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Protecting Intellectual Property Rights Abroad: Due Process, Public Interest Factors, and Extra-Jurisdictional Remedies

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Several recent antitrust investigations involving the licensing of intellectual property rights (IPR) have raised concerns about fundamental due process and the alleged use of industrial policy in antitrust investigations to lower royalty rates, particularly for standard-essential patents (SEPs), in favor of local implementers. These concerns raise serious problems for innovation, economic growth, and consumers, and are likely compounded by the use of extra-jurisdictional remedies whereby one agency imposes worldwide portfolio licensing remedies, including on foreign patents, for conduct that may be deemed procompetitive or benign in other jurisdictions, which may facilitate a lowest-common denominator approach.

With respect to due process, reported concerns focus on the lack of the ability to meaningful present a defense to decision-makers, including allowing the participation of local and international counsel, notification of the legal and factual bases of an investigation, and the right to appeal any decision to an independent tribunal. Industrial policy concerns are tied, at least in part, to the fact that many foreign competition laws explicitly provide for the consideration of non-competition public interest factors. For example, China's Anti-Monopoly Law (AML) states that its purpose includes "promoting the healthy development of the socialist market economy," and that "[t]he state constitutes and carries out competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system."[2] Korea's Monopoly Regulation and Fair Trade Act states that its purpose is the promotion of "fair" competition and the achievement of "balanced economic development,"[3] while India's Competition Act instructs the Competition Commission to "keep[] in view…the economic development of the country."[4]

This article discusses core features of fundamental due process, concerns with the use of non-competition public interest factors, and potential dangers of imposing extra-jurisdictional remedies.

I. Due Process

a. Core Features of Fundamental Due Process

While process varies by jurisdiction, core features of fundamental due process have emerged based on substantial work by multilateral organization such as the International Competition Network (ICN) and the Organisation for Economic Co-operation (OECD).[5] Core features include:

1. Legal representation for parties under investigation, including allowing the participation of local and foreign counsel of the parties' choosing;

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[2] Anti-Monopoly Law of the People's Republic of China, (promulgated by the Standing Comm. Of the Tenth Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 68 STANDING COMM. NAT'L PEOPLE'S CONG., art. 1-2 (China).

[3] Monopoly Regulations and Fair Trade Act, Act. No. 8666, Oct. 17, 2007, art. 1 (S. Korea).

[4] The Competition Act, 2002, No. 12 of 2003, INDIA CODE, pmbl. (2003).

[5] INTERNAT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS, (2015); ORGANISATION FOR ECONOMIC CO-OPERATION, PROCEDURAL FAIRNESS AND TRANSPARENCY, (2012).

2. Notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies (including any exculpatory evidence);

3. Direct and meaningful engagement between the parties and the agency's investigative staff and decision-makers;

4. Ability to present a defense to decision-makers;

5. Protection of confidential information; and

6. Ensuring checks and balances on decision-making (including meaningful access to independent courts).[6]

b. Why Due Process from an Agency Perspective?

Providing fundamental due process can provide substantial benefits to agencies, including: allowing them to efficiently reach duly informed and vetted decisions; creating credibility with stakeholders and the public; facilitating reliable deterrence; and avoiding cooperation gaps in parallel investigations due to asymmetric information, which can contribute to different analysis and conflicting outcomes.[7]

Among other things, permitting the participation of local and foreign counsel of the parties' choosing allows agencies to hear the parties' side of the story from the legal representatives with the greatest familiarity with the facts and matter under investigation. Early engagement can save agency resources by focusing on dispositive issues, allowing an agency to develop and vet its case, and to gain insight into the parties' evidence and defenses. Similarly, informing the parties of the legal and factual basis of an investigation allows parties to make effective responses, which in turn allows the agency to better focus its investigation.[8] With respect to credibility with stakeholders and the public, concerns about process can create the impression that substantive results are flawed, undermining the perceived legitimacy of cases. In contrast, providing fundamental due process protections can bolster the legitimacy of the enforcement outcome. Lastly, with respect to deterrence, transparent and predictable decisions provide parties with guidance, facilitating their ability to determine in advance whether their actual or proposed conduct may violate the antitrust laws.

