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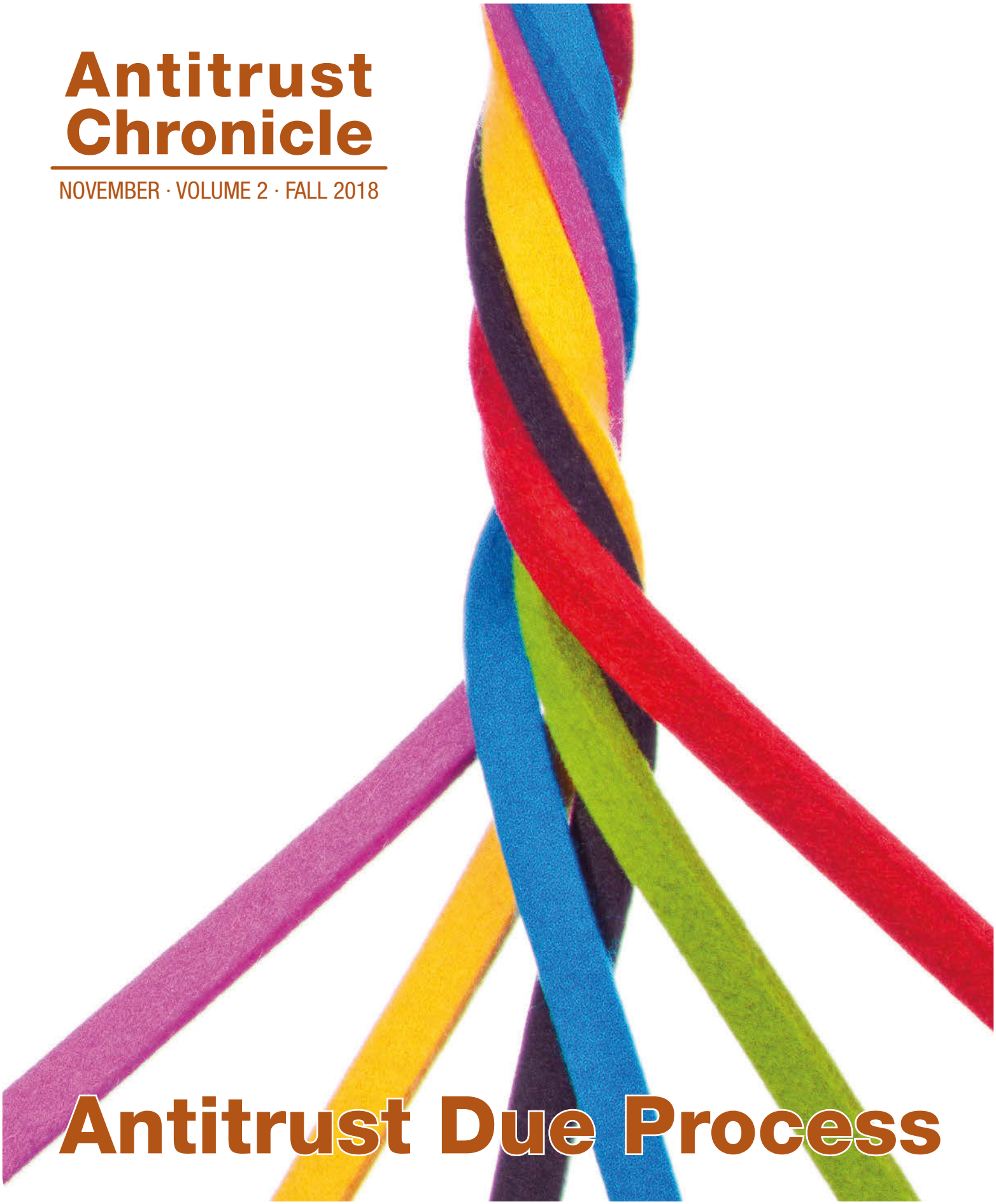

Antitrust Due Process

CPI COMPETITION POLICY INTERNATIONAL

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LETTER FROM THE EDITOR

Dear Readers,

The November 2018 CPI Antitrust Chronicle features articles which play a role in the global conversation about norms for antitrust due process. As companies increasingly engage in international/global business transactions, there is also a growing number of jurisdictions with competition agencies (over 140 agencies in over 100 countries) that enforce competition laws.

These antitrust enforcers have long worked together, through the ICN, OECD, and other international intergovernmental and private organizations, to build best practices and international consensus. As one of this month's authors notes, "a consensus on high-level principles may mean little without a commitment to embed fairness into the day-to-day practices and choices that guide agency investigations and decision making."

On June 1, 2018, the U.S. DOJ's Makan Delrahim, announced that the United States will finalize and join the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement. Delrahim seems to be pushing for due process concerns to be a top priority for antitrust and competition enforcement: "With more than 140 competition agencies, and increased international commerce, including digital commerce, it is more and more critical that we share a common set of principles that affords due process to individuals and businesses in investigation and enforcement."

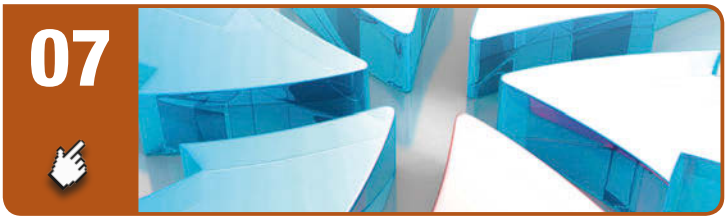
So, where do things stand today with the developing consensus around procedural fairness, rights of defense, transparency, and other due process issues in antitrust enforcement around the world? And what are some ways to facilitate and nurture even more progress?

As always, thank you to our great panel of authors.

Sincerely,

CPI Team

SUMMARIES



Procedural Fairness: Convergence in Process

By Paul O'Brien

Competition agency process can be just as important as substance when it comes to effective enforcement. Over the past decade, the scrutiny of agency process has led to the identification and promotion of consensus principles for the provision of procedural fairness during competition investigations at the OECD, ICN, and elsewhere. But a consensus on high-level principles may mean little without a commitment to embed fairness into the day-to-day practices and choices that guide agency investigations and decision making, and ultimately affect enforcement outcomes. This article explores the developing consensus around procedural fairness principles and practices and suggests possible ways for more progress.

Advances in International Due Process Considerations: Proper Compliance Mechanisms Could Propel Convergence

By Jana I. Seidl & James F. Rill

Convergence in practice on due process principles is critical to the evolution of international antitrust. While international intergovernmental and private organizations have long promoted best practice and guidance documents on due process principles, more remains to be done. The Department of Justice recently announced the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement ("MFP"). Unlike previous efforts, the MFP contemplates a mechanism for accountability with respect to participants' adherence to issued guidance, which evokes a promise for evolution of adherence to and implementation of basic due process standards. If the MFP can shine a light on the extent to which nations implement due process norms, the new direction in which it may take the international antitrust community is an important and salutary development.

Due Process and Production of Documents Stored Abroad: A Review of Antitrust Discovery Tools After *Microsoft Ireland* and the Cloud Act

By Valeria Losco & Terry Calvani

This article discusses one specific issue raised by new technologies in antitrust investigations: the production of documents stored abroad. Until recently government agencies could only request the production of documents available on the territory where they had jurisdiction, but new technologies have challenged the concept of what is "available" in a particular territory. Generally the governing law is silent in this respect. Over the last couple of years legislatures and courts around the globe have started to address this issue. This article reviews these recent developments, with a particular focus on U.S. antitrust proceedings and an overview of the main developments in Canada and Europe.

What's the Appeal? How the General Court and Competition Appeal Tribunal are Shaping the EU and UK Antitrust Regimes

By Paul Gilbert

This article considers why European Commission antitrust decisions seem less vulnerable to appeal on substance than equivalent decisions by the UK authority ("CMA"). It considers whether differences in the investigation procedures have resulted in more robust decisions. It also considers whether differences in the standard of judicial review or other features of the appeal process are responsible for different levels of intervention. It concludes that greater judicial intervention in the UK has been responsible for driving enhancements to the authority's investigation procedures and argues that similar intervention by the General Court could reduce the risk of confirmation bias in EU decisions.

SUMMARIES

WHAT'S NEXT?

Our December 2018 Chronicle will focus on issues related to **Multi-Sided Markets & Consumer Harm** and notably the recent Google Android decision in the EU.

ANNOUNCEMENTS

CPI wants to hear from our subscribers. In the remaining months of 2018, we will be reaching out to members of our community for your feedback and ideas. Let us know what you want (or don't want) to see, at: antitrustchronicle@competitionpolicyinternational.com.

CPI ANTITRUST CHRONICLE JANUARY 2019

Starting in January 2019 CPI will be publishing two Chronicles each month. For January 2019, we will feature Chronicles focused on issues related to (1) **Behavioral Economics**; and (2) **Leniency**.

Contributions to the Antitrust Chronicle are about 2,500 – 4,000 words long. They should be lightly cited and not be written as long law-review articles with many in-depth footnotes. As with all CPI publications, articles for the CPI Antitrust Chronicle should be written clearly and with the reader always in mind.

Interested authors should send their contributions to Sam Sadden (ssadden@competitionpolicyinternational.com) with the subject line "Antitrust Chronicle," a short bio and picture(s) of the author(s).

The CPI Editorial Team will evaluate all submissions and will publish the best papers. Authors can submit papers in any topic related to competition and regulation, however, priority will be given to articles addressing the abovementioned topics. Co-authors are always welcome.

PROCEDURAL FAIRNESS: CONVERGENCE IN PROCESS

BY PAUL O'BRIEN[1]

1 Paul O'Brien is Counsel for International Antitrust in the Office of International Affairs of the U.S. Federal Trade Commission ("FTC"). The views expressed are his and do not necessarily reflect those of the FTC or any individual Commissioner.

I. INTRODUCTION

The quality of competition agency enforcement depends on the quality of agency process. This is the underlying idea that has driven scrutiny and discussion of agency process over the last decade. Call it due process, procedural fairness, natural justice, or plain old transparency and fairness,[2] there is increasing recognition that sound enforcement outcomes depend upon sound process and with it, support for international convergence towards due process principles.

The global expansion of competition law enforcement in the 1990s and 2000s that brought new competition laws, agencies, institutions, and procedural frameworks to many jurisdictions has allowed for a great comparative exercise of the 2010s and 2020s. Accumulated records of enforcement experience and growing bodies of commentary and appellate reviews have allowed informed comparisons of outcomes – how agencies (and courts) conduct competition analysis and make enforcement decisions. Similarly, attention to one of the primary inputs into enforcement decisions[3] – *process*, or how agencies investigate – has increased. More comparisons by companies involved in parallel reviews and agencies involved in enforcement cooperation and other exchanges have led to greater recognition of practices that are perceived as lacking in due process. In turn, this has prompted the identification of common procedural norms and calls for convergence towards best practices. Consolidation around and implementation of basic procedural standards presents the international competition community with the potential to improve enforcement effectiveness and efficiency.

II. WHY FOCUS ON FAIRNESS?

The justifications for procedural fairness during competition law enforcement generally fall into three categories, focused on different perspectives: the rights of the parties, agency decision making, and the overall mission of the enforcement system.

A. Parties: Fundamental Requirements

The starting point for the provision of procedural fairness is the rule of law and its even application to entities subject to it. Fairness in enforcement is not unique to competition law but often a fundamental part of a jurisdiction's broader legal system derived from constitutional provisions, charters of rights and judicial decisions.[4] This view of fairness as due process to parties focuses on legal requirements, fundamental rules of procedure, and basic protections such as appropriate notice and the opportunity to be heard. This core of due process – safeguarding the rights of parties – is often the first aspect that comes to mind and the one that receives the most attention, particularly from parties that believe they have been subject to inadequate process and for appellate scrutiny.

B. Agencies: Effectiveness through Fairness

> It is sometimes suggested that adequate procedural rights only exist for the benefits of parties that are subject to antitrust investigation . . . However, it is now 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.[5]

The second line of reasoning in support of procedural fairness is focused on agencies and specific enforcement outcomes. The provision of procedural fairness informs investigation and decision making, leading to better outcomes.[6] Transparency to and engagement with parties

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2 For ease of drafting, "due process" or "procedural fairness" are used most often to convey these similar ideas. The OECD's Competition Committee concluded that "[t]he term 'due process' in competition proceedings does not have a clearly defined meaning and is generally understood in terms of 'procedural fairness.'" OECD Competition Committee, *Procedural Fairness: Transparency issues in civil and administrative enforcement proceedings*, Issues Paper, DAF/COMP [2010] at 11 (October 5, 2011) (hereafter OECD 2011).

3 D. Daniel Sokol, Due Process, *Transparency and Procedural Fairness in Asian Antitrust*, Competition Policy International Asia Column (January 2015) at 5 (hereafter Sokol 2015).

4 For example, the European Union Charter of Fundamental Rights, Article 41, Right to good administration embodies due process principles by stating that "every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union." In the United States, the principles of due process come from the Fifth Amendment to the U.S. Constitution that prevents the federal government from depriving "life, liberty, or property, without due process of law."

5 Paul Lugard, *Procedural Fairness and Transparency in Antitrust Cases: Work in Progress*, Competition Policy International Antitrust Chronicle (June 2014) at 4.

6 Paul O'Brien, Krisztian Katona, & Randolph Tritell, Procedural Fairness in Competition Investigations, Competition Policy International Antitrust Chronicle (July 2015) at 2.

and third parties can increase the understanding of critical facts, evidence, and areas of dispute.[7] Opportunities to respond allow agencies to sharpen their investigative theories by testing theories and evaluating evidence and counterarguments, improving the quality of decision making.[8] Better-informed and focused investigations can also improve investigative efficiency and the use of agency resources. The OECD Competition Committee recognized that "[t]ransparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority."[9]

This view of the value of fairness is not limited to legal requirements, but also includes aspects of process that are often within agency discretion to address the needs of investigations, such as early interaction with parties or modification of requests for information. Whereas the party-focused arguments amount to "fairness to companies is required," this agency-based justification is premised on the idea that "fairness is good for consumers and markets via better enforcement outcomes." The latter has an obvious attraction to agencies considering whether to undertake the resources and burdens to ensure sound process.

C. Enforcement System: Protecting the Mission

The third angle from which to view procedural fairness involves the health of the competition enforcement system as a whole, specifically the credibility of the agency and its mission. Much of the discourse around the provision of procedural fairness cites competition agency credibility. ICN's Guidance on Investigative Process proclaims that the "credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency's investigative process and public understanding of such process."[10] Canada's former Commissioner of Competition emphasized "the importance of justice, procedural fairness and due process and the important role they play in establishing, maintaining and enhancing the credibility of our competition institutions."[11] The Director General for Competition for the European Commission has stated that "[i]f a competition authority wants to maintain credibility and trustworthiness – in the eyes of courts, counterparts, businesses and consumers – it must help ensure fairness and above all guarantee procedural fairness."[12]

Sound process is an important foundational piece of the overall mission of competition law enforcement to protect consumers and competition by even, fair application of the law to all involved, and not at the expense of specific market participants. Like any other law enforcement, fact-based, objective analysis guided by fair procedures confers legitimacy to specific case outcomes as well as the agency's overall mission. Inadequate process contributes to inferior outcomes and can prompt contempt for competition law and competition agencies. The benefits of sound procedural rules and practices and an agency's enforcement credibility go beyond specific cases before the agency. They help promote increased compliance and deterrence, as companies and individuals have clear guidance with which to attune their conduct with the law and agency enforcement.[13]

D. Fairness Beyond Borders

The argument that sound process helps support a healthy enforcement environment has been extended to the international level. Increasingly, agencies recognize that process can affect enforcement cooperation.[14] An agency's commitment (or lack of) to sound process and fairness has reputational value with its peers, part of a currency of trust between agencies that approach matters with rules and practices that ensure fairness, informed decision making, and an objective application of the law. An agency's willingness to cooperate with its counterparts, as well as the frequency, scope, and depth of such cooperation, in part reflects the perceptions of whether the partner is committed to sound process.

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7 ICN Report on Competition Agency Transparency Practices (2013) at 4 (". . .transparency during the investigative process is a key element to improving both the quality of evidence presented and the reasoning on which competition agencies base enforcement decisions.").

8 See, for example, Edith Ramirez, Keynote Address by FTC Chairwoman Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC*, Antitrust in Asia Conference, Beijing, China (May 22, 2014) at 4-5 (hereafter Ramirez 2014). ("I have experienced how listening to parties enables me to make better, more informed decisions, and this applies equally to FTC staff and managers who routinely engage with parties throughout their investigations."); Sokol 2015 at 3-4.

9 OECD 2011 at 26.

10 ICN Guidance on Investigative Process (2018), Introduction.

11 John Pecman, Commissioner of Competition, *Competition Law in a Global and Innovative Economy—A Canadian Perspective*, BRICS Conference, New Delhi, India (November 21, 2013).

12 Johannes Laitenberger, Director-General for Competition, European Commission, *EU Competition Law in Innovation and Digital Markets: Fairness and The Consumer Welfare Perspective* (October 10, 2017) at 3 (hereafter Laitenberger 2017).

13 Ramirez 2014 at 6.

14 Id. at 5.

The significant number of parallel investigations and their web of related decisions has made the call for increased attention to procedural fairness a shared endeavor. Discussing the nature of multilateral enforcement, the head of the Antitrust Division explained that "[d]ifferent outcomes matter less if the decision-making process was transparent and fair. The legitimacy of all of our agencies' decisions is strengthened by a collective commitment to transparent and fair decision-making processes."[15] The idea that the entire international competition community has a stake in the proper implementation of competition laws introduces an aspect of peer pressure and reputational consequences for agencies that fall short of procedural norms.

