

Procedural Fairness and the Importance of Focusing Solely on Competition Factors in Competition Analysis

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The importance of ensuring fair and transparent investigative procedures and focusing solely on competition factors in competition analysis have been topics of much recent international discussion. On May 22, 2014, U.S. Federal Trade Commission (FTC) Chairwoman Edith Ramirez gave a keynote address at an antitrust conference in Beijing¹ setting forth core features of fair and transparent processes and explaining that consumers are best served when competition enforcement and policy decisions are based on competition considerations and not other economic or social goals.² While Chinese officials stated their agreement, at least in principle, with the importance of procedural fairness, there are at least some who defend the use of non-competition factors in competition analysis. Ministry of Commerce (MOFCOM) Director General Shang Ming has suggested that the balance between competition and industrial policy issues in Anti-Monopoly Law (AML) enforcement may tilt more towards the former over time, and National Development and Reform Commission (NDRC) Director General Xu Kunlin has stated his personal recommendation that, except in some emerging or high-risk industries, competition policy should play a fundamental role in encouraging innovation.

The Importance of Fair and Transparent Investigative Procedures

In her keynote address, FTC Chairwoman Ramirez stated that, while there are differences in investigation procedures among antitrust enforcers, core features of fair and transparent investigative processes have emerged, including based on substantial work by multilateral organizations such as the OECD and ICN. These include:

- Permitting legal representation for the parties under investigation, including allowing the participation of local and foreign counsel;
- Notifying the parties of the legal and factual bases of an investigation and sharing the evidence on which the agency relies;
- Facilitating direct and meaningful engagement between the parties and the agency's investigative staff and decision-makers; and
- Ensuring internal checks and balances on decision-making within the agency.³

Chairwoman Ramirez went on to explain that strong procedural guarantees not only ensure fairness to parties but also provide substantial benefits to agencies, including allowing them to efficiently reach duly informed decisions and maintain credibility with stakeholders. Specifically, the Chairwoman explained that providing parties with information on the theories of harm and evidence relied upon by the agencies allows parties to re-

spond effectively and helps the agency to better focus its investigation, understand key areas of dispute, and develop its case. "Good process is required to ensure the quality and accuracy of agency decisions. Understanding the parties' arguments forces the agency to sharpen its own arguments, allows it to test its theories, and provides an opportunity to gain insight into the parties' evidence and potential defenses."⁴ Finally, differing levels of engagement between parties and agencies in parallel investigations can result in "cooperation gaps" due to asymmetric information, which can contribute to different analyses and conflicting outcomes.

With respect to potential barriers to ensuring fair and transparent procedures—namely, inadequate resources, a desire to preserve the integrity of the investigative process, and the need to protect confidential information and sources—the Chairwoman explained that transparency can result in increased efficiencies by allowing the agency and the parties to focus resources on key issues, and that confidentiality protections need not pose an impediment to fair and transparent procedures. "In addition to short-term efficiencies there are also long-term efficiencies from greater transparency, including increased compliance and deterrence."⁵ With respect to confidentiality, a number of measures can be employed to balance transparency with confidentiality, including providing access to confidential information subject to a protective order; providing meaningful, detailed summaries of the confidential information; and disclosing confidential information only to a limited set of individuals, such as outside counsel subject to an agreement not to share the information with individuals within the company with whom it might lead to competitive concerns.

Following the Chairwoman's keynote address, Director General Xu stated that, at NDRC, all companies have the opportunity to present a defense, and SAIC Director Yang Jie stated that SAIC provides the core features discussed by Chairwoman Ramirez.⁶

The Importance of Focusing Solely on Competition Factors in Competition Analysis

In many Asian, as well as other, countries, competition analysis explicitly or implicitly includes the consideration of non-competition factors, such as employment or the environment. For example, Article 1 of China's AML provides that the AML was enacted "for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy." Article 4 of the AML further states that "[t]he state constitutes and carries out

competition rules that accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.”

Similarly, Article 1 of Korea’s Monopoly Regulation and Fair Trade Act provides that the purpose of the Act includes the promotion of “fair” competition and the achievement of “balanced economic development.” Article 1 of Japan’s Anti-monopoly Act states that purpose of the Act is “to promote fair and free competition, . . . to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of general consumers.” The Introduction to India’s Competition Act states that, in interpreting the Act, the Competition Commission should “keep[] in view . . . the economic development of the country.” Chapter 2, Article 3 of Indonesia’s Competition Law states that the purpose of the law includes safeguarding the interests of the public, creating effective and efficient business activities, and ensuring fair business competition to ensure equal business opportunities for large, middle, and small-scale entities. Article 2 of the Act further states that “[b]usiness activities of business actors in Indonesia must be based on economic democracy, with due observation of the equilibrium between the interests of business actors and the interests of the public.”

