IP AND ANTITRUST: THE IMPORTANCE OF DUE PROCESS AND THE ICC BEST PRACTICES

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I. INTRODUCTION

The need to implement effective procedural rights and guarantees to ensure the fair and proportionate exercise of competition agencies' enforcement powers has been a topical subject for many years.[2] However, in light of increased enforcement levels by an ever growing number of competition agencies, often with diverging procedural and substantive rules, and resulting heightened risks of inconsistent outcomes, due process requirements have never been more relevant. The growing cross-border dimension of antitrust investigations exacerbates this risk, particularly in IP-centric cases, where the potential impact of remedies may go well beyond the relevant domestic market(s) at issue.

The effective observance of due process principles across jurisdictions is therefore essential to ensure procedural fairness and transparent decision-making and to minimize the risk of ill-informed decisions.

This contribution discusses the relevance of procedural rights in antitrust enforcement in light of the Best Practices issued by the Competition Commission of the International Chambers of Commerce, the world's largest business organization (the "ICC Best Practices") and it highlights their crucial role in the context of IP-related cases.[3] In addition, this paper examines a number of specific procedural safeguards which are not always guaranteed, are not uniformly available, or are not always effectively applied by competition agencies.

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2 Lugard (2014), "Procedural Fairness and Transparency in Antitrust Cases: Work in Progress," *CPI*, Antitrust Chronicle, Summer 2014, Vol. 6, Number 1; Wils (2011), "EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay Between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights," *World Competition*, Vol. 34, No. 2; Forrester (2009), "Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures," E.L. Rev, December; Temple Lang (2013), "The strength and weakness of the DG Competition Manual of Procedure," 1 J. of Antitrust Enforcement 1. For a U.S. perspective on due process see Gingsburg & Owings (2015), "Due process in Competition Proceedings," *Competition Law International*, Vol. 11, No. 1.

3 ICC Commission on Competition, "Effective procedural safeguards in competition law enforcement proceedings" (225/765), published on July 7, 2017, available at: https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf. The International Chamber of Commerce ("ICC") is the largest business organisation in the world. It represents hundreds of thousands of member companies in over 130 countries.

II. THE ROLE OF DUE PROCESS IN ANTITRUST ENFORCEMENT PROCEEDINGS

The fundamental aim of procedural safeguards in competition law enforcement proceedings is to ensure consistent, predictable and fair decision-making by competition enforcement agencies. Their effective and timely implementation during each step of the proceedings not only ensures procedural fairness for the parties under investigation and other interested parties, but also benefits competition enforcement agencies by enhancing their legitimacy, increasing efficiency and promoting accuracy and better informed decisions. Indeed, the credibility of competition agencies is closely tied to the integrity and public understanding and perception of the agencies' investigative process.

Unfortunately, due process shortcomings risk becoming increasingly problematic in light of competition agencies' growing tendency to intervene in fast-moving (e.g. online, digital and high-tech) markets. The time pressure resulting from the dynamic nature of these markets may in fact cause agencies to assess cases at a faster pace and potentially overlook strict compliance with procedural rights.

In order to bridge the gap between due process theory and practice, numerous multilateral efforts have been made to attempt to clarify the importance and application of due process rights, including by the Organization for Economic Cooperation and Development ("OECD"),[4] the Business and industry Advisory Committee to the OECD ("BIAC"),[5] the International Competition Network ("ICN"),[6] the American Bar Association ("ABA")[7] and by National Competition Authorities ("NCAs").

Due to the developments highlighted above, there is a need for further guidance on the implementation and application of procedural rights at this time. Accordingly, and building on previous efforts, the Competition Commission of the ICC has recently issued Best Practices on effective procedural safeguards in competition proceedings.[8] The ICC Best Practices set out a number of fundamental overarching principles of due process that should apply in competition law enforcement proceedings, and provide specific standards that competition enforcement agencies should adopt to ensure their rules and procedures conform to due process norms.[9]

III. THE CRITICAL IMPORTANCE OF DUE PROCESS IN ANTITRUST CASES INVOLVING IPR

Procedural rights are of general application in antitrust proceedings. However, it is even more critical that competition authorities comply in an effective manner with due process requirements in antitrust cases involving intellectual property rights.

IP-related cases tend to raise technical and complex substantive issues that do not always arise in other, more conventional, antitrust cases and which, if not dealt with properly, may have very profound implications for the businesses involved. As explained in more detail below, the setting of ("FRAND") licensing terms, the imposition of compulsory licensing and other, similar remedies by competition agencies, generally under the competition rules dealing with exclusionary conduct, are capable of irreparably undermining the business model of IP-centric businesses. Furthermore, improperly designed IP remedies may lead to profound changes in market conditions, which cannot simply be reversed by a successful appeal.