II. Non-Competition Public Interest Factors

The use of noncompetition public interest factors in competition analysis has received significant attention in recent years, particularly in the United States where the goal of antitrust law

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[6] *See generally id.*; Koren W. Wong-Ervin, *Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis*, 2 INTERNATIONAL ANTITRUST BULLETIN (ABA SECTION OF ANTITRUST LAW) 8, (August 2014) [hereinafter Wong-Ervin], https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_procedural_fairness_-_aug_2014.pdf; Abbott B. Lipsky, Jr. & Randolph Tritell, *Practices for Antitrust Procedure: Section of Antitrust Law Offers Its Model*, THE ANTITRUST SOURCE, http://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

[7] Wong-Ervin, *supra* note 6, at 9.

[8] *Id.* at 8.

is economic welfare.[9] This has not always been the case. In fact, for much of the U.S.'s history, courts and the antitrust agencies sought to use its antitrust laws to serve a hodgepodge of social, political, and economic goals. This all shifted in the 1970's when the U.S. Supreme Court, following substantial economic literature, held that the goal of antitrust is economic or consumer welfare.[10]

The U.S. experience has taught us that robust and undistorted competition produces substantial benefits for consumers and society as a whole by promoting growth, spurring innovation, and facilitating the efficient allocation of resources.[11] It has also taught us that competition law and policy is most effective when it focuses exclusively upon competition and consumer welfare rather than attempting to achieve simultaneously multiple goals, some of which may be in conflict with others. Indeed, economies with competitive domestic markets tend to have higher levels and rates of growth per capita income, and industries with greater competition experience faster productivity growth.[12] Competition in the domestic market creates efficient, productive firms that are better able to compete on global markets, which in turn increases economic growth and standards of living. A competitive market also enhances the innovative efforts of a society. "A market mechanism achieves much of its efficiency and its adaption to consumer desires through financial incentives, by providing higher payoffs to those firms that are more efficient and whose products are most closely adapted to the wishes of consumers. The same mechanism obviously drives innovation in an even more powerful way."[13]

Studies such as the McKinsey Global Institute's survey of the economic performance of thirteen nations further support this assessment.[14] The McKinsey survey supports the consensus view among economists that productivity makes a crucial difference in economic development and that the presence or absence of undistorted competition among firms is critical to productivity.[15]

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[9] *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription."); *Nat'l Society of Prof'l Engineers v. United States*, 435 U.S. 679, 690, 695 (1978) ("Under either [the per se rule or a rule of reason,] the inquiry is confined to a consideration of impact on competition conditions. . . . The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."); *see also* Federal Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section S of the FTC Act 1 (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf ("…an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process.").

[10] 435 U.S. 690, 695 ("Under either [the per se rule or a rule of reason,] the inquiry is confined to a consideration of impact on competition conditions. . . . The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.").

[11] GLOBAL ANTITRUST INST., COMMENT ON THE PROPOSED REVISIONS TO THE PEOPLE'S REPUBLIC OF CHINA ANTI-UNFAIR COMPETITION LAW (Mar. 24, 2016), http://masonlec.org/site/rte_uploads/files/GAI%20Comment_NDRC%20Illegal%20Gains%20and%20Fines_7-9-16_FINAL.pdf; *see also* Edith Ramirez, Chairwoman, FED. TRADE COMM'N, *Core Competition Agency Principles: Lessons Learned at the FTC* at 7 (May 22, 2014) [hereinafter Ramirez Speech], https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

[12] GLOBAL ANTITRUST INST., COMMENT OF THE GLOBAL ANTITRUST INSTITUTE, GEORGE MASON UNIVERSITY SCHOOL OF LAW, ON THE QUESTIONNAIRE FOR THE REVISION OF CHINA'S ANTI-MONOPOLY LAW 2, (Dec. 10, 2015), http://masonlec.org/site/rte_uploads/files/GAI%20Response_Questionnaire%20on%20AML%20Revisions_12-10-15_FINAL.pdf.

[13] *Id.* at 3.

[14] *See, e.g.*, William Lewis, THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY (2004) at 13.

[15] *Id.*

When competition is distorted, firms that fail to meet the demands of the market to produce what consumers want at competitive prices are not pressured to either improve or to exit the market. As a result, an entire economy becomes less competitive. Investment lags, jobs are more scarce, goods and services are more expensive, and more of what consumers spend goes to enriching monopolists instead of their own lives.

In addition, the use of non-competition public interest factors in competition analysis raises a number of other concerns, including:

1. the difficulty of balancing competition and non-competition factors across different markets and balancing efficiency concerns against equity concerns;

2. the likelihood that public policy issues may undermine consumer welfare considerations;

3. undermining clarity and predictability in antitrust enforcement; and

4. the lack of expertise by competition officials to weigh non-competition factors.

