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from the Section Chair

Antitrust and Due Process

"But how can I be under arrest? And how come it's like this?" "Now you're starting again," said the policeman, dipping a piece of buttered bread in the honeypot. "We don't answer questions like that."

—Franz Kafka, *The Trial*

"I guess the only time most people think about injustice is when it happens to them."

—Charles Bukowski, *Ham on Rye*

Dear Colleagues,

THIS ISSUE OF ANTITRUST is devoted to trying cartel cases. Most of the trials addressed in these pages have taken place in U.S. courts, which follow well-established procedural rules that provide extensive discovery rights prior to trial and ensure that parties have the ability at trial to confront and cross-examine adverse witnesses. In addition, the party bringing the claims, whether it is the government or a private civil plaintiff, must convince a neutral decision maker—either a judge or jury—that a cartel existed and that the defendants participated in it.

The mixed outcomes of recent cartel trials underscore the importance of these procedural guarantees of fairness; without them, it would be much harder for a defendant to defeat the claims. But while it may be easy for U.S. antitrust lawyers to take due process rights like these for granted, it is important to recognize that they are not universally available in competition enforcement proceedings around the world.[1]

One illustrative example came to light in news reports published last summer. According to reported accounts, in-house counsel for more than two dozen major companies attended a meeting with competition enforcers in one of the world's most important economies.[2] According to sources quoted in the articles, the enforcers pressured the group for antitrust "confessions" and "self-criticisms" and warned of enhanced penalties if they hired outside counsel. After initial reports of the meeting began to circulate, some of the reported participants gave conflicting accounts—or said that they were not there—and the government's news agency disputed that the enforcers had overstepped any bounds.[3]

Whether or not the story was accurate, it highlights a very important—and growing—problem confronting businesses, consumers, and legal professionals all over the world: how to cope with substantive and procedural differences among countries that are increasingly engaged in competition enforcement against global business conduct. In other words, how can we ensure that the many antitrust enforcement institutions around the world operate with appropriate safeguards to assure fairness and objectivity?

As the world gets "flatter," companies increasingly engage in business conduct that crosses national boundaries. At the same time, nations around the world are demonstrating an ever-growing interest in applying their own laws to that conduct, at least to the extent that the conduct has effects within their borders. Today, there are over 125 agencies in over 100 countries that enforce competition laws.[4] Many of these competition regimes initially focused their efforts on cross-border merger reviews. Now, however, their operational charters are rapidly expanding into international cartel enforcement (both criminal and civil), monopolization and abuse of dominance, and non-cartel joint conduct—all of which can potentially reach firms and people based in other countries.

Penalties for competition infractions have also increased dramatically.[5] For example, before 1990, the highest European fines for a single cartel totaled 60 million ECU[6] for 23 petrochemical producers involved in price fixing in the plastic industry. Since 2006, however, cartel fines have skyrocketed to more than €1 billion per year, and in some years have topped €3 billion.[7] Several individual cartels have been assessed fines in excess of more than €1 billion. Jurisdictions outside the U.S. and EU are following the upward trend in penalties for competition violations, with India assessing a $1.1 billion fine in 2012 against a cement cartel (albeit a domestic one), and Brazil, Japan, Korea, South Africa, Taiwan, and Turkey each assessing fines in excess of $100 million on individual cartels in 2013, most of which set new records.[8] Similarly, in recent years significant civil penalties for abuse of dominance and other non-cartel antitrust infringements have been imposed on multinational companies.[9] There has also been an upward trend in the severity of criminal penalties against individuals—including prison terms. In the U.S., for example, average prison sentences have climbed to more than two years, and one executive was recently sentenced to five years, both of which are new records.[10]

This global explosion of competition enforcement can be viewed as a very positive development, at least to the extent that it signifies a strong shared interest in protecting competition and consumers. But it also raises some critical complications—the most important of which is the significant divergence in processes and standards being followed by enforcers around the world, some of which raise serious concerns about procedural fairness and due process.

