedural fairness in the enforcement process. There is little

scope to comment about the lack of expertise, not the least, because this is readily acknowledged by newer enforcement agencies and such agencies are publicly committed to enhance their expertise and to do so with the support of more experienced ones.

With procedural fairness, there is much greater scope for discussion. Almost inevitably a complaint about the lack of procedural fairness in competition law enforcement in a foreign jurisdiction turns to a comparison about procedural fairness in comparison with that of jurisdictions with older enforcement agencies.

I use the term "procedural fairness" to encompass a wide range of issues about the enforcement process such as transparency or openness about the enforcement process, disclosure of the details of an alleged violation including evidence, findings of fact and theories of harm to a company which is a party under investigation, opportunity for a target of investigation to respond to the allegations and the evidence and theories of harm in support, due process. For convenience I restrict my discussion about procedural fairness to procedural fairness as applied to the parties under investigation, noting that there are procedural fairness issues relating to complainants and other non-parties.

Whatever the motivation for its interest in procedural fairness in competition law enforcement in foreign jurisdictions, any agency that wishes to have its comments to be taken seriously and to be helpful ought to adopt a principled approach to procedural fairness. A principled approach, in my view, involves the following.

First, an agency must have or develop a view or position about procedural fairness, which transcends jurisdictions and enforcement systems. What are the core values of procedural fairness that transcend jurisdictional boundaries and should be applicable in evaluating all enforcement systems?

As a minimal set of core principles for such a universal view of procedural fairness in competition law enforcement, I offer the following for consideration:

- A person, which is under investigation ("target") and against which a violation-finding is under consideration, should receive full disclosure before the finding is made of (a) the totality of the evidence gathered by the enforcement body, (b) the specifics of the alleged violation of competition law, (c) the findings of facts and the evidence in support, (d) the theory or theories of harm underlying the alleged violation, (d) the reasoning leading to the conclusion of a violation ("Disclosure Principle");
- The target should have the opportunity to respond fully, before the violation-finding is made, to an alleged violation including the alleged findings of fact, theory or theories of harm and the reasoning supporting the alleged violation ("Right of Defense Principle");
- The decision maker which decides whether or not there is a violation of competition law should be independent and impartial ("Independence of Decision-Maker Principle")

As indicated above, these propositions are being offered as minimal core principles for a universal view of procedural fairness in enforcement. They have to be further articulated and elaborated upon in addressing specific concerns, such as, should these core principles be applicable throughout the enforcement process and if so, to the same degree and should these principles be applied differently depending on whether the decision on the merits is made by an integrated enforcement body or by a body separate from the body which conducts the investigation.

Second, discussion about procedural fairness should not be limited to making an evaluation on the enforcement process as a whole. Issues of procedural fairness come up virtually throughout an enforcement process. Concerns about fairness may have a different significance depending on the stage in which they arise. In this regard, it would be helpful to divide for analytical purposes an enforcement process into six stages: initiation, investigation, prosecution, decision on the merits, and decision on sanctions (if any).

Third, an agency must develop an informed understanding of the enforcement system under consideration. In particular, this requires understanding the competition legislation and how the enforcement process is structured and operates. More generally, it also requires understanding the place of competition law enforcement in the broader context of law enforcement including applicable principles of administrative law.