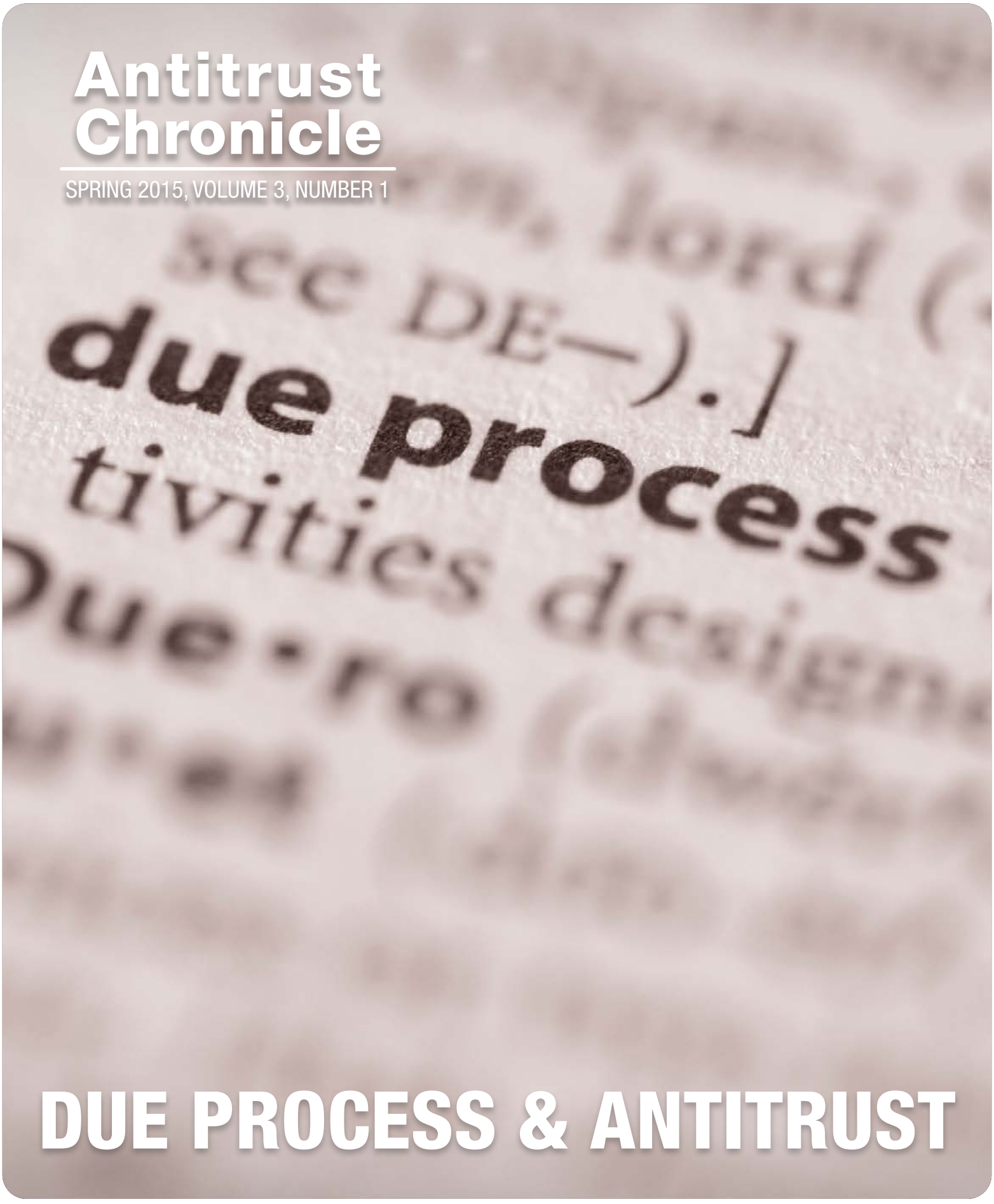

CPI COMPETITION POLICY INTERNATIONAL

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Procedural Fairness and Transparency in Antitrust Cases: Work in Progress

Paul Lugard
Baker Botts LLP

Procedural Fairness and Transparency in Antitrust Cases: Work in Progress

Paul Lugard[1]

I. AN INTRODUCTION TO THIS CHRONICLE

There is broad consensus on the need for, and growing importance of, transparency and procedural fairness in competition enforcement. However, the objectives, scope, and practical application of the associated procedural rights have never been undisputed.[2] On the one hand there is a general belief that the wide powers of competition law enforcement agencies require the application of checks and balances. On the other hand, day-to-day practice demonstrates that procedural rights differ significantly from one jurisdiction to another; for instance, the wide variance in degree and ways that the parties to an antitrust investigation can obtain sufficient and timely information about material competitive concerns.

Not surprisingly, the importance of procedural rights and their practical application to real-life cases are often complex and tend to be dependent on legal, cultural, historical, and economic factors. It is hard to dispute the proposition that different traditions may entail different processes and that, despite these differences, competition agencies may still arrive at equivalent end results, albeit through different ways and means. However, this possibility obviously does not mean that all outcomes are—by definition—equally fair and effective in safeguarding the procedural rights of parties subject to an antitrust investigation.

On the contrary, there are—unfortunately—too many examples around the world of enforcement practices that, despite often the best intentions and highest morals of individual agency officials, simply do not meet any reasonably conceivable minimum standard of due process rights. The argument that, as yet, no generally accepted catalog of minimum acceptable procedural norms exists does not alter this observation, but merely underscores that a set of best practices in this area is needed more than ever.

Incidentally, it would be wrong to believe that the lack of procedural fairness best practices implies a complete lack of convergence with regard to the nature and scope of procedural rights. Indeed, as the OECD observes:

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[1] Paul Lugard is a partner in the Brussels office of Baker Botts LLP. He is also a Vice Chair of the Competition Commission of the Business and Industry Advisory Council ("BIAC") to the OECD.

[2] Among the many insightful contributions on procedural fairness and due process rights, *see* for example: Ian Forrester, *Due Process in Competition Cases: A distinguished institution with flawed procedures*, 34 E.L REV 817 (2009); Wouter Wils, *Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement*, 29(1) WORLD COMPETITION 3 – 24 (2006); and Sean Heather, *Seeking Procedural Fairness in Competition Cases*, 12 GCR (August/September 2009).

> .. Procedural rights differ significantly from one jurisdiction to another, but most countries ensure, in one form or another, to the parties to an antitrust investigation the opportunity to obtain sufficient and timely information about material competitive concerns, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions. ..[3]

A number of scholars and other authoritative authors have suggested various lists of guiding principles, key concerns, and topics that should guide the discussion of procedural fairness. Here are three examples:

Judge Douglas H. Ginsburg recently identified six due process concerns to consider: (i) delay, (ii) a hearing before the actual decision maker, (iii) a neutral decision maker, (iv) the right to confront evidence, (v) a reasoned decision based solely upon the evidence, and (vi) review by an independent tribunal.[4]

Stanley Wong, a leading competition law adviser who combines experiences as a private practitioner and a senior public enforcement official, has suggested that a meaningful debate about procedural fairness should be structured around three core principles: (i) the Disclosure Principle, (ii) Right of Defense principle, and (iii) Independence of Decision-Maker Principle.[5]

And Christopher Hockett, the current Chair of the Section of Antitrust Law of the American Bar Association, lists seven potential topics to address in a global conversation about norms for antitrust due process:

1. opportunity for a meaningful hearing by the decision maker before enforcement action is taken;
2. actual and perceived neutrality of the merits decision maker;
3. transparency of (i) the legal standards that apply to the conduct in question; and (ii) the theory of how those legal standards apply in particular cases—both when enforcement is being weighed and when investigations are closed with no action taken;
4. access to evidence collected in connection with an enforcement action;
5. ability to challenge and test evidence, including questioning of adverse witnesses;
6. protection of parties' and third parties' confidential information from unauthorized disclosure; and

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[3] *See* OECD Policy Roundtables, Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings (2010), *available at* http://www.oecd.org/competition/mergers/48825133.pdf.

[4] *See* Keynote Address by Judge Douglas H. Ginsburg, *Due Process in Competition Proceedings*, International Competition Network Roundtable on Investigative Process (March 25, 2014) Washington D.C., *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc958.pdf

[5] *See* Stanley Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, ICN Column, COMPETITION POL'Y INT'L (April 23, 2014), *available at* https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach.

7. ability to challenge enforcement outcome before an independent judicial or administrative body.[6]

It is, however, important to recognize that a precise definition of procedural fairness, or a delineation of the rights and principles that are within the category of necessary procedural safeguards, is not essential for a constructive debate on procedural fairness. In fact, the exchange of views within the OECD on procedural fairness and transparency that started in 2010 demonstrates that a meaningful debate can be structured around a small number of key notions—and the practical importance of those notions—in different phases of the investigation.[7]

Similarly, the recent ICN Roundtable Discussion on Competition Agencies' Investigative Process distinguished between the initial and advanced phases of the investigative process and focused on issues such as engagement with the parties, efficiency of the investigation, evidence fathering and confidentiality, opportunities to be heard, internal checks and balances, and measures that promote the legitimacy of agency decisions.[8]

It is sometimes suggested that adequate procedural rights only exist for the benefit of parties that are subject to an antitrust investigation, and this belief may explain—in part—the reluctance among some antitrust agencies to change existing practices or to engage in a dialog with other agencies or the business community. However, it is now increasingly recognized that, in fact, procedural rights are also beneficial for agencies themselves and indirectly contribute to the legitimacy of competition law enforcement and societal welfare. Indeed,

> .. The quality of competition enforcement depends on agencies' ability to conduct effective investigations. Effectiveness depends on investigative procedures that provide for transparency, predictability, confidentiality protections, notice and an opportunity to be heard. .. [9]

Finally, let me touch upon—but not discuss in detail—the interrelationship between agencies' procedures and legal review of enforcement decisions. A legitimate question is whether judicial review may cure any defects of fining decisions that result from the fine being imposed by an administrative body that does not itself comply with essential procedural requirements.[10]

This is a complex issue that requires further discussion. Courts play a significant role in guaranteeing due process, particularly when competition agencies are administrative bodies. It is important for the courts to ensure antitrust proceedings are conducted in a fair manner—this function as a check and balance of the competition agency enhances not only the credibility of

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[6] *See* Christopher B. Hockett, *Antitrust and Due Process*, 28(2) ANTITRUST 2– 5 (Spring 2014).

[7] For a useful introduction and synthesis of the OECD discussions to date, *see* OECD Competition Committee, Procedural Fairness and Transparency, Key Points (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf

[8] *See* ICN Roundtable Discussion Competition Agencies' Investigative Process, Tuesday, March 25, 2014, Washington DC. Paul Lugard was one of the panel speakers on Phase 1 Engagement and Decision Making.

[9] *Id.*

[10] This question has particularly arisen in the context of the application of the Charter of Fundamental Rights of the European Union. *See* in this respect Koen Lenaerts, *Due process in competition cases*, 1(5) NEUE ZEITSCHRIFT FUER KARTELLRECHT, 175-182.

the enforcement action, but is in keeping with the basic principles for fairness and rule of law that are hallmarks of a developed and accountable legal system. However, for the parties affected by an enforcement agency decision, rights of appeal are not a practical substitute for fairness at the agency stage given the additional time, cost, and commercial and reputational damages incurred while an appeal is pursued.

II. TRENDS UNDERLYING THE GROWING IMPORTANCE OF PROCEDURAL FAIRNESS IN COMPETITION INVESTIGATIONS

A number of current, interrelated trends in the international antitrust arena contribute to the growing importance of procedural fairness in competition law proceedings.[11] Five key trends can be summarized under the following headings: (i) globalization, (ii) fragmentation, (iii) diversification, (iv) cooperation, and (v) litigation.

To start with the obvious, the number of jurisdictions with an antitrust enforcement regime has grown to some 115 and the ICN currently has 128 member agencies, including Armenia, Kazakhstan, Kenya, Uruguay, Colombia, and, since 2013, Algeria, Hong Kong, and Saudi Arabia. Clearly, the increasing number of potentially relevant jurisdictions not only adds a layer of complexity to the work of practitioners, but also creates significant challenges for firms doing business in these jurisdictions.

Paradoxically, the immense increase of enforcement regimes and agencies has led to a significant fragmentation in enforcement policies, priority setting, substantive rules, and due process standards. Indeed, while the ICN has been successful in bringing about a certain degree of substantive convergence, the work on procedural matters as a separate issue, including minimum standards for rights of defense, has only just started.[12]

A third trend is the changing portfolio of many competition agencies. Many competition authorities, including the Korea Fair Trade Commission, the Dutch ACM, the U.K. AMC, and the Danish Competition and Consumer Authority diversify into areas neighboring competition law. This trend appears to be driven by a belief that agencies should have larger portfolios than just competition enforcement to effectively deal with anticompetitive practices and other market failures. In addition, enforcement agencies tend to increasingly resort to negotiated settlements in an attempt to effectively remedy identified competitive problems.[13] While it may be argued that parties that decide to settle their matter with an agency may be expected to give up some of their procedural rights, there is a risk that settlement procedures erode essential procedural rights, such as the right to be informed in sufficient detail of the agency's competitive concerns as well as theory of harm.

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[11] The relevance of a number of the trends discussed has also been observed by others. *See* in particular Hockett, *supra* note 6 and OECD Competition Committee, Procedural Fairness and Transparency, Key Points, *supra* note 7.

[12] Obviously, many ICN work products, such as the *Recommended Practices for Merger Notification and Review Procedures* and parts of the Anti-Cartel Manual directly or indirectly relate to procedural rights of parties.

