

PROCEDURAL FAIRNESS: CONVERGENCE IN PROCESS



BY PAUL O'BRIEN¹



¹ Paul O'Brien is Counsel for International Antitrust in the Office of International Affairs of the U.S. Federal Trade Commission ("FTC"). The views expressed are his and do not necessarily reflect those of the FTC or any individual Commissioner.

CPI ANTITRUST CHRONICLE NOVEMBER 2018

**Procedural Fairness:
Convergence in Process**
By Paul O'Brien



**Advances in International Due Process
Considerations: Proper Compliance
Mechanisms Could Propel Convergence**
By Jana I. Seidl & James F. Rill



**Due Process and Production of Documents
Stored Abroad: A Review of Antitrust
Discovery Tools After *Microsoft Ireland* and
the Cloud Act**
By Valeria Losco & Terry Calvani



**What's the Appeal? How the General Court
and Competition Appeal Tribunal are
Shaping the EU and UK Antitrust Regimes**
By Paul Gilbert



**Due Process and Antitrust in Japan:
Enforcers' Perspective**
By Hideo Nakajima



**Procedural Fairness and Transparency in
Competition Proceedings**
By Antonio Capobianco & Gabriella Erdei



**Towards a Systematic Controlling of
Antitrust Decisions?**
By Oliver Budzinski & Annika Stöhr



Visit www.competitionpolicyinternational.com for
access to these articles and more!

CPI Antitrust Chronicle November 2018

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2018[©] Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

The quality of competition agency enforcement depends on the quality of agency process. This is the underlying idea that has driven scrutiny and discussion of agency process over the last decade. Call it due process, procedural fairness, natural justice, or plain old transparency and fairness,² there is increasing recognition that sound enforcement outcomes depend upon sound process and with it, support for international convergence towards due process principles.

The global expansion of competition law enforcement in the 1990s and 2000s that brought new competition laws, agencies, institutions, and procedural frameworks to many jurisdictions has allowed for a great comparative exercise of the 2010s and 2020s. Accumulated records of enforcement experience and growing bodies of commentary and appellate reviews have allowed informed comparisons of outcomes – how agencies (and courts) conduct competition analysis and make enforcement decisions. Similarly, attention to one of the primary inputs into enforcement decisions³ – *process*, or how agencies investigate – has increased. More comparisons by companies involved in parallel reviews and agencies involved in enforcement cooperation and other exchanges have led to greater recognition of practices that are perceived as lacking in due process. In turn, this has prompted the identification of common procedural norms and calls for convergence towards best practices. Consolidation around and implementation of basic procedural standards presents the international competition community with the potential to improve enforcement effectiveness and efficiency.

II. WHY FOCUS ON FAIRNESS?

The justifications for procedural fairness during competition law enforcement generally fall into three categories, focused on different perspectives: the rights of the parties, agency decision making, and the overall mission of the enforcement system.

A. Parties: Fundamental Requirements

The starting point for the provision of procedural fairness is the rule of law and its even application to entities subject to it. Fairness in enforcement is not unique to competition law but often a fundamental part of a jurisdiction's broader legal system derived from constitutional provisions, charters

² For ease of drafting, "due process" or "procedural fairness" are used most often to convey these similar ideas. The OECD's Competition Committee concluded that "[t]he term 'due process' in competition proceedings does not have a clearly defined meaning and is generally understood in terms of 'procedural fairness.'" OECD Competition Committee, *Procedural Fairness: Transparency issues in civil and administrative enforcement proceedings*, Issues Paper, DAF/COMP [2010] at 11 (October 5, 2011) (hereafter OECD 2011).

³ D. Daniel Sokol, *Due Process, Transparency and Procedural Fairness in Asian Antitrust*, Competition Policy International Asia Column (January 2015) at 5 (hereafter Sokol 2015).

of rights and judicial decisions.⁴ This view of fairness as due process to parties focuses on legal requirements, fundamental rules of procedure, and basic protections such as appropriate notice and the opportunity to be heard. This core of due process – safeguarding the rights of parties – is often the first aspect that comes to mind and the one that receives the most attention, particularly from parties that believe they have been subject to inadequate process and for appellate scrutiny.

