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Procedural Fairness

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The topic of “procedural fairness” is now a hot topic among the world’s antitrust community.

America’s chief antitrust enforcer, Christine Varney, kicked off the conversation with her speech before the 13th Annual Competition Conference of the International Bar Association in Italy. Varney earned the respect of her fellow antitrust enforcers earlier this year by announcing that she was throwing out the Bush Administration’s playbook and adopting a “get tough on competition” policy.

In her Italy speech, however, Varney made it clear that transparent and fair investigative procedures that are grounded in serious economic analysis are critical not only to good policy, but also to trust in the system.

Regardless of the substantive outcome of a government investigation, it is important that parties involved know that the process used to reach that outcome was fair. The two concerns—substance and process—go hand in hand. Complaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome. Both are important. Indeed, we hear complaints about process as frequently as we hear complaints about substantive outcomes.

Just two weeks later at the Fordham Antitrust Conference, Varney’s European counterpart, Neelie Kroes, delivered a speech² that began by referencing Varney’s address. While Varney’s speech was not directed at Europe, much of the intervening discussion had focused on the European Commission and Kroes felt it was necessary to defend her organization’s reputation. In her speech, Kroes argued that Varney is right, “as enforcers we do have ‘special responsibility’ to ensure a fair and transparent process. But the great weight of evidence says we meet this responsibility.”

Rather than simply providing that evidence, however, she fell back on an unfortunate *ad hominem* attack, branding all her “critics and their bed-fellows” as “law-breakers and their lawyers” who remind her of “the bankers now going to court to try to reclaim their ill-gotten bonuses.”

Ignoring for the moment that the list of critics is far longer than that, her statement is the equivalent of suggesting: “the only critics of police brutality are those who have been arrested

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² Neelie Kroes, *The Lessons Learned*, speech at Fordham University New York, (September 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408&format=HTML&aged=0&language=EN&guiLanguage=en>

and the lawyers who represent them.” Given that they are the only ones directly affected, would it not make sense that they would be the first to draw attention to the problems?

The Commission clearly has made some efforts to meet its “special responsibility,” but there is also evidence to suggest more can be done.

III. Criticism Has Come From Far and Wide

The lineup of those who have criticized European antitrust procedures is far broader than Kroes mentioned in her speech. The European Commission has long been the subject of process concerns from academics, lawmakers, lawyers, and corporate executives who have been investigated. Despite attempted reforms in recent years, however, the number of complaints over the way the Commission handles investigations has only grown.

Certainly, many companies that have been on the receiving end of Commission fines and reprimands (IBM, E-ON, Shell, St. Gobain, and others) have been critical of its procedures. However, the wireless carrier O2³ pursued a case of maladministration against the Commission even after the regulator dropped its investigation of the company.

The academic ranks also contain many critics. In fact, the experts at the Global Competition Law Centre (“GCLC”), a research center of the College of Europe, have been some of the most consistent and harshest critics of the system. The college has produced several white papers⁴ analyzing European antitrust enforcement procedures and finding them to be “illegal.”

As another example, Professor Dr. Jürgen Schwarze and experts from the law firm of Gleiss Lutz wrote a white paper⁵ that analyzed the European system of competition law enforcement in light of rapidly increasing fines. These experts had three pretty devastating critiques:

- they found that the Commission’s system of fines was “illegal;”
- the “decision making process fails to meet due process requirements and lacks transparency;”
- and that the judicial review structure is far too limited, preventing the CFI from investigating the “facts” found by the Commission.

Government leaders have also joined the chorus of critics. Earlier, 29 members of the U.S. Congress also called into question the procedural fairness of the European Commission. The members argued that the Commission’s decision in the Intel case “ignores the reality of a

³ Maxim Kelly, *Inquiry into EU Roaming Probe Begins*, available at http://www.theregister.co.uk/2006/10/24/eu_roaming_probe_begins/

⁴ Global Competition Law Centre, working papers, available at <http://www.coleurop.be/template.asp?pagename=gclc>

⁵ Jürgen Schwarze, Rainer Bechtold & Wolfgang Bosch, *Deficiencies in European Community Competition Law: Critical analysis of the current practice and proposals for change*, white paper, (September, 2008) available at http://ec.europa.eu/competition/consultations/2008_regulation_1_2003/gleiss_lutz_en.pdf

highly competitive marketplace” and fails “to cite any evidence of actual consumer harm in its ruling.”⁶

Finally, and perhaps most importantly, the European Ombudsman (one of the few independent checks on the European Commission) officially rebuked the Commission’s handling of evidence in the Intel case.⁷ According to the Ombudsman, the commission committed “maladministration” by not recording in the case file evidence from an interview with Dell that contradicted the Commission’s case.