E. A Rising Tide of Procedural Fairness lifts all Boats

Though any one line of reasoning or perspective is enough to justify appropriate due process, articulating specific benefits to agencies and to the overall enforcement system has given the dialogue around procedural process a mutually beneficial context. The recognition of agency benefits has enhanced the prospects for progress towards convergence by giving agencies without the legal context, requirements, tradition or institutional will to provide due process, an attractive rationale for pursuing practices that promote procedural fairness.

Specific rules or practices may favor one perspective over others – i.e. investigative notice arguably aims more at party rights; transparent rules and written, reasoned enforcement decisions aim to bolster system credibility – but many procedural fairness-friendly rules deliver benefits to all three categories of procedural fairness beneficiaries. For example, party-agency (and third party-agency) engagement and the opportunity to be heard not only operationalize party rights but also inform agencies and their decision making and ensure stakeholders that the system is an objective attempt to consider all perspectives. Sound process can be good for parties, third parties, agencies, and the overall enforcement mission.

III. CONSENSUS: HALF WAY THERE

The story of the ongoing global, comparative exercise of the provision of due process in competition enforcement reveals a stunning success. There is a robust international consensus on the value of procedural fairness during competition enforcement and on basic guiding principles for how it should be provided. The major multilateral competition agency-led ventures agree on the importance of due process:

> A key theme emerging from the discussions was a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement . . . *Procedural Fairness and Transparency, Key Points,* OECD

> There is a broad consensus among ICN members regarding the importance of transparency, engagement, internal checks and balances on enforcement process, and protection of confidential information during competition investigations. . . . *ICN Guidance on Investigative Process*

> *UNCTAD's Model Law on Competition* states that "[a] common feature to be highlighted is that the Authority's functions must be based on the principle of due process of law as well as transparency."[16]

This common recognition of purpose is *prima facie* evidence of a growing consensus, and indeed, such consensus is expanding into identified core values and concepts of what due process means in application. To date, the primary sources for international perspectives and consensus on due process in competition law enforcement consist of (1) the agency-led perspectives of the ICN's Guidance on Investigative Process and Guiding Principles for Procedural Fairness,[17] and the OECD's Key Points Report[18] of its roundtables on procedural fairness; and (2) the ICC's Recommended Framework and Discussion Paper,[19] and the ABA's Best Practices.[20]

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15 Makan Delrahim, *International Antitrust Policy: Economic Liberty and the Rule of Law*, NYU School of Law and Concurrences, New York, NY, October 27, 2017, at 14.

16 UNCTAD Model Law on Competition ¶ 169, https://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx.

17 ICN Guidance on Investigative Process (2018); ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (2018).

18 OECD Competition Committee, Procedural Fairness and Transparency, Key Points (2012).

19 ICC Recommended framework for international best practices in competition law enforcement proceedings (2010); ICC Discussion Paper, Effective Procedural Safeguards in Competition Law Enforcement Proceedings (2017).

20 ABA Best Practices for Antitrust Procedure (2015).

Increasingly, with respect to the key elements of due process and its importance, antitrust enforcers speak a similar language.[21] There is widespread agreement among agencies that the essence of due process includes the fundamental concepts of transparency and notice of charges and evidence, opportunities to respond, and independent appellate review. The consensus ICN Guiding Principles for Procedural Fairness cite impartiality, transparency, objectivity, meaningful engagement, opportunity to respond, judicial review, and timely investigation among its nine universal principles. The OECD Competition Committee concluded that "… 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."[22]

A. Underpinnings of Consensus

There are two key ideas that act as critical support for the international consensus on due process principles. First, the consensus is predicated on the idea that there is no superior institutional framework when it comes to the provision of procedural fairness. Differences in institutional set-up dictated by foundational legislation (often a country's competition law) are accepted.[23] Instead, multilateral dialogue to date has put a premium on practical tools, ideas, and practices that any system, any agency can use to improve its process while proclaiming that all systems should provide at least basic levels of fairness.

The OECD emphasizes a "broad consensus that the objective is not uniformity—one size does not fit all—and that transparency and procedural fairness can [be], and are, achieved in many different ways."[24] The ABA's Best Practices note that "[n]o specific system of enforcement—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capabilities."[25] The ICN Guidance recognizes that "[c]ompetition agencies operate within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented. Consequently, there can be different approaches to achieving fairness during investigations . . ."[26] This recognition that due process is attainable across different institutional frameworks is integral to multilateral consensus building on due process principles.

The second, related supporting pillar for the international consensus on due process is that many implementing principles and practices should be flexible as opposed to absolute. Shared *guiding principles* do not necessarily equate to identical agency *practices*. Differences in legal systems, agency rules, and the needs of specific investigations drive numerous variations and differences in the scope, timing, discretion, balancing, specificity, and application of due process principles across the world.

The ICN, OECD, ABA, and ICC consensus-building exercises are not aimed at developing a single set of universal procedural rules nor establishing binding compliance mechanisms for due process commitments. Instead, they establish basic procedural norms such as "investigative notice to parties" or "agency-party engagement at key points of investigations" and then allow for flexibility and adaptation across different systems — often in the absence of implementing details — in factors such as timing, frequency, implementation, and level of participation within the agency.

The no-one-size-fits-all conclusion for due process practices in competition law proceedings is not only driven by obvious differences among jurisdictions, but also in part by the situational nature of competition enforcement itself and the need to tailor process and analysis to the facts of each case. The flexibility in defining specific due process practices is a feature of aspirational convergence work, not a flaw, and reflects the nature of due process and an agency's degree of discretion in applying it to specific cases. Still, even in the absence of universal implementing rules or binding adherence mechanisms, these efforts set expectations that competition law enforcement be guided by consensus principles of fairness, transparency, and predictability in pursuit of a coherent approach to enforcement.

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21 For example, a U.S. enforcer's description of "frank exchange during all phases of an investigation," is echoed by an EU enforcer touting "ample opportunity for open and frank discussion and to make [parties'] points of view known throughout the procedure." Christine Varney, Procedural Fairness, 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, September 12, 2009 at 3; Laitenberger 2017 at 6.

22 OECD Competition Committee Policy Roundtables on Procedural Fairness (2011).

23 Institutional design's impact on process remains a topic of great interest and debate, even if not central to multilateral consensus building efforts. See, e.g. Stanley Wong, *The Independence of Decision-Maker Principle in Competition Law Enforcement*, Competition Policy International Antitrust Chronicle (June 2014) (explores the "procedural fairness problem" of assigning investigative and decision-making functions to a single administrative body).

24 OECD Key Points Report (2012), Introduction.

25 ABA Best Practices (2015).

26 ICN Guidance on Investigative Process (2018), Introduction.

B. Where's the Beef?

This flexibility and recognition of agency discretion can be both good news and bad news for convergence. It means that agencies have the ability to improve procedural fairness, investigative practices, and consistency in the application of their own rules. However, it may also mean that even perfect due process rules depend on the circumstances of their application in specific cases. To some degree, the prospects for convergence are determined at the agency and case handler level, every day in every investigation. This is a more daunting challenge than articulating a single, universal set of multilateral recommendations and proclaiming victory. Even the best rules face implementation challenges. In an enforcement environment characterized by difficult fact-finding and analysis in a context of significant agency discretion, convergence and consistency are challenges requiring sustained agency commitment via skills training, internal safeguards, and review mechanisms that ensure the implementation of process consistently matches the agency's ideals.

In 2017, the U.S. Chamber of Commerce conducted a global survey of competition practitioners focused on competition agency process in 14 jurisdictions, with respondents rating their home agency's practices.[27] One finding stands out in offering insight into the perceived weaknesses of the provision of due process and possible advice to promote stronger practices. Respondents were given a choice as to the primary source of procedural fairness "problems," in their jurisdiction: 70 percent attributed the problems to "too much variation between case handlers"; whereas 30 percent cited existing (or lacking) statues and regulations.[28] This result may indicate that many agencies have appropriate existing rules, practices, and frameworks to provide for due process, but are not consistently living up to them. This perception supports the idea that agencies have the ability to make strides on their own. It might be worthwhile to devote increased attention to agency-controlled investigative process choices, internal training, and decision-making safeguards in order to promote more consistent application of existing rules and identified best practices.

IV. NEXT STEPS

Inadequate process that leads competition agencies to uninformed, biased, or unfair decisions is a worthy target of convergence efforts toward consensus fairness and transparency norms. For today's consensus on due process principles to inform and improve tomorrow's agency practices, the competition community will need to finds ways to instill the principles in to the day to day work of enforcement. The following ideas may support future progress and closer convergence.

- Convergence efforts around sound process will continue to need contributions from across the competition community, including private sector comparisons, surveys, ratings, and/or criticism, academic study, agency commitment and self-evaluation, judicial scrutiny, and international organization leadership to articulate consensus standards.

- Practitioners, agencies, and academics should continue to evaluate the impact of differences in rules and agency practices, identifying those that they perceive as inadequate. More surveys and comparative studies on the provision of due process may also be useful to identify deficiencies and prospects for improvement.

- According to the practitioner survey mentioned earlier, a focus on the consistent application of existing rules and practices may be worth attention. Agencies should consider internal agency choices and safeguards to promote consistent implementation of rules and investigative practices, for example, via staff training and internal manuals, models, guides, or templates.

- International organizations such as the ICN and OECD should continue work devoted to agency process by developing consensus recommendations and, importantly, encouraging their implementation. Non-binding, soft-law recommendations have allowed agencies to identify and develop procedural norms and expectations for agencies to consider and emulate.

- While a consensus-building approach using non-binding recommendations has helped identify and elaborate due process standards and best practices, agencies should consider international tools or agreements that introduce implementation "nudges" such as peer reviews, self-reporting, agency-to-agency dialogue, or compliance mechanisms. This may help accelerate the implementation of basic, agreed

27 Adherence to ICN Guidance on Investigative Process, A Practitioner Survey, U.S. Chamber of Commerce (2017), https://www.uschamber.com/report/adherence-icn-guidance-investigative-process-practitioner-survey.

28 Id. at 11.

upon principles and practices and limit their uneven application.[29]

The pursuit of better practices and improved process in competition law proceedings is a work in progress. The benefits of predictability, transparency, and fairness accrue not only to parties, but also promote more informed decision making and strengthen enforcement credibility. The blueprint for convergence is in place. The ICN Guiding Principles and Guidance and perspectives from the ICC Framework and ABA Best Practices have articulated important due process principles and standards. Future progress depends on the willingness of agencies to continue to commit to self-evaluation, public accountability, and consistent application of sound procedural rules and practices. Time will tell whether the existing consensus of *principles* and *objectives* spurs closer convergence of agency *practices*.

29 See, for example, the recent initiative for a multilateral framework on procedures with "core procedural norms and meaningful compliance mechanisms." Makan Delrahim, *Remarks on Global Antitrust Enforcement at the Council on Foreign Relations*, Washington, DC (June 1, 2018).

ADVANCES IN INTERNATIONAL DUE PROCESS CONSIDERATIONS: PROPER COMPLIANCE MECHANISMS COULD PROPEL CONVERGENCE

BY JANA I. SEIDL & JAMES F. RILL[1]

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I. INTRODUCTION

With the continued proliferation of competition, or antitrust, law across the globe, discussions regarding convergence on due process principles have again taken center stage. The U.S. Department of Justice has placed emphasis on increasing its efforts in the international arena: it established the Antitrust Division International Working Group with representation from each section in the Division; and it has promoted increased international engagement.[2] In that regard, the global business community has applauded the launch of a new Multilateral Framework on Procedures in Competition Law Investigation and Enforcement ("MFP") announced in June of this year by Assistant Attorney General to the Antitrust Division of the United States Department of Justice, Makan Delrahim.

While a number of international intergovernmental and private organizations have long promoted best practice and guidance documents in which due process principles feature prominently, more remains to be done. The MFP promises to be a significant step in the right direction. Specifically, if commenters are correct, the MFP may be distinct from and an enhancement of the work of the ICN and OECD in that it contemplates a mechanism for accountability with respect to participants' adherence to issued guidance. We have previously advanced the desirability of more prominent and regular accountability mechanisms — public reporting and possible reputational effect are a powerful motivator.[3] If the MFP can shine a light on the extent to which nations implement due process norms, the new direction in which it may take the international antitrust community is an important and salutary development.

II. THE INTERNATIONAL COMMUNITY DEMANDS DUE PROCESS NORMS

The number of countries with actively enforced competition, or antitrust, laws has grown exponentially in the last three decades.[4] Since 2000 alone, when the International Competition Policy Advisory Committee's ("ICPAC") report to the United States Attorney General and Assistant Attorney General for Antitrust was issued, the number of nations with competition regimes has grown from 80 to around 130. Alongside this growth, membership in intergovernmental organizations has soared, as well. In a seven-year span, from 2002 to 2009, the International Competition Network's ("ICN") membership grew to include competition agencies from 14 jurisdictions originally to 92 jurisdictions.[5] Today, including non-governmental advisors, the ICN boasts over 300 members spread across the globe.[6]

As additional regimes emerge, drafting and adopting new competition laws, countries with established antitrust codes also continue to develop and refine their own laws and enforcement efforts. As a result of newly emerging and changing antitrust systems, companies frequently face the challenge of complying with conflicting legal rules. Conversely, "[a]ntitrust enforcers who do not consider the global impact of their enforcement decisions can create inefficiencies that ultimately harm consumers throughout our interconnected world."[7] At times, the differences are the result of distinct political and cultural frameworks or the nature of a country's particular economy. It is apparent, however, that in some instances, antitrust decisions are mired in industrial policy objectives. To be sure, both advanced and newly emerging regimes are susceptible to this danger. For example, in the late 1990s, the European Commission attempted to block the Boeing-McDonnell Douglas merger based on a protectionist desire to safeguard its domestic industry.[8] A more recent misuse of antitrust law to promote a national champion is the much criti-

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2 Statement of Assistant Attorney General Makan Delrahim Before the Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights on "Oversight of the Enforcement of the Antitrust Laws" (Oct. 3, 2018), available at https://www.justice.gov/opa/pr/statement-assistant-attorney-general-makan-delrahim-senate-subcommittee-antitrust-competition.

3 *See* Jana I. Seidl and James F. Rill, *Global Convergence on Due Process Norms: Discussion and Recommendations*, in DOUGLAS H. GINSBURG LIBER AMICORUM: AN ANTITRUST PROFESSOR ON THE BENCH VOL I (Charbit et al. eds., 2018).

4 *See* EUROPEAN COMMISSION, COMPETITION POLICY BRIEF, at 1 (May 2016) ("In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today."), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf; ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), CHALLENGES OF INTERNATIONAL CO-OPERATION IN COMPETITION LAW ENFORCEMENT, at 5, (2014) ("There has been more than a 600% increase in the number of jurisdictions with competition law enforcement since 1990, from fewer than 20 to about 120 today."), https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

5 International Competition Network, History, http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf; *see also* ICN Factsheet and Key Messages, at 1 (April 2009), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf.

6 *See* International Competition Network, Member Directory, http://www.internationalcompetitionnetwork.org/members/member-directory.aspx.

7 Remarks of Roger Alford, Deputy Assistant Attorney General Antitrust Division U.S. Dept. Justice, at the American Chamber of Commerce in South Korea, Antitrust Enforcement in an Interconnected World (Jan. 29, 2018), available at https://www.justice.gov/opa/speech/file/1029821/download.

8 *See* Alison Mitchell, Clinton Warns Europeans of Trade Complaint on Boeing Deal, N.Y. TIMES, July 18, 1997, at D2; Commission Decision of 97/816, 1997 O.J. (L 336). For more on this topic, *see* James F. Rill and Stacy L. Turner, *Presidents Practicing Antitrust: Where To Draw The Line?*, 79 ANTITRUST L. J. 2 (2014).

cized decision by the Ministry of Commerce of the People's Republic of China ("MOFCOM") to block Coca Cola's proposed acquisition of Chinese fruit juice manufacturer Huiyuan Juice Group Ltd.[9] MOFCOM's decision expressed a fear that the transaction would impede the ability of small and medium-sized domestic juice companies to compete.[10]

The common thread is that industrial policy can thrive under the guise of competition enforcement especially where due process safeguards, which should ensure procedural fairness and protect the rights of the parties, are insufficient and transparency is lacking. Without procedural fairness and transparency, parties that are subject to an investigation as well as outside observers are left to wonder about the basis of a decision's rationale and the process by which such a decision was reached. Participants in the global antitrust community cannot in turn adjust their own behavior to align with a particular institution's expectations of what constitutes lawful conduct under that regime's antitrust law. Similarly, they are not assured that should they find themselves the subject of an investigation their rights are protected and they would get impartial, competitively sound treatment. The result is a lack of confidence in that legal institution.

In the face of such potential for abuse of competition law, it is important to recognize that, while none of the competition regimes across the globe are identical, they do feature several common, fundamental principles. These foundational principles serve to guide the application of competition laws and their development over time — and they aim to promote convergence in a culturally relativistic manner, i.e. still respecting the differences between numerous jurisdictions with diverse, uniquely tailored regimes. Employing these principles and engaging in open dialogue is an important first step. Promoting active convergence on consensus-driven pillars of due process is a necessary second.

III. SUBSTANTIAL EFFORTS HAVE BEEN UNDERTAKEN TO PROMOTE CONVERGENCE ON PROCEDURAL FAIRNESS

Recognizing the desirability of a global consensus on competition law issues — especially the critical role due process norms play in the investigative process — intergovernmental bodies and private organizations have stepped up to the plate to facilitate the open exchange of ideas and experiences relating to competition investigations. And the principles of due process and procedural fairness are celebrated by every international organization to address the issue. For example, the Organisation for Economic Co-operation and Development ("OECD") has advised that "[f]airness and transparency are essential for the success of antitrust enforcement [because they] ensure a better understanding of the facts [] and help improve the quality of evidence and reasoning on which the agency bases its enforcement actions."[11] To facilitate convergence on due process norms, the OECD has hosted roundtables on competition policy issues in which countries and invited experts submitted comments to spark effective discussion among competition regimes. The OECD then published the consensus results as best practices.