[13] *See* Paul Lugard & Martin Möllmann, *The European Commission's Practice Under Article 9 Regulation 1/2003: A Commitment a Day Keeps the Court Away?*, 4(1) CPI ANTITRUST CHRON. (April, 2013).

A fourth key trend is the need for an increase of inter-agency cooperation in a globalized system of antitrust enforcement. While agencies may have legitimate reasons to exchange information in the context of investigations and enforcement of their competition laws—which is often in the interest of the business community—that same cooperation risks raising significant due process issues; for instance, with respect to the safeguards that apply to confidential business information that may have been provided to agencies on a voluntary basis in the context of merger reviews. One important project in this respect is the revision of the 1995 OECD *Recommendation on International Cooperation between Member Countries on Anticompetitive Practices*.[14] A recent draft involves provisions that would facilitate the exchange of confidential business information without the consent of the party that provided the information.

Finally, a fifth trend that underlies the growing importance of procedural fairness is the increase in penalties resulting from private and public enforcement. Over the past ten years sanctions for competition law violations have increased significantly and it seems that newer agencies are sometimes tempted to follow the examples set by the European Commission and other lead agencies with proven track records. Obviously, the larger the penalties are, the more critical the respect for procedural safeguards becomes.

III. THE WAY FORWARD

We are far away from a global recognition of a catalog of minimum standards for procedural fairness and transparency in antitrust cases that includes sufficient specificity for practical use, and it is perhaps optimistic to hope that a comprehensive set of truly global recommended best practices in this field will be agreed upon in the next decade. The building of sufficient consensus—probably first among a subset of like-minded jurisdictions—will take time and is a gradual process that is, to some extent, dependent on the pace of development in specific parts of the world. It is clear that a number of authoritative agencies, such as the European Commission, will—and should—play a prominent role in this process.

However, the valuable role of individual agencies should be complemented by initiatives of international organizations, in particular the ICN and the OECD. In many respects, the OECD Competition Committee's Working Party No. 3 has taken the lead in this important area, and has provided for an appropriate, neutral, well-informed, and authoritative platform for much-needed next steps. The 2010 and 2011 OECD Roundtable discussions on procedural fairness and transparency have laid the foundations for meaningful follow-up activities.[15] However, to optimize the chances of success, private organizations such as the American Bar Association, and first and foremost, organizations that represent companies whose procedural rights are at stake, should be given a clear voice in the years to come.

[14] *See* in this respect http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf.
[15] *See*, *supra* note 7.

IV. THE CONTRIBUTIONS TO THIS CHRONICLE

In this issue of the *CPI Antitrust Chronicle* a number of expert authors with a variety of backgrounds and views from different parts of the world offer their thoughts on procedural fairness, transparency, judicial review, and related issues.

Georg Berrisch and Martin Möllmann both provide views on the EU competition enforcement regime, albeit from different perspectives. Georg Berrisch's contribution, *The EU Judiciary Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights*, concentrates squarely on the essential role of the EU courts in safeguarding due process rights. He, *inter alia,* observes that the CJEU's findings in *Menarini* and *Schindler* necessitate a full review of the Commission's assessment of complex economic matters, something that is increasingly critical in light of the expanding category of (hard-core) infringements under Article 101 TFEU.

In contrast, Martin Möllmann's contribution, *Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough*, concentrates on the European Commission itself and is a courageous attempt to look beyond the implications of the *Menarini* judgment. He notes that the European Union should continue to pay attention to suggestions for reforms, all the more because those reforms would also strengthen the effectiveness of the Commission's antitrust enforcement policy. Möllmann's contribution can be situated against the background of the discussion on institutional design and the question whether different models may produce similar results in terms of procedural fairness.

Albert Sanchez-Graells and Francisco Marcos take a radically different and opposing position in their contribution *A Call for a restriction of "Corporate Human Rights" In Competition Enforcement Procedures, and More Generally.* They argue that the recognition of procedural rights, or "corporate human rights" for companies, has the potential to weaken both competition law and human rights enforcement and advocate for the suppression of those rights in the area of competition law enforcement. Their view is unorthodox and may certainly elicit critiques, but is also worth reading and reflecting upon.

Michael Han & Janet (Jingyuan) Wang, Stephen Harris, and Toshiaki Takigawa each shift the focus to a region of the world where procedural fairness concerns are developing into central concerns. In his contribution, *Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences*, Toshiaki Takigawa discusses the relative pros and cons of administrative and prosecutorial enforcement systems, and in many respects complements Berrisch' and Möllmann's contributions—with an interesting twist. Indeed, Takigawa notes that among the reasons for the Japan Fair Trade Commission to abolish its (pseudo prosecutorial) administrative-law-judge system and replace that system with an enforcement model akin to the EU system is the inefficiency and lack of procedural justice associated with the former system. Takigawa's observations are interesting, in some respects unconventional, and give food for thought.

Stephen Harris' *Due Process and Procedural Rights Under the China Anti-Monopoly Law,* and the contribution by Michael Han & Janet (Jingyan) Wang, *Due Process in Chinese Competition Law Regime*, both provide valuable insights in parties' procedural rights under the Chinese competition law regime and, importantly, put the associated concerns in the context of

the Chinese legal, economic, and political systems. It is difficult not to agree with many of the authors' observations and suggestions. Interestingly, both contributions also show that, while much remains to be done and many due process provisions lack sufficient practical detail, there is real potential for improvement, especially—as Han and Wang show—in light of the current drafting of a unified administrative procedural law. However, there are many obstacles and, as Harris notes, "[a]meliorating the pernicious effects of bureaucratic politics on AML policy and procedures requires political will and political action towards that end." It is hoped that will shall prevail.

Finally, in his article, *The Independence of Decision-Maker Principle in Competition Law Enforcement*, Stanley Wang elaborates on the principled approach that he recently suggested and discusses one of his three core principles, the Independence Decision-Maker Principle. He notes, *inter alia,* that confirmation bias is not, as such, sufficient to justify the adoption of that principle as a core principle for procedural fairness in competition law enforcement. He goes on to explore when combining investigative and decision-making functions makes sense and when it does not, and for which reasons. Let's hope that Stanley Wong would be able to elaborate his thoughts on the two other principles, the Disclosure Principle and the Right of Defense Principle, in the near future.

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The EU Courts Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights

Georg M. Berrisch
Baker Botts LLP

www.competitionpolicyinternational.com

The EU Courts Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights

Georg M. Berrisch[1]

I. INTRODUCTION

In its *Menarini* ruling, the European Court of Human Rights ("ECtHR") held that fines imposed by the Italian antitrust authority for the violation of competition law are criminal charges and that, consequently, the requirements of Article 6 of the European Convention of Human Rights ("ECHR") apply. However, ECtHR did not consider it incompatible with Article ECHR that these fines were adopted by an administrative authority and not an "independent and impartial tribunal established by law," because, in the view of the ECtHR, it was sufficient that the Italian courts exercised a full review—and not just a legality control—of the fining decisions.

In *Schindler*, the Court of Justice of the EU ("CJEU"), referring to the *Menarini* ruling, used essentially the same reasoning in finding that the EU's system of antitrust enforcement is not contrary to Article 47 of the Charter—and hence Article 6 ECHR. Referring to its earlier ruling in *Chalkor*, the CJEU observed that the EU courts review both the facts and the law and have the powers to assess the evidence, to annul the contested decisions, and to alter the fine. It further held that, when reviewing the legality of a Commission decision imposing fines for violation of the EU's competition rules, the EU courts cannot use the Commission's discretion, either as regards the choice or the assessment of the factors used to set the fine, as a ground for not conducting of an in-depth review of the facts and the law.

Much has—and can be—said about the merits of both *Menarini* and *Schindler*. The purpose of this short note, however, is not to enter into that debate but rather to comment on some specific issues related to the judicial control by the EU courts of the European Commission's decisions imposing fines for infringements of Articles 101 and 102 TFEU. Indeed, it seems fair to say that, as a result of *Menarini* and *Schindler*, the compatibility of the EU system of antitrust enforcement with Article 6 ECHR and Article 47 of the Charter depends on the degree of judicial control exercised by the EU courts. In this respect, the work of the General Court is of particular importance because it is the sole "independent and impartial tribunal" assessing the evidence relied on by the Commission in establishing an antitrust infringement and setting a fine.

II. THE CHAHIER DES CHARGES FOR THE GENERAL COURT

First, one could characterize the CJEU's findings in *Schindler* and *Chalkor* as an *ex-post* justification of a system that has failed to ensure adequate judicial review, or as instructions by the CJEU to the General Court to increase the level of judicial review, or as both. In any event, what matters is that, in the future, the General Court does indeed carry out an in-depth review of

[1] Dr. Georg M. Berrisch, a German Rechtsanwalt, is a partner in the Brussels office of Baker Botts LLP.

the facts and the law and, in particular, of whether the evidence put forward by the Commission does indeed prove the alleged competition infringement. Also, in appeal judgments, the CJEU must ensure that the judicial review carried out by the General Court meets the requirements of *Schindler* and *Chalkor* and rigorously quashes any judgment where the General Court failed in its task; for example, by referring to the Commission's discretion as a reason for only pursuing a limited review.

As regards the latter point, both in *Schindler* and in *Chalkor*, the CJEU considered it as irrelevant that the General Court, when reviewing the Commission's fine calculation, started from the incorrect assumption that the Commission enjoyed wide discretion when deciding on whether to grant a company a reduction of the fine for cooperating with the Commission and that, therefore, the General Court's assessment of the Commission's decision was limited to establishing whether the Commission had manifestly gone beyond the boundaries of its discretion. According to the CJEU, the application of an incorrect standard of review was irrelevant because, in the CJEU's view, the General Court had, in fact, carried out an in-depth review.

While it is correct, in principle, that the degree of judicial review actually carried out is more important than the label given to it, the findings of the CJEU are highly problematic. If the General Court explicitly states that its review is limited to assessing whether the Commission had manifestly exceeded a wide margin of discretion, it must be assumed that this affects the degree of judicial review actually exercised. Therefore, a finding that the General Court exercised a strict in-depth review of the Commission's evidence—even though it stated that the Commission enjoys wide discretion—would require a detailed assessment of all arguments put forward by the applicant and the Court's response to them. The CJEU failed to do that but simply asserted that the General Court did carry out a full review.

III. THE END OF THE COMMISSION'S DISCRETION?

Both *Schindler* and *Chalkor*, but also *KME*, were cases where the applicants had challenged "only" the determination of the amount of the fines but not the finding of an infringement. The finding by the CJEU that the EU judiciary cannot use the Commission's discretion as a ground for not conducting of an in-depth review of the facts and the law explicitly referred to the choice and assessment of the factors used to set the fine. But what about the finding of the infringement itself which, after all, is the very prerequisite for the imposition of a fine?

The Courts, traditionally, have granted the Commission a wide latitude as regards the assessment of complex economic or technical matters. I would submit that following *Menarini* and *Schindler*, the EU courts must also carry out a full review of the Commission's assessment of complex economic matters, if this assessment forms the basis of a finding of an infringement for which the Commission has imposed a fine. The EU's system of antitrust enforcement could not be considered compatible with Article 6 ECHR or Article 47 of the Charter if the Courts were to (continue to) allow the Commission wide discretion in this regard. The discretion then would not be exercised by an independent and impartial tribunal and would not be subject to a sufficient degree of judicial control.

It is true that in many hard-core cartel cases the issue of discretion does not arise, because the only question is whether or not there was an agreement. However, the Commission increasingly looks beyond hard-core cartels into cases where, in order to show the existence of an agreement or concerted practice, so-called plus factors, including the actual effects of the investigated conduct on the market, are relevant. These analyses typically concern complex economic matters.

Importantly, full judicial review in this context does not mean that the Courts can decide instead of the Commission or alter the Commission's decisions. Outside of the assessment of the fine, the Courts cannot do this—they can only fully (or partially) annul the decision. However, this limitation does not mean that they cannot undertake an in-depth review of the Commission's findings, nor that they must—or should—allow the Commission wide discretion.

IV. HAVING TO BREAK SERVE

Despite all the rhetoric about full judicial review, a company challenging a Commission decision before the General Court remains at a fundamental disadvantage. In fact, challenging such a decision is akin to playing a tennis match with the opponent, the Commission, having serve all the time.

To begin with, the first thing that the judges read in a case is the Commission's decision. Of course, a decision by a public authority finding an infringement and imposing a fine carries significant weight and inevitably directs the thinking of the judges. The applicant must then prove to the Court that the Commission got it wrong; for example, because the evidence relied on by the Commission is insufficient to support its allegations. To make matters more difficult, the Commission not only has the first word, but also the last word, both during the written procedure and the oral hearing. Compare that to a system where an enforcement authority goes to court with an indictment, then has to prove its case to the judges, with the accursed having the last word.

Moreover, because the Court does not redo the investigation carried out by the Commission, it will only hear those arguments and evidence that the applicant has put forward or has asked the Commission to produce. Also, in principle, the applicant may not supplement the pleas and evidence submitted in the initial application at a later stage. The fact that the initial application must be submitted within a relatively short period of a little over two months puts the applicant at a further disadvantage. Indeed, in several cases the courts refused to hear an argument on the ground that it had not been properly set out in the initial application. And to make things worse, the courts also try to limit the number of pages that an applicant can submit.

Particularly troubling is the General Court's general reluctance to hear witnesses. In many cartel cases, the Commission relies to a great extent on the evidence provided by amnesty or leniency applicants. While in some cases there is a significant body of documentary evidence, in others statements by witnesses play a key role. However, neither at the Commission nor before the Court is there an opportunity for the company's lawyers to cross examine such witnesses; in fact, it is not even assured that the Commission itself will question the witness.

