



DEPARTMENT OF JUSTICE

Designing a System to Secure the Fair Administration of Competition Laws

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Introduction

I am delighted to be with you today to discuss how competition authorities can promote fundamental due process in competition investigation and enforcement. Ten years ago this topic would not have been high on the agenda for competition enforcers. Today, in a globalized economy with over 130 competition enforcers, almost everyone agrees that convergence on due process is an important aspect of competition enforcement. So the question is not whether we should promote due process, but how best to do so. While guidelines, recommendations, and best practices are useful and important, the international competition community is ready to do more. We should actively promote effective compliance to fundamental due process through a multilateral framework on procedures through which parties commit to basic fundamental norms, and that framework should be open for signature by all competition authorities.

To ensure due process for all, it is essential to have a system in place to promote compliance. Former Irish Foreign Minister Seán MacBride, a Nobel Peace Prize Laureate and a founder of the European Convention on Human Rights, noted that guarantees such as the “right to the fair administration of justice” will “never be adequately or efficiently protected without a system of machinery to enforce their application, a system of *implementation* for the rights declared.”¹ Today, I would like to discuss recent international efforts to design a system to secure the administration of competition laws according to due process principles.

For years, many jurisdictions, including the United States, have promoted due process in competition investigations and enforcement at home and abroad. Former Assistant Attorney General Bill Baer emphasized that “in a global economy, competition and consumers are best served where corporations and individuals have confidence that they will be treated fairly wherever they do business.”² Adherence to due process principles helps agencies reach the right decision

¹ Seán MacBride, *The European Court of Human Rights*, 3 NYU J. INT’L L. & POL. 1, 2-3 (1970).

² Bill Baer, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement (Sept. 29, 2015), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-ninth-annual-global-antitrust>.

and improves the quality of antitrust enforcement overall. Due process also enhances the reputation of competition authorities.

Many competition authorities around the world have joined in this effort to promote due process, including initiatives to promote due process at the ICN and OECD, leading to the current proposal, the Multilateral Framework on Procedures.

Outline of the MFP

As many of you know, in early June 2018, Assistant Attorney General Makan Delrahim discussed publicly our months-long cooperation with leading antitrust agencies on an initiative to craft the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (“MFP”).³ The MFP’s goal is to promote global due process in antitrust enforcement and thereby further improve cooperation among antitrust agencies around the world. The United States and our partners around the world agree that basic minimal due process protections are of fundamental importance in antitrust enforcement.

The goal of the MFP is to establish minimal procedural norms that are truly universal. The MFP is animated by fundamental norms, which are accepted widely across the globe and that most competition agencies already recognize. The MFP will combine this set of universal procedural norms with an adherence and review mechanism, under which the participants commit to these norms and agree to cooperate with each other regarding their compliance.

The fundamental principles set forth in the MFP were derived from the texts of competition chapters in several existing bilateral and regional agreements, as well as from the work related to due process conducted by international organizations such as the OECD and the ICN, in conjunction with an examination of procedures and practices of competition authorities around the world.

³ Makan Delrahim, Assistant Attorney General, U.S. Department of Justice Antitrust Division, Fresh Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement (June 1, 2018), *available at* <https://www.justice.gov/opa/speech/file/1067582/download>.

The draft text captures universal principles, using language that is versatile enough to cover both common as well as civil law jurisdictions, administrative as well as prosecutorial systems, and older as well as younger competition agencies.

The core principles identified in the MFP include basic commitments regarding non-discrimination, transparency, meaningful engagement, timely resolution, confidentiality protections, avoidance of conflicts of interest, proper notice, opportunity to defend, access to counsel, and independent judicial review of enforcement decisions.

The adherence and review mechanism under the MFP includes bilateral discussions and consultations between participating agencies, reporting by participants on the working of the MFP principles, as well as a proposed mechanism to review periodically any changes as may be needed. The adherence and review mechanisms under the MFP are an important step forward towards a mutual commitment amongst agency partners. The MFP also represents a substantial positive effort towards global respect for competition enforcement and the overall culture of competition we collectively have sought to promote.