Three of these roundtables followed from a 2009 speech before the International Bar Association's Competition Conference in Fiesole by Christine Varney, then Assistant Attorney General for the Department of Justice's Antitrust Division. AAG Varney implored the international community to focus on procedural due process norms, "refin[ing] procedures that parties can understand and rely on as a means of removing unnecessary uncertainty from enforcement efforts."[12] Two of the roundtables were held in February and June 2010; the most recent was held in October 2011. These three roundtables addressed basic procedures followed by the OECD Member States for promoting due process, procedural fairness principles, and judicial review of competition agency decisions. The OECD published the discussions' results in two reports titled *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* and *Procedural Fairness: Competition Authorities, Courts and Recent Developments*.[13]

The United States DOJ has also taken the lead in incorporating elements of procedural fairness into the competition chapters of trade agreements. Thus, the recently negotiated United States–Mexico–Canada Agreement ("USMCA") includes a competition chapter pursuant to

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9 *See, e.g.* Daniel C.K. Chow, China's Enforcement of its Anti-Monopoly Law and Risks to Multinational Companies, 14 Santa Clara J. Int'l. L. 99, 105 (2016); Sundeep Tucker, China Blocks Coca-Cola Bid for Huiyuan, Financial Times (Mar. 19, 2009), available at https://www.ft.com/content/5c645830-1391-11de-9e32-0000779fd2ac.

10 *See* MOFCOM Press Release, Ministry of Commerce decides on anti-monopoly review of Coca-Cola's acquisition of China Huiyuan Company (March 18, 2009), available at http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html.

11 OECD, Procedural Fairness: Transparency issues in civil and administrative proceedings, at 9 (2011), www.oecd.org/daf/competition/48825133.pdf [hereinafter OECD Procedural Fairness].

12 Christine A Varney, 'Procedural Fairness' (13th Annual Competition Conference of the International Bar Association, Fiesole, 12 September 2009), available at www.justice.gov/atr/public/speeches/249974.htm.

13 *See* OECD Procedural Fairness, *supra* note 11; OECD, Policy Roundtables, Procedural Fairness: Competition Authorities, Courts and Recent Developments, available at http://www.oecd.org/daf/competition/ProceduralFairnessCompetition AuthoritiesCourtsandRecentDevelopments2011.pdf.

which the parties agree to adhere to foundational principles of due process requiring transparency, early consultation, access to information, an opportunity to appear before agency decision makers, and the right to judicial review. These provisions are supported by the endorsement of consultation between the parties "in relation to their enforcement laws and policies."[14]

The ICN has consistently underscored in its guidance documents that due process and procedural transparency are "essential to sound competition law enforcement."[15] In 2012, the ICN's Agency Effectiveness Working Group launched an Investigative Process Project to identify and study the investigative processes of various regimes in action — a natural experiment of agency decision-making and the effects that result from disparate principles and processes. The goal of the study: to ultimately arrive at a set of key practices to improve effective agency process. The ICN formally adopted these practices in its 2015 process guidance on investigatory procedures. Just this year, the ICN updated its process guidance document.[16]

Private organizations also promote engagement across regimes and publish their own best practices documents. The American Bar Association ("ABA"), for example, has established the International Task Force ("ITF"), to among other mandates, "coordinate [] the submission of comments to countries on a wide variety of substantive and procedural issues."[17] Additionally, the ITF takes on special projects such as the ABA's 2015 "Best Practices for Antitrust Procedures" report. Another report is currently in process regarding due process adherence in jurisdictions across the globe.[18] The International Chamber of Commerce ("ICC") has long published its own guidelines on internationally accepted due process norms.[19] And the U.S. Chamber recently commissioned a 15-member independent group to author a report with recommendations on how the U.S. should approach challenges arising in international antitrust — including those resulting from the misuse of competition laws — which was published in 2017.[20]

The various organizations' best practice and guidance documents enhance movement toward consensus on the following five core due process pillars: (1) the right to confront the objections and evidence; (2) a hearing before the actual decision-maker; (3) an independent decision maker; (4) a timely decision; and (5) review by an independent arbiter.[21] These norms exist to protect both the integrity of competition authorities' investigations and the rights of the parties under investigation. Along with rectifying shortcomings of procedural nature, convergence on due process norms can also foster critical convergence on substantive analysis and procedure. Substantive convergence ensures predictability and crucial certainty which businesses require to operate efficiently.

Best practice and guidance documents are a step towards convergence. The international antitrust community has delivered sound guidance in this respect to date. However, more remains to be done to foster convergence in practice on internationally accepted due process norms and, crucially, enforceable promises of consistent adherence to and implementation of these principles. After all, "[g]uidelines, as we all know, are valuable. Promises are different, because they create the opportunity for reflecting on decisions that may help enhance reputational standings among peers."[22] In short, guidelines can only go so far in assuring adherence to global standards of procedural fairness. Even the stated opportunity for consultation in the USMCA lacks specific provisions for assessing compliance with its due process provisions. Here is where the current antitrust initiative evokes a promise for evolution of adherence to and implementation of basic due process standards.

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14 Office of the United States Trade Representative, United States–Mexico–Canada Agreement, Chapter 21, available at https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/21%20Competition%20Policy.pdf.

15 International Competition Network, ICN Guidance on Investigative Process, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

16 *Id.*

17 American Bar Ass'n, Section of Antitrust Law: International Task Force, http://apps.americanbar.org/dch/committee.cfm?com=AT311025.

18 *See* American Bar Ass'n, Section Of Antitrust Law, Best Practices For Antitrust Procedure–Report Of The Aba Section Of Antitrust Law International Task Force (May 22, 2015), available at www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.authcheckdam.pdf; American Bar Association, International Taskforce, *Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model* (Dec. 2015), https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

19 *See* Int'l Chamber of Commerce, Effective Procedural Safeguards in Competition Law Enforcement Proceedings 8 (2017), available at https://cdn.iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf.

20 U.S. Chamber of Commerce, International Competition Policy Expert Group, Report and Recommendations (March 2017), available at https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf.

21 Douglas H. Ginsburg and Taylor M Owings, *Due Process in Competition Proceedings*, 11 Comp. L. Int'l 1, 1 (April 2015), available at https://www.ibanet.org/Document/Default.aspx?DocumentUid=C45C4020-65E8-48B8-8336-7E67ADC3480B.

22 Assistant Attorney General Makan Delrahim Delivers Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (June 1, 2018), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement [hereinafter MFP Announcement].

IV. THE MFP OFFERS A SEACHANGE IN ESTABLISHING A MECHANISM DESIGNED TO DEMAND COMPLIANCE WITH BEST PRACTICES

Observers still frequently register concerns that competition agencies diverge from their promises to implement best practices throughout their competition investigations, which undermines the credibility of these competition regimes.[23] It is not sufficient to pay lip service to due process norms — instead, general basic adherence to the five pillars of due process is necessary. To ensure this adherence, better mechanisms are needed to assess the extent of consistent implementation of internationally recognized due process norms. Such mechanisms are not intended to force strict compliance with an ethnocentric set of procedures invoking due process. Rather, the exact procedures must vary depending on the structure of each nation's competition law system. [24] The crux, as acknowledged by Deputy Assistant Attorney General Roger Alford, is that "[t]o retain the confidence of both the business community governed by [a competition regime's] laws and the public [that competition enforcers] protect, [agencies] must be willing to expose [their] policies and practices to aggressive scrutiny and challenge."[25]

In that vein, AAG Makan Delrahim announced a new initiative in furthering convergence on consensus-driven international due process norms at the Council on Foreign Relations in Washington, D.C., this past June: the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement.[26] The MFP reportedly draws from the prior work of intergovernmental organizations such as the OECD and ICN, trade agreements' competition chapters, as well as competition regimes' practices across the globe.[27] Additionally, the draft MFP, which has not been publicly released, reportedly is the result of close cooperation with the U.S. Agencies' global partner agencies.[28] At the end of September, the heads of the European and U.S. Antitrust Agencies met in Washington, D.C., to discuss again, among other items, the MFP.[29]

The MFP offers a major step in increased international engagement since the U.S. Department of Justice and Federal Trade Commission updated their joint Antitrust Guidelines for International Enforcement and Cooperation in 2017.[30] These guidelines implicitly endorse the U.S. Agencies' ability to affirmatively assert the role of jurisdiction and positive comity. Specifically, the guidelines promote the U.S. Agencies' engaging and having their views known wherever a sister agency's procedures depart significantly from global norms of due process in instances where there is an effect on important U.S. interests, without requiring the U.S. Agency to have opened its own concurrent investigation.[31] What the Guidelines imply, the MFP's announcement by all accounts makes clear and expands on. International engagement is paramount and the international community must look to mechanisms to ensure nations consistently adhere to the pillars of due process and procedural fairness. As AAG Delrahim emphasized, "[r]ather than simply encourage good behavior, the time is now for us to embrace meaningful mechanisms that encourage *compliance*."[32] Importantly, the MFP should embrace the fundamental precepts of due process and enhance implementation through public evaluation of adherence.

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23 Prepared Statement of Koren W. Wong-Ervin, Before the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law, at 5 (May 19, 2017), available at https://gai.gmu.edu/wp-content/uploads/sites/27/2016/07/Wong-Ervin-Testimony_International-Antitrust_5-19-17.pdf ("Numerous other examples come to mind involving reported concerns about due process, including: failure to allow international counsel of the parties choosing; failure to notify the parties of the legal and factual basis upon which an investigation is based; failure to provide access to the investigative file, including any exculpatory evidence; failure to protect confidential information and honor legal privileges; refusal to allow parties to cross-examine witnesses at hearings; and denial of the right to appeal to an independent tribunal and to stay remedies pending appeal.").

24 *Ginsburg and Owings, supra* note 21, at 1.

25 Remarks of Deputy Assistant Attorney General Roger Alford at China Competition Policy Forum (Aug. 30, 2017), available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-alford-delivers-remarks-china-competition-policy.

26 MFP Announcement, *supra* note 22.

27 *Id.*

28 *Id.*

29 Fed. Trade Comm'n, Officials from U.S. and European Commission Participate in Bilateral Discussions in Washington D.C. to Discuss Antitrust Enforcement (Sep. 28, 2018), available at https://www.ftc.gov/news-events/press-releases/2018/09/officials-us-european-commission-participate-bilateral.

30 Fed. Trade Comm'n and Dept. of Justice, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf.

31 *See id.* at § 5, n.138 ("An Agency may continue that cooperation [with sister agencies across the globe] when either it or the foreign authority has closed its investigation. The Agencies may also engage in *general discussions* with foreign authorities on matters in which only one authority has an open investigation.") (emphasis added).

32 MFP Announcement, *supra* note 22 (emphasis added).

The MFP has been met mostly with endorsement as complementary to the international community's efforts already underway, precisely because it goes a step beyond what has been done to date. The ICC and its American national affiliate, the United States Council for International Business ("USCIB"), have endorsed the proposal and are conducting continuing analysis. USCIB President and CEO Peter M. Robinson stated that "USCIB applauds this complementary MFP initiative, *which goes beyond soft-convergence to employ a practical mechanism that will promote compliance* by competition authorities with a dozen fundamental procedural fairness principles."[33]

While the text of the draft MFP itself is not yet public, and as such the envisioned compliance mechanism is a bit unclear, if implemented as announced, it would have the potential to substantially advance convergence. One element is clear: "[t]he compliance mechanisms do not envision establishing a formal and binding dispute settlement mechanism."[34] Rather, it seems they are based on the principles of mutual respect and reputational capital. AAG Delrahim explained, "[t]he rich network of relationships [we have built amongst jurisdictions] ensures that reputation matters, and that the promise to abide by an obligation becomes a potent means of enhancing compliance." And as we have previously noted, peer review holds competition regimes accountable, not just within their own jurisdiction, but amongst their partner agencies and jurisdictions globally precisely because it invokes the potential for enhancing reputation.

While the programs of existing international organizations have been important, there are limitations that the MFP seeks to transcend. Thus, the OECD conducts what it terms "in-depth country reviews" of various countries' competition laws and policies. The purpose of these reviews is for the OECD to "assess how each country deals with competition and regulatory issues, from the soundness of its competition law to the structure and effectiveness of its competition institutions."[35] However, while valuable, the OECD country reviews serve a different purpose than that reportedly envisioned by the MFP. This is because the country reviews are sporadic and not targeted — they may not engage in a timely fashion with regimes that are the subject of criticism by parties and observers. One such example is Korea. The last time the OECD conducted a review of Korea's competition policy in practice was in 2004 though there have been numerous reports more recently that the jurisdiction may not afford procedural due process protections in accord with the internationally recognized pillars.[36]

Additionally, participation in these country reviews is limited to OECD member enforcement agencies only and does not allow for a broader forum including non-members or non-governmental advisors, i.e. representatives acting in their individual capacities and not as the formal representatives of any specific member.[37] However, these players should have an opportunity to submit questions and provide their views to truly garner the benefits of peer review's reputational effects. The reputation mechanism embodied in the MFP ultimately should allow for such input. Regardless, the MFP, and its compliance mechanism, has the potential to present a vehicle for allowing broad community engagement on global agency decision-making. This involvement in turn should lead to fairer and more efficient antitrust procedures.

V. CONCLUSION

The work of international bodies and professional organizations has driven progress toward global consensus on due process standards. Much remains to be done, however, not only in respect to the development and adoption of basic principles of procedural fairness, but also in fomenting and assessing the extent to which these principles are implemented in practice. The MFP's specific inclusion of a compliance mechanism demonstrates another step towards the ultimate goal of consistent adherence to proposed best practices and guidelines. Mechanisms built on the foundation of reputational enhancement, such as peer review of competition agency practices, when conducted in the appropriate fashion and with the appropriate frequency, has the potential to bring about more faithful adherence to international best practices. Thus, a compliance mechanism presents the right move towards promoting greater public confidence in competition agency processes and outcomes.

33 United States Council for International Business, *Global Business Welcomes New Multilateral Framework on Procedures in Competition Enforcement* (June 27, 2018), available at https://www.uscib.org/global-business-welcomes-new-multilateral-framework-on-procedures-in-competition-enforcement/ (emphasis added).

34 MFP Announcement, *supra* note 22.

35 OECD, Country reviews of competition policy frameworks, available at http://www.oecd.org/daf/competition/countryreviewsofcompetitionpolicyframeworks.htm.

36 *Id.*

37 *See* OECD, Country Reviews of Competition Policy Frameworks, available at www.oecd.org/competition/countryreviews.

DUE PROCESS AND PRODUCTION OF DOCUMENTS STORED ABROAD: A REVIEW OF ANTITRUST DISCOVERY TOOLS AFTER *MICROSOFT IRELAND* AND THE CLOUD ACT

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I. INTRODUCTION

New technologies and global business practices are posing questions on how antitrust law should be applied and antitrust investigations conducted. The U.S. Federal Trade Commission ("FTC") and the European Commission ("EC") have recently launched a series of public hearings to determine whether these developments might require adjustments to competition law, enforcement priorities, and policy.[2] At the same time, the global antitrust community has been concerned about due process issues.[3] This article discusses one specific issue raised by new technologies in antitrust investigations: the production of documents stored abroad.

Until recently government agencies could only request the production of documents available in the territory where they had jurisdiction, but new technologies have challenged the concept of what is "available" in a particular territory. Daily, at work or at home, we access docum1ents and information that is not physically stored in the country where we operate. Most of the time, we do not know where the information is actually stored and we are unconcerned as this is largely irrelevant to our daily life. Yet, this matters when an antitrust agency conducts a civil or criminal investigation and requests production of documents to the parties.

Many questions arise in this context. Can an agency request only what is stored domestically, or anything parties can access from a domestic location? Does it matter if the parties can access with or without a requisite password or otherwise authorized access? If an agency can request anything that a party can access from a domestic location, is it a domestic or an extraterritorial request? What are the laws of privilege and privacy that ought to apply to information stored in one country and produced in another one?

Current law is generally silent in this regard as today's technology was not available when the legislation was enacted or when courts interpreted those laws. Over the last couple of years legislatures and courts around the globe have started to address these questions. This article will review these developments and their impact on the principles of due process, with a particular focus on U.S. antitrust proceedings.[4]

II. *MICROSOFT IRELAND* AND CLOUD ACT: IMPLICATIONS FOR U.S. ANTITRUST ENFORCEMENT

The issue of the production of documents stored abroad was recently presented to the U.S. Supreme Court in *United States v. Microsoft*[5] (commonly referred as the *Microsoft Ireland* or the *Microsoft email* case), which posed the question as to whether a U.S. Department of Justice ("DOJ") search warrant issued to Microsoft as an internet service provider could require it to produce customer email data stored in a server in Dublin, Ireland.

The case stemmed from a U.S. Court of Appeals decision from July 2016,[6] which held that a DOJ search warrant on Microsoft as an internet service provider could not compel it to produce customer email data maintained in a server in Dublin. The Second Circuit found that the DOJ and other U.S. authorities do not have the power to investigate data stored outside U.S. territory as this would be an unlawful extraterritorial

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2 Information on the "FTC Hearings on Competition and Consumer Protection in the 21st Century" is available at https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-1-competition-consumer-protection-21st-century. Information on the hearings organized by Commissioner Vestager on "Shaping Competition Policy in the Era of Digitalization" is available at http://ec.europa.eu/competition/scp19/.

