Due Process in Competition Proceedings

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Abstract

Because most competition matters are resolved in proceedings entirely before a national competition authority, a company accused of an infringement, despite its potential liability for a large fine, may not receive the due process protections associated with judicial proceedings. This article discusses five areas in which competition authorities may fail to provide important due process protections: The right to confront the evidence and arguments against the company; a hearing before the actual decision maker; a neutral decision maker; a decision rendered without inordinate delay; and, in the case of an adverse decision, review by an independent tribunal. We explain the importance of strong due process protections in these areas and suggest some design features for authorities to consider.

Introduction

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The design of competition proceedings varies by jurisdiction, but each jurisdiction should aim to ensure due process for companies accused of a violation. The rule of law requires no less.

We here instance five requirements of due process that should be accommodated in the administrative enforcement of competition laws, as they ordinarily are accommodated in judicial proceedings: The right to confront the evidence and arguments against the company; a hearing before the actual decision maker; a neutral decision maker; a decision rendered without inordinate delay; and, in the case of an adverse decision, review by an independent tribunal.[3] Although these five due process protections apply throughout the legal system, they are too often unavailable in competition proceedings.

We do not attempt to prescribe specific procedures for ensuring due process as those can vary depending upon the design of each particular legal system and upon the priorities of each jurisdiction. We urge, however, that every jurisdiction be guided by the principle of procedural proportionality. The United States Supreme Court described this principle in a civil case in which an individual faced the termination of his welfare benefits: "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss."[4] Of course, even the most grievous losses may not warrant additional procedures if those procedures would not improve the accuracy and reliability of legal outcomes. Some

[3] Other typologies have been suggested, but they generally address the same concerns. *See, e.g.*, Stanley Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, COMPETITION POL'Y INT'L (Apr. 23, 2014), https://www.competitionpolicyinternational.com/assets/Uploads/ICNApril142.pdf (defining the disclosure principle, the right of defense principle, and the independence of decision-maker principle); Stanley Wong, *The Independence of Decision-Maker Principle in Competition Law Enforcement*, CPI ANTITRUST CHRONICLE, June 2014, https://www.competitionpolicyinternational.com/file/view/7188.

[4] Goldberg v. Kelley, 397 U.S. 254, 263 (1970).

commentators therefore describe the proportionality principle as a rough cost-benefit analysis.[5]

Adopting this terminology for a moment, we stress that in competition proceedings the cost of a fine imposed upon a company is not less because the jurisdiction labels the infringement civil rather than criminal. Fines for civil infringements can be just as burdensome as criminal sanctions. For instance, in 2012 the European Commission imposed civil fines totaling €1.47 billion (~$1.92 billion) upon the six members of the cathode ray tube cartel.[6] Although these fines were civil, they rival the most severe criminal sanctions ever imposed by the United States Department of Justice, Antitrust Division, which in 2014 announced that, in the course of a multi-year proceeding, it had imposed unprecedented criminal fines of more than $2 billion upon 26 members of the auto parts cartel.[7] Due to the magnitude of the fines, the due process protections afforded to the accused companies in each of those two cases should have been similar, regardless of the different labels applied to them; indeed, the average fine of €245 million (~$320 million) in the EC "civil" case was more than four times the average fine of ~$77 million in the US criminal case. Of course, where a company or an individual is charged with a criminal violation of an antitrust law,[8] the

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[5] *See, e.g.*, Richard A. Epstein, *No New Property*, 56 Brook. L. Rev. 747, 770 (1990) ("The analysis supports the additional protection only if some further gain in systemwide reliability is obtained at some acceptable cost").

[6] Foo Yun Chee, *EU Imposes Record $1.9 Billion Cartel Fine on Phillips, Five Others*, REUTERS.COM (Dec. 5, 2012 10:53 AM), http://www.reuters.com/article/2012/12/05/us-eu-cartel-crt-idUSBRE8B40EK20121205.

[7] U.S. Dep't of Justice, Antitrust Division, *Division Update Spring 2014*, http://www.justice.gov/atr/public/division-update/2014/criminal-program.html.

