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**INVESTIGATIVE POWERS IN PRACTICE – Breakout session 3: Due Process in
relation to Evidence Gathering**

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at: oe.cd/invpw.

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Table of contents

Investigative Powers in Practice Breakout session 3 – Due Process in relation to Evidence Gathering	3
1. Introduction	3
2. An overview of due process	3
2.1. What is due process?.....	3
2.2. Benefits of due process and effectiveness of investigations	4
3. Some Rights and Principles regarding Due Process in relation to Investigative Powers	5
3.1. Right to be notified	5
3.2. Right of defence.....	6
3.3. Right to be present	7
3.4. Right to confidentiality	8
3.5. Proportionality	9
3.6. Transparency.....	10
4. Review of Evidence Gathering Powers	11
4.1. Internal review	11
4.2. Judicial review	11
5. Conclusion	13
Endnotes	15
References.....	16

Boxes

Box 1. Digital Inspections and Right to be Present.....	8
Box 2. Ex-post Judicial Review of Inspections.....	13

Investigative Powers in Practice

Breakout session 3 – Due Process in relation to Evidence Gathering

1. Introduction

1. Due process is fundamental to the sound administration of justice, including competition regimes. It is relevant to all the stages and types of proceedings run by competition authorities. It is particularly important in evidence gathering processes for several reasons. Competition cases rest on information and evidence collected by means of investigative tools. Any misconduct during this process can harm the whole case. Also, investigative powers intervene into the private sphere and affect both undertakings and individuals. This calls for greater attention to due process issues. Moreover, it can be argued that individuals are weaker than legal persons in front of state power so they deserve stronger protection under due process principle (Sanchez Graells and Marcos, 2015^[1]). Although legal persons are the subject of the competition investigations, with the exception of cartel investigations under criminal regimes, natural persons are affected by evidence gathering processes as their belongings are searched and they reply questions during interviews.

2. In this context, this note highlights due process issues in relation to investigative powers and evidence gathering. The note starts by exploring due process and its effect on evidence gathering in general. In the following section, some rights (i.e. right to be notified, right to defence, right to be present and right to confidentiality) and principles (i.e. proportionality and transparency) regarding due process in relation to evidence gathering are examined. Lastly, access to neutral decision making and judicial review by independent courts are discussed.

2. An overview of due process

2.1. What is due process?

3. Due process of law is a principle which regulates the relationship between the citizen and state. Due process of law requires state to respect the rights which are owned according to law. Although it is not clearly defined in the framework of competition proceedings, due process can be described as prevention of arbitrary and biased decisions through protection of the individual's rights. In this sense, it is generally seen as strongly related to notions of procedural fairness and transparency. Procedural fairness generally include "(i) the rights of individuals to be adequately notified of charges or proceedings, (ii) the opportunity to be heard at these proceedings, and (iii) the making of any final decision over the proceedings by an impartial person or panel." (OECD, 2010, pp. 25-26^[2]). Transparency is an integral part of due process since it enables individuals to know their rights, be aware of procedures to protect these rights, learn the rationale and grounds of public authorities' decisions concerning themselves and others individuals. Thus transparency improves accountability, predictability and consistency of authorities' actions (ICN, 2015^[10]).

4. Since due process is an overarching principle which applies to both criminal and civil regimes, including administrative and prosecutorial proceedings, due process requirements vary depending on the situation. In the context of competition proceedings, due process encompasses many procedural safeguards such as the right to be notified of charges and proceedings adequately and promptly, the right to be present at the proceedings, the right to be represented by legal counsel, the right to confidentiality, the right to challenge incriminating evidence, the right to be heard by decision makers, impartial and evidence-based decision making, the right to reasoned decision, avoidance of undue delay and the right of access to judicial review (Muheme, Neyrinck and Petit, 2016^[2]) (Ginsburg, 2014^[3]) (Sokol, 2015^[4]) (Sanchez Graells and Marcos, 2015, p. 91^[5]).

2.2. Benefits of due process and effectiveness of investigations

5. Due process has many widely accepted benefits for parties subject to a competition investigation, third parties and competition agencies.