The MFP is not a binding agreement in the international sense, but adhering to the framework is important, because breaches of a promise can have reputational consequences. As Assistant Attorney General Makan Delrahim said in June, “The rich network of relationships ensures that reputation matters, and that the promise to abide by an obligation becomes a potent means of enhancing compliance.”⁴

Dozens of competition agencies from around the world have been spending countless hours and many months working on the MFP. The initial discussions culminated in the “Paris Draft” of the MFP, a remarkable document that reflects the current practices of many leading competition authorities around the world.

⁴ *Id.*

Over the summer, further discussions ensued among all interested antitrust agencies worldwide, including discussions with agencies on the sidelines of the Fordham Conference in New York in early September. A revised draft of the MFP was circulated recently, reflecting suggestions made at New York and since. We look forward to meeting with those interested in joining the MFP on the margins of the OECD in late November.

There has been widespread support for the MFP from numerous agencies around the world. We are delighted that so many countries are committed to the MFP and recognize its value, and will continue efforts to further improve it and move toward its enactment.

The Path Here and Forward

To date, the vast majority of agencies have expressed strong support for the MFP. A few agencies, however, have expressed some concerns with respect to the MFP structure and review mechanism. Let me address the more salient concerns.

First, a few agencies had raised questions about the need for mandatory review mechanisms. In general, a review mechanism is a key component of any agreement such as the MFP. The goal of the MFP is to strike a constructive path, promoting incremental progress through an acceptable implementation mechanism.

In light of these concerns, the review mechanisms in the MFP have been calibrated so that they are meaningful, but not burdensome. For example, unlike certain treaties, there are no mechanisms for binding dispute settlement, third-party mediation, independent expert reports, or private complaint procedures. Instead, there are modest proposals that include mechanisms for dialogue, agency self-reporting on adherence, and periodic assessments of the functioning of the framework, only as needed. This will allow for advancing the shared goals towards due process norms.

It is important to note that although meaningful review mechanisms of agreements relating to due process may appear novel in the antitrust context, they are routine in other contexts. For example, meaningful review of a country's compliance with fundamental due process norms is common in

the context of investment protections, human rights, anti-corruption, trade, tax, and development assistance.⁵

In fact, even in the antitrust context, review mechanisms are not new. For example, in free trade agreements there are consultation provisions in various competition chapters.⁶ Likewise, in 2006 the European Competition Network (ECN) adopted the ECN Model Leniency Programme to “harmonise the key elements of leniency policies within the ECN.”⁷ In 2009, the ECN published an assessment report to “provide an overview of the status of convergence of the applicable provisions contained in the ECN leniency programmes.”⁸ If a network of regional competition authorities can agree to periodically assess the state of procedural convergence of their leniency programs, it seems only reasonable to have competition authorities periodically assess the state of procedural convergence on fundamental due process.

A second issue presented related to the possibility that the MFP can be confused to create a new international organization. The language has been modified to make it clear that the MFP does not create a new international organization. Instead, the MFP is a new multilateral arrangement for adherence to fundamental due process norms by the signatory agencies.

A third issue was whether certain competition agencies have the capacity to sign at the agency level. This was a fair concern, and we are pleased to have revised the draft to make clear that agencies can either sign or join the MFP by sending a letter through ICN providing notice of

⁵ See United Nations Model Double Taxation Convention between Developed and Developing Countries, arts. 24-26 (2017), available at http://www.un.org/esa/ffd/wp-content/uploads/2018/05/MDT_2017.pdf; EU Regulation 978/2012 of The European Parliament and of the Council of 25 October 2012, art. 9, Annex VIII, available at http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf; UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 99-125 (2007), available at https://unctad.org/en/Docs/iteiia20065_en.pdf; United Nations Convention Against Corruption, arts, 44, 63, Dec. 9, 2003, G.A. Res. 58/4, U.N. Doc, A/58/4, available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf; European Convention for the Protection of Human Rights and Fundamental Freedoms, 19-46, Nov. 4, 1950, 213 U.N.T.S. 222, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf; Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, available at https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

⁶ Free Trade Agreement between the Republic of Korea and the United States of America, U.S.-S.Kor., art. 16.7, June 30, 2007, modified Dec. 5, 2010; United States-Mexico-Canada Agreement, art. 21.6, Oct. 1, 2018.

