

# DUE PROCESS IN INTERNATIONAL ANTITRUST ENFORCEMENT: AN IDEA WHOSE TIME HAS COME



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## I. INTRODUCTION

The past few decades have witnessed an upsurge in the number of authorities worldwide engaged in competition enforcement. The magnitude of this change is demonstrated eloquently by the fact that the membership of the global organization of competition enforcement agencies known as the International Competition Network (“ICN”) has now swelled to more than 130.

The proliferation of enforcement authorities has given new impetus to longstanding calls for increased substantive and procedural convergence across jurisdictions. One area of potential harmonization that has received particularly strong attention over the years is due process and transparency in enforcement. Discussions about this longstanding area of interest has been reinvigorated in the past year by new comparative studies as well as recent initiatives launched by the ICN and the Competition Committee of the Organization for Economic Cooperation and Development (“OECD”). This article reviews those developments and looks ahead to what comes next.

## II. NEW COMPARATIVE STUDIES

In order to be successful, reform proposals must have a sound theoretical and empirical basis. Two recent comparative studies have helped provide the type of research and analysis needed to support improvements in due process.

The Procedural Transparency Task Force of the American Bar Association’s Section of Antitrust has conducted an assessment of how a sample of countries are performing on thirty-one of the best practices previously identified in the Section’s 2015 report.<sup>2</sup> For each of these practices, the Task Force selected roughly five jurisdictions from different regions of the world and evaluated the extent to which each of those jurisdictions is complying with a particular Best Practice. Compliance was determined by whether a jurisdiction had adopted written, publicly available directives with respect to that practice and whether it honors that practice on a consistent basis, with the best jurisdictions satisfying both criteria and the worst jurisdictions satisfying neither. Rather than offering an absolute grade or labeling any jurisdiction as compliant or noncompliant, the Task Force instead chose to make relative comparisons by ranking the jurisdictions selected for each Best Practice from best to worst. The report concluded that a significant gap remains between the Best Practices identified by the ABA and the way that many jurisdictions enforce competition law.

<sup>2</sup> ABA SECTION OF ANTITRUST LAW, ASSESSMENT OF GLOBAL COMPETITION AGENCY IMPLEMENTATION OF ABA BEST PRACTICES FOR ANTITRUST PROCEDURE (2019), available at [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/sal-procedural-transparency-2019-04-29.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/sal-procedural-transparency-2019-04-29.pdf). For the ABA’s 2015 Best Practices, see ABA SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE (2015), available at [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_bestprac\\_20150522.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.pdf).

Another recent comparative study of due process in antitrust enforcement is being conducted by academics from universities in China, Europe, and the U.S., including myself.<sup>3</sup> Our study began by reviewing the academic literature identifying the benefits of due process. These include:

- Compliance with basic norms of impartiality
- Greater accuracy of decisions
- Stronger economic growth
- Greater respect for the government
- Better control of the bureaucracy
- Restraints on the influence of special interest groups
- Stronger visibility of corruption.

Unlike the ABA study, which examined a broad range of global jurisdictions, our study takes a deeper dive into enforcement practices in China, the European Union, and the U.S., which represent the world's three largest economies and are widely regarded as the most important competition law jurisdictions. Our analysis breaks the enforcement process down into twenty-eight discrete steps, spanning document requests, inspections, agency deliberations, issuance of decisions, commitments/settlements, and judicial review, and conducted a detailed assessment of the performance of all three jurisdictions with respect to each.

The analysis identified three practices that would have the biggest impact on improving due process:

- Agency disclosure of the evidence on which it wishes to rely
- Separation of investigatory/prosecutorial and adjudicatory functions
- The availability of rigorous judicial review of economic reasoning.

Our study also offered six secondary recommendations.

These analyses have already exerted an important influence over many of the new initiatives that are now underway and will no doubt continue to do so in the future.

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<sup>3</sup> Christopher S. Yoo et. al., *DUE PROCESS IN ANTITRUST ENFORCEMENT THROUGH THE LENS OF COMPARATIVE LAW* (2019), available at <https://ssrn.com/abstract=3440571>. The other members of the research team include Professors Yong Huang and Shan Jiang of the Competition Law Center of the University of International Business and Economics in China and Professor Thomas Fetzer of the Mannheim Center for Competition and Innovation at the University of Mannheim in Germany.