[8] Many countries now authorize criminal sanctions for violations of their antitrust laws, including Brazil, Canada, France, Israel, Japan, Mexico, South Africa, South Korea, the United Kingdom, and the United States. In a number of countries, such as Brazil, Hungary, Mexico, and Slovakia, individuals are subject to criminal sanctions but corporations are not. For an overview see Allen & Overy, *Global Trends in Antitrust 2013*, http://www.allenovery.com/SiteCollectionDocuments/Global_Antitrust_Trends_in_2013.PDF; Douglas H.

proceedings originate not before a competition agency but in court, where due process protections are ordinarily at their strongest.

Multiple courts have endorsed the notion that, when determining what due process protections are necessary in a given instance, the consequence of a penalty matters more than whether that penalty is labeled criminal or civil. In *A. Menarini Diagnostics S.R.L. v. Italy*,[9] the European Court of Human Rights determined that a €6 million fine imposed by the Italian competition authority was sufficiently severe as to be "considered … a criminal penalty," to which "the criminal limb of Article 6 § 1 [of the European Convention on Human Rights] was applicable."[10] Article 6 § 1 requires the provision of procedural protections of independence and impartiality,[11] which the court found had been afforded only because judicial "review had been carried out by courts having full jurisdiction" to determine the merits of the case against the company.[12]

The Court of Justice of the European Union has since applied the teaching of the Menarini case to the European Commission when it levies a substantial civil fine for an infringement of the competition laws of the EU.[13] Although not a competition case, *R. v. Wigglesworth*, is similarly instructive. In *Wigglesworth*, the Supreme Court of Canada held Section 11 of the Canadian Charter of Rights and Freedoms, which aims to secure fundamental fairness for "any person charged with an offence," applies to a

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Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMPETITION POL'Y INT'L 3, Appendix (Autumn 2010), *available at* https://www.competitionpolicyinternational.com/file/view/6379.

[9] Judgment of Sep. 27, 2011, 43509/08, ¶¶58-67.

[10] ECHR Information Note 144, at 9; http://www.echr.coe.int/Documents/CLIN_2011_09_144_ENG_894208.pdf.

[11] Article 6.1 of the ECHR provides in relevant part, "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[12] ECHR Information Note, *supra* note 10.

[13] Judgment of July 18, 2013, C-501/11 P, Schindler Holding Ltd. v. Commission, ¶¶33-38, relating to Article 81 of the Treaty of Rome, now Article 101 of the Treaty on the Functioning of the European Union.

person facing a nominally civil fine that "by its magnitude would appear to be imposed for the purpose of redressing a wrong due to society at large."[14] Section 11, the court held, "is intended to provide procedural safeguards in proceedings which may attract penal consequences even if not criminal in the strict sense."[15]

The severity of the consequences in some competition cases can hardly be overstated. In addition to the staggeringly large fines already mentioned, private class actions seeking treble damages, which in the U.S. are almost always filed as soon as the enforcement agency makes public its case, may increase greatly the total amount at stake.[16] In the EU and its Member States, actions for collective redress in damages will soon increase the consequences for a company held by a competition agency to have participated in a cartel or other violation of Article 101.[17] Furthermore, companies and individuals face reputational damage and the prospect that other jurisdictions might commence additional proceedings, which could include further civil or criminal sanctions.

Accordingly, with the principle of proportionality in mind, we turn to evaluating the five due process concerns we raised at the outset of this essay.

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[14] 2 S.C.R. 541, ¶24 (1987).
[15] *Id.* at syllabus.
[16] For instance, even after the Antitrust Division had dropped its investigation of Dow Chemical and other alleged members of a polyurethane cartel, a class action suit resulted in a $1.2 billion judgment against Dow. *See* Andrew M. Harris, *Dow Chemical Damages Hit $1.2 Billion in Urethane Case*, BLOOMBERG.COM (May 16, 2013), http://www.bloomberg.com/news/articles/2013-05-15/dow-chemical-hit-with-1-2-billion-judgment-in-antitrust-case. That judgment was recently upheld on appeal. In re Urethane Antitrust Litigation, 768 F.3d 1245 (10th Cir. 2014).
[17] Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringement of the Competition Law Provisions of the Member States and of the European Union, Nov. 10, 2014, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/damages__directive_final_en.pdf; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress*, June 11, 2013, *available at* http://ec.europa.eu/consumers/archive/redress_cons/docs/com_2013_401_en.pdf.