6. Primarily, due process protects legitimate rights of the parties against the coercive power of state. Under this principle, parties are entitled to a fair and transparent process during which they can be present or be represented by their legal counsel, have the opportunity to present their case to impartial decision makers and oppose to the outcomes. Enhanced accountability and predictability of competition authority activity also allows undertakings plan their business better without bearing the risk of uneven competition enforcement (Sokol, 2018^[6]).

7. Fair and just proceedings strengthen the legitimacy of competition policy. Fair process increases credibility of the decisions. Moreover, stakeholders' confidence on the fairness of enforcement would contribute to normative compliance to law (Beaton-Wells, 2015^[7]). On the contrary, if the procedural safeguards are weak and the enforcement process is not transparent, the outcome of competition investigation can be open to speculation (Sokol, 2018, pp. 7-8^[6]).

8. Due process benefits not only parties to enforcement proceedings but also competition authorities. Firstly, due process improves the efficiency of the competition authority's activities by promoting effective case management and efficient resource allocation. Since the quality of evidence gathering is increased by due process, it will be easier to spot meritless cases earlier and allocate the authority's resources accordingly (O'Brien, Katona and Tritell, 2015^[8]) (OECD, 2010, p. 27^[2]). Further, respect for due process will decrease number of decisions overruled by judicial review. In this way, the resources tied to re-handling cases can be freed and the workload of the authority can be better managed. This should assist in lowering the overall costs of the authority.

9. Secondly, committing to transparency and due process protects competition authorities from external interference. Lack of transparency and due process create a fertile ground for political pressure since such demands can be hidden from scrutiny easily (Sokol, 2018, p. 8^[6]).

10. Finally, and most importantly for our discussion, due process improves quality of the evidence and competition authority's understanding of the facts of the case at hand. Therefore, due process increases the accuracy of decisions (O'Brien, Katona and Tritell, 2015^[8]) (Sokol, 2018^[6]) (OECD, 2010^[2]). If parties believe in the legitimacy of the process and trust that their rights will be protected, they will be more inclined to provide information. Transparency can lead to more open dialogue between the parties and the

authority, and contributes to the quality of evidence gathering. Lastly, due process ensures that parties can challenge the evidence against them and help the authority to find the truth.

11. Against all its benefits for the competition authorities, fulfilment of requirements of due process and effective law enforcement are perceived at odds, especially in respect to use of investigative powers. First of all, due process requirements can limit the investigative powers of competition authorities. For instance, legal professional privilege keeps communications between a client and its lawyer out of competition authorities' reach. Additionally authorities must bear some costs in terms of time, human power and resources to ensure due process. In prioritising due process, competition authorities may face increased workloads and more complex evidence gathering processes.

12. All in all, these constraints are very moderate costs for ensuring the protection of legitimate rights of parties and the legitimacy of competition policy. Efficiency gains derived from due process may exceed costs of due process. If the right balance between due process and the effectiveness of investigations can be reached, both goals can be promoted.

3. Some Rights and Principles regarding Due Process in relation to Investigative Powers

13. Competition authorities are equipped with many investigative powers, including the powers to pursue on-the-spot inspection, issue requests for information and conduct interviews in order to access all the necessary information and evidence to enforce competition rules. Although these powers are invaluable for enforcement, they interfere with the private spheres of concerned parties and must thus be deployed in line with due process. The tension between the due process rights and the effectiveness of evidence gathering during competition proceedings shapes the investigative procedures and limits the investigative powers. In this section, some of the main due process rights and principles will be discussed in order to explore their implications for evidence gathering process.