In the recent *Duravit* judgment, the General Court stated it is within its sole discretion to decide whether or not to hear a witness and that the parties have no right to examine a specific witness (although they can, and should, formally request that a specific witness is heard). While it

is not possible to opine on the basis of the information contained in the *Duravit* judgment whether, in that particular case, there was indeed no need to hear the witnesses, I would submit that in order to ensure compliance of the EU's antitrust enforcement system with Article 6 ECHR and Article 47 of the Charter, the General Court should err on the side of caution and, if there is the slightest indication that hearing a witness may help the applicant, call the witness.

V. CONCLUSION

It needs to be seen, whether, and how, the EU Courts, and in particular the General Court, will intensify the judicial control of the Commission competition law decisions, in particular those imposing fines. It is only a matter of time before an aggrieved company will bring a case before the ECtHR challenging the EU's competition enforcement regime as being incompatible with Article 6 ECHR. The outcome of that case will likely depend on the depth of the judicial review actually exercised by the European Union—provided, of course, the ECtHR confirms *Menarini* and does not hold that a system where fines of several hundreds of millions of Euros are imposed by an administrative authority and not by an independent and impartial tribunal is generally incompatible with Article 6 ECHR.

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Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough

Martin Möllmann
White & Case LLP

Due Process in Antitrust Proceedings Before the European Commission: Fundamental Rights are Not Enough

Martin Möllmann[1]

I. INTRODUCTION

The issue of due process in competition law proceedings before the European Commission ("Commission") has been debated for many decades, since the early days of the European competition enforcement system.[2]

For many commentators, the original sin was to combine the investigative and adjudicative functions under the roof of the Commission. The principle of this combination has been strongly criticized, as has its concrete implications for how the guilt or innocence of companies is determined. The fact that the final decision-making in cases involving significant sanctions lies in the hands of 28 politically appointed commissioners—who are not involved either in the decision drafting or in the hearing of the parties—is one of the strongest sources of complaints.[3] And the fact that the same Commission officials investigate the case, draft the accusation (the so-called Statement of Objections ("SO")), receive the responses of the parties, convoke the oral hearing, and draft the infringement decision is also widely perceived as a flawed concentration of powers.[4] The risk of prosecutorial bias associated with such a combination of incompatible functions is often pointed out as a source of unfairness and even, in some cases, potential errors.[5]

Several reforms have been suggested to remedy these weaknesses. The most ambitious would be to adopt a system similar to the United States in which the Commission would

[1] Lawyer registered at the Bar of Paris and Associate in the Brussels office of White & Case LLP. I thank Ian S. Forrester and Paul Lugard for their helpful advice and comments. The views expressed in this article are exclusively those of the author.

[2] *See* for example F. Graupner, *Commission Decision-Making on Competition Questions*, 10 C.M.L. REV. 291 (1973) cited in I. S. Forrester, *Due process in EC competition cases: A distinguished institution with flawed procedures*, EUR. L. REV. 817 (2009).

[3] The only exception being that the commissioner for competition can be involved in the decision drafting, although he never attends hearings.

[4] For a description of such criticisms, *see* inter alia D. Geradin & N. Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment*, TILEC Discussion Paper Series 2011/8; I. S. Forrester, *supra* note 2; Donald Slater, Sébastien Thomas, & Denis Waelbroeck, *Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?*, The Global Competition Law Centre Working Paper 04/08 (2008); J. Jourdan, *Droits procéduraux des entreprises dans les procédures de cartel de l'Union Européenne*, J. DE DROIT EUROPÉEN, 381 (2013); S. Kinsella, *Is it a Hearing if Nobody is Listening?*, 3(1) CPI ANTITRUST CHRON. (March 2010).

[5] For the description of such potential bias, *see* W. Wils, *The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis*, 27(2) WORLD COMPETITION, 201-224 (2004).

investigate antitrust proceedings, but its adjudicative power would be transferred to the Court of Justice of the EU ("CJEU"). Less ambitious suggestions (although probably more realistic in the short term) aim to reorganize the Commission's Directorate General for Competition ("DG COMP") to structurally separate services involved in investigations from those involved in decision making. The role of the commissioners would then be limited to confirming or vetoing decisions drafted by case teams specifically dedicated to the adjudicative task and separated (e.g. via Chinese walls) from the case team investigating the case.[6]

The entry into force of the Lisbon Treaty in 2009 provided full legal effect to the Charter of Fundamental Rights of the EU ("the Charter") and made it clear that the European Union will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR").[7] Both of these changes fuelled the aspect of the debate relating to the compatibility of this combination of functions with fundamental rights enshrined in both acts, notably Article 6 ECHR (the right to a fair trial).

In 2011, the European Court of Human Rights ("ECtHR") issued its widely noted *Menarini* judgment,[8] stating that an administrative body may impose competition law penalties (which constitute criminal law sanctions) without infringing Article 6 ECHR, as long as the parties have the possibility to appeal such decisions before a tribunal with full jurisdiction as to facts and law, not merely to review legality.

While it can still be doubted whether this is the final word of the ECtHR (the judgment was not issued by the Grand Chamber and Judge Albuquerque issued a strong dissenting opinion), and also whether the CJEU fulfills the criteria of full judicial review,[9] there could be a temptation for the Commission to consider that *Menarini* closes, once-and-for-all, the above mentioned debates regarding the combination of investigative and adjudicative functions.

However, even if *Menarini* is construed as excluding any possibility that the EU enforcement system infringes the right to a fair trial (which, again, is doubtful), would this mean that the system is bullet proof against other criticisms? Is this really the end of the debate on the combination of investigation and decision-making powers?

It is submitted that the impact of the *Menarini* judgment should not be overestimated. An enforcement system does not become adequate simply because it does not infringe fundamental rights. Compliance with such rights should be seen as a minimum mandatory standard, not an achievement. Despite the *Menarini* judgment, bold reforms to the Commission's antitrust enforcement structure are still necessary. Indeed, such reforms would reinforce the Commission's antitrust policy.

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[6] For a good description of different possible reforms to remedy the combination of functions, *see* the Report presented at the Fifth Annual Conference of the Global Competition Law Center, 11-12 June 2009, *Enforcement by the Commission—The Decisional and Enforcement Structure in Antitrust Cases and the Commission's Fining System*.

[7] Article 6(2) of the Treaty on European Union states that: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms."

[8] Judgment of 27 September 2011, *Menarini Diagnostics v Italy*, Application no. 43509/08.

[9] For different aspects of the debate as to whether the CJEU exerts full judicial review, *see* D. Geradin & N. Petit, *supra* note 4, and H. Schweitzer, *Judicial Review in EU Competition Law*, RESEARCH HANDBOOK ON EU COMPETITION LAW (Damien Geradin & Ioannis Lianos, eds., 2011).

II. COMPLIANCE WITH FUNDAMENTAL RIGHTS: NOT AN ACHIEVEMENT, ONLY A REQUIREMENT

The *Menarini* judgment should not be construed as the final word in the debate as to the appropriateness of current due process rules before the Commission. This judgment potentially addressed only the criticisms relating to fundamental rights. As the Commission's Hearing Officer has said, the jurisprudence of the ECtHR:

> […] does of course not exclude a possible wider discussion as to whether or not this system is, among the various systems that are legally possible, the best system in terms of administrative cost, effectiveness, or other policy considerations.[10]

Still, it seems that this jurisprudence offers an opportunity for the Commission to reject further claims that the EU enforcement system should be reconsidered. In this vein, the Director-General for Competition recently stated that:

> As far as the Commission is concerned however, these recent developments should allow us to put to rest institutional debates and concentrate on our core business—on enforcing the law.[11]

It would be most regrettable for the Commission to consider calls for structural changes to its due process rules as illegitimate based on the ECtHR's judgments.[12] Not breaching fundamental rights should not become an excuse to avoid bolder improvements to antitrust enforcement procedures.

The *Menarini* judgment held that Article 6 ECHR allowed, in certain circumstances, a system in which an administrative body imposing criminal law sanctions to combine investigative and decision-making powers, nothing more. While such compliance is of course mandatory, it is far from being the only objective a competition law enforcement system should pursue. Quite the contrary: it is only a minimum standard any competition authority should reach and it has absolutely no meaning as to the effectiveness or fairness of that authority's enforcement policy.

Considering that such compliance puts an end to the institutional debate surrounding EU antitrust enforcement would also call into question the purpose of strong efforts the Commission has made in the past to improve the transparency of its procedures and limit the risk of prosecutorial bias. The introduction of Best Practices, the Chief Economist, and peer review panels were not driven by the necessity to comply with fundamental rights, but rather by the

[10] W. Wils, *The compatibility with fundamental rights of the EU antitrust enforcement system in which the European Commission acts both as investigator and as first-instance decision maker*, 37(1) WORLD COMPETITION 7 (March 2014).

[11] Alexander Italianer, *Recent developments regarding the Commission's cartel enforcement*, speech given at the Studienvereinigung Kartellrecht Conference on March 14, 2012 in Brussels.

[12] Although the decision to reform the current institutional structure would not only need the Commission's approval, but also, depending on the changes envisaged, of the European Parliament and the Council of the EU (and even the Member States, should the EU Treaties be amended), the Commission remains the institution controlling almost the entirety of the power of legislative initiative. A reform would therefore require first the support of the Commission to be translated into a legislative initiative.

legitimate objective to reinforce both the legitimacy and the reliability of Commission decisions.[13]

It would therefore be wise for the Commission to keep the door wide open to discussions as to how the very structure of EU competition law enforcement can be improved. Relying on *Menarini* to avoid strong reforms would probably only postpone inevitable changes.

The current level of combination of functions in the Commission is not only problematic with respect to fundamental rights; it also calls into question the appropriateness, legitimacy, and effectiveness of the EU's competition policy. None of these issues was resolved by the ECtHR. The EU should therefore continue paying attention to suggestions for reforms, all the more because most of the suggested changes would not only strengthen the companies' rights, but also the effectiveness of the Commission's antitrust enforcement policy.

III. STRONGER DUE PROCESS FOR A STRONGER ENFORCEMENT POLICY

Calls for stronger due process in EU competition law, especially when voiced by counsels of companies subject to investigations, could be interpreted as attempts to weaken the Commission's enforcement policy so as to avoid infringements being uncovered. This interpretation would be mistaken since most suggested improvements to due process would strengthen both the defendant's rights and the Commission's antitrust policy.

Regard fact-finding, for example. While oral hearings in the current system merely allow the parties to voice their arguments without granting them a real chance to confront other parties, the introduction of a real contradictory hearing with cross-examination of witnesses would allow the case team to test the robustness of factual statements made by parties on which it relied, which would reduce risks of errors. Indeed, why are "contradictoire" hearings used in other EU jurisdictions, notably in criminal law? Not only because they give the defendant greater chances to prove its innocence, but also because they allow the truth more readily to be discovered. In this regard, stronger hearings should not be considered as obstacles to the enforcement efforts of the Commission, but rather as opportunities to strengthen them.

In the same vein, allocating the tasks (i) to investigate and (ii) to take the final decision on the infringement to different officials, working in structurally separate departments of the Commission, would support the Commission's enforcement policy for similar reasons, as it would significantly reduce both the objective risk and the subjective perception by parties of prosecutorial bias. In the current system, companies facing antitrust proceedings often have the feeling that the decision has already been made when they are granted the right to respond to the SO and to a hearing. Such suspicion is triggered both by the fact that companies are defending themselves before the same officials who drafted the SO incriminating them as well as the absence of the final decision makers (i.e. the commissioners) in the oral hearing. In this sense, more robust due process rights would support the Commission's enforcement efforts as they

[13] Several of these improvements also followed the annulment by the General Court of the EU (then Court of First Instance) of three decisions of the Commission prohibiting mergers (*see* Judgment of 25 October 2002, *Tetra Laval v Commission*, T-5/02, ECR, EU:T:2002:264; Judgment of 6 June 2002, *Airtours v Commission*, T-342/99, ECR, EU:T:2002:146, and Judgment of 22 October 2002, *Schneider Electric v Commission*, T-310/01, ECR, EU:T:2002:254).

would enhance the Commission's legitimacy, thereby increasing the deterrent effect of its decisions.

The issue in this regard is not so much whether prosecutorial bias really influences the case team. Rather, the problem lies more in the perception companies have that they don't have the chance to defend themselves effectively before persons who are not already convinced of their guilt.

While a structural separation between officials investigating the case and those drafting the infringement decision may not radically change the outcome of most proceedings, it would substantially address the perception of unfairness many companies have when walking out of hearings.

Addressing such legitimacy concerns would inevitably imply reconsidering the role of the commissioners in the decision-making process. Since none of them attends oral hearings nor, except for the Commissioner for competition, are any involved in any step of the proceedings, their legitimacy to decide on guilt or innocence is called into question. As such, a concrete separation of investigative and adjudicative powers, as described above, would necessarily be coupled to a limitation of the Commissioners' role to a mere veto right. This way, parties to antitrust proceedings would know that they are defending themselves before the real decision makers, i.e. the officials drafting the decision.

