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Procedural Fairness and Transparency in Antitrust Cases: Work in Progress

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I. AN INTRODUCTION TO THIS CHRONICLE

There is broad consensus on the need for, and growing importance of, transparency and procedural fairness in competition enforcement. However, the objectives, scope, and practical application of the associated procedural rights have never been undisputed.[2] On the one hand there is a general belief that the wide powers of competition law enforcement agencies require the application of checks and balances. On the other hand, day-to-day practice demonstrates that procedural rights differ significantly from one jurisdiction to another; for instance, the wide variance in degree and ways that the parties to an antitrust investigation can obtain sufficient and timely information about material competitive concerns.

Not surprisingly, the importance of procedural rights and their practical application to real-life cases are often complex and tend to be dependent on legal, cultural, historical, and economic factors. It is hard to dispute the proposition that different traditions may entail different processes and that, despite these differences, competition agencies may still arrive at equivalent end results, albeit through different ways and means. However, this possibility obviously does not mean that all outcomes are—by definition—equally fair and effective in safeguarding the procedural rights of parties subject to an antitrust investigation.

On the contrary, there are—unfortunately—too many examples around the world of enforcement practices that, despite often the best intentions and highest morals of individual agency officials, simply do not meet any reasonably conceivable minimum standard of due process rights. The argument that, as yet, no generally accepted catalog of minimum acceptable procedural norms exists does not alter this observation, but merely underscores that a set of best practices in this area is needed more than ever.

Incidentally, it would be wrong to believe that the lack of procedural fairness best practices implies a complete lack of convergence with regard to the nature and scope of procedural rights. Indeed, as the OECD observes:

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[2] Among the many insightful contributions on procedural fairness and due process rights, *see* for example: Ian Forrester, *Due Process in Competition Cases: A distinguished institution with flawed procedures*, 34 E.L REV 817 (2009); Wouter Wils, *Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement*, 29(1) WORLD COMPETITION 3 – 24 (2006); and Sean Heather, *Seeking Procedural Fairness in Competition Cases*, 12 GCR (August/September 2009).

> .. Procedural rights differ significantly from one jurisdiction to another, but most countries ensure, in one form or another, to the parties to an antitrust investigation the opportunity to obtain sufficient and timely information about material competitive concerns, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions. ..[3]

A number of scholars and other authoritative authors have suggested various lists of guiding principles, key concerns, and topics that should guide the discussion of procedural fairness. Here are three examples:

Judge Douglas H. Ginsburg recently identified six due process concerns to consider: (i) delay, (ii) a hearing before the actual decision maker, (iii) a neutral decision maker, (iv) the right to confront evidence, (v) a reasoned decision based solely upon the evidence, and (vi) review by an independent tribunal.[4]

Stanley Wong, a leading competition law adviser who combines experiences as a private practitioner and a senior public enforcement official, has suggested that a meaningful debate about procedural fairness should be structured around three core principles: (i) the Disclosure Principle, (ii) Right of Defense principle, and (iii) Independence of Decision-Maker Principle.[5]

And Christopher Hockett, the current Chair of the Section of Antitrust Law of the American Bar Association, lists seven potential topics to address in a global conversation about norms for antitrust due process:

1. opportunity for a meaningful hearing by the decision maker before enforcement action is taken;
2. actual and perceived neutrality of the merits decision maker;
3. transparency of (i) the legal standards that apply to the conduct in question; and (ii) the theory of how those legal standards apply in particular cases—both when enforcement is being weighed and when investigations are closed with no action taken;
4. access to evidence collected in connection with an enforcement action;
5. ability to challenge and test evidence, including questioning of adverse witnesses;
6. protection of parties' and third parties' confidential information from unauthorized disclosure; and

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[3] *See* OECD Policy Roundtables, Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings (2010), *available at* http://www.oecd.org/competition/mergers/48825133.pdf.

