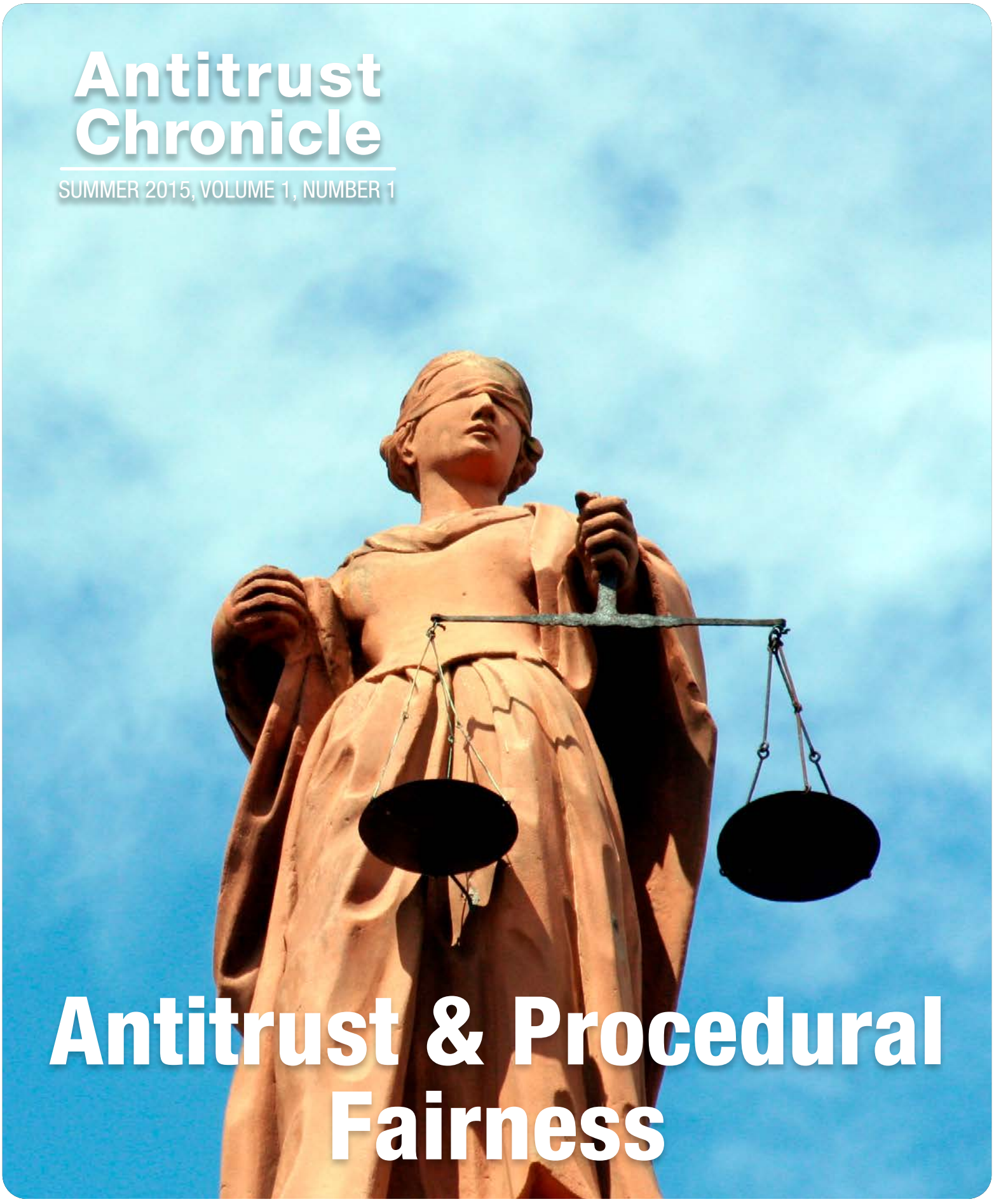
Antitrust Chronicle

SUMMER 2015, VOLUME 1, NUMBER 1



Antitrust & Procedural Fairness

CPI COMPETITION POLICY INTERNATIONAL

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2015 (1)

Procedural Fairness in Competition Investigations:
U.S. FTC Practice and Recent Guidance from the International Competition Network

Paul O'Brien, Krisztian Katona, & Randolph Tritell

U.S. Federal Trade Commission

www.competitionpolicyinternational.com

Procedural Fairness in Competition Investigations: U.S. FTC Practice and Recent Guidance from the International Competition Network

Paul O'Brien, Krisztian Katona, & Randolph Tritell[1]

I. INTRODUCTION

Procedural fairness has become an increasingly important part of the international dialogue on competition law enforcement. As competition enforcement has expanded, issues and concerns regarding how agencies conduct their investigations have increased. It is important that competition agencies recognize and respond to these concerns for many reasons, including to: (i) ensure that subjects of competition investigations are treated fairly, (ii) ensure the credibility of competition enforcement decisions, and (iii) maximize the quality of competition agencies' analyses and decisions. As discussed below, the United States Federal Trade Commission ("FTC") and the International Competition Network ("ICN") are cognizant of these issues and have developed rules and guidance to address them.

Procedural fairness is a necessary and beneficial ingredient of effective competition enforcement. While competition agencies operate within different legal and institutional frameworks, all enforcement systems can and should provide at least basic levels of fairness. As such, procedural fairness has universal application. Regardless of the chosen enforcement framework, there are specific investigative practices that can promote transparency and better outcomes.

The case for procedural fairness in competition enforcement goes beyond the obligations of good governance to safeguard the rights of parties. Recent international discussion on procedural fairness has recognized that fairness benefits the agencies that provide it.

First, procedural fairness enables better-informed agency decisions. Good process has a direct impact on the quality and accuracy of agency enforcement decisions. A transparent and meaningful dialogue between parties and agencies about process, theories, and evidence increases the likelihood that the agency will consider all the relevant facts and issues prior to making its decision. Understanding the parties' arguments allows the agency to test its theories and sharpen its own conclusions. This also facilitates the agency's ability to narrow the relevant issues, which makes the investigative process more efficient.

Second, procedural fairness enhances the legitimacy and credibility of competition agency enforcement actions. A predictable and transparent investigative process allows both

[1] Paul O'Brien and Krisztian Katona are Counsel for International Antitrust in, and Randolph Tritell is Director of, the Office of International Affairs of the U.S. Federal Trade Commission. The views expressed are those of the authors and do not necessarily reflect those of the Commission or any individual Commissioner.

parties under investigation and the public to understand how the agency makes decisions. This increases confidence in the substantive results of the agency's enforcement.

This article provides an overview of investigative practices in competition investigations in the United States as well as of broad principles of consensus from global discussion of these issues. First, we introduce some of the investigative practices that the FTC uses to provide procedural fairness. Second, we present and discuss the results of an important recent initiative of the ICN on competition agency investigative process.

II. HOW THE FTC PROVIDES PROCEDURAL FAIRNESS DURING ITS INVESTIGATIONS

The FTC ensures procedural fairness during its investigations through practices that promote transparency and meaningful dialogue between its staff and the parties.[2] Internal institutional checks and balances reinforce reasoned decision-making.

The FTC highly values open communication with the subjects of its competition investigations. Agency staffs regularly inform parties through written and oral communications as to how an investigation is proceeding, including the legal and factual bases for the investigation. These discussions encompass the procedural course of the investigation, including the scope of document requests and staff's substantive theories of the case. Providing parties with information on the theories of harm and the nature of the evidence on which the agency relied allows parties to respond more effectively. This also helps the agency to focus on the real areas of dispute, and ultimately contributes to making the optimal enforcement decision in an efficient manner.

FTC investigations benefit from engagement with the parties under investigation. Investigative staff and decision-makers regularly seek substantive input from the parties in order to ensure that the agency is aware of counter-arguments and evidence that might support factual and legal theories inconsistent with enforcement action. FTC staffs routinely encourage companies under investigation to present their views of the evidence and case theories, both orally in informal meetings and through written submissions known as "white papers."

The dialogue between investigative staffs and parties continues throughout the course of an investigation. During an FTC investigation, companies have multiple opportunities to discuss their views with staff lawyers. In addition, parties are free to request meetings with agency management, and ultimately, the Commissioners of the FTC, to present their positions and discuss the theories pursued during the investigation. Business executives and industry and economic experts, as well as the parties' lawyers, often participate to explain their views directly

[2] Although similar rules apply to the two US federal antitrust agencies—the Department of Justice's Antitrust Division (DOJ) and FTC—this section focuses on the FTC's practices. For an overview of relevant FTC and DOJ practices and rules, *see* Submissions of the United States to the OECD Roundtables on Procedural Fairness (2010-11), *available at* https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/transparency_us.pdf; https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usprofairness.pdf; and https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1110oecd-procedural.pdf.

to agency officials. This dialogue is most productive when parties engage meaningfully on the merits, rather than leaving the other side guessing about areas of concern or potential counterarguments.

Several internal checks and balances contribute to procedural fairness in FTC investigations. Investigative staff typically includes lawyers from the agency's Bureau of Competition and economists from the Bureau of Economics. The lawyers and economists coordinate their work while bringing their own expertise to investigation and to decision-makers through independent and parallel reviews.

FTC Bureau management is actively involved at all key stages of an investigation, monitoring progress through periodic detailed briefings from staff. At key decision points, staff presents the factual, legal, and economic bases for its recommendations, including expected arguments from the parties and reasoned responses to them. Each Bureau's management makes its own recommendation to the Commission, informed by staff recommendations as well as meetings with the parties. Thus, the Commission routinely receives analyses and recommendations from its legal staff and its economic staff, supplemented by recommendations from the Director of the Competition and Economics Bureaus. Through these types of internal checks, the Commission benefits from a range of perspectives prior to issuing a complaint or settling a case.