Again, changes in this regard should not be considered as obstacles to a strong enforcement of antitrust law. On the contrary, it has been stated on several occasions that this perception of unfairness detracts from the effectiveness of Commission decisions:

> Although certain issues may not be of significant individual concern, together they serve to sap the effectiveness and fairness of procedures that the Commission has worked hard to establish.[14]

The interests of the Commission and those of companies subject to antitrust proceedings are therefore converging in this respect more than they diverge. Unfortunately, the position of the Commission remains ambiguous:

> Of course, we can look at ways to improve this process even further, and we will do so through our Best Practices, but the merits of our system as such should not be put into question. We will not follow those who ask us radical changes in this field.[15]

While the Commission appears ready to consider limited improvements to due process, it keeps the door closed to debates regarding the allocation of investigative and adjudicative powers. Unfortunately, it is therefore unlikely that substantial changes will be adopted in the next years. This opposition is all the more unfortunate as it may affect the development of due process rights before other antitrust enforcers.

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[14] D. Anderson & R. Cuff, *Cartels in the EU: Procedural Fairness for Defendants and Claimants*, INT'L ANTITRUST L. & POL'Y, Fordham University School of Law (2010).

[15] J. Almunia, Vice President of the European Commission responsible for competition policy, *Transatlantic Trends in Competition Policy*, SPEECH/10/305, 10 June 2010.

IV. THE SPECIAL RESPONSIBILITY OF A MODEL INSTITUTION

Despite the above-mentioned concerns, the Commission remains one of the strongest and most influential competition enforcers worldwide. As noted by several commentators, both the substantive law and the institutional organization of its enforcement have inspired many countries which recently introduced similar enforcement systems:

> the Commission is perceived as a role model within the European Competition Network and among the global enforcement community.[16]

Such a prominent institution is therefore subject to a special responsibility regarding the choices it makes. There is little doubt that the current position of the Commission influences other enforcers. The refusal of the Commission to consider wider reforms to its procedures therefore probably supports the reluctance of other enforcers to reinforce due process rights.

V. CONCLUSION

Compliance with fundamental rights should not become a pretext for public institutions to avoid bold reforms. One can understand that the Commission stopped holding its breath after *Menarini*. But it cannot claim a final victory.

It is hardly credible that the current concentration level of investigative and adjudicative functions is tenable in the long term. In the context of increasing recourse to private damage claims in the European Union, it is more important than ever to have antitrust proceedings not weakened by doubts as to their legitimacy or robustness. Unfortunately, it seems that the Commission is not yet determined to start structural reforms. One can hope that the new commissioners who will be appointed following the recent EU parliamentary elections will be more ambitious than their predecessors in this respect.

[16] Amcham EU, *Due Process in EU Antitrust Proceedings - AmCham EU calls for Improvements in Due Process in EU Competition Cases* 3 (2010).

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A Call for a Restriction of "Corporate Human Rights" In Competition Enforcement Procedures, and More Generally

Albert Sanchez-Graells
School of Law, University of Leicester
&
Francisco Marcos
IE Law School

www.competitionpolicyinternational.com

A Call for a Restriction of "Corporate Human Rights" In Competition Enforcement Procedures, and More Generally

Albert Sanchez-Graells & Francisco Marcos[1]

I. INTRODUCTION

Despite having originally been recognized with the clear and limited purpose of protecting the individual from State abuses (and, incidentally, from violations by other individuals where their rights may clash), the human rights recognized in the European Convention on Human Rights ("ECHR") have been, to a significant degree, extended to protect corporate entities. As the European Court of Human Rights ("ECtHR") put it, the assumption underlying such a protective stretch is that the dynamic nature of the ECHR (i.e. its perception as a "living instrument'") and an unspecified set of present-day conditions support a very flexible interpretation of the ECHR with the teleological aim of making corporations the beneficiaries of an array of "human rights."

It is important to stress that, in our view, the extension of such protection has not been derived from a clearly defined strategy or conscious decision to actually grant such protection to corporations; rather, the patchy developments in this area have usually derived from a compartmentalized or "siloistic" approach to the analysis of specific problems in given cases. Under the very specific circumstances of those cases, good administration considerations—or, to some extent, the will to limit public administrative intervention in the context of enforcement of economic law—were usually the real underpinning rationale for the decisions reached by the Courts confronted with "corporate human rights" claims (mainly, the ECtHR and the Court of Justice of the European Union ("CJEU")). Unfortunately, these were cloaked under human rights rhetoric.

Such creeping extensions of corporate human rights protection have resulted in a broader trend where there seems to be a full assimilation between individual human rights (and human rights of groups and associations concerned with the promotion of activities mainly centered in the individual) and corporate human rights (or rights of corporate entities, including or particularly concerned with those engaged in for-profit and economic activities). In our view, the creation of such momentum for corporate human rights has been accidental—and unfortunate.

II. THE CREATION OF CORPORATE HUMAN RIGHTS IN COMPETITION LAW ENFORCEMENT

In particular, the creation of such corporate human rights is obvious in the area of due process guarantees and, possibly even more so, in the area of competition law enforcement. Such a development has been largely undesirable and, consequently, should be reversed or at least minimized for the reasons that we develop more fully in a paper to be presented in the

[1] Dr. Albert Sanchez-Graells is a Senior Lecturer at the University of Leicester's School of Law; Dr. Francisco Marcos is a Professor at the IE Law School and Visiting Fellow at George Washington Law School.

forthcoming ASCOLA conference[2] and that we will briefly summarize here. Some of our arguments have been presented in a milder formulation by others (such as MacCulloch) or in the past (by Sanchez-Graells), but we now consider that such intermediate or mild criticisms to the creation and extension of corporate human rights are problematic because they may derive from the assumption that, in the absence of human rights protection, corporate defendants may not have resort to any other devices to prevent abuses of power committed by the competition authorities.

However, a realistic approach towards the system for the enforcement of competition law (at least in the European Union and in other developed jurisdictions) and the administrative procedures underpinning this system clearly shows that this is not the case. Competition enforcement procedures do provide corporate defendants with a sufficient degree of protection of their core interests and include systems of checks and balances (including judicial review) that prevent (at least most) instances of abuse of public power. Therefore, such intermediate positions may need reviewing, at least answering a more definitive answer to the extent question: How weak should corporate human rights protection be, if, indeed, it is at all justified? In order to address this general point, critical re-assessments such as those recently provided by Grear in her argument for a re-humanization or re-embodiment of human rights serve as an interesting reference point. From a legal perspective sound theoretical justifications were provided by Dan Cohen in the United States more than two decades ago.

For reasons we cannot fully explore here, it seems reasonable to consider that corporations cannot suffer coercion by public powers in the same condition as if they were individuals and, thus, corporate defendants deserve a different, more reduced protection. Indeed, from the perspective of both the need for protection, and the need to counterbalance public power and its exercise, we submit that creating corporate human rights lacks a plausible and sufficient justification. If an alternative justification is sought in the concept of due process as a value in itself (i.e. not as a human right), we acknowledge that there may be more scope to find justification in the need to design sound administrative procedures that ensure high levels of good administration in the management of investigations and, especially, in the decision-making processes involved in the enforcement of economic law (and competition law in particular). But we would still disagree that these needs for regulatory quality produce a need for corporate human rights.

Therefore, in a nutshell and from a pragmatic perspective, our concerns and arguments against the creation, consolidation, and inflation of corporate human rights in the area of competition law enforcement (and more generally) revolve around the effectiveness of both the system for the enforcement of competition law and, possibly more importantly, the enforcement and protection of human rights themselves.

III. CORPORATE HUMAN RIGHTS AS A WEAKENING OF COMPETITION LAW ENFORCEMENT

It should be stressed that the effectiveness of competition law requires competition authorities to investigate those actions that might infringe articles 101 or 102 TFEU (or their

[2] A copy is *available at* http://ssrn.com/abstract=2389715.

domestic equivalents) and, for them to do so effectively, these authorities need to be empowered to sanction those undertakings that are proven to have done so. Their decisions in punishing violations of those rules are crucial in deterring future anticompetitive actions. In conducting their tasks, competition authorities face both the difficulties of finding information and evidence of anticompetitive actions, and the need to carry out complex economic assessments, but they are experienced and well prepared to do so.

Given that neither the fact-finding exercise, nor the analysis of the facts, by competition authorities are crystal-clear tasks, introducing the full-set of guarantees and safeguards required by due process in criminal proceedings in favor of corporations subject to antitrust investigation would obstruct the conduct of competition authorities' investigation and assessment tasks. In order to allow investigations to proceed quickly and smoothly, lenient procedural guarantees should be applied.

In this same vein, given the difficulties faced in finding 100 percent definitive evidence that a violation has occurred (as the wording of the prohibitions themselves clearly reveals) a lower standard of proof may be required. Several interpretations and assessments can be made of the same facts, and for that reason, the scrutiny of competition authorities' investigation procedures and decisions should be limited to a requirement that they construct a sound and rigorous case concerning the behavior subject to investigation and sufficiently justify that it falls within the scope of articles 101 or 102 TFEU (or their equivalent).

The ECtHR has acknowledged the need to provide the necessary deference to such judgments that imply "classic exercise of administrative discretion" or, in other words "the issues to be determined [require] a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims." Therefore, subjecting competition law enforcement to excessively demanding standards of proof, or to compliance with excessive (and unnecessary) protections of corporate human rights, would end up diminishing the effectiveness of competition law enforcement.

Moreover, and from a clearly normative perspective, it seems to be worth stressing that the enforcement of competition law is clearly seen as a mechanism mainly aimed at either preventing or correcting (as quickly as possible) distortions and restrictions of competition in the markets. Such enforcement has, as its objective, allowing market mechanisms to continue working properly, with an intermediate objective towards achieving allocative and dynamic efficiency, and, ultimately, becoming a tool to protect welfare and promote innovation.

This fundamental normative element in the design of competition law enforcement has some clear implications. On the one hand, it requires that competition law enforcement be as speedy and flexible as possible. That this emphasis is already present is clearly seen in the design of enforcement mechanisms that tend to benefit corporate defendants willing to accept guilt or to cooperate with the competition authorities, such as the leniency and settlement mechanisms in place in most jurisdictions (and, clearly, in the European Union).

On the flip side, it might also be necessary to develop more mechanisms to minimize the risk of appeal and, consequently, suspension of their effects, to the appropriate level, thus continuing to ensure speedy enforcement decisions are adopted by competition authorities (following already sufficiently sound administrative procedures) and giving those decisions

almost immediate effectiveness. Creating a too broad and generous basis for challenge or appeal on the basis of protecting corporate human rights would be a significant element creating a reduced effectiveness of competition law enforcement—even if the decisions were eventually upheld and implemented (or, in clearer terms, time is actually gold in the implementation of enforcement decisions aimed at restoring competitive market situations, since a belated execution of the measures—possibly of those other than the imposition of fines, but also those to some extent—may render them ineffective or even inadequate in a changed market and competitive setting). Therefore, eliminating one tier of potential challenges and appeals both in terms of legal basis and available jurisdictional fora, by preventing corporate human rights litigation in the area of competition law, would contribute to strengthen the effectiveness of the system.

Finally, in order to contextualize these prior considerations, it may be worth stressing that competition laws are one of the main regulatory instruments for the protection of the market economy itself. Only properly functioning markets can bring about the benefits of the free market paradigm, and preventing competition distortions is clearly beneficial for consumer protection (through preventing welfare losses) and consumer interests. But, even if consumer welfare is not recognized as the ultimate valid normative standard, and a total or social welfare approach more lenient towards corporate manufacturers or suppliers is adopted, competition laws still remain one of the fundamental safeguards of the free market economy.

From this perspective, it seems evident that an excessive protection of corporate defendants in competition enforcement procedures by an overgrowth of corporate human rights (and, more specifically, due process rights) is a self-defeating strategy. In these cases, the attribution of those rights to corporate defendants can only handcuff the already limited—in terms of actual human and other resources—enforcement powers of competition authorities and, in the end, result in a diminished effectiveness of a system unable to properly protect social welfare in the market economy.

In somewhat comic terms, it could be represented as a system where the human rights pliers would be used to pull out the teeth of the competition watchdog—which would simply result in a toothless competition law system unable to bite corporations engaged in anticompetitive behavior. This should be seen as an undesirable outcome, given the very strong public interest element implicit in competition law enforcement.

IV. AND AN ADDED POTENTIAL LOSS OF EFFECTIVENESS OF HUMAN RIGHTS PROTECTION ITSELF

Moreover, it is important to stress that granting full corporate human rights may create problems not only regarding competition law enforcement, but also in connection with the enforcement of proper human rights themselves, as the amount of litigation that could derive from the consolidation of such development does not seem to be negligible. As the ECtHR already clarified in some instances where it was confronted with significant threads of increased litigation (and following an implicit "floodgates argument") the ECHR "is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective." Therefore, a preference for the investment of all available resources in the protection of those human rights with a clearer and sounder justification (i.e. those of individuals) over a diversion towards the protection of lower ranking corporate rights should be stressed.

Indeed, there seems to be no good reason to promote permissive rules and standards oriented towards a stronger protection of corporate human rights in competition law cases. Undertakings having been fined for breaches of competition law will always have a very strong financial incentive to challenge those fines before the relevant courts (i.e. both the ECtHR and, potentially, the CJEU) or, at least, to win some time by resorting to this additional review procedure. Therefore, there are high incentives for an excessive recourse to—if not an abuse of—procedures for corporate human rights protection on the basis of spurious claims of insufficient corporate human rights protection in competition law cases. As a matter of system design, then, restrictions on the actual opportunities to bring an action before the ECtHR and the CJEU on the basis of human rights' protection arguments seems a proportionate and desirable counterbalance to such perverse incentives.

