CLEARY GOTTLIEB

Maurits Dolmans and his firm represent clients in pending abuse allegations including the Qualcomm and Google cases. These comments have not been approved by, and are not made on behalf of, the firm, any colleague, or any client, and are not binding on them.

Due Process in International Antitrust: Where Are We; Where Are We Heading?

Maurits Dolmans

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Question 1: How do due process questions differ in inquisitorial and adversarial systems?

Inquisitorial *versus* adversarial systems

Inquisitorial	Adversarial
Arose from Medieval ecclesiastical courts that could summon and interrogate witnesses on their own initiative	Historically, defendants could only be tried if formally accused by their victim. Some trace adversarial system back to trial by combat
Authority gathers proof, builds case, decides	Relies on advocates to defend rights, uncover facts, and present evidence
Seeks to protect public interest (consumer welfare through competitive process)	Seeks redress for private harm – public interest or harm to consumers is secondary
Authority protects competitive process	Relies more on market forces
Investigator, prosecutor, decision-maker can be the same	Independent adjudicator
Accused can be compelled to give statements, but is not cross-examined by prosecutor	Rule against self-incrimination (accused not compelled to give evidence)
Authority seeks to find truth, but cannot be fully neutral. While truth is good, is justice better?	Higher value placed on winning than finding truth? "*leads to the exculpation of the guilty through the use of games*" (Evan Whitton)

Can an inquisitorial system comply with due process?

Judge Henry Friendly listed the following basic due process rights in 1975:

1. Notice of the proposed action and the grounds asserted for it
2. An opportunity to explain why the proposed action should not be taken
3. The rights to call witnesses, to know the evidence against one, and to have decision based only on the evidence presented
4. The right to be represented by counsel
5. Record of the evidence presented
6. Written findings of fact and reasons for the decision

All of these can be guaranteed by an administrative process. But what about:

7. An unbiased tribunal – "*distrust of the bureaucracy is surely one reason for the clamour for adversary proceedings*"?

Confirmation bias is a risk in inquisitorial procedures

EC has excellent, responsible, and professional staff, who work in good faith, but if investigator, prosecutor, judge, and jury are the same, we may find:

- *"the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand"*
  (Nickerson, "Confirmation bias" (1998) 2 *Review of General Psychology* 175–22).
- *"bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias […]"* (*R v Gough* [1993] UKHL 1 (Lord Goff)).

And we find in some cases political temptations and (attempts at) influence

This bias is by its nature difficult to prove (Vesterdorf, *Due Process,* 2010)

It can undermine the requirement of impartiality, which encompasses :

- *"subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice* and
- *"objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the <u>institution</u> concerned."*
  (Case C-439/11 P *Ziegler v Commission*,, paras 154–155).

Two solutions to ensure objective impartiality

1. Separate investigator from decision maker. EC has taken some steps but
   - A devil's advocate and peer review panel are useful but not enough
   - Strengthening role of Hearing Officer is useful but not enough
   - Best Practices Guidelines (SOP meetings etc), publication of ManProc, and cabinet attendance at hearings are useful but not enough
   - Commissioner should review the SO and the Response, and attend the oral hearing. She should read and hear all arguments and facts unfiltered. This could be done without a treaty change.
2. Thorough judicial review of facts and law
   - Article 6(1) ECHR: "[i]*n 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*". (also art 47 CFR)
   - Antitrust fines are in the nature of a criminal penalty since they serve punishment and general/specific deterrence

Key to due process in inquisitorial systems: thorough judicial review

ECtHR in *Menarini Diagnostics v. Italy, no 43509/08*

- *"Article 6(1) ECHR requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision."*
- *"[A]lthough the Court may not replace [Authority's] assessment by its own and, accordingly, it does not affect the legality of [Authority's] assessment if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, the Court must nonetheless be convinced that the conclusions drawn by the Authority are supported by the facts."*
- *"Accordingly, the submission that the Court may intervene only if it considers a complex economic assessment of [the Authority] to be manifestly wrong must be rejected."*

Prospect of thorough review should encourage sound assessment of fact and law at administrative stage. But does it always work if cases take years…?