[4] *See* Keynote Address by Judge Douglas H. Ginsburg, *Due Process in Competition Proceedings*, International Competition Network Roundtable on Investigative Process (March 25, 2014) Washington D.C., *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc958.pdf

[5] *See* Stanley Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, ICN Column, COMPETITION POL'Y INT'L (April 23, 2014), *available at* https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach.

7. ability to challenge enforcement outcome before an independent judicial or administrative body.[6]

It is, however, important to recognize that a precise definition of procedural fairness, or a delineation of the rights and principles that are within the category of necessary procedural safeguards, is not essential for a constructive debate on procedural fairness. In fact, the exchange of views within the OECD on procedural fairness and transparency that started in 2010 demonstrates that a meaningful debate can be structured around a small number of key notions—and the practical importance of those notions—in different phases of the investigation.[7]

Similarly, the recent ICN Roundtable Discussion on Competition Agencies' Investigative Process distinguished between the initial and advanced phases of the investigative process and focused on issues such as engagement with the parties, efficiency of the investigation, evidence fathering and confidentiality, opportunities to be heard, internal checks and balances, and measures that promote the legitimacy of agency decisions.[8]

It is sometimes suggested that adequate procedural rights only exist for the benefit of parties that are subject to an antitrust investigation, and this belief may explain—in part—the reluctance among some antitrust agencies to change existing practices or to engage in a dialog with other agencies or the business community. However, it is now increasingly recognized that, in fact, procedural rights are also beneficial for agencies themselves and indirectly contribute to the legitimacy of competition law enforcement and societal welfare. Indeed,

> .. The quality of competition enforcement depends on agencies' ability to conduct effective investigations. Effectiveness depends on investigative procedures that provide for transparency, predictability, confidentiality protections, notice and an opportunity to be heard. .. [9]

Finally, let me touch upon—but not discuss in detail—the interrelationship between agencies' procedures and legal review of enforcement decisions. A legitimate question is whether judicial review may cure any defects of fining decisions that result from the fine being imposed by an administrative body that does not itself comply with essential procedural requirements.[10]

This is a complex issue that requires further discussion. Courts play a significant role in guaranteeing due process, particularly when competition agencies are administrative bodies. It is important for the courts to ensure antitrust proceedings are conducted in a fair manner—this function as a check and balance of the competition agency enhances not only the credibility of

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[6] *See* Christopher B. Hockett, *Antitrust and Due Process*, 28(2) ANTITRUST 2– 5 (Spring 2014).

[7] For a useful introduction and synthesis of the OECD discussions to date, *see* OECD Competition Committee, Procedural Fairness and Transparency, Key Points (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf

[8] *See* ICN Roundtable Discussion Competition Agencies' Investigative Process, Tuesday, March 25, 2014, Washington DC. Paul Lugard was one of the panel speakers on Phase 1 Engagement and Decision Making.

[9] *Id.*

[10] This question has particularly arisen in the context of the application of the Charter of Fundamental Rights of the European Union. *See* in this respect Koen Lenaerts, *Due process in competition cases*, 1(5) NEUE ZEITSCHRIFT FUER KARTELLRECHT, 175-182.

the enforcement action, but is in keeping with the basic principles for fairness and rule of law that are hallmarks of a developed and accountable legal system. However, for the parties affected by an enforcement agency decision, rights of appeal are not a practical substitute for fairness at the agency stage given the additional time, cost, and commercial and reputational damages incurred while an appeal is pursued.

II. TRENDS UNDERLYING THE GROWING IMPORTANCE OF PROCEDURAL FAIRNESS IN COMPETITION INVESTIGATIONS

A number of current, interrelated trends in the international antitrust arena contribute to the growing importance of procedural fairness in competition law proceedings.[11] Five key trends can be summarized under the following headings: (i) globalization, (ii) fragmentation, (iii) diversification, (iv) cooperation, and (v) litigation.