3 Multilateral Framework on Procedures in Competition Law Investigation and Enforcement ("MFP"), a project launched by the DOJ Assistant Attorney General for the Antitrust Division on June 1, 2018, at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-global-antitrust-enforcement; ICN, Guiding Principles for Procedural Fairness in Competition Agency Enforcement, March 2018, at http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf; OECD, Report on Procedural Fairness and Transparency, 2012, at http://www.oecd.org/competition/mergers/50235955.pdf; ICC, Guidance on Due Process in Global Competition Law Enforcement Proceedings, June 2017, at https://iccwbo.org/publication/icc-effective-procedural-safeguards-competition-law-enforcement-proceedings/; ABA Section of Antitrust Law, International Task Force, Best Practices for Antitrust Procedure, May 22, 2015, at https://www.americanbar.org/content/dam/aba/directories/antitrust/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

4 Professor Jennifer S. Daskal, American University Washington College of Law, is an important contributor to the legal literature on the general topic of domestic and international electronic discovery and to many related issues. Anyone interested in these topics should consult her contributions to the subject. Rather than cite a long list, we point to both her SSNR authors' pages at https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1504888 or her CV at https://www.wcl.american.edu/community/faculty/cv/daskal/. We, as most anyone thinking about these issues, are indebted to her.

5 *United States v. Microsoft Corp. (Microsoft Ireland)*, No. 17-2, slip op. at 3 (Apr. 17, 2018) (per curiam) (vacating and remanding judgment).

6 *Microsoft Corp v. U.S.*, 829 F.3d 197 (2d Cir 2016).

application of U.S. law.[7]

The U.S. government sought review of the case in the U.S. Supreme Court and, while the case was pending, on March 23, 2018, the U.S. Congress passed the Clarifying Lawful Overseas Use of Data Act ("CLOUD Act"), which requires email service providers to disclose emails within their "possession, custody, or control," even when those emails are located outside the U.S.[8] On April 17, 2018, the U.S. Supreme Court found the *Microsoft email* case moot, as the issue had been regulated by Congress. What lessons can be learned from *Microsoft Ireland* from an antitrust perspective?

Microsoft Ireland was not an antitrust case. It involved a New York-based narcotics trafficking investigation targeting an unidentified individual where the DOJ sought disclosure of emails held in a cloud-based account provided by Microsoft. The dispute arose over a search warrant issued pursuant to the Stored Communications Act ("SCA"), which authorizes search warrants for data held by electronic communications and remote computing services.[9]

III. U.S. ANTITRUST DISCOVERY TOOLS AND PRODUCTION OF DOCUMENTS STORED ABROAD

The SCA allows "a government entity" (which includes the DOJ Antitrust Division) to use warrants for the disclosure of electronic communications by a third party provider. Although the DOJ Antitrust Division is such a "government entity" under the SCA, to our knowledge, it has never used these warrants in antitrust investigations.

We are also not aware of any case where the U.S. DOJ Antitrust Division has used other potential avenues, such as a search warrant or a grand jury subpoena, to collect data from a third party internet provider. Similarly, the Antitrust Division does not appear to have released any specific guidance or statement in this respect. Furthermore, the sections of the Division Manual on Grand Jury Subpoena and Search Warrants have not changed regarding access to data stored abroad.

A. U.S. DOJ Grand Jury Subpoena

The Division Manual on Subpoenas Duces Tecum (section updated on April 2018) includes the following statement:

> Efforts to obtain evidence located outside the United States present special considerations. Staff should consult with the International Section to discuss possible methods of obtaining such evidence, including alternatives to subpoenas.[10]

In practice, while grand jury subpoenas require the production of all materials within the custody, possession or control of the recipient wherever located, the cover letter accompanying the subpoena always, in our experience, explicitly states that the DOJ does not demand the production of such materials when located abroad. Voluntary production of those same materials is welcome.

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7 In 2014, Microsoft took legal action to block a court order authorizing an investigative authority to access a Hotmail email account stored n a server in Dublin, Ireland. The U.S. government sought the emails as part of a criminal investigation, referring to the Stored Communications Act ("SCA"). The District Court held that the order against Microsoft was lawful because an authority's power to demand access to (digital) information – unlike a search warrant, which entails a physical search of premises – is not limited to the U.S., claiming that what matters is who controls the data, not where it is stored. The Court of Appeals reversed this opinion by concluding that Congress did not intend the SCA's warrant provisions to apply extraterritorially. On the Second Circuit decision of July 14, 2016, see *Data stored abroad – who controls it and where is it stored?* at https://www.freshfields.com/en-gb/our-thinking/campaigns/digital/data/data-stored-abroad; B. Nevitt, *Jurisdiction, territoriality and production orders for data stored abroad,* Jan. 23, 2018 at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=a877af7f-9b16-43bb-940e-2188c3aa7369#Footnote 1; *What powers do antitrust and competition authorities have to seize data located on foreign servers?* at http://www.nortonrosefulbright.com/knowledge/publications/143209/what-powers-do-antitrust-and-competition-authorities-have-to-seize-data-located-on-foreign-servers. For more background on the case, see *District Court Upholds Government's Ability to Seek Digital Information Stored Abroad,* Gibson Dunn, Aug. 4, 2014 at https://www.gibsondunn.com/district-court-upholds-governments-ability-to-seek-digital-information-stored-abroad/.

8 CLOUD Act, H.R. 1625, 115th Cong. div. V (2018) (enacted) (codified in scattered sections of 18 U.S.C.). The CLOUD Act, however, permits courts to exempt providers from disclosing emails of customers who are not U.S. Citizens or residents, if disclosure would risk violating the laws of certain foreign governments. 18 U.S.C. § 2703(h).

9 For other cases, this time involving Google, in which DOJ relied on the SCA to seek overseas account data, see U.S. District Court, N.D. Alabama, Northeastern Division, Sep. 1, 2017, at https://abovethelaw.com/wp-content/uploads/2017/10/In-re-Search-Warrant-Issued-to-Google-Inc._2017-10-25-11-34-33-0400.pdf; U.S. District Court for the Northern District of California, Apr. 19, 2017, at https://dlbjbjzgnk95t.cloudfront.net/0915000/915244/https-ecf-cand-uscourts-gov-doc1-035115371508.pdf; U.S. District Court for the Eastern District of Pennsylvania, Feb. 3, 2017, at https://www.justice.gov/archives/opa/blog-entry/file/937001/download.

10 See page III-86 of Division Manual, Fifth Edition, at https://www.justice.gov/atr/division-manual.

B. U.S. DOJ Search Warrants Executed on Premises with Access to Foreign Stored Data

Similarly to grand jury subpoenas, when search warrants are executed, terminals are used to access materials located within the U.S. but not those hosted outside the U.S.

To our knowledge, the Antitrust Division has not issued guidance on the production of electronic information hosted on a server outside the U.S. but accessible by the parties through terminals in the U.S., suggesting that the Antitrust Division intends to preserve the option of evaluating each situation on a case-by-case basis.[11]

Similarly, access to password protected information should be viewed as a fact specific question. It is common practice nowadays to have password protected electronic devices. Again, absent specific circumstances, if custodians can access password protected information stored abroad on a regular basis, it would be difficult to argue that they do not have "possession, custody, or control" over this information. The situation would be different if the same custodians could have obtained the password or restricted access, but they never sought or obtained it. In this situation it seems plausible that the Antitrust Division would take the position that these custodians did not have "possession, custody, or control" over that information.

C. Private Treble Damage Subpoenas

On the private litigation side, plaintiffs have no other public policy consideration and always demand documents located abroad if they are in the custody, possession, or control of the defendant, even if foreign law forbids their production.[12] Courts are generally often willing to order production even when foreign governments themselves have asserted that such production would violate the law if the court thinks that the threat of sanctions has been orchestrated by the defendant and is not real.

IV. A LOOK AT HOW THE ISSUE IS ADDRESSED IN OTHER JURISDICTIONS

A. Canada

While there is no judicial authority that addresses the power of competition authorities to seize data located on foreign servers, the Canadian Competition Act (Section 16.1. "Operation of computer system") provides that the Commissioner can obtain a court warrant authorizing the search of computer systems for "any data contained in or available to the computer system." Such data could arguably include data accessible from the Canadian computer but located on a foreign server. Thus, Canadian practice may be more permissive than that of the U.S.

Furthermore, the Canadian Commissioner of Competition can obtain a court order requiring a Canadian corporation to produce relevant records of an affiliate, even if the affiliate is outside Canada. There has been litigation challenging the constitutionality of this provision, but each time it has settled or has been abandoned. There is therefore no legal certainty regarding the application of this provision. The Canadian Commissioner of Competition considers these as domestic requests for a warrant from a Canadian court relating to physical premises in Canada.

With respect to the question on password protected information, the Canadian Competition Act (Section 16.2) states that the person in possession or in charge of the premises searched shall permit the officers executing a warrant "to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system" and to produce a copy.[13] The Commissioner's position is that one can be required to provide a password. Again, there is a possibility for constitutional challenges and we are not aware of definitive jurisprudence on this issue.

In terms of Canada's approach to legal professional privilege and data protection, there is no conclusive authority. However, we are not aware of any instances in which the Commissioner's staff has attempted to apply lower levels of privilege protection from foreign jurisdictions

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11 The section on search warrants of the Division Manual is silent in this respect. See page III-90, Division Manual, Fifth Edition, at https://www.justice.gov/atr/division-manual. Guidance on this issue is also not provided by the Criminal Division's Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations, which was last updated in 2009. This document is available at https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf.

12 On the specific topic of discovery in U.S. antitrust litigation of European Commission materials, see T. Calvani, J. Mellott, Discovery of European Commission Materials in U.S. Civil Antirust Litigation: An Update, Concurrences N° 1-2015.

13 S. 487(2.1) of the Criminal Code contains a similar provision, while S. 487.02 of the same code allows the issuing court to order a person to provide assitance.

(e.g. Europe, which does not consider the advice of an in-house counsel to be protected by attorney-client privilege).

We also note that in some of the competition class actions (e.g. in the financial sector) we are seeing defendants and plaintiffs deal with settlements in a manner that respects privacy laws of both domestic and applicable foreign jurisdictions. However, these are uncontested court orders.

B. European Union

There is little guidance with regard to the European Commission's authority to search and seize electronic documents located on foreign servers.[14] More guidance seems to come from Member States, as is illustrated below.

Things may change should the pending proposal for an EU Regulation on European Production and Preservation Orders for electronic evidence in criminal matters be approved by the European Parliament and Council.[15] The new Regulation, which is currently available as a first draft, will focus on facilitating the process for collecting evidence abroad. Specifically, the Regulation would introduce binding European Production and Preservation Orders that would be issued or validated by a judicial authority of a Member State. These orders would be issued to seek the preservation or production of data that is stored by a service provider located in another jurisdiction, and that are necessary as evidence in criminal investigations or criminal proceedings. Both Orders could be served on providers of electronic communication services, social networks, online marketplaces, other hosting service providers, and providers of internet infrastructure such as IP address and domain name registries. Such Orders may only be issued if a similar measure is available for the same criminal offence in a comparable domestic situation in the issuing State. It appears, therefore, that this Regulation would only apply to Member States with criminal competition law sanctions already in place.

C. United Kingdom

There is no direct provision or published guidelines from the Competition Market Authority ("CMA") indicating that the CMA can search data located on a foreign server. Yet such data could be copied or taken away when it is "accessible." Indeed, according to Section 28A(2)(f) of the Competition Act of 1998 inspecting officers are entitled "to require any information which is held in a computer and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced…"

The CMA (and the UK sector regulators with concurrent jurisdiction to enforce the Competition Act) takes the view that they are able to use their document production powers to compel the production of any documents that can be accessed from a domestic location. It does not appear to matter whether the information can be accessed with or without a requisite password or otherwise authorized access. The CMA can indeed require the undertaking concerned to provide any passwords needed to access information that it regards as within its jurisdiction to obtain. Requests to produce information on foreign servers that parties can access from a domestic location would be treated as a domestic request falling within the scope of the Competition Act's powers.

This approach seems to be confirmed by a recent UK case concerning not the CMA, but the UK Serious Fraud Office (SFO). Interestingly, on September 6 of this year, the English High Court ruled in *R (KBR Inc.) v. The SFO* on the SFO's power to compel the production of data held overseas.[16] According to this decision, the scope of the SFO's power to compel the production of data extends to:

- data of a UK company held abroad; and
- data of a non-UK company held abroad, provided there is a "sufficient connection" between that company and the UK.

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14 See *What powers do antitrust and competition authorities have to seize data located on foreign servers?*, Norton Rose Fulbright, 2016, at http://www.nortonrosefulbright.com/knowledge/publications/143209/what-powers-do-antitrust-and-competition-authorities-have-to-seize-data-located-on-foreign-servers.

15 See proposal for a Regulation of the European Parliament and of the Council of the European Union on European Production and Preservation Orders for electronic evidence in criminal matters (April 2018), at https://eur-lex.europa.eu/resource.html?uri=cellar:639c80c9-4322-11e8-a9f4-01aa75ed71a1.0001.02/DOC_1&format=PDF.

16 Case No: CO/4915/2017 at http://www.bailii.org/ew/cases/EWHC/Admin/2018/2368.html. See J. Kelly, *Non-UK company with non-UK data: Serious Fraud Office's information powers can still bite,* Sep. 6, 2018, at http://risk.freshfields.com/post/102f1p2/non-uk-company-with-non-uk-data-serious-fraud-offices-information-powers-can-st.

The Court clarified that the "sufficient connection" test is necessarily fact-specific, and refused to limit itself to a fixed list of relevant factors. However, the Court did mention that a sufficient connection might exist where:

- A non-UK company carries on business in the UK; or

- where there is evidence that a non-UK company is actively involved in the matters being investigated by the SFO, including where the company has a UK-based employee at the time of the matters being investigated.

Merely being the parent of a UK company, or having already voluntarily assisted the SFO with its investigation, would not, in itself, constitute a sufficient connection with the UK. The SFO's power to directly order the production of data stored abroad under the circumstances clarified above is viewed by the Court as an alternative tool to the Mutual Legal Assistance Treaties ("MLAT"), which allow the SFO to request information stored abroad through foreign authorities.

A Bill of last June could make this decision less relevant, at least for documents stored electronically in countries that have reciprocal arrangements for the recognition of production orders.[17] The "Crime (Overseas Production Orders) Bill" will provide law enforcement agencies and prosecutors the option to apply for a UK court order to get stored electronic data directly from a company or person based outside the UK for the purposes of criminal investigations and the prosecution of serious crimes.

Currently, when UK agencies are seeking access to data for evidence purposes - and that data is held by providers based overseas – they must seek access to the data using MLAT, which can be slow and cumbersome. This legislation will allow law enforcement agencies and prosecutors to apply directly to service providers based in a territory with whom the UK has a relevant international agreement, by way of a UK court approved order[18]. This will make the process for gaining access to this type of data faster and more reliable.

Generally, the CMA (and sector regulators) would apply the UK's law on privilege to any materials disclosed in response to a UK investigation conducted under Competition Act powers. However, the applicable guidelines (OFT404, paras 6.2 to 6.4) clarify that where material is provided to the CMA by another agency in a jurisdiction where that material was not privileged from disclosure to the foreign agency, then the CMA would be entitled to use that material regardless of the UK's privilege position in relation to it.

D. Belgium

In Belgium, a Supreme Court decision of December 2015 allowed Belgian authorities to request Yahoo! to provide subscriber data on the identity of certain individuals who had used their free Yahoo! email account to commit fraud in Belgium. The authorities' request was based on Article 46*bis* of the Belgian Code of Criminal Procedure, which states that electronic communication service providers operating in Belgium are obliged, under certain circumstances, to disclose subscriber information to the Belgian authorities for the purposes of a criminal investigation.[19]

The Belgian Supreme Court did not treat this as an extraterritorial request even where the information requested was stored outside Belgium. The Court reasoned that Yahoo! was "actively participating in the economic activity in Belgium" by using a local domain in Flemish and French (i.e. www.yahoo.be), showing advertisements directed to Belgian consumers and creating a local complaint box and helpdesk.

The same approach was followed by the more recent case involving Skype, which confirmed the legitimacy of domestic production orders on foreign companies providing a service in Belgium.[20] In this case, a court in Mechelen imposed a EUR30,000 fine on Skype for producing

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17 The text of the Bill is available at https://services.parliament.uk/bills/2017-19/crimeoverseasproductionorders.html. For a comment on this Bill, see *SFO Successfully Defends Challenge Over the Territorial Scope of Compulsory Document Requests,* Gibson Dunn, Sep. 11, 2018, at https://www.gibsondunn.com/wp-content/uploads/2018/09/sfo-successfully-defends-challenge-over-territorial-scope-of-compulsory-document-requests.pdf.

18 According to this Bill, "International co-operation arrangement" means "an international agreement, instrument or other arrangement which relates to the provision of mutual assistance in connection with the investigation or prosecution of offences and to which the UK is a party or in which the UK participates." If the Bill becomes law and agreements are put in place, it should become easier for government officials to obtain electronic data from abroad.

19 *Hof van Cassatie of Belgium, YAHOO! Inc.*, No. P.13.2082.N of Dec. 1, 2015. An English translation of this decision is available at http://journals.sas.ac.uk/deeslr/article/viewFile/2310/226. See Nevitt, *Jurisdiction, territoriality and production orders for data stored abroad,* Jan. 23, 2018 at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=a877af7f-9b16-43bb-940e-2188c3aa7369#Footnote 1.

