19TH ANNUAL ANTITRUST SYMPOSIUM: KEYNOTE PANEL DISCUSSION

Moderator: ***Terry Calvani****, Of Counsel, Freshfields Bruckhaus Deringer US LLP*

Panelists: ***Abbott (Tad) Lipsky, Jr.****, Partner, Latham & Watkins LLP*
Dr. Frank Montag*, Partner, Freshfields Bruckhaus Deringer LLP*
Randy Tritell*, Director, Office of International Affairs, Federal Trade Commission*

INTRODUCTORY COMMENTS

Todd Zywicki: Welcome to the Nineteenth Annual *George Mason Law Review* Antitrust Symposium. I am Todd Zywicki, the Executive Director of the Law and Economics Center. I want to welcome all of you. I especially want to welcome the members of the Attorneys General Education Program. Thank you for being here.

I'm not going to say much other than that. Just to say welcome to all of you, and express my delight at the LEC's ongoing partnership now for many years with the *Law Review* with respect to this program, which is one of the highlights of the year both as part of the Attorneys General Education Program as well as educationally. And especially thank this group of law review editors. You've done a fabulous job putting this together, thinking about it, organizing it, and everything else.

With that, I will turn it over to the fabulous leader of this fabulous team, Elise Nelson, who is the Symposium Editor of the George Mason Law Review. Elise?

Elise Nelson: Good morning. On behalf of the *George Mason Law Review*, I would like to welcome you all to our Nineteenth Annual Antitrust Symposium: Antitrust in an Interconnected World. We have a really exciting program for you today. We're excited about all of the panels and keynotes, and we're so happy that you could join us.

Today wouldn't have been possible without a few key people. First, we would like to thank the Law and Economic Center for their continued partnership with us over the past few years. Second, a huge thank you to our wonderful sponsors: Freshfields Bruckhaus Deringer and Charles

River Associates. Without your support, today wouldn't be possible. Finally, on a personal note, I would like to thank Josh Wright, Judge Douglas H. Ginsburg and Terry Calvani for their support, ideas, and constant encouragement throughout this entire process. The mentoring and guidance each of you provided me was truly monumental in shaping our great program today.

Speaking of Mr. Calvani, he is the commentator for today's morning keynote: Exploring Due Process and Antitrust. Terry Calvani is Of Counsel in the Washington D.C. office of Freshfields Bruckhaus Deringer. His reputation speaks for itself. So, without further ado, Terry will take it away with the morning keynote.

PANEL DISCUSSION

Calvani: Thank you very much. Good morning, ladies and gentlemen. If I were to give you an assignment this morning and ask you to go into the law library and collect the materials addressing the appropriate standards for measuring price predation, at the end of the day each of you would come back with a little red wagon filled with paper. Countless trees would have lost their lives to printing these materials. Much ink spilled. If I were to ask you to take your red wagons back into the library to collect everything on the appropriate standards for measuring anticompetitive effects in horizontal mergers, again, you would come back with reams of paper.

If, on the other hand, I ask you to go into the library and bring back the literature on process values or due process in competition law cases, you would come back with very, very little paper. The reason for that is that the antitrust community has been fascinated with the substance of antitrust law, but we've paid precious little attention to process and process values.

Today we are going to open this program by focusing on those issues. I suspect that all of us, if we pause for a few moments, would conclude that process can be just as outcome determinative as substance. We begin looking at Europe. Next we'll examine international efforts to foster due process, focusing principally on the ICN, to see what's taking place internationally as people think about these issues. Lastly, borrowing from Vladimir Ilyich Lenin's book,

What is to be Done?,[1] we'll consider what the future has to hold.

Our speakers today need no introduction. Leading off will be Frank Montag, a partner at Freshfields, resident in the Brussels office, but also, as you probably know, the president of the Studienvereinigung Kartellrecht. Frank needs no introduction. Importantly for today's program, this is a topic that Frank has thought about for a long time. He wrote one of the very first articles in Europe on due process at the European Commission.

We then turn to what's taking place internationally with Randy Tritell, who is the head of the international section at the U.S. Federal Trade Commission. I think it is no exaggeration to say that if you were to list those people that have been instrumental in the development of the ICN, Randy Tritell would be at the top of that list. He might share the place with two or three others, but he would be on everyone's first list. Mr. ICN.

Then, we will conclude with a presentation on the future of this issue in the international competition community by Tad Lipsky. Tad is a partner at Latham & Watkins here in Washington D.C. Tad is not only an excellent practitioner with whom I've had the honor of working on a good number of cases, but he's also a very thoughtful commentator.

Well, you didn't come to hear me. You came to hear the panelists. And so let's begin by moving to Europe. Frank, would you take the lead?

Montag: Terry, thank you very much for the introduction. Good morning, everybody. Thank you very much for inviting me to speak on a topic which, for once, is in the comfort zone of lawyers—economists usually don't criticize us for talking about due process and not understanding what's going on (as it happens not infrequently in competition cases). So, I'm very happy to speak about due process and our experience in Europe.