3.1. Right to be notified

14. The right to be notified of charges and proceedings promptly and adequately is a fundamental part of due process. While it is indispensable for the parties to be able to defend themselves, the right to be notified also fulfils a transparency requirement (ICC, 2010, p. 2^[9]). The ICN Guidance on Investigative Process (ICN Guidance) recommends that “[t]o the extent that it does not undermine the effectiveness of an investigation, agencies should notify parties as soon as feasible that an investigation has been opened, and identify its legal basis, the conduct under investigation, and where possible, the expected timing of the investigation.” (2015, p. 4^[10])

15. Evidence gathering is intense in the early stages of an investigation. Often, being the subject of evidence gathering is the first contact that parties have with an investigation. Therefore it is common for the notification of proceedings to accompany the first investigative measure addressed to the parties (ICN, 2013, p. 12^[11]). Especially in the case of cartel investigations, notification of an investigation is generally made as late as at the start of unannounced inspections, in order for such inspections to benefit from a surprise element. Third parties may be only learn of investigative proceedings through a request of information addressed to them.

16. The content of the notification is important to safeguard the parties' rights of defence, as it reveals the scope, basis and reasons for the start of investigative proceedings. A notification should enable the subjects of evidence gathering practices – such as inspections, RFIs or interviews – to assess the scope of their duty to cooperate and to challenge these practices before judicial authorities.

17. As mentioned in ICN recommendation, competition authorities must balance effectiveness of investigative tools and right to be notified. In addition to postponement of notifications until unannounced inspections, authorities might leave some information out of notification to keep identity of informants or leniency applicants confidential or refrain from clear cut expressions in the notifications about market definitions or exact nature of investigated conduct.

3.2. Right of defence

18. Under due process principles, parties to a proceeding must have the opportunity to make their case. In other words, their right of defence and to a fair trial must be respected. This has many implications for evidence gathering.

19. First of all, addressees of investigative measures should have the ability to be represented and advised by legal counsel.

20. In this context, it is a common practice for competition authorities to allow legal counsel to be present in evidence gathering procedures. In almost all jurisdictions, legal counsel are admitted to voluntary and compulsory interviews. Legal counsels' powers during interviews vary from one jurisdiction to another, yet it is common for legal counsels to be able to object to improper questioning (e.g. when the question is irrelevant, unclear or involves legally privileged information). In some jurisdictions, legal counsel can clarify the answers of the interviewee, be consulted in private by the interviewee or ask complementary questions to interviewee (ICN, 2013, pp. 31, 35-36^[12]). During inspections, it is also common for lawyers of the inspected party to accompany the inspection team, observe the proceedings and give advice to their clients. Addressees of RFIs can designate a legal counsel as their representative and may request that communications related to RFIs to be addressed them.

21. However competition authorities often find themselves in a position to counterweight legitimate use of right to access legal advice and its use as a pretext to curtail evidence gathering power of the authority. Therefore, legal counsels are not allowed to answer questions instead of interviewees and their presence is not a precondition for the validity of inspections.

22. Secondly, as a corollary of right to defence, all natural and legal persons should be able to communicate with their legal counsel freely to access legal advice. To enable free communication, the client must be guaranteed that attorney-client communications will not be disclosed against the client's will and that the communications will not be used against the client. Legal privilege in competition proceedings is not recognised by all countries and where it exists, scope of legal professional privilege differs widely among jurisdictions (OECD, 2018^[13]). Nonetheless, when it is applicable, legal privilege limits the evidence gathering powers of competition authorities. Interviewees or addressees of RFIs can refuse to reply questions which demand privileged information. Privileged documents are protected from seizure and copying during inspections as well.

23. The last corollary of the right to defence related to evidence gathering is the privilege against self-incrimination. The privilege against self-incrimination aims at preventing evidence gathering “through methods of coercion or oppression in defiance of the will of the accused”¹ and grants a right to silence. As in the case of legal professional privilege, the scope of protection provided by the privilege against self-incrimination varies among jurisdictions. For example, while privilege against self-incrimination can be a ground for refusing to speak during compulsory interviews in Germany, interviewees in Japan cannot refuse to answer question on this basis during administrative proceedings. Nonetheless, it is common for any self-incriminating information gathered through interviews and RFIs under civil proceedings not to be allowed to be used against that person under criminal proceedings (ICN, 2013, pp. 24-25, 36-37_[12]). Overall, when it is applicable, the privilege against self-incrimination limits the evidence gathering power of competition authorities, particularly as it concerns RFIs and interviews.