Strong confidentiality protections are an important counterbalance to the FTC's investigative transparency. The protection of confidential information—by law and agency policies and practices—is a critical component of effective enforcement.

When FTC cases proceed to adjudication, there are additional opportunities and safeguards for defendants. These include the rights to (i) legal representation, (ii) present witness and documentary evidence, (iii) test the legitimacy of documentary evidence and cross-examine government witnesses and experts, and (iv) appeal an adverse determination to a court. There are also strong procedural protections to ensure separation between FTC staff, as complaint counsel, and the Commission, as adjudicators, once the Commission issues a Complaint initiating formal charges against a respondent.[3]

III. INTERNATIONAL WORK ON PROCEDURAL FAIRNESS

Procedural fairness during competition investigations has received increased international attention in recent years as enforcement has expanded and firms are subject to different types of procedures around the world. Several competition agencies have issued new rules or statements regarding transparency and related investigative process issues.[4]

[3] *See* 16 CFR Part 4, Rule 4.7.

[4] *See, e.g., Australian Competition and Consumer Commission, Accountability framework for investigations (2013), available at* http://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations; Canadian Competition Bureau, Information Bulletin on Communication during Inquiries (2014), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03747.html; UK Competition and Markets Authority, Transparency and disclosure: Statement of the CMA's policy and approach (2014), *available at* https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach.

In multilateral fora, the Competition Committee of the Organization for Economic Cooperation and Development ("OECD") held roundtable discussions on transparency and procedural fairness during 2010 and 2011, culminating in a 2012 report.[5] The Association of Southeast Asian Nations ("ASEAN") addressed due process issues as part of its Regional Guidelines on Competition Policy, released in 2010.[6] The International Chamber of Commerce ("ICC") published a recommended framework for competition law enforcement proceedings to promote procedural safeguards in 2010.[7]

In addition, as part of an ongoing project on antitrust procedures, the Antitrust Section of the American Bar Association recently approved a report on best practices in antitrust investigations, which contains recommendations on many aspects of the investigative and decision-making process.[8]

The ICN recently undertook the most ambitious agency-led effort to study procedural fairness during competition investigations. In 2012, the ICN initiated the Investigative Process Project to increase understanding among ICN member agencies of how investigative practices contribute to enhancing the effectiveness of agencies' decision-making and ensuring the protection of procedural rights. The premise of the project is that effective competition enforcement depends on investigative procedures that promote fair and informed enforcement actions.[9] A first for the ICN, this project, led by the FTC and the European Commission's Competition Directorate, addressed how competition agencies can implement and improve fair and effective investigative process across all institutional frameworks and all competition enforcement areas.

ICN member agencies and non-governmental advisors from over 60 jurisdictions participated in the three-year project by completing surveys on agency investigative practices, participating in a workshop on investigative process in Washington, D.C., and holding many discussion calls including a wide network of private sector lawyers, culminating in the drafting of consensus agency guidance. From 2012-14, the Project issued three reports: *Competition Agency Investigative Tools*,[10] *Competition Agency Transparency Practices*,[11] and *Competition Agency*

[5] Procedural Fairness and Transparency: Key Points, OECD Competition Committee, April 2015, *available at* http://www.oecd.org/daf/competition/abuse/proceduralfairnessandtransparency-2012.htm.

[6] ASEAN Regional Guidelines on Competition Policy, August 2010, Chapter 7: Due Process, *available at* http://www.asean.org/archive/publications/ASEANRegionalGudelinesonCompetitionPolicy.pdf.

[7] ICC Recommended framework for international best practices in competition law enforcement proceedings, International Chamber of Commerce (March 2010), *available at* http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/due-process/.

[8] *See* Best Practices for Antitrust Procedure, Report of the ABA Section of Antitrust Law International Task Force (publication forthcoming).

[9] *See* ICN Investigative Process Project Issues Paper and Mandate (2012), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf.

[10] ICN Report on Competition Agency Investigative Tools (2013), *available at* http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf.

[11] ICN Report on Competition Agency Transparency Practices (2013), *available at* http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf.

Confidentiality Practices,[12] and organized an ICN Roundtable on Competition Agencies Investigative Process.[13]

Based on agencies' responses to surveys about their investigative practices, existing ICN and other international work on investigative process and procedural fairness, the 2014 Roundtable, and a series of consensus building discussions around drafts of the guidance, the Project produced *ICN Guidance on Investigative Process* ("*Guidance*"), which the ICN adopted at its annual conference in April 2015.[14]

IV. THE ICN GUIDANCE ON INVESTIGATIVE PROCESS

The *Guidance* is based on a broad consensus among ICN members regarding the importance of transparency, engagement, and protection of confidential information during competition investigations. The *Guidance* presents four principles for good investigative practices: (i) effective agency investigative tools, (ii) transparency to parties about the investigation, (iii) engagement with the parties during an investigation, and (iv) the protection of confidential information. The *Guidance* is written in five parts:

Part 1 reaffirms the need for competition agencies to have effective investigative tools and introduces basic principles to promote their fair and efficient use, including appropriate legal requirements and limitations on those powers, and accompanying internal agency procedures and safeguards.

Part 2 addresses transparency to the public of competition laws, rules, policies, decisions, and enforcement practices to ensure that individuals and companies know what to expect of competition enforcement and the public has a basis to monitor consistency of enforcement.

Part 3 discusses transparency to parties during an investigation. This includes informing parties of the legal basis for an investigation, the facts and nature of evidence gathered, and the agency's theories of harm. This is an ongoing commitment that includes updates of the investigation's scope, status, and any significant developments.

Part 4 focuses on engagement during an investigation—the interaction between agency and party and the value of providing opportunities for parties to respond to identified agency concerns. The engagement section highlights "meetings or discussions between the agency and parties at key points of the investigation" and "early discussion of the evidence and working theories."

Part 5 addresses the importance of the protection of confidential information obtained during an investigation; the considerations that go into the submission and treatment of confidential information; and policies regarding the disclosure of confidential information,

[12] ICN Report on Competition Agency Confidentiality Practices (2014), *available at* http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf.

[13] Report on the ICN Roundtable on Competition Agency Investigative Process (2014), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc1023.pdf.

[14] ICN Guidance on Investigative Process (2015), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

including the disclosure to parties of confidential information relied upon as the basis for an agency's formal allegations.

The *Guidance* represents the most comprehensive agency-led guidance on procedural fairness during investigations to date. It provides a baseline for agencies to benchmark their investigative procedures against best practices from around the world. The ICN now plans to take steps to help agencies understand and implement the *Guidance*.

V. CONCLUSION

Procedural fairness during competition agency investigations has found an increasingly prominent place on the international competition agenda.[15] The global discussion of investigative process is premised on the fact that an agency's investigative process has a direct impact on its effectiveness and credibility and recognizes that fair process benefits both parties and agencies.

The consensus on the importance of investigative transparency and party-agency interaction within the context of strong confidentiality protections should serve as the foundation for the continued development of international norms of good practice for all competition agencies. The FTC is a strong proponent of procedural fairness standards and will continue to advocate for their improvement and adoption.

[15] *See*, *e.g.*, Keynote Address by FTC Chairwoman Edith Ramirez, 7th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, Washington, DC, September 25, 2013, *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf; Keynote Address by FTC Chairwoman Edith Ramirez, Core Competition Agency Principles: Lessons Learned at the FTC, Antitrust in Asia Conference, ABA Section of Antitrust Law and Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, Beijing, China, May 22, 2014, *available at* http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2015 (1)

The Efforts of the JFTC Toward Promoting Procedural Fairness and Transparency in the Investigation Proceedings

Toshiyuki NAMBU
Japan Fair Trade Commission

The Efforts of the JFTC Toward Promoting Procedural Fairness and Transparency in the Investigation Proceedings

Toshiyuki NAMBU[1]

I. HOW DOES THE CASE INVESTIGATION PROCEDURE OF THE JFTC ENCOURAGE TRANSPARENCY?

A. The JFTC provides the investigated parties with the proper opportunity to express their views and to be informed of the relevant evidence by the investigators in the process of a case investigation.

Specifically, investigated parties can submit to the Investigation Bureau of the JFTC their opinions in the form of written statement. This statement expresses their views on the alleged violation and the evidence, which sustains their views at any time of the investigation process.

Also, if necessary, investigators of the JFTC sometimes explain the relevant evidence on the investigated case, after hearing the parties' views on the case, mid-course in the investigation process.

B. Additionally, the JFTC holds a hearing procedure at the final phase of investigation before issuing administrative orders.

The hearing procedure will be presided over by an independent hearing officer and the investigators of the JFTC will explain to the parties concerned the contents of the draft orders and the main evidence supporting the draft order.

Following the investigators' explanation, the parties concerned may ask questions, present their arguments, and submit relevant evidence.

C. Besides, when issuing a cease and desist order and/or a surcharge payment order after a hearing procedure, the JFTC makes its orders and the relevant information public (excluding confidential information), to the extent necessary for ensuring the proper and transparent application of the Anti-Monopoly Act.

II. WHAT ARE THE KEY PROCEDURAL STAGES BUILT INTO THE JFTC'S CASE INVESTIGATION PROCEDURE?

A. The key procedural stage of the JFTC's investigation process is a newly introduced hearing procedure, which occurs before issuing administrative orders.

To enhance due process, an amendment of the AMA of 2013—which took effect on April 1, 2015—has introduced a new hearing procedure before issuing orders in which a hearing will

[1]Deputy Secretary General for International Affairs, Japan Fair Trade Commission (JFTC).

be presided over by an officer designated by the JFTC who is independent from the Investigation Bureau.

