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

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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.

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).

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 criticized 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.

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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).

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.

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 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 jurisdic-

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.

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.

tions 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.

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]

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].

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.

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.

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.

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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).

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.

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.

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.

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