24. Privileges does not only limit the content of investigative powers but also shapes the process. Some authorities remind the parties their privileges in the course of evidence gathering and provide guidance on how to claim privilege. In majority of jurisdictions privilege claims are reviewed by competition authorities. In such cases, party claiming privilege have the burden to demonstrate that the privilege applies. Claiming party is required to describe the nature of the document or enable a cursory look to allow other parties to assess the applicability of the privilege. To this end, some authorities provide instructions about preparation and submission of privilege logs (ICN, 2014, pp. 47-48_[14]). In some cases clearly unfounded claims of privilege can be considered as delaying tactic and taken into account as an aggravating circumstances in calculation of fines.²

3.3. Right to be present

25. Another due process right is the right to be present at the milestones of the proceedings. The right to be present facilitates transparency and protects the exercise of other due process rights, such as the right to challenge incriminating evidence and the right to be heard. In the context of evidence gathering, this right comes up particularly during on-the-spot inspections.

26. In principle, inspected parties should be able to observe the inspections and participate in the process. However, a balancing exercise between procedural rights and effectiveness of investigations must be struck in terms of the scope of the right to be present. In unannounced inspections, it is not rare to find out that target persons (individuals whose work product, office and digital devices are being inspected) are out of office or not available to accompany inspection team for extended hours. In this situation, lawyers or other agents of the inspected undertaking generally accompany the inspection instead of the target person. Additionally, target person may be informed about the process and his/her rights.

27. The exercise of the right to be present faces a more serious challenge in the context of digital inspections. In some jurisdictions, digital data which is seized or copied at the premises of the inspected party is transferred to the premises of the competition agency to be searched and sifted. This may be considered as a violation of the right to be present and other related due process rights of the inspected party in some jurisdictions as exemplified in Box 1. Therefore, competition authorities often seal the data carrier and invite representatives of the inspected party to attend the sifting at the authorities’ premises. However, this procedure has been criticised too as burdensome on undertakings, especially for those with limited resources (Simonsson, 2013, pp. 10-11_[15]).

Box 1. Digital Inspections and Right to be Present

The Polish Competition Authority (PCA) started proceedings upon suspicion of an anti-competitive agreement in the fitness sector. During inspections, the PCA copied *en masse* some digital data belonging to the CEO and CFO of the inspected undertaking. Sealed data carriers were then transported to the premises of the PCA for sifting and analysis. The inspected party brought a judicial appeal, claiming that the PCA had copied documents outside the scope of the search warrant and documents protected by legal professional privilege.

In March 2017, the Warsaw Court of Competition and Consumer Protection ruled that, in order to ensure the appropriate protection of an undertaking's right of defence and its right to privacy, the initial selection of information had to be conducted at the undertaking's premises and in the presence of its representative. It held that the analysis of copied data is not a mere technical activity but an inspection in itself. Therefore, analysing the data in the absence of the inspected undertaking would have undermined its right of defence.

After the judgment, the PCA announced that all electronic evidence had been kept under seal and not been searched therefore there had been no violation of law. The PCA also modified its inspection procedure. The electronic data gathered during inspections is now reviewed only at the premises of inspected undertakings.

Source: Dawn raids in Poland – tighter rules on the gathering of electronic evidence, <http://competitionlawblog.kluwercompetitionlaw.com/2017/10/19/dawn-raids-poland-tighter-rules-gathering-electronic-evidence/>; Competition authority adopts new approach to gathering electronic evidence during dawn raids, <https://www.internationallawoffice.com/Newsletters/Competition-Antitrust/Poland/Schoenherr-Attorneys-at-Law/Competition-Authority-adopts-new-approach-to-gathering-electronic-evidence-during-dawn-raids>

3.4. Right to confidentiality

28. Competition authorities can access great amounts of information by means of their investigative tools. As a result of the intrusive nature of these tools, the gathered information often contains sensitive elements such as business secrets and personal data. Thus, power to collect all the necessary information is balanced with right to confidentiality, in other words authorities' duty of professional secrecy.

29. Right to confidentiality primarily intends to protect the legitimate interests and rights of the parties to the proceedings. However it also prevents the spreading of sensitive information, which could harm competition in the market by creating artificial levels of transparency.

30. In addition to these purposes, the right to confidentiality is instrumental in evidence gathering. At the early stages of investigation, when evidence gathering is more intense, investigation teams may find secrecy necessary for integrity of the investigation and effective evidence gathering.³ What is more, once parties are convinced that their secrets will be safe with the authority, they will be more comfortable with providing sensitive information to the authority (OECD, 2010, p. 315_[2]). Professional secrecy obligation, also provides a justification for competition authorities to assert that undertakings cannot withhold information claiming the information is commercially sensitive (Faull and Nikpay, 2014, p. 154_[16]). In short, confidentiality duty on the part of the competition authorities not only protects parties but also enhances the effectiveness of evidence gathering.

31. In this context, it is not surprising that confidentiality is a widely accepted duty incumbent on competition authorities. A survey conducted by ICN (2014, p. 17_[14]) shows that, confidential information is protected on the basis of statute in all 39 respondent countries. The ASEAN Regional Guidelines on Competition Policy' (2010, p. 26_[17]) state that there should be "safeguards to protect the confidentiality of information acquired during the course of a search or to protect the identity and interest of a company ("whistle blower" or "informant") that informs the competition regulatory body of the existence of an anti-competitive practice, such as a cartel." The ICN Guidance also recommends that parties should be able to claim confidentiality for the information that they submit to the agency during an investigation.⁴

32. In order to ensure confidentiality, competition authorities adopt some procedures in their evidence gathering processes. In some jurisdictions, all the information submitted in the course of an investigation is considered confidential. In other jurisdictions, where confidentiality is granted upon certain level of substantiation, parties are informed about the professional secrecy obligation incumbent on the investigative staff and about procedures to claim confidentiality. In many jurisdictions, parties are required to submit non-confidential versions of their responses to RFIs or merger notifications. It is also a common practice to request inspected parties to identify confidential documents among the ones seized or copied during inspections. Also, inspection and RFI decisions are issued in such a way that confidential information of third parties are not revealed to the addressee.

33. However, competition authorities may need to disclose confidential information under specific circumstances. One of these circumstances is "advancement of an investigation". Disclosure of confidential information may be needed in order to confront a witness or collect further information from other public agencies or competition authorities. These situations constitute examples of cases where the agencies have to balance due process rights and the effectiveness of an investigation. As exceptions to due process rights, such disclosure of confidential information "is used carefully and sparingly" by competition agencies (ICN, 2014, p. 9_[14]).

3.5. Proportionality

34. Evidence gathering is a power and a duty of competition authorities. In doing that, they enjoy wide discretion. However, in some jurisdictions, such as the EU, principle of proportionality limits investigative powers. When it is applicable, proportionality aims at preventing excessive and arbitrary use of investigative powers during evidence gathering.

35. First of all, proportionality requires presentation of a clear justification for the use of investigative tools. Also it must be clearly explained why such measures are required to investigate a particular subject. In other words, authorities must be able present sound reasons for exercising its evidence gathering powers. In this respect, competition authorities should not wander out of investigation's scope while asking questions during interviews, requesting documents in RFIs or seizing documents during inspections. Tailoring the use and content of evidence gathering tools to the specific investigative situation benefits not only the subjects of investigative tools but also agency enforcement (ICN, 2015, p. 2_[10]). In this way, competition authorities can avoid the risk of being swamped by irrelevant information.

36. Also, competition authorities must choose evidence gathering methods which are not overly interfering. This is particularly important for an inspection, since it is more intrusive than other evidence gathering methods. In some jurisdictions, on-the-spot inspections are only allowed if a less interfering option is not available.⁵

37. Additionally, evidence gathering processes should not place an extraordinary burden on the subjects of investigative powers. Other factors, besides the scope of an investigation, such as the capacity and resources of the parties, their status in the proceedings (subject, third party, complainant) and the severity of the case must be considered when determining the scope and detail of the information sought. It is also important to give parties enough time to complete their preparations without hampering the timely conclusion of investigation. Short notices and strict deadlines may cause an unnecessary burden on the resources of the parties and disrupt their daily operations. This can also decrease quality of information provided.

3.6. Transparency

38. “Transparency refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale and the terms of agencies’ accountability, are provided to the public in a comprehensible, accessible, and timely manner.” (OECD, 2010, p. 26_[2]).

39. Transparency applies to evidence gathering processes, too. According to the ICN Guidance (2015, p. 3_[10]), “[c]ompetition laws and policies that govern agency enforcement should be transparent”, including the ones about “processes and investigative tools that agencies use to conduct their investigations”. In this respect, transparency can refer to (i) general transparency of rules and regulations on investigative tools and practices and (ii) case specific transparency, which involves notifications and open dialogue with the parties. As mentioned previously, both types of transparency are crucial for evidence gathering since they improve the quality of the evidence gathered and speed up evidence gathering processes. Transparency and due process build confidence and promote a cooperation-inducing environment between the agency and parties. Effective and transparent communications with parties and third parties allow authorities to identify relevant evidence and use their investigative powers more precisely and efficiently.

40. To that end, competition authorities have adopted a number of transparency-promoting practices. According to a survey conducted by ICN (2013, p. 9_[11]), 72% of the 36 respondent competition authorities make investigative process, procedures and practices public. 69% of respondents make explanations about the treatment of confidential and legally privileged information publicly available. Competition authorities encourage parties and third parties to submit materials which would complement the information gathered through RFIs, interviews and inspections. Investigative staff commonly hold meetings with the parties to inform them about the progress of the investigation and provide opportunities to parties to present their point of view. Investigative staff tend to meet relevant third parties who can present valuable information or evidence material to the inquiry. These meetings are generally structured around RFIs issued by the authority (ICN, 2013_[11]).

41. While pursuing transparency, competition authorities have to protect the confidentiality of sensitive information and ensure the effective use of investigative powers. In this context, authorities tend to be more transparent with investigated parties in comparison to third parties or the general public. Furthermore, the amount of disclosure to parties tends to increase as the investigation advances. (ICN, 2013_[11])

4. Review of Evidence Gathering Powers

42. Procedural fairness and due process require decision-making by an impartial person or panel, and the opportunity to be heard. In this respect, judicial review is essential to ensure due process. Yet, judicial review is not the only mechanism required by procedural fairness as concerns the review of proceedings and solve disputes. Indeed, many competition regimes “utilise the competition authority itself as the first stage of review” (OECD, 2011, p. 11_[18]).

4.1. Internal review

43. Internal review consists in the supervision of proceedings and dispute resolution by an impartial mechanism within the competition authority. It is recommended that competition authorities should internally review their use of investigative powers and offer a redress procedure to the parties who believe that their due process rights were breached during evidence gathering (ICC, 2010_[9]) (ICN, 2015_[10]). Indeed, many competition authorities adopt such mechanisms.

44. The internal review of investigative powers can be initiated after enforcement upon request of the parties (ex-post) or conducted as a part of evidence gathering procedure prior to enforcement (ex-ante). In many jurisdictions, a formal decision or authorization from the head of the agency is required for inspections. Along the same lines, compulsory RFIs are reviewed internally prior to being issued.⁶

45. During or after the enforcement of evidence gathering decisions, parties may request modifications to these decisions, or oppose them or the procedures used during execution. In such cases, it is advisable to allow investigative staff to attend to these issues as a first step to dispute resolution.⁷ If the dispute cannot be solved, it can be referred to a senior official or an independent review unit which is not involved in the investigation to fulfil a neutral supervisory role.⁸

46. Internal review processes provide parties with an opportunity to use their right to be heard and access to fair trial without having to make a judicial appeal. This internal review function and self-discipline about due process in general are especially important if procedural issues cannot be challenged on standalone basis. Moreover, considering the expense and time cost of judicial review of procedural disputes, internal mechanisms also offers an efficient means to address disputes (OECD, 2011, p. 13_[18]). Yet, it is important to note that internal mechanisms are not substitutes to judicial review, since judicial review provides a binding and independent supervision of the authorities’ evidence gathering practices.

4.2. Judicial review

47. Judicial review is one of the building blocks of a fair process. Independent judicial review enables parties to have access to a neutral decision maker, and prompts competition authorities to respect due process rights. Judicial review of authorities’ decisions and actions regarding evidence gathering may occur ex-ante or ex-post. Ex-ante review takes place when competition authority needs approval of a judicial body to use its investigative powers. For instance, according to a survey conducted by ICN (2013, p. 10_[12]), on-the-spot inspections at business can be conducted if only authorised by a court in 16 jurisdictions out of 31. Even when such an ex-ante review takes place, it may lack precision of ex-post control and parties may still claim that their rights were not respected during the

implementation of the authorised investigative action. Therefore, ex-ante review only complements ex-post review.

48. In this respect, ex-post review is indispensable and plays an essential role in ensuring that due process is respected as regards evidence gathering. Alongside its availability to investigated parties, the timing of judicial review is also an important factor when evaluating whether judicial review has genuine supervisory functions over the competition authority. Judicial review of investigative actions can be pursued through stand-alone actions or within the context of final decision of the competition authority (retrospective review). For instance, compulsory interviews in France can be appealed to President of the Appeal Court on a standalone basis, whereas such challenge is not possible in Germany. However, if some procedural rights of interviewee are breached in Germany, the testimony cannot be used as evidence (ICN, 2013, p. 38^[12]).

49. In the context of stand-alone actions, courts can check whether the investigative measure employed by the agency is necessary and proportionate at an early stage of proceedings. However this type of review would prolong investigative process significantly (Simonsson, 2013^[15]). Despite its advantages, retrospective review may not offer immediate remedy to affected parties since it may take years for competition authorities to reach to a final decision. What is more, a decision is not taken at the end of every proceeding; in such cases, investigated parties may never have the possibility to challenge the agency's procedure.

50. Since both approaches to judicial review have advantages and disadvantages, the focus must be on offering an adequate and timely remedy to the parties to protect their right to due process when deciding which judicial review model to adopt. For example, while some disputes, such as legal professional privilege claims may need to be addressed immediately, challenges about voluntary RFIs may be susceptible of being addressed retrospectively since the addressee can always choose not to reply.

Box 2. Ex-post Judicial Review of Inspections

Retrospective review may not be good enough - Czech Republic

In 2012, the Czech Office for the Protection of Competition (COPC) conducted an unannounced inspection at the premises of Schneider Electric. Schneider Electric appealed to the Regional Court in Brno, arguing that a court warrant was required instead of the order the authority produced and that inspectors seized documents of private nature. In 2013, the court ruled that Schneider Electric's claims were premature and inadmissible since the undertaking can protect its right through retrospective judicial review of the final decision, or claim damages even if such a decision was never taken. On 13 February 2014, the Supreme Administrative Court confirmed regional court's decision.

Several months after that decision, the European Court of Human Rights (ECtHR) announced its decision regarding an earlier case which had a similar outcome. In 2003, the COPC conducted inspections within the context of an investigation about price-fixing agreement among bakeries. Some inspected undertakings opposed the inspections by arguing that a court warrant, which was not presented, was required and that the inspections were "fishing expeditions" without enough grounds. After their claims were denied by Czech courts, claimants appealed to the ECtHR. In its decision, the ECtHR stated that a court warrant is not a prerequisite for legality of inspections. However, if prior court approval is not provided, ex-post judicial review must be strong and effective. According to the decision, neither the applicable Czech laws nor the court proceedings at the time provided sufficient independent supervision of the inspection as to proportionality.

Standalone review upon protest during inspection - Slovakia

In February 2015, the Slovak Supreme Court (SSC) ruled that. Although on-the-spot inspections are not decisions but actions, they can be subject to judicial review under the Slovak law on "actions against unlawful acts of public authorities". However, the court also stated that a claimant must exhaust all legal remedies available to him in order to be able to bring his/her case to court. In this case, a simple protest against the inspection was considered such a remedy. In other words, only disputes which are recorded during the inspections have the legal effect of opening the way for judicial review.