I. The right to confront evidence and arguments

More than a century ago, the U.S. Supreme Court, in deciding the obligations of an administrative agency with both prosecutorial and adjudicatory functions, made clear that due process requires that the accused receive an opportunity to rebut the case against it:

> All parties must be fully apprised of the evidence submitted or to be considered, and must be given [an] opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding.[18]

In competition proceedings, two obstacles to such a meaningful opportunity are a lack of transparency in the law and a lack of transparency in the investigation of the accused.

Concern over transparency in the law has a long history. In order to apprise the public of legal obligations, Hammurabi's Code was inscribed on a stele and placed in a public place so all could see it. The contemporary equivalent is the practice, followed by many competition authorities, of issuing guidelines to advise regulated companies of their obligations. These guidelines, however, are not law and until they have been tested and upheld in the courts, the law necessarily will be less than clear.

The increasing reliance upon settlements[19] – to some extent a by-product of fines being so large that a company cannot risk litigating the merits of its case – means the agency's position is often one that has never been tested before a tribunal of any kind and that may change with the prevailing political winds. This opacity in the law gives

[18] Interstate Commerce Comm'n v. Louisville & Nashville R.R. Co., 227 U.S. 88, 93 (1913).
[19] *See generally* Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Settlements: The Culture of Consent*, 1 WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE – LIBER AMICORUM 177 (Charbit et al. eds., 2012).

agencies still more leverage to extract concessions. To quote Professor Richard Whish of King's College London, who recently lamented the practice of agencies entering into settlements and accepting commitments, "[Without infringement decisions] how does the law develop? What is the law in cases like Google or Samsung? I suspect I will never find out."[20]

Even when the law is transparent, the evidence upon which a specific case is built must also be transparent in order for the accused to have a meaningful opportunity to rebut that evidence or to contest the inferences the agency might draw from it. To this end, an agency can adopt an open-file policy, as some have done. The EC Directorate General for Competition follows such a policy, subject to the usual and necessary protections for competitively sensitive and for privileged information,[21] but the U.S. agencies are bound by no such policy.[22] A respondent in the U.S., therefore, may have to decide whether to accept a consent decree in order to avoid the costs of litigation without ever having had a chance either to evaluate the strength of the case against it or to explain the evidence to the agency.

II. A hearing before the actual decision maker

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[20] Faaez Samadi, *Whish: Be Wary of DG Comp Settling Too Many Cases*, GLOBAL COMPETITION R. (Nov. 12, 2013), http://globalcompetitionreview.com/news/article/34549/whish-wary-dg-comp-settling-cases/.

[21] European Comm'n, DG Competition, *Best Practices on the Conduct of Proceedings Concerning Articles 101 and 102 TFEU* ¶ 80, http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf ("The addressees of the Statement of Objections are granted access to the Commission's investigation file, in accordance with Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of the Implementing Regulation, so on the basis of that evidence, they can express their views effectively on the preliminary conclusions reached by the Commission in its Statement of Objections").

[22] Although the Tunney Act, 15 U.S.C. § 16, requires the U.S. agencies to make publicly available their enforcement actions and any resulting consent decrees, it says nothing about transparency to the accused during the process of the enforcement action.

In administrative decision-making, identifying the actual decision maker is not always a simple task. Commissioners or other officers charged with the authority to decide may frequently rely upon agency staff to evaluate the strength of a case, and so their "decisions" may not be much more than a rubber stamp. Whoever is the de facto decision maker, however, should be the one hearing the case. As the U.S. Supreme Court put it, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner."[23] If the decision maker has himself not heard the testimony or read the evidence, then the opportunity to be heard is not meaningful.