To start with the obvious, the number of jurisdictions with an antitrust enforcement regime has grown to some 115 and the ICN currently has 128 member agencies, including Armenia, Kazakhstan, Kenya, Uruguay, Colombia, and, since 2013, Algeria, Hong Kong, and Saudi Arabia. Clearly, the increasing number of potentially relevant jurisdictions not only adds a layer of complexity to the work of practitioners, but also creates significant challenges for firms doing business in these jurisdictions.

Paradoxically, the immense increase of enforcement regimes and agencies has led to a significant fragmentation in enforcement policies, priority setting, substantive rules, and due process standards. Indeed, while the ICN has been successful in bringing about a certain degree of substantive convergence, the work on procedural matters as a separate issue, including minimum standards for rights of defense, has only just started.[12]

A third trend is the changing portfolio of many competition agencies. Many competition authorities, including the Korea Fair Trade Commission, the Dutch ACM, the U.K. AMC, and the Danish Competition and Consumer Authority diversify into areas neighboring competition law. This trend appears to be driven by a belief that agencies should have larger portfolios than just competition enforcement to effectively deal with anticompetitive practices and other market failures. In addition, enforcement agencies tend to increasingly resort to negotiated settlements in an attempt to effectively remedy identified competitive problems.[13] While it may be argued that parties that decide to settle their matter with an agency may be expected to give up some of their procedural rights, there is a risk that settlement procedures erode essential procedural rights, such as the right to be informed in sufficient detail of the agency's competitive concerns as well as theory of harm.

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[11] The relevance of a number of the trends discussed has also been observed by others. *See* in particular Hockett, *supra* note 6 and OECD Competition Committee, Procedural Fairness and Transparency, Key Points, *supra* note 7.

[12] Obviously, many ICN work products, such as the *Recommended Practices for Merger Notification and Review Procedures* and parts of the Anti-Cartel Manual directly or indirectly relate to procedural rights of parties.

[13] *See* Paul Lugard & Martin Möllmann, *The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment a Day Keeps the Court Away?*, 4(1) CPI ANTITRUST CHRON. (April, 2013).

A fourth key trend is the need for an increase of inter-agency cooperation in a globalized system of antitrust enforcement. While agencies may have legitimate reasons to exchange information in the context of investigations and enforcement of their competition laws—which is often in the interest of the business community—that same cooperation risks raising significant due process issues; for instance, with respect to the safeguards that apply to confidential business information that may have been provided to agencies on a voluntary basis in the context of merger reviews. One important project in this respect is the revision of the 1995 OECD *Recommendation on International Cooperation between Member Countries on Anticompetitive Practices*.[14] A recent draft involves provisions that would facilitate the exchange of confidential business information without the consent of the party that provided the information.

Finally, a fifth trend that underlies the growing importance of procedural fairness is the increase in penalties resulting from private and public enforcement. Over the past ten years sanctions for competition law violations have increased significantly and it seems that newer agencies are sometimes tempted to follow the examples set by the European Commission and other lead agencies with proven track records. Obviously, the larger the penalties are, the more critical the respect for procedural safeguards becomes.

III. THE WAY FORWARD

We are far away from a global recognition of a catalog of minimum standards for procedural fairness and transparency in antitrust cases that includes sufficient specificity for practical use, and it is perhaps optimistic to hope that a comprehensive set of truly global recommended best practices in this field will be agreed upon in the next decade. The building of sufficient consensus—probably first among a subset of like-minded jurisdictions—will take time and is a gradual process that is, to some extent, dependent on the pace of development in specific parts of the world. It is clear that a number of authoritative agencies, such as the European Commission, will—and should—play a prominent role in this process.

However, the valuable role of individual agencies should be complemented by initiatives of international organizations, in particular the ICN and the OECD. In many respects, the OECD Competition Committee's Working Party No. 3 has taken the lead in this important area, and has provided for an appropriate, neutral, well-informed, and authoritative platform for much-needed next steps. The 2010 and 2011 OECD Roundtable discussions on procedural fairness and transparency have laid the foundations for meaningful follow-up activities.[15] However, to optimize the chances of success, private organizations such as the American Bar Association, and first and foremost, organizations that represent companies whose procedural rights are at stake, should be given a clear voice in the years to come.