B. Agencies: Effectiveness through Fairness

It is sometimes suggested that adequate procedural rights only exist for the benefits of parties that are subject to antitrust investigation . . . However, it is now recognized that, in fact, procedural rights are also beneficial for agencies themselves and indirectly contribute to the legitimacy of competition law enforcement and societal welfare.⁵

The second line of reasoning in support of procedural fairness is focused on agencies and specific enforcement outcomes. The provision of procedural fairness informs investigation and decision making, leading to better outcomes.⁶ Transparency to and engagement with parties and third parties can increase the understanding of critical facts, evidence, and areas of dispute.⁷ Opportunities to respond allow agencies to sharpen their investigative theories by testing theories and evaluating evidence and counterarguments, improving the quality of decision making.⁸ Better-informed and focused investigations can also improve investigative efficiency and the use of agency resources. The OECD Competition Committee recognized that “[t]ransparency and fairness are not only essential requirements for the parties involved in a competition proceeding, but are also a key part of efficient and effective case management by the competition authority.”⁹

This view of the value of fairness is not limited to legal requirements, but also includes aspects of process that are often within agency discretion to address the needs of investigations, such as early interaction with parties or modification of requests for information. Whereas the party-focused arguments amount to “fairness to companies is required,” this agency-based justification is premised on the idea that “fairness is good for consumers and markets via better enforcement outcomes.” The latter has an obvious attraction to agencies considering whether to undertake the resources and burdens to ensure sound process.

C. Enforcement System: Protecting the Mission

The third angle from which to view procedural fairness involves the health of the competition enforcement system as a whole, specifically the credibility of the agency and its mission. Much of the discourse around the provision of procedural fairness cites competition agency credibility. ICN’s Guidance on Investigative Process proclaims that the “credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency’s investigative process and public understanding of such process.”¹⁰ Canada’s former Commissioner of Competition emphasized “the importance of justice, procedural fairness and due process and the important role they play in establishing, maintaining and enhancing the credibility of our competition institutions.”¹¹ The Director General for Competition for the European Commission has stated that “[i]f a competition authority wants to maintain credibility and trustworthiness – in the eyes of courts,

4 For example, the European Union Charter of Fundamental Rights, Article 41, Right to good administration embodies due process principles by stating that “every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.” In the United States, the principles of due process come from the Fifth Amendment to the U.S. Constitution that prevents the federal government from depriving “life, liberty, or property, without due process of law.”

5 Paul Lugard, *Procedural Fairness and Transparency in Antitrust Cases: Work in Progress*, Competition Policy International Antitrust Chronicle (June 2014) at 4.

6 Paul O’Brien, Krisztian Katona, & Randolph Tritell, *Procedural Fairness in Competition Investigations*, Competition Policy International Antitrust Chronicle (July 2015) at 2.

7 ICN Report on Competition Agency Transparency Practices (2013) at 4 (“. . .transparency during the investigative process is a key element to improving both the quality of evidence presented and the reasoning on which competition agencies base enforcement decisions.”).

8 See, for example, Edith Ramirez, Keynote Address by FTC Chairwoman Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC*, Antitrust in Asia Conference, Beijing, China (May 22, 2014) at 4-5 (hereafter Ramirez 2014). (“I have experienced how listening to parties enables me to make better, more informed decisions, and this applies equally to FTC staff and managers who routinely engage with parties throughout their investigations.”); Sokol 2015 at 3-4.

9 OECD 2011 at 26.

10 ICN Guidance on Investigative Process (2018), Introduction.

11 John Pecman, Commissioner of Competition, *Competition Law in a Global and Innovative Economy—A Canadian Perspective*, BRICS Conference, New Delhi, India (November 21, 2013).

counterparts, businesses and consumers – it must help ensure fairness and above all guarantee procedural fairness.”¹²

Sound process is an important foundational piece of the overall mission of competition law enforcement to protect consumers and competition by even, fair application of the law to all involved, and not at the expense of specific market participants. Like any other law enforcement, fact-based, objective analysis guided by fair procedures confers legitimacy to specific case outcomes as well as the agency’s overall mission. Inadequate process contributes to inferior outcomes and can prompt contempt for competition law and competition agencies. The benefits of sound procedural rules and practices and an agency’s enforcement credibility go beyond specific cases before the agency. They help promote increased compliance and deterrence, as companies and individuals have clear guidance with which to attune their conduct with the law and agency enforcement.¹³

D. Fairness Beyond Borders

The argument that sound process helps support a healthy enforcement environment has been extended to the international level. Increasingly, agencies recognize that process can affect enforcement cooperation.¹⁴ An agency’s commitment (or lack of) to sound process and fairness has reputational value with its peers, part of a currency of trust between agencies that approach matters with rules and practices that ensure fairness, informed decision making, and an objective application of the law. An agency’s willingness to cooperate with its counterparts, as well as the frequency, scope, and depth of such cooperation, in part reflects the perceptions of whether the partner is committed to sound process.