Sometimes when you think about due process, you feel that this is kind of an Anglo-Saxon invention that may have originated in the United Kingdom, and then spilled over to the United States, Canada, etc. And it is true. When you look at the origins of due process, you probably can go back as far as the Magna Carta. Tad and I had a little de-

---

[1] VLADIMIR ILLYICH LENIN, WHAT IS TO BE DONE? (Joe Fineberg & George Hanna trans., 1990) (1902).

bate last night about where in the Magna Carta you might find it as there are several places where you may find traces of it. So, there are clearly origins in the U.K.

Due process also has origins in continental Europe, especially in the French and the German legal tradition. I have brought you a quote from the German nineteenth century scholar and philosopher, Rudolf Jhering, who said that, "Form is the sworn enemy of arbitrariness, the twin sister of liberty."[2] He wasn't speaking about form in the sense of the normal social interaction between people, but about form in the way a government or a court deals with a matter.[3] He was arguing that observing a strict form would prevent arbitrary decisions. That is clearly one of the principles of due process in Europe.[4]

We then tried to identify a comprehensive definition of what due process actually means. Referring to what Terry said about going to the library and coming back with very little, to be honest, we came back with nothing. Nowhere, neither in the U.K. nor in continental Europe, could we find someone who had attempted a comprehensive definition of what due process means. From the European perspective, I think we can say there are certain elements that are commonly understood to be part of due process. It is the duty of an authority to follow the decision-making process determined by law, so the legislator has applied the process through which a goal can be achieved. Part of due process is to give notice to the target of investigation, why the target is being investigated, and what the charges are all about.[5] Furthermore, the target of an investigation must be provided access to the file, access to witnesses, and be allowed the right to defend himself.[6] The authority must also hear the defenses of the target.[7] The authority then must draft a decision based on clear reasoning, logic, and analysis.[8] Finally, the subject of such decision should have a

---

2 Jürgen Schwarze, *Judicial Review of European Administrative Procedure*, 68 LAW & CONTEMP. PROBS. 85, 85 (2004) (quoting RUDOLF VON JHERING, GEIST DES *RÖ*MISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN DER ENTWICKLUNG II, 471 (3d ed. 1874)).

3 *See id*. at n.1.

4 *Id*. at 85.

5 *See* David E. Shipley, *Due Process Rights Before EU Agencies: The Rights of Defense*, 37 GA. J. INT'L & COMP. L. 1, 12–13 (2008).

6 *Id*. at 13.

7 *Id*. at 41–42.

8 *Id*. at 43.

right to appeal the decision to an independent court.[9] These are the elements identified in legal literature in Europe when you try to find out what due process means; however, these elements are not comprehensive, and due process could mean more than that.

I also understand from our research for a comprehensive definition of due process that in the United States, you have a distinction between procedural and substantive due process. I leave that distinction to my American colleagues to explain. As far as I can see from the European perspective, when American lawyers speak about substantive due process, we would probably speak about competence, i.e., does an authority have the competence conferred to it by law to adopt certain decisions or take certain measures, or does the legislator have the competence to enact certain laws under the relevant constitution.

What is relevant for us this morning is procedural due process and the rules of procedure that govern antitrust investigations. Let me illustrate that with a few examples from the world of anti-cartel enforcement and merger review.

First, anti-cartel enforcement. In the European Union, starting in the seventies, we had a long line of cases where the European Commission adopted ever-increasing fines.[10] There was a debate centered on whether or not the European Commission was sufficiently scrutinized when it made these decisions, and whether we should have a system similar to the one in the United States, where the DOJ cannot impose a fine in a cartel investigation, but instead must ask a court to do so.

The European Court of Justice and the Court of First Instance reacted in a number of high-profile cases in the early nineties, crushing the Commission's decisions without any mercy. I have listed a few on this slide: the *PVC Cartel* case,[11] the *Wood Pulp* cartel case,[12] and the *Cement* case.[13] The most striking was the *PVC* case for a number of rea-

---

9 *Id.* at 10 (citing Case C-49/88, Al-Jubail Fertilizer Co. v. Council, 1991 E.C.R. I-3187).

10 *See* Maurice Guerrin & Georgios Kyriazis, *Cartels: Proof and Procedural Issues*, 16 FORDHAM INT'L L.J. 266, 271 (1992).

11 Case C-137/92, Comm'n v. BASF, 1994 E.C.R. I-2629.

12 Joined Cases C-89, 104, 114, 116, 117, 125–129/85, Ahlstrom Osakeyhtio v. Comm'n, 1993 E.C.R. I-1575 [hereinafter *Wood Pulp* Case].

13 Joined Cases C-204, 205, 211, 213, 217, & 219/00, Aalborg Portland v. Comm'n, 2004 E.C.R. I-403 [hereinafter *Cement* Case].

sons. The decision in that case had been discussed by the College of Commissioners, but then they delegated the final version to their staff in only certain language versions. In the EU, a decision needs to be taken in each of the languages of each of the targets who are the subjects of a decision.[14] So, if you have companies from five different countries with five different languages, you have to have five decisions taken by the College of Commissioners in each relevant language. That task had been delegated to the Commissioner of Competition, who had finally signed the decision at a point in time when he was no longer in office.[15]

