

# PROCEDURAL FAIRNESS AND TRANSPARENCY IN COMPETITION PROCEEDINGS



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## I. INTRODUCTION

In modern legal systems, a procedural fairness framework establishes the basic rights of individuals and companies throughout the investigation procedure and lays down the foundations for an effective, reliable and trustworthy enforcement action. A sound set of procedural rules and sound procedural safeguards is, therefore, a key and indispensable component of any enforcement system where governments scrutinize the conduct of individuals or a legal person, as is the case in competition enforcement proceedings. This is particularly true when the government enforcement action may lead to serious legal consequences for those involved, such as the imposition of hefty corporate, individual monetary fines, or other types of serious penalties, including sanctions of a criminal nature.

Although fairness and transparency are generally considered an indispensable condition for competition proceedings, countries' procedural frameworks and specific rules differ from one another. Significant efforts have been made over the years at the international level to harmonize substantive competition rules, which has led to great results in most enforcement areas. The same cannot be said for procedural rules. It is possible nevertheless to detect common features across national procedural frameworks. While competition proceedings remain largely national in nature, the increasing number of cross-border cases has led to new and different challenges for competition authorities. The need to secure information located in different countries raised the question of the level of procedural guarantees for parties involved in multi-jurisdictional proceedings if the information collected in one jurisdiction is to be used in another. Especially in today's globalized world, cooperation between national competition authorities is becoming more and more important. Hence, laying down basic principles and minimum standards for fairness and due process which can be implemented in most countries plays an increasingly important role in policy making.

Enhancing fairness in competition proceedings is a dynamic, constantly evolving process and international fora have played an important role in striving to identify common principles that could be applied across countries, regardless of the criminal, civil, or administrative nature of their enforcement system. Steps taken by the International Competition Network ("ICN") and the Organisation for Economic Co-operation and Development ("OECD"), as well as initiatives at the national level, offer an opportunity to reflect on the degree of consensus existing on the basic concepts underpinning the principles of procedural fairness and transparency:

- In February and June 2010,<sup>2</sup> Working Party 3 ("WP3") of the OECD Competition Committee held two roundtables on Procedural Fairness looking at Transparency Issues in Civil and Administrative Enforcement Proceedings. In October 2011, these two roundtables were fol-

<sup>2</sup> Organisation for Economic Co-operation and Development - Working Party No. 3 on Co-operation and Enforcement - ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE PROCEEDINGS (January 20, 2010) [http://ec.europa.eu/competition/international/multilateral/2010\\_fairness\\_feb.pdf](http://ec.europa.eu/competition/international/multilateral/2010_fairness_feb.pdf).

lowed by another roundtable on Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts and by an update on Developments in Procedural Fairness and Transparency.

- The ICN issued a Guidance on Investigative Process in 2018.<sup>3</sup> The aim of the Guidance is to synthesize the collective experience of ICN members on how competition agencies implement and improve fair and effective investigative processes. To develop its Guidance, the ICN conducted surveys of agencies' investigative practices and produced a number of relevant reports on investigative tools, transparency, and confidentiality.

## II. THE IMPORTANCE OF PROCEDURAL FAIRNESS

The procedural framework of most competition authorities includes a range of rights for the parties when subject to the wide range of enforcement tools (such as requests for information, inspections and seizure of business records, witness interrogations, etc.) which form part of a competition investigation. The fact that competition agencies can rely on strong (and at times intrusive) investigative tools makes it even more important that the parties are granted effective rights of defense. Procedural fairness in investigations and decisions involves establishing procedures that are fair and clear and that provide opportunities for parties to take active part in the investigation leading to a fair decision-making process. Procedural fairness includes rights such as the right to protection of confidential information, the right to obtain access to the case file and to the evidentiary record on which the enforcer intends to rely on, the right to be heard during the investigation and to present arguments and evidence, and finally to request an independent judicial review of the competition enforcement decision.<sup>4</sup>

A well-set procedural legal framework benefits both the agencies and the parties, as well as any other entity or third party, especially since it contributes to more effective agency work. Fairness and transparency are essential for the success of an investigation regardless of its outcome. It is key that the parties involved are confident with the process used to reach a competition decision and trust that the agency's measures were just. The trust of the parties that their arguments will be heard and that the final decision will have taken into consideration all possible facts, arguments, and evidence, especially those in favor of the parties, will ensure better cooperation with the agency, a more smooth and serene confrontation of different views, and certainly a higher impact of the decision itself on market competition. At the same time, transparency and fairness ensure a better understanding of the facts underpinning the investigation and help improve the quality of evidence and reasoning on which the agency bases its enforcement action.<sup>5</sup> They also assist the agency in allocating their scarce resources more efficiently, focusing on the aspects of a case that are really worth pursuing and dropping investigations which seemed promising at the outset but, through an open dialogue with the parties involved, reveal unfounded.

## III. WHAT DOES PROCEDURAL FAIRNESS INCLUDE?

The concept of procedural fairness can be unfolded into three elements:

- 1) General transparency: government measures of general application must be published and this should be done, as a general rule, before they are applied;
- 2) Procedural fairness in investigations: such measures must be administered in a uniform, impartial and reasonable manner or in a fair and equitable way; and
- 3). Judicial review: there must exist possibilities for appeal or review of decisions on the application of such measures.

Embedded in the concept of fairness is the principle of transparency. 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

<sup>3</sup> International Competition Network - Guidance on Investigative Process <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

<sup>4</sup> Organisation for Economic Co-operation and Development DAF/COMP/WD(2018)6 - Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020 (April 23, 2018) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2018\)6&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En).

<sup>5</sup> Organisation for Economic Co-operation and Development – Procedural Fairness and Transparency – Competition Committee (2012) <https://www.oecd.org/daf/competition/abuse/50235955.pdf>.

to the public in a comprehensible, accessible, and timely manner. In a broad sense transparency means the degree to which public policies and practices, and the process by which they are established, are open and predictable. Transparency is a basic requirement for the enforcement of competition law as competition laws are often written in general framework form and are applied in a technical manner on a case-by-case basis.

## **A. General Transparency**

Consistency, predictability, and fairness in decision-making processes can be fostered by transparency with respect to the substantive legal standards; agency policies, practices, and procedures. There is no fair and just process if the substantive and procedural rules applied by the agency are not accessible upfront by the parties subject to the enforcement action. Transparency is an integral part of due process since it enables individuals to know their rights, be aware of procedures to protect these rights, and learn the rationale and grounds of public authorities' decisions concerning themselves and other individuals. Thus, transparency improves the accountability, predictability, and consistency of authorities' actions. Generally, agencies have to be transparent and open towards the public and for that purpose they rely on formal transparency in the form of guidelines, public legal standards; most agencies make their policies, decisions, and practices publicly available. But they also use informal ways to increase transparency and predictability like press releases, speeches, articles, working papers, etc.

While most agencies provide a good degree of transparency into their competition laws and policies, there is generally a lower degree of transparency into the procedural rules that they apply. This is often because the procedural rules applied by the agency are governed by general procedural rules applicable to all administrative proceedings, i.e. they are not competition specific provisions. Often access to this information is limited by language constraints which makes the system less transparent for foreign parties in antitrust proceedings. This is an area where there is scope for significant improvements in many jurisdictions.

## **B. Procedural Fairness in the Investigative Stage**

The core of the discussion on procedural fairness in competition cases, however, concerns fairness during the investigative stage. Although fairness is not clearly defined in the framework of competition proceedings, it includes all measures that prevent arbitrary and biased decisions through protection of the individual's rights. It generally includes "(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)

Procedural fairness during the investigation rests on a number of general principles:

- *Confidentiality*: Competition authorities can access great amounts of information which is often sensitive, such as business secrets and personal data. Power to require such information is balanced by the right of the parties to keep that information confidential. Confidentiality also ensures that those involved in antitrust proceedings are willing to cooperate with competition agencies and supply relevant information and documents. The right to confidentiality finds its limits in the parties' right of defense: parties should have access to information and evidence used against them, both incriminating and exonerating.<sup>6</sup> A number of methods are adopted by competition agencies to provide access to evidence containing confidential information while respecting confidentiality claims. These include "conventional" methods such as redaction or summaries, and "innovative" methods such as confidentiality rings and data rooms.
- *Functional separation* and internal checks and balances: Separation of the different stages during the procedure ensures an objective decision-making process. This is why in many countries, investigation is formally or de facto separate from decision-making. Thanks to that, decision makers can be more objective about the case and about the weight of the evidence brought in support of the infringement claim. In addition, many agencies' internal processes and rules promote fairness of the investigation by providing ongoing internal review of investigatory decisions and by ensuring leadership involvement in the investigation. These agencies make use of procedures such as "devil's advocate" review, separate review by teams of specialized economists, or the use of additional industry or sectoral experts in the analysis.
- *Collaboration and openness*: Communication between the competition agency and those involved in an enforcement proceeding is a key component of a fair and transparent investigation. Many agencies consider it valuable to hold meetings with subjects of competition

<sup>6</sup> Organisation for Economic Co-operation and Development DAF/COMP/WD(2018)6 - Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020 (April 23, 2018) [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2018\)6&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2018)6&docLanguage=En).

enforcement proceedings at key points in the investigation, at both the staff and decision-maker levels. These meetings can ensure that the investigation is more targeted and more effective. For instance, a formal request of information sent to the parties can be followed (or preceded) by an informal discussion with the parties so that they can provide the most accurate answers and submit only the relevant documents for the investigation based on a better knowledge of the purpose of the request itself. Openness towards the parties to a proceeding has the great potential to enhance the knowledge of the facts underpinning the investigation and offers opportunities for the parties to present arguments and new facts.

