

Anne Riley – Panel 1

(1) Moderator - introduction of Panel on overview of international discussions on Due Process

It gives me great pleasure to introduce Antonio Capobianco and Hiroshi Yamada-san.

Antonio is Senior Competition Law Expert, OECD Secretariat. Antonio is responsible for the proceedings of OECD Competition Committee Working Party No. 3, which focuses on International Co-operation and antitrust law enforcement. Prior to joining the OECD, Antonio was a competition lawyers with Wilmer Hale LLP and also worked for three years with the Italian Competition Authority. Antonio is going to update us on the status of OECD discussions in this important area.

After Antonio, we will hear from Hiroshi Yamada-san on the status of APEC discussions. Hiroshi is Director International Affairs Division at the Japanese Fair Trade Commission, where he has been since 1984, including a post as attaché of the Permanent Delegation of Japan to the OECD.

(2) Introduction of ICC recommended framework for international best practices in competition law enforcement proceedings

The ICC has published two papers on due process and procedural fairness. The first (which we will discuss today) is the ICC's recommendations on international best practices in competition law enforcement proceedings. The second ICC paper deals with due process in EU antitrust proceedings. This latter paper was partly in response to DG Comp's consultation on its own Best Practices paper, but also urged the Commission to think more fundamentally in its review of due process and procedural fairness protections. We are not going to discuss the EU paper specifically today, but I would also recommend this paper for your attention.

Turning now to the ICC paper on the recommended framework for international best practices in competition law enforcement proceedings, you will have seen from the paper that the ICC believes it is essential that competition enforcement agencies embrace the principles of transparency, early and continuing engagement, due process, non-discrimination and accountability.

Business believes that there are certain minimum standards for procedural fairness which should be met by civil and administrative enforcement authorities when conducting antitrust proceedings and indeed when interpreting the law.

In making these recommendations, the ICC does not wish not to impugn the professionalism, dedication and commitment of the talented staff in the many competition authorities around the world – that dedication and professionalism is well recognised and appreciated. But any weakness or perceived weakness in the procedural safeguards accorded to companies may potentially reduce the prestige of the agencies as antitrust enforcers.

The exceptional success of various antitrust agencies in enforcing antitrust law means that the practices of those agencies need to be such that all stakeholders are convinced that those procedures are robust and are incapable of being politically influenced. This is why due process and scrupulous attention to procedural fairness are imperative if justice is not only to be done, but also seen to be done

We believe that the safeguards of procedural fairness suggested in the ICC paper will enable companies to comply with the law, will facilitate the better and more efficient handling of investigations and will further enhance the reputation of antitrust agencies as tough but fair enforcers of antitrust law.

With that introduction, I would now like to hand over to Mark Clough QC as Moderator of the next panel. Thank you.

Anne Riley – Panel 3

Transparency, engagement, confidentiality, non-discrimination and accountability

I am grateful to have the opportunity to speak on this topic.

The rapid spread of laws to protect and promote competition across the globe that is evidenced by the large number of agencies attending the ICN meeting, and the globalisation of business over recent years mean that businesses increasingly need to:

- Understand the requirements of multiple sets of substantive legal rules, to ensure our business practices, agreements and transactions are in full compliance; and
- Be aware of the standards, agency policies, practices and procedures applicable when seeking approvals and, eventually, when dealing with any one or more of a range of different enforcement proceedings.

Access to the texts of relevant laws and regulations of itself is seldom sufficient to enable a business fully to understand its obligations, to comply with them and to deal effectively and responsibly with any enforcement proceedings which may be initiated. Business needs:

- Sufficient detail of the likely interpretation of the substantive rules by the authorities to be able to predict how those rules will apply to contemplated business activities; and
- Information regarding any approval or guidance procedure which may be necessary or available

In terms of dealing with an investigation, a firm cannot defend itself appropriately unless the competition authority informs the firm in sufficient detail of the allegations, the claims, and the evidence supporting the claims against it. The ICC has made several suggestions to ensure procedural fairness and effective decision-making are assured. I do not intend to recite all of those protections here, but in summary, we believe that protections fall into six key areas as far as the antitrust agencies are concerned. These are:

- Transparency
- Engagement
- Confidentiality
- Due process and Fairness
- Non-discrimination
- Accountability

The ICC paper also considers the vital role of the courts in ensuring due process.

I don't wish to dwell in any detail on the recommendations in the ICC paper, since I believe these recommendations "speak for themselves" – I would however just like to draw out a few points made by the other panelists.

We heard from Mr. Mirza the Chairman of the Pakistani Competition that he has concerns over allowing counsel to attend a dawn raid in case they hamper the investigation, particularly by facilitating the destruction of electronic evidence. That indeed would be a real concern if it occurred, but agencies normally (and rightly) have powers to pursue the obstruction of investigations and should be encouraged to do so rather than deny rights. I think business would generally support agencies challenging obstruction – but the fear of potential obstruction should not deny companies of legitimate rights of

defence – in particular since electronic evidence is almost impossible to delete and can normally be recovered.

Carlos Esteva Mosso commented that the ICC paper on international due process was unbalanced in that it stressed due process but did not take into account efficiency. However efficiency cannot and should not trump fairness. It is more important that a system is fair, even at the risk of some small inefficiencies – an efficient but unfair system does not achieve justice. I would also like to reiterate what Paul Lugard and Mark Clough have said, and that is that ensuring due process can actually save costs by identifying the key issues early on (and discarding the non-issues) which can save avoidable costs for the authorities.

Philip Collins has rightly pointed out that parties need to be realistic about the merits of their case and avoid over confidence, since there are invariably more than one side to a case. I completely agree with that proposition, but would ask in return that the agencies are also realistic about the merits of – and understand the weaknesses in - their case, and are not over confident in the perfections of their own processes. An open and realistic dialogue between the parties under investigation and the authority conducting the investigation is more likely to achieve a sensible resolution of the case, whatever the outcome.

Philip Collins also said that with rights come responsibilities, and that businesses should exercise some responsibility in the arguments they run and the points they make in defence – I also agree with that proposition, but would say that competition law imposes considerable responsibilities already on companies, and the corollary of those responsibilities should be the right of every company to defend itself with the assurance of due process and procedural fairness to enable it to do so.

With these few comments I would like to conclude, and to thank everyone for their valuable contribution to this debate.