In a 2014 keynote address, then-U.S. Federal Trade Commission (FTC) Chairwoman Edith Ramirez elaborated on the importance of focusing solely on competition factors.

First, "a competition agency ultimately weighs the procompetitive gains and the anticompetitive harms to determine whether, on balance, the conduct is anticompetitive. Introducing public interest factors significantly complicates this analysis by requiring agencies to balance numerous factors across different markets and to balance efficiency concerns against equity concerns."[16]

"Second, public interest issues typically involve equity concerns that may undermine consumer welfare considerations."[17] Chairwoman Ramirez offered, as an example, merger approvals conditions on specified employment levels or local procurement. "While this may protect domestic jobs and producers for the short term, it often comes at a cost in terms of higher prices for consumers and a less efficient economy over the long run."[18]

Third, "it is important to consider the potential impact of implementing a test that attempts to reconcile a wide range of factors. Mixing social and political objectives within competition analysis may undermine the clarity and predictability of competition law and its enforcement, which is likely to deter investment."[19]

Fourth, competition agencies "are generally ill-equipped to undertake an analysis of non-competition public interest factors."[20]

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[16] Ramirez Speech, *supra* note 11, at 7.

[17] *Id.* at 8.

[18] *Id.*

[19] *Id.*

[20] *Id.*

Finally, to the extent that a competition agency nonetheless considers non-competition public interest factors, it should first complete its competition analysis and then consider any public interest factors so as to have a clear understanding of the tradeoffs including any potential welfare losses. It should also ensure transparency with respect to any public interest factors it takes into account, including what factors are being considered and the way in which it weighs the competition and non-competition considerations.[21]

III. Extra-jurisdictional Remedies

Concerns about due process and the use of public interest factors are likely intensified by the imposition of extra-jurisdictional remedies, which likely conflict with well-established principles of international comity. Specifically, extra-jurisdictional remedies can result in significant substantive conflicts given the wide variety of approaches taken globally on antitrust matters involving IPRs, particularly with respect to honoring an IPR holder's core right to exclude.[22] As a result, competition and welfare are likely to suffer, particularly if conduct that is widely considered to be generally procompetitive (such as bundling and cross-licensing) is prohibited worldwide.

The worldwide prohibitions also risk overdetterence because parties will be subjected to multiple authorities for the same conduct, and the agencies may not coordinate to adjust their penalties. Further, applying comity principles in the context of IPRs and antitrust enforcement is particularly important because of the inclusion of non-competition factors in national agencies' competition decisions and the wide variety of IPR enforcement approaches among the agencies.[23]

Thus, limits on global remedies are appropriate to mitigate that risk, and honoring principles of comity prevent the lowest common denominator from governing across the board. These global remedies are also likely unnecessary to resolve harm to consumers in the jurisdictions imposing them. It only seems necessary if the aim is to protect domestic manufacturers who export, which is not the goal of U.S. antitrust law nor even consistent with the mainstream approach to competition policy, which is focused on harm to the competitive process and to consumers, as opposed to protection of domestic firms against foreign rivals.[24]

IV. Conclusion

Many competition agencies contend that providing fundamental due process protections requires time, calling on the international community to be patient with them. While it may be true that experience, time, and confidence may improve agency officials' ability to provide some of the core features of due process, such as meaningful engagement with the parties on theories of harm, the core features of fundamental due process should be implemented from an agency's inception. At the very least, they should be firmly in place prior to an agency's initiation of complex investigations involving IPRs, particularly given the risks from false positives on innovation,

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[21] *Id.*

[22] *See* Koren Wong-Ervin *et al.*, *Extra-Jurisdictional Remedies Involving Patent Licensing*, COMPETITION POLICY INT'L (Dec. 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2870505.

[23] *Id.*

[24] *Id.*

economic growth, and consumer welfare.

With respect to non-competition public interest factors, although the competition laws of some countries explicitly provide for the consideration of such factors, it is important for agencies to carefully consider the tradeoffs of attempting to weigh and balance competition and non-competition factors and efficiencies against equity concerns.

Lastly, extra-jurisdictional remedies, particularly worldwide portfolio licensing remedies, pose risks of over-deterrence and substantive conflicts with the competition agencies of other countries, particularly given the substantially different approaches of agencies with respect to matters involving IPRs.