As the Chairwoman explained in her speech, in contrast, in the United States, competition law focuses exclusively on preventing or remedying anticompetitive practices. This is because experience has taught us that consumers and economic development are best served when competition law and policy focus on an analysis of competitive effects and consumer welfare, and that robust and undistorted competition produce substantial benefits for consumers and society as a whole by promoting growth, spurring innovation, and facilitating the efficient allocation of resources.

Studies such as the McKinsey Global Institute’s survey of the economic performance of thirteen nations support this assessment.⁷ This study showed that productivity makes a crucial difference in economic development and that the presence or absence of undistorted competition among firms is critical to productivity. When competition is distorted, firms that fail to meet the demands of the market to produce what consumers want at competitive prices are not pressured to either improve or exit the market. As a result, an entire economy becomes less competitive. Investment lags, jobs are more scarce, goods and services are more expensive, and more of what consumers spend goes to enriching monopolists instead of their own lives. Conversely, competition begets efficient, productive firms, which are better able to compete domestically and globally. This, in turn, increases domestic economic growth and standards of living.

In her keynote address, the Chairwoman explained that the use of non-competition factors in competition analysis raises a number of other concerns, such as the difficulty of balancing competition and non-competition factors across different mar-

kets and balancing efficiency concerns against equity concerns; the likelihood that public policy issues may undermine consumer welfare considerations; the likelihood of undermining clarity and predictability in antitrust enforcement; and the lack of expertise by competition officials to weigh non-competition factors.

During a lively two-hour panel discussion on the first morning of the May 21-23 Beijing conference, UIBE Professor Huang Yong asked both Director General Shang and Director General Xu about the relationship between competition policy and other policies. DG Shang responded that MOFCOM’s decisions are reviewed by other agencies and their comments often include industrial policy direction. However, DG Shang stated that while MOFCOM’s decisions are made in what he referred to as the “shadow” of industrial policy, MOFCOM does not engage in the shadow. DG Shang also stated that the AML agencies have done a lot of research in this area and that one of their findings is that, in other countries, implementation of competition laws in the beginning stages are weak and that industrial policy considerations at certain stages of economic development is quite strong and dominant, but that over time competition policy becomes more important. According to Shang, competition policy is gradually becoming more important in China, but both competition policy and industrial policy are necessary to promote the healthy development of China’s economy.

Director General Xu stated that over the past 30 years, industrial policy has played a very important role in promoting the development of China’s economy and has a very important role in China’s economy under conditions of shortage. However, according to Xu, there is currently significant excess industry capacity in China, and thus China should reexamine its use of industrial policy in competition analysis. Xu further stated that the AML agencies have made great efforts to study this issue and determine how best to give competition policy a fundamental role while still coordinating other economic policies to establish a unified, competitive, orderly, and dynamic market.

On July 10, 2014, in the Strategic and Economic Dialogue, China, along with the United States, “recognize[d] that the objective of competition policy is to promote consumer welfare and economic efficiency rather than promote individual competitors or industries, and that enforcement of their respective competition laws should be fair, objective, transparent, and non-discriminatory.”⁸ In addition, “China commit[ted] that its three Anti-monopoly Enforcement Agencies (AMEAs) are to provide to any party under investigation information about the AMEA’s competition concerns with the conduct or transaction, as well as effective opportunity for the party to present evidence in its defense.”⁹ It will be interesting to observe what effect this will have on China’s implementation of its AML.

* The views expressed here are the author’s own and do not purport to represent the views of the Commission or any of its Commissioners. The author thanks Randy Tritell for his helpful comments on this article.

¹ The conference was held on May 21-23, 2014, and was sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of China's State Council, with the support of the Competition Law Center of China's University of International Business and Economics (UIBE). The conference was attended by approximately 245 people from 19 countries.

² Edith Ramirez, Chairwoman, U.S. Federal Trade Comm'n, "Core Competition Agency Principles: Lessons Learned at the FTC," Keynote Address Before the ABA Antitrust in Asia Conference (May 22, 2014), *available at* www.ftc.gov/system/files/documents/public_statements/314151/140522aba_chinakeynote.pdf. The speech also covered the need for competition agencies to carefully balance competition principles and intellectual property rights, but this article focuses on the other two topics.

³ *Id.* at 2.

⁴ *Id.* at 4.

⁵ *Id.* at 5.

⁶ Director General Xu's comments were made on May 22, 2014 at the ABA conference; Director Yang's comments were made on May 24, 2014 at a subsequent conference hosted by the Korea-China Market and Regulation Law Center.

⁷ *See, e.g.*, William Lewis, *THE POWER OF PRODUCTIVITY: WEALTH, POVERTY, AND THE THREAT TO GLOBAL STABILITY* (2004) at 13.

⁸ "U.S.-China Joint Fact Sheet Sixth Meeting of the Strategic and Economic Dialogue" (July 10, 2014), *available at* www.treasury.gov/press-center/press-releases/Pages/jl2561.aspx.

⁹ *Id.*