CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
November 2013 (2)

Ending the "Confidentiality Exception" to Due Process

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Procedural fairness, sometimes referred to as "due process," in investigations and enforcement proceedings by competition law agencies is among the hottest topics in antitrust enforcement today. For example, the International Competition Network ("ICN") launched in 2012 its "Investigative Process Project" to consider "the extent to which antitrust and competition law enforcement agencies policies and procedures are transparent and protect due process during investigations and other administrative proceedings."[2] OECD has a similar initiative, which was described in their recent publication, *Procedural Fairness and Transparency*.[3]

The current focus of the enforcement community and practitioners on procedural fairness (and the closely-related issue of agency transparency) is most welcome. Procedural fairness is essential to: (i) ensuring that agency actions are based on the application of sound antitrust principles, (ii) creating a complete and accurate evidentiary record, (iii) increasing efficiency, (iv) avoiding mistakes, and (v) gaining the public's confidence in the process and its outcome. As explained by Christine Varney when she was the Assistant Attorney General and head of the Antitrust Division of the U.S. Department of Justice:

> 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. Both are important.[4]

Perhaps the most fundamental aspect of procedural fairness is affording the Respondent in an investigation a timely opportunity to be heard. As AAG Varney further explained:

> The ability to present one's case and have a fair hearing before the decision to bring an action ensures that the government decision maker knows all the arguments against an action, while simultaneously providing the party with the confidence that all relevant arguments have been considered.[5]

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[1] Vice-President, Legal Counsel Qualcomm, Inc. The views expressed herein are those of the author, and do not necessarily reflect the views of his current or prior employers and clients.

[2] For a report of the results of the ICN investigation, *see* ICN Agency Effectiveness Project On Investigative Process: Competition Agency Transparency Practices, *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc892.pdf.

[3] OECD, Procedural Fairness and Transparency: Key Points (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf.

[4] Remarks by Assistant Attorney General Christine A. Varney at the Competition Conference of the International Bar Association, Fiesole, Italy, (Sept. 12, 2009).

[5] *Id.*

Importantly, the opportunity to be heard must occur "in a meaningful time and in a meaningful manner."[6] Toward that end, there needs to be "an open and frequent dialogue"[7] between the agency enforcers and the Respondent to ensure fairness and facilitate effective enforcement.

Unfortunately, the opportunity to be heard in some jurisdictions, at least in investigations or proceedings involving unilateral conduct, is not meaningful in time or manner, especially prior to the decision of the agency or its investigators to prosecute the Respondent for violating competition law. Indeed, 55 percent of respondents to a survey[8] designed and conducted by three non-government advisors for the ICN's Investigative Process Project reported that their meetings with agency enforcers "offered little in the way of substance, or that the meetings were neither timely nor meaningful."[9]

The dissatisfaction with these meetings is likely attributable to several factors. First, many agencies do not allow the Respondent access to complaints or other documents and information submitted to, or collected by, the agency from complainants or third parties. Nor do they provide a sufficiently detailed summary of the allegations and evidence against the Respondent. Thus, the Respondent is able only to address the extremely limited information about the allegations and evidence that it can glean from the agency's requests to it for documents and information.

Second, while agency enforcers are usually attentive to Respondent's presentation, they ask few if any questions and often provide no reaction to anything the Respondent has said; the Respondent leaves meetings no more informed about the investigation than it was before the meetings began. It is thus hardly surprising that one respondent to the ICN NGA Survey concluded that the only purpose served by its meetings with the agency's investigators "was to allow the agency to say it met with us."[10]

Agencies sometimes seek to justify the practices described above by noting that the information they withhold from the Respondent has been designated "confidential" by the submitting party, and/or that Respondent receives "access to file" when the agency has decided to file and prosecute charges. I submit with utmost respect that these explanations are unconvincing. For one thing, some agencies do not even provide material that has not been designated confidential. And some agencies do not provide access to file during the administrative hearing after charges have been filed. These practices do not comport with any meaningful notion of fairness or transparency.

Further, "confidentiality" designations by the submitting party provide no basis for denying to the Respondent a timely opportunity to be heard in a meaningful manner. Among

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[6] *Id.*, quoting S. Ct. case

[7] *Id.*

[8] *Practitioner's Survey on Transparency and Due process in Competition Law Investigations*, Antitrust & Competition Policy Blog (February, 2013), further information *available at* http://lawprofessors.typepad.com/antitrustprof_blog/2013/02/transparency-and-due-process-survey-please-make-time-to-take-this.html.