4 See OECD Competition Committee, Procedural Fairness and Transparency: Key Points (Apr. 2012), available at: http://www.oecd.org/daf/competition/mergers/50235955.pdf.

5 See Summary of Discussion Points presented by BIAC to the OECD Competition Committee, June 2016, Roundtable on Commitment Decisions in Antitrust Cases, available at: http://biac.org/wp-content/uploads/2015/06/2015-06-10-BIAC-Competition-Committee-Oligopoly-Markets1.pdf.

6 See ICN Roundtable on Investigative Process, Due Process in Competition Proceedings, March 25, 2014, available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc958.pdf.

7 See Hockett, "Antitrust and Due Process", Antitrust, Vol. 28, No. 2, Spring 2014. See also the Joint Comments of the American Bar Associations Section of Antitrust Law and Section of International Law And Practice on the Commissions Green Paper on the Review of Council Regulation (EEC) No 4064/89 (2007).

8 ICC Best Practices, supra note 3.

9 ICC Best Practices, page 1.

Thus, while some of the risks being taken by today's innovators are significant, they may rely on fragile rewards systems that could potentially be eliminated by overly extensive antitrust remedies. Moreover, even if competition agencies have correctly identified competitive harm and all the necessary elements for an actual antitrust violation, devising an appropriate remedy – such as a compulsory license or establishing appropriate licensing terms – is a difficult and technical task, for which some antitrust enforcers may not be well placed.

In order to avoid the hardship caused by the irreversible nature of remedies in IP-related antitrust cases, firms need to be able to seek the assistance of the courts to not only set aside incorrect agencies' decisions, but also to stay their enforcement pending final determination. At the European level, the Rules of Procedure of the Court of Justice allow for the suspension of the operation of a contested decision of the European Commission.[10] However, the case-law of the European Courts has established a very high threshold for the granting of a stay of enforcement. Specifically, measures of this nature cannot be considered unless the factual and legal grounds relied upon to obtain them establish a *prima facie* case for granting them. In addition, there must be urgency in the sense that it is necessary for the measures to take effect before the decision of the Court on the substance of the case in order to avoid serious and irreparable damage to the parties seeking them. Finally, they must be provisional in the sense that they do not prejudge the decision on the substance of the case.[11]

Notwithstanding this high threshold, the courts of the European Union have recognized the far-reaching consequences of remedies in IP-related antitrust cases. In particular, they have previously held that a stay of enforcement was warranted and indeed necessary in the context of two European Commission decisions imposing compulsory licensing remedies.

In *Magill*,[12] the European Commission had issued a decision holding that broadcasters ITP, BBC and RTE had abused their dominant position by refusing to grant licenses for the use of copyrighted information concerning TV program timings. On appeal, the Court of Justice of the European Union ("CJEU") granted a stay of enforcement of the decision, stressing that the compulsory licensing remedy imposed by the Commission "might [have led] to a new development on the market that would subsequently be very difficult, if not impossible, to reverse."[13] A similar position was adopted by the General Court of the European Union in *IMS Health*,[14] where the European Commission also imposed a compulsory license remedy on IMS after finding that it had abused its dominant position by refusing to license the use of a copyrighted brick structure forming the basis of reporting data on sales of medicinal products. The General Court suspended the operation of the Commission decision on the basis that the likely market developments which would result from its immediate execution would be very difficult, if not impossible, to reverse if IMS were successful in its appeal.[15]

Magill and *IMS Health* well illustrate the high risk associated with the imposition of IP-related remedies in antitrust cases, and stress the irreversibility of market developments flowing from their execution. They acknowledge the particular sensitivity of IP-related cases and, importantly, point to an even greater need for strict due process compliance by competition authorities.

The concerns highlighted by the Courts in *Magill* and *IMS Health* are particularly relevant, as court procedures in antitrust cases in a number of jurisdictions do not seem to provide for an effective system to stay the imposition of antitrust remedies pending a judgment on the legality of the competition agency's decision. The ICC Best Practices stipulate that courts should have the power to order the suspension of an agency's decision under appeal, in whole or in part, if its enforcement would have severe consequences on the investigated party or would be against the public interest.

10 Rules of Procedure of the Court of Justice, Article 160.

11 See Case 114/83 R, *Société d'initiatives et de coopération agricole and Société interprofessionnelle des producteurs et expéditeurs de fruits et légumes v. Commission*, ECLI:EU:C:1983:203, para. 2.

12 Joined Cases 76, 77 and 91/89, *RTE v. Commission*.

13 Ibid. para. 18.

14 Case T-184/01 R, *IMS Health v. Commission* [2001] ECR II-3193.

15 Ibid. para. 129.

IV. DUE PROCESS RIGHTS AND THE ICC BEST PRACTICES

Due process rights in competition proceedings are generally considered – at least in the EU – to be composed of a variety of legal instruments.[16] They include – but are not limited to – the right of access to file, the right to be heard (i.e. the right to respond to allegations of anti-competitive conduct), the right to have a decision within a reasonable time, the right of the addressees to obtain the reasons of the measure adopted, the right to confidential treatment of business secrets, the right of effective access to judicial review and the right to consistency and predictability in decision-making. The above key principles should be implemented and observed at all stages of the administrative procedure, and the ICC Best Practices provide guidance on how to achieve this effectively.