It is worth considering, then, whether a commission or other voting body enforcing competition law should be able to overturn — based only upon the cold, written record — the decisions of those who were present to judge the credibility of witnesses. For example, in the U.S., when a case is heard in the first instance by an Administrative Law Judge (ALJ) and then appealed to the five Commissioners of the Federal Trade Commission, those individuals have not heard the evidence as it was presented, yet they are charged by statute to review the ALJ's findings of fact *de novo*.[24] Former Commissioner Thomas Rosch pointed out the anomaly of this arrangement, which made him "squeamish about second-guessing an ALJ's findings of fact, especially when they are based on the credibility of witnesses."[25] This power to second-guess is particularly troublesome because the Commission has consistently reversed

[23] Matthews v. Eldridge, 424 U.S. 319, 333 (1976).
[24] Administrative Procedure Act, 5 U.S.C. § 557(b).
[25] J. Thomas Rosch, *Three Questions About Part Three*: *Administrative Proceedings at the FTC*, Remarks Before the American Bar Association Section of Antitrust Law Fall Forum (Nov. 8, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf.

ALJs' findings when they have not supported the charge of infringement made by the Commission when it authorized the enforcement action.[26]

Likewise, the College of Commissioners of the European Union vote to take a decision without personally having heard the case against the proposed decision. No Commissioner, not even the Commissioner for Competition, who proposes the resolution of a case brought by the Directorate General for Competition, will have attended the hearing.[27] This approach may have merit insofar as the Commissioners are voting upon the basis of a policy view, but to the extent their votes are based upon an assessment of the evidence, this institutional design denies the respondent a meaningful opportunity to be heard by the actual decision makers.

III. A neutral decision maker

A neutral decision maker is fundamental for ensuring a case is decided on its merits. The U.S. Supreme Court put it this way: "Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'"[28] The most obvious example is the unfairness of a proceeding in which the decision maker has a pecuniary interest in the outcome, no matter how small. In a case where a small-town mayor acted as the judge in a prosecution for a minor offense and personally received $12 in fees and costs if he found the defendant guilty but not if he acquitted the defendant, the U.S. Supreme

[26] *See, e.g.*, Opinion of the Commission, *In re Rambus, Inc.*, No. 9302, Slip op. at 21 (F.T.C. Aug. 2, 2006) (considering "supplemental evidence" and setting aside the ALJ's findings of fact in the course of reversing the ALJ's decision to dismiss a complaint); Opinion of the Commission, *In re Schering-Plough Corp.*, No. 9297, Slip Op. at 8 (F.T.C. Dec. 8, 2003) (explaining that the Commission "made *de novo* findings of fact that differ substantially from those in the [ALJ's] Decision" in the course of reversing the ALJ's decision to dismiss a complaint).

[27] OECD, *European Commission: Peer Review of Competition Law and Policy 2005*, at 64, http://www.oecd.org/eu/35908641.pdf.

[28] Withrow v. Larkin, 421 U.S. 35, 47 (1975) (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

Court, through Chief Justice Taft, was unanimous in holding "it certainly deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him."[29]

We know of no jurisdiction in which a competition agency keeps direct control of the money it collects in fines, civil or criminal, but both U.S. agencies as well as DG Comp tout the amount of the fines they collect as a measure of their success,[30] raising the question whether they are neutrals in deciding whether to bring a case and what remedy to seek. Perhaps the agencies are simply trying to show they are catching more violators or more egregious ones every year, but ever-growing fines might also be a lagging indicator of a lack of deterrence, which undermines the story that higher fine totals demonstrate a job well done. More likely, ever larger fines simply help make the case for an ever larger agency budget, serving the bureaucratic imperative to grow.[31] Although this interest is not strictly pecuniary, it seems at least as substantial a potential

[29] Tumey v. State of Ohio, 273 U.S. 510, 523 (1927).

