Towards Fairness and Transparency in Agency Antitrust Investigations and Cases

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INTRODUCTION

As many jurisdictions enter the field of or intensify their enforcement of competition law, and agencies adopt decisions that benefit local competitors and customers at the expense of foreign companies, members of the business and academic communities are concerned that the outcomes of agency decisions may not reflect the application of sound competition law principles to a complete and accurate record.[2] Greater skepticism may be warranted where the same organization acts as investigator, prosecutor, judge and jury. The prevailing system in such jurisdictions provides enormous incentives to agencies to rule against the respondent in an investigation, especially when the respondent is a citizen of a different jurisdiction. This bias is manifested in agency interpretation and application of substantive law, and facilitated by procedural rules and practices that are nontransparent and unfair.

The best way by far to ensure that outcomes in agency antitrust cases reflect the application of sound antitrust principle to a complete and accurate record is to replace enforcement regimes in which the same agency serves as investigator, prosecutor, judge and jury with a regime that places these functions in separate and independent organizations. For example, investigations and prosecutions would be the responsibility of an administrative agency, while the adjudication functions would be performed by courts that are less subject to influence by personal ambition and industrial policy. The relative freedom from political and personal bias of courts is likely to result in procedures that ensure genuine "equality in arms" with regard to the collection, presentation and analysis of evidence.

Regrettably, the unfortunate combination of prosecutorial and adjudicatory functions is likely far too entrenched in many jurisdictions to hope for fundamental structural changes in the foreseeable future. The next best alternative for attaining some minimally acceptable level of transparency and procedural fairness is revision to agency practice. To date, however, many if not all of the significant initiatives to explore and recommend such revisions have been undertaken by associations or other organizations comprised of the very agencies whose political and personal agendas are served so well by the current system. While the continuation and expansion of these initiatives should be welcomed, they are prone to the same concerns that underlie the skepticism of government agencies toward industry "self-regulation." Accordingly, it would be imprudent to rely on them as the exclusive source of proposals and campaigns for change. The legal, business and academic

communities need to devise and lobby for proposals for fundamental change, with these proposals serving as a benchmark against which agency practices and proposals may be measured. This article offers one set of such proposals.

BACKGROUND

Those who concern themselves professionally with economics and incentives cannot be oblivious to the incentives of an agency, including one run and led by public servants, that performs all of the functions described above. These incentives create enormous bias in favor of rulings against investigation targets.

Most fundamentally, when an enforcement agency concludes that the respondent has violated its jurisdiction's competition law, the agency may impose potentially enormous monetary fines that — even if not received directly by the agency — can be used by the agency to solicit support for continued or increased funding or expansions of its authority. The incentive increases when the respondent is a citizen of a different jurisdiction. In that circumstance, the fine represents a pure transfer of wealth from one jurisdiction to another. Such fines, and perhaps even more so "cease and desist" relief that limit the pricing and marketing actions of the target, may reduce competitive pressures on local enterprises, which have greater political power locally.

By contrast, there exists little or no incentive for an agency to drop an investigation without finding a violation by the respondent. Few, if any, antitrust enforcers have received huge boosts to their careers from a decision in favor of a foreign target of an investigation. Instead, such a decision may spur criticism or questions by local government, media and the public regarding the agency's competence or resource utilization.

The effect of the incentive scheme described above is evinced by the quick and strongly worded press releases by agencies touting the fines they collect, and the common use by agencies of data on cumulative fines they assess or collect as a metric of their success and worth, and their virtual silence in the rare cases when an extensive, highly public investigation is terminated with no findings against the target.

The ability of an agency to adopt and enforce decisions that reflect personal agendas and industrial policies is enhanced by procedural rules and practices that preclude the compilation of a complete and accurate record, and/or that inflame local opinion against their targets. The reliability of agency decisions from the perspective of sound antirust principle would be enhanced immeasurably by rules and practices that increase agency transparency and create true equality of arms between agency prosecutors and their targets in the compilation, presentation and analysis of evidence, as discussed below.

PROPOSALS FOR CHANGE

A. Timely Disclosure Of All Allegations, Theories And Evidence To Investigation Targets.

Perhaps no aspect of the investigative and adjudicatory processes is more critical than the timely disclosure to the target company of the allegations and evidence. All evidence, regardless of the investigator/prosecutors' opinion of its relevance or materiality,[3] should be disclosed without redactions to investigation targets.[4] Next to assigning to separate entities responsibility for investigation/prosecution, on the one hand, and adjudication on the other, thereby eliminating the biases described above, ensuring such disclosure is the measure most likely to enhance the prospect that outcomes in agency antitrust cases will reflect the application of sound antitrust principle to a complete and accurate record.