At the new hearing procedure, a designated hearing officer will make the investigators for the case explain to the parties concerned the contents of the draft orders, including the facts found by the JFTC and the main evidence supporting them. The parties concerned may, following the investigators' explanations, raise questions to the investigators (if any), present their arguments, and submit relevant evidence.

The designated hearing officer will prepare the report describing the issues raised at the hearing and submit it to the Commission.

The Commission is to give due consideration to this report in making its final decision.

B. Also, the amendments of the AMA of 2013 have expanded the coverage of evidence that the party concerned may inspect and copy.

The party concerned may, between the time when notice of a hearing is given and the time when the hearing is concluded, submit a request to the JFTC to inspect or copy the evidence that proved the facts found by the JFTC with respect to the case for hearing.

Copying is limited to a copy of what was submitted by the said party concerned, or its employees, or the records of the statements of the said party concerned or its employees.

III. HAVE THERE BEEN ANY CHANGES IN THE LAST FIVE YEARS IN THE JFTC'S APPROACH TO TRANSPARENCY AND DUE PROCESS?

A. The amendments of the AMA of 2013 abolished the JFTC's *ex-post* hearing procedure for administrative appeals and entrusted the Tokyo District Court with appeals against the JFTC's administrative orders.

Also, as already mentioned, from the perspective of enhancing due process, the amendments of 2013 introduced a new hearing procedure before issuing orders.

These amendments responded to criticism that the JFTC's *ex-post* hearing procedure for administrative appeals lacked the appearance of fairness because the entity that made a decision also determined whether such decision was appropriate or not.

B. Since it is essential for the JFTC to maintain public confidence in its investigations and decisions, the abolition of the *ex-post* hearing procedure is sure to dissolve the criticism about the appearance of fairness.

C. In order to ensure the expertise of the court, the amendment of 2013 makes any appeal concerning the JFTC's administrative orders subject to the exclusive jurisdiction of the Tokyo District Court, in which a panel comprising three or five judges will hear the case.

IV. WHAT CHALLENGES DOES THE JFTC FACE TOWARD GREATER TRANSPARENCY AND STRONGER PROCEDURAL STRUCTURES?

A. Greater transparency and stronger procedural structures are beneficial in making case investigations more legitimate and keeping public confidence in the JFTC.

B. On the other hand, in order to ensure legitimacy of agency decisions, it is of vital importance for the agency to be able to perform any fact-based investigation thoroughly and evaluate any facts with flawless precision.

Otherwise, agencies cannot reach legitimate conclusions based on the realities of violating activities and their actual harm on the markets.

C. In order to implement legitimate, publicly confident, and fact-based investigations, it is essential for investigators to be able to gather necessary information through having enough communication with the parties concerned and other relevant parties.

To make such an opportunity to communicate with investigators more effective, the parties are also expected to express their views on an honest and fact-based basis.

D. The JFTC's approach of introducing a hearing procedure before issuing orders is expected to contribute to the promotion of communication between agencies and the parties concerned.

E. Another effective way to establish such communication is to adopt a system in which agencies can communicate with the parties in the course of investigation and subsequently voluntarily conclude its investigation process by consensus between the parties and agencies. These systems could include commitments, settlements, or consent orders, although the JFTC does not have any system like that at present.

V. FROM THE STANDPOINT OF BUSINESS PLANNING, WHAT DO DOMESTIC AND INTERNATIONAL FIRMS SEEK IN TERMS OF PROCEDURAL FAIRNESS IN JAPAN?

A. In Japan, under the name of promoting procedural fairness in the investigation process, business circles have been seeking—as part of the right to a defense—the presence of an attorney during on-the-spot inspections and depositions, attorney-client privilege, audio/video recording of the process of taking depositions, issuance of copies of deposition records when deposition records are taken, etc.

B. Against this background, the Advisory Panel on Administrative Investigation Procedures under the Anti-Monopoly Act (Advisory Panel) was established at the Cabinet Office, with members consisting of representatives from business, the bar, academies, labor unions, consumers, and media.

An Advisory Panel meeting was held 14 times in 2014, after which it reported to the Minister of State.

C. The Advisory Panel has discussed the rights to defense for investigated parties during the investigative process, in consideration of the necessity of ensuring strict enforcement of the AMA by the JFTC, as well as the balance between the JFTC's fact-finding ability and the right to defense for investigated parties, while also referring to other administrative procedures in Japan and practices in foreign jurisdictions.

D. In December 2014, the Advisory Panel compiled and made public its report on administrative investigation procedures under the Anti-Monopoly Act.[2]

In this report, the Advisory Panel concluded that the introduction of the rights to defense mentioned above are not appropriate at the present stage because their introduction could impede the fact-finding ability of the JFTC; however, it also concluded that it is appropriate to continue discussions and consider the necessity and advisability of introducing such rights to defense.

For example, concerning issues related to on-the-spot inspections, the report says that:

> Companies may have an attorney present during an on-the-spot inspection. However, the presence of an attorney is not recognized as a right of companies concerned, and it is appropriate to understand that companies may not refuse an on-the-spot inspection on the grounds that the attorney has not arrived.

As for Attorney-Client Privilege, the report says that:

> It is not appropriate to introduce attorney-client privilege at the present stage, because the grounds and scope of the privilege are not clear and it could not dispel concerns that the fact-finding ability of the JFTC would be impeded as a result of introducing such privilege.

The report concluded that it is appropriate for the JFTC to draw up and make public guidelines, etc. regarding standard administrative investigation procedures for the JFTC's investigation on alleged violating cases.

E. Following the conclusion of the report, the JFTC has prepared draft guidelines on the investigation procedure of the Anti-Monopoly Act and on June 30, 2015, the JFTC made it public and requested for public comments by July 29.[3]

[2] *See* http://www8.cao.go.jp/chosei/dokkin/finalreport/body-english.pdf.

[3] *See* http://www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/150630.pdf http://www.jftc.go.jp/en/pressreleases/yearly-2015/June/150630.files/Attachment.pdf

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
June 2015 (1)

Procedure Transparency in the Taiwan Fair Trade Commission

Diana H.A. Tsai

Taiwan Fair Trade Commission &
National Chiao Tung University

Procedure Transparency in the Taiwan Fair Trade Commission

Diana H.A. Tsai[1]

I. INTRODUCTION

In the Taiwan Fair Trade Commission ("TFTC"), we trust that greater transparency will contribute to accomplishing our mission to maintain trading order and ensure free and fair competition. The implementation of procedure transparency helps companies comply with the competition laws and, as a result, effectively reduces the risk of law violations. The TFTC continues making efforts to raise competition awareness. On the basis of the TFTC survey, over 90 percent of participants who attended competition advocacy seminars, conferences, and related events in 2013 and 2014 have a better understanding of the Fair Trade Act.

A stronger procedure structure also provides parties under investigation opportunities to be heard and present evidence and arguments before being punished by governmental authority. To a greater extent, TFTC will be granted benefits from the fact that TFTC's decisions would be challenged less often by the courts.

This article investigates procedure transparency at the Taiwan Fair Trade Commission and explores the recent amendments in the Fair Trade Act in the area of procedure transparency.

II. THE RECENT AMENDMENTS TO PROMOTE TRANSPARENCY

The latest amendments to the Fair Trade Act were promulgated on February 4, 2015. The amendments cover a wide range of provisions under the FTA in line with rapid economic changes and these changes can better protect consumers from the harm caused by anticompetitive and unfair competitive practices.

The amendments were considered to be the most extensive reform since the implementation of the FTA in 1992. A number of significant changes that promote transparency are described as follows:

A. Transparency in Court Procedure

Based on the new Law, appeals to TFTC's decisions would be taken directly to the Administrative Court, rather than an appeals committee responsible to the Executive Yuan. All TFTC's decisions are to be scrutinized by an administrative review that focuses on not only whether decisions made by government agencies are lawful but also considers whether the decision is reasonable and appropriate for administrative purposes. To some extent the revision pushed the TFTC one step forward to a quasi-judiciary agency.

[1] Diana H.A. Tsai is Commissioner at Taiwan Fair Trade Commission and Professor at National Chiao Tung University, Taiwan.

B. Enforcement Transparency in Cartel Detection

Recognition of circumstantial evidences for concerted actions (cartels) in response to more sophisticated and clandestine concerted actions is now possible. The new Law employs circumstantial evidences for concerted actions (cartels) and a general clause of cartel exemption is listed explicitly.

C. Enforcement Transparency in Merger Review

When deciding whether (i) a transaction constitutes a merger under the Fair Trade Act and (b) whether the turnover threshold is met, the revised regulation prescribes that—in addition to considering shareholding and turnover of the merger parties' parent companies and subsidiaries—each affiliated company, where both it and the merger parties are controlled by the same company, should also be taken into consideration. In this regard, the new law can better capture transactions that may affect domestic markets.

D. Enforcement Transparency in Defining RPM (Resale Price Maintenance)

RPM is generally prohibited. The new law listed out four economically reasonable principles that business entities can apply to see if RPM is not a concern. The five reasonable principles listed in the Enforcement Rules of Fair Trade Act, Article 25, are: 1) promoting down-steam efficiency and quality; 2) preventing free riding; 3) promoting new entry enterprises or new brands, 4) promoting inter-brand competition; and 5) considering other economic reasonable principles for competition.

E. Procedure Transparency in Merger Review

In a review, a broader coverage for the calculation of the turnover threshold and the notifying parties is identified and a longer review period for further merger review, from 30 days to 60 days, if necessary, is stipulated.

F. Procedure Transparency in Administrative Penalties

For restrictive competition cases, the expiration length of power to impose administrative penalties is extended from 3 years to 5 years.