The Commission was unable in a trial before the Court of Justice to produce an original decision that had actually been adopted by the people who should have adopted it.[16] You can imagine there was very scathing criticism. First, by the Court of First Instance, who claimed that the decision was nonexistent because it was affected by such grave errors in law that it wouldn't even exist as such;[17] then the European Court of Justice with the wisdom of the higher court found that the decision was not nonexistent, but it was "only" null and void.[18]

The whole procedure lasted nineteen years from the inspection visit of the Commission at the companies' premises until the final decision of the Court of Justice. That is the second significance of this decision; it covered a good part of my career. I started the case as a young trainee, and I was the Senior Partner when it finally was completed. I said at that time to the court, "I'm very happy that after nineteen years this case will finally be over, but I'm also very sad, because I had hoped to retire on it." The *Wood Pulp* and *Cement* cases dealt with the issue that certain evidence had not been disclosed to the parties, but was used by the Commission in the decision.[19] The Statement of Objections, which is a document containing all of the objections which the Commission has, is issued after closing the investigation but before issuing a decision. Its purpose is to

---

14 Case C-137/92, Comm'n v. BASF, 1994 E.C.R. I-2629, ¶ 10–11.

15 *Id.* at ¶ 13–14.

16 *Id.* at ¶ 75–77.

17 Joined Cases T-79, 84, 85, 86, 89, 91, 92, 94, 96, 98, 102, & 104/89, BASF v. Comm'n, 1992 E.C.R. II-318, ¶ 100.

18 Case C-137/92 P, Comm'n v. BASF, 1994 E.C.R. I-2629, ¶ 51–53.

19 *See Cement* Case, 2004 E.C.R. I-403, ¶ 4–5; *Wood Pulp* Case, 1993 E.C.R. I-1575, ¶ 39–40.

provide companies with the chance to defend themselves and make their views known. In the two cases, the Statement of Objections did not contain all of the objections that were ultimately stated in the decision, thus the court crushed these decisions as well.[20]

What happened after these judgments was that the EC rules on cartel investigations were upgraded. The Notice on access to the file was published by the European Commission which set out in greater detail the rights of the defendants to see the evidence in the Commission's file.[21] At the same time, the role of the Hearing Officer, which before had just been a gentleman conducting the oral hearing after the issuing of the Statement of Objections, was enhanced as an arbiter for all procedural questions during the investigation.[22] He is no longer part of the Directorate General for Competition, but instead reports directly to the Commissioner.

This came at about the same time when the European Union introduced a leniency policy following the example of the United States. As a result, the cases became much more solid because the evidence was there. Lots of companies applied for immunity or leniency and provided the Commission with all of the evidence. At the same time, these new procedural rules allowed the Commission to adopt more sound decisions.

During the last ten to fifteen years, we have seen a return to the old debate as to whether the European Commission should be the prosecutor, judge, and jury in these cases. Why? Because the fines imposed in today's cartel proceedings sometimes go well beyond $1 billion on individual companies.[23] They are so high that questions are being raised as to whether such significant fines should even be set by a court, and whether the judicial review system we currently have is sufficient to act as a counterbalance to this power of the Commission, particularly because cartel cases and competition cases in general involve complex eco-

---

20 *Cement* Case, 2004 E.C.R. I-403, ¶ 74–76; *Wood Pulp* Case, 1993 E.C.R. I-1575, ¶ 43–46.

21 Commission Notice on the Internal Rules of Procedure for Processing Requests for Access to the File in Cases Pursuant to Articles 85 & 86 of the EC Treaty, Articles 65 & 66 of the ECSC Treaty and Council Regulation (EEC) No 4064/89, 1997 O.J. (C 23) 3, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51997XC0123(01)&from=EN.

22 Decision 2011/695, of the President of the Commission, 2011 O.J. (L 275) 29, ¶ 8, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011D0695&from=EN.

23 *See, e.g.*, Commission Press Release IP/16/2582, Antitrust: Comm'n Fines Truck Producers € 2.93 for Participating in a Cartel (July 19, 2016), http://europa.eu/rapid/press-release_IP-16-2582_en.htm.

nomic facts. The European Commission has a high margin of appreciation of such facts, which the courts will not look at.

Then the European Court of Human Rights, which is not part of the European Union, but set up under a separate treaty, was ask to look at the Italian system of enforcing competition law and the granting of a right to appeal to a court. In the famous *Menarini* case,[24] the court said that the Italian system was compatible with the right to a fair trial under the European Human Rights Convention, because the Italian courts would be able to examine in detail the facts and the law of the decision and reverse it.[25] Since the Italian system is quite similar to the European system, everybody in the EU institutions said, "Wonderful. Our system is in line with the Human Rights Convention so that we can maintain it."

But there is a lot of doubt as to whether the courts really exercised the type of control demanded by the Court in *Menarini* in the past. In view of the *Menarini* judgment the European Courts, i.e. the Court of First Instance, now called the General Court, and the European Court of Justice have become strict again. The Commission recently lost a number of cartel cases, which it hadn't done for a long time. The most prominent one, which you have all heard about, is the *Air Cargo Cartel* case,[26] where the Commission fined numerous airlines for creating a cartel on fuel surcharges and other charges.[27] It was crushed by the courts for its sloppiness, because the operative part of the decision containing the findings was not in line with what the Commission explained in the body of the decision.[28] The issue was whether there was a so-called single and continuous infringement. I won't bore you with the details as they are not relevant here.