The significant number of parallel investigations and their web of related decisions has made the call for increased attention to procedural fairness a shared endeavor. Discussing the nature of multilateral enforcement, the head of the Antitrust Division explained that “[d]ifferent outcomes matter less if the decision-making process was transparent and fair. The legitimacy of all of our agencies’ decisions is strengthened by a collective commitment to transparent and fair decision-making processes.”¹⁵ The idea that the entire international competition community has a stake in the proper implementation of competition laws introduces an aspect of peer pressure and reputational consequences for agencies that fall short of procedural norms.

E. A Rising Tide of Procedural Fairness lifts all Boats

Though any one line of reasoning or perspective is enough to justify appropriate due process, articulating specific benefits to agencies and to the overall enforcement system has given the dialogue around procedural process a mutually beneficial context. The recognition of agency benefits has enhanced the prospects for progress towards convergence by giving agencies without the legal context, requirements, tradition or institutional will to provide due process, an attractive rationale for pursuing practices that promote procedural fairness.

Specific rules or practices may favor one perspective over others – i.e. investigative notice arguably aims more at party rights; transparent rules and written, reasoned enforcement decisions aim to bolster system credibility – but many procedural fairness-friendly rules deliver benefits to all three categories of procedural fairness beneficiaries. For example, party-agency (and third party-agency) engagement and the opportunity to be heard not only operationalize party rights but also inform agencies and their decision making and ensure stakeholders that the system is an objective attempt to consider all perspectives. Sound process can be good for parties, third parties, agencies, and the overall enforcement mission.

III. CONSENSUS: HALF WAY THERE

The story of the ongoing global, comparative exercise of the provision of due process in competition enforcement reveals a stunning success. There is a robust international consensus on the value of procedural fairness during competition enforcement and on basic guiding principles for how it should be provided. The major multilateral competition agency-led ventures agree on the importance of due process:

12 Johannes Laitenberger, Director-General for Competition, European Commission, *EU Competition Law in Innovation and Digital Markets: Fairness and The Consumer Welfare Perspective* (October 10, 2017) at 3 (hereafter Laitenberger 2017).

13 Ramirez 2014 at 6.

14 Id. at 5.

15 Makan Delrahim, *International Antitrust Policy: Economic Liberty and the Rule of Law*, NYU School of Law and Concurrences, New York, NY, October 27, 2017, at 14.

A key theme emerging from the discussions was a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement . . . *Procedural Fairness and Transparency, Key Points*, OECD

There is a broad consensus among ICN members regarding the importance of transparency, engagement, internal checks and balances on enforcement process, and protection of confidential information during competition investigations. . . . *ICN Guidance on Investigative Process*

UNCTAD's Model Law on Competition states that “[a] common feature to be highlighted is that the Authority’s functions must be based on the principle of due process of law as well as transparency.”¹⁶

This common recognition of purpose is *prima facie* evidence of a growing consensus, and indeed, such consensus is expanding into identified core values and concepts of what due process means in application. To date, the primary sources for international perspectives and consensus on due process in competition law enforcement consist of (1) the agency-led perspectives of the ICN’s *Guidance on Investigative Process and Guiding Principles for Procedural Fairness*,¹⁷ and the OECD’s *Key Points Report*¹⁸ of its roundtables on procedural fairness; and (2) the ICC’s *Recommended Framework and Discussion Paper*,¹⁹ and the ABA’s *Best Practices*.²⁰

Increasingly, with respect to the key elements of due process and its importance, antitrust enforcers speak a similar language.²¹ There is widespread agreement among agencies that the essence of due process includes the fundamental concepts of transparency and notice of charges and evidence, opportunities to respond, and independent appellate review. The consensus ICN *Guiding Principles for Procedural Fairness* cite impartiality, transparency, objectivity, meaningful engagement, opportunity to respond, judicial review, and timely investigation among its nine universal principles. The OECD Competition Committee concluded that “. . . most countries ensure, in one form or another, to the parties to an antitrust investigation the opportunity to obtain sufficient and timely information about material competitive concerns, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions.”²²

A. Underpinnings of Consensus

There are two key ideas that act as critical support for the international consensus on due process principles. First, the consensus is predicated on the idea that there is no superior institutional framework when it comes to the provision of procedural fairness. Differences in institutional set-up dictated by foundational legislation (often a country’s competition law) are accepted.²³ Instead, multilateral dialogue to date has put a premium on practical tools, ideas, and practices that any system, any agency can use to improve its process while proclaiming that all systems should provide at least basic levels of fairness.