III. THE PROCEDURE TRANSPARENCY IN THE ASIAN REGION

According to the GCR report, total fines imposed by Asian competition authorities exceed U.S. $1.7 billion in 2014, which may illustrate a wave of active competition enforcement actions in the Asian region. More and more significant cases have drawn the attention of the business sector, general public, and competition authorities in the rest of the world. Procedural fairness and transparency in Asian antitrust enforcement have been a hot issue over the past years, although these issues have not been limited to Asian jurisdictions. They should be a universal topic around the world and need to be widely discussed among the competition community to find out the best practice.

In my view, the best practices provided by the *ICN Guidance Document on Investigative Process*, OECD reports, and ICN guidelines are still applicable to the Asian region.

IV. FROM THE STANDPOINT OF BUSINESS PLANNING

From the standpoint of business planning, two dimensions of procedure transparency are worth noting in the TFTC— in clearing legal criteria and during the decision-making process.

To make businesses more aware of what constitute antitrust violations in Taiwan, the TFTC has developed various kinds of regulations, guidelines, and explanatory notes, and made its decisions public on its website. The related regulations guidelines and explanatory notes will interpret more details regarding legal standards used for enforcement. Besides, the disclosure of the TFTC's decisions may prevent market players from conducting any similar violations (chilling effect).

As for transparency in the investigation process, as early as we can, the TFTC will inform the parties of its investigation and competition concerns before conducting interviews or making compulsory requests for submission of relevant documents. It can ensure that the parties will defend themselves in a timely and appropriate way. For some complicated cases, the parties may apply for hearing proceedings.

The following two procedure stages are also important to reflect agency transparency in the TFTC.

A business has the opportunity to be heard by the agency based on the following laws:

1. Administrative procedure act, which was promulgated in 1999 and most recently amended in 2013.
2. FTC Guidelines on Oral Arguments in Cases, which was promulgated in 1996 and recently amended in 2012.
3. FTC Guidelines on the Procedure of Public Hearing, which was promulgated in 2000 and recently amended in 2014.

The access to and disclosure of public information based on the following laws:

1. The Disclosure of the Regulations, Guidelines, and Decisions; and
2. The Freedom to Reach Government Information Act, if not violating the Personal Information Act. Meeting Records of the agency shall be available to the public

Furthermore, in accordance with the Administrative Procedure Act (Article 46), any party or stakeholder may apply to our Commission during an investigation procedure to examine, transcribe, copy, or take photographs of non-confidential parts of relevant materials or records when these materials or records are necessary for claiming or protecting the requesting party's legal interests.

If the parties are still dissatisfied with the TFTC's decisions, they still have the last resort to execute their statutory right to appeal directly to the Administrative Court based on the sixth amendments came into force February 2015.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2015 (1)

Transparency is Not Just Good for Those Regulated, It Also Strengthens Enforcers—An ACCC Perspective

Marcus Bezzi & Nicholas Heys
Australian Competition and Consumer Commission

www.competitionpolicyinternational.com

Transparency is Not Just Good for Those Regulated, It Also Strengthens Enforcers—An ACCC Perspective

Marcus Bezzi & Nicholas Heys[1]

I. INTRODUCTION

Now 40 years old, the Australian Competition and Consumer Commission ("the ACCC")—with its various predecessors—is one of the mature competition agencies. It has established a strong reputation for effectiveness and independence. It has gained this position because it has become well known as a strong advocate for consumers and competition. It is known as a tenacious and pro-active competition and consumer enforcer that usually succeeds in its enforcement actions. It is also perceived as willing to use all its powers to achieve appropriate outcomes for consumers and promote fair competition. It has a reputation for handling merger decisions well and granting authorizations in an appropriate manner. Over the years it has delivered effectively within its significant regulatory responsibilities in communications, infrastructure, fuel, energy (through the Australian Energy Regulator), and rural water.

This article seeks to describe some of the steps that the ACCC takes to make its processes fair and transparent within the broader system and highlight the benefits that flow for both the broader community and the ACCC from it being more transparent.

II. PRIORITIES, METHODOLOGY, AND DECISION-MAKING FRAMEWORK

The ACCC exercises its powers as a competition, consumer, and regulatory agency in a transparent and accountable manner. Its approach to accountability spans the establishment of the ACCC, the appointment of Commissioners and staff, corporate planning, proper standards for investigative procedures, and public reporting of decisions and outcomes. Its commitment to accountability is supported by governance and management structures and both internal and government-wide systems and processes.

The accountability and transparency of the ACCC decision-making processes is supported by a number of internal and external processes. The ACCC accountability framework for investigations published in 2013 sets out the governance and management structures in place to ensure that the ACCC operates investigations in a transparent and accountable manner.[2]

Under Australian Government policy independent regulators such as the ACCC are provided with a statement of expectations that outlines the Government's views about the role and responsibilities of the agency, its relationship with the Government, issues of transparency,

[1]Marcus Bezzi is Executive General Manager Competition Enforcement at the ACCC and Nicholas Heys is Director, Enforcement Coordination—the views expressed in this article are those of the authors and should not be attributed to the ACCC.

[2] *Available at* http://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations.

and accountability and operational matters.[3] The ACCC has provided a Statement of Intent that responds to the Government's Statement of Expectations for the ACCC.[4] While the Government acknowledges and respects the independence of the ACCC these statements recognize that the ACCC exists to deliver outcomes for the Australian public within the scope of the Government's broader policy agenda. It is beneficial for all concerned to have these understandings publicized.

Each year the ACCC conducts an extensive "strategic review" of the Australian scene with a view to determining its priorities for enforcement and compliance work in the following year. It consults extensively with representative bodies of consumers and businesses as well as industry ombudsman, other Australian and international regulators, and other relevant groups including its own staff; it extensively interrogates all accessible reliable complaints and intelligence data. All of the information gathered during the ACCC environmental scan is fed into a discussion between ACCC Commissioners and senior officers.

The revised priorities are determined in the first or second Commission meeting each year and then explained in a speech by the ACCC Chairman in February. The revised enforcement and compliance policy is published on the ACCC website.[5] It is then discussed and used by many businesses and their in-house and external legal advisors to inform their compliance strategies.

The ACCC usually establishes project teams to work within the priority areas to achieve particular outcomes that will include improved compliance with the law by relevant businesses.

This approach means that the ACCC's active engagement with compliance in a particular area will not be a surprise to anyone. It also enables the ACCC to focus its resources on the issues that, after detailed consultation and review of the available evidence, are deemed to be the most important.

III. TRANSPARENCY AND ACCOUNTABILITY IN ENFORCEMENT DECISIONS

The ACCC operates in a largely prosecutorial model of enforcement. When seeking to enforce the law the ACCC must persuade the Court to find a contravention of the law on the basis of the evidence gathered by the ACCC; the accused or respondent then presents its own evidence in defense and can challenge the evidence presented by the ACCC.

Once a hearing commences litigation is almost always completely public. Exceptions can be made to protect highly sensitive confidential information. Decisions about whether a firm has engaged in cartel conduct, anticompetitive vertical restraints, abuse of dominance, or anticompetitive mergers fall within the jurisdiction of the Australian Federal Court.

Australia's constitution creates a separation of powers between the executive of which the ACCC is part and the judiciary of which the Federal Court is part. For this reason the ACCC

[3] A copy of the document can be found on the ACCC website, *see* http://www.accc.gov.au/system/files/ACCC_Statement_of_expectations.pdf.

[4] A copy of the document can be found on the ACCC website, *see* http://www.accc.gov.au/system/files/ACCC%20Statement%20of%20Intent%20-%2026%20June%202014.pdf.

[5] *Available at* http://www.accc.gov.au/system/files/ACCC%20Compliance%20and%20Enforcement%20Policy%202015.pdf.

cannot make findings or determinations that a firm has engaged in anticompetitive conduct. Nor can the ACCC impose penalties or other remedies.

As part of an investigative into allegations the ACCC has a number of internal processes it follows. These procedures and processes are described in some detail on the ACCC website. In addition, aspects of these processes are made more transparent through detailed guidelines or policies. Examples include guidelines on the use of the section 155—coercive notice power and the ACCC policy on immunity and cooperation in cartels cases.

An investigation involves no formal finding that a party has engaged in anticompetitive conduct. Parties under investigation by the ACCC will become aware of the allegations as part of the investigative process. The ACCC's internal processes require various levels of engagement with the target of investigation. This engagement includes:

- Correspondence which sets out the allegations and invites the other party to respond;
- Issuing of formal notices to provide information or give evidence; and
- Meetings with the parties.

As part of an investigation the ACCC will assess the evidence and make a decision to take court action (or refer to the CDPP). The ACCC must prove on the balance of probabilities (in civil penalty cases) and beyond reasonable doubt (in criminal cases) before the Court makes a finding that a firm has engaged in anticompetitive conduct.

The adversarial court process involves disclosure of key information to the party alleged to have engaged in anticompetitive conduct. This includes a comprehensive statement of claim which sets out the allegations as well as disclosure of and access to evidence.

In some circumstance the parties do reach a settlement agreement. In these situations the Court must approve the agreement—this approval is not a mere rubber stamp and can be subject to change.

The Australian competition and consumer law framework does allow, where there is agreement between the parties, for matters to be settled administratively through the acceptance of an undertaking (or agreement) between the parties. Section 87B undertakings under the Australian framework are published in a public register and impose obligations on the parties for a set period of time, often five years.

IV. MERGERS—PROCESSES

The ACCC merger regime has been praised for its flexibility and rigor and assessed as "ticking along efficiently." This, independent observers note, is despite recent reductions in resources (including a 12.5 percent drop in staff numbers). It has been noted that when it makes a merger decision it is keen to ensure that it can justify the decision.[6]

The ACCC operates an informal merger clearance process that enables parties that are planning a merger to seek the ACCC's view on whether a proposed acquisition is likely to have

[6] Annual Global Ranking of Competition Regulators by *Global Competition Review* published 1 July 2015.

the effect of substantially lessening competition. There is no legislation underpinning the informal process; rather, it has developed over time so that merger parties can seek the ACCC's view before they complete a merger. The ACCC publishes both analytical merger guidelines and process guidelines to assist merger parties and the public to understand the ACCC's approach to assessing and conducting reviews.