---

24 *See* Menarini Diagnostics S.R.L. v. Italy, 43509 Eur. Ct. H.R. 08 (2011).

25 *Id.*

26 Case T-67/11, Martinair Holland v. Comm'n (Dec. 16, 2015), http://curia.europa.eu/juris/docment/document.jsf?text=&docid=173081&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=358679.

27 *Id*.

28 General Court Press Release 147/15, The General Court Annuls the Decision by Which the Comm'n Imposed Fines Amounting to Approximately € 790 million on Several Airlines for Their Participation in a Cartel on the Airfreight Market (Dec. 16, 2015), http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-12/cp150147en.pdf.

There are two other cases which were recently decided against the Commission. *Soliver*[29] is a case concerning the Car Glass Cartel where the question was whether the Commission correctly found a single and continuous infringement.[30] Then there was the *Deutsche Bahn* case,[31] where the Commission ordered an inspection of Deutsche Bahn. The Commission identified one objection to be investigated, but also looked at other things, which the court said was illegal.[32]

So, in the cartel enforcement area, we have seen waves of strict and not so strict scrutiny of Commission decisions by the European courts. In the early nineties a lot of decisions were being crushed. Then the rules for conducting cartel procedures were improved and the leniency policy was introduced. For a long time, decisions remained unchallenged or the Commission won them in court. Finally, after *Menarini*, the pendulum swung back and the court is again scrutinizing Commission decisions more.

This relationship between the level of rigor of the Commission and court intervention is also visible in the merger field. *Annus horribilis* was 2002, where the European Commission lost three major prohibition cases in court, namely the cases of *Airtours*,[33] *Schneider*,[34] and *Tetra Laval*.[35] The European Court of First Instance, known as the General Court today, was very dismissive. I've got the quote here where the court found in *Schneider* that "the errors, omissions and inconsistencies which [the Court] has found in the Commission's analysis of the impact of the merger" are of "undoubted gravity".[36] To say it more clearly, the Commission had been extremely sloppy.

What followed then was an upgrade in the decision-making process in the Commission with respect to the procedure and the internal safeguards that the Commission applies be-

---

29 Case T-68/09, Soliver NV v. Comm'n (Oct. 10, 2014), http://curia.europa.eu/juris/document/docment.jsf?text=&docid=158470&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=359859.

30 *Id.* at ¶ 9.

31 Joined Cases T-289, 290 & 521/11, Deutsche Bahn AG v. Comm'n (Sept. 6, 2013), http://curia.europa.eu/juris/document/document.jsf?text=&docid=140725&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=360111.

32 *Id.* at ¶ 5.

33 Case T-342/99, Airtours v. Comm'n, 2002 E.C.R. II-2592.

34 Case T-310/01, Schneider Electric v. Comm'n, 2002 E.C.R. II-4075.

35 Case T-5/02, Tetra Laval v. Comm'n, T-5/02, 2002 E.C.R. II-4389.

36 Case T-310/01, Schneider Electric v. Comm'n, 2002 E.C.R. II-4075, ¶ 404.

fore making a decision. First of all, the Office of the Chief Economist was created similar to the Chief Economist that you would see in the U.S. agencies.[37] Ph.D. economists were hired to work with the Chief Economist. At the same time, so-called peer review panels were created where officials who do not have anything to do with the case at hand would provide a fresh pair of eyes to review and test the officials who are working on the case.[38] The role of the Hearing Officer was enhanced in that the Hearing Officer can make decisions with respect to disputes about procedure between the parties and the European Commission.[39]

We have not seen the annulment of any merger decision since that time, with the exception of one where the decision was crushed because of a complainant who did not like that the transaction had been cleared.[40] It was retaken by the Commission afterwards. That was not an annulment decision of the Commission, but that was a decision that had cleared a merger.[41]

Some say that one strong reason is that the system, which allows the Commission to be the investigator and the decision maker, is flawed in itself. Unlike the U.S. system, where you need to go to court if you want to prohibit a merger, in the EU, the European Commission can make that decision and can prohibit the merger unilaterally. The dynamics of merger review are usually such that companies don't have the time to go through lengthy court proceedings and therefore do not appeal the decisions of the Commission except in rare cases.

This brings me to my conclusion. Due process in Europe is always about striking the right balance: intrusive investigatory powers, wide discretion in the setting of a fine, and the appreciation of complex economic facts must be counter-

---

37 Mario Monti, Comm'r, EU Competition Policy, Address at Fordham Annual Conference on International Antitrust Law and Policy (Oct. 31, 2002), http://europa.eu/rapid/press-release_SPEECH-02-533_en.htm?locale=en.

38 Mario Monti, Comm'r, EU Competition Policy, Address at Fordham Annual Conference on International Antitrust Law and Policy (Oct. 24, 2003), http://europa.eu/rapid/press-release_SPEECH-03-489_en.htm.

39 *Id.*

40 Case 452/04, Éditions Odile Jacob v. Comm'n (Sept. 13, 2010), http://curia.europa.eu/juris/document/document.jsf?text=&docid=82797&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=369752.