[30] *See, e.g.,* U.S. Dep't of Justice, Antitrust Division, *Division Update Spring 2013*, http://www.justice.gov/atr/public/division-update/2013/criminal-program.html ("The [Fiscal Year] 2012 $1.14 billion criminal fine total is the highest ever obtained by the Division in a single year"). *See also* U.S. Federal Trade Comm'n, *2013 One Page FTC Performance Snapshot*, http://www.ftc.gov/system/files/documents/reports/2013-one-page-ftc-performance-snapshot/2013snapshotpar.pdf ("The FTC returned more than $36 million in redress funds to consumers and nearly $153 million to the U.S. Treasury derived from fees, redress disgorgements, and fines"); European Comm'n, *Competition: Annual Report Shows How Competition Policy Helps Unlock Potential of EU Single Market*, http://europa.eu/rapid/press-release_IP-13-472_en.htm ("[T]he Commission fined seven international groups of companies close to € 1.5 billion for colluding to raise the prices of tubes used in TV and computer screens").

[31] *See* William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36–42 (1971) ("Bureaucrats maximize the total budget of their bureau during their tenure, subject to the constraint that the budget must be equal to or greater than the minimum total costs of supplying the output expected by the bureau's sponsor").

source of bias as the $12 fee the Supreme Court deemed a denial of due process back in 1927.

Even when a decision maker has no direct interest in the outcome of a case, there is still some probability of unfairness –- and certainly the appearance of unfairness -- when the decision maker is the same person or collegium who decided to pursue the case in the first instance. Competition cases brought by an enforcement agency in which the same official(s) direct or authorize the staff to undertake the investigation, direct or authorize the staff to prosecute a case based upon the evidence turned up in that investigation, and then decide whether the evidence is sufficient to show an infringement, might reasonably be thought to have an interest in the outcome; for them to say the evidence is insufficient is to say the entire undertaking was a waste of resources for which they are responsible. The potential for unfairness is self-evident.

The psychological problem created by combining the investigative, prosecutorial, and adjudicatory functions in competition proceedings – known as confirmation bias[32] – has been discussed in depth elsewhere.[33] Here we offer only a precis of the criticism and of some of the empirical evidence that supports it.

The idea of confirmation bias is that when a decision maker first approves a competition investigation and authorizes an enforcement action in the case, he will later be compelled to confirm those prior positions in the ultimate adjudication. Several empirical studies suggest the FTC, whose Commissioners first vote to authorize an

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[32] *See, e.g.*, Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 Rev. of General Psych. 175 (1998) ("Confirmation bias ... connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand").

[33] *See generally* Terry Calvani & Angela M. Diveley, *The FTC at 100: A Modest Proposal for Change*, 21 GEO. MASON L. REV. 1169 (2014); Ian Forrester, *Due Process in EC Competition Cases: A Distinguished Institution With Flawed Procedures*, 34 E.L. Rev. 817 (2009); Frank Montag, *The Case for a Radical Reform of the Infringement Procedure Under Regulation 17*, 8 E.C.L.R. 428, 433 (1996).

enforcement action and later sit as an appellate body to review the initial decision of the ALJ, suffers from this confirmation bias. Even at first blush, the FTC's record of upholding on appeal its own staff's position is startling: Until 2014 the Commission had not once in two decades dismissed an administrative complaint it had previously authorized. When it dismissed the price-fixing allegations against McWane Inc., a producer of iron pipe fittings, commentators made the tongue-in-cheek observation that it marked the end of a phenomenal "winning streak."[34]

A few more rigorous observations are also available. One study observes a correlation between the number of Commissioners who were a part of the original decision to bring an enforcement action and the Commission's ultimate finding of infringement.[35] Other studies draw conclusions from the rate at which the Commission is reversed when its decisions are reviewed in court. For instance, over the same 20-year period during which the Commission affirmed every one of its self-initiated enforcement actions, it was reversed by the U.S. Courts of Appeals in about 20% of the cases that were appealed.[36] Another study contrasts this performance with the reversal rate of federal district courts deciding antitrust cases, including both cases brought by the Antitrust Division and private cases. When district courts are the first instance adjudicators for antitrust cases, their judgments are reversed in only about 7% of the cases that are taken to the courts of appeals – the same courts that hear appeals