Source: The Supreme Administrative Court of Czech Republic refuses to allow judicial review of a dawn raid (Schneider Electric) , <https://www.concurrences.com/en/bulletin/special-issues/utilities-cartels/anticompetitive-practices-3006/the-supreme-administrative-court-of-czech-republic-refuses-to-allow-judicial>; Delta Pékárny A.S. v. Czech Republic, App. No 97/11, ECHR 279, Judgment of 2 October 2014, <http://hudoc.echr.coe.int/eng?i=001-147075>; The Slovak Supreme Court outlines the principles of effective ex-post court review of dawn raids (Stengl Consulting / Slovak Competition Office) <https://www.concurrences.com/en/bulletin/news-issues/february-2015/The-Slovak-Supreme-Court-outlines>

5. Conclusion

51. Due process is essential to the sound administration of competition cases. It is particularly important during the evidence gathering stage, since it lays the basis for a case and interferes with the privacy of the investigated parties.

52. Due process is beneficial for the parties to the proceedings, for third parties and for competition authorities. One significant benefit of due process for competition authorities is increased quality of evidence. Due process and transparency help authorities in their fact-finding efforts by encouraging cooperation and allowing detection of unfounded information and claims.

53. However, competition regimes must find a balance between protecting due process rights and promoting effective enforcement of competition laws. This balancing exercise has substantial and procedural implications for evidence gathering process. For instance, transparency is a requirement of procedural fairness and parties and competition authorities have established many mechanisms to ensure it. Still, transparency may have to be limited to address concerns regarding the protection of confidentiality rights of the parties and the integrity of the investigation.

54. This search for balance is a never ending endeavour. In the OECD's roundtable on procedural fairness (2010, p. 28^[2]), it was concluded that "regular review of existing rules and procedures, in order to identify opportunities for improvement" is appropriate and necessary. In doing this, consultations with stakeholders seems one of the best methods of reviewing current status (OECD, 2010, p. 39^[2]).

Endnotes

¹ Judgment of the ECtHR of 17 December 1996 in case Saunders vs United Kingdom, App. No. 19187/91, para. 68, <http://hudoc.echr.coe.int/eng?i=001-58009>

² Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (2011/C 308/06), para. 58, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC1020\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC1020(02)&from=EN)

³ “6.4.2 The protection of confidentiality will help persons providing information to the competition regulatory body or other law enforcement body to avoid the risk of harm to their legitimate business interests or individual interests, *e.g.*, through economic retaliation.” (ASEAN, 2010_[17])

⁴ “8.4. Parties and third parties that submit information to an agency during an investigation should have the ability to designate and request protection for information that they deem confidential. The persons providing confidential information should identify and explain, to the competition regulatory body or other law enforcement body, the reasons why the information should be treated as confidential.” (ICN, 2015_[10])

⁵ For example, Swedish Competition Act (Chapter 5 Section 3) “Upon an application by the Swedish Competition Authority, the Patent and Market Court may decide that the Authority may perform an inspection of a company to establish if it has infringed the prohibitions in Chapter 2, Section 1 or 7, or Article 101 or 102 of the TFEU, if ... 3. the importance of the action taken is sufficient to outweigh the interference or other inconvenience caused to the parties affected by it.” <http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf>

⁶ “3.1 Compulsory agency requests for information should be subject to internal review prior to being issued.” (ICN, 2015_[10])

⁷ “3.4 Agencies should allow for case teams to discuss and seek to resolve disputes regarding information requests with recipients as a first step. Rules governing agency investigations may also provide for internal review or external appeal procedures to resolve disputes related to information requests.” (ICN, 2015_[10])

⁸ “2.4.11 The agency should appoint an appropriate agency official who is not involved in conducting the investigation (such as, for example, a member of the agency’s General Counsel Office or an agency hearing officer) to resolve disputes between the investigators and any party or non-party regarding information requests.” (ICC, 2010_[9])

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