41 *See* Court of Justice Press Release 5/16, The Court Dismisses Odile Jacob's Appeal in the Case Concerning Lagardere's Purchase of Vivendi Universal Publishing (Jan. 28, 2016), http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-01/cp160005en.pdf.

balanced with a high requirement of factual accuracy and procedural fairness.

I believe that we can expect after the recent losses in *Air Cargo Cartel* and other cases that the Commission will once again be forced to upgrade its cartel enforcement and the way they apply the procedural rules in cartel enforcement cases. It has yet to be seen what the impact of the use of the settlement procedure will be on that. As you may be aware, for a number of years there has been the possibility to settle cartel cases and you get a shortened decision against a reduction of the fine. Obviously when there is a settlement in a cartel case, the companies don't challenge that settlement decision.

In court we now have the first challenge ever of such a settlement decision.[42] Obviously the settlement negotiations allow the Commission to paper over certain procedural defects that might have occurred in the meantime.

I have not mentioned dominance cases at all. The Commission has never lost a dominance case in court, even though this is where economists are most critical of what the Commission has been doing. The Courts have been very, very formal and conservative on how they look at these cases. We will possibly see a development in the not-too-distant future, because in its appeal of the decision by the General Court, Intel raises one procedural issue, and that complaint may say that they should have been made aware of an interview with a customer, Dell, which was favorable to them and they weren't given access to that.[43]

One final point: the European Commission has started a consultation to empower National Consultation Authorities.[44] What they are saying is that the National Competition Authorities in the EU—the twenty-eight—are under an obligation to apply EU law if the case is subject to EU law. But that National Authorities do not have the same powers everywhere, and therefore they want to harmonize the powers which the National Authorities have to apply—EU

---

42 *See* Case C-411/15, Timab Industries & CFPR v. Comm'n (Ct. of First Instance May 20, 2015) *appeal filed* July 27, 2015; Patrick Harrison, *Timab Litigates Settlement All the Way to the CJEU*, WOLTERS KLUWER: KLUWER COMPETITION BLOG (Sept. 21, 2015), http://kluwercompetitionlawblog.com/2015/09/21/timab-litigates-settlement-all-the-way-to-the-cjeu/.

43 *See* Lisbeth Kirk, *EU Accused of Unfair Play On Intel Case*, EUOBSERVER (Aug. 10, 2009), https://euobserver.com/economic/28537.

44 European Commission Press Release IP/15/5998, Antitrust: Commission Consults on Boosting Enforcement Powers of National Competition Authorities (Nov. 4, 2015), http://europa.eu/rapid/press-release_IP-15-5998_en.htm.

law and the profit bar. The associations among them have said, "[a] very good point, but if you do that you also have to harmonize the due process role, and you also have to harmonize the rules on things like legal privilege, access to the file, the right to a Statement of Objections, the right to be heard, etcetera." The Commission didn't have that in mind. We will see whether they will take this criticism on board.

Calvani: Thank you very much, Frank. Excellent review on what's taking place in Europe. Randy, let's cast a broader net. What's happening at the ICN and elsewhere around the world?

Tritell: Thanks, Terry. Good morning. Thanks to *George Mason Law Review* for having me and to Elise and Josh, who I'm sorry couldn't join us, for having me back. I very much enjoyed participating in this forum last year and was enriched by the excellent discussion. I look forward to another invigorating day here today.

In the event I inadvertently express any views, please know that they are my own and not attributable to my employer, the Federal Trade Commission, or any of its commissioners.

I am glad that the Symposium is featuring this topic, which is becoming increasingly prominent on the international antitrust agenda – in my view, for good reasons. I would like to, first, talk about why this topic is important, then focus on international efforts in particular, and then say a few words about the challenges that remain in the due process area.

As Terry alluded to, as antitrust has spread very quickly around the world, much of the focus has been on the differences in substantive antitrust law and the potential for conflicts. As cross-border investigations have increased, multinational firms have encountered very different notions of process and investigational procedures around the world. That has led companies and officials to ask whether there should be some common understanding of best practices or fundamental rules governing process in competition investigations.

This is of course a great concern to the companies that are subject to these processes, but also, I want to stress, is or should be of paramount importance to the enforcement community.

Most if not all agencies are governed by some laws or rules that say what their process should be and it is obviously important for them to observe them. I think most if not all enforcers also believe in a good government notion that fairness, transparency, and predictability are important values that they should uphold.

But there are a variety of additional practical reasons why agencies and enforcers should care about these principles. Transparency about one's law and rules to stakeholders and the public is important for agencies, perhaps especially younger agencies that are trying to establish themselves.

Having good process is important for administrative efficiency. It facilitates better agency case management. It allows the enforcement team to focus on the key issues, narrowing areas of disagreement and enabling the agency to allocate its scarce resources more efficiently.

Thus, good process helps the agency substantively. It enables the agency to learn the facts about the conduct or transaction they're investigating, to test its legal and economic theories, to design appropriate remedies, and to lessen error costs. I know that at the FTC, our interaction with parties enables our staff and Commissioners to have a much better understanding of the case, ultimately producing better decisions.

It also prevents surprises. At an ICN session that the FTC hosted on procedural fairness, our Competition Bureau Director, Debbie Feinstein, noted, "If the respondents have a good argument, I don't want to hear it for the first time when I go to court."