The following sub-sections focus on due process rights which antitrust agencies are known to sometimes fail to implement to a sufficiently fair, effective and transparent standard, including the right of access to file and the right to be heard. In addition, they comment on the exercise of a competition agencies' discretion to embark upon (as well as terminate) an antitrust investigation, and set out corresponding ICC Best Practices.

A. The Right of Access to the File and Confidentiality Claims

The right of access to file is a fundamental element of the rights of the defense. Undertakings under investigation must be given the opportunity to examine all documents collected by the agency, including both inculpatory and exculpatory documents. This is key to ensuring that the investigated party is on equal footing with the agency: a core element of due process. Importantly, competition agencies need to strike a fair balance between the right of access to file – which is not absolute – and the right of complainants and other interested parties to the confidential treatment of their business secrets.

Even at the EU level, where there have been established rules protecting investigated parties' access to file for many years, there are still cases where the Community Courts find that the European Commission has failed to grant the requisite access to undertakings before finding an infringement. For example, in *Dresdner Bank v. Commission,*[17] the General Court held that the Commission could not rely on inculpatory evidence contained in the reply of one of the addressees of the statement of objections ("SO") because the applicant had been refused access to it in the course of the administrative procedure.[18] As a result, the agency was unable to prove a price fixing agreement to the requisite legal standard and its decision was annulled. While this case is an example of effective judicial protection, a similar failure to grant access to file and resulting in the imposition of remedies in an IP-related case may, as explained above, have much more profound consequences that are often irreversible on appeal.

Therefore, it is essential that competition authorities do not accept over-inclusive confidentiality requests which unjustifiably encroach on the investigated party's ability to adequately prepare its defense. Accordingly, the ICC Best Practices provide that safeguards for confidential information must be "reasonable" and that confidentiality claims should be carefully balanced against due process rights and evaluated based on clear and transparent procedures.[19] Moreover, satisfactory access to the file must be granted in sufficient time for the investigated parties to assess the information in preparation for their defense.[20] A failure to provide timely access to file may prevent investigated parties from presenting their observations on the complaints/objections raised against them before the final decision, and from effectively exercising their right to be heard.

16 Some are enshrined in statutory instruments: the founding Treaties (Treaty on the European Union and Treaty on the Functioning of the European Union), the Charter of Fundamental Rights of the EU, the European Convention on Human Rights and EU secondary legislation (in particular Regulation 1/2003 and the Implementing Regulation 773/2004). Others can be found in the case-law of the EU Courts and of the European Court of Human Rights. They often stem from general principles of law or from the legal traditions and case-law of the Member States. Finally, several important procedural rights originate from the EU Commission's administrative practice.

17 Case T-44/02 OP, *Dresdner Bank v. Commission*, ECLI:EU:T:2006:271.

18 Ibid. para. 160.

19 Best Practices, Section 3.5(2).

20 Ibid.

B. The Right to be Heard

The right to be heard provides that any firm subject to antitrust proceedings must have the opportunity to present its views on the veracity of the objections raised against it, be it on factual or legal grounds. This includes a right to respond in writing and a right to an oral hearing. In order to effectively exercise their right to express, formulate or verbalize observations, investigated parties must not only be given timely access to the file, but also sufficient time to respond to allegations of misconduct.

In the context of administrative proceedings before the European Commission, investigated parties are generally made aware of the authority's allegation in a SO, and are given a set amount of time to reply in writing. Investigated parties may request an extension of the deadline to the Hearing Officer for competition, whose mandate is to ensure that their due process rights are respected. However, such procedural safeguards are not available in all jurisdictions. There are still instances where competition authorities consistently fail to communicate their objections to the investigated parties with sufficient notice before adopting a final decision. For example, there are new competition regimes outside of Europe, in particular in the Commonwealth of Independent States ("CIS") and Asia, in which agencies do not issue SOs, issue letters or similar documents and only inform the investigated parties of their concerns by sending them a draft decision shortly before publishing its official version.[21] It is hard to imagine how, in such circumstances, investigated undertakings would have a meaningful opportunity to comment (either in writing or orally) on the agency's objections and effectively plan their defense.

In this regard, the ICC Best Practices state that competition enforcement agencies should provide investigated parties with a period no shorter than 60 days to prepare and present their response to allegations.