When a merger is notified to the ACCC, or the ACCC becomes aware of a transaction by other means, it determines whether a public review is required. When the ACCC is satisfied that there is a low risk of a substantial lessening of competition, it may decide that a public review of the merger is unnecessary. These mergers are described as being "pre-assessed." A significant proportion of the mergers assessed are pre-assessments which enables the ACCC to respond quickly where there are no substantive competition concerns.

For mergers that undergo a public review, the ACCC maintains an online public register of mergers being considered that publishes indicative timelines for key stages for each review and indicative decision dates. As part of the process, the ACCC may release a Statement of Issues when it has come to a preliminary view that a proposed merger raises competition concerns that require a second-phase review.

At the conclusion of a public review, the ACCC will publish its decision and a summary of the reasons on the public register and, in most cases, will issue a press release. For certain categories of merger decisions, the ACCC will also publish a Public Competition Assessment, which is a detailed summary of a decision and the issues considered.

Ultimately if the ACCC opposes a merger and the parties proceed, the ACCC can apply to the courts for orders that may include injunction, divestiture, or penalties.

In addition to the informal review process, parties can apply to the ACCC for formal merger review[7] and parties can also apply directly to the Australian Competition Tribunal for merger authorization on the basis that a merger results in public benefits that outweighs any anticompetitive effects.

V. ADJUDICATION

The ACCC's Adjudication function provides parties with a transparent way to manage the potential risk that conduct they wish to engage in may breach the competition provisions of the CCA but they nevertheless consider that they should be able to engage in that conduct because the public benefit outweighs the public detriment.

Parties are able to apply to the ACCC for authorization to engage in certain anticompetitive conduct, for example price-fixing, when there is an offsetting public benefit. The authorization process is transparent and the ACCC will test the public benefit and detriment claims made by an applicant with potentially interested parties.

Generally the authorization process must be completed within a six-month time frame, and includes the ACCC issuing and consulting on a draft decision before it makes a final determination that sets out the conduct the party is entitled to engage in. The ACCC is required

[7] No applications for formal merger clearance have been made since this clearance option was legislated in 2007.

to keep a public register of all authorization applications. The public register is available on the ACCC's website and includes the status of the particular application, any submissions received from interested parties (subject to confidentiality claims), and the ACCC's draft and final decisions.

The authorization process involves:

- Inviting interested parties to make submissions;
- Conducting market inquiries;
- Receiving extensive information through submissions and market inquiries from interested parties;
- Issuing a draft determination setting out the reasons for why the ACCC may grant or dismiss the application;
- Inviting further submissions in response to the draft determination, including the opportunity to request pre-decision conferences with applicant interested parties; and
- Issuing a final determination.

Authorizations are granted for a set period of time, often three or five years. Parties must make a re-application if they wish to continue with the conduct beyond the set time period. Decisions to grant or dismiss an authorization are subject to a merits review in the Australian Competition Tribunal.

VI. ADDITIONAL TRANSPARENCY MECHANISMS

A. ACCC Accountability/Checks and Balances

As a government agency, the ACCC is held accountable through a number of non-court/tribunal forums. The separation of power between the legislative and executive forms of government provides the Commonwealth Parliament with mechanisms to scrutinize the actions taken by the ACCC. In addition there are other bodies, including the Commonwealth Ombudsman, that can, in limited circumstances, review the conduct and decisions of the ACCC.

The ACCC regularly publishes guidelines and reports about its activities. The publication of this material is complemented by regular meetings with businesses, industry associations, and the regular meetings of ACCC established Consultative Committees. The ACCC also publishes media statements at key decision points of investigations and projects.

The extensive publication of material has a dual purpose: (1) to promote transparency about decisions taken by the organization; and (2) to raise awareness of compliance obligations, including the education of businesses and consumers about their rights.

The ACCC must employ external lawyers to represent it in Court proceedings. The ACCC is also required to operate in accordance with a Ministerial Direction called the Legal Services Direction. Among other things it requires agencies such as the ACCC to act as a "model litigant." These features of the legal framework increase the objectivity of decisions to take and maintain legal action against a business or individual for contraventions of Australia's

competition law. Generally they improve the quality of the cases taken and contribute to the ACCC's record of successful court action.

Recently, the Australian Government introduced a new regulatory performance framework that seeks to further improve the accountability of agencies including the ACCC for their regulatory systems, action, and decisions.

In addition, under Australia's administrative law framework individuals can access certain information through freedom of information requests and there is administrative review or judicial review available of certain administrative decisions and other actions by the ACCC and its officers.

B. Use of Coercive Powers

The ACCC has access to various powers as part of its suite of investigative tools, including (i) search warrants, (ii) issuing notices to parties (s155) that require those parties to produce information and/or give evidence under oath, and (iii) gathering evidence using tools under other legislation including Telecommunication Intercepts.

The use of these powers is subject to review—either through the courts using judicial review or by the independent Commonwealth Ombudsman. The number of times these powers are used is published annually by the ACCC.

C. Improvements in Transparency

A recent review into Australia's competition law framework known as the Competition Policy Review or Harper Review has made a number of recommendations that seek to enhance the accountability of the ACCC and improve transparency around decisions.[8] The ACCC accepts that improvements can be made. For example, the ACCC has welcomed recommendations that it publish detailed guidance on misuse of market power laws and develop a media code of conduct.[9]

What aids accountability and transparency in any dynamic regulatory system changes as circumstances change. The ACCC as a public institution recognizes the value of continuing to improve its transparency and accountability in order to enhance and maintain a strong reputation for fairly and effectively exercising the power conferred on it for the benefit of Australians.

[8] *Available at* http://competitionpolicyreview.gov.au/final-report/.

[9] *See* ACCC's submission on the Harper Review Final report, pp. 14, 15, 24.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2015 (1)

EU Competition Enforcement and Compliance with Fundamental Rights' Standards: The Challenge and the Promise of Accession to the ECHR

Arianna Andreangeli
University of Edinburgh

www.competitionpolicyinternational.com

EU Competition Enforcement and Compliance with Fundamental Rights' Standards: The Challenge and the Promise of Accession to the ECHR

Arianna Andreangeli[1]

I. INTRODUCTION

The question of the compliance of the framework and the procedures for the enforcement of the EU competition rules with human rights' rules has been a vexed subject for many years. In that context, whether and how the European Union ("EU") should become a party to the European Convention on Human Rights ("ECHR") has been also hotly discussed.

In 2013, following a complex period of negotiations, a Draft Accession Agreement was submitted to the Court of Justice of the EU to obtain an opinion pursuant to Article 218(11) TFEU. The Draft Agreement had envisaged a series of arrangements designed to address issues of passive standing of the Union before the European Court of Human Rights and the possible involvement of the EU judiciary in respect of claims involving the Union and lodged in Strasbourg.

However, the CJEU ruled at the end of 2014 that the agreement, as it stood, did not comply with a number of founding principles of EU law, namely the principle of supremacy of EU law over domestic norms, the rules governing the inter-institutional architecture enshrined in the Founding Treaties, and—in that context—the judicial independence enjoyed by the same Court of Justice, especially in discharging its role vis-à-vis the domestic courts in the context of the preliminary reference procedure.

This brief paper aims to investigate some of the implications of accession for the public enforcement of the EU competition rules. It will review the 2014 Opinion and consider how the human rights' scrutiny of inspections ordered by the Commission and carried out either directly or via the assistance of the competent NCAs could be conducted post-accession. It will argue that any future arrangements should encompass robust mechanisms to ensure that the "Union interests" are taken into account and the primacy and coherence of Union law is maintained, even in cases involving domestic authorities acting within the scope of EU law.

II. FUNDAMENTAL RIGHTS' PROTECTION IN THE EUROPEAN UNION: FROM GENERAL PRINCIPLES, TO THE CHARTER AND TO ACCESSION TO THE ECHR—FINDING THE MISSING LINK?

The limited remit of this contribution does not allow for a consideration of the complex path that has led to the emergence of human rights' guarantees within the scope of EU law and for their evolution. Today, this legal landscape is notably characterized by a commitment to a

[1] Arianna Andreangeli is Lecturer in Competition Law at the University of Edinburgh, as well as Senior Tutor.

"Union's own" human rights' catalogue, i.e. the EU Charter of Fundamental Rights, which forms part of the primary law of the Union, namely of the "EU constitution" and enjoys a relationship of continuity not just with the CJEU's case law, but also with the ECHR, which has constantly provided special "inspiration" for the Court in Luxembourg.[2]

The central role played by the Convention, and the fundamental rights' protection standards enshrined in EU law, were regarded as extremely relevant by the European Court of Human Rights.[3] In its *Bosphorus* decision[4] the Court acknowledged that the duty to meet obligations arising from international law arrangements did not exonerate the Member States from respecting the Convention principles.[5] Nonetheless, it held, after reviewing the status quo as regards the Union's fundamental rights, that the latter were afforded a level of protection that could be considered "equivalent" to that provided in the ECHR,[6] unless the applicant in an individual case could satisfy the Strasbourg Court that there had been a "breakdown" in those safeguards.[7]

The 2006 judgment was therefore a turning point since it confirmed the robustness of the mechanisms provided by the EU Treaties for the protection of human rights.[8] However, it exposed how difficult it would be in practice to seek redress of infringements arising from Union action before the Court in Strasbourg in the manner depicted in *Bosphorus*.[9] It was therefore clear that the accession of the Union to the ECHR would have provided the "missing link" in this picture.