Good process also facilitates better cooperation by parties, and therefore better compliance. It allows the parties to better focus their documents, their studies, and their proposed remedies.

Protecting confidential information makes it more likely that parties will be forthcoming in submitting confidential business information to the agency. Conversely, a lack of good protection will impede the agency's ability to obtain probative information.

Having good process also facilitates cooperation with counterpart agencies around the world. We have had dealings with other agencies on a case we're mutually investigating where they lacked some information that we had because they failed to engage with the parties. That can lead to different analyses, even different outcomes and different

> remedies, thereby impeding our key goal of convergence and consistent outcomes.
>
> Having good process also can facilitate settlements that can save both the parties and the agency from expensive litigation.
>
> Importantly, maintaining good process is key to an agency's legitimacy. A perception that investigations are conducted with proper respect for procedural rights enhances the credibility of competition agencies with the parties, other stakeholders, the public, and governments. This is especially true where competition regimes are not well established. Conversely, process perceived to be unfair will lead to perceptions that the agency is not acting legitimately and will likely ultimately impede the agency from achieving its goals.
>
> Finally, if firms feel that they are treated unfairly, they're not just going to sit back and say, "That's too bad" but will likely take their case to other parts of government, which risks taking antitrust issues out of the hands of competition officials and risks politicizing them.
>
> I hope I have persuaded you that we take these due process issues very seriously, and all enforcers should do the same.
>
> At the FTC, procedural fairness has become an important part of our international agenda. Those of you who have followed the speeches of our chairwoman and commissioners have seen our chairwoman emphasizing key aspects of due process in speeches, like the one she gave in Beijing on the importance of access to legal representation, notice of the factual and legal basis of investigations, access to the evidence on which the agency relies, and direct and meaningful engagement with staff and decision makers at key points in the investigation, as well as internal checks and balances at the agency.[45]
>
> Our commissioners—for example, Commissioner Olhausen in Beijing[46] and Commissioner McSweeney in

---

45 Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at the Antitrust in Asia Conference: Core Competition Agency Principles: Lessons Learned at the FTC (May 22, 2014), https://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

46 *See* Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, Remarks at China Competition Policy Forum: Nurturing Competition Regimes: Evaluation and Evolution (July 31, 2013). https://www.ftc.gov/sites/default/files/documents/public_statements/nurturing-competition-regimes-evaluation-and-evolution/130731comppolicychina.pdf.

> Europe[47] – have similarly emphasized these points. And our staff, in our Office of International Affairs and elsewhere in the FTC when they're on the road, take the opportunity to emphasize the importance of good process.
>
> We have done this in numerous programs, for example recently with enforcers in Asia, Eastern Europe, and South Africa. Our colleagues at the Department of Justice Antitrust Division have done likewise.[48]
>
> You will also see provisions that address procedural protection in competition investigations in the more recent free trade agreements that the United States has negotiated, such as in the competition chapter of the proposed Trans-Pacific Partnership Agreement.[49]
>
> Process issues have also taken center stage in the multilateral competition fora. In 2012, at the initiative of the FTC, the ICN added procedural fairness to its agenda.[50] The FTC partnered with the EU's DG-Competition to chair the project with the objective of increasing understanding among ICN members of how different investigative processes contribute to enhancing the effectiveness of agency decision making by ensuring protection of procedural rights.
>
> The project was based on the premise that, while the expression of procedural fairness can differ based on differing legal systems and cultures, certain elements are fundamental. Thus, the ICN Guidance on Investigative Process states, "There is a broad consensus among ICN members regarding the importance of transparency, engagement and protection of confidential information during competition investigations."[51]

---

47 *See* Terrell McSweeny, Comm'r, Fed. Trade Comm'n, Remarks at King's College: Procedural Fairness in Competition Law Enforcement and the FTC Experience (Oct. 23, 2015), https://www.ftc.gov/system/files/documents/public_statements/836913/mcsweeny_-_kings_college_remarks_10-23-15.pdf.

48 *See, e.g.*, Christine A. Varney, Assistant Att'y Gen for the Antitrust Div., U.S. Dep't of Justice, Antitrust Div., Remarks at the Thirteenth Annual Competition Conference of the International Bar Association: Procedural Fairness (Sept. 12, 2009), https://www.justice.gov/atr/speech/procedural-fairness.

49 *See, e.g.*, Vin Gurrieri, *Expect Expansion of Foreign Antitrust Enforcement Under TPP*, LAW 360 (Nov. 5, 2015), http://www.law360.com/articles/723803/expect-expansion-of-foreign-antitrust-enforcement-under-tpp.

50 Press Release, Fed. Trade Comm'n, International Competition Network Launches New Initiatives on the Investigative Process, Enforcement Cooperation, and Working with the Courts (Apr. 20, 2012), https://www.ftc.gov/news-events/press-releases/2012/04/international-competition-network-launches-new-initiatives.

51 INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS 1 (2015), http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

> The ICN project had an ambitious scope, looking at how agencies can implement and improve fair processes across all institutional frameworks – administrative and prosecutorial and covering all enforcement areas including mergers, dominance, and cartels.
>
> The project involved over sixty competition agencies that participated in a set of surveys to establish baselines on agencies' procedural rules and practices, followed by a workshop to explore the issues. The project culminated in a consensus document called ICN Guidance on Investigative Process[52] that was adopted by the ICN, which now includes almost every competition agency in the world—over 130.It is the most far-reaching agency-led statement on investigative principles and practices that support procedural fairness.
>
> I highly recommend the document, which is on the ICN's website.
>
> The Guidance contains five parts. The first addresses agencies' investigative tools – their powers, the legal requirements for using them, and the limitations on their use.[53] It then addresses transparency to the public regarding the agency's policies and standards.[54] The third section covers transparency provided to parties during an investigation.[55]
>
> Part four addresses engagement during the investigation – opportunities for parties to meet with the agency and discussions at key points during the investigation.[56] Finally, it addresses the protection of confidential information, recommending a high standard.[57]
>
> It has become increasingly common for agencies to issue detailed codes of due process. For example, the Canadian Competition Bureau has an action plan for transparency, the Australian agency has an accountability framework for investigations, and we are seeing more initiatives from agencies in Asia such as the Japan Fair Trade Commission to heighten their procedural protections.
>
> But our work is certainly not finished. The ICN's work is aspirational. Having issued this document, we are not de-

52 *Id.*
53 *Id.* at 2–3.
54 *Id.* at 3.
55 *Id.* at 4.
56 *Id.* at 5.
57 INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS 6–7 (2015).

claring victory and moving on – the key is in its implementation and we will now focus on that.

I think it is important that agencies that are at least "talking the talk" but now we must move toward "walking the walk." The ICN Guidance document provides a basis for accountability. We will be following up with ICN initiatives to help agencies understand these commitments, translate them into other languages where necessary, and provide training materials to help agencies implement it.

The task is not easy, as implementation is ultimately discretionary. There is a lot of room for interpretation of all of these concepts, and there are differences in, among other things, legal culture and how outside counsel's role is perceived. I was once in a discussion with a major agency that asked about how we involve counsel in our investigations at the FTC. Following our explanation, they basically said, "That's all well and good for you because you have a culture of compliance. But if we were to give parties the ability to know exactly what we're doing, how we're doing it, and what our evidence is, they would just use it to sabotage our investigations." I believe we have made major steps forward, particularly through the ICN Guidance, but challenges remain. We, as enforcers, want to take that up. We can't do it alone. We work closely with stakeholders including companies, practitioners, and academics, and we look forward to working with and hearing from you so we can continue to improve procedural fairness in antitrust investigations, wherever they occur. Thank you.

Calvani: Thank you, very much, Randy. That's an excellent survey of what's taking place internationally. Tad, let me ask you to pull out your crystal ball. What does the future hold: *What is to be Done?*[58] Where do we go from here?

Lipsky: Thank you, Terry. It's a privilege for me to be here. It's a very wonderful event with fantastic speakers, including my predecessors on this panel, who have given extremely effective presentations. What to do? I don't think I would like to take the answers from Lenin's book, but it is worthwhile looking forward and asking how to effectively address all of the weaknesses in procedure that are evident in the antitrust enforcement picture.

---

58 LENIN, *supra* note 1.

I'll start with a couple of basic orienting comments. One is that I prefer to avoid the term "due process". The term I like is "antitrust procedure", because we're examining the field of antitrust, and we're basically examining procedural rights in that field. There are obvious spillovers in any legal system. There are systems of legal protections and legal rights that relate to procedure, which are often common to the antitrust procedures. In the United States, for example, we have pretrial discovery rules that apply to all civil federal cases equally, but we also have provisions for a mandatory trebling of damages, or one-way shifting of attorneys' fees, and certain other particular procedural rules that apply only to antitrust.

So, to me, the area of focus is antitrust procedure. It also has the advantage of avoiding some fairly substantial baggage that attends the notion of due process, which is regarded, as Frank pointed out, as kind of an American way of looking at it. It reminds me very much of when I was at the very first ICN conference, which was held in Naples, Italy. One of the speakers, a very distinguished EC jurist, got up to address this wonderful gathering. He said, "I'm very, very happy that the ICN is here. I'm especially happy that you're here in Naples." The speaker was himself from Naples. He said, "However, I have to tell you this idea that the ICN is founded upon—this idea of competition—is really not a Neapolitan idea. It's really not an Italian idea; it's more of an American idea, or perhaps a Canadian idea." Which was humorous in the context. So, I avoid due process so I can avoid the American baggage of that concept.

Having said that, it's also very important to realize that a lot of the critique of antitrust procedure around the world is related in some indirect, but, nevertheless, a very profound way to the differences between the way in which legal matters and particularly litigation matters in the courts are treated in the United States versus other parts of the world. Lawyers, law, and lawsuits are far more important in American society than in any other society around the world. This is true even in common-law jurisdictions that we think of as very much historically linked to our traditions, speaking particularly of the UK and the UK-heritage jurisdictions—Australia, New Zealand, South Africa, India and so on.