The need to provide investigated parties with sufficient time to respond to allegations also arises in the context of the oral hearing, where undertakings should have the opportunity to challenge the competition authority's objections. In particular, agencies are sometimes criticized for using the oral hearing to "ambush" investigated parties by confronting them with new, previously undisclosed, accusations. The ICC Best Practices recognize that in order to be able to prepare their defense and effectively respond to allegations, investigated parties should be properly informed prior to the hearing of any new allegations.

Ensuring a level playing field between the investigated parties and the authorities through the effective implementation of procedural rights is all the more important in cases where there is little opportunity for investigated parties to have meaningful engagement with the agency's officials. The mere fact of corresponding or meeting with the agency's case team does not guarantee a meaningful interaction or exchange concerning the nature of the complaints, the theory of harm and all the crucial elements that investigated parties need to be aware of in order to prepare their defense. Accordingly, the ICC Best Practices provide that there should be on-going and meaningful engagement between the case team and the investigated parties throughout the proceedings, which includes the opportunity to meet officials and higher-level decision-makers in the agency at critical stages.

C. The Right to Expedient Proceedings and the Decision to Open/Close an Investigation

Under EU law, investigated firms also have a right to expedient proceedings. This right applies to the period which starts with the adoption of a SO and ends with a final decision. Prior to this, the European Commission can in principle take as much time as it wants to investigate a case and gather evidence. The rationale behind this view is that an investigation is not *per se* capable of adversely affecting the rights of the defense, since the undertakings concerned are not subject of any formal accusation until they receive a SO.[22] Notwithstanding this, the EU courts have recognized that an excessively lengthy investigative phase may reduce the effectiveness of the rights of defense in the second phase. For example, if the investigation is protracted, the Commission may be able to adduce a rich body of inculpatory evidence. This in turn, elevates the burden of proof on the suspected firm at the post-SO stage, and its ability to defend itself within a strict timeframe. Furthermore, if the internal organization of the suspected firm changes over time, key individuals familiar with the case may no longer be present after the adoption of the SO.

21 The author is aware of one instance where the notice period was as short as four business days.

22 See Joined Cases T-5/00 and T-6/00, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie BV v. Commission,* [2003] ECR II-05761, paras. 77-80.

Overall, excessively lengthy investigations leave investigated firms in a state of enduring legal uncertainty, which may unduly affect stakeholders' decision-making in terms of strategy and investment.[23] In the *Dutch Beer* cartel case,[24] the General Court of the EU found that the European Commission had infringed the firm's right to expedient proceedings by issuing an infringement decision more than seven years after the start of the investigation. The Court held that the duration of the administrative procedure was unreasonable, and it ordered a reduction of five percent of the amount of the fine. Whether the reduction was quantitatively appropriate is arguable. What is less arguable is the notion that, in reaching decisions and making judgment calls on how to instruct an investigation, antitrust agencies should take due account of the impact of the investigation on the companies' operations, resources and reputation and operations, as well as the legal expenses incurred by undertakings throughout the course of the procedure.

In light of the above, it is crucial that competition agencies are disciplined to critically assess whether they have sufficient information to objectively start an investigation. Investigations should only be embarked upon where genuinely motivated by objective consumer welfare concerns, rather than by a desire to protect domestic industries, pursue national industrial policies, or advance perceived national security interests. Moreover, competition agencies must not hesitate to end on-going investigations where there are no *prima facie* concerns after a certain period of time. The ICC Best Practices address this issue and provide that agencies should proactively and swiftly end proceedings where the allegations of anti-competitive conduct do not appear to have merit or where there is no clear discernible public interest in continuing to pursue an investigation.

V. CONCLUDING COMMENTS

Today, there are more than 130 competition and consumer protection authorities active worldwide.[25] As these agencies are increasingly engaged in competition enforcement, the international competition arena is being confronted with a complex challenge: how to ensure that antitrust proceedings remain fair and objective in light of the significant divergences in processes and standards being followed by enforcers around the world.

Meaningful procedural safeguards are essential to ensure fairness and objectivity of antitrust enforcement, in particular in the context of IP-related cases where remedies may have far-reaching consequences on business models and market developments.

Multilateral efforts by international organizations have already advanced an important global dialogue on due process and they need to continue. In this context, the ICC Best Practices provide a set of due process requirements aimed at facilitating the development of a more uniform standard across jurisdictions.

23 In some jurisdictions the right to expedient proceedings translates into an obligation on the competition agency to issue a decision within a set period (e.g. 10 months) of starting the investigation. While such a measure prevents excessively lengthy investigations, it may also have a negative effect: in particularly complex cases, the agency may lack sufficient resources to complete the analysis within the set timeframe, which may result in the issuing of a decision that is not well-reasoned.

24 T-240/07, *Heineken Nederland and Heineken v. Commission*, ECLI:EU:T:2011:284.

25 Federal Trade Commission, Competition & Consumer Protection Authorities Worldwide, available at: https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide.