



DEPARTMENT OF JUSTICE

Fresh Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement

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Thank you very much for that introduction and for the opportunity to speak with you today at the Council on Foreign Relations. I personally find invaluable the work that you do and the debates that you promote here, at CFR, which contribute immensely towards a more collegial mutual understanding of international economic and diplomatic relationships.

Today, I will discuss an important topic related to international economic relations, which has been a focus of mine since I commenced my previous service at the Department of Justice, when I was the so-called International Deputy for the Antitrust Division. Specifically, I would like to offer some fresh thinking on how to promote greater procedural norms and due process in antitrust, or competition, enforcement.

Margaret Thatcher, at the height of the Cold War, said that “[m]odern liberty rests upon three pillars: ... representative democracy; economic freedom; and the rule of law.”¹

As competition enforcers, every day we have the privilege and honor to uphold all three pillars of modern liberty: we work within democratic institutions, in pursuit of economic freedom, subject to the rule of law. Given the nature of our duties, we tend to focus on economic freedom. Just as important, however, is how we uphold the rule of law in the pursuit of that freedom.

During my Senate confirmation hearing last year, I emphasized that the rule of law, and its promotion internationally, would be one of my top priorities. My first public speech as Assistant Attorney General focused on international antitrust policy, including new approaches to international cooperation with close partners that would focus specifically on principles of non-discrimination, procedural fairness, and transparency.²

I appointed a highly-respected international law professor from Notre Dame Law School, Professor Roger Alford, as my International Deputy and immediately challenged him and our very capable attorneys in the International Section of the Antitrust Division to think creatively about how we can promote fundamental due process in antitrust enforcement.

¹ Margaret Thatcher, *Europe: The Obligations of Liberty*, Winston Churchill Memorial Lecture (Oct. 18, 1979).

² Makan Delrahim, International Antitrust Policy: Economic Liberty and the Rule of Law (Oct. 27, 2017), available at <https://www.justice.gov/opa/speech/file/1007231/download>.

The proliferation of competition authorities around the world underscores the importance of agreeing on a core set of procedural norms.

With more than 140 competition agencies, and increased international commerce, including digital commerce, it is more and more critical that we share a common set of principles that affords due process to individuals and businesses in investigation and enforcement. Fortunately, the competition community has long embraced this issue as a matter of common concern, and recognized that pursuing the common good of procedural fairness means acting according to a core set of common rules.

There is now a groundswell of support for fundamental due process in competition enforcement, and many believe that the time is right to propose some fresh thinking on how to accomplish this shared objective.

Today, I would like to share with you our recent efforts towards a new approach for an improved system of competition enforcement. The goal of this approach is to garner increased confidence and respect for antitrust enforcement globally. Specifically, we intend to achieve agreement among competition agencies around the world on fundamental procedural norms.

Toward that end, I am pleased to announce that next week, the United States, in partnership with leading antitrust agencies around the world, will introduce and invite the global antitrust enforcement community to help finalize and join the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement. As we do so well in the federal government, we will assign this its own acronym, “MFP,” for short.

For the past several months we at the Department of Justice, have been drafting proposals and meeting with our counterparts from around the world to develop a draft text to serve as the basis for the MFP. We have worked closely with our colleagues at the Federal Trade Commission and, of course, the Department of State, and appreciate very much their input.

We are committed to including in the agreement those procedural commitments that reflect fundamental due process. We are also committed to bridging the differences between civil and common law countries, between administrative and prosecutorial approaches, and between young and old agencies in small and large markets.

The goal is to identify procedural norms that are truly universal. What we have proposed are norms that are accepted across the globe and indeed, that almost every agency already has recognized in some form or another.

To derive these principles, we compared the texts of competition chapters in major trade agreements, and every OECD and International Competition Network (“ICN”) guideline and recommendation touching on procedural fairness. We also examined the practices of competition authorities around the world. As a result of this effort, we identified approximately a dozen core values.

The MFP includes important due process commitments regarding: non-discrimination, transparency, timely resolution, confidentiality, conflicts of interest, proper notice, opportunity to defend, access to counsel, and judicial review.

We also have given extensive and considered thought to the appropriate compliance mechanisms. The MFP strives to ensure meaningful compliance among competition agencies toward advancing the culture of free-market competition we share. Suggestions, guidelines, and recommendations were critical first steps in this process, but now is the time for us to go further. Rather than simply encourage good behavior, the time is now for us to embrace meaningful mechanisms that encourage compliance. We have now canvassed every type of treaty one can imagine, and we have presented to our competition enforcement partners proposals that we think are meaningful and achievable.

The compliance mechanisms built into the current draft of the MFP, we are convinced, will be key to its success. We have proposed a variety of ways to ensure the greatest compliance by competition authorities. We expect nothing less from subjects of our enforcement, and should expect nothing less from ourselves.

The compliance mechanisms do not envision establishing a formal and binding dispute settlement mechanism, but do help to ensure that we all have sufficient incentives to comply with the common commitments.

Generally speaking, governments comply with international commitments because of threats of retaliation, promises of reciprocity, or potential harm to reputation.³ Given the context and the nature of our competition enforcement functions and the proposed commitments, our focus is on the last of these mechanisms: enhancing reputation, a value to which all of our competition agency partners already are committed.

In my 15-year experience with the increasing network of international competition authorities, I have found a common and positive characteristic. We all share a commitment to shared objectives and each invest heavily in building relationships through frequent interactions towards advancing our shared values for free markets through competition law enforcement. Thanks to a vibrant press and active bar, we are subject to careful and constant scrutiny, increasing the transparency and information that is available on agency behavior. 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.

Guidelines, as we all know, are valuable. Promises are different, because they create the opportunity for reflecting on decisions that may help enhance reputational standings among peers.⁴ This is true for both hard-law commitments such as treaties, and soft-law commitments such as MOUs.⁵ Even the choice of whether to join a multilateral arrangement that is open to all and reflects fundamental norms is an important statement in international economic relations.⁶

³ ANDREW GUZMAN, HOW INTERNATIONAL LAW WORKS, 33-48 (2008).

⁴ *Id.* at 71-118.

⁵ Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1881 (2002) (“Agreements among states lie on a spectrum of commitment. The same reputational issues influence ... promises regardless of the form in which they are made, but the magnitude of the reputational effect varies with the level of commitment made.”).

⁶ Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHIC. L. REV. 469, 525, 533-34 (2005) (membership in international agreements brings benefits that states value, including a boost to a state’s reputation).

Accordingly, our goal has been to design a respectful agency-to-agency arrangement that is not a treaty in the formal sense,⁷ but nonetheless uniquely suited for the specific functions of market competition enforcement competition authorities engage in.

Given the broad consensus on fundamental due process, the main purpose of the upcoming discussions towards building a consensus around the MFP next week will not be to compromise on the norms, but to contextualize the language to reflect the different legal systems and agency approaches. Many agencies have likely already internalized these norms as part of their own legal systems.⁸

We have been pleased, but not surprised, by the incredibly warm reception the draft MFP proposal has received around the world thus far. The vast majority of agencies with whom we have had the opportunity to discuss the MFP have welcomed the initiative and have agreed to help negotiate toward its conclusion. And, of course, it is our goal and design to ensure that every antitrust enforcement agency around the world joins it and finds its norms consistent with their approaches on process.

To date, we have asked our partner agencies to consider the need for a multilateral framework on procedure with core procedural norms and meaningful compliance mechanisms, and that they agree to negotiate in good faith toward its conclusion. We have used opportunities at various international meetings to discuss informally the concepts of the MFP, including recently in Delhi, Brussels, Mexico City, Washington, D.C. and elsewhere, and we will continue further discussions in Paris next week, during our meetings at the OECD.

We intend for the MFP to be an open rather than a closed instrument. That means that it will be open to every competition authority around the world. That is a model of negotiation that is common in other contexts, and one that we are confident will be successful here. This approach allows for the negotiation to proceed toward a strong document at a brisk pace, but also allows for

⁷ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE*, 28-54 (3RD ed. 2013) (distinguishing between a treaty and an MOU).