The OECD emphasizes a “broad consensus that the objective is not uniformity—one size does not fit all—and that transparency and procedural fairness can [be], and are, achieved in many different ways.”²⁴ The ABA’s *Best Practices* note that “[n]o specific system of enforce-

¹⁶ UNCTAD Model Law on Competition ¶ 169, <https://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx>.

¹⁷ ICN *Guidance on Investigative Process* (2018); ICN *Guiding Principles for Procedural Fairness in Competition Agency Enforcement* (2018).

¹⁸ OECD Competition Committee, *Procedural Fairness and Transparency, Key Points* (2012).

¹⁹ ICC Recommended framework for international best practices in competition law enforcement proceedings (2010); ICC Discussion Paper, *Effective Procedural Safeguards in Competition Law Enforcement Proceedings* (2017).

²⁰ ABA *Best Practices for Antitrust Procedure* (2015).

²¹ For example, a U.S. enforcer’s description of “frank exchange during all phases of an investigation,” is echoed by an EU enforcer touting “ample opportunity for open and frank discussion and to make [parties’] points of view known throughout the procedure.” Christine Varney, *Procedural Fairness*, 13th Annual Competition Conference of the International Bar Association, Fiesole, Italy, September 12, 2009 at 3; Laitenberg 2017 at 6.

²² OECD Competition Committee Policy Roundtables on Procedural Fairness (2011).

²³ Institutional design’s impact on process remains a topic of great interest and debate, even if not central to multilateral consensus building efforts. See, e.g. Stanley Wong, *The Independence of Decision-Maker Principle in Competition Law Enforcement*, *Competition Policy International Antitrust Chronicle* (June 2014) (explores the “procedural fairness problem” of assigning investigative and decision-making functions to a single administrative body).

²⁴ OECD *Key Points Report* (2012), Introduction.

ment—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capabilities.”²⁵ The ICN Guidance recognizes that “[c]ompetition agencies operate within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented. Consequently, there can be different approaches to achieving fairness during investigations . . .”²⁶ This recognition that due process is attainable across different institutional frameworks is integral to multilateral consensus building on due process principles.

The second, related supporting pillar for the international consensus on due process is that many implementing principles and practices should be flexible as opposed to absolute. Shared *guiding principles* do not necessarily equate to identical agency *practices*. Differences in legal systems, agency rules, and the needs of specific investigations drive numerous variations and differences in the scope, timing, discretion, balancing, specificity, and application of due process principles across the world.

The ICN, OECD, ABA, and ICC consensus-building exercises are not aimed at developing a single set of universal procedural rules nor establishing binding compliance mechanisms for due process commitments. Instead, they establish basic procedural norms such as “investigative notice to parties” or “agency-party engagement at key points of investigations” and then allow for flexibility and adaptation across different systems — often in the absence of implementing details — in factors such as timing, frequency, implementation, and level of participation within the agency.

The no-one-size-fits-all conclusion for due process practices in competition law proceedings is not only driven by obvious differences among jurisdictions, but also in part by the situational nature of competition enforcement itself and the need to tailor process and analysis to the facts of each case. The flexibility in defining specific due process practices is a feature of aspirational convergence work, not a flaw, and reflects the nature of due process and an agency’s degree of discretion in applying it to specific cases. Still, even in the absence of universal implementing rules or binding adherence mechanisms, these efforts set expectations that competition law enforcement be guided by consensus principles of fairness, transparency, and predictability in pursuit of a coherent approach to enforcement.