OECD and ICN support this solution

"[c]ombining the function of investigation and decision in a single institution can save costs but can also dampen internal critique."
(OECD Country Studies EU (2005), 62)

1. **Substantive and procedural transparency** – firms must be able to easily tell and understand what rules apply to them, and how they are applied.
2. **Access to evidence** – defendants should be given meaningful access to the complaints and the authority's investigatory file
3. **Communication of preliminary concerns and receiving a fair hearing –** if the authority identifies competition concerns, it should issue a clear written report identifying the legal basis, the unlawful conduct, and the corroborative facts, data, and evidence.
4. **Objectivity and impartiality** – all levels of personnel involved in enforcing a country's competition laws should be independent of influences that are irrelevant to determining competition law infringements
5. **Independent review** – there must also be scope for appeal to an independent judiciary that will conduct a full review of the facts and the law.

EC Court is moving in the right direction

- EU Courts used to limit themselves in fact to verifying
  - "*whether the relevant rules on procedure and on stating reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers*" (*Microsoft*)
- ECJ in *KME* changed direction, following *Menarini*
  - *"the Courts cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts*"
- ECJ increasing erosion of Commission's margin of discretion:
  - *"in complex economic assessment, the Commission has a margin of discretion … [but] Court [must establish] whether the evidence relied on is factually accurate, reliable and consistent … contains all the information … [needed] to assess a complex situation … [and] is capable of substantiating the conclusions draw from it" (Microsoft, Chalkor; Posten Norgen)*
- Is this enough and will this continue with expansion of the Court?

P.S.: To protect subjective impartiality, decision maker must avoid public statements suggesting prejudgment

- In EU, Commission is required to examine "*carefully and impartially*" all the relevant aspects of a case
- But they are also politicians, and comment sometimes on cases before they are decided, or even heard. This undermines "*objective impartiality*, and creates "*legitimate doubt as to bias on the part of the institution concerned*"
- In UK, Barling J recused himself in a case on grounds that he had given a speech on the topic after the case had been decided (then remitted back by Court of Appeal):

  "*my own view, whether I would deal with the remitted matter impartially and in accordance with my judicial oath is not relevant: it is the appearance which is important in this context*"

Contrast General Melchett in *Blackadder*: "*The case before us is that of the Crown versus Captain Edmund Blackadder, alias the Flanders Pigeon Murderer. Oh, and hand me the black cap, will you - I'll be needing that*."

Question 4: How does the procedural situation in Korea and elsewhere compare with the European Commission?

KFTC gets bad rap but there is increasing convergence

Europe versus Korea: Due process comparison

Issue	Europe	Korea
Decision team separate from investigatory team	✗	✓
Notice of concerns (SO); Right of access to file	✓	✓....
Public hearing	✗	✓
Decision-maker reads file and submissions	✗	✓
Decision-maker attends hearing; asks questions	✗	✓
Right to call and question witnesses	✓	✓
Judicial review of reasoned decision	✓	✓

Both KFTC and EU Commission offer a generally high-standard in protecting parties' procedural rights. Neither are perfect, but KFTC's efforts to improve and separation of the investigative and decision-making function deserve recognition.

Case Study: EU and KFTC *Qualcomm* decisions

- In late 2016, the EC had a hearing in a *Qualcomm* case (predatory pricing)
- In December, the KFTC fined Qualcomm $865 million for unfair practices in its licensing of standard essential patents
- Greg Sidak, in a colourful open letter, criticized the KFTC decision as being based on a an "*autocratic brand of due process*".
- But Qualcomm insisted on due process:
  - Defendant had access to the file (~2,800 except business secrets)
  - Defendant had 6 months to rebut the KFTC's 400-page preliminary report
  - The KFTC held multiple hearings (5 open + 2 closed)
  - Qualcomm could rebut KFTC and 3rd party presentations and economic analysis, submit expert reports and witnesses, and both Qualcomm and KFTC could (but didn't) call witnesses who would have been subject to cross-examination
  - Decision-makers attended hearing and asked critical questions of both sides
  - Qualcomm can appeal decision to active judiciary (*POSCO* decision illustrates that strict judicial oversight is hallmark of competition regime in Korea)

Korea-US Trade Agreement, Art 16.1 -- a good model?

3. Each Party shall ensure that a respondent in an administrative hearing convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present evidence in its defense and to be heard in the hearing. In particular, each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based.