As is well known, the CJEU had ruled in 2001 that absent an express legal basis to this effect, accession to the ECHR would not have been possible for the Union without amending the Treaty.[10] The Treaty of Lisbon saw eventually such a bespoke provision being introduced to this end.[11] However, the Union could not have made way for accession without putting in place appropriate arrangements designed to maintain the coherence of its own legal system, by now enriched by the EU Charter, and, at the same time, secure the meaningful application of the same ECHR, especially in policy areas in which the domestic authorities acted as "proxies" for the Union.[12]

---

[2] *See* case C-386/10 P, *Chalkor v Commission*, judgment of 8 December 2011, nyr, ¶ 51. *See* also case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4.

[3] *See* e.g. appl. No 24833/94, *Matthews v United Kingdom*, [1999] 28 EHRR 1, ¶ 33-35.

[4] Appl. No 45036/98, *Bosphorus v Ireland*, [2006] 42 EHRR 1, ¶ 155-156.

[5] *See* e.g. *application No.13258/87, M & Co v Germany, Comm. Dec. 09.02.1990.*

[6] Appl. No 45036/98, *Bosphorus v Ireland*, [2006] 42 EHRR 1, ¶ 155-156.

[7] *Id.*

[8] *See,* inter alia, Parga, *Bosphorus v Ireland and the protection of fundamental rights in Europe*, 31(2) EUR. L. REV. 251 at 256-257 (2006).

[9] For commentary, *see* e.g. Jacque' *The accession of the European Union to the European Convention on Human Rights and Fundamental freedoms,* 48 COMMON MKT. L. REV. 995 (2011*),* especially at 1016-1018*; see* also Lock, *EU accession to the ECHR: implications for the judicial review in Strasbourg,* 35(6) EUR. L. REV. 777 at 780-781 (2010).

[10] Opinion 2/94, [1996] ECR I-1759.

[11] *See,* inter alia, Jacque', *supra* note 9 at 1019-1020.

[12] *See* Opinion 2/13, Full Court, 18 December 2014, not yet reported, e.g. ¶ 161. For commentary, *see,* inter alia, Lock, *Walking on a tightrope?,* (2011) 48 (4) COMMON MKT. L. REV. 1025 at 1030-31 (2011).

The Draft Agreement envisaged that individuals could "take the Union to court" in Strasbourg subject to the fulfilment of the requirement of the "exhaustion of domestic remedies," just with any other contracting party. If any such challenge was brought, however, there was the possibility, subject to a decision on the part of the Strasbourg Court, for the CJEU to be called upon to rule on the validity of EU measures in light of the Convention on which it has not ruled thus far, so as to maintain the integrity of the Court's role of "ultimate judge" as to the validity of Union acts and pursuant to the principle of subsidiarity.[13]

The Draft agreement also provided that the Union could be involved as co-respondent with the Member State/contracting party which was alleged to have infringed ECHR rights on account of action taken to fulfill EU law obligations either by accepting an "invitation" to this end or by decision of the European Court of Human Rights.[14]

However, in its Opinion 2/13[15] the CJEU doubted that the Draft Treaty would ensure the continuing interpretation of human rights' standards in light of the purpose, structure, and objectives of the Union,[16] due to the absence of rules governing the coordination between the ECHR and the EU Charter of Fundamental Rights.[17] The Court also found that the residual possibility for a Member State to take another contracting party—that was also a member of the Union or, indeed, the Union itself—to court in Strasbourg would have undermined the relation of trust on which the very Treaty was based,[18] and weakened its own "monopoly" over the adjudication of inter-state disputes.[19]

Furthermore, leaving it to the Strasbourg court to decide on whether the Union should be "invited" as co-respondent in cases where contracting states' action was allegedly originating from compliance with EU obligations would have been incompatible with the division of powers between the Union and the Member States.[20]

Finally, the CJEU held that, to allow the Strasbourg court to decide whether the Court of Justice had already been given the opportunity to rule over the same question as that in issue in the proceedings before it, would have deprived it of the possibility to decide whether EU measures complied with human rights' rules which, after accession, had become part of the Union *acquis*.[21] In addition, it would be questioning its relationship with the domestic courts, enshrined in the preliminary reference procedure.[22]

---

[13] *See,* inter alia *Handyside v UK*, Ser. A/24, [1979-80] 1 EHRR 737, ¶ 48; for commentary, inter alia Jacque', *supra* note 9 at 1018-1019.

[14] *Id.*

[15] *See* Lambrecht, *The sting is in the tail: CJEU Opinion 2/13*, EUR. HUMAN RIGHTS L. REV. 185 at 192-194 (2015).

[16] *Id.*, *see* ¶ 157-162; *see* also ¶¶ 183-189.

[17] *Id.*, ¶ 169; *see* also ¶ 186, 192.

[18] *Id.*, ¶ 199-200; *see* also ¶ 202-208.

[19] *Id.*, ¶ 207; *see* e.g. also case C-459/03, *Commission v Ireland*, [2006] ECR I-4635, ¶ 169. For comment, inter alia, Lambrecht, *supra* note 15 at 189.

[20] *Id.*, ¶¶ 222-225; *see* also ¶¶ 229-232.

[21] *Id.*, ¶¶ 238-239; *see* also ¶¶ 242-246.

[22] Opinion 2/13, ¶¶ 197-198; *see* also Lambrecht, *supra* note 15 at 186, 190.

The next section will query the direction in which the debate on the future accession arrangements may go, having regard to EU competition law investigations.[23]

III. EU COMPETITION ENFORCEMENT AS A "LABORATORY" FOR ACCESSION ARRANGEMENTS CONCERNING THE ECHR: THE CASE OF INSPECTION DECISIONS

The previous section provided a short overview of the status quo concerning human rights' protection in EU law. This section will explore some of the questions that could flow from accession having regard to the EU Commission's powers of competition inspection. More than ten years after the Modernisation reforms[24] the NCAs have become increasingly proactive in applying these rules and rely on the ECN as an informal cooperation framework, with the Commission remaining competent to take on cases for which a decision adopted at Union level may be required in the interest of the Union.[25] Nonetheless, despite the "assumption" made in the Preamble of the Modernisation regulation—that the rights of defense enjoyed by investigated undertakings across the Union can be considered "sufficiently equivalent"—significant differences exist in this area.[26]

Having regard to inspection powers, Article 20 of Council Regulation No 1/2003 confers to the Commission the power to conduct such inspections on the basis of a "letter of authorisation" or, if the investigated party objects to the measure, upon a formal decision which is binding and challengeable before the CJEU. Furthermore, Article 20(5) allows Commission officials to request assistance from officers of the national authorities to enable them to inspect premises owned or used by the investigated undertakings. Article 22 of Regulation 1/2003 also empowers both the Commission and the NCAs to rely on their fellow Network members for the purpose of carrying out inspections "by proxy" in other jurisdictions. Officials, according to, respectively, Articles 20(6) and 22(2), are obliged to obtain the necessary authorizations to carry out the inspection, including those of a judicial nature, and to respect domestic law.

As to the timing of a judicial remedy against a Commission's inspection decision,[27] Article 20 of the Modernisation Regulation allows the concerned firm to challenge it *ex-post*. The CJEU's case law, which has been confirmed also in the vigor of the EU Charter,[28] indicates that the lack of an *ex ante* remedy would not infringe the undertaking's right to the inviolability of its "home." This confirmation is based on the grounds that a number of other safeguards designed

---

[23] Recital 16, Preamble to Regulation No 1/2003.

[24] *See* e.g., most recently, case T-355/13, *EasyJet v Commission*, [2015] ECR II-36; T-201/11, *si. mobil and another v Commission*, [2014] ECR II-1096; case C-375/09, *Tele.Polska and others*, [2011] ECR I-270. For commentary, *seem* inter alia, Botta, *Testing the decentralisation of competition law enforcement*, 38(1) EUR. L. REV. 107 at 108-110 (2013).

[25] *See* e.g., Cengiz, *Multi-level governance in competition policy the European Competition Network*, 35(5) EUR. L. REV. 660 at 663-665 (2010).

[26] *See,* inter alia, Andreangeli, *The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings*, 31(3) EUR. L. REV. 342 at 348, 357-358 (2006).

[27] *See* inter alia, most recently, Andersson, *Dawn raids under challenge*, 35(3) EUR. COMPETITION L. REV. 135 (2014).

[28] Case C-583/13, *Deutsche Bahn and others v Commission*, judgment of 18 June 2015, nyr, ¶ 19; *see* also ¶¶ 30-32.

to protect the former from arbitrary or disproportionate investigative measures were in place;[29] namely, *inter alia*, the obligation imposed on the Commission to specify the subject matter of the investigation (including the essential features of the suspected infringement) and the existence of an *ex-post* remedy before the EU Courts.[30]

The EU position may however be contrasted with the position adopted in several domestic jurisdictions where ordering inspections is a matter for the courts, and not for the NCAs, such as in Germany.[31] It was therefore queried to what extent, if the Commission required assistance in carrying out such inspections in a jurisdiction where, as in Germany, a "judicial warrant" was necessary, these measures can be challenged *ex ante*.