20 *Correctionele Rechtbank van Antwerpen, afdeling Mechelen of Belgium,* No. ME20.F1.105151-12, Oct. 27, 2016, at http://www.wolterskluwer.be/files/communities/legal-world/rechtspraak/2016/Corr.%20Mechelen%2027%20oktober%202016%20(Skype).pdf.

only metadata in the context of an investigation involving a criminal gang that used Skype to communicate. On November 15, 2017, the court of appeals of Antwerp rejected Skype's appeal and confirmed the fine.[21]

V. CONCLUSIONS

The production of documents stored abroad appears to be an area primarily handled according to local practices with little guidance from national laws or antitrust agencies. The issue is probably evolving so fast, due to new technologies, data storage, and management tools unimaginable only a few years ago, that legislators struggle to keep up. New bills are pending and courts in different parts of the world are expanding national tools and ruling on obligations of foreign companies to produce documents stored abroad in case of a sufficient connection of the company with the jurisdiction where the enforcer is located. These developments occur primarily with respect to criminal investigations and fraud cases. Additional considerations, such as the protection of privileged information and data privacy issues are making the production of documents stored abroad even more complicated. Companies in the EU or elsewhere may have to comply with rigorous data privacy regulation without being able to use it to defend against the production of information in other jurisdictions where such data is accessible through local terminals.

21 It is worth mentioning that in addition to the UK and Belgium decisions, a similar case was brought before a court in The Netherlands. The case did not lead to a decision on the merits thought. The case assessed the legality of a production order for content data served to a Dutch provider of fiscal cloud software. The requested data was stored in servers in Ireland, rented by the Dutch company from Amazon. The cloud software provider had filed a complaint against the production order to the Overijssel District Court. The Overijssel District Court explicitly acknowledged that the data requested under the production order was stored in Ireland but failed to address any issues of possible extraterritorial enforcement and declared the complaint made by the cloud software provider unfounded on other grounds. Overijssel District Court, Feb. 1, 2017, ECLI:NL:RBOVE:2017:417.

WHAT'S THE APPEAL? HOW THE GENERAL COURT AND COMPETITION APPEAL TRIBUNAL ARE SHAPING THE EU AND UK ANTITRUST REGIMES

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I. INTRODUCTION

In December 2016, the UK Competition and Markets Authority ("CMA") imposed the largest competition law fine it has ever placed on a single company. Pfizer was fined £84 million (just under €100 million) for abusing a dominant position by charging excessive prices for phenytoin sodium capsules, an anti-epilepsy drug. Flynn Pharma, its distributor, was fined a further £5.2 million. Just 18 months later, that decision was overturned by the Competition Appeal Tribunal ("CAT"). The CAT found that the CMA had misapplied the legal test and had failed to consider facts that should have been relevant to its assessment.[2] In other words, the CAT reviewed the legal and economic analysis carried out by the CMA and found it wanting.

Pfizer/Flynn is not a unique case. The CAT has overturned decisions by the UK competition authorities on several occasions, including the following:

- In *Tobacco*, the CAT overturned an antitrust infringement decision by the OFT (the predecessor of the CMA). Relying heavily on witness evidence, the CAT found that the OFT's infringement decision did not accurately represent the facts and so could not stand.[3]

- In *Welsh Water*, the CAT overturned a "no-infringement" decision by Ofwat[4] and replaced that decision with its own finding that there had been an abuse of dominance. The CAT's decision then formed the basis of a successful follow-on damages action.[5]

- In *Hotel Online Booking*, the CAT overturned a decision to accept commitments relating to pricing agreements with online travel agents because the OFT had not given sufficient weight to some of the evidence it had received (which it should have investigated further) and had assumed the wrong competitive counterfactual in its analysis.[6]

- In *GSK*, an ongoing case, the CAT is considering a CMA infringement decision relating to "pay for delay" agreements involving Paroxetine, an antidepressant pharmaceutical product. The appeal has not yet concluded because the CAT has referred questions (including questions on the correct approach to market definition) to the Court of Justice of the European Union.[7] The CAT has, however, already issued a 180-page judgment setting out a detailed review of the CMA's legal, factual, and economic analysis.

- The *CAT* was also prepared to overturn parts of the CMA's Final Report in its *Private Healthcare Market Investigation*, effectively reversing the CMA's decision to order a divestment remedy.[8]

These few examples illustrate that the CAT is prepared to pore over every part of the CMA's decisions and is not afraid to overturn them if it disagrees with the CMA's substantive assessment.

The European Commission has investigated far more cases, and the sums at stake in Commission investigations are generally much larger. And yet, it is difficult to think of any Commission antitrust decisions that have been overturned by the European Court on substantive grounds (as opposed to procedural or technical legal grounds). The recent *Intel* judgment is a possible exception.[9] In *Intel*, the Court of Justice criticized the General Court's approach to reviewing the Commission's economic assessment. But even here, the Court of Justice did not engage with the substance, only the legal test, and the appeal has been remitted to the General Court to be considered again. There is no certainty that the Commission's decision will be overturned on remittal, nor whether the General Court will be prepared to grapple with the substance the second time around. The wider point stands in any event: it is rare for the European Court to intervene in Commission decisions on substantive grounds.

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2 *Pfizer v. CMA* and *Flynn Pharma v. CMA*, [2018] CAT 11. The CMA is appealing the CAT's judgment to the Court of Appeal. The CMA is also re-opened its investigation and could issue a new infringement decision in due course.

3 *Imperial Tobacco and others v. OFT*, [2011] CAT 41.

4 Ofwat is the sector regulator for water and sewerage in England and Wales. It has the power to enforce competition law in its sector concurrently with the CMA.

5 *Albion Water v. Water Services Regulatory Authority and others*, [2008] CAT 31.

6 *Skyscanner v. CMA*, [2014] CAT 16.

7 *GSK v. CMA*, [2018] CAT 4.

8 *HCA v. CMA*, [2014] CAT 23.

9 *Intel v. Commission*, Case C-413/14 P, judgment of September 6, 2017.

The European Commission certainly deals with a greater number (and greater proportion) of "classic" cartel investigations than the CMA. Cartels are "by object" infringements, they raise fewer questions of legal and economic judgment, and they often involve leniency applications and settlement agreements. Appeals in cartel cases more often involve the calculation of fines and attribution of liability than questions of effect or economic assessment. Even so, the Commission cannot be accused of shying away from difficult or controversial cases. For example, its investigations into interest rate benchmarks, foreign currency exchange, multi-lateral interchange fees, Microsoft, Qualcomm, and Google have all raised difficult questions of law and economics, as well as complex facts. And they all involve significant consequences for the parties involved.

This article does not seek to examine the merits of individual cases, but to consider whether there are institutional or procedural reasons why CMA decisions seem more vulnerable to judicial attack than those of the European Commission. Has the CMA given the CAT reason to be so interventionist? Are the CMA's investigative processes less robust than those of the Commission? Or does the General Court give the Commission an easy ride?

II. SMALL BUT SIGNIFICANT DIFFERENCES IN PROCEDURE

When it comes to administrative investigations, the CMA's powers and procedures largely mirror those developed for (and by) the European Commission at the EU level. Both are administrative regimes, in which the authority acts as both investigator and decision-maker.

- The Commission and the CMA can both require parties to produce evidence, and have the power to carry out dawn raids.
- Both are obliged to explain the case against the parties in a statement of objections, and to provide access to documents on the case file.
- Both are required to give the parties the right to respond in writing and at an oral hearing before issuing an infringement decision.
- An infringement decision is a corporate decision by the Commission (through the College of Commissioners) or CMA (through powers delegated by the CMA Board).
- Procedural disputes along the way can be referred to an independent Hearing Officer (EU) or Procedural Officer (UK).
- The authority has to produce a reasoned decision, which is then subject to appeal.

The similarities between the EU and UK regimes are far greater than their differences. As the following examples show, however, the differences are potentially significant.

A. Case Opening and Closing

The European Commission can use investigative powers "in order to carry out the duties assigned to it" under Regulation 1/2003. It can use formal information-gathering powers to collect information about a suspected infringement and decide whether to proceed with a formal investigation based on that material.

The CMA cannot use formal investigation powers *unless* it has concluded that it has reasonable grounds to suspect an infringement and has also decided that the case is an administrative priority under its published Prioritisation Principles.[10] This means that the CMA cannot even begin an investigation until it has already carried out a preliminary fact-finding exercise (without any formal investigation powers). It has to be satisfied not only that there is a suspected infringement and that its impact is sufficiently large to justify the use of CMA resources, but also that there is a reasonable prospect of reaching an infringement decision on the substance and that it would be able to impose remedies in the end. The Commission can – and does – carry out preliminary assessments before opening investigations too. But it can also use formal investigation powers from the outset, while the CMA cannot. Intuitively, the need to satisfy additional tests before the CMA can open a case ought to ensure that its decisions are less susceptible to appeal.

10 Prioritisation Principles for the CMA (CMA 16), April 2014.

Conversely, while it is harder for the CMA to open an investigation, it is far easier for the CMA to close an investigation than it is for the Commission. The CMA can decide to close a case if it decides there is insufficient evidence of an infringement or that pursuing an investigation would be a disproportionate use of its resources, i.e. if the case ceases to be an administrative priority under the same Prioritisation Principles. The CMA's power to close cases on administrative grounds, even after it has already carried out a lengthy investigation, is long established, following the High Court judgment in *Cityhook*.[11] The ability to close investigations easily also suggests that the cases which the CMA determines should be pursued to an infringement decision are less vulnerable to challenge.

While the European Commission can also close cases on administrative grounds or where there is a "lack of EU interest," this can involve sending rejection letters to complainants, setting out the reasons for the decision, which can then be subject to challenge.

The *Confédération européenne des associations d'horlogers-réparateurs* ("CEAHR") case provides a powerful illustration.[12] CEAHR complained to the European Commission in 2004 that manufacturers of luxury watches were refusing to supply spare parts to independent repairers, in breach of EU competition law. The Commission formally rejected that complaint in 2008, but its rejection decision was annulled by the General Court (because of a failure to provide sufficient reasons). The Commission was forced to carry out a further investigation and rejected the complaint a second time in 2014. This rejection decision was also challenged to the General Court and finally upheld in 2017, some 13 years after the original complaint. When it is so difficult to close a case, there are strong incentives to continue towards an infringement decision.

B. Witness Evidence

The CMA has powers to require individuals connected to the companies under investigation to attend compulsory interviews.[13] Compulsory interviews are now a common feature of UK antitrust investigations and witness evidence can be critical in defending (or challenging) a CMA decision before the CAT. The European Commission does not have powers to conduct compulsory interviews (other than asking limited factual questions in the context of a dawn raid). Its understanding of the facts therefore depends to a large degree on the accounts of complainants and leniency applicants, who may both have incentives to present the facts in ways that are most damaging to the companies under investigation. It is difficult for the Commission to test its theories with the individuals involved in an impartial way.

C. Oral Hearings

Before the European Commission, complainants and other interested third parties are often permitted to attend the parties' oral hearings. The company under investigation is given only a short opportunity to make oral submissions and is then subject to interrogation by the Commission case team and a series of allegations from complainants. The Commissioner does not even attend. It is therefore not uncommon for parties to decline the opportunity for a hearing altogether.

In the UK, hearings are private. The company under investigation has half a day to make its submissions and answer questions directly to the decision-makers. As a result, CMA hearings are rarely avoided by the parties.

D. Decision Making

Under the UK regime, investigations are run by a Senior Responsible Officer ("SRO"), who acts as decision-maker until a Statement of Objections has been issued. There are checks and balances along the way but, ultimately, that decision rests with the SRO. Once a Statement of Objections has been issued, a Case Decision Group ("CDG"), made up of three senior officials who have not been involved in the investigation is appointed to act as decision-maker. The CDG considers the Statement of Objections with a fresh pair of eyes, receives the parties' written responses, and attends the oral hearing. In Sports Bras, for example, the CDG closed the CMA's case once it had considered the Statement of Objections issued by the case team and heard the parties' responses.[14]

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11 *R (ex p. Cityhook) v. OFT*, [2009] EWHC 57.

12 Case T-712/14 *Confédération européenne des associations d'horlogers-réparateurs (CEAHR) v. Commission*, ECLI:EU:T:2017:748, General Court judgment of October 23, 2017.

13 Competition Act 1998, section 26A.

14 Case CE/9610-12, CMA case closure summary of June 13, 2014

The UK Government's intention when introducing this approach was "to increase the robustness of decisions and reduce any perception of confirmation bias by introducing collective judgement in decision-making with separation between responsibility for the investigation of the case and for the final decision."[15]

This decision-making process also helps to ensure that UK antitrust investigations are free from political influences; decisions are taken on technical legal and economic grounds, without any involvement by politicians.[16]

European Commission investigations, on the other hand, are the responsibility of the Competition Commissioner, a political appointee. Investigations are subject to review by the Commission's Legal Service and Chief Economist Team along the way and, in complex cases, the Commission may also establish a peer review panel, known as a "devil's advocate" panel, to provide a fresh perspective. But the decision to proceed always rests with the Competition Commissioner and case team.

Infringement decisions are taken by the full College of Commissioners. The Commissioners are not competition law experts and they are heavily dependent on the advice of the Competition Commissioner and case team on questions of substance. The proposed infringement decision may not be presented to the College of Commissioners until it is ready for adoption – already in final form – giving no meaningful opportunity to engage with the substance. The Commissioners (other than the Competition Commissioner) are not part of the investigation process, and the parties have no right (and usually no opportunity) to put their case directly to these decision-makers.

These are just a few examples of small, but arguably significant, differences in what are ostensibly very similar administrative procedures. They are by no means comprehensive and there is considerable room for debate about whether either regime is "better" than the other for enforcement and deterrence. What these examples suggest, however, is that the UK regime tends to be more cautious in finding an infringement. If true, this again raises the question: why do the UK authorities seem to have a harder time before the CAT than the Commission has before the General Court?

III. WHEN IS AN APPEAL NOT AN APPEAL?

The first, and perhaps most obvious, reason why CMA decisions have been subject to greater scrutiny is that most antitrust decisions taken by the UK authorities are subject to appeal on the merits. The CAT has full jurisdiction to examine every aspect of the decision, can hear new evidence, and it can substitute its own decision for that of the authority. It has been argued that the CAT should not substitute its own view for a tenable view taken by the authority on a sound factual basis, particularly where there was a range of reasonable conclusions it could have reached.[17] It is debatable whether this is true in practice. The question before the CAT is whether the competition authority got it right, with little deference given to the authority's expertise. The CAT cannot carry out its own investigation and, where additional facts are needed, a case may have to be referred back to the CMA. In *Pfizer*, for example, the CAT overturned the CMA's decision but was unable to reach its own conclusion on whether there had been an abuse without further evidence.[18] The case was therefore sent back to the CMA. But where it has all the facts it needs; the CAT will decide the outcome (see *Welsh Water*).

In contrast, the General Court's jurisdiction is limited to judicial review. It can quash a decision by the European Commission if it identifies an error in its assessment, but it does not have the jurisdiction to substitute its own decision for that of the Commission. If a decision is quashed, it is for the Commission to decide whether to re-open its investigation and bring a new decision. As the EFTA Court explained when applying the same legal threshold in *Posten Norge*, the Court cannot substitute its own decision for that of the authority, "if there can be no legal objection to the assessment […], even if it is not the one which the Court would consider to be preferable."[19]

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15 Growth, Competition and the Competition Regime, Government Response to Consultation, March 2012 (paragraph 6.21).

16 The UK regime allows for some limited political involvement in mergers and markets cases, but not in antitrust investigations.

17 See, for example, "Appeal and Review in the Competition Appeal Tribunal and High Court" by Dinah Rose QC and Tom Richards (2010), *Judicial Review* 15(3) pages 201 to 219, citing *T-Mobile (UK) Ltd and others v. Ofcom* [2008] CAT 12 and *Albion Water Limited v. Water Services Regulation Authority* [2008] CAT 31.

18 *Pfizer v. CMA* and *Flynn Pharma v. CMA*, [2018] CAT 11 (paragraph 467): "In the present case, however, although our essential finding is that the CMA misapplied the test for unfair pricing, the correct application of that test as we have described it would involve detailed consideration of further information, some of which may need to be obtained and properly tested, and the careful assessment of what normal competitive conditions might have been. A particular example is a better understanding of the evolution of the tablet market and tablet pricing. These are not things that the Tribunal is, in practice, in this case, in a position properly to do."

19 *Posten Norge v. EFTA Surveillance Authority*, Case No. E-15/10, judgment of April 18, 2012 (paragraph 98).

It is questionable how significant this difference is, at least as a matter of law. Although the General Court is carrying out a judicial review and cannot substitute its own decision for that of the European Commission, it has the power – and sometimes the obligation – to examine the facts underlying a Commission decision.[20] This principle was confirmed by the European Court of Human Rights in *Menarini*.[21] Since antitrust fines are quasi-criminal, the decision should be subject to review by an independent and impartial tribunal with full jurisdiction to review the facts. In *Posten Norge*, the EFTA Court was even more explicit:

> the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision … [the authority] cannot be regarded to have any margin of discretion in the assessment of complex economic matters which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review.
>
> … although the Court may not replace [the authority's] assessment by its own …, the Court must nonetheless be convinced that the conclusions drawn by [the authority] are supported by the facts.[22]

This is a difficult balance to strike: a decision will not be quashed just because the court disagrees with the conclusions, but the court has to decide whether the decision is supported by the facts.[23] This is not so different from an appeal on the merits, and yet there are few examples of the General Court intervening on this basis.

In contrast, there are times when the CAT's jurisdiction is limited to judicial review but has nevertheless felt able to grapple with (and criticize) the CMA's substantive assessment. In *Hotel Online Booking*, for example, the CAT was asked to review a decision to accept commitments. It was therefore confined, as a matter of law, to considering whether the decision was unlawful, irrational or procedurally unfair. It could not simply disagree with the CMA's assessment.[24] The CAT nevertheless felt able to examine the substance of the decision in detail: "We are willing to concede a large margin of appreciation to the CMA in cases of this kind … to allow it to exercise its expert judgement. The Tribunal must, however, intervene under the normal principles of judicial review where there has been a clear error."[25] It concluded that there had been an error of judgment and quashed the decision.