- *Parties' involvement in the case:* one of the ways in which agencies provide transparency and ensure procedural fairness to the parties is to allow for the party involvement in the investigative and decision-making processes. This includes:
  - 1) 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. The ICN Guidance on Investigative Process 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.” One commonly adopted method is the use of a written document (such as a Statement of Objections, Statement of Issues, or Examination Report) informing the parties of the allegations against them, the details of the case and the evidence brought against them.
  - 2) The *right to an effective representation*, which includes the right to be represented and advised by legal counsel and the right against self-incrimination. Most jurisdictions recognize the legal professional privilege (“LPP”) to protect confidential communications between attorney and client from forced disclosure to public authorities or third parties. While the scope of the LPP varies from one jurisdiction to another, LLP aims at ensuring that all legal and natural persons have unrestricted access to external (and in many countries also to internal) legal advice without fearing their communications can be used against them. Another element of the right to defense is privilege against self-incrimination. This privilege can be a ground for refusal to provide answers which directly or indirectly involve admission of an infringement.
  - 3) The *right to present arguments and evidence*. Most jurisdictions allow the parties to submit written replies to the written document setting out the allegations against them. Some jurisdictions also allow parties to review and comment on key submissions by third parties contained in the case file, or submit memoranda or observations at any point during the investigation stage, especially if those include exculpatory evidence. Most agencies provide the parties with the right to a hearing where arguments and defenses can be presented orally directly before the case team or the decision-making body of the agency. Specific rules governing hearings are often set out in writing and made publicly available, including rules on the independence of the hearing officer.
- *Transparency of final decisions:* There are benefits to final agency enforcement decisions being made public. This ensures transparency of the enforcement action and accountability of the enforcing agency. Typically, agencies are required to (a) provide the parties with their theory of harm in writing; (b) in sufficient detail so as to identify the basis and rationale for the decision, including consideration of the parties' contentions, and exculpatory and inculpatory evidence; and (c) provide to the parties prior to publication of the final decision. Transparency in the decision-making phase is the basis for effective judicial review of the agency's actions. Most jurisdictions extend transparency not only to full infringement decisions but also to settlement and commitment decisions. More diversified is the situation concerning transparency of decisions not to pursue an investigation; often, transparency is provided not through the publication of a decision but rather via a short press release or other statements referring to the decision to close the case and its justifications.

### **C. Judicial Review**

Fairness of the enforcement action also rests on the ability of the addressees of such action to seek external review by an independent body of the administrative decision. One of the main roles of the judiciary is to exercise control over administrative bodies to ensure that their decision-making powers are used in a fair and reasonable manner. The standard of review applied by the courts in competition cases varies between jurisdictions and may depend upon the particular administrative or judicial act under review. That being said, courts ultimately have to ensure that agencies act within the boundaries of the legal authority given to them by the legislator, safeguarding the rule of law, and protecting individuals from arbitrary acts of the state. In some jurisdictions specialist competition tribunals exist to review competition decisions. In other jurisdictions the review is carried out by the ordinary courts. The judicial body will decide if the relevant procedural rules have been adhered to, whether the

facts have been accurately found, and whether there is any evidence of misuse of powers, or manifest error of assessment. In some countries, the scope of the judge's review goes beyond the procedural rights and encompasses the economic and legal assessment carried out by the competition authority.<sup>7</sup>

## IV. CONCLUSION

Procedural fairness and transparency are a complex, multi-sided set of principles that embrace many rights, as well as formal and informal practices providing for an effective legal framework to support sound and efficient competition enforcement. Ensuring minimum standards of fairness in competition proceedings is crucial for the success and credibility of the enforcement system. The principles of transparency and procedural fairness need to be flexible enough to adjust to the ever-changing circumstances and requirements of the complexity of competition enforcement. The growing cross-border nature of many antitrust investigations and the need for cooperation between different national competition authorities in such cases emphasizes and deepens the need to ensure a coherent and consistent framework for procedural fairness across jurisdictions. While the general principles on which fairness rest are largely common across jurisdictions, many questions remain to be addressed. International organizations have played and can continue to play a key role in fostering fairer procedures through dialogue, sharing of experiences and standard setting.

Despite the existing differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among countries, there is a growing consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement. Transparency and procedural fairness can, and are, achieved in many different ways. The ultimate objective of setting minimum common standards and principles is not uniformity – one size does not fit all – but to ensure consistency in the approach of agencies operating in different jurisdiction. An enforcement process which is perceived to be fair, predictable, and transparent will strengthen the legitimacy of the decisions of competition authorities ensuring that the action of governments will result in substantive outcome in the market. Transparent and fair procedure will benefit not only the parties involved who will trust that the action of the government will be just and fair, but mostly they will help agencies make better enforcement decisions by exposing their theories and facts to informed criticism throughout the enforcement process. The effectiveness of the enforcement actions overall will improve as agencies will be better able to deploy their scarce resources on the real issues in dispute.

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<sup>7</sup> Organisation for Economic Co-operation and Development - Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation (2013) <http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf>.

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