Moreover, and possibly from a more prosaic but also relevant perspective, the ECtHR (and the CJEU to some more limited extent, as it is already competent to hear challenges against enforcement decisions in competition law matters) should be aware of the potentially significant impact of these cases in their workload and the significant amount of resources needed to deal with such complex cases. Furthermore, at least the ECtHR would need to significantly expand its expertise in the area of competition law (and, more generally, of economic regulation) in order to properly appraise the applications submitted for its protection under the ECHR—and this could be disproportionate to protect the "theoretical" due process rights of corporate defendants.

V. A SKETCH OF A PROPOSAL TO HALT AND REVERSE THE CURRENT TREND

Therefore, given the very weak justification for the creation of corporate human rights, along with their potential impact to weaken both competition law and human rights enforcement, this trend towards their recognition and expansion should be halted and reversed. We advocate for the suppression of corporate human rights in the area of competition law enforcement, and more generally.

That is not to say that all due process arguments should be dismissed, nor that enforcement procedures do not require improvement. Granted, in the field of the enforcement of economic law, administrative law procedures should be sound and there should clearly be a strong system of judicial review in place but, in our view, corporations should not have access to broader constitutional or human rights protections, and any perceived shortcomings in the design and application of enforcement procedures should remain within the sphere of regulatory reform.

In the end, the design of economic law enforcement mechanisms should be concerned with providing a workably sound framework, but should not strive to the same level of guarantees that are designed for criminal law investigations against the individual person. The fact that corporations are the majoritarian (if not de facto exclusive) type of defendant in cases involving the enforcement of economic law seems to be an additional reason to justify the relaxation of these mechanisms in terms of procedural guarantees as compared to procedures where individuals are involved.

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Due Process in Chinese Competition Law Regime

Michael Han & Janet (Jingyuan) Wang
Freshfields Bruckhaus Deringer LLP

www.competitionpolicyinternational.com

Due Process in Chinese Competition Law Regime

Michael Han & Janet (Jingyuan) Wang[1]

I. INTRODUCTION

The People's Republic of China adopted its Anti-Monopoly Law ("AML") in 2008. In the following six years, China has made notable progress towards becoming one of the most robust and dynamic competition law regimes in the world. While substantive competition laws are developing rapidly in China, procedural safeguards for parties involved in antitrust proceedings seem to fall short of the due process requirements upheld in more mature jurisdictions such as the European Union and the United States.

This article provides a cursory review of the due process protections available under the current Chinese competition law and general administrative law, with a comparative view towards the due process requirements in the European Union and the United States. The main conclusion is that while the Chinese competition law regime sets out some key due process rights to parties involved in an antitrust proceeding, there is substantial room for development before antitrust due process protections become adequate, effective, and consistent in China.

II. DUE PROCESS REQUIREMENTS

Originating from the Natural Justice doctrine of English law and incorporated in the U.S. Constitution, due process principles have been recognized as providing fundamental procedural safeguards for individuals and companies involved in government proceedings (including antitrust proceedings) in various jurisdictions across the world. While different jurisdictions may have their own adaptations, the core requirements of due process largely remain the same. To quote from Judge Douglas Ginsberg, "[a] precise definition [for due process] has never been attempted… Its fundamental requirement is an opportunity for a hearing and defense." [2]

Due process rights available to parties in an EU competition law proceeding generally include: (i) the right not to self-incriminate, (ii) the right to be informed whether they are potentially suspected of having committed an infringement, (iii) the right to an oral hearing, (iv) access to files, and (v) a fully reasoned decision.[3] Similarly in the United States, due process rights in an antitrust proceeding are generally understood to include: (i) the right to a hearing (before the actual decision maker), (ii) the right to a neutral decision maker, (iii) the right to confront

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[1] Michael Han is a partner and Janet (Jingyuan) Wang is an international legal consultant of Freshfields Bruckhaus Deringer LLP in Beijing.

[2] *Ballard* v. *Hunter*, 204 U.S. 241, 255 (1907).

[3] Paul Csiszar, Director, DG Competition, European Commission, *Due Process in EU Competition Law – Recent Package of Best Practices and Mandate for the Hearing Officer, Fifth Annual Conference on Competition Enforcement in the CCE Member States*, February 21, 2014, Bratislava; Alexander Italianer, Director General, DG Competition, European Commission, *Best Practices for antitrust proceedings and the submission of economic evidence and the enhanced role of the Hearing Officer, OECD Competition Committee Meeting*, October 18, 2011, Paris; Alexander Italianer, *Safeguarding due process in antitrust proceedings*, Annual Conference on International Antitrust Law and Policy, Session on "Enforcers' perspectives on international antitrust," September 23, 2010.

evidence, (iv) reasoned decisions based solely upon evidence, (v) the right to review by an independent tribunal, and (vi) efficiency.[4] Despite other differences, the right to a fair hearing and the right to a neutral and impartial decision-making process are among the common core requirements of due process principles in the arena of antitrust laws.[5]

III. DUE PROCESS REQUIREMENTS IN THE CONTEXT OF THE CHINESE COMPETITION LAW REGIME

Influenced by thousands years of feudal history, the Chinese legal community traditionally attached significant importance to substantive justice, while procedural justice was largely overlooked. Despite the AML and various implementation regulations all providing for certain procedural rights of parties in antitrust proceedings, currently a unified guideline setting out procedural rights for these parties is still unavailable in China.

Under the Chinese competition law regime, the Ministry of Commerce ("MOFCOM") is in charge of proceedings with regards to merger control; the National Development and Reform Committee ("NDRC") is in charge of proceedings with regards to price-related cartels and abuse of dominance; and the State Administration of Industry and Commerce ("SAIC") is responsible for investigating non-price related cartel agreements and abuse of dominance. Accordingly, each of these agencies issues procedural rules specific to their domains of responsibility. Unfortunately, the provisions promulgated by the different agencies are not always consistent with each other, and the procedural rights offered by one agency—for example, the right to a hearing—may not be available in the provisions issued by another agency.

The State Council's *Outline for Promoting Law-based Administration in an all-round Way* ("Outline") issued in 2004 provides a sound reference to the general due process requirements under the AML. Binding on all the subordinating agencies of the State Council, which includes the above-mentioned three agencies entrusted with the enforcement power of the AML, this Outline explicitly lists "due process" as one of the basic requirements for the "Law-based Administration," one of the key elements of the "rule of law" doctrine enshrined in the *Constitutional Law of Peoples' Republic of China*.

In the explanatory texts of the due process requirement, the Outline provides that:

1. The administrative agencies shall conduct their proceedings in an open manner, except for those concerning state, commercial, or personal secrets, and shall listen to the opinion of the public;
2. The administrative agencies shall strictly observe legal procedures when discharging their duties, and protect the parties and stakeholders' right to be informed, right to participate (the right to hearing is deemed as the essence of the "right to participate" by Chinese

[4] Judge Douglas H. Ginsburg, U.S. Court of Appeals for the District of Columbia Circuit, *Due Process in Competition Proceedings*, International Competition Network Roundtable on Investigative Process, March 25, 2014, Washington D.C.

[5] WILLIAM WADE, ADMINISTRATIVE LAW [M]. Translated by Xu Bing. Encyclopedia of China Publishing House, 95, (1997).

administrative law scholars)[6] and the right to adequate judicial remedies when the parties seek to redress their injury from the proceedings; and

3. When the official has a conflict of interest with the parties involved, the official shall withdraw from the specific matter in order to ensure that the administrative proceeding is fair and impartial.

Clearly, the Outline recognizes the two most fundamental due process requirements, i.e. the right to hearing and the right to equal and impartial treatment. From the general description of the "right to be informed" and "conducting the affairs in an openly manner," inference can also be made that the parties involved shall be provided with key information relating to the administrative proceedings, and the proceedings shall be conducted in a transparent manner. In addition to these requirements, the Outline also stresses the right to obtain judicial relief after a detrimental decision is made.

As the AML is, by nature, an administrative law, the principles of administrative laws are applicable to the enforcement of the AML. In the absence of any specific due process guidance in the AML and its implementing regulations, the due process requirements under a general administrative legal regime should be observed by the enforcement agencies of the AML. Therefore, we may conclude that, as a matter of principle, in a Chinese antitrust proceeding the parties should at least be entitled to the right to a hearing and the right to equal and impartial treatment, as well as the right to be informed of any necessary information concerning the proceeding. Set out below is an analysis of the actual status of the availability of these due process rights in China.

IV. RIGHT TO A FAIR HEARING AND RIGHT TO STATE OPINION AND DEFENSE

While the AML itself does not explicitly provide the right to hearing, most of the procedural rules issued by the MOFCOM, the NDRC, and the SAIC have either incorporated the procedures for hearing or made reference to the *Law of the People's Republic of China on Administrative Penalty* ("Administrative Penalty Law"). Promulgated in 1996, the Administrative Penalty Law established a set of basic procedural principles that are applicable to administrative proceedings detrimental to the parties involved, and introduced procedural rules of hearing to the Chinese legal system.

In addition, the Administrative Penalty Law provides procedural guidance on other aspects of an administrative proceeding, such as the manner to conduct an administrative investigation, the format of an administrative penalty decision, etc. In the absence of specific rules in the AML, the Administrative Penalty Law offers a general reference of the parties' procedural rights during an antimonopoly proceeding.

Under the AML as well as relevant procedural implementing rules on merger reviews and antitrust investigations (together, the "Anti-Monopoly Laws"), before the antitrust agencies make a penalty decision against anyone, a hearing needs to be granted at the request of the company or individual that will be imposed with such penalties or reviews. When given severe penalties (e.g. order to terminate the business or considerable fines), the agencies shall inform the parties of

[6] Zhou Youyong, *Principle of Due Process in Administrative Law* [J], 4 CHINESE SOCIAL SCIENCES, 123, (2004).

their right to a hearing. The hearing will be conducted by officials not involved in the particular proceeding, and shall be in public unless state, commercial, or personal secrets are concerned. The hearing will be recorded in writing, and the written record is subject to the confirmation of the parties to the hearing.[7] During a merger review, MOFCOM may also conduct hearings either at its own initiative or at the request of the parties concerned, and may invite—at MOFCOM's discretion—the undertakings concerned, competitors, stakeholders in the upstream and downstream markets, experts, and representatives from the industrial associations and/or the governmental bodies to attend the hearing.[8]

Aside from the right to hearing, the Anti-Monopoly Laws also provide parties under an antitrust investigation or a merger control review the right to "state opinions" and defenses. Article 43 of the AML specifically provides that "Undertakings being investigated and interested parties shall have the right to state their opinions. The Anti-Monopoly Enforcement Authority shall verify the facts, reasons and supporting evidences furnished by the undertakings being investigated or interest parties."

Unfortunately, the procedural rules on hearing and defense under the Anti-Monopoly Laws and the administrative laws are lacking in sufficient detail, and give rise to a series of practical concerns with regard to the effectiveness of the hearing mechanism.

First, the evidentiary weight of the information obtained during a hearing remains ambiguous. After reading most of the provisions, including the hearing rules set out in the Administrative Penalty Law, it is still unclear whether the information and evidence obtained during a hearing will form the basis of the final decision-making. The only exceptions are the *Procedural Provisions on Price-related Administrative Penalties* ("Procedures on Price-related Penalties"), adopted by NDRC in 2013, and its accompanying review rules. Here the information obtained during a hearing is listed as part of the materials to be reviewed by the final decision maker.[9] Nevertheless, the regulations remain obscure as to the extent to which information from hearings will be evaluated in relation to other materials such as the reports and opinions obtained from the initial investigators.

In terms of the opinions and defenses put forward by the parties concerned in exercising their right to state an opinion, the general rule from the Administrative Penalty Law is that the opinions and defenses of the parties shall be "accepted" once verified by the administrative agencies.[10] However, the exact process with regard to "acceptance" of the verified opinions and defenses is left unsaid. The specific provision in the AML does not shed any light in this regard, and even fails to clarify whether the opinion and defenses stated by the parties, once verified as true, should be taken into consideration in the agencies' final decisions. The NDRC's Procedures

[7] Article 42, Administrative Penalty Law (1996); Article 29, 34, 36, *Procedural Provisions on Price-related Administrative Penalties* (NDRC) (2013); Article 26, *Measures on Procedures for the Prohibition of Acts of Abuse of Administrative Power to Eliminate or Restrict Competition* (SAIC) (2009).

[8] Article 7, *Measures on the Review of Concentrations of Undertakings* (MOFCOM) (2009).

[9] Article 39, Procedures on Price-related Penalties (NDRC) (2013); Article 13, *Regulations on the Trial and Examination of Cases in Relation to Price-related Administrative Penalties* (attached to the Procedures on Price-related Penalties) (NDRC) (2014).

[10] Article 32, Administrative Penalty Law (1996).

on Price-related Penalties is again the only regulation providing that the decision maker shall consider statements and defenses before making its decision.[11] Otherwise, the laws basically remain silent on whether the parties' defenses outside of a hearing will play any role in the final decision-making process.

Second, the procedural safeguards for the hearing are inadequate. Under the EU system, the Hearing Officers, in full independence of DG Competition, have the function of ensuring that the right to be heard is safeguarded in competition proceedings, and disputes arising between DG Competition and the parties can be brought before the Hearing Officers for resolution.[12] Under the Chinese regime, there is no such a system of checks-and-balances to ensure that the hearing is conducted fairly. Moreover, it has been reported that in some past hearings, the person to conduct the hearing ("hearing monitor") failed to provide the parties equal opportunity when making decisions that were partial to one party and even failed to allocate appropriate time for the parties' defense.[13]

When it comes to procedures regarding the right to state opinions and the right to defense, the EU system has devised a Statement of Opinion to ensure the parties ample opportunity to defend themselves via a written reply to the Statement of Opinion, and offers the parties at least four weeks for making such reply.[14] Under the Chinese administrative and Anti-Monopoly Laws, in contrast, the procedural aspects of stating the opinion, e.g. the timeframe, the person to verify the statements, and the formality of the statements are largely left blank.