Putting aside the legal tests for intervention, there are other differences between the CAT and the General Court. First, the CAT is a specialist competition law tribunal, and the judges are (for the most part) experts in competition law. They are confident intervening in technical matters and show little deference to the competition authority. The CAT's only purpose is to resolve competition law disputes and hold competition authorities to account. The European Court has a far wider role. As it has to deal with disputes concerning all areas of EU law, it may feel less confident interfering with the Commission's expert assessment in competition cases, and it has more than enough cases to process without expanding its competition-law functions.

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20 See, for example, *Microsoft v. European Commission*, Case T-201/04, judgment of September 17, 2007 (paragraph 89): "while the Community Courts recognise that the Commission has a margin of appreciation in economic or technical matters, that does not mean that they must decline to review the Commission's interpretation of economic or technical data. The Community Courts must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it."

21 *Menarini Diagnostics v. Italy*, Case No. 43509/08, judgment of September 27, 2011. See also the European Court of Human Rights judgment in *Ortenberg v. Austria* (Case 33/1993/428/507) [1995] 19 EHRR 524.

22 *Posten Norge v. EFTA Surveillance Authority*, Case No. E-15/10, judgment of April 18, 2012 (paragraphs 100 and 101).

23 See *Posten Norge v. EFTA Surveillance Authority* (paragraph 102): "the submission that the Court may intervene only if it considers a complex economic assessment of [the authority] to be manifestly wrong must be rejected."

24 The Court of Appeal has confirmed that the standard of judicial review exercised by the CAT is no different in law from the standard that applies to the review of decisions by other public bodies. See, for example, Carnwath LJ's statements in *OFT and others v. IBA Health Limited*, [2004] EWCA Civ 142 (paragraphs 88 to 89): "The Tribunal was required to apply the principles which would be applied 'by a court on an application for judicial review' (s 120(4)). On its face, this seems a clear indication that, notwithstanding the Tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court. The Tribunal expressed their difficulty in interpreting this duty (para 217). In these circumstances, they might have found help in the leading textbooks on the subject."

25 *Skyscanner v. CMA, [2014] CAT 16, judgment of September 26, 2014 (paragraph 173).* See also Professor Glynn's dissenting judgment in *FIPO v. CMA*, [2015] CAT 8, judgment of April 29, 2015 (paragraphs 77 and 87): "I am also advised that although the principles of judicial review rightly allow a very wide margin of discretion to the CMA, it is not impossible for an application for review on grounds of lack of Wednesbury rationality to succeed." When applying these principles to the economics effect of a fee cap, he stated: "For the CMA to find no AEC [adverse effect on competition] on the ground that consultants 'could' compete below the fee caps did not have regard to the economic realities, and was therefore irrational."

There are also significant differences in the court process at the UK and EU levels. An appeal to the General Court is decided mostly "on the papers." The oral hearing is short, with parties generally given only a limited opportunity to present their arguments, and it is normal for the overall process to take several years. The General Court's judgment in Intel came five years after the Commission's decision, for example. Its judgment in *MasterCard* came four and a half years after the contested decision.[26] Compare this with the CAT appeal in *Pfizer*. The trial lasted 13 days, and the 152-page judgment was issued just 18 months after the contested decision.

The CAT also relies heavily on witness evidence. Witnesses are important because their evidence can be tested in court. Evidence provided to the CMA during its investigation, even in response to a formal information request, cannot be tested by the court in the same way and so cannot be given the same evidential weight.[27] The importance of witness evidence was first highlighted in the *Tobacco* case (mentioned above), where the OFT's description of the price parity agreements at issue was undermined by witness testimony. The lack of witness evidence in support of the CMA's decision was criticized more recently in *Pfizer* and in *GSK*. In *Pfizer*, the CAT criticized the CMA for failing to call factual witnesses, stating that the failure to produce witnesses "could expose the CMA to the risk that it will fail to convince the Tribunal that it has proven the alleged infringements." In *GSK*, the CAT also criticized the parties for failing to produce more witnesses of fact and instead seeking to rely on statements made by individuals during the original investigation. While statements and transcripts of interviews by the CMA taken during the administrative investigation were admissible in the appeal, the CAT placed limited weight on this evidence because the witnesses could not be cross-examined or tested in court.[28]

In short, the CMA has a hard time before the CAT because the CAT is prepared to re-examine every aspect of the CMA's analysis. It does so carefully and at length, it accepts new evidence, places considerable weight on witness evidence, and displays little deference to the expertise of the CMA or any other competition authority.

IV. CONCLUSION

The European Commission has been responsible for developing investigation procedures that have been adopted not only in the UK but in many other jurisdictions across Europe and around the world. Fundamental safeguards are built into the system, including the right to know the authority's allegations, the right of reply, access to evidence, publication of a reasoned decision, and review by an independent tribunal. The Commission also led the way with the introduction of an independent Hearing Officer, intended to provide parties with stronger guarantees of procedural fairness (which the UK has copied).

While there are more similarities than differences between the UK and EU regimes, the examples above suggest that, in at least some important aspects, UK procedure goes further to protect parties' rights of defense. When introducing the most recent reforms to the UK regime, the desire to ensure fairer, more robust decision making was at the heart of the Government's thinking: "The Government has decided to embed an enhanced administrative approach to antitrust enforcement, involving improvements to the speed of the process and the robustness of decision-making, addressing perceptions of confirmation bias."

Despite this, the CMA continues to find itself on the receiving end of greater judicial intervention. One possible explanation is that the CMA is simply doing a bad job. Another, more plausible, explanation is that greater intervention by the CAT has stimulated a need (and a desire) for more robust decision making. For an infringement decision to stand, not only does the CMA have to conclude that there was an infringement, the CAT has to agree as well.

In contrast, the European Commission has enjoyed relatively little substantive intervention by the General Court, and its procedures have remained largely unchanged since the regime was introduced. While this article does not specifically consider merger cases, it is notable that the Commission did reform its processes in merger cases following successful appeals of its prohibition decisions in *Airtours/First Choice, Schneider/Legrand*, and *Tetra Laval/Sidel*. Unless the General Court is prepared to intervene more in the substance of antitrust cases, there is a growing risk of confirmation bias and a (relative) weakening of procedural safeguards for parties under investigation, to the detriment of the regime as a whole.

Over the next few years, the General Court will face a number of highly complex cases, including the remitted appeal in *Intel* and appeals of the Commission's abuse of dominance decisions against Qualcomm and Google. All of these cases raise novel questions of law, economics and fact. The General Court will have to decide whether it is ready to grapple with the detail, or defer to the Commission's expertise. The approach it takes could have a significant effect on the way EU antitrust investigations are carried out in future.

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26 Case T-111/08, *MasterCard v. Commission*, General Court judgment of May 24, 2012.

27 See, for example, *Pfizer v. CMA* and *Flynn Pharma v. CMA*, paragraphs 83 to 85.

28 *GSK v. CMA*, paragraphs 69 to 72.

DUE PROCESS AND ANTITRUST IN JAPAN: ENFORCERS' PERSPECTIVE[1]

BY HIDEO NAKAJIMA[2]

1 Since I worked at the Japan Fair Trade Commission ("JFTC") as Secretary General prior to joining the law firm last year, I would like to discuss an issue of due process in antitrust law from the enforcers' perspective, though any views mentioned below should be regarded my own. Also, while the definition of "due process" may vary, in this article let me use that term in its broader sense, including procedural safeguards and fairness, as well as the rights of defense.

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I. THE BASIC ARGUMENT FOR DUE PROCESS

Needless to say, due process is critical for those parties subject to antitrust enforcement in defending their rights, but it is equally so for antitrust enforcers, since it helps them make fully informed and legitimate decisions, thereby enhancing their effectiveness and the credibility of their antitrust decisions.

From this perspective, the major thrust of due process is, among others, to ensure for those parties concerned a sufficient opportunity to be heard under transparent enforcement procedures.

To be specific, this includes;

1) delivering an adequate notice to appraise the parties involved of the agencies' competition concerns,

2) affording them sufficient opportunities to present their views and relevant evidence at an appropriate time and in a meaningful manner, and

3) ensuring that all of the agency's enforcement procedures are transparent and clearly made public.

In short, open, timely, and sufficient communication exchanged between the antitrust enforcers and the parties concerned at various stages of enforcement procedures not only helps ensure sufficient defense to those parties but also facilitates more legitimate and effective antitrust enforcement actions.

That said, of course, different legal systems, practices, and traditions among jurisdictions may well entail different types of enforcement procedures, which can all still ensure a high standard of due process for those parties subject to antitrust enforcements.

In this context, at the outset of this article, let me refer to a quite unique feature of Japan's antitrust legal framework.

Under Japan's Antimonopoly Act ("AMA"), the amounts of administrative surcharges imposed on parties implicated in antitrust infringements are meant to be determined in a uniform and compulsory manner in accordance with legally prescribed methods, regardless of specific factors concerning individual cases, including whether and to what extent those parties under investigation cooperate with the JFTC.

The amounts of administrative surcharges are calculated as a fixed percentage of a firm's turnover from the sale of the relevant cartelized products or services. These fixed rates of surcharge as stipulated under the AMA vary depending only on the size and types of business (manufacturing, wholesale, or retail) of the parties concerned.

In other words, unlike the administrative fines imposed by the EU and many other overseas agencies, the JFTC is not authorized at all to determine whether a surcharge should be imposed or not, and how much of a surcharge should be imposed in individual cases in accordance with their case-specific factors.

In the same vein, even under the Japanese leniency program, the rates of the surcharge reductions granted to leniency applicants are fixed by law at certain percentages (100, 50, or 30 percent) according only to the timing and order of their respective applications. So long as the information contained in the leniency submission is regarded as sufficient to help the Commission launch or advance its formal investigation, the degree of cooperation by leniency applicants during the Commission's investigation as well as the value of the information contained in leniency submissions are basically irrelevant to whether surcharge reductions will be granted to leniency applicants or how significant they may be.

Actually, such a uniform and compulsory surcharge system is fully consistent with the overall legal framework in Japan. Not only the JFTC, but any other administrative agency of the Japanese government, has never been given such authority or discretionary power to determine the appropriate amount of administrative surcharges imposed upon the relevant parties in accordance with various case-specific factors, including the degree of cooperation of the infringing parties. The basic thought behind this is that administrative surcharges should be highly predictable and transparent in their amounts, and the way of calculating them as they are to be imposed is mainly for the purpose of deterring infringements of administrative laws. Those case-specific factors are, as necessary, to be considered in criminal proceedings by the court judges under the exiting judicial system in Japan.

The next section shows very briefly what the JFTC has been doing to enhance due process, and the final section presents what the JFTC will do to enhance it further in the near future.

II. RECENT DEVELOPMENTS IN DUE PROCESS IN ANTITRUST ENFORCEMENT IN JAPAN

The JFTC has recently been taking several measures to enhance due process in its enforcement actions. The AMA was amended five years ago, particularly in response to the requests of business communities. The amendments included the following three major components:

1) the abolishment of the *ex-post* administrative hearing procedure held by the Commission for reviewing its original decisions upon appeal by their respondents;

2) the improvement of the Commission's pre-decision notification procedure, including allowing the parties concerned almost full access to the evidence held by the Commission for establishing their infringements; and

3) a review of the Commission's investigation procedures and the issuance of Guidelines on them.

Before the 2013 amendments above, whenever the parties concerned wanted to appeal JFTC's legal decisions, the appeal had first to be heard in the hearing procedure before the JFTC. This *ex-post* administrative hearing procedure, which was introduced by the 2005 amendments to the AMA by converting from *ex-ante* hearing procedure into an *ex-post* one, had received wide-spread criticism voiced in particular among the business community. They argued that the Commission's *ex-post* procedure lacked the appearance of fairness, since the Commission itself was in a position to review its own original decision under such procedure, where they were to play the roles both of a prosecutor and of a judge.

In response to such criticism, the JFTC had taken various measures, including appointments of court judges or outside lawyers as the examiners on a secondment basis. The criticism regarding a lack of the appearance of fairness, however, could not be dismissed practically without completely overhauling the existing hearing procedure.

After abolishing this *ex-post* hearing procedure, appeals presented by the parties concerned against the JFTC's decisions are now to be filed directly with the Tokyo District Court in the first instance. Regarding the pre-decisional notification procedure, the amendments further enhanced the concerned parties' opportunity to be heard prior to the Commission's decision.

Under the new procedure the investigators of the case, under the direction of a procedure supervising officer appointed by the Commission for each case, are to explain the contents of the draft orders to the parties, who can then raise questions to the investigators and present their arguments and evidence, if they so wish.

The officer is to report to the Commission on those issues raised during the pre-decisional notification procedure with the relevant documents when it is completed, and the Commission is required to give due consideration to the report in making its final decisions.

Furthermore, under the 2013 amendments the parties are allowed almost full access to the evidence establishing their infringements held by the Commission during the advance notification process, regardless of whether it was collected from the relevant parties themselves or from other parties. In addition, they are to be allowed to make a copy of any evidence submitted by themselves and any witness statements by their employees. The Commission cannot refuse such access to the evidence by the parties concerned without justifiable reasons, including jeopardizing third parties' interests.

In addition to those two changes, the 2013 amendments to the AMA requested the government to review the Commission's investigation procedures from the viewpoint of ensuring sufficient defense for the parties under investigation.

In response to this request, in December 2015 the JFTC published "Guidelines on Administrative Investigation Procedures under the Antimonopoly Act," which articulates the guiding principles for administrative investigation procedures under the AMA.

Basically, they have amplified the contents of the existing Rules on Investigation stipulated by the Commission in more detail to clarify the Commission's standard investigation procedures to ensure due process and transparency for the businesses and the general public.

Such guidelines have also established grievance procedures, in which parties or their employees subject to voluntary witness interviews make a complaint in writing to the Commission when they have found violations committed by case-handlers of the requirements articulated in the guidelines. Actually, several complaints have been filed with the Commission through this procedure every year since its introduction.

III. FURTHER STEPS ENVISAGED FOR ENSURING DUE PROCESS

Notwithstanding the Commission's recent efforts to enhance due process in Japan mentioned above, the voices requesting its further enhancement, in particular by introducing attorney-client privilege, remain strong among the business community and defense lawyers alike.

Moreover, the current surcharge system in Japan has been recently confronted with several potential or perceived problems arising from its uniform and compulsory nature, which I referred to earlier.

Lack of discretion for the JFTC in calculating the surcharge amount in individual cases under the current surcharge system has caused the following problems in its antitrust enforcements, particularly in an increasingly globalized economy and with the recent proliferation of competition laws around the world, where alleged violations of competition laws may often be subject to multiple actions by more than one competition agency almost simultaneously. Needless to say, under such circumstances the convergence or harmonization of antitrust enforcement regimes around the world, including the investigation procedures, would be not only desirable but even essential to promote sound worldwide economic development and to ensure more innovative economic environments.

1) The JFTC has little room to address so-called double counting or double dipping issues, even though the Commission is aware that overseas competition agencies will include or have included some parts of turnovers of the products subject to infringements in determining the amount of their fines, which the Commission is going to include, too.

2) Under the uniform and compulsory surcharge system, the JFTC is legally bound to impose a certain surcharge on the infringed parties even when the Commission believes that they would be of little need or effectiveness in terms of deterring antitrust infringement for cases such as abuses of market dominance or unfair trade practices involving the quite new or innovative business models which have been finally been found to be anti-competitive after thorough investigation.

3) One problem that has significant relevance to due process in Japan, unlike other jurisdictions, is that there is actually very little incentive for parties under investigation to cooperate with the JFTC, as whether and to what extent they cooperate is totally irrelevant to the amount of the surcharge imposed upon them. Consequently, cooperation from the parties under investigation has usually been quite limited, even in cases where they have submitted leniency applications.

In my view, such differences or uniqueness in the Japanese surcharge system should be viewed critically in considering an appropriate method for investigation procedures ensuring due process in Japan, since further strengthening the rights of defense may not necessarily mean that the Commission is well-informed in its investigation process so long as the current uniform and compulsory surcharge system is kept intact and the parties concerned are not incentivized to cooperate with the Commission.

In order to cope with those problems mentioned above, the current surcharge system may, for example, be revised in such a way as to authorize the JFTC to determine at its discretion (probably within the permissible range clearly prescribed by the law as necessary) the most appropriate amounts of surcharge imposed upon the infringing parties for each individual case in accordance with relevant case-specific factors.

Such a revised surcharge system may allow companies under investigation to receive a reduced surcharge in return for their cooperation with the JFTC, as in a lot of overseas jurisdictions, thereby incentivizing them to cooperate with the commission's investigations. Accordingly, it would be expected not only to facilitate the Commission' fact-finding activities during its investigation but also to help enhance antitrust compliance by the relevant companies, particularly through effective communication with their defense lawyers.

It is in this context, I believe, that the introduction of such an incentive mechanism into our surcharge system would possibly lead to the further enhancement of due process in our procedures by strengthening the rights of defense through the introduction of attorney-client privilege, which has never been recognized at all in Japan's legal system, as well as the right to legal counsel during witness interviews.

What is important in reviewing investigation procedures in our jurisdiction in terms of further ensuring due process is to strike a proper balance between the Commission's investigative powers and the rights of defense of the parties under investigation. For doing so, incentive mechanisms for businesses provided by the new discretionary surcharge system should play a key role in Japan, as they do in other jurisdictions.

IV. THE CURRENT STATUS OF DISCUSSION ON THE AMA AMENDMENTS

Of the actions mentioned above, the JFTC actually began reviewing the current surcharge system by establishing an expert study group in 2016 in order to align it more closely with prevailing international standards under a global economy. The group issued a report summarizing its deliberations in April 2017.

That report stressed the importance of improving the surcharge system so as to determine the surcharge amounts in a more flexible manner in accordance with case specific factors, without undermining its transparency and predictability.