4. Each Party shall provide persons subject to the imposition of a sanction or remedy for violation of its competition laws with the opportunity to seek review of the sanction or remedy in a court of that Party. […]

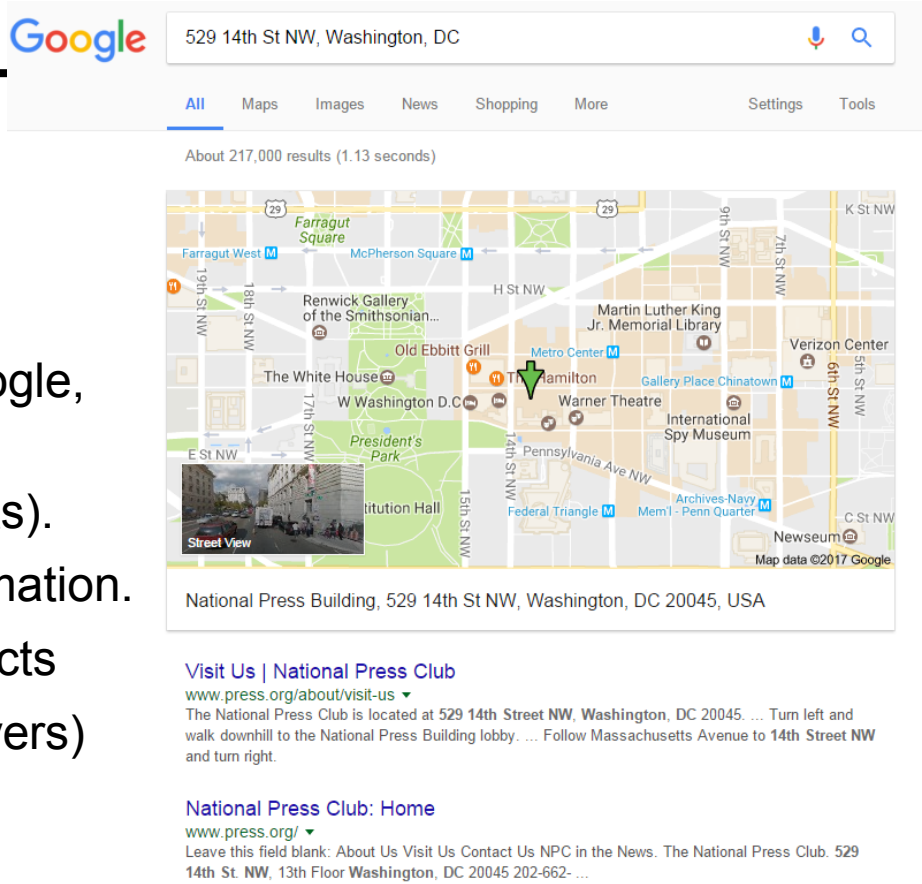
6. Each Party shall publish rules of procedure for administrative hearings convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws. These rules shall include procedures for introducing evidence in such proceedings, which shall apply equally to all parties to the proceeding.

Korea-US Trade Agreement, Art 16.1

16.5. 3. Each Party shall ensure that all final administrative decisions finding a violation of its competition laws are in writing and set out any relevant findings of fact and the reasoning and legal analysis on which the decision is based. Each Party shall further ensure that the decisions and any orders implementing them are published or, where publication is not practicable, otherwise made available to the public in such a manner as to enable interested persons and the other Party to become acquainted with them. The version of the decisions or orders that the Party makes available to the public may omit business confidential information or other information that is protected by its law from public disclosure.

Directly enforceable in court?

Another case study: TFTC finding the way



— In 2015, TFTC closed investigation of Google, after process with improved due process:

- access to its file (including the complaints).
- sensible and targeted requests for information.
- in-person meetings to understand products
- Attendance of counsel (incl. foreign lawyers)

— TFTC found that Google's display of a map in its search results "*could be seen as providing convenience to users and in line with users' benefits.*" Google's provision of its own map "*does not obstruct map providers from approaching customers and continuing to offer them their map services.*"

— Lesson: It helps to cooperate and focus on how due process can improve quality of decision making and final decision

Compare and Contrast: FAS *Android* decision

— In September 2015, Russia's Anti-Monopoly Service (FAS) found that the terms on which the Play app store is licensed on Android devices infringed Russian competition rules

— FAS opened its investigation 15 minutes after receiving the complaint of Yandex, a Russian rival, and a final decision was adopted within 3.5 months

— The FAS procedure raises concerns:

- Defendant only received a short summary of Yandex's complaint
- FAS denied Defendant the possibility to comment on Yandex's allegations
- Defendant was not granted access to the FAS case file
- Defendant was excluded from a two-day hearing between FAS and Yandex
- FAS refused to hear testimony from Android experts
- Defendant was not provided with a statement of FAS's provisional objections or given an adequate opportunity to defend itself