



DEPARTMENT OF JUSTICE

Judicial Review and Due Process in Antitrust Enforcement

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I. Introduction

I am delighted to be here today to discuss procedural fairness in antitrust enforcement. I appreciate Professors Huang Yong, Thomas Fetzer, and Christopher Yoo for hosting this event and inviting me to participate. I commend their efforts and welcome further scholarship on this important topic. Today's discussions have been extremely interesting so far, and I am gratified to be able to add the U.S. Antitrust Division's perspective.

Procedural fairness is an issue that is of central concern to competition authorities around the world. It has been the topic of much conversation within the Competition Committee of OECD and the International Competition Network (ICN). It was the subject of Makan Delrahim's first speech as Assistant Attorney General,¹ as well as the focus of my first speech in China as Deputy Assistant Attorney General.

Procedural fairness also has been an important part of many of our discussions with our Chinese counterparts, including in the U.S.-China Joint Dialogue earlier this year, where we had numerous meetings with the Chinese judiciary and our Chinese counterparts that addressed this issue. We look forward to continuing this discussion, and to building on the interactions begun in previous administrations, such as the first U.S.-China Judicial Dialogue, which was held in China in August 2016.

As the resident law professor at the Antitrust Division, let me begin by discussing the jurisprudential basis for promoting procedural fairness. As Ronald Dworkin famously described in *Law's Empire*, procedural due process is a type of "integrity in adjudication" that requires "courts and similar institutions to use procedures of evidence, discovery, and review that promise the right level of accuracy and otherwise treat people accused of violation as people in that position ought to be treated."²

¹ Makan Delrahim, "International Antitrust Policy: Economic Liberty and the Rule of Law," (October 27, 2017), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-law>.

² RONALD DWORKIN, *LAW'S EMPIRE*, 164-65, 167 (1986).

The good news is that in observing how competition authorities enforce antitrust laws, one cannot help but appreciate the shared set of beliefs about core procedural norms. Competition authorities recognize the diversity among us on the margins, and yet affirm the common set of practices in pursuit of a coherent approach to enforcing antitrust laws. And, we generally are adept at discerning the difference between companies encountering serious due process violations versus those that suffer procedural “injuries” that lead them to flop and dive in a manner that would make a World Cup football player proud.³

II. Importance of Judicial Review

Today, I would like to discuss one aspect of procedural fairness on which almost everyone agrees, and that is the importance of judicial review in antitrust enforcement. Let me begin by discussing the American tradition of judicial review and separation of powers, although it is by no means unique to the American experience.

Separation of powers has always been central to enforcing the antitrust laws in the United States. In introducing the Sherman Act on March 21, 1890, Senator John Sherman “invoke[d] the power of the National Government ... to restrain” unlawful combinations by requiring “the Attorney General ... in the name of the United States, to commence and prosecute all such suits to final judgment and execution.”⁴ Although he viewed such combinations to be “unlawful by the code of any law of any civilized nation of ancient or modern times,”⁵ he recognized that the courts must define the contours of that code. “[I]t is difficult,” he admitted, “to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them so as to carry out the meaning of law.”⁶

Senator John Sherman’s celebrated speech from the floor of the Senate succinctly summarizes separation of powers in antitrust enforcement. The legislative branch prescribes its

³ Geoff Foster, *The World Cup Flopping Rankings*, WALL STREET JOURNAL, (June 27, 2014), available at <https://www.wsj.com/articles/the-world-rankings-of-flopping-1403660175>.

⁴ 21 Congressional Record 2456 (1890).

⁵ *Id.*

⁶ *Id.* at 2460.

views to prohibit unlawful combinations, the executive branch executes that power by commencing suits to restrain such combinations, and the judicial branch interprets the law to determine the precise line between lawful and unlawful combinations, thereby imposing some checks on the law enforcers.

This commitment to separation of powers in the antitrust context is part of the larger understanding of judicial review in the U.S. constitutional framework. In *Marbury v. Madison*, a landmark U.S. Supreme Court case from the founding era, Chief Justice John Marshall famously declared that, “[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”⁷ The predicate to that pronouncement is the role of the Executive Branch in enforcing the law. It is emphatically the province and duty of the Justice Department to invoke the power of the national government to enforce the law, including the antitrust laws. Because only cases and controversies are subject to judicial review, as law enforcers, we at the Antitrust Division provide a critical gatekeeping function in exercising our discretion by challenging certain mergers and pursuing conduct that we believe in good faith will result in anticompetitive harm. The combination of a federal enforcement action and judicial review of that action is the essence of shared power in antitrust enforcement in the United States.

Such pronouncements may seem so elementary that they are hardly worth declaring. But they reflect the constitutional principles of judicial review in antitrust enforcement.