Recently, a survey of nearly 100 private practitioners was conducted on transparency and due process procedures followed in connection with antitrust investigations and enforce-

ment proceedings conducted by 37 different agencies in 35 jurisdictions.[11] The survey reveals significant divergences among agencies and jurisdictions in the level of due process that they afford to parties in antitrust proceedings. For example, although nearly 60 percent of the respondents said that they had the opportunity for regular meetings with the enforcement agency staff during the investigation, 55 percent stated that the meetings were either untimely or not meaningful, or both.[12] Sixty-eight percent of the respondents reported that during the investigation, the enforcers did not disclose their theory of economic harm or the data used to support it.[13] A plurality of the respondents (41%) responded they were not given a meaningful opportunity to challenge the evidence against them or to cross-examine witnesses during the agency process.[14]

The due process differences observed among jurisdictions arise at least in part from distinct cultural, legal, political, and judicial norms that influence the characteristics of each country's competition laws and enforcement mechanisms. In addition, some countries are new to competition enforcement and lack the technical expertise and institutional knowledge possessed by mature jurisdictions. Moreover, there may be some jurisdictions in which competition law is (at least sometimes) invoked as a means to pursue other goals—such as protecting domestic industries, pursuing national industrial policies, or advancing perceived national security interests.

There will never be agreement among sovereign nations on a single institutional design or set of procedures that represents the "right" system to assure the fair enforcement of competition laws.[15] However, much can be done by the international antitrust community to share ideas and best practices with the goal of converging on basic *principles* to guide enforcement processes around the world. That convergence would obviously promote the due process interests of the companies and business people who are potential targets of particular enforcement efforts. But there are other interests at stake, too. It is important to protect the fairness of competition enforcement systems in the eyes of third parties—including consumers and competitors—whose faith in the integrity of the systems is essential to their effective operation. In addition, employing fair processes should help ensure less arbitrary and more reliable *outcomes* of the enforcement process—again, benefiting both consumers and the competitive process.

So what are the potential topics to address in a global conversation about norms for antitrust due process? To start with, here are some initial suggestions:

- Opportunity for a meaningful hearing by the decision maker before enforcement action is taken.
- Actual and perceived neutrality of the merits decision maker.
- Transparency of (1) the legal standards that apply to the conduct in question; and (2) 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.
- Party access to evidence collected in connection with an enforcement action.
- Party ability to challenge and test evidence, including questioning of adverse witnesses.
- Protection of parties' and third parties' confidential information from unauthorized disclosure.
- Ability to challenge enforcement outcome before an independent judicial or administrative body.

How do we reach a global consensus on norms like these? Unfortunately, there is no simple answer.[16] Fortunately, however, there are multilateral international organizations that have already devoted significant attention to the issues of due process and procedural fairness. In 2010 and 2011, the OECD Competition Committee's Working Party No. 3 held a series of closely followed discussions on Procedural Fairness and Transparency.[17] In addition, the International Competition Network is now in the midst of an initiative devoted to the topic, co-chaired by the FTC and the European Commission. This initiative will be the focus of an all-day joint workshop to be held at the FTC on the Tuesday prior to the start of the ABA Antitrust Section's 2014 Spring Meeting. These multilateral efforts have already advanced an important global dialogue, and they need to continue.

For its part, the Antitrust Section is determined to spotlight the issue of antitrust and due process as a key focus area. As a start, the Section's International Task Force commenced work this year on a thorough analysis of all of the prior work that has been done to date in this area, with the goal of assessing whether it will be feasible for the Section to develop and recommend its own set of best practices. In addition, the Chair's Showcase program at the 2014 Spring Meeting will be dedicated in its entirety to exploring the issue of antitrust and due process.[18]

This is not a simple problem, and it will not be solved with a simple stroke. But as professionals and highly interested participants in a global web of increasingly active competition enforcement, we have a responsibility to address it with all of the skill and energy we can muster. ■

Best regards,

Christopher B. Hockett
Chair, Section of Antitrust Law 2013–2014

[1] Of course, they are also not universally available in many other important proceedings that do not involve competition enforcement.

[2] *See* Michael Martina, *China Presses Foreign Firms into Admitting Guilt*, South China Morning Post, Aug. 21, 2013, http://www.scmp.com/business/companies/article/1298327/tough-talking-china-pricing-regulator-sought-confessions-foreign .

[3] Wu Liming, *Well-Behaved Int'l Firms Welcomed in China*, Xinhua General News Service, Aug. 19, 2013; released on Aug. 21, 2013.