The root of these concerns is the somewhat peculiar structure of the European antitrust apparatus. In Europe, the Competition Commissioner and her staff play the role of prosecutor, judge, and jury. Under this kind of system, the threat of procedural bias is ubiquitous. The experts at GCLC recently explained it this way,

As often stressed, the Commission is vested with wide powers in performing its various roles as investigator, prosecutor, decision-maker and enforcer of the EC Treaty’s rules on competition. These roles inevitably involve conflicts with one another. Whilst the Commission is required to undertake an objective investigation, the reality is that lack of objectivity can creep into the investigative and decision-making processes at any stage.

The system is not designed to ensure procedural fairness, so those checks and balances must be retrofitted onto it.

A review of the recently released decision in the Intel case demonstrates how the European Commission still has a ways to go if it wants to fulfill its “special obligation.”

In her speech, Ms. Kroes stated that:

In my mind there can be no efficiency if a process lacks accuracy. Therefore, consolidating effects-based approaches has been critical to increasing the sophistication of our decisions. It also ensures our efforts to prove consumer harm match our rhetoric about the importance of consumer welfare.

Yet, the redacted decision the Commission released in the Intel case essentially argues that the regulator does not need to show effects. It asserts “there is no requirement in the case-law to demonstrate actual foreclosure in order to prove an infringement,”⁸ and offers no evidence of consumer harm in the section that is supposed to detail “consumer harm.”⁹

Ms. Kroes also discussed how the improved fact finding procedures are allowing her staff to gather “better evidence and market knowledge.”

⁶ Letters to Assistant Attorney General Christine Varney and Chairman Jonathan Leibowitz, (September 18, 2009), available at http://www.globalcompetitionreview.com/_files/_news/FinalSignedLetters.pdf.

⁷ *EU Draws Rebuke In Intel Case Lapse*, WALL STREET J, (August 8, 2009) available at <http://online.wsj.com/article/SB124967239079915187.html>

⁸ COMMISSION DECISION of relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3 /37.990 - Intel), at 276, available at http://ec.europa.eu/competition/antitrust/cases/decisions/37990/provisional_decision_en.pdf.

⁹ *Id.* at 459.

Yet, in the Intel case it appears that the Commission procedures were only effective in finding and cataloging evidence and market knowledge that supported their decision, but less so when the evidence was contradictory. In its decision, the Commission argues that market knowledge isn't even relevant to the case, and it refused to obtain and review documents about the market that included information about the complainant, AMD. Its argument was that, "As regards Intel's conducts concerned by the Decision, the performance of competitors is not relevant for the application of Article 82 of the Treaty according to the relevant case-law."¹⁰

As previously discussed, the Commission has already been reprimanded by the Ombudsman for failing to record evidence that contradicted their view of the events. In the decision, however, the Commission makes the seeming outrageous claim that even if the evidence was "exculpatory" for Intel, they weren't required to record it and thus make it available to defendant because the case law only obligates them to record any information the Commission "intends to use in [any possible] decision."¹¹ By this line of argument, the Commission never has to record any information that disagrees with their theory of the case, because they won't be using it in the decision anyway. We're not sure this is the way to handle the "special responsibility" a regulator has in ensuring procedural fairness to build trust in the system.

In her speech, Ms. Kroes also stated that:

The Court has unlimited jurisdiction to review Commission fines, and leaves no stone unturned on other aspects of our decisions.

While this is a powerful argument, there are few if any legal experts who agree with it. As the GCLC found, review by the CFI is limited to merely reviewing what the Commission has already decided for "manifest errors" in law. The CFI cannot "rehear the case" or "substitute its own opinion for that of the Commission."

The Commission has made important changes to its procedures over the years, but it still has a way to go to create full confidence in its procedural fairness.

¹⁰ *Id.* at 27.

¹¹ *Id.* at 22.