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In an earlier article, *Thinking About Procedural Fairness of Competition Law Enforcement across Jurisdictions: A Suggested Principled Approach*,² I suggested that in order to engage in meaningful debate about procedural fairness, a principled approach is needed. I proposed that such a principled approach should contain, at minimum, three core principles, which I labeled as Disclosure Principle, Right of Defense Principle, and Independence of Decision-Maker Principle.

In this article I propose to elaborate on the Independence of Decision-Maker Principle (Independence Principle). In the earlier article, I described the Independence Principle in the following terms: “The decision maker which decides whether or not there is a violation of competition law should be independent and impartial.” I also suggested that for analytical purposes, the process of competition law enforcement should be divided into five stages: initiation, investigation, prosecution, decision on the merits, and decision on sanctions, if any.

It is also important to identify another stage in discussing procedural fairness. This is the stage when a decision on the merits (or sanctions) is reviewed by a court that is composed of one or more independent and impartial decision makers. I refer to this stage as “judicial supervision” rather the more commonly used terms such as “judicial review” or “judicial appeal” as the latter terms often have special meanings in legal systems about the nature of the judicial supervision. In jurisdictions that vest making in competition enforcement in an administrative body, the availability of judicial supervision and its nature are at the center of the debate as to whether competition laws are criminal in nature.

Finally as a preliminary matter, it is important to distinguish between different institutional structures for decision making in competition law enforcement. For the purpose of this article, it is sufficient to identify decision making in competition law enforcement in a jurisdiction as a variant of one of two models for decision making on the merits: Administrative Model and Litigation Model. In an Administrative Model, the main distinguishing characteristic is that the same body is responsible for conducting investigations and decision making on the merits. In a Litigation Model there is a structural separation between investigations and decision making. These functions are vested in different bodies. Investigations are conducted by an

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² International Competition Network (ICN) Column, COMPETITION POLICY INTERNATIONAL, (April 23, 2014).

administrative body while decision making is vested in a court (general or specialized) or tribunal (typically, specialized).

It should be noted that there are many similarities between the two models and there are many variants of each model. For the purpose of this article it is sufficient to distinguish between the two models solely on the basis of the difference in institutional structure for conducting investigations and decision making on the merits.

In jurisdictions using the Litigation Model for competition law enforcement, the independence and impartiality of the decision maker is rarely an issue. It is inherent in the design of the enforcement system to provide that the decision maker is independent and impartial; specifically, independent from the conduct of investigations. It is under the Administrative Model that the issue of independence and impartiality of the decision maker is the subject of considerable controversy.

Much of the criticism about the lack of separation of the investigative and decision making functions under the Administrative Model is focused on confirmation bias.³ Confirmation bias is concerned with the tendency of an investigator to look for evidence confirming conclusions from earlier stages in the investigation. In the context of competition law enforcement, it is argued that there is confirmation bias because the investigator is also the decision maker and this is an issue of great concern given the severity of sanctions and penalties imposed for contravention of competition laws.

Confirmation bias is not, however, sufficient to justify the adoption of the Independence Principle as a core principle for procedural fairness in competition law enforcement. The simple reason is that there are many administrative and regulatory areas where combining investigative and decision-making functions makes sense. Consider, for example, administrative decisions on eligibility to receive a driving permit or a pension or the determination of an income tax assessment or tax penalties. In these areas, the possibility of confirmation bias does not justify replacing administrative decision making with an independent and impartial decision maker.

Why should the Independence Principle be a core principle of procedural fairness in competition law enforcement? What distinguishes competition law enforcement from administrative decisions about such matters as driving permits, pensions, tax assessments, or tax penalties? First, competition law prohibitions are not self-evident. Second, and more importantly, making a decision on whether there is a contravention of a competition law prohibition involves the exercise of discretion.

Discretion is involved throughout the complex process leading to answering the ultimate question of whether there is a contravention. During this process, decisions are made on such key questions as: What are the geographic and product dimensions of the markets involved? Who are the competitors, actual and potential, in a market? Does the target of investigation possess market power? If the target has market power, is the impugned conduct an abuse of that

³ See, for example, Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 EUR. L. REV. 817 (2009); Wouter P.J. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function*, 27 WORLD COMPETITION: L. & ECON. REV. 201 (2004).

market power? What have been, are, or would be the reactions of competitors, actual or potential, in the market to actions by the target?

Answering these questions involves the exercise of discretion in interpretation of evidence, in drawing of inferences from evidence and other inferences, and, sometimes, in making predictions about the future. It is not unreasonable to suggest that the final decision in a competition law enforcement case involves the making of thousands of decisions involving the exercise of discretion. In this situation should the investigator also act as the decision maker?

Is the concern about procedural fairness satisfactorily addressed if the supervising court reviewing the decision of the administrative body has ultimate jurisdiction to conduct a full review of the laws and facts, including substituting its decision for that of the administrative body? In *Menarini*,⁴ the European Court of Human Rights appeared to have concluded that there is no requirement under Article 6(1) of the European Convention on Human Rights (“ECHR”) for a decision maker in the first instance in a competition case to be independent and impartial—providing the supervising court has full jurisdiction to review the facts and the law and to substitute its decision for that of the decision of the administrative body. Article 6(1) ECHR imposes the requirement of having an independent and impartial tribunal decide on whether or not a person has contravened a criminal prohibition.