### III. THE INTERNATIONAL COMPETITION NETWORK

The growing interest in due process in antitrust enforcement led to two major developments at the ICN's May 2019 Annual Conference in Cartagena, Colombia. First, the ICN adopted its *Recommended Practices for Investigative Process*. Second, the ICN adopted its Framework on Competition Agency Procedures ("CAP"). Together, they represent complementary measures, with the *Recommended Practices* representing the ceiling to which agencies should aspire and the CAP representing the floor below which no agency should fall.

#### A. *Recommended Practices for Investigative Process*

The *Recommended Practices for Investigative Practices* represents the culmination of years of effort by the ICN's Agency Effectiveness Working Group since 2012.<sup>4</sup> Preceded by the ICN's adoption of its *Guidance on Investigative Process* in 2015<sup>5</sup> and its *Guiding Principles for Procedural Fairness in Competition Agency Enforcement*<sup>6</sup> and *Guidance on Investigative Process* in 2018,<sup>7</sup> the *Recommended Practices* represent the most authoritative type of document that the ICN issues.

The *Recommended Practices* begin by noting that agency transparency and engagement with the parties yield numerous benefits, including more efficient, effective, accurate, and predictable enforcement and enhanced agency credibility. The document then organizes into forty-nine paragraphs into eleven key principles and six overarching categories:

- **Sufficient and appropriate investigative tools**, including sufficient resources, clear legal frameworks setting out clear criteria and procedural requirements, disclosure of internal procedures, and ability to apply tools in a tailored and reasonable manner.
- **Transparency about agency policies and standards**, including substantive legal standards and processes and public disclosure of reasoned decisions.
- **Transparency during an investigation**, including notice as soon as feasible of the existence of an investigation, its subject matter, its legal basis, the expected timing, the basic facts and evidence gathered, and theories of competitive harm, and access to evidence, subject to appropriate protections for confidential information.
- **Meaningful engagement during an investigation** on significant factual, legal, economic, and procedural issues, including open discussion of investigative theories and factual evidence, the opportunity to present evidence and arguments in a timely manner, and the opportunity for third parties to submit their views.
- **Agency safeguards**, including internal procedures and practices to ensure avoidance of conflicts of interest, consistency across investigations, periodic reassessment, conclusion of investigations within a reasonable time, periodic reevaluation of procedures, evaluation of investigative recommendations before the agency makes a final decision based on the full record, meaningful opportunity to be heard and respond, and sufficient written decisions.
- **Confidentiality protections and legal privileges** under clear, publicity available policies.

Three times longer than the Annex to the CAP, the *Recommended Practices* represent the ICN's most fulsome elaboration of what constitutes a good enforcement process. As is the case with most ICN work product, the *Recommended Practices* are nonbinding, and members are under no obligation to adhere to its content. As such, it represents an aspirational ceiling to which all agencies are encouraged to strive.

<sup>4</sup> INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR INVESTIGATIVE PROCESS (2019), available at <http://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-for-investigative-process/>.

<sup>5</sup> INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), available at [http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_Guidance\\_InvestigativeProcess.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_Guidance_InvestigativeProcess.pdf).

<sup>6</sup> INT'L COMPETITION NETWORK, ICN GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT (2018), available at [http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_GuidingPrinciples\\_ProFairness.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf).

<sup>7</sup> INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2018), available at [http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_Guidance\\_InvestigativeProcess.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_Guidance_InvestigativeProcess.pdf).

## B. Framework for Competition Agency Procedures

The more surprising development in Cartagena was the widescale endorsement of the ICN's new *Framework for Competition Agency Procedures* ("CAP").<sup>8</sup> ICN consideration of the CAP was motivated by the leadership of the Antitrust Division of the U.S. Department of Justice in proposing a Multilateral Framework of Procedures ("MFP") in June 2018 as a way for competition law enforcement agencies to agree to certain basic due process principles.<sup>9</sup>

The ICN began consideration of the parallel initiative that became the CAP in November 2018. The ICN's twenty-member steering group approved the CAP in April 2019, and the CAP was officially launched at the ICN Annual Meeting in May 2019 with sixty-two inaugural participating agencies. The speed with which this initiative came together is stunning, as is the breadth of its support. As of this writing, the number of participating agencies has reached seventy, which represents more than half the membership of the ICN.