The importance of timely disclosure to an investigation target with timely access to all allegations and evidence is manifest. Evidence submitted to agency prosecutors by complainants and third parties standing to benefit from agency action may be entirely fabricated, inaccurate if generated by recollection, taken out of

context or be incomplete. Inferences and conclusions drawn from evidence, moreover, may be unwarranted, erroneous or misleading. Sound decisions about the authenticity, reliability, relevance and materiality of evidence cannot be made without the informed input of the respondent, the party that typically has the most competence and incentive to challenge the evidence, and the validity of any conclusions and inferences drawn from it.[5] Agency personnel and third parties, no matter how competent and well intentioned, cannot without the informed assistance of the respondent arrive reliably and consistently at sound conclusions about the relevance and weight to be accorded particular evidence. In addition, agency prosecutors may not recognize or be disinclined to disclose to the target exculpatory evidence.

Alarmingly, however, few competition law agencies provide complete and timely disclosure to their targets of allegations and evidence and allow agencies to decide the course and outcome of an investigation based on secret evidence. In some jurisdictions, the respondent never receives access to any evidence; in other jurisdictions, the respondent is accorded access to selected evidence, though the criteria for predicting what will be disclosed and when are uncertain. In jurisdictions that utilize secret evidence, the agency's investigators (who are often also the agency's prosecutors and first-instance decision makers) merely assert to the respondent the existence of evidence of which there is little or no description, and advise the respondent of the conclusions they have drawn from it. The sources, vintage or form of the evidence or, more accurately, *alleged* evidence, remain undisclosed. The respondent has no means to confirm the existence or authenticity of the alleged evidence, challenge its credibility or dispute the interpretation thereof by the agency.

The justification most frequently invoked by agencies for the use of secret evidence in antitrust cases is that the evidence is "confidential" to the providing party, including complainants and third parties that stand to benefit from sanctions against the defendant. The "confidentiality" exception to due process is indefensible, however. Preliminarily, "confidentiality" is a classic example of an exception swallowing the rule (in this case, disclosure to respondents). Determining whether a document or information is genuinely confidential is a highly burdensome process, and the frequency with which an agency undertakes it as doubtful. Indeed, an example of the absence of transparency in agency proceedings is the absence of information about whether, when and how an agency attempts to determine the legitimacy of confidentiality designations. Given the incentives described earlier in this argument, it is unreasonable to assume that agencies expend much if any effort on such an exercise, as disclosure may undermine rather than support a decision against a target. Accordingly, complainants and third parties hostile to the respondent are often inclined to designate virtually everything they submit as "confidential," a practice that appears not to trouble and may even be welcomed by the agency. A confidentiality exception to the due process requirement that all evidence be provided to a respondent, especially if the exception applies merely to information designated confidential by the provider with no review by an independent tribunal, seriously undermines the importance of the disclosure principle generally.

More fundamentally, confidentiality, however, provides no basis for dispensing with a measure so critical to the compilation of a complete and accurate record and preventing government abuse.[6] Even legitimately confidential information should be disclosed to respondents or at least their legal representatives. Measures are available to protect documents and information that are legitimately found "confidential" without opening the door to prosecutorial abuse or otherwise diminishing the contribution a respondent can make to the compilation of a complete and accurate record. These include prohibiting the respondent from using the documents and information outside of the investigation or proceeding, as well as limiting disclosure to the target's counsel and experts. This is the practice of United States' courts; documents and information are virtually never withheld from a defendant on confidentiality grounds, but are instead disclosed pursuant to a protective order placing appropriate limits on use and access, the violation of which may be punished severely. There are exceedingly few instances in which violations of protective orders are alleged, much less found.

B. Authorizing Collection Of Evidence By Investigation Targets

In most jurisdictions, including the European Union, China, South Korea and Japan, there is a gross disparity between the authority of the agency, on the one hand, and the targets of the agency's investigations, on the other, to obtain evidence from complainants and third parties. More specifically, most agencies have broad authority to compel production of evidence by threatening and imposing sanctions for non-compliance, while respondents have no authority at all to do so directly, or even indirectly through the agency. In addition, complainants and interested third parties that frequently stand to reap commercial advantage from an agency order against the target are quite willing to assist the agency to develop a record appearing to support such an order, while refusing to cooperate with the target. By contrast, few if any jurisdictions where the prosecutorial and adjudicatory functions are combined grant any authority whatever to investigation targets to compel the production of evidence from complainants and third parties, which typically lack any incentive to cooperate with the target and may even incur the risk of an agency's wrath were they to provide such cooperation.