Major litigation -- civil rights litigation, environmental litigation—litigation in so many walks of life—is a common

occurrence. It is a constant in American society, unlike virtually any other society in the world. As a result, Americans grow up realizing at some level, conscious or unconscious, that the legal system is highly formalized, and we have some traditions that are still widely respected in society that we expect to produce fair outcomes. Our Supreme Court has a degree of prestige that is probably not enjoyed by any other judicial or legal institution anywhere else in the world.

You know from so many sources in the culture that if you should be unfairly put behind bars by an overenthusiastic police officer, you're entitled to a phone call. That phone call is to a qualified lawyer. You get a lawyer appointed for you if you can't afford one. We have a sense in the United States of the tremendous structure of legal protections that have been built up over time.

Back to antitrust. Before antitrust spread around the world, which you could probably place between the mid-eighties and the mid-nineties, you had the United States with almost a century of very powerful application of antitrust, where it was very typical for criminal remedies to be applied and for people to actually go to jail for antitrust offenses. The United States had a very highly formalized system of antitrust. As antitrust began to develop in other parts of the world, you had desultory enforcement in a tiny handful of jurisdictions—Germany and Japan—that had been given antitrust rules by the Allied Occupation following World War II. You had the European rules, which came into effect in 1962, which were just beginning to be enforced at that time.

But the shift in the EU to the Single Market, the proliferation of antitrust agencies to all of the EU member states, the adoption of mandatory premerger approval requirements under the EU Merger Regulation, and the fall of the Soviet Union; it was really in that period from the mid-eighties to the mid-nineties that the proliferation of antitrust exploded with the degree of penetration and speed that has probably not been equaled in any other field of law or of business regulations before or since. That's really when these phenomena began to be encountered by lawyers who were highly trained in antitrust traditions and in U.S. antitrust procedures.

There was almost an immediate response that there would be trouble due to potential conflicts among the different jurisdictions now trying to enforce antitrust law. You had, for

example, the situation where Boeing acquired the McDonnell Douglas aircraft company back in the mid-nineties, which the U.S. quickly approved and the EU was very aggressively and visibly threatening to disapprove.[59] I am told, although I don't know for a fact, that there were actually discussions between the President of the United States and officials of the European Union about the terrible consequences that would occur if Europe actually disapproved this merger. So, that collision was avoided, but the point had been made in a very visible and public way. That led more or less directly to the Justice Department's formation of the International Competition Policy Advisory Committee, which led to the central recommendation for an international organization whose concerns would be "all competition all the time".

Oddly, almost the minute that the ICN had been formed, and that minute came on October 25, 2001, the discussion shifted and it became very common to hear, "Substantive convergence is impossible. The EU is not going to follow the predatory pricing rules of the U.S. So, let's talk about something else."

The first thing that the ICN talked about was procedural convergence in the field of merger notification and review. One of the first major works of the ICN was this wonderful set of principles and recommended practices.[60] Very sensible. One of the outstanding work products of the ICN, which I still think is the leading work product on how to harmonize merger notification procedures; how to make them rational, when to apply certain investigation triggers—don't use market shares; use objective tests for determining when notification is required—really a magnificent document.[61]

Randy has done an absolutely outstanding job of painting the picture on how the ICN's thinking about antitrust procedure has evolved. But the central point that I'm really coming down to is this: even though the possibilities for divergence and friction among the worldwide jurisdictions have been recognized for over twenty years, and even though these questions of procedural convergence have

---

59 *See Brussels v Boeing*, THE ECONOMIST, July 17, 1997, http://www.economist.com/node/151796.

60 *See* INT'L COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES, http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf.

61 *Id.*

been focused on by the ICN and by OECD for about fifteen years, progress is almost imperceptible.

It is true that there is a lot of very good paper put out. And it is true that we are starting to adopt provisions in trade agreements between the United States and individual countries that address basic antitrust procedure. But other than that, the progress in obtaining a higher standard of procedural regularity, formality and protection outside of the United States is really making almost no progress. In my view, this is because the discussion has occurred primarily within organizations consisting only of government antitrust enforcement agencies. Just as Adam Smith said, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[62] The main subject of discussion, and properly so, in an organization consisting entirely of antitrust enforcement agencies, is how to improve enforcement. The views of the respondents and the companies, and the lawyers for the companies who are forced to accommodate themselves to these weak protections and inadequate procedures, do not really penetrate and take hold within those international agency organizations.

We're looking for something new and different. We're looking for perhaps increased focus on procedure issues in broader trade agreements. We're looking for higher consciousness of these problems within the business community, which thankfully, at long last, is finally getting focused on procedural deficiencies. I think that these efforts will pick up speed.

Randy has been among the most effective proponents of this focus on antitrust procedure. But Randy can't do it alone. He needs help from the business community. He needs help from the private bar. I hope and believe that with additional pressure on the issue from outside the enforcement community he'll get that help.

Calvani: Thank you.

Randy has been kicking me saying, "Don't I get a chance to respond?" The fact is that we are out of time. I've told Randy that he will have to respond during the coffee break if he can corral Tad.

---

62 ADAM SMITH, THE WEALTH OF NATIONS 145 (R. H. Campbell & A. S. Skinner eds., Oxford Univ. Press 1976) (1776).

Ladies and gentlemen, I hope you will join me in expressing your appreciation to our panelists today for what was a most engaging presentation.