It should be noted that according to the recent Procedures on Price-related Penalty, the parties shall make their statements or defenses within three days after receiving the Prior Notice of Administrative Penalty. Although the timeframe provided in the Procedures on Price-related Penalty is rather stringent compared with EU rules, it is the first specific timeline set out in an antitrust procedural regulation for the parties to state their opinions.

In merger control proceedings, the MOFCOM's *Interim Measures on the Investigation and Handling of Concentrations of Undertakings that Have Failed to Notify in Accordance with Applicable Laws* ("Interim Measures on Investigation of Concentrations") provides that the Parties shall submit opinions and evidence in writing,[15] and MOFCOM's *Measures on the Review of Concentrations of Undertakings* provides that the parties may submit written statements or defenses via mail or facsimile to MOFCOM during the review.[16] But overall, the procedural regulations for the parties to state opinions and defenses are far from adequate under the Chinese competition law regime.

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[11] Article 39, Procedures on Price-related Penalties (NDRC)(2013).

[12] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[13] Wang Ning, *A Study on Legal System of Antitrust Hearing*, Master's thesis, College of Politics and Law, Central China Normal University, 22, (2011).

[14] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[15] Article 14, Interim Measures on Investigation of Concentrations (MOFCOM) (2012).

[16] Article 10, *Measures on the Review of Concentrations of Undertakings* (MOFCOM) (2009).

V. RIGHT TO EQUAL AND IMPARTIAL TREATMENT

To ensure the parties' right to a fair and impartial proceeding, the "rule of avoidance," i.e. to request an official to withdraw from a matter where he has a conflict of interest, has been well-established in the Chinese legal system. Under the anti-monopoly law regime, both the hearing monitor and the person in charge of the investigation are subject to the rule of avoidance. Request of avoidance can be made by the parties, or at the initiative of the official who considers himself as having a conflict of interest. The head of the administrative agency shall make the decision whether to grant the application of avoidance.

However, detailed rules on exercising the right to request avoidance are not available. Questions arise as to the timeline for making such a request, the deadline for the decision to be made, and whether the underlying proceeding should be suspended when the request of avoidance is made.

Another concern related to the parties' right to receive a neutral and impartial treatment lies in the judicial remedies available to them in the case where an adverse decision is rendered by the antitrust agencies. The decisions made by the EU Commission are subject to the independent review of the courts. In the United States, the antitrust agencies need to challenge an anticompetitive merger or conduct before a court and have the court to make the final decision. In contrast, the decisions of the Chinese anti-monopoly agencies are subject to administrative reconsideration (to be reviewed by the same agencies (normally by the legal services division of the agencies) or an administrative agency with superior hierarchy) and/or administrative litigation (to bring a lawsuit in court).

For the anti-monopolistic decisions by the SAIC and the NDRC, parties contesting the agencies' decisions can either request administrative reconsideration or initiate an administrative litigation. For MOFCOM's merger review decisions, however, parties are not allowed to file administrative lawsuits without first seeking remedies in the form of administrative reconsideration.[17] And a problem arises here: According to the *Law of People's Republic of China on Administrative Reconsideration* ("Administrative Reconsideration Law"), for decisions made by the ministries under the State Council (including all three of the agencies enforcing the Anti-Monopoly Laws), administrative reconsideration shall be made by the ministries themselves.[18]

In other words, when the parties request administrative reconsideration of decisions made by MOFCOM, the decisions will be reconsidered by MOFCOM itself, albeit a different division within MOFCOM (namely the legal services division) from the merger review division that initially made the decisions. When the same enforcement agency serves as the reviewer of its own decisions, the neutrality and adequacy of the remedies to the parties are highly questionable.

Finally, the neutrality of the hearing monitor is not guaranteed. While the Administrative Law Judge in the United States and the Hearing Officer in the European Union are both fully independent from the competition authorities, members of the competition agencies in China will serve as the hearing monitors, as long as they do not directly participate in the specific proceedings in question. Apparently, influences from colleagues or superiors of the agencies in

[17] Article 53, AML; Article 18, Interim Measures on Investigation of Concentrations (MOFCOM) (2012).
[18] Article 14, Administrative Reconsideration Law (1999).

charge of the case are allowable, although they may only have an indirect impact on the impartiality of the hearing monitors.

VI. RIGHT TO BE INFORMED AND TRANSPARENCY

Compared with the right to a hearing and the right to neutral treatment, the right to be informed and obtain key information seems to be even more limited under the Chinese competition law regime. Despite the requirements in the Outline issued by the State Council, the parties' right to be informed is only reflected in some high-level principles in the administrative laws and the Anti-Monopoly Laws, and the parties in general do not have access to the agencies' files.

According to Article 31 of the Administrative Penalty Law, prior to an administrative penalty being made, the administrative agencies shall inform the parties of the facts, reasons, and basis for making such penalty, as well as the rights the parties are entitled to. The Interim Measures on Investigation of Concentrations issued by MOFCOM and the Procedures on Price-related Penalties issued by the NDRC have adopted similar provisions. In particular, the Procedures on Price-related Penalties also requires the NDRC to issue a notice informing the parties of the proposed penalty. This is, to a certain extent, similar to the Statement of Objection under the EU system, in which the Commission indicates whether it intends to impose fines, as well as the laws and facts for imposing, aggregating, or attenuating the fines.[19]

Other than the notice prior to the penalties, no other official documents are required to be served on the parties throughout the proceedings before the decision notice is issued. In the case of an on-site inspection or dawn raid, the Procedures on Price-related Penalties provides that the NDRC "may" issue an inspection notice[20] (but this is not an obligation that the NDRC must fulfill). The other procedural regulations simply do not contain any requirements in this respect.

In addition, unlike the EU system where the parties are granted access to the Commissions' investigation files upon the receipt of the Statement of Objections, parties under the Chinese antitrust proceedings generally do not enjoy the right to review the files of the enforcement agencies during the course of the proceedings.

After the penalty decision is made, the Administrative Penalty Law requires the agencies to issue a detailed administrative penalty decision notice, which shall set out the facts, evidence, and basis for the decision; the required manner and time limit to perform the obligations under the decision; the remedies available, etc.[21] These requirements are only reflected in the Procedures on Price-related Penalties issued by the NDRC.[22]

Interestingly, although the Outline requires that administrative affairs be conducted in a transparent manner, under the current Anti-Monopoly Laws, the decisions of the agencies are

[19] European Commission, DG Competition *Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, (2011).

[20] Article 20, Procedures on Price-related Penalties (NDRC) (2013).

[21] Article 39, Administrative Penalty Law (1996).

[22] Article 41, Procedures on Price-related Penalties (NDRC) (2013).

only to be published at the discretion of the agencies.[23] In practice, the three antitrust enforcement agencies in China have not taken a consistent approach. Starting from July 2013, the SAIC has published its decisions on its websites, including the factual background, evidence collected, the legal analysis of the SAIC, and penalties, etc. MOFCOM releases its detailed decisions for the conditional clearances or prohibition, but for the unconditional clearances that constitute the majority, MOFCOM does not publish its decisions. The NDRC has not yet published any official decision on its website, but it has released announcements regarding some of its high-profile investigations, including a summary of the key findings of the violations.

In general, the decisions published by the Chinese antitrust agencies, in comparison with the decisions of their counterparts in the European Union and the United States, are very brief—often a few pages long with less detailed legal analysis and reasoning. Therefore, the published decisions generally are less valuable in terms of providing guidance to the parties for future cases.

VII. CONCLUSION

Safeguarding parties' procedural rights is an intrinsic requirement both for achieving equitable outcomes under any competition law regime and for conferring legitimacy upon the work of the competition authorities. Legislation in China has gained momentum during the past decades in strengthening the procedural protections to parties involved in judicial/administrative proceedings. Under the current legal regime, the parties involved in antitrust proceedings in China are entitled to most of the fundamental due process rights upheld by other major jurisdictions, such as the right to a hearing and defense, the right to receive equal and impartial treatment, and the right to be informed. It is evident that the ultimate objective for the legislators is to ensure that the parties have the right to have their affairs handled impartially, fairly, and effectively.

This said, to what extent due process rights are actually available to parties in antitrust proceedings remains a major challenge to legislators and practitioners. While the law reflects certain concepts of due process, most of the relevant provisions lack sufficient practical details, rendering due process rights difficult to be implemented. It should be noted that more refined provisions have been envisaged in recently adopted legislative documents. However, given that legislative activities are undertaken separately by the MOFCOM, NDRC, and SAIC, parties' procedural rights under the proceedings of different enforcement agencies may be inconsistent. The Administrative Penalty Law is also unable to provide ample reference of parties' due process rights, as it was promulgated at a time when the Chinese legislative body's understanding of due process was rather primitive.

The right to hearing will only be meaningful when a proper mechanism is in place to ensure that parties' defenses will be fully considered, and that procedures in conducting the hearing are observed. The right to be treated impartially will only be relevant when the decision-maker is not only free from a conflict of interest, but also not unduly influenced by bias or pressures from peers or superiors. The right to be informed will not be effective if parties are not granted with access to the information showing their alleged violations, the supporting evidence, and the reasoning in finding for the illegality.

[23] Article 44, AML (2008).

Currently, a unified administrative procedural law is being drafted by the Chinese legislative body. It is expected that this law will comprehensively update the current administrative procedural framework in China and, hopefully, improve the status of due process rights for the parties in administrative proceedings. It is also foreseeable that this law will become a better reference for the procedural aspect of Anti-Monopoly Laws, and lead to a series of amendments and new legislation in China's competition law regime that strengthen due process protection to the parties in antitrust proceedings.

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Due Process and Procedural Rights Under the China Anti-Monopoly Law

H. Stephen Harris, Jr.
Winston & Strawn LLP

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H. Stephen Harris, Jr.[1]

I. INTRODUCTION

In her keynote address recently delivered at the Antitrust in Asia conference in Beijing, FTC Chairwoman Edith Ramirez emphasized the importance of fair and transparent procedures to the development of an effective antitrust enforcement regime.[2] She noted how such procedures benefit agencies: (i) by allowing agencies to focus on substantive competition issues rather than process, (ii) ensure the quality and accuracy of agency decisions, (iii) increase respect for those decisions thus benefiting the agency's credibility, and (iv) help ensure effective and, to the extent possible, consistent international enforcement in matters affecting multiple jurisdictions.

Chairwoman Ramirez's timely remarks came in the wake of a number of expressions of concern about due process and procedural rights in matters under the China Anti-Monopoly Law ("AML"), before the Chinese Anti-Monopoly Enforcement Authorities ("AMEAs"), and before the Chinese courts. Such concerns followed several incidents, as detailed below, but it is important to put these concerns in the context of the Chinese legal, economic, and political systems.

II. CONCERNS BY SPECIFIC SECTOR

A. NDRC

In perhaps the best publicized example, numerous articles reported that a senior Chinese official at NDRC[3] had "put pressure on around 30 foreign firms . . . to confess to any antitrust violations and warned them against using external lawyers to fight accusations from regulators," citing unnamed sources.[4]

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[1] Steve Harris is a partner in Winston & Strawn's Washington, D.C. and New York offices and concentrates his practice in antitrust/competition law, including litigation, cartel defense, merger control filings, and administrative proceedings before U.S. and international courts and agencies.

[2] FTC Chairwoman Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address by FTC Chairwoman*, Antitrust in Asia Conference, co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, (May 22, 2014), Beijing, *available at*: http://www.law360.com/competition/articles/544997?nl_pk=10d927b3-62ab-472b-a51e-1ff698416e82&utm_source=newsletter&utm_medium=email&utm_campaign=competition

[3] The Price Regulation and Anti-Monopoly Bureau of the National Development and Reform Commission.

[4] Michael Martina, *Tough-talking China Pricing Regulator Sought Confessions from foreign firms*, REUTERS, (Aug. 21, 2013), *available at* http://www.reuters.com/article/2013/08/21/us-china-antitrust-idUSBRE97K05020130821.

This report engendered expressions of concern about due process, as well as questions about whether NDRC, and possibly other AMEAs, apply the AML with equal rigor in matters involving domestic companies as in those involving foreign entities. The Director-General of the NDRC quickly responded to the uproar, denying that the NDRC was targeting foreign companies.[5] It was later suggested that the official who allegedly made the statement had "merely intended to warn meeting participants against the dangers of hiring 'unscrupulous lawyers' who promised they [can] make investigations go away."[6]

Later, questions were raised about whether NDRC's investigations of Qualcomm and Interdigital might reflect a desire to lower domestic IT costs as China rolls out its fourth-generation mobile telecommunications networks. These questions were also quickly met by a similar denial from the Director-General, stating that there was no "background" to those investigations and that they "stemmed from complaints and have nothing to do with 3G or 4G standards."[7]

B. MOFCOM And Merger Control Decisions

The AMEA responsible for merger reviews under the AML, MOFCOM, had no choice but to begin accepting, reviewing, and rendering merger control decisions that met the mandatory filing thresholds as soon as the AML became effective in August, 2008. Understandably, early on, many questions and concerns were raised about the lack of established and transparent procedures to be applied during merger reviews. However, many noted, within three years thereafter, that "MOFCOM . . . made impressive progress in promulgating rules and regulations to provide guidance on the procedural aspects of the merger review process."[8]

Concerns of a different kind have been expressed with regard to the transparency, or lack of same, of the procedures used by MOFCOM[9] in the course of its review of mergers, acquisitions, and joint ventures. FTC Commissioner Maureen Ohlhausen noted that during the course of the first five years of the AML, MOFCOM has shown that it is taking steps to increase transparency for those procedures, noting in particular the fact that MOFCOM had recently decided to exceed the disclosure requirements of the AML by publishing not only prohibited transactions and transactions with conditional approvals, but also releasing information on all cases cleared without condition and updating that data on a periodic basis.[10]

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[5] Lan Lan, *Antitrust "Not Target" Foreign Companies*, PEOPLE'S DAILY, (Aug. 27, 2013), *available at* http://english.people.com.cn/90778/8378624.html.