This gross disparity in the ability to collect and present evidence is inimical to the compilation of a complete and accurate record. Agencies claiming to strive for such a record should revise or if necessary seek authority from their governments to revise their regulations to provide a means by which investigation targets may compel production of documents and information from third parties subject to their jurisdiction, and from complainants. One such means could be mandatory service by agency personnel on complainants and third parties of discovery requests prepared by targets, with responsive materials disclosed to the agency as well as the target (subject, as appropriate, to a protective order). The scope of such discovery should be the same as that permitted the agency.

C. Outside Legal Counsel For Targets

Competition law agencies in most jurisdictions allow targets of their investigations to be represented by outside legal counsel licensed to practice in their jurisdiction. A citizens of a jurisdiction different than that of the agency should also be allowed, at its option, to include outside counsel from its own jurisdiction, acting under the supervision of local counsel, as part of its defense team. The outside counsel with the greatest knowledge of the target, its business and its industry is likely to be located in the target's own jurisdiction. Such counsel can provide great assistance to both the target and local counsel, reducing the burden and cost on the target and its in-house counsel. The efficiencies of employing outside counsel from the target's home jurisdiction are even greater in a world where multiple agencies can and often do investigate the same conduct by the same target. Such outside counsel should be permitted to attend and speak at all hearings, meetings and conferences with agency investigators, prosecutors and decision-makers. This would be in addition to and never in lieu of participation by the target's outside local counsel, who would be responsible among other things for ensuring compliance with local rules and procedures.

D. Appointing And Expanding The Authority Of Hearing Officers

Some agencies employ "hearing examiners" (*e.g.*, the European Commission) or "administrative law judges" ("ALJ") (*e.g.*, U.S. FTC) to supervise certain aspects of the agency's investigation and post-investigation hearings and other procedures. One of the primary reasons for employing such officials is to allow for more neutral handling, relative to the agency's investigators and prosecutors, of scheduling and other procedural matters. All agencies should employ hearing examiners to minimize reliance on agency prosecutors to handle and resolve disputes with targets over such matters. These would include not only scheduling (*e.g.*, the timing of required submissions, hearings) but also disputes over the collection, disclosure and presentation of evidence. For example, hearing officers should resolve:

- disputes over the scope and timing of discovery requests propounded by agency personnel, and the investigation target;

- disputes over the legitimacy of any confidentiality designation, the completeness or timeliness of disclosure of allegations and evidence to respondents, and the need for and terms of a protective order to safeguard any legitimately confidential information; and

- requests for extensions of time to file responses to discovery requests and other submissions to the agency.

In addition, hearing officers should be authorized to receive and required to distribute to Commission personnel deciding the merits of a case complete and uncensored briefs and other materials submitted by the target.

Agency hearing officers/ALJs should be independent from agency investigators and prosecutors to the maximum extent possible. Measures that promote such independent include having these officials report to and be supervised by agency personnel who are not responsible for investigations and prosecution. Nor should agency investigators and prosecutors have input into the compensation or other terms of employment of hearing officers/ALJs.

E. Hearing Before Agency Decision-Makers/Prohibition On Ex Parte Communications

If the agency's investigators/prosecutors decide to formally charge a target with violations of their jurisdiction's competition law, the target should be entitled to a meaningful, live hearing to contest and present evidence and argument. The hearing should be scheduled by and presided over by a hearing officer or ALJ, to whom agency prosecutors and targets have equal access, and attended by all members of the agency who will vote on the agency's final decision. The hearing should be conducted on the merits and decided without deference to the agency prosecutors' view of the facts or applicable law. The agency should bear the burden of proof on all elements on alleged violation. The subjective beliefs of agency investigators and operators, no matter how strongly or sincerely held, should not formally or informally be used to shift the burden to the respondent.

In addition, all *ex parte* contacts between the hearing examiner/ALJ and agency members (and their personal staffs) on the one hand, and agency investigators/prosecutors or the target and its representatives on the other, should be strictly prohibited. Such *ex parte* contacts at which evidence and argument are presented by only one party to a legal or administrative proceeding, outside the presence of or without service on the other party, are the antithesis of a fair and open proceeding; yet such contacts by agency investigators and prosecutors may be routine. The absence of agency transparency forecloses any definitive statements about the frequency of this practice.