It also recommended that attorney-client privilege be paid due attention in the JFTC's enforcement actions, to the extent to which discretionary power is authorized for the Commission. In this regard, the study group noted that an introduction of such legal privilege may affect the entire legal framework in Japan, since this is not currently recognized at all in any legal fields there, unlike in other jurisdictions. Accordingly, it recommended the Commission to explore the possibility of introducing attorney-client privilege in its enforcement actions as a matter of implementation policy for the time being, rather than legalizing it by amending the AMA.

After the report was published, the JFTC started preparing an amendment bill to the AMA in accordance with its recommendations.

Originally, the JFTC was planning to submit the amendments bill to the National Diet earlier this year, but the Commission recently announced that it had given up doing so since lawmakers from the ruling parties, as well as several lawyers, had strongly argued over the legalization of attorney-client privilege by the forthcoming amendments bill, in addition to the proposals for revising the current clear and predictable, but rather rigid, surcharge system.

Facing such arguments from lawmakers for the legalization of a privilege which is likely to affect the entire legal framework of our nation, the Commission has decided to closely watch and follow the developments and outcomes of legislators' deliberations instead of submitting any amendment bill for the AMA to the National Diet right away.

Furthermore, the authorization of discretionary power for the JFTC, even to a rather moderate extent, may not be so straightforward at all under the existing legal system in Japan. As mentioned earlier, no administrative agencies of the Japanese government have ever been given the authority to exercise their own discretion in determining the amount of administrative surcharges imposed upon infringing parties in accordance with various case-specific factors. On top of that, as antitrust infringements such as cartels are subject to criminal proceedings as well as administrative ones, an issue of double jeopardy may also need to be cleared by the Cabinet Legislation Bureau, a legal office of the government.

At this moment, it remains unclear when the amendments bill to the AMA, including an improvement of the surcharge system, will be submitted to the National Diet for its deliberation and approval.

Any changes to the AMA would definitely require the full understanding and cooperation of all stakeholders including businesses communities, lawmakers, defense lawyers, and academics, as well as the relevant government branches, and the general public. In particular, both the introduction of discretionary authority to the JFTC and the matter of attorney-client privilege are closely related to issues concerning the overall legal framework in Japan. Therefore, thorough and constructive discussion would need to continue among the stakeholders before concluding any amendments bill to the AMA, though the problems mentioned earlier arising from the current surcharge system should be addressed as promptly as possible given the current global situation.

PROCEDURAL FAIRNESS AND TRANSPARENCY IN COMPETITION PROCEEDINGS

BY ANTONIO CAPOBIANCO & GABRIELLA ERDEI[1]

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I. INTRODUCTION

In modern legal systems, a procedural fairness framework establishes the basic rights of individuals and companies throughout the investigation procedure and lays down the foundations for an effective, reliable and trustworthy enforcement action. A sound set of procedural rules and sound procedural safeguards is, therefore, a key and indispensable component of any enforcement system where governments scrutinize the conduct of individuals or a legal person, as is the case in competition enforcement proceedings. This is particularly true when the government enforcement action may lead to serious legal consequences for those involved, such as the imposition of hefty corporate, individual monetary fines, or other types of serious penalties, including sanctions of a criminal nature.

Although fairness and transparency are generally considered an indispensable condition for competition proceedings, countries' procedural frameworks and specific rules differ from one another. Significant efforts have been made over the years at the international level to harmonize substantive competition rules, which has led to great results in most enforcement areas. The same cannot be said for procedural rules. It is possible nevertheless to detect common features across national procedural frameworks. While competition proceedings remain largely national in nature, the increasing number of cross-border cases has led to new and different challenges for competition authorities. The need to secure information located in different countries raised the question of the level of procedural guarantees for parties involved in multi-jurisdictional proceedings if the information collected in one jurisdiction is to be used in another. Especially in today's globalized world, cooperation between national competition authorities is becoming more and more important. Hence, laying down basic principles and minimum standards for fairness and due process which can be implemented in most countries plays an increasingly important role in policy making.

Enhancing fairness in competition proceedings is a dynamic, constantly evolving process and international fora have played an important role in striving to identify common principles that could be applied across countries, regardless of the criminal, civil, or administrative nature of their enforcement system. Steps taken by the International Competition Network ("ICN") and the Organisation for Economic Co-operation and Development ("OECD"), as well as initiatives at the national level, offer an opportunity to reflect on the degree of consensus existing on the basic concepts underpinning the principles of procedural fairness and transparency:

- In February and June 2010,[2] Working Party 3 ("WP3") of the OECD Competition Committee held two roundtables on Procedural Fairness looking at Transparency Issues in Civil and Administrative Enforcement Proceedings. In October 2011, these two roundtables were followed by another roundtable on Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts and by an update on Developments in Procedural Fairness and Transparency.

- The ICN issued a Guidance on Investigative Process in 2018.[3] The aim of the Guidance is to synthesize the collective experience of ICN members on how competition agencies implement and improve fair and effective investigative processes. To develop its Guidance, the ICN conducted surveys of agencies' investigative practices and produced a number of relevant reports on investigative tools, transparency, and confidentiality.

II. THE IMPORTANCE OF PROCEDURAL FAIRNESS

The procedural framework of most competition authorities includes a range of rights for the parties when subject to the wide range of enforcement tools (such as requests for information, inspections and seizure of business records, witness interrogations, etc.) which form part of a competition investigation. The fact that competition agencies can rely on strong (and at times intrusive) investigative tools makes it even more important that the parties are granted effective rights of defense. Procedural fairness in investigations and decisions involves establishing procedures that are fair and clear and that provide opportunities for parties to take active part in the investigation leading to a fair decision-making process. Procedural fairness includes rights such as the right to protection of confidential information, the right to obtain access to the case file and to the evidentiary record on which the enforcer intends to rely on, the right to be heard during the investigation and to present arguments and evidence, and finally to request an independent judicial review of the competition enforcement decision.[4]

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2 Organisation for Economic Co-operation and Development - Working Party No. 3 on Co-operation and Enforcement - ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE PROCEEDINGS (January 20, 2010) http://ec.europa.eu/competition/international/multilateral/2010_fairness_feb.pdf.

3 International Competition Network - Guidance on Investigative Process http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

4 Organisation for Economic Co-operation and Development DAF/COMP/WD(2018)6 - Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020 (April 23, 2018) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En.

A well-set procedural legal framework benefits both the agencies and the parties, as well as any other entity or third party, especially since it contributes to more effective agency work. Fairness and transparency are essential for the success of an investigation regardless of its outcome. It is key that the parties involved are confident with the process used to reach a competition decision and trust that the agency's measures were just. The trust of the parties that their arguments will be heard and that the final decision will have taken into consideration all possible facts, arguments, and evidence, especially those in favor of the parties, will ensure better cooperation with the agency, a more smooth and serene confrontation of different views, and certainly a higher impact of the decision itself on market competition. At the same time, transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement action.[5] They also assist the agency in allocating their scarce resources more efficiently, focusing on the aspects of a case that are really worth pursuing and dropping investigations which seemed promising at the outset but, through an open dialogue with the parties involved, reveal unfounded.

III. WHAT DOES PROCEDURAL FAIRNESS INCLUDE?

The concept of procedural fairness can be unfolded into three elements:

1) *General transparency*: government measures of general application must be published and this should be done, as a general rule, before they are applied;

2) *Procedural fairness in investigations*: such measures must be administered in a uniform, impartial and reasonable manner or in a fair and equitable way; and

3). *Judicial review*: there must exist possibilities for appeal or review of decisions on the application of such measures.

Embedded in the concept of fairness is the principle of transparency. Transparency refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, and the terms of agencies' accountability are provided to the public in a comprehensible, accessible, and timely manner. In a broad sense transparency means the degree to which public policies and practices, and the process by which they are established, are open and predictable. Transparency is a basic requirement for the enforcement of competition law as competition laws are often written in general framework form and are applied in a technical manner on a case-by-case basis.

A. General Transparency

Consistency, predictability, and fairness in decision-making processes can be fostered by transparency with respect to the substantive legal standards; agency policies, practices, and procedures. There is no fair and just process if the substantive and procedural rules applied by the agency are not accessible upfront by the parties subject to the enforcement action. Transparency is an integral part of due process since it enables individuals to know their rights, be aware of procedures to protect these rights, and learn the rationale and grounds of public authorities' decisions concerning themselves and other individuals. Thus, transparency improves the accountability, predictability, and consistency of authorities' actions. Generally, agencies have to be transparent and open towards the public and for that purpose they rely on formal transparency in the form of guidelines, public legal standards; most agencies make their policies, decisions, and practices publicly available. But they also use informal ways to increase transparency and predictability like press releases, speeches, articles, working papers, etc.

While most agencies provide a good degree of transparency into their competition laws and policies, there is generally a lower degree of transparency into the procedural rules that they apply. This is often because the procedural rules applied by the agency are governed by general procedural rules applicable to all administrative proceedings, i.e. they are not competition specific provisions. Often access to this information is limited by language constraints which makes the system less transparent for foreign parties in antitrust proceedings. This is an area where there is scope for significant improvements in many jurisdictions.

5 Organisation for Economic Co-operation and Development – Procedural Fairness and Transparency – Competition Committee (2012) https://www.oecd.org/daf/competition/abuse/50235955.pdf.

B. Procedural Fairness in the Investigative Stage

The core of the discussion on procedural fairness in competition cases, however, concerns fairness during the investigative stage. Although fairness is not clearly defined in the framework of competition proceedings, it includes all measures that prevent arbitrary and biased decisions through protection of the individual's rights. It generally includes "(i) the rights of individuals to be adequately notified of charges or proceedings, (ii) the opportunity to be heard at these proceedings, and (iii) the making of any final decision over the proceedings by an impartial person or panel." (OECD, 2010)

Procedural fairness during the investigation rests on a number of general principles:

- *Confidentiality*: Competition authorities can access great amounts of information which is often sensitive, such as business secrets and personal data. Power to require such information is balanced by the right of the parties to keep that information confidential. Confidentiality also ensures that those involved in antitrust proceedings are willing to cooperate with competition agencies and supply relevant information and documents. The right to confidentiality finds its limits in the parties' right of defense: parties should have access to information and evidence used against them, both incriminating and exonerating.[6] A number of methods are adopted by competition agencies to provide access to evidence containing confidential information while respecting confidentiality claims. These include "conventional" methods such as redaction or summaries, and "innovative" methods such as confidentiality rings and data rooms.

- *Functional separation* and internal checks and balances: Separation of the different stages during the procedure ensures an objective decision-making process. This is why in many countries, investigation is formally or de facto separate from decision-making. Thanks to that, decision makers can be more objective about the case and about the weight of the evidence brought in support of the infringement claim. In addition, many agencies' internal processes and rules promote fairness of the investigation by providing ongoing internal review of investigatory decisions and by ensuring leadership involvement in the investigation. These agencies make use of procedures such as "devil's advocate" review, separate review by teams of specialized economists, or the use of additional industry or sectoral experts in the analysis.

- *Collaboration and openness:* Communication between the competition agency and those involved in an enforcement proceeding is a key component of a fair and transparent investigation. Many agencies consider it valuable to hold meetings with subjects of competition enforcement proceedings at key points in the investigation, at both the staff and decision-maker levels. These meetings can ensure that the investigation is more targeted and more effective. For instance, a formal request of information sent to the parties can be followed (or preceded) by an informal discussion with the parties so that they can provide the most accurate answers and submit only the relevant documents for the investigation based on a better knowledge of the purpose of the request itself. Openness towards the parties to a proceeding has the great potential to enhance the knowledge of the facts underpinning the investigation and offers opportunities for the parties to present arguments and new facts.

- *Parties' involvement in the case*: one of the ways in which agencies provide transparency and ensure procedural fairness to the parties is to allow for the party involvement in the investigative and decision-making processes. This includes:

    1) The *right to be notified of charges* and proceedings promptly and adequately is a fundamental part of due process. While it is indispensable for the parties to be able to defend themselves, the right to be notified also fulfils a transparency requirement. The ICN Guidance on Investigative Process recommends that "[t]o the extent that it does not undermine the effectiveness of an investigation, agencies should notify parties as soon as feasible that an investigation has been opened, and identify its legal basis, the conduct under investigation, and where possible, the expected timing of the investigation." One commonly adopted method is the use of a written document (such as a Statement of Objections, Statement of Issues, or Examination Report) informing the parties of the allegations against them, the details of the case and the evidence brought against them.

    2) The *right to an effective representation*, which includes the right to be represented and advised by legal counsel and the right against self-incrimination. Most jurisdictions recognize the legal professional privilege ("LPP") to protect confidential communications between attorney and client from forced disclosure to public authorities or third parties. While the scope of the LPP varies from one jurisdiction to another, LLP aims at ensuring that all legal and natural persons have unrestricted access to external (and in many

6 Organisation for Economic Co-operation and Development DAF/COMP/WD(2018)6 - Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020 (April 23, 2018) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En.

countries also to internal) legal advice without fearing their communications can be used against them. Another element of the right to defense is privilege against self-incrimination. This privilege can be a ground for refusal to provide answers which directly or indirectly involve admission of an infringement.

3) The *right to present arguments and evidence*. Most jurisdictions allow the parties to submit written replies to the written document setting out the allegations against them. Some jurisdictions also allow parties to review and comment on key submissions by third parties contained in the case file, or submit memoranda or observations at any point during the investigation stage, especially if those include exculpatory evidence. Most agencies provide the parties with the right to a hearing where arguments and defenses can be presented orally directly before the case team or the decision-making body of the agency. Specific rules governing hearings are often set out in writing and made publicly available, including rules on the independence of the hearing officer.

- *Transparency of final decisions:* There are benefits to final agency enforcement decisions being made public. This ensures transparency of the enforcement action and accountability of the enforcing agency. Typically, agencies are required to (a) provide the parties with their theory of harm in writing; (b) in sufficient detail so as to identify the basis and rationale for the decision, including consideration of the parties' contentions, and exculpatory and inculpatory evidence; and (c) provide to the parties prior to publication of the final decision. Transparency in the decision-making phase is the basis for effective judicial review of the agency's actions. Most jurisdictions extend transparency not only to full infringement decisions but also to settlement and commitment decisions. More diversified is the situation concerning transparency of decisions not to pursue an investigation; often, transparency is provided not through the publication of a decision but rather via a short press release or other statements referring to the decision to close the case and its justifications.

C. Judicial Review

Fairness of the enforcement action also rests on the ability of the addressees of such action to seek external review by an independent body of the administrative decision. One of the main roles of the judiciary is to exercise control over administrative bodies to ensure that their decision-making powers are used in a fair and reasonable manner. The standard of review applied by the courts in competition cases varies between jurisdictions and may depend upon the particular administrative or judicial act under review. That being said, courts ultimately have to ensure that agencies act within the boundaries of the legal authority given to them by the legislator, safeguarding the rule of law, and protecting individuals from arbitrary acts of the state. In some jurisdictions specialist competition tribunals exist to review competition decisions. In other jurisdictions the review is carried out by the ordinary courts. The judicial body will decide if the relevant procedural rules have been adhered to, whether the facts have been accurately found, and whether there is any evidence of misuse of powers, or manifest error of assessment. In some countries, the scope of the judge's review goes beyond the procedural rights and encompasses the economic and legal assessment carried out by the competition authority.[7]

IV. CONCLUSION

Procedural fairness and transparency are a complex, multi-sided set of principles that embrace many rights, as well as formal and informal practices providing for an effective legal framework to support sound and efficient competition enforcement. Ensuring minimum standards of fairness in competition proceedings is crucial for the success and credibility of the enforcement system. The principles of transparency and procedural fairness need to be flexible enough to adjust to the ever-changing circumstances and requirements of the complexity of competition enforcement. The growing cross-border nature of many antitrust investigations and the need for cooperation between different national competition authorities in such cases emphasizes and deepens the need to ensure a coherent and consistent framework for procedural fairness across jurisdictions. While the general principles on which fairness rest are largely common across jurisdictions, many questions remain to be addressed. International organizations have played and can continue to play a key role in fostering fairer procedures through dialogue, sharing of experiences and standard setting.

Despite the existing differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among countries, there is a growing consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement. Transparency and procedural fairness can, and are, achieved in many different ways. The ultimate objective of setting minimum common standards and principles is not uniformity – one size does not fit all – but to ensure consistency in the approach of agencies operating in different jurisdiction. An enforcement process which is perceived to be fair, predictable, and transparent will strengthen the legitimacy of the

7 Organisation for Economic Co-operation and Development - Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013) http://www.oecd.org/competition/InternEnforcementCooperat ion2013.pdf.

decisions of competition authorities ensuring that the action of governments will result in substantive outcome in the market. Transparent and fair procedure will benefit not only the parties involved who will trust that the action of the government will be just and fair, but mostly they will help agencies make better enforcement decisions by exposing their theories and facts to informed criticism throughout the enforcement process. The effectiveness of the enforcement actions overall will improve as agencies will be better able to deploy their scarce resources on the real issues in dispute.

TOWARDS A SYSTEMATIC CONTROLLING OF ANTITRUST DECISIONS?

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I. INTRODUCTION

In an imperfect world, it is impossible for competition authorities to get every case right in an economic sense, i.e. with a view to actual pro- and anticompetitive effects. This is particularly true since antitrust decisions involve the prediction of future effects (for instance, in merger control cases) and/or the assessment of counterfactuals (like in abuse of market power cases or cartel damage estimations). Especially in merger control and abuse of market power or monopolization cases, the benefit of hindsight often allows for an *ex-post* analysis with superior knowledge and, thus, an *ex-post* assessment of antitrust decisions yielding insights about strengths and weaknesses of the decisions.