[6] J. O'Connell, *Rabbit, Revisited –Antitrust Enforcement in China*, 28 ANTITRUST 6 (2014)

[7] Zheng Yangpeng, *Probes "Not Targeting" Foreign Firms: Official*, CHINA DAILY, (Feb. 2, 2014), *available at* http://ww.chinadaily.com.cn/china/2014-02/20/content_17292983.htm.

[8] Angela Huyue Zhang, T*he Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 3, 631 (2011).

[9] The Anti-Monopoly Bureau of the Ministry of Commerce.

[10] Commissioner Maureen K. Ohlhausen, *Taking Notes: Observations on the First Five Years of the Chinese Antimonopoly Law*, Competition Committee Meeting, United States Council for International Business, Washington, DC, (May 9, 2013), *available at* http://www.ftc.gov/public-statements/2013/05/taking-notes-observations-first-five-years-chinese-anti-monopoly-law.

However, Commissioner Ohlhausen also said in this context "China still is considered a 'black box' by many practitioners. . . ."[11] The concerns that remain seem to primarily relate to: (i) the length of MOFCOM's reviews of many foreign transactions, (ii) the lack of early transparency regarding any substantive competition concerns MOFCOM believes may be raised by a notified concentration, and (iii) the extent and nature of the apparently frequent involvement of other government authorities in merger reviews, including most notably NDRC, MIIT, and sectoral regulators responsible for non-AML regulation of sectors of Chinese businesses and industries that include relevant markets in which the parties to a transaction may compete.[12]

Finally, concerns continue to be expressed about whether MOFCOM treats major foreign-to-foreign concentrations in the same manner that it treats purely domestic transactions. There are several well-publicized MOFCOM decisions that have imposed various types of behavioral obligations on the parties as conditions of permitting a merger or acquisition to proceed. Some of these obligations include the imposition of a FRAND-like obligation to license patents, including in at least one instance certain non-standard essential patents not subject to any previous FRAND commitment, but which were deemed by MOFCOM to be important to a certain Chinese industry.

Many of these behavioral remedies strike non-Chinese practitioners and scholars as inconsistent with the approach to remedies by merger control regimes in other major economies. Such decisions have heightened concerns about the extent to which China's industrial policy (perhaps favoring Chinese industries over foreign companies, or seeking to foster or create conditions ripe for the creation of so-called "national champions" in key industries) may affect MOFCOM's substantive analysis of certain mergers.[13] One well-informed scholar of the AML wrote that, as a result of such pressures, "merger control is not merely industrial policy based on the current Chinese players but also based on the potential for future Chinese entry."[14]

C. SAIC

The third AMEA, the SAIC,[15] has also suffered some criticism about procedural fairness, including transparency of its decision-making process. However, it is difficult to assess the fairness of SAIC's procedures because, to date, it has handled a relatively small number of matters compared to those handled by MOFCOM and NDRC.

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[11] *Id.*

[12] The Ministry of Industry and Information Technology.

[13] Yuni Han Sobel, 13 ANTITRUST SOURCE 1 (2014).

[14] D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & BUS. 1, 23 (2013). *See* also Nathan Bush & Yue Bo, *Disentangling Industrial Policy and Competition Policy in China*, 10 ANTITRUST SOURCE (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_fullsource.authcheckdam.pdf.

[15] The State Administration for Industry and Commerce.

D. The Courts

Other concerns have been raised about AML cases brought before the Chinese court system. Some cases were filed immediately after the AML became effective, though no AML-specific procedures had been promulgated. Subsequently, the Supreme People's Court ("SPC") has allocated AML cases to the special IP Tribunals that exist in many lower courts—an approach that many Chinese and foreign practitioners have welcomed, as those tribunals are seen to include many of China's leading jurists, and because those judges have been undergoing special training on antitrust and economic concepts as well as the approaches courts have developed towards various antitrust issues over many years in foreign jurisdictions with much older antitrust laws.

The SPC also issued Judicial Rulings (essentially rules to be followed by lower courts) on the handling of private civil AML cases (as contrasted with appeals of AMEA decision), which augment the provisions of the Civil Procedure Law and other general laws and regulations governing court proceedings.[16] However, one Chinese scholar has noted that, while the SPC has issued procedural rules for AML cases in the civil courts, no such rules have been established for cases in the administrative courts, which have jurisdiction over appeals of AMEA decisions.[17]

And there remain frequently expressed concerns about the perceived lack of independence of the Chinese courts, which fall under the aegis of the Ministry of Justice, and are therefore an executive agency, not a separate branch of government. The courts can also at times be subject to directions from the State Council and, at least in theory, the Communist Party of China ("CPC").

III. PUTTING THESE CONCERNS IN CONTEXT

All of these concerns, and possible ways to address them, are better understood by viewing them in the context of the Chinese legal, economic, and political systems. Much has been written about the uniqueness, among the nations of the world, of many aspects of China's legal system.[18] Any substantial consideration of all those unique characteristics, and their possible sources and consequences, is well beyond the scope of this brief article. But in the context of procedural fairness in matters—whether before an agency or court—involving so-called "economic law" (which includes antitrust law), it must be noted that many scholars of the China legal system have long noted that China has gradually developed toward a truer "rule of law" system as China's economic system has moved (though not always continuously) in the overall direction of a more market-oriented system since the founding of the People's Republic of China

[16] The Supreme Court Judicial Rulings on Several Issues for the Application of Law Concerning the Proceeding of Unfair Competition Civil Cases (Fa Shi [2007] No. 2).

[17] Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 48 CORNELL INTL. L. J. 1, and 15 PEKING UNIVERSITY L. REV. (in Chinese)(2014).

[18] *See* generally, Xiao Li, L*egal and Economic Development with Sui Generis Chinese Characteristics: A Systems Theorist's Perspective*, 39 Brook. J. INT'L L. 159 (2014).

in 1949.[19] The very enactment of the AML, as well as the steps that the AMEAs and the SPC have already taken to establish AML procedures, are instances of this trend.

A leading Chinese expert has written "[t]he direction of causation runs from politics to economics, not the other way around."[20] Perhaps similarly showing in turn that the direction of causation runs from economics to law, not the other way around—including in particular with regard to the AML—another noted Chinese scholar has written that "scholars and practitioners observe that the effort to draft the AML was suddenly revived and accelerated after China's entry into the World Trade Organization (WTO) in 2002 and that there appeared to be a 'broad consensus' at the time that China needed the AML to protect against the anticompetitive practices of multinational firms."[21]

So, taking first the influence of economics on the AML, if the law is likely to more or less evolve in the direction of international norms as China liberalizes its markets, those with concerns about procedural (and substantive, for that matter) fairness likely welcome certain statements and decisions made in conjunction with the Third Plenary Session of the 18th CPC Central Committee, held in November, 2013. On that occasion, President Xi and the CPC announced numerous notable reforms to the Chinese economic system, including:

- greater reliance on market forces;
- judicial reforms;
- continued development of AML enforcement and institutions;
- broader access to the Chinese markets, both internally and internationally, and including sectors heretofore subject to significant restrictions such as finance, education, and health care;
- possible creation of separate intellectual property courts (query whether they would have jurisdiction over AML matters as do the IP Tribunals within existing courts); and
- reforming the administrative judicial system, among others.

According to a CPC document, the judicial reforms are aimed at preventing miscarriages of justice and better protecting human rights. President Xi noted that the "[j]udicial system is a major component of the political system"[22] adding that the public have long complained about miscarriage of justice, and that lack of judicial credibility is largely related to the unreasonable judicial system and working mechanism.

So we have drilled down to bedrock, to the third fundamental influence on China's legal system, including on the state of procedural fairness under the AML; namely, the political system

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[19] *See* generally, RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW (Cambridge, 2002).
[20] YASHENG HUANG, INFLATION AND INVESTMENT CONTROL IN CHINA, xix (1996).
[21] Zhang, *supra* note 17.
[22] *Xi Expounds New Judicial Reform Measures*, GLOBAL TIMES (November 16, 2013), *available at* http://www.globaltimes.cn/content/825300.shtml

of China. The single-party system in China, and its long reliance on central planning, must be seen in the context of recent ongoing, but incomplete, economic reforms driven by the political desire to maintain growth, develop technologies, and participate at higher levels in global politics, trade, and economics. Political leaders in recent decades have demonstrated greater sophistication in economic policy and apparently a greater recognition of the incalculable value to China of developing legal and administrative systems, institutions, officials, and judges that are regarded as professional, reliable, expert, consistent, and, most importantly, committed to the rule of law.

Many of the challenges to reaching that goal are, I believe, rooted in China's political system. Many of the needed procedural reforms in AML policy and enforcement appear to be rendered more difficult, if not impossible, by certain so-called "bureaucratic politics." The leading paper on this subject delves deeply into such political and bureaucratic influences.[23] While the CCP has supreme power over all political decisions and policies, the vastness of the country and its economy require extensive delegation by the CCP to administrative agencies.

For example, the State Council has delegated the implementation of the AML to the State Council, which in turn delegated the implementation to an umbrella interim policy body, the Anti-Monopoly Commission ("AMC") and, ultimately, to three AMEAs seated within already established larger administrative bodies—NDRC, SAIC and MOFCOM—which have distinct cultures, missions, and policy goals. It appears that, at least in some instances, these differences affect the AMEAs varying approaches to enforcement and may explain inconsistencies in certain rules established by the agencies. To illustrate, the NDRC rules regarding its AML leniency program provides the NDRC with complete discretion in deciding whether to grant leniency to an applicant, whereas the SAIC leniency rules require SAIC to grant leniency when an applicant fulfills certain requirements.

There have also been differences in the interpretations of AML provisions by the AMEAs as well as the courts. For example, in 2013, NDRC issued the largest AML fines to date at that time against foreign companies engaged in resale price maintenance ("RPM"). Within the same week that that decision was announced, the Shanghai Higher People's Court found that a U.S. company had violated the AML by engaging in RPM. The court decided that engaging in resale price maintenance is not *ipso facto* an AML violation absent the consideration of certain factors such as the level of competition in the market, the defendant's market position, the motives for implementing resale price maintenance, and anticompetitive effects, if any, of the practice.

The approach taken by the court is very similar to the rule of reason as applied by U.S. courts and agencies under the U.S. antitrust laws. While the NDRC decision is less detailed than that of the court, it appears that the NDRC did not consider any pro-competitive justifications of the practice as relevant to its analysis. While commentators have interpreted the NDRC decision in various ways, many see it as closer to the U.S. *per se* rule than to the rule of reason.

[23] *Id.*

IV. CONCLUSION

Ameliorating the pernicious effects of bureaucratic politics on AML policy and procedures requires political will and political action towards that end. The apparently gradually increasing recognition of the economic benefits to China and the Chinese people through greater AML procedural fairness—by both the CCP and the ministries that house the AMEAs—augurs well for the future in this connection. Continued engagement both at the political level and among antitrust enforcement authorities to emphasize the need for such reforms in order to ensure the continued growth of trade with and investment in China by foreign enterprises is key to moving the political levers that move the economic levers that move the levers in the legal and administrative systems of China.

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Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences

Toshiaki Takigawa
Kansai University

Balancing Fairness and Efficiency in the Globalized Competition Law Enforcement: Insights from JFTC Experiences

Toshiaki Takigawa[1]

I. INTRODUCTION

A competition agency's decision, consisting of a remedy and a fine, causes serious consequences for the targeted firm. Firms (and other respondents) therefore are empowered to appeal to the courts against an agency's decision. This judicial appeal constitutes the basic safeguard for rights of defense and procedural fairness against abuse of administrative powers by competition agencies.

Nevertheless, discussions at the OECD Competition Committee[2] and, most recently, at the American Bar Association's ("ABA") Antitrust Spring Meeting indicate that the provision of judicial appeals does not constitute an adequate safeguard. Procedural fairness needs to be secured within the decision-making process of the competition agencies.

Setting up a hearing system within a competition agency is deemed necessary because courts usually find it difficult to negate an agency's decision. This is caused by the comparative disadvantage between courts and agencies with regard to specialized knowledge of competition law and economics. Another often cited reason for the ineffectiveness of appeals to the courts is that courts take a long time to reach a decision; during court proceedings, an agency's orders remain in effect.

However, a hearing system presents problems—increasing the administrative and personnel costs of the agency, at the same time slowing down issuance of decisions. Competition agencies therefore need to strike the right balance between procedural fairness and efficient enforcement.

Administrative hearings, as now practiced by the U.S. FTC and the EU's DG Competition, represent two different models for other countries' competition agencies to emulate. In this context, the Japanese experience regarding transformation of its administrative-hearing may help reveal the relative pros and cons of the U.S. FTC and the EU models.

II. THE NEED TO FOCUS EXAMINATION ON THE ADMINISTRATION MODEL OF COMPETITION LAW ENFORCEMENT

World-wide spread of competition laws necessitates examining procedural fairness practices with a globalized perspective, going beyond a selected number of highly developed competition law regimes, prominently those of the United States and the European Union.