[34] Alex Lawson, *FTC's McWane Dismissal Leaves Antitrust Enforcement Murky*, Law360.com, http://www.law360.com/articles/507980/ftc-s-mcwane-dismissal-leaves-antitrust-enforcement-murky; *see also* Brent Kendall, *FTC's Antitrust Decision Hands Partial Defeat to ... the FTC*, LawBlog, Wall Street Journal, http://blogs.wsj.com/law/2014/02/06/ftcs-antitrust-decision-hands-partial-defeat-to-the-ftc/.
[35] Malcom Coate & Andrew Kleit, *Does It Matter that the Prosecutor Is Also the Judge?*, 19 Managerial & Decision Econ. 1 (1998).
[36] David Balto, *The FTC at a Crossroads: Can It Be Both Prosecutor and Judge*, Washington Legal Foundation Legal Backgrounder (April 23, 2013).

coming from the FTC.[37] This disparity in the reversal rates for the FTC and the federal trial courts is significant and casts doubt upon the fairness of the FTC's adjudications.

On the other hand, it is only fair also to compare the success rate of the FTC to that of the Antitrust Division, which serves as investigator and prosecutor but must bring cases before the federal district courts to be adjudicated. Of 126 civil antitrust cases the Division filed in district court and that were terminated in the decade 2004-2013, the Division lost or the court dismissed only four, or 3.2%.[38] The Division's high rate of success (96.8%) is consistent with the FTC's results when it is acting as the adjudicator and, therefore, casts some doubt upon the theory that confirmation bias accounts for the FTC's near-perfect record in its internal adjudications. Still, a 20-year winning streak for the FTC does seem hard to accept as solely the result of judicious case selection by the Commission in its prosecutorial role.

Although the empirical evidence of bias in the institutional design of the FTC is not conclusive, the argument for combining the functions of investigator and prosecutor with that of adjudicator remains weak. As Stanley Wong has pointed out,[39] several jurisdictions have successfully separated the functions and can provide a design template for others. For example, in France, the Autorité de la Concurrence operates under a constitutional norm that requires the separation of investigative and adjudicatory functions..[40] The Competition Commission of India operates under a

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[37] *See* Calvani & Diveley, *supra* note 33, at 1180-81 (describing studies).
[38] Data taken from U.S. Dep't of Justice, *Antitrust Division Workload Statistics FY 2004-2013*, http://www.justice.gov/atr/public/workload-statistics.pdf.
[39] Stanley Wong (June 2014), supra note 3, at 5.
[40] *Id.; see* Décision n°2012-280 QPC du 12 octobre 2012, *Société Groupe Canal Plus et autre.*

statute that provides for an independent investigator called the Director General.[41] The Hellenic Competition Commission in Greece assigns each investigation to one of eight commissioners, and that commissioner cannot vote on the outcome.[42]]]

IV. Delay

Too often, justice delayed is, as the maxim says, justice denied. Likewise, due process delayed is due process denied. As discussed above, an agency can in effect avoid due process requirements with consent decrees, which might be the only expeditious resolution available to a respondent if the agency's institutional design requires multiple levels of review or if its backlog of cases or simple inaction results in a lengthy wait before a respondent receives an opportunity to go before an independent tribunal and rebut the case against it. If a respondent cannot afford to wait, then it will have to forgo critical procedural protections, a problem that is particularly acute in merger cases.

In pre-merger review cases, parties ordinarily cannot put a deal on hold for a year or more while a competition agency evaluates it.[43] An agency that drags its feet may fatally delay the resolution of a merger case without having to rule upon the merits, which is surely a temptation with some politically controversial transactions. (The same may be true of an agency acting in all good faith but insufficiently funded to move

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[41] The Competition Act § 26, No. 12 of 2003, India Code (2014) ("[I]f the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter").

[42] Nomos (2011:3959) Protection of Free Competition Art. 15 § 7, Gov't Gazette [FEK A'] 2011 ("[T]he Commissioner-Rapporteur designated for the case concerned shall participate in the meetings and deliberations of the Competition Commission ... without voting rights").