[4] *See* Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Update on

International Cooperation and Convergence, Remarks at Fourth Annual Chicago Forum on International Antitrust Issues (June 13, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/update-international-cooperation-and-convergence/130613antitrustchicagoupdate.pdf. Although competition laws have been on the books of many countries for many years, relatively few of them actually engaged in enforcement efforts. *See* Abbott B. Lipsky, Jr., *The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?*, Fletcher F. World Aff., Summer/Fall 2002, at 59, 60–61 ("Until 1990, perhaps only a half-dozen other developed nations had functional antitrust regimes with at least episodic enforcement. Competition laws were found in the developing world as well, but enforcement was sporadic at best.").

[5] "In the last two decades, the world has seen the proliferation of effective leniency programs, ever-increasing sanctions for cartel offenses, a growing global movement to hold individuals criminally accountable, and increased international cooperation among enforcers in cartel investigations." Scott Hammond, Deputy Assistant Att'y Gen. for Crim. Enforcement, Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Address Before 24th Annual Nat'l Institute on White Collar Crime 1 (Feb. 25, 2010), *available at* http://www.usdoj.gov/atr/public/speeches.255515.htm.

[6] The European Currency Unit (ECU) was a basket of various EC member state currencies and served as a unit of account for the EC before the Euro was introduced.

[7] Hammond, *supra* note 5, at 7.

[8] *See, e.g.*, Megan Leonhardt, *India's Antitrust Watchdog Hits Cement Cos. With $1.1B Fine*, Law360 (June 1, 2012), http://www.law360.com/articles/352532/india-s-antitrust-watchdog-hits-cement-cos-with-1-1b-fine.

[9] *See, e.g.*, Erin Coe, *South Korean Court Upholds Qualcomm, Intel Antitrust Fines*, Law360 (June 21, 2013), http://www.law360.com/articles/452228/south-korean-court-upholds-qualcomm-intel-antitrust-fines (discussing Korean court decision upholding fines of $236 million against Qualcomm and $25 million against Intel): Bill Donahue, *EU Fines Microsoft $730M for Breach of Landmark Browser Deal*, Law360 (Mar. 6, 2013), http://www.law360.com/competition/articles/421232?nl_pk=a75e518b-f336-47ed-b16d-dabb57d54980&utm_source=newsletter&utm_medium=email&utm_campaign=competition. And in May 2009, the European Commission fined Intel €1.06 billion for abuse of dominance. Press Release, European Commission (May 13, 2009), http://europa.eu/rapid/press-release_IP-09-745_en.htm?locale=en.

[10] *See* U.S. Dep't of Justice, Criminal Enforcement, Fine and Jail Charts, *available at* http://www.justice.gov/atr/public/criminal/264101.html; Beth Winegarner, *Ex-Sea Star Prez Gets Longest-Ever Antitrust Sentence*, Law360 (Dec. 11, 2013), http://www.law360.com/articles/495165/ex-sea-star-prez-gets-longest-ever-antitrust-sentence.

[11] *See* Sean Heather, James Rill & Charles Webb, Summary Responses: A Practitioner's Survey on Transparency & Due Process in Competition Proceedings (Apr. 2013) (unpublished report by three non-governmental advisors to the Int'l Competition Network) (on file with author).

[12] *Id.* at 7.

[13] *Id.* at 8.

[14] *Id.* at 14, 43.

[15] Indeed, as many have observed, within the U.S. system alone, the FTC and DOJ represent different structural models for competition enforcement, with the FTC integrating investigative, enforcement, and decision-making functions, and the DOJ separating them (at least the decision-making function). *See, e.g.*, Nicole Durkin, *Rates of Dismissals in FTC Competition Cases from 1950–2011 and Integration of Decision Functions*, 81 Geo. Wash. L. Rev. 1684, 1687–93 (2013).

[16] Good lawyers everywhere are trained to be "problem solvers" rather than just "problem finders." But sometimes we have a duty to draw attention to a problem, even if the solution to it is not yet clear.

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

[18] The panelists will include The Honorable Douglas H. Ginsburg, Director General Alexander Italianer, William E. Kovacic, A. Douglas Melamed, Christine A. Varney, and Stanley Wong.