In *Roquette Freres*[32] it was held that this "review (…)[could] not go beyond an examination (…) to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation (…)."[33] Thus, Article 20(8) of Regulation No 1/2003 states that the national judge must "(…) satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules (…)." if necessary by demand that the Commission provide it with "(…) explanations showing, in a properly substantiated manner (…)" that it has sufficient information showing such "reasonable suspicion."[34] If serious doubts emerge as to the legitimacy of the Commission's measure, a preliminary reference must be made to the Luxembourg court that is the "ultimate judge" of the validity of these measures.[35]

It is legitimate to query whether accession to the ECHR is likely to affect this approach. In respect of the question of the ECHR compliance of the inspection regime enshrined in Articles 20 to 22 of Regulation No 1/2003, it may be suggested that the CJEU seems to have "fallen in line" with current approaches enshrined in the case law of the European Court of Human Rights. According to these approaches the absence of *ex ante* judicial control on inspection decisions adopted in similar proceedings would not be fatal to their legality under Article 8 of the Convention if the decision was both accompanied by other non-judicial safeguards and was also open to an *ex-post* challenge before a court enjoying full jurisdiction on all matters of fact and law.[36] It is, however, argued that accession to the Convention may open complex, procedural questions, which will be considered in the following section.

---

[29] *See* e.g. case 97-99/87, *Dow Iberica and others v Commission*, [1989] ECR 1865, ¶ 26; see also ¶ 45. More recently *see,* inter alia, case T-135/09, *Nexans France SAS v Commission*, [2013] 4 CMLR 6, ¶¶ 43-45.

[30] *See* e.g. *Dow Iberica*, cit. (fn. 28), ¶¶ 44-45; *see* also, mutatis mutandis, case C-94/00, *Roquette Freres*, [2002] ECR I-9011, especially ¶¶ 67, 80-82.

[31] *See* Section 105, Code of Criminal Procedure; also, *see* Report submitted to the ICN Subgroup on Enforcement Techniques on 24 June 2013, *available at*: http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Mustertexte/Leaflet-ICN_Anti-Cartel_Enforcement_Template.pdf?__blob=publicationFile&v=8, pp. 15-17.

[32] Case C-94/00, cit. (fn. 29), especially ¶ 54 ff.

[33] *Id.*, ¶ 60.

[34] *Id.*, ¶¶ 60-61.

[35] *Id.*, ¶ 68.

[36] Case C-583/13, cit. (fn. 27), ¶ 26; *see* e.g. appl. 56716/09, *Harju v Finland*, judgment of 15 February 2011, nyr, *available at*: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103397; *see* especially ¶¶ 41-45; also

IV. THE CJEU OPINION 2/13 AND THE DRAFT ACCESSION AGREEMENT: BACK TO SQUARE ONE? THE EXAMPLE OF COMPETITION INSPECTIONS AND THE WAY FORWARD…

It was anticipated in Section II that according to the Draft Agreement's Article 3(2), the EU could become a co-respondent in proceedings brought against any of the Member States that appeared to "call into question the compatibility of the rights" enshrined in the ECHR with a provision of Union law, "including decisions taken under" the TEU and the TFEU, "notably where that violation could have been avoided only by disregarding" one of the duties bestowed upon the member state by EU law.[37] However, the decision as to whether to allow the Union (or any of the Member States if an action was brought against the EU, in accordance with Article 3(3)) would have rested with the European Court of Human Rights.[38]

As to the involvement of the CJEU, Article 3(6) of the Draft Agreement merely stated that the Luxembourg judiciary would have to be "afforded sufficient time" to allow it to examine these issues and only if the latter were "novel."[39] However, this opportunity should not affect the powers of the European Court of Human Rights, which could still assess whether associating the CJEU with a specific case was required in light of the conditions listed in the same provision,[40] nor would have been relevant when assessing the admissibility of individual applications.[41]

It is not surprising therefore that these provisions were found to be incompatible with the TFEU.[42] The CJEU was not only concerned with the lack of coordination between the ECHR and the Union's Charter but also at the "optional" nature of the co-respondent mechanism, which was subject to the Strasbourg court's appreciation in each case and was therefore regarded as undermining the integrity of the rules governing the division of powers between the Union and the Member States.[43]

Similarly, in respect of the Draft rules regarding the Luxembourg court's own involvement,[44] the solution envisaged by the Draft agreement was seen as adversely affecting the CJEU's function of "ultimate judge" of the validity of all measures adopted "within the scope of Union law" whether directly or via the preliminary reference procedure.[45] It is acknowledged that the European Court of Human Rights' "supervisory jurisdiction" aims at verifying that the rights

---

appl. No 71302/01, *Smirnov v Russia*, judgment of 7 June 2007, *available at*: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-80953, especially ¶¶ 44-45.

[37] Article 3(2), Draft Accession Agreement, 3-5 April 2013, *available at*: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf.

[38] *Id.*, Article 3(3).

[39] *Id.*, Article 3(6).

[40] *Id.*, *see* also ¶ 43, 47-48 of the Report accompanying the Draft, *available at*: http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282013%29008rev2_EN.pdf, pp. 23-24.

[41] *Id.*, ¶ 40, p. 23.

[42] Opinion 2/13, *see* e.g. ¶¶ 157-162; *see* also ¶¶ 183-189.

[43] *Id.*, ¶¶ 222-225.

[44] *Id.*, ¶¶ 238-239.

[45] *Id.*, ¶¶. 242-246.

granted to individual applicants by the ECHR are not unduly restrained.[46] However, this scrutiny should occur consistently with the essential principles of the EU institutional framework and preserving the integrity of the Union judiciary's function,[47] ultimately in order to uphold the primacy and coherence of Union law and the integrity of the EU's institutional structure.[48]

It is therefore argued that the co-respondent mechanism, far from being an "optional device" for "novel cases" should become an indispensable feature for alleged ECHR infringements arising from action occurred "within the scope of Union law."[49] Allowing the Court to "have a say" in these cases would also reconcile the unity of Union law with the effectiveness of the Convention and respect both the supervisory jurisdiction of Strasbourg and the concept of "margin of appreciation" which the Union enjoys.[50]

It is submitted that these considerations are extremely relevant for the enforcement of the EU competition rules which is increasingly left to the NCAs acting "within the scope of Union law" and thus prompts the likelihood of "Convention questions" arising in domestic courts.[51] It is doubted that, if serious questions arise as to the lawfulness of these investigative measures vis-à-vis Convention principles, the latter could avoid making a preliminary reference to Luxembourg, since to hold otherwise would potentially imperil the unity and coherence of EU law taken as a whole as well as threaten the integrity of the CJEU's jurisdiction.[52]

It may even be suggested that a "wider ranging" view of the requirement of "exhaustion of domestic remedies" would have to be adopted to encompass the condition that the competent court hearing these cases make a preliminary reference to the CJEU.[53] Consequently, it is concluded that a mechanism securing a merely "optional" involvement of the EU Court of Justice, such as the one provided in the Draft Agreement, could not be sufficient to allay these concerns.[54]

---

[46] *See* e.g., mutatis mutandis, *Handyside v UK*, Ser. A/24, [1979-80] 1 EHRR 737, ¶ 48; for commentary, inter alia, Jacque', *supra* note 9 at 1018-1019.

[47] *See Bosphorus*, *supra* note 4 at ¶¶ 155-156. *See* also, inter alia, case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4. For commentary, *see,* inter alia, Platon, *The "equivalent protection test": from European Union to United Nations, from Solange II to Solange I*, 10(2) EUR. COMPETITION L. REV. 226 at 235-236 (2014).

[48] *See,* inter alia, Lock, *supra* note 12 at 1032, 1035.

[49] *See* e.g. Lock, *EU accession to the ECHR: implications for judicial review in Strasbourg*, 35(6) EUR. L. REV. 777 at 780-781 (2010).

[50] For commentary, *see,* inter alia, Jacque, *supra* note 9 at 1020-21; also case C-94/00, *supra* note 30 at ¶ 54.

[51] *See,* inter alia, case C-94/00, *supra* note 30 at ¶ 51.

[52] *See id.*; *see* also, mutatis mutandis, case C-583/13, *supra* note 28 at ¶¶ 30-32.

[53] *See* Costa, *The relationship between the European Court of Human Rights and the national courts*, 3 EUR. HUMAN RIGHTS L. REV. 264 at 266-267 (2013).

[54] Opinion 2/13, ¶ 240-248; *see* also, mutatis mutandis, ¶ 90. *See*, inter alia, Lock, *supra* note 12 at 1032-1033.

V. EU ACCESSION TO THE ECHR AND COMPETITION INVESTIGATIONS: A "HUMAN RIGHTS LABORATORY" WITH UNCERTAIN OUTCOMES? TENTATIVE CONCLUSIONS

The previous sections attempted to address some of the issues arising from the impact of ECHR accession on the rules governing the enforcement of the EU competition rules across the ECN in light of the recent Opinion of the CJEU on the Draft Agreement; in particular, having regard to challenges concerning the proportionality and non-arbitrariness of inspection decisions. It was suggested that the application of these principles, whether pre- or post-accession, should always be subjected to the framework of objectives of the Treaties and occur in the respect of the Union's institutional and judicial architecture.[55]

Thus, it was argued that allowing the Union to appear as co-respondent in all cases involving the application of Convention standards to measures adopted within the scope of Union law would not just be merely desirable, but should be compulsory to manifest the legitimate interest to the effective application of the EU competition rules.

It is added that, in these cases, the prior involvement of the CJEU should always be allowed for the integrity of the Court's jurisdiction within the TFEU. It is therefore hoped that a new accession agreement will allow the Union to appear as co-respondent in all cases concerning allegations of human rights' infringements arising from the Member States' fulfilment of their Treaty obligations and permit the Court of Justice of the EU to rule on these allegations, for the purpose of fulfilling the condition of the "exhaustion of domestic remedies."

[55] *See*, inter alia, case 11/70, *Internationale Handelsgesellschaft*, [1970] ECR I-1125, ¶¶ 3-4.

CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle
July 2015 (1)

Reverse Payments Post *Actavis*: A Litigation Quagmire?

Keith N. Hylton
Boston University

www.competitionpolicyinternational.com

Reverse Payments Post *Actavis*: A Litigation Quagmire?