Let me now address this issue from the international perspective. Judicial review by an independent court can be an important check in antitrust enforcement. The ICN Guiding Principles recognize the importance of judicial review, stating that “[c]ompetition agency enforcement proceedings should include the right to seek impartial review by an independent judicial body.”⁸ This pronouncement is consistent with general international norms. The United Nations has affirmed that “everyone shall have the right to be tried by ordinary courts or

⁷ *Marbury v. Madison*, 5 U.S. 137 (1803).

⁸ ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (Mar. 2018) available at <http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf>.

tribunals using established legal procedures.”⁹ As for judicial independence, the United Nations has declared that:

The independence of the judiciary shall be guaranteed by the State.... The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.¹⁰

In the antitrust context, judicial review by independent courts has a number of benefits.

First, judicial review of multiple cases over time helps promote stability and continuity. This stability affords businesses and consumers the predictability necessary to make plans and investment decisions with a high degree of confidence. As I said the last time I spoke in China, “business blossoms in the light of clear guidance, and withers in the fog of cloudy decisions.”¹¹

With competition laws, the judiciary has a common law mandate to apply and develop the law, recognizing and adapting to changed circumstances and accumulated experience.¹² In this sense, judicial review promotes the incremental development of the law, imposing a moderating effect on challenges to longstanding practices based on revolutionary impulses. Distributing power in this way, in Edmund Burke’s words, “interpose[s] a salutary check to all precipitate resolutions [and] render[s] deliberation a matter not of choice, but of necessity ... mak[ing] all change a subject of compromise, which naturally begets moderation.”¹³ The thrust of change is tempered by the sharing of power.

⁹ UN Basic Principles on the Independence of the Judiciary, 7th UN Conference on the Prevention of Crime and the Treatment of Offenders, G.A. Res. 40/32, art. 5, (Nov. 29, 1985).

¹⁰ *Id.*, arts. 1-2; *see also* International Commission of Jurists, International Principles of the Independence and Accountability of Judges, Lawyers, and Prosecutors—A Practitioners Guide, (2007).

¹¹ Roger Alford, “Charting a Straight Course: Promoting Transparency and Procedural Fairness in Competition Enforcement,” (August 30, 2017), <https://www.justice.gov/opa/speech/file/994671/download>.

¹² *State Oil Co. v. Khan*, 522 U.S. 3, 20-21 (1997); *National Soc. Of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the ‘Common Law’ Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).

¹³ Edmund Burke, *Reflections on the Revolution in France* (1791); *see generally* Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 372-374 (2006); Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 674-681 (1994).

Second, judicial review enhances the credibility and legitimacy of competition authorities. By subjecting agency decisions to judicial scrutiny by independent courts, competition authorities promote their reputation for adhering to sound antitrust enforcement and fundamental procedural norms. It means that competition authorities only will pursue cases they believe they can win. It also means that when they don't succeed even after appellate review, they show respect for the rule of law. It sounds counterintuitive to say that a competition authority's reputation is enhanced even when it loses, but at a fundamental level, it is true.

A final benefit of judicial review is that sometimes it has the potential to yield more accurate results than an agency might produce on its own. Subjecting competition authorities to judicial scrutiny enhances the agency incentives to secure the right result. It also affords an additional layer of analysis in the decision-making process.

III. Meaningful Judicial Review

If the courts are to play their essential role in promoting the rule of law in antitrust enforcement, it is critical that parties have meaningful judicial recourse. It means defendants can access the courts without encountering unreasonable procedural hurdles or delays. And it means that the courts are independent and impartial, free of corruption and undue government influence.

Parties must perceive that they have genuine freedom to challenge an adverse decision without undue burden. If the barriers to seeking review are too high, even the most independent and impartial court is of little value.

Timely resolution of disputes also is a fundamental norm in antitrust enforcement. Of course, sometimes the source of the delay is outside the government's control, and parties have no room to complain about their own strategic inertia. But otherwise, competition authorities and the courts have a responsibility to resolve cases within a reasonable time period.

Third, judicial review is meaningful only when it is conducted by independent, impartial, and competent judges. There is little solace in knowing that agency action is subject to judicial scrutiny if the courts are corrupt or captured. Surveys indicate that judicial independence and

access to justice falls along a spectrum, with some courts entirely independent from government influence, and others independent in name only.¹⁴

Taken together, these pillars of meaningful judicial review support a system in which courts play their rightful role in promoting the rule of law.

IV. **China and Judicial Review**

Here in China, there has been a great deal of change in recent years with respect to promoting the rule of law, including in the context of antitrust enforcement. China's Anti-Monopoly Law is just a decade old and competition law is now a fundamental part of Chinese economic legislation. Today, China has an active antitrust enforcement regime, which affords us welcome opportunities to cooperate. We have been closely monitoring the developments in China and look forward to working with our counterparts at the State Administration for Market Regulation (SAMR) in the coming years. The creation of a new competition agency and the amendment of its competition law presents China with a golden opportunity to redouble its commitment to fundamental due process.