The prohibition on *ex parte* contacts should commence at the outset of the investigation. If there is any exception to the prohibition, it should be for communications during the early stages of the investigation intended to allow senior agency personnel to exercise some control over their agency's expenditure of resources. Absent an outright ban on *ex parte* contacts, a target and its representatives should be allowed to seek *ex parte* contacts with agency members entitled to vote on the agency's ultimate disposition of the case, and such members should be required to accept such contacts if they accept them from agency investigators/prosecutors. True equality of arms requires no less. Currently, e*x parte* contacts by an investigation target or its representatives may be regarded as inappropriate in at least some jurisdictions.

F. Agency Communications With The Media And Other Members Of The Public

In certain jurisdictions, the media and others often report statements about the preliminary or other views of agency personnel about the merits or status of a particular case or investigation, prior to the target having had an effective opportunity to challenge the allegations and evidence against it. These statements virtually always indicate guilt on the part of the target, and have the effect if not intent of creating expectations on the part of the

public for a decision against and the imposition of serious sanctions on the target. The likelihood of prejudice is especially palpable in the case of investigation targets that are citizens of a jurisdiction different than that of the agency, and that may lack the domestic political support required to counter the pressure on the agency to issue a decision against it.

To minimize potential prejudice from statements or reports in the media attributed to agency personnel, the commencement of an investigation, whether formal or informal, should be announced just once, and accompanied by a statement that fact of an investigation is not a tentative or other finding that particular conduct has occurred or is illegal, and should not be regarded by the public or other tribunals as evidence of conduct or guilt. Statements that an agency has decided to proceed with a formal investigation following an informal investigation are prejudicial and unjustified by any legitimate countervailing purpose. However, it is not unreasonable for an agency to respond to inquiries by noting that an investigation remains pending, if accompanied by the disclaimer that this is not a finding or evidence of a violation.

There is little doubt that statements about an agency investigation or case appearing in the media may be falsely attributed to identified or unidentified agency personnel. In that event, the agency should upon being informed of the statement promptly disavow it in the same media or other outlet in which the statement has been reported.

An agency should never punish or threaten to punish a respondent that attempts to refute a media report about a proceeding against it, or inform its own government about the conduct and status of such a proceeding.

Conclusion

Agency enforcement of competition law today is too often driven by industrial policy and skewed incentives inherent in systems that entrust the prosecution and adjudicatory functions to a single entity. The absence of transparency and procedural fairness in agency proceedings is both a symptom and cause of these problems. Absent the dismantling of these systems, agencies can restore at least some measure of confidence in the integrity of their decisions by adopting measures like those proposed herein. Until they do, their decisions should enjoy no presumption of validity, and should be disregarded by other tribunals conducting investigations and deciding cases against the same enterprise for the same conduct.

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[2] *See*, *e.g.,* D. Sokol, *Tensions Between Antitrust Policy and Industrial Policy*, 22 Geo Mason L. Rev. 1247 (2015).

[3] Limiting disclosure to materials "relied upon" by the investigators/prosecutors to allege or prove a competition law violation is inadequate. First, such a limitation may be interpreted to exclude exculpatory evidence. Second, the phrase "relied upon" is undefined and open to different interpretations even as to evidence that may tend to be incriminating. True equality of arms can be achieved only by providing to targets timely access to all evidence submitted to the agency by complainants and third parties.

[4]Written "Guidance" on Investigative Process issued last year by the International Competition Network ("ICN"), an association of government agencies charged with enforcement of their nations' competition laws, calls for the disclosure to investigations targets of access to all "evidence relied upon" (para.5.4) by the agency no later than its adoption of formal allegations of competition law violations. The ICN Guidance identifies and supports certain measures for protecting genuinely "confidential" business information (para. 9). Notably, however, those measures *exclude* nondisclosure of the information to investigation targets. Nondisclosure is an option only with regard to the public (*id*.). The ICN Guidance is welcome, but inadequate because it is non-binding and because it allows the secrecy of evidence to be maintained until the final hearing, at which time agency views may have hardened and public pressure to find a violation too great to overcome.

[5]*See* judgment of July 8, 1999 of the Court of Justice of the European Union Case C-51/92 P, *Hercules Chemicals NV v Commission* EU:C:1999:357, para. 75 (“access to the file in competition cases is intended in particular to enable the addressees of statements of objections to acquaint themselves with the evidence in the Commission's file so that on the basis of that evidence they can express their views effectively on the conclusions reached by the Commission in its statement of objections”).

[6] A distinction needs to be made between disclosure of evidence to a defendant, on the one hand, and to the public, on the other. The use of secret evidence threatens the respondent, not the public, with deprivation of liberty (e.g., “cease and desist” relief) and property. This article takes no issue with refusals of agencies to provide for or allow for disclosure to the public of documents and information that are legitimately designated “confidential.”