[43] *See* Shepard Goldfein & James A. Keyte, *Merger Review at FTC and Department of Justice*, 252 NEW YORK L. J. 1, 2, Dec. 9, 2014, *available at* https://www.skadden.com/sites/default/files/publications/070121417Skadden.pdf ("This lengthy process itself can be a deal killer: parties often abandon mergers rather than ensure administrative review"); CNN Money, *American, US Airways Say Merger at Risk From Trial Delay*, CNNMONEY.COM (Aug. 29, 2013, 4:29 PM), http://money.cnn.com/2013/08/29/news/companies/american-us-airways-merger/; *see also*.

expeditiously.) Additionally, whenever an individual is the subject of an enforcement action, the specter of investigation and possible litigation will disrupt his life both personally and professionally; this may be equally true for the executives of a company under investigation or in litigation. All these possibilities raise the risk of "oppressive delay," which the U.S. Supreme Court has said is inconsistent with the principle of due process.[44] In sum, competition agencies should be required to act as expeditiously as circumstances will allow, lest due process be denied by inaction rather than action.

V. Review by an independent tribunal

The right of appeal can rectify a result marred by many of the previously discussed procedural flaws, but only if the reviewing tribunal can detect them and has the authority to overturn the first-instance decision maker on those grounds. The U.S. Supreme Court has ensured the courts of appeals can perform this function by requiring that "[t]he decisionmaker's conclusion ... rest solely on the legal rules and evidence adduced at the hearing.... To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on."[45] Requiring competition agencies to give a reasoned explanation of their decisions when made ensures both better decisions in the first instance as well as a record upon which a reviewing tribunal can make an informed decision. There may well be evidence to support an agency's finding of infringement, but whether the agency relied upon that evidence, or upon a horoscope or some other capricious notion, is for the agency to say and for an independent tribunal to review.

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[44] United States v. Lovasco, 431 U.S. 783, 789 (1977)("[P]roof of prejudice is generally a necessary but not sufficient element of a due process claim, and … the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused").
[45] *Goldberg*, 397 U.S. at 271.

If the agency does explain its reasoning, then the substance of its decision must stand up to scrutiny. The agency obviously should not carry the day if its reasoning is contrary to the law applicable to the case. Therefore, the reviewing tribunal should have authority to review at least questions of law *de novo*.

Whether the court should so closely review technical conclusions or other fact evidence is a more difficult question. When the Antitrust Division brings a case in federal district court and the result is appealed, the Courts of Appeals can overturn a finding of fact only if it is "clearly erroneous." In contrast, when the FTC serves as adjudicator, the Courts of Appeals can overturn its findings of fact if they are not supported by "substantial evidence."[46] This difference in the standards of review perhaps reflects that a district court is a forum that provides all the procedural safeguards we have already discussed. Particularly when the agency does not follow best practices, a robust right of appeal is necessary to safeguard due process. Consider a recent example from the Competition Commission of India. The Commission found that India's governing body for cricket had abused its dominance but the Competition Appellate Tribunal reversed on the ground that the Commission had not made available to the respondent all the evidence that was used against it in coming to a decision.[47] Without a chance to rebut that evidence, the respondent had to rely upon its right of appeal to the tribunal to correct a serious abuse of due process.

Conclusion

[46] Administrative Procedure Act, 5 U.S.C. § 706(2)(E); *see also* Indiana Fed'n of Dentists, 476 U.S. 447, 454 (1986) (explaining the standard of review for FTC decisions in competition cases).
[47] *See* Faaez Samadi, *Tribunal Overturns CCI Ruling Against Cricket Association*, GLOBAL COMPETITION R. (Feb. 24, 2015), http://globalcompetitionreview.com/news/article/38052/tribunal-overturns-cci-ruling-against-cricket-association/.

It is our hope that focusing upon these five aspects of due process – the right to confront the evidence and arguments against the company; a hearing before the actual decision maker; a neutral decision maker; a decision rendered without inordinate delay; and review by an independent tribunal – will help frame an ongoing discussion about procedural fairness across competition jurisdictions. Competition agencies should consider all five both separately and in the aggregate to ensure they are providing sufficient procedural safeguards to achieve not only accurate results but also legitimacy in the eyes both of the regulated entities and of the public.