⁸ Harold Hongju Koh, *Why Do Nations Obey International Law*, 106 *YALE L. J.* 2599, 2659 (1997) (“A transnational actor’s moral obligation to obey an international norm becomes an internally binding domestic legal obligation when that norm has been interpreted and internalized into its domestic legal system.”).

inclusive input from others. I expect that this approach will generate momentum toward core commitments with widespread adherence in the coming months.

In proposing the MFP, we have borrowed liberally from other sources. The draft is an amalgamation of other competition initiatives already in place, combined with ideas derived from other contexts. This new model of cooperation builds upon and is fully consistent with previous efforts to promote procedural fairness. It is a logical, incremental and yet significant step toward promoting procedural fairness. I truly believe that explains why it has been warmly received by so many other competition agencies.

Let me speak briefly about the building blocks that have informed the current initiative.

First, the cornerstone of the MFP is the network of cooperation agreements between competition agencies. For decades competition authorities have entered into cooperation agreements to reflect a commitment to close collaboration. The United States has over a dozen such cooperation agreements,⁹ and there are almost 150 such agreements around the world.¹⁰ These cooperation agreements are the principal expression for coordinating competition enforcement, and the MFP reflects and builds on that tradition.

The second building block for the MFP is the procedural principles promulgated by international organizations. The OECD Competition Committee and the ICN are invaluable platforms for the promotion of sound competition enforcement. The work the competition community has done, and continues to do, through these organizations helps make an agreement such as the MFP possible. These organizations have routinely promulgated best practices, guidelines, and recommendations, and they will continue to do so. We welcome those efforts and have played a major role in promoting them. It is important to note that both the OECD and the ICN encourage competition agencies to implement the suggested guidelines and recommendations in a variety of ways, including through international agreements.

⁹ Antitrust Cooperation Agreements, available at <https://www.justice.gov/atr/antitrust-cooperation-agreements>.

¹⁰ OECD Inventory of International Cooperation Agreements Between Competition Agencies (MoUs), available at <http://www.oecd.org/daf/competition/inventory-competition-agency-mous.htm>.

In 2014, the OECD recognized that “transparent and fair processes are essential to achieving effective and efficient cooperation” and that competition agencies are “committed to working together to adopt ... international cooperation instruments,” including “new forms of cooperation.”¹¹ Likewise, the 2012 ICN Operational Framework states that “where the ICN reaches consensus on recommendations arising from a project, it is left to its members to decide whether and how to implement the recommendations, for example, through unilateral, bilateral, or multilateral arrangements.”¹² Cooperation agreements, including the MFP we are discussing today, complement and enhance the work of these organizations.

Finally, the third building block of our proposal are commitments in competition chapters in certain free trade agreements (“FTAs”). The provisions in modern competition chapters vary in their scope and detail, but they all include core commitments such as transparency, non-discrimination, and procedural fairness. Notable examples include the Korea-U.S. Free Trade Agreement as well as agreements still under consideration, such as NAFTA 2.0. I should note that the MFP is fully consistent with these FTA chapters, and seeks to build upon and extend the due process commitments beyond just our closest trading partners.

We welcome and support competition chapters in FTAs, and have spent countless hours negotiating them. They are particularly useful as examples of instruments that reflect binding commitments on procedural norms. But we also recognize their limits. Competition chapters are a small part of free trade agreements, and the agenda of every trade negotiation encompasses issues that extend far beyond the core concerns of antitrust laws. A multilateral arrangement between competition authorities on procedural fairness is far more likely to generate both broad and deep commitments.

These three building blocks taken together form the basis for the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement.

¹¹ OECD, Recommendation Concerning International Cooperation on Competition Investigations and Proceedings, (Sept. 16, 2014), available at <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf>.

¹²ICN Operational Framework, (Feb. 13, 2012), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc784.pdf>.

Our shared vision is a multilateral framework that is open to all competition authorities, reflects fundamental due process recognized by almost every competition authority, enhances and extends the work of international organizations, and incorporates meaningful mechanisms to secure compliance.

With those goals in mind, we will proceed with discussions next week in Paris, and thereafter, and invite all antitrust enforcement agencies to join us in the pursuit of providing due process as we achieve our goal of liberty through the proper enforcement of competition laws.

Thank you.