In our view, systematic *ex-post* analyses may form an important part of due process in the sense of a systematic "controlling" of the processes and decisions of competition authorities in order to improve future decisions and, thus, reduce error costs. Competition authorities have a responsibility towards society and companies alike to improve antitrust decisions over time and to learn from past decision "errors." Figuratively, the due process requirement should not end with the case decision. A systematic controlling of antitrust decisions indirectly improves the legal rights of the parties involved by making competition policy better over time. Such a "controlling" approach refers to reviewing past decisions in order to make better future decisions – in contrast to going back to change or revise past decisions.

II. ERROR COST FRAMEWORK

The so-called "error cost framework" is commonly used to evaluate antitrust rules and decisions. The starting point of this approach is the assumption that competition policy enforcement is always imperfect. Two types of errors can then occur in the application of antitrust law: Type 1 "false positives," where competition authorities intervene without true justification because the analyzed conduct did not, in fact, harm competition; and Type 2 "false negatives," where the authority does not intervene but the respective conduct does indeed harm competition.[3] There can be various reasons for these errors, such as basic uncertainties about future developments and counterfactuals, (strategic) information asymmetries, individual rent-seeking behavior and lobbying activities, etc. The aim of the error cost framework is to add up the costs for the two error types with potential transaction costs that are associated with the legal analysis process ("regulation costs") to try to assess the social costs of single instruments, rules, and/or competition policy as a whole.[4] While a simultaneous reduction of both types of errors obviously improves welfare, possible trade-offs between false positives and false negatives, (i.e. a reduction of false positives through a more lenient antitrust policy) come at the price of an increased probability of false negatives, are more controversial, and are not always well researched.

For reasons of simplicity, we use the term "decision error" to denounce a final decision that deviates from the actual effects (irrespective of whether they are observable at the time of the decision or not). Thus, we ignore the multi-stage character of antitrust decision-making, as well as nuanced decisions that may be too complex to put into a "yes-or-no" framework. However, neither simplification should considerably change our reasoning.

III. *EX-POST* ANALYSIS

There can be three main motivations for *ex-post* evaluations of competition policy decisions:[5]

i. *Regime accountability* with the purpose of showing whether the overall antitrust regime was worth its running costs (paid by taxpayers). Here, one has to check whether the overall benefits exceed the costs and whether another regime would have been more efficient and, therefore, would have created higher overall benefits.

ii. *Authority accountability* to verify whether, under given institutional and other constraints at the time of the decision, the analysis and

3 See, e.g. Baker, J.B. (2015), Taking the Error out of "Error Cost" Analysis: What's Wrong with Antitrust's Rights, *Antitrust Law Journal*, 80(1).

4 See, *inter alia* Easterbrook, F. H. (1984), Limits of Antitrust, *Texas Law Review*, 63(1); Christiansen, A. & Kerber, W. (2006), Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason," *Journal of Competition Law & Economics*, 2(2), pp. 215-244.

5 See, *inter alia* Budzinski, O. (2013), Impact Evaluation of Merger Control Decisions, *European Competition Journal*, 9(1), pp. 199-224.

the conclusions reached by the competition authority[6] were correct.

iii. *Policy learning* shows whether, with the benefit of hindsight, the final decision did in fact protect competition and minimized decision errors of both types.

Regime accountability focuses more on the evaluation of whole competition policies and their possible welfare effects, whereas the other two refer to single decisions and possible errors of both types that occur. Therefore, different methods are necessary to identify the various effects.[7]

However, more interesting than these methods are the reasons for *ex-post* evaluation itself. As already mentioned, *regime accountability* targets the whole competition policy regime by analyzing whether this regime is overall beneficial for welfare or, as an extreme alternative, whether a society would benefit more from not having competition policy rules at all. When conducting such an analysis, the deterrence effect of an antitrust regime must be considered.[8] If companies act rationally, the existence of competition rules and minimum-effective enforcement activities will cause some level of compliance and induce them to skip anticompetitive merger plans or collusive conducts for which the detection and enforcement probability is sufficiently high. The more transparent the competition rules in a given regime, the easier it is for rational companies to comply. *Ex-post* analysis may contribute to improving the transparency of competition rules and, thus, the anticipatable nature of antitrust decisions for companies (as a part of due process). The better deterrence works, the lower the costs for both taxpayers (costs of running competition authorities) and companies for achieving a certain amount of protection within the competitive process.

Authority accountability attempts to detect both types of decision errors in explicit decisions made by the competition authorities. The goal is to find out whether the authority came to the right conclusion given the knowledge available at the time of its decision and given all institutional constraints and limitations (like a lack of budget and/or staff, institutional restrictions, or political influence).[9] In the case of a merger, for instance, it is notoriously difficult to predict the exact (positive and negative) effects on competition and welfare before the merger is completed because of the *ex-ante* lack of post-merger market data. As a consequence, two types of decision errors may exist:

(a) A case was decided wrongly because the authority misapplied or ignored available information and evidence.

(b) A case was decided wrongly in terms of actual effects because of information or evidence not available to the authority, i.e. the authority correctly applied available information and evidence but the post-case development, with hindsight, still shows that the decision was wrong with respect to the effects that actually occurred.

Type (a) is clearly a decision error the authority needs to be held accountable for. However, if only *ex-post* data – the benefit of hindsight – revealed effects that could not be anticipated by the competition authority at the time of the decision (type (b)), then the authority cannot be held accountable for this "decision error." Or, in other words, according to the concept of *authority accountability* it does not constitute a decision error if the benefit of hindsight was required to reveal the effects in question. If a decision error of Type 1 or 2 occurs due to this imperfect information, the competition authority cannot be held responsible for a "wrong" decision – in the pre-merger world without all subsequently available information, the decision was "right."

Given all the limitations and constraints that have to be considered, the concept of *authority accountability* only provides a narrow scope for the evaluation of competition policy decisions. It excludes the detection of type (b) errors, which however also lead to a decrease in welfare and a worse level of protection for competition. Consequently, some of the causes for decision errors (both false positives and false negatives) will be overlooked, namely where the authority cannot be made responsible, perhaps because institutional constraints did not allow it to gather or make appropriate use of the relevant information or evidence. This points towards the benefits of a systematic controlling of antitrust decisions going beyond the narrow scope of *authority accountability*.

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6 We use the general term "competition authority" to cover different regimes with different decision competence structures. For instance, in the U.S. competition agencies like the Federal Trade Commission or the Antitrust Division of the Department of Justice do not directly decide whether to prohibit a merger or a specific monopolization or abuse conduct, but need to challenge the parties in front of a court. (Although an agency decision not to challenge a case often does *de facto* represent an antitrust decision.) In contrast, in the EU, competition agencies at the European and national levels usually enjoy far-reaching powers for making decisions.

7 The main methods used to evaluate competition policy decisions *ex-post* are structural models and simulations, difference-in-difference ("DiD") methods, event studies, surveys, and case studies.

8 See Buccirossi, P., Ciari, L., Duso, T., Spagnolo, G. & Vitale, C. (2013), Competition Policy and Productivity Growth: An Empirical Assessment, The Review of Economics and Statistics, October 2013, 95(4), pp. 1324-1336.

9 Kovacic, W.E. (2006), Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities, *The Journal of Corporation Law*, 31, pp. 503-547.

The concept of *policy learning* tries to heal the shortcomings of *authority accountability* from a due process or controlling perspective by targeting a broader scope and taking into account new available information on the cases after the decision was made, with the aim of identifying the causes for these decision errors and improving future competition policy (decisions) by minimizing errors. In an imperfect world there will always be some kinds of errors – therefore it is highly relevant for competition authorities to improve their *ex-ante* decisions by reviewing them *ex-post*, learn from potential mistakes, and thus increase citizens' welfare.[10] Along with improving decisions under the existing framework, this particularly includes learning about better practices and rules, i.e. creating knowledge for improving the (institutional) framework of decision-making as well. Since competition, competitive strategies and markets are ever-changing, this learning process is never-ending, and a continuous process of improvement is necessary.

IV. LIMITATIONS AND CHALLENGES

However, *ex-post* evaluation is not advantageous for competition authorities in all cases. When many cases are found to be erroneous from an *ex-post* evaluation perspective, this may (i) have negative effects on the authority's reputation (perhaps decreasing positive deterrence effects), (ii) increase the probability of damage claims by the companies involved (with the potential of creating legal uncertainty over long periods accompanied by significant procedural costs), and (iii) lead to some kind of selection bias, where rational agencies tend to choose cases for review that have a low probability of causing negative *ex-post* evaluations. These disadvantages, however, are strongly related to the *ex-post* evaluation motives of *regime* and *authority accountability* and less prevalent for the concept of *policy learning*. Thus, the potential negative effects of *ex-post* evaluations also point towards employing *ex-post* analysis explicitly for *policy learning only*. Eventually, in an imperfect world even *ex-post* evaluations will not be completely free of potential errors (partly because of the use of unreliable *ex-post* evaluation methods).[11]

Ex-post analysis of single-case antitrust decisions, as well as of overall regimes or more macroeconomic developments, are frequently conducted by independent researchers as part of their scientific research programs and activities (and not on behalf of competition authorities). For instance, Ashenfelter & Hosken (2010)[12] and Kwoka (2015)[13] collect and summarize existing *ex-post* analyses of merger cases. The recent discussion about the rise of so-called superstar firms and an overall increase in market concentration along with a widespread lessening in competition intensity follows more macro-level *ex-post* analyses.[14] However, while highly important, such analyses cannot replace a systematic control of authority decisions. Integrating systematic *ex-post* analysis into an expanded due process would offer several advantages.

One issue is the reduction of selection biases through a more systematic choice of cases. Obviously, a systematic control using *ex-post* evaluations will not and should not conduct *ex-post* analyses for every single case. The necessary resources will neither be realistically available, nor would it be an efficient approach. Instead, criteria for the systematic and transparent selection of cases need to be developed. A discretionary choice by the authorities themselves would generate incentives for a biased selection favoring cases where easy confirmation of the authorities' decision can be expected.

A second issue is the availability of data, which often renders independent *ex-post* analysis by "outsiders" (e.g. independent researchers from universities) impossible. Integrating *ex-post* analysis into the competition policy process, on the one hand, can improve access to relevant data. However, on the other hand, this may generate additional data delivery duties (and burdens) for companies.

This leads to a third issue, namely the question of publication of results. In order to safeguard the process, some form of publication of results for *ex-post* evaluations is necessary in order to create transparency. Furthermore, the results of *ex-post* analyses are not identical with learning effects improving future decisions. Instead, any discussion of *ex-post* evaluation insights should include independent scientific input. The latter is beneficial and helpful, yet it requires some public access to evaluation results. On the other hand, justified business and data secrecy concerns may limit publication. Moreover, the publication of evaluation results may lead to – intended and unintended – effects on reputation and – involuntarily – emphasize elements and aspects of *regime* and *authority accountability* over *policy learning*.

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10 Hosken, D., Miller, N. & Weinberg, M. (2017), Ex Post Merger Evaluation: How Does it Help Ex Ante?, *Journal of European Competition Law & Practice*, 8(1), pp. 41-46.

11 See Budzinski, O. (2013), Impact Evaluation of Merger Control Decisions, *European Competition Journal*, 9(1), pp. 199-224.

12 Ashenfelter, O. & Hosken, D. (2010), The Effects of Mergers on Consumer Prices: Evidence from Five Selected Case Studies, *The Journal of Law and Economics*, 53(3), pp. 417-466.

13 Kwoka, J. (2015), Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy, Boston: MIT.

14 See, inter alia Autor D.; Dorn, D; Katz, L.F.; Patterson, C. & Van Reenen, J. (2017a), The Fall of the Labor Share and the Rise of Superstar Firms, *NBER Working Paper No. 23396*; Autor D.; Dorn, D; Katz, L.F.; Patterson, C. & Van Reenen, J. (2017b), Concentrating on the Fall of the Labor Share, *American Economic Review: Papers and Proceedings* 2017, 107(5), pp. 180-185; OECD (2018), Market Concentration – Issues paper by the Secretariat, Paris; Grullon, G.; Larkin, Y. & Michaely, R. (2018), Are U.S. Industries Becoming More Concentrated?, available at https://ssrn.com/abstract=2612047.

A fourth issue relates to who shall conduct the *ex-post* analyses and evaluations. While we advocate not relying only on "accidental" *ex-post* analyses conducted by independent researchers, a more systematic approach may still find it favorable to systematically include independent researchers. In addition to the reasons outlined in the preceding paragraph, the participation of independent researchers could reduce bias incentives that authority insiders face when reviewing their own or their colleagues work.

V. CONCLUSIONS AND IMPLICATIONS

Competition authorities have a responsibility to strive towards making the best possible antitrust decisions in order to simultaneously (i) protect competition as a welfare-enhancing process for society, (ii) safeguard the rights of companies to freely choose competition strategies and business activities, as well as (iii) justify the spending of taxpayer money. Most competition authorities employ a variety of actions and expend efforts to do exactly this. One area where further improvement potentials may be reaped, from an economic perspective, is a more systematic application of *ex-post* evaluations of antitrust decisions. In an imperfect world, competition authorities dealing with counterfactuals and predicting future effects cannot avoid running into false positives and false negatives at times. However, creating knowledge about which decisions have been mistakes of what type by using the benefit of hindsight represents a powerful tool to (imperfectly) reduce future decision errors. A systematic integration of *ex-post* analyses and evaluations into the competition policy process may establish something like a systematic control of antitrust decisions. This may benefit both society (in terms of welfare) and the companies acting under the jurisdiction of antitrust law. However, this benefit is not meant to come through revisions of past decisions, perhaps even accompanied by damage claims. Instead, generating knowledge for better future decisions as well as for better rules, practices and procedures represents the benefit (reducing error costs) that, at the end of the day, also contribute to an (extended and figurative) due process.

Thus, the implementation of systematic *ex-post* analyses and evaluations should be done with *policy learning* in mind. While the matter of adequate methods for conducting such analyses has been thoroughly discussed, there has been less research on a number of issues relating to how an efficient systematic controlling procedure may look like. Case selection, data availability, publication and publicity, as well as the question who should conduct the *ex-post* evaluations represent some of the challenges that need to be tackled. Notwithstanding, a more systematic integration of *ex-post* case analyses into the competition policy process offers great potentials from an economic perspective.

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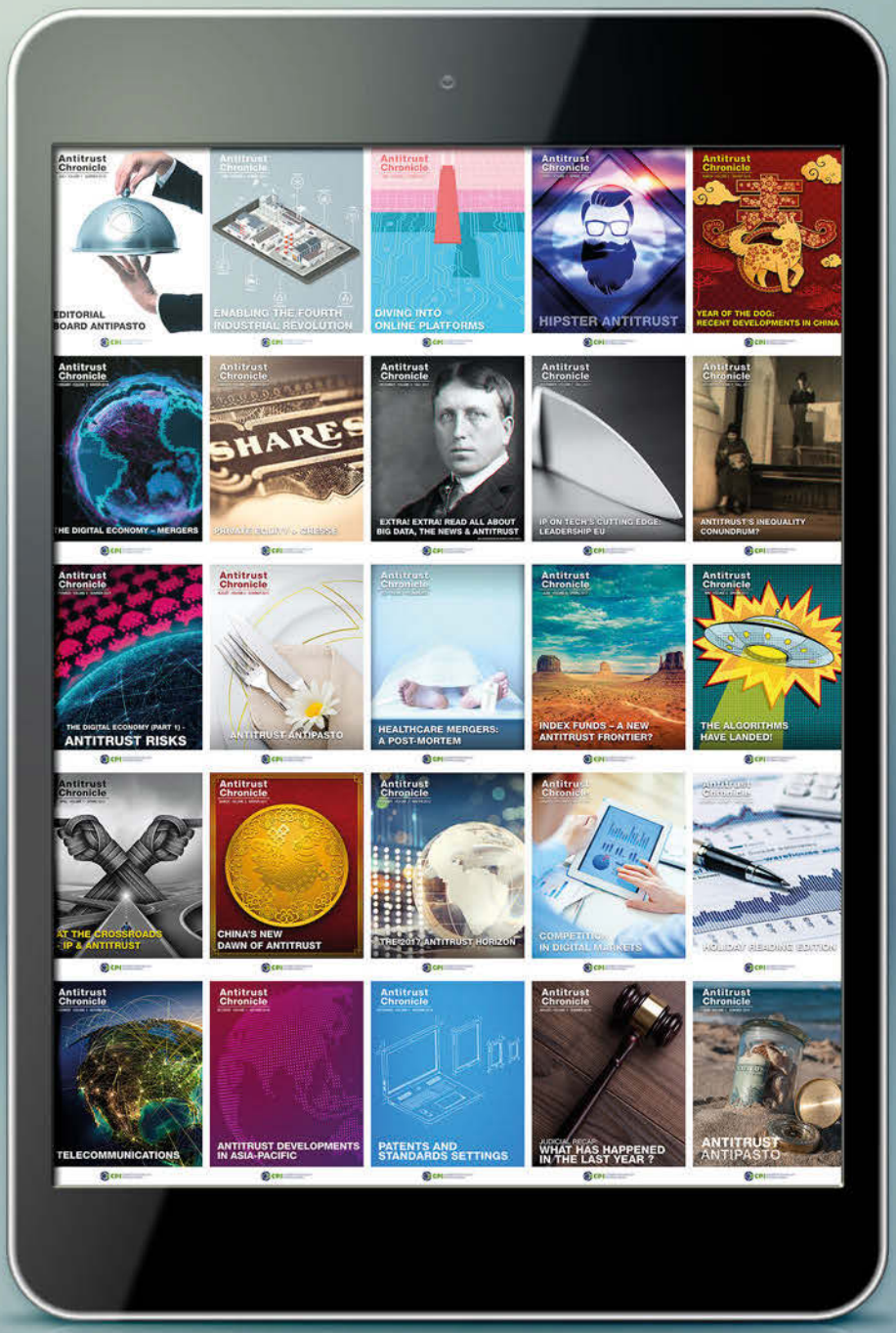


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