In *Jussila*,⁵ the same Court earlier held that the requirements of Article 6(1) ECHR need not be applied with the same vigor to all laws that are found to be criminal in nature. The Court accepts that competition law prohibitions are criminal. It distinguishes, however, between serious criminal laws where the requirements of an independent and impartial tribunal must be met by the decision maker in the first instance, and less serious criminal laws such as tax laws or competition laws where the decision maker in the first instance does not have to meet the requirements of Article 6(1) ECHR provided a supervising court meets the requirement.

While distinguishing between serious criminal law offenses and less serious criminal offenses can be justified, it is difficult to accept that less serious criminal offenses should all be treated the same with respect to the requirement for independence and impartiality. I suggest that the assessment or re-assessment of tax liability and the imposition of tax surcharges (penalties) such as involved in the *Jussila* case should not be equated to decisions on competition law prohibitions.⁶

The proposition that a first-instance decision in competition case is procedurally fair provided a supervising court has full jurisdiction is difficult to accept for several reasons. First, it is unclear what “full jurisdiction” to review facts and law means. This question is a subject of

⁴ Judgment, Case of *A. Menarini Diagnostics srl. v. Italy*, Application No. 43509/08, ECtHR, 2nd Section, 27 September 2011.

⁵ Judgment, Case of *Jussila v. Finland*, Application No. 73053/01, ECtHR, Grand Chamber, 23 November 2006, para. 43

⁶ The *Jussila* case involves the review by a court of tax surcharges (penalties) of about EUR 300 following a re-assessment of value-added tax liability by the tax authorities. At issue was the decision of the reviewing court to dispense with an oral hearing even though it gave parties the opportunity to make extensive written submissions.

continuing controversy before the European Court of Justice.⁷ Second, if full jurisdiction is tantamount to a *trial de novo*, is it a good usage of scarce public resources to have, in effect, both the administrative body and the supervising court engage in activities that are similar and quite likely duplicative? Third, having such a system imposes significant additional costs on both the administrative body and the parties. Thus, the problem created by combining investigative and decision-making functions is not resolved by transferring the issue to a supervising court.

Many jurisdictions using an Administrative Model for competition law enforcement recognize the fairness problem of combining the investigative and decision-making functions within a single body. Various measures are used to address this concern. In some jurisdictions there is a formal separation between the investigative function from the decision-making function. For example:

1. In the Autorité de la concurrence (France) the rapporteur général is responsible for the conduct of investigation independently from the collège comprised of seventeen members who sit in various formations to make decision on the merits. This separation of functions is considered a constitutional requirement.⁸
2. In the Competition Commission of India, the members decide on the merits of a case having regard to the results of an investigation that is conducted independently by the Director General and after having given to the targets of the investigation an opportunity to make submissions.⁹
3. The Hellenic Competition Commission is comprised of eight commissioners of which four are commissioner-rapporteurs. Before a final decision is made, one of the commissioner-rapporteurs takes charge of the investigation and presents its results to the commission, which makes the decision on the merits. The assigned commissioner-rapporteur does not vote on the final decision.¹⁰

Other jurisdictions using the Administrative Model employ less formal means. For example, the newly established Competition and Markets Authority (United Kingdom) places decision making on the merits in the hands of a three-person panel of senior officials (Case Decision Group) who have had no prior involvement in the investigation.¹¹ The European Commission has also grappled with the problem raised by combining the investigative and decision-making functions. The establishment of the role of a hearing officer and the use of “devil advocates panel” in the European Commission can be seen as measures to address procedural fairness.

⁷ See, Case C-272/09 P *KME Germany and others v. Commission*, Judgment (Second Chamber), 8 December 2011, ECR I-12789, Case C-386/10 P *Chalkor AE Epexergasias Metallon v. Commission*, Judgment (Second Chamber), 8 December 2011, ECR I-13085 and Case T-286/09 *Intel v Commission*, Judgment (Seventh Chamber, extended composition 12 June 2014, paras. 1607-1612; see Christopher Bellamy, *ECHR and competition law post Menarini: An overview of EU and national case law*, E-COMPETITIONS, N° 47946, 5 July 2012

⁸ Décision n°2012-280 QPC du 12 octobre 2012, *Société Groupe Canal Plus et autre*.

⁹ See, sections 19, 26 and 27, *Competition Act, 2002*.

¹⁰ See, Law 3959/2011.

¹¹ *Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 Cases*, Competition and Markets Authority, CM8, 12 March 2014, Ch. 11

The procedural fairness problem created by assigning investigative and decision-making functions in competition law enforcement to a single administrative body cannot be defended on the grounds that it is inherent in the Administrative Model to have the two functions combined. First, as discussed above, various jurisdictions following the Administrative Model adopt measures to separate investigative and decision-making functions. These efforts constitute strong evidence of the recognition of the problem of procedural fairness resulting from combining the functions. In any event, these measures are not a substitute for having separate institutions for each function.

Second, and more fundamentally, decision on the merits in competition law enforcement is a complex process involving the exercise of discretion or judgment on thousands of questions. This distinguishes competition law enforcement from prohibitions in other regulatory or administrative laws. Procedural fairness in competition law enforcement can only be guaranteed through the adoption of the Independence of Decision-Maker Principle.

In conclusion, it is reasonable to suggest that the issue of independence and impartiality of the decision maker will continue to be a subject of controversy given the enhanced level of enforcement and high level of penalties in competition law enforcement around the world.