B. Where’s the Beef?

This flexibility and recognition of agency discretion can be both good news and bad news for convergence. It means that agencies have the ability to improve procedural fairness, investigative practices, and consistency in the application of their own rules. However, it may also mean that even perfect due process rules depend on the circumstances of their application in specific cases. To some degree, the prospects for convergence are determined at the agency and case handler level, every day in every investigation. This is a more daunting challenge than articulating a single, universal set of multilateral recommendations and proclaiming victory. Even the best rules face implementation challenges. In an enforcement environment characterized by difficult fact-finding and analysis in a context of significant agency discretion, convergence and consistency are challenges requiring sustained agency commitment via skills training, internal safeguards, and review mechanisms that ensure the implementation of process consistently matches the agency’s ideals.

In 2017, the U.S. Chamber of Commerce conducted a global survey of competition practitioners focused on competition agency process in 14 jurisdictions, with respondents rating their home agency’s practices.²⁷ One finding stands out in offering insight into the perceived weaknesses of the provision of due process and possible advice to promote stronger practices. Respondents were given a choice as to the primary source of procedural fairness “problems,” in their jurisdiction: 70 percent attributed the problems to “too much variation between case handlers”; whereas 30 percent cited existing (or lacking) statutes and regulations.²⁸ This result may indicate that many agencies have appropriate existing rules, practices, and frameworks to provide for due process, but are not consistently living up to them. This perception supports the idea that agencies have the ability to make strides on their own. It might be worthwhile to devote increased attention to agency-controlled investigative process choices, internal training, and decision-making safeguards in order to promote more consistent application of existing rules and identified best practices.

²⁵ ABA Best Practices (2015).

²⁶ ICN Guidance on Investigative Process (2018), Introduction.

²⁷ Adherence to ICN Guidance on Investigative Process, A Practitioner Survey, U.S. Chamber of Commerce (2017), <https://www.uschamber.com/report/adherence-icn-guidance-investigative-process-practitioner-survey>.

²⁸ *Id.* at 11.

IV. NEXT STEPS

Inadequate process that leads competition agencies to uninformed, biased, or unfair decisions is a worthy target of convergence efforts toward consensus fairness and transparency norms. For today's consensus on due process principles to inform and improve tomorrow's agency practices, the competition community will need to find ways to instill the principles in to the day to day work of enforcement. The following ideas may support future progress and closer convergence.

- Convergence efforts around sound process will continue to need contributions from across the competition community, including private sector comparisons, surveys, ratings, and/or criticism, academic study, agency commitment and self-evaluation, judicial scrutiny, and international organization leadership to articulate consensus standards.
- Practitioners, agencies, and academics should continue to evaluate the impact of differences in rules and agency practices, identifying those that they perceive as inadequate. More surveys and comparative studies on the provision of due process may also be useful to identify deficiencies and prospects for improvement.
- According to the practitioner survey mentioned earlier, a focus on the consistent application of existing rules and practices may be worth attention. Agencies should consider internal agency choices and safeguards to promote consistent implementation of rules and investigative practices, for example, via staff training and internal manuals, models, guides, or templates.
- International organizations such as the ICN and OECD should continue work devoted to agency process by developing consensus recommendations and, importantly, encouraging their implementation. Non-binding, soft-law recommendations have allowed agencies to identify and develop procedural norms and expectations for agencies to consider and emulate.
- While a consensus-building approach using non-binding recommendations has helped identify and elaborate due process standards and best practices, agencies should consider international tools or agreements that introduce implementation “nudges” such as peer reviews, self-reporting, agency-to-agency dialogue, or compliance mechanisms. This may help accelerate the implementation of basic, agreed upon principles and practices and limit their uneven application.²⁹

The pursuit of better practices and improved process in competition law proceedings is a work in progress. The benefits of predictability, transparency, and fairness accrue not only to parties, but also promote more informed decision making and strengthen enforcement credibility. The blueprint for convergence is in place. The ICN Guiding Principles and Guidance and perspectives from the ICC Framework and ABA Best Practices have articulated important due process principles and standards. Future progress depends on the willingness of agencies to continue to commit to self-evaluation, public accountability, and consistent application of sound procedural rules and practices. Time will tell whether the existing consensus of *principles* and *objectives* spurs closer convergence of agency *practices*.

²⁹ See, for example, the recent initiative for a multilateral framework on procedures with “core procedural norms and meaningful compliance mechanisms.” Makan Delrahim, *Remarks on Global Antitrust Enforcement at the Council on Foreign Relations*, Washington, DC (June 1, 2018).

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