[1] Professor, Faculty of Law, Kansai University, Osaka, Japan <takigawa@kansai-u.ac.jp>.

[2] *See* OECD Competition Committee, *Procedural Fairness and Transparency: Key Points* (2012), *available at* http://www.oecd.org/daf/competition/mergers/50235955.pdf (accessed May 24, 2014).

Practically all large-scale price-fixing cases these days are global, incorporating non-western industrialized countries: Japan, South Korea, and China, in particular. Both Japan and Korea have recently greatly increased amounts of fines against competition law violations.

From a globalized perspective, procedural justice needs to be examined focusing on the administration model (in contrast with the prosecution model) of competition law enforcement. Only a small number of countries with common-law traditions (including the U.S. Department of Justice, but not the U.S. Federal Trade Commission) have adopted the prosecution model, in which competition agencies must bring cases to courts. By contrast, in the administration model (practiced in a dominant majority of countries), competition agencies themselves decide cases and then impose fines on the targeted firms. The firms, in turn, have the right to bring the agencies' decisions to courts.

True, the prosecution model has a clear advantage in securing procedural justice because the model guarantees separation of prosecution from adjudication. But countries now adopting the administration model would find it infeasible to transform their enforcement system to a prosecution model. First, it is too radical a departure from the law enforcement system of countries with the civil (Continental) law traditions.

Second, more importantly, the prosecution model would, in those countries, cause considerable delays in law enforcement, leading to less than optimal enforcement. This is because, in the prosecution model, firms may not be imposed fines until the courts reach decisions, which may take years in countries where the courts' system is not so well developed as in the United States. By contrast, in the administration model, only a minority of firms resort to appealing to courts, and, during court proceedings, an agency's orders remain in effect.

III. THE REASONS BEHIND THE JFTC'S SWITCH FROM THE ADMINISTRATIVE-LAW-JUDGES SYSTEM TO THE HEARING-OFFICERS SYSTEM

Within their respective administration models, the U.S. FTC's administrative-law-judges system and the EU's hearing-officers system both provide hearings conducted prior to the agencies' final decisions. Nevertheless, important differences exist between the two. First, EU hearing-officers only deal with procedural justice; they do not judge the substance of the law's application.[3] Second, hearing-officers are lacking in judge-like power to preside over hearings; they do not possess powers either to summon third-party witnesses or to punish false statements. The U.S. FTC's administrative-law-judges and Commissioners can do both.

In spite of the comparative advantage of the administrative-law-judge system in securing equity between accusers and defendants, only a minority of competition agencies have adopted the system. And the Japan Fair Trade Commission ("JFTC"), at the end of 2013, abolished its administrative-law-judges system and is now in the process of adopting a hearing-officers system akin to the EU system.

Examination of the reasons for the JFTC's forsaking the administrative-law-judge system reveals both pros and cons of the system. The JFTC's administrative-law-judges system took the

[3] *Id.* at 53 ("Although they [hearing officers] do not adjudicate on substance, they report to the Commissioner on whether the rights of defence have been fully respected and provide a full report on the Oral Hearing.")

form of "Hearing-Examiners," who were not administrative-law-judges as practiced in the U.S. legal system. Nevertheless, the Hearing-Examiners were modeled after the U.S. FTC, with the same functions as U.S. administrative-law-judges; the Examiners were independent from the JFTC (the Commissioners as well as the Secretariat) and acted as judges.

Hearing-Examiners conducted JFTC's complaints through court-like adversarial proceedings. The JFTC Hearing-Examiners system was qualitatively different from the European Commission's hearing-officers. EC hearing-officers review procedural fairness only, while JFTC Hearing-Examiners not only reviewed procedural fairness but also checked facts and applications of the law in JFTC complaints. In other words, Hearing-Examiners, in contrast to hearing-officers, functioned as judges.

The JFTC Hearing-Examiners system lasted to the end of 2013. But the system had already ceased its essential function in 2005, when hearings ceased to be conducted prior to JFTC decisions. After 2005, Hearing-Examiners functioned as the first tribunal when the respondent firms appealed the JFTC's decisions. Then, the business circle's (represented by the powerful Japan Economic Federation's) criticism that these hearings only delayed respondent firms' appeals to courts became convincing.

The reason for the transformation (in 2005) of the JFTC Hearing-Examiners system lay in its inefficiency. The system took a considerably long time (years in some cases), thus hampering the efficient resolution of a case. In order to rectify this deficiency, the JFTC had routinely resorted to a "Recommendation" procedure, whereby the JFTC "recommended" to a respondent firm to accept a JFTC complaint. When the firm accepted the Recommendation, the Recommendation (which represent the JFTC complaint) became the JFTC's decision, without going through a hearing with Hearing-Examiners. The firm accepting the Recommendation was obligated to adhere to the remedy order incorporated in the JFTC complaint, although acceptance of the Recommendation did not constitute admittance of illegal conduct by the firm. Nevertheless, the firm accepting the Recommendation could not escape a fine (for categories of illegal conduct to which fines apply). Recommendation decisions therefore may not have been interpreted as settlements.

A large majority of JFTC decisions originated from Recommendations. Rarely did firms refuse Recommendations. The efficiency of the JFTC's case handling had thus been secured. However, this situation started to change in 1976 when fines against price-related cartels were introduced. Since then, fine amounts have been repeatedly increased through amendments to the Japanese competition law (Antimonopoly Act ("AMA)). Also, the scope of AMA violations covered by fines has broadened. These changes incentivized firms not to accept JFTC Recommendations. As a result, firms that refused to accept Recommendations constantly increased in number, leading to an increased number of hearings being conducted by Hearing-Examiners. Firms adopted such a procedure with the aim of delaying the payment of fines, because fines could not be levied until the JFTC had issued a decision through the hearing process.

IV. THE NEED TO INSTITUTE INDEPENDENT HEARING-OFFICERS WITHIN THE COMPETITION AGENCY

The transformation in 2005 (followed by the termination in 2013) of the Hearing-Examiners system changed the JFTC decision procedure from a hearing system modeled after the U.S. FTC to a system akin to the Continental administration system—the EU competition law decision procedure. The JFTC is now pressed to establish within the JFTC a system akin to hearing-officers at the European Commission, because the repeal of the JFTC Hearing-Examiners necessitates an alternative mechanism for securing procedural justice within JFTC decision-making.

The amended AMA provisions on JFTC procedures regarding hearing-officers (provisionally named "Presiding officer of procedure for hearing")[4] show that the hearing-officer will be equipped with considerably weaker power than the EC's hearing-officers. Most importantly, no measures to secure independence of the hearing-officers are instituted. Concomitantly, the hearing-officer is attached to the Secretariat (not to the Commissioners).

EU experiences[5] reveal that the hearing-officer needs to be equipped with independent power in order to amply check procedural fairness regarding the competition agency's issuance of complaints. The JFTC is advised to emulate the European Commission in guaranteeing independence of its hearing-officers.

V. THE NEED TO PROTECT DEFENSE RIGHTS OF THE RESPONDENT FIRMS

The hearing-officers system is superior to the administrative-law-judges system in its efficiency, but is inferior regarding protection of the defense rights of the accused firms. This inferiority needs to be compensated by giving the accused firms ample power to defend in court. The accused firms, then, need to be guaranteed equal-footing vis-à-vis the accuser (the competition agency) regarding access to the facts used for the accusation.

The amended AMA provisions regarding JFTC procedures do not entitle the respondent firms sufficient access to the JFTC files.[6] First, JFTC documents to which a respondent firm is entitled to get access are limited to those documents that the JFTC used to establish illegality of the respondent firm; documents that may negate the illegality are excluded. Second, a respondent firm is entitled to copy only the documents submitted by itself or its employees.

These rights are conspicuously inferior to the rights given to respondent firms by the European Commission; the Commission hands to the respondent firm a DVD containing all documents (except those deemed confidential) that the DG Competition compiled in establishing a statement of objections. The JFTC needs to provide to a respondent, in a

[4] *See* JFTC, *Outline of the Bill to Amend the Antimonopoly Act*, at §2-(1) (December 9, 2013), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/Attachment01.pdf (accessed May 21, 2014).

[5] *See*, e.g., Michael Albers & Jérémie Jourdan, *The Role of Hearing Officers in EU Competition Proceedings: A Historical and Practical Perspective* 2(3) J.E.C.L. & PRACT. 185 (2011), *available at* *http://jeclap.oxfordjournals.org/content/earle/2011/05/15/jeclap.lpr023.full.pdf+html (accessed May 21, 2014).*

[6] *See* JFTC, *supra* note 4, at §2-(2).

convenient DVD format, all evidence (subject to legitimate confidentiality concerns) used by the JFTC in establishing its complaint.

VI. THE NEED TO SET UP SIMPLIFIED PROCEDURES IN COMPETITION LAW ENFORCEMENT: SETTLEMENTS OR CONSENT DECREES

As hearings tend to take a long time, competition agencies need to make use of simplified procedures in cases in which firms agree to forgo the right to a hearing. Firms have in the past agreed to forgo a hearing in exchange for escaping fines, while accepting remedy orders. Nevertheless, competition agencies should not forgo the imposition of fines for serious violations—mostly, hard-core cartel conduct. For other less serious violations, competition agencies may forgo imposing fines in order to swiftly get rid of anticompetitive practices.[7]

Settlements (or similar procedures) have the merit of swiftly resolving cases with lesser resources expended by competition agencies. Settlements, however, are achieved at the expense of not determining the illegality of the allegedly anticompetitive practices and, consequently, fines are not imposed on firms. Settlements, therefore, are inappropriate for serious violations that deserve the imposition of fines. Nor are settlements appropriate for important cases that, for the sake of establishing precedents, require detailed determinations on whether the practices under consideration constitute infringement of the law.

The establishment of limiting principles is therefore required to constrain competition agencies in their use of settlements. In counterbalancing this consideration, rules that are too constraining would excessively deter use of settlements, at the expense of administrative efficiencies.

The JFTC currently does not allow for any simplified enforcement procedure in its handling of competition law cases. Prior to the 2005 AMA amendment, the JFTC had two simplified procedures, Recommendations and consent decisions, both of which were repealed by the 2005 AMA amendment.

The JFTC therefore needs to set up a new simplified procedure, most plausibly by reviving the consent decisions. A key obstacle, however, prevents the JFTC from instituting a settlements procedure. This is the mandatory nature of fines with AMA violations.[8] This lack of discretion by the JFTC, regarding not only the amount of the fine but also whether or not to impose a fine at all, needs to be rectified before the JFTC puts in place a settlement procedure.

VII. CONCLUSION

Globalization of competition law enforcement necessitates examining procedural fairness with a globalized perspective. Procedural fairness, then, needs to be designed based on the administration model, which is adopted by a dominant majority of competition agencies.

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[7] Daniel Crane names such solutions as "administrative solutions," which have the advantage of being swifter and less cumbersome than "the adjudicatory system, " *see* D.A. CRANE, THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT, at 107 (2011).

[8] Antimonopoly Act, Article 7-2 (as well as other similar articles) stipulate that the JFTC is obligated to impose fines on categories of AMA violations stipulated in the Articles. The discretion of the amount of a fine is also removed from the JFTC; the Antimonopoly Act, Article 7-2 (as well as other similar Articles) stipulate the concrete amount (on a percentage basis) of the fine for each violation.

The experiences of the JFTC reveals the impracticality of instituting administrative-law-judges (or their equivalents) for competition agencies that are equipped with powers to impose substantial fines (the U.S. FTC is not empowered to impose fines for antitrust offenses). This is because a firm that is subject to a decision that imposes a fine of a considerable amount naturally demands a hearing rather than simply accepting a simplified procedure. Since a court-like proceeding by law judges (or their equivalents) takes considerable time before its conclusion, routine use of court-like proceedings causes delay in the resolution of a case.

Given that appeals against competition agencies' decisions to courts are secured, the hearing system within a competition agency needs not one-handedly cater to procedural fairness (i.e. protection of a firm's right of defense). As an example, the hearing-officers system implemented at the European Commission may be regarded as sufficient for balancing procedural fairness with administrative efficiency.

The best design of a hearing-officers system needs to be contemplated for each individual country, bearing in mind the debate over European Commission's hearing-officers. The EU experiences show the critical importance of securing two points: first, independence of hearing-officers; second, availability (to the respondent firms) of all documents (subject to legitimate confidentiality concerns) used by the competition agency in establishing its complaint. The JFTC hearing system, as currently envisaged, is deficient in both points.

Following the adoption of an administrative hearing system, competition agencies need to establish simplified enforcement procedures for speeding up the resolution of cases. The most straightforward way to achieve this is with a settlement between a competition agency and a respondent firm, whereby the firm will undertake the remedy order in exchange for escaping a fine. Hard-core cartels should be excluded from settlements. Competition agencies also need to publish guidelines delineating instances where settlements may be utilized.

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The Independence of Decision-Maker Principle in Competition Law Enforcement

Stanley Wong
StanleyWongGlobal (SW Law Corporation)

The Independence of Decision-Maker Principle in Competition Law Enforcement

Stanley Wong[1]

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

[1] Dr. Stanley Wong is a competition lawyer with a career in law of over 30 years. In June 2011, he established StanleyWongGlobal (SW Law Corporation) to conduct a global practice of competition law and competition policy to advise and to represent the public side including enforcement agencies, governmental bodies, and international governmental organizations. The views expressed in this article do not and are not intended to represent the views of any organization with which the author has been or is associated.

[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.

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[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*, Judgement (Seventh Chamber, extendec 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.