[14] *See* in this respect http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf.
[15] *See*, *supra* note 7.

IV. THE CONTRIBUTIONS TO THIS CHRONICLE

In this issue of the *CPI Antitrust Chronicle* a number of expert authors with a variety of backgrounds and views from different parts of the world offer their thoughts on procedural fairness, transparency, judicial review, and related issues.

Georg Berrisch and Martin Möllmann both provide views on the EU competition enforcement regime, albeit from different perspectives. Georg Berrisch's contribution, *The EU Judiciary Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights*, concentrates squarely on the essential role of the EU courts in safeguarding due process rights. He, *inter alia,* observes that the CJEU's findings in *Menarini* and *Schindler* necessitate a full review of the Commission's assessment of complex economic matters, something that is increasingly critical in light of the expanding category of (hard-core) infringements under Article 101 TFEU.

In contrast, Martin Möllmann's contribution, *Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough*, concentrates on the European Commission itself and is a courageous attempt to look beyond the implications of the *Menarini* judgment. He notes that the European Union should continue to pay attention to suggestions for reforms, all the more because those reforms would also strengthen the effectiveness of the Commission's antitrust enforcement policy. Möllmann's contribution can be situated against the background of the discussion on institutional design and the question whether different models may produce similar results in terms of procedural fairness.

Albert Sanchez-Graells and Francisco Marcos take a radically different and opposing position in their contribution *A Call for a restriction of "Corporate Human Rights" In Competition Enforcement Procedures, and More Generally.* They argue that the recognition of procedural rights, or "corporate human rights" for companies, has the potential to weaken both competition law and human rights enforcement and advocate for the suppression of those rights in the area of competition law enforcement. Their view is unorthodox and may certainly elicit critiques, but is also worth reading and reflecting upon.

Michael Han & Janet (Jingyuan) Wang, Stephen Harris, and Toshiaki Takigawa each shift the focus to a region of the world where procedural fairness concerns are developing into central concerns. In his contribution, *Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences*, Toshiaki Takigawa discusses the relative pros and cons of administrative and prosecutorial enforcement systems, and in many respects complements Berrisch' and Möllmann's contributions—with an interesting twist. Indeed, Takigawa notes that among the reasons for the Japan Fair Trade Commission to abolish its (pseudo prosecutorial) administrative-law-judge system and replace that system with an enforcement model akin to the EU system is the inefficiency and lack of procedural justice associated with the former system. Takigawa's observations are interesting, in some respects unconventional, and give food for thought.

Stephen Harris' *Due Process and Procedural Rights Under the China Anti-Monopoly Law,* and the contribution by Michael Han & Janet (Jingyan) Wang, *Due Process in Chinese Competition Law Regime*, both provide valuable insights in parties' procedural rights under the Chinese competition law regime and, importantly, put the associated concerns in the context of

the Chinese legal, economic, and political systems. It is difficult not to agree with many of the authors' observations and suggestions. Interestingly, both contributions also show that, while much remains to be done and many due process provisions lack sufficient practical detail, there is real potential for improvement, especially—as Han and Wang show—in light of the current drafting of a unified administrative procedural law. However, there are many obstacles and, as Harris notes, "[a]meliorating the pernicious effects of bureaucratic politics on AML policy and procedures requires political will and political action towards that end." It is hoped that will shall prevail.

Finally, in his article, *The Independence of Decision-Maker Principle in Competition Law Enforcement*, Stanley Wang elaborates on the principled approach that he recently suggested and discusses one of his three core principles, the Independence Decision-Maker Principle. He notes, *inter alia,* that confirmation bias is not, as such, sufficient to justify the adoption of that principle as a core principle for procedural fairness in competition law enforcement. He goes on to explore when combining investigative and decision-making functions makes sense and when it does not, and for which reasons. Let's hope that Stanley Wong would be able to elaborate his thoughts on the two other principles, the Disclosure Principle and the Right of Defense Principle, in the near future.