The Chinese judicial system is developing as a profession. Scholars have noted that Chinese judges today are more qualified and better trained than any other cohort of judges in modern Chinese history.¹⁵ Judicial applicants must now meet higher educational standards, pass a unified national exam, and undergo training before they assume their posts. Similar to judges in many European countries, they pursue the judicial path from the early stages of their career, and slowly move up the ladder within the judicial hierarchy.¹⁶

As scholars have recently noted, particularly in major urban centers, Chinese judges have the financial resources and necessary staff to perform their duties in a professional manner. An evolution is occurring with Chinese judges developing a professional identity that encompasses (1) expertise in the law; (2) formulation of judgments based on the law; (3) skill in evidentiary

¹⁴ World Economic Forum, Global Competitiveness Report, Judicial Independence (2017-18); World Justice Project, Rule of Law Index, 38 (2017-18), available at <https://worldjusticeproject.org/our-work/wjp-rule-law-index/wjp-rule-law-index-2017%E2%80%932018>.

¹⁵ KWAI HANG NG AND XIN HE, EMBEDDED COURTS: JUDICIAL DECISION-MAKING IN CHINA, 66-82, 194-201 (2017).

¹⁶ *Id.*

analysis and judicial writing; and (4) greater access to legal research and clerical help.¹⁷ Particularly in commercial and competition cases, a greater focus on rule-based judicial decision-making is a valuable development.

In this regard, it is worth emphasizing that the Supreme People’s Court is spearheading efforts at judicial reform. As Madame Tao Kaiyuan, Vice President of the Chinese Supreme People’s Court, said at a Brookings Institution speech, “to complete the building of a moderately-prosperous society in all respects calls for the rule of law.”¹⁸ Reform of the Chinese legal system is a key part of that effort, because as she put it, “[j]udicial justice is the most important index of social justice, and judicial injustice is a blow to social justice.... The purpose [of judicial reform] is to make people feel fairness and justice in any judicial case.”¹⁹

In our recent joint dialogue this past February, we had the good fortune to meet with Madame Tao and some of her colleagues at the Supreme People’s Court. The Antitrust Division strongly supports their efforts to promote the rule of law and judicial reform in the Chinese legal system. We warmly welcome the opportunity to continue the China-U.S. judicial dialogue that began in August 2016, and look forward to discussing these and similar developments with our Chinese colleagues.

The realization of judicial professionalism and the guarantee of judicial independence is a worthy mandate for every government.

V. Promoting Procedural Due Process in Antitrust Enforcement

In conclusion, as I mentioned earlier, judicial review is one aspect of a much larger initiative to promote procedural due process in antitrust enforcement. With nearly 140 competition agencies, and increased international commerce, it is more and more critical that we

¹⁷ *Id.* at 198.

¹⁸ Madame Tao Kaiyuan, *Rule of Law in China*, Brookings Institution, (Jan. 28, 2015), available at <https://www.brookings.edu/events/rule-of-law-in-china-speech-by-madame-tao-kaiyuan-vice-president-of-chinas-supreme-peoples-court/>.

¹⁹ *Id.*

share a common set of principles that affords due process to individuals and businesses in investigation and enforcement.

We are encouraged by the important work of the OECD and ICN in promoting due process. We will actively support every effort within these organizations to highlight the importance of due process. That includes adopting ICN recommended practices and OECD recommendations to address procedural fairness.

It also means exploring new ways to promote due process among competition authorities. In that regard, as Assistant Attorney General Delrahim announced on June 1, 2018, we have recently begun discussions with competition authorities around the globe about a Multilateral Framework on Procedures in Competition Investigation and Enforcement (“MFP”).²⁰ As AAG Delrahim discussed, the MFP is “open to every competition authority around the world” with negotiations proceeding “toward a strong document at a brisk pace,” with “inclusive input from others.”²¹

Earlier this month, we met in Paris on the edges of the OECD meeting to discuss a draft that reflects a common core of fundamental practices. We have been diligently working with agencies from common and civil law traditions to revise the draft to incorporate changes and contextualize commitments. We are confident that the Paris Draft of the MFP accurately reflects a common core of current practices of leading competition agencies from around the world.

The MFP will serve as the basis for continued discussions with competition authorities that have expressed an interest in negotiating towards its conclusion. Our goal is to continue to reach out to competition authorities to encourage them to join the process and facilitate any necessary negotiations in the coming months.

²⁰ Makan Delrahim, “Fresh Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement,” (June 1, 2018), <https://www.justice.gov/opa/speech/file/1067582/download>.

²¹ *Id.*

We welcome and look forward to discussing the MFP with our Chinese counterparts at SAMR whenever is best for them, as well as other competition authorities from around the world.

Thank you.