⁷ ECN Model Leniency Programme, Report on Assessment of the State of Convergence, http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

⁸ *Id.*

adherence. This is a common practice that has been employed previously in many contexts, including in the antitrust context.⁹ This change should allow any competition agency interested in joining the MFP to do so.

I should also note that although all of the interested agencies working on the MFP hope that every agency adheres to these principles, that the MFP is voluntary. Only agencies that want to join will be subject to the norms. Also, the MFP allows an agency to take a reservation if their law allows them to comply with almost everything but prevents compliance with a specific provision.

The international community can and should seek to promote convergence on core principles, while respecting diversity on the margins. That is what the MFP does.

Finally, let me address the issue that Commissioner Margrethe Vestager raised in her remarks at the Georgetown University conference regarding the relationship between the MFP and international organizations such as OECD and ICN. The Antitrust Division fully supports initiatives by OECD, ICN and other international organizations to promote due process. Indeed, the substantive principles set forth in the MFP are fully in line with – and, in fact, complement – these initiatives.

The ICN already recognizes regional competition networks like the ECN, bilateral and trilateral dialogues like those held by the North American partners last week in Mexico, competition chapters in free trade agreements such as KORUS and USMCA, and hundreds of cooperation agreements between competition authorities. Despite these developments, the ICN is as strong as ever, and the MFP will further complement its success. Indeed, the ICN expressly anticipates initiatives such as the MFP. The ICN Framework provides that “where the ICN reaches consensus on recommendations ... it is left to its members to decide whether and how to implement the recommendations, for example, through unilateral, bilateral or multilateral arrangements.”¹⁰

⁹ International Competition Network’s Framework for Merger Review Cooperation, *available at* https://www.jftc.go.jp/en/policy_enforcement/speeches/2012_files/1Framework_for_Merger_Review_Cooperation.pdf; Proposal for Establishing the ICN Framework for Promotion of Sharing Non-Confidential Information for Cartel Information, *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc1043.pdf>.

¹⁰ International Competition Network Operational Framework, art. 1(vi) (February 13, 2012), *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc784.pdf>

From the start, the MFP has been designed to go beyond mere guidance on procedural fairness. The MFP will reflect the commitment of its participants to uphold fundamental due process norms.

There are various other reasons why we believe the MFP is needed and does not duplicate the OECD or ICN. For example, the OECD has only 36 members, and its recommendations apply to countries rather than to competition agencies, where we would like to focus our efforts. And while around 140 agencies are members of the ICN, not all agencies are ICN members, though we encourage all to join.

Further, as currently structured the ICN is not set up for accountability and review of its recommendations. It has never had that role and it could dramatically change the culture of the ICN if it were to take on such a role, although at a later time the ICN may choose to change its culture. That time is not now, however, as we don't want to risk the consensus-based good work the ICN does.

Conclusion

Let me close with an historical analogy. In 1948, the Universal Declaration of Human Rights was adopted, which included the fundamental due process commitment that “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations....”¹¹ Yet at the very moment the U.S. delegate Eleanor Roosevelt was celebrating that victory, she said she still was not satisfied. Why? Because the declaration had no means for implementation. She said that while the adoption of this declaration was a monumental achievement, we should “now move on with new courage and inspiration to the completion” of a multilateral agreement with “measures for ... implementation.”¹² We all recognize that the time is ripe for us to join in moving forward with inspiration to implementation of a multilateral framework on fundamental due process.

¹¹ Universal Declaration of Human Rights, art. 10 (1948), available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

¹² Eleanor Roosevelt, American Delegate to the United Nations, On the Adoption of the Universal Declaration of Human Rights, Address to the United Nations General Assembly, (Dec. 9, 1948).

We look forward to further discussions on the MFP in Paris in a few weeks. A significant number of competition authorities have recognized the benefits of the MFP and we look forward to being a partner in working together to bring it to fruition.

Thank you.