Keith N. Hylton[1]

For the last decade or so, the FTC has had a bee in its bonnet over "reverse payment settlements." Such a settlement occurs when a pioneer pharmaceutical firm terminates a patent infringement lawsuit against a generic drug maker by forming an agreement under which the generic enters the market at some later date (still before expiration of the patent) in exchange for a payment from the pioneer.

In theory, reverse payment settlements could be observed in any area of litigation. One famous nuisance dispute, *Spur Industries v. Del E. Webb Development Co.*,[2] resulted in a reverse payment remedy, and probably many such disputes have been settled under similar terms. But reverse payment settlements have been especially noticed in pharmaceutical patent litigation—and not just because they must be reported by law.

The U.S. Federal Trade Commission ("FTC") argues that these settlements are designed to unduly protect a patent-based monopoly and to share the profits from the monopoly between pioneer and generic. Without such settlements, says the FTC, generics would prevail in the infringement lawsuits brought by pioneer firms, and drug markets would be opened to generic competition earlier. From this it follows that reverse payment settlements should be deemed to violate the antitrust laws, because they harm consumers.

This argument was somewhat persuasive to a majority of the Supreme Court in *FTC v. Actavis*, decided in 2013, which changed the law on patent infringement settlements from a rule favoring such settlements to a searching "rule of reason" inquiry that attempts to balance the pro-competitive and anticompetitive effects of a reverse payment settlement.[3] The Court didn't give much guidance to lower courts on how to conduct the balancing test other than to say that a large reverse payment may be taken as evidence that the underlying patent is weak.[4]

For the past year, lower courts have been struggling mightily to figure out how to apply the *Actavis* balancing test.

Unfortunately for the courts, and for consumers as well, much of the reasoning behind the FTC's decade-long attack on reverse payment settlements is flawed. The rash of reverse payment settlements observed in recent years, and similar deals transferring resources from pioneer to generic firms, may have benefitted consumers over the long term, and almost certainly

---

[1] Keith Hylton is the William Fairfield Warren Distinguished Professor of Boston University and Professor of Law at Boston University School of Law.

[2] *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972). The court required the nuisance source (a cattle feedlot) to move and the developer to compensate the nuisance source.

[3] *FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2234 (2013).

[4] *Id.* at 2236.

left consumers better off than under the new FTC-created legal environment that obstructs such settlements.

The main argument against reverse payment settlements is that they permit a pioneer firm with a weak patent—one likely to be held invalid—to buy off the generic challenger and split the monopoly profits from a protected market. Yes, this is possible, and even plausible given that the Hatch-Waxman Act of 1984 stimulated generic challengers by reducing regulatory obstacles and giving the first challenger a period of exclusivity on the market.[5] But in assessing whether costly and intrusive—and, in this area, seemingly never-ending—antitrust scrutiny of patent infringement settlements is preferable to the earlier rule that favored such settlements, attention should be focused on the general case over the long term rather than the worst-case scenario.

The mere fact that a pioneer pays a reverse payment settlement—even one that exceeds its expected litigation cost—is not strong evidence that its patent is invalid. Even if the patent is 99 percent likely to be upheld, a pioneer with a blockbuster drug may still be willing to pay a lot of money to avoid the 1 percent risk that it will be invalidated. To return to my nuisance comparison based on the *Spur* case, the reverse payment order in *Spur* did not reflect a belief on the court's part that the developer's nuisance theory was weak. Instead, it reflected, in part, a perception that the gain to the developer was large relative to the loss suffered by the cattle feedlot from having to move.[6] Similar economics underlay many reverse payment settlements in pharmaceutical litigation.

Moreover, reverse payment settlements have provided an excellent escape option from litigation for generic challengers, one that has given them supercharged incentives to challenge pioneer patents. Knowing that a reverse payment or some other lucrative deal might be offered to put an end to litigation, generics have been quick to file challenges.

Overall, reverse payment settlements and similar deals have led to an enormous wealth transfer from pioneer firms to the generic sector. Generics have pocketed the money and used it to fund more dissemination, research, and patent challenges.

Indeed, the framework of streamlined patent challenges introduced by the Hatch-Waxman Act has had the general effect of transferring part of the investment return from pioneer firms to generics, thus increasing the hurdle rate for new drug innovation—and the prices necessary to justify that innovation—and pumping up the vigor of generic challengers.

This transfer appears to have been a windfall for consumers, as long as you try not to look at its effects on drug innovation. If you take into account effects on incentives for innovation, the overall impact of Hatch-Waxman on consumers may have been harmful: consumers received the benefit of greater generic competition in exchange for a slower innovation cycle that pumps out pricier drugs.

---

[5] *See, e.g.*, Garth Boehm *et al.*, *Development of the Generic Drug Industry in the U.S. After the Hatch-Waxman Act of 1984*, 3 ACTA PHARMACEUTICA SINICA B 297, 298 (2013); Ashlee B. Mehl, *The Hatch-Waxman Act and Market Exclusivity for Generic Manufacturers: An Entitlement or an Incentive*, 81 CHI.-KENT. L. REV. 649, 653 (2006).

[6] *Spur Indus. v. Del E. Webb Dev. Co.*, 494 P.2d at 708.

By obstructing the pioneer to generic wealth transfer, the emerging legal prohibition of reverse payment settlements promises more undesirable consequences. As lower courts have expanded *Actavis* to cover *all* settlements that appear to benefit generic challengers, money exchanged or not, the rule is quickly morphing into a roach motel for litigation: drug firms can check in but never check out. The burden on new drug innovation remains and has likely worsened as a result, while the incentive to challenge patents has decreased.

The *Actavis* litigation itself offers an example of the burden and waste created by the new regime. The patent infringement litigation at its core began in 2003, settled in 2006 with a reverse payment that was perfectly legal at the time,[7] and now continues today in the form of antitrust litigation against the FTC with no apparent end in sight—and the class action lawyers have only started to circle around this litigation quagmire.

Of course, drug firms don't have to fight the FTC. They can settle, as Cephalon, now owned by generic Teva, just did, agreeing to pay $1.2 billion after the FTC threatened to seek a $5 billion disgorgement of alleged ill-gotten gains from a nearly decade-old reverse payment deal.[8] The $1.2 billion includes a $500 million previously agreed payment to class action lawyers, so it is arguably a good deal for Teva under the circumstances.

Taking money out of the drug development and dissemination system and giving it to a coalition consisting of the FTC and class action lawyers is not just a dollar-for-dollar exchange. The Hatch-Waxman transfer from the pioneer to the generic sector, though probably harmful to innovation, wasn't smoked up in the pipes of generic owners. Each dollar transferred resulted in a dollar more for development and dissemination by generic firms, and at the same time permitted pioneer firms to retain more money for research and development—decisions with positive global health implications. Now much of the transfer goes to litigation.

Eventually drug firms will figure out a way to settle their patent disputes without exposing themselves to this huge litigation tax. One judge recently dismissed the core of the FTC's reverse payment settlement case against pioneer Abbvie on the ground that the deal offered benefits to consumers.[9] Drug firms will be advised to read the decision as a primer on how to avoid liability.

Still, for now, an impenetrable fog of uncertainty sits over the law in this area. The FTC has no incentive to clear up this fog, because the combination of uncertainty and huge threatened disgorgement fines enhances settlement pressure on targeted firms.[10]

---

[7] *FTC v. Actavis, Inc.*, 133 S.Ct. at 2229; *see also* Press Release, Watson Pharmaceuticals, Inc., Watson and Unimed Pharmaceuticals, Inc. Settle Lawsuit Over AndroGel(R) Testosterone Gel (Sept. 13, 2006), http://actavis.com/news/news/thomson-reuters/watson-and-unimed-pharmaceuticals,-inc-settle-law.

[8] Rebecca R. Ruiz & Katie Thomas, *F.T.C. Settles Suit With Drug Maker*, N.Y. TIMES, May 2, 2015, at B1.

[9] *FTC v. AbbVie Inc.*, 2015 U.S. Dist. LEXIS 59115 (E.D. Pa. May 6, 2015).

[10] When a targeted firm pays off the FTC to put an end to antitrust litigation, its motive appears to be the same as when it pays off a generic to put an end to the patent challenge. In one case, the patent-based "monopoly profits" are shared with the generic; in the other with the FTC. This suggests that the only way the FTC could protect consumers would be to seek to invalidate the patent. The settlement is merely a sideshow.

There is no evidence so far that the new legal regime has led to any benefits for the average consumer. Generic prices have been skyrocketing since *Actavis*.[11] While there may be many reasons for this (e.g., regulation-induced shortages), the transfer of capital that could be used for drug development and dissemination into an expanding litigation black hole may be one of them.

Prices must rise to cover unpredictable legal expenses. Generic firms have to be big to handle all of this litigation, which at the same time is making fast bedfellows of pioneer and generic firms. Mergers and acquisitions, such as the one between Cephalon and generic Teva in 2011,[12] can help keep money in house.

All of this reduces the amount of competition in the long run. As the law of unintended consequences goes, this one may turn out to be generic.

[11] Trefis Team, *Why Are Generic Drug Prices Shooting Up?*, FORBES, (Feb. 27, 2015, 8:38 AM) http://www.forbes.com/sites/greatspeculations/2015/02/27/why-are-generic-drug-prices-shooting-up/; *see also* Elisabeth Rosenthal, *Rapid Price Increases for Some Generic Drugs Catch Users by Surprise*, N.Y. TIMES, July 9, 2014 at A16.

[12] Chris V. Nicholson, *Teva to Pay $6.8 Billion For Cephalon*, N.Y. TIMES, (May 3, 2011, 4:30 PM) http://query.nytimes.com/gst/fullpage.html?res=9B03E3D91F30F930A35756C0A9679D8B63.