[9] For survey questions, *see* https://docs.google.com/spreadsheet/viewform?formkey=dDNKRlVzc3ppQmVOTTZfVFJnemdaUlE6MQ

[10] *Id.*

other things, there is usually no mechanism for a Respondent to challenge the legitimacy of "confidentiality" designations by complainants or third-parties; and at least some agencies refuse even to advise Respondents whether they have reviewed and determined the designations to be legitimate—both of these factors are in violation of principles of transparency as well as fairness.

These practices can only encourage complainants and third parties hostile to the Respondent to make overbroad confidentiality designations to keep the Respondent in the dark for as long as possible. As another respondent to the ICN survey cogently explained:

> The agency's tolerance for the use of confidentiality designations to deny access to the target of evidence, allegations and assertions against it, at least until the issuance of [formal charges], and deny to the target any access thereafter to potentially exculpatory documents and information, greatly exacerbates the absence of fairness in the agency's proceeding.[11]

There are, moreover, several compelling reasons why deferring access of the Respondent to material designated "confidential" by the submitting party until the agency's investigation team has decided and announced to the public a decision to file and prosecute charges against the Respondent is a classic example of "too little too late." It is exceedingly difficult and extraordinarily rare for a Respondent to convince an agency's decision-makers at the hearing to overrule the agency's staff following a lengthy and expensive investigation, especially in jurisdictions where "face" is an important consideration. While agency decision-makers may very well approach their task with an open mind, to promote confidence in the agency's process and its outcome, and remove any lingering doubts as to the agency's open minded approach, it is vital to provide access to the Respondent sooner than the decision to charge and prosecute.

In addition, even if Respondents and the public have complete confidence that agency decision-makers will keep an open mind through the hearing, and decide the case impartially, the denial of access until the hearing nevertheless inflicts substantial harm on the Respondent and administrative efficiency. Competition law cases are extraordinarily costly to the Respondent, sometimes lasting several years. And they require substantial expenditure of resources, including fees for outside counsel, experts, and other consultants, as well as divert attention away from working to satisfy customers (the company's primary business) to responding to agency requests for documents and information and assisting its counsel in formulating and presenting its defenses.

Further, the commencement of an investigation, and the decision to file and prosecute charges, are often publicly disclosed by the agency, and can seriously damage a Respondent's reputation no matter how vehemently the agency disclaims any finding of liability, etc.

For these reasons, Respondents have a legitimate and compelling interest in convincing the agency to terminate the investigation as soon as possible. Denial of access to the allegations and evidence against the Respondent are highly prejudicial to its efforts to obtain that result. Equally important, failure to terminate investigations of meritless complaints sooner rather than later seriously and unnecessarily drains agency resources.

[11] *Id.*

Finally, measures are available to protect documents and information that are designated legitimately as "confidential" without negating due process for the Respondent or compromising administrative efficiency. These include prohibiting the Respondent from using the documents and information outside of the investigation or proceeding, was well as limiting access and disclosure to Respondent's counsel, or even Respondent's outside counsel.

Violations of these prohibitions and limitations should be subject to serious sanctions. This is the practice of courts in the United States; documents and information are virtually never withheld from a defendant on confidential grounds, but are instead disclosed pursuant to a protective order placing appropriate limits on use and access. There are exceedingly few if any instances in which violations of protective orders are alleged, much less found.

Concern that complainants and third parties will not cooperate with enforcement agencies if they are subject to the risk of disclosure of their confidential information to Respondents likewise does not justify the failure to provide timely access to Respondent of the allegations and evidence against it. As noted above, limiting use of and access to the information through a protective order, radically backed by the threat of firm and substantial sanctions for violations, reduces—if not eliminates—the potential that the information provided by its competitors will be used by the Respondent to gain an advantage in the market.

Claims by customers and/or suppliers that Respondents will retaliate against them for filing complaints or cooperating with the agency by withholding supply or support, increasing prices, etc. likewise do not justify the sacrifice of a defendant's interest in due process or compromising the public interest in administrative efficiency. Even successful sellers must continue to strive to earn customer trust and their business. Refusing to supply or support a customer is short-sighted and akin to "throwing out the baby with the bathwater." The potential for "retaliation" can be further reduced by the agency's assurances that it will sanction, including through adverse inferences in the investigation and appropriate fines, any Respondent found to have engaged in retaliation.

In sum, it is time to end the "confidentiality" exception to according a Respondent due process. At the same time, prohibitions and measures to enforce against the disclosure by the agency of any party or third-party's confidential documents and information, except to the Respondent pursuant to a protective order, should be maintained and, if necessary, enhanced. The disclosure to competitors, customers, or suppliers of non-public business or technical information can inflict substantial harm on the disclosing party and perhaps its customers and suppliers. Nothing here is intended to suggest otherwise. Providing access to a Respondent is necessary as a matter of due process. However, no one other than the Respondent has a legitimate compelling interest in receiving such access.