The substantive principles are contained in the CAP's Annex, which as noted earlier are less detailed than the *Recommended Practices*. The Annex consists of twenty-four paragraphs organized into eleven principles:

- **Non-discrimination** – participating agencies will not treat persons from other jurisdictions less favorably.
- **Transparency and predictability** – every agency should have substantive laws, procedural rules, and any applicable guidance that are publicly available.
- **Investigative process** – agencies will inform persons under investigation of the investigation, its legal basis, and the conduct under investigation as soon as possible; provide them with meaningful and timely opportunities for engagement; and make sure that requests for information are focused and given a reasonable time for response.
- **Timing of investigations and enforcement proceedings** – agencies will endeavor to conclude their investigations and proceedings within a reasonable period.
- **Confidentiality** – agencies will have publicly available rules, policies, or guidance regarding confidential information and protect that information from unlawful disclosure, taking into account the interests of the parties and the public.
- **Conflicts of interests** – officials will be objective and impartial and not have conflicts of interest in cases, with agency being encouraged to have rules, policies, or guidance regarding such conflicts.
- **Notice and opportunity to defend** – agencies will give parties timely notice of alleged violations or claims against them, including facts and relevant legal and economic reasoning; and reasonable and timely access to the information necessary to prepare an adequate defense; and reasonable opportunities to defend, including the opportunity to be heard and present, respond to, and challenge evidence.
- **Representation by legal counsel and privilege** – agency will not deny representation by legal counsel of a person's choosing without due cause, will provide persons a reasonable opportunity to present views, and recognize applicable privileges, preferably according to available rules, policies, or guidelines.
- **Decisions in writing** – agencies will issue publicly available final decisions in writing, setting out the findings of fact and conclusions of law, as well as any remedies or sanctions and commitments, along with the reasons for them.
- **Independent review** – no agency will impose a prohibition, remedy, or sanction unless there is an opportunity for review by an independent, impartial adjudicative body (e.g. a court, tribunal, or appellate body).

<sup>8</sup> INT'L COMPETITION NETWORK, ICN FRAMEWORK ON COMPETITION AGENCY PROCEDURES (2019), available at [http://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN\\_CAP.pdf](http://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf).

<sup>9</sup> Makan Delrahim, Asst. Att'y Gen. U.S. Dept. of Justice, Promoting Due Process in Global Antitrust Enforcement, Council on Foreign Relations (June 1, 2018), available at <http://www.cfr.org/event/promoting-due-process-global-antitrust-enforcement>.

- **Additional standards** – agencies may maintain additional standards consistent with providing effective and fair procedures, such as the ICN’s Recommended Practices for Investigative Process.

Much of the substance overlaps with the principles identified in prior studies. The mechanisms for encouraging member compliance with the CAP principles are more innovative. For example, the CAP operates on an opt-in basis, inspired by prior provisions in the *Framework for Merger Review Cooperation* and the *Framework for the Promotion of the Sharing of Non-Confidential Information* that included provisions allowing members to opt-in to establishing a center point of contact. Indeed, the CAP broadens its scope further by permitting agencies that are not members of the ICN to join as well. At the same time, the CAP permits participating agencies to join subject to limitations when particular laws or procedural rules prevent them from applying CAP principles. This stands in contrast to other ICN work product, which does not require any explicit endorsement or agreement for ICN members. The fact that members must take affirmative actions to join the CAP and expressly note any limitations signals the signatories’ greater commitment to adhere to its principles and raises the normative obligation to comply with the terms to which they have agreed.

In addition, the CAP creates two new tools to promote its implementation. First, it creates a “cooperation process” through which agencies may request “dialogues” with other agencies regarding issues relevant to the CAP, much like consultation provisions included in many bilateral trade agreements. The recent consultations between the U.S. and South Korea under the chapter on Competition-Related Matters contained in the United States–Republic of Korea Free Trade Agreement (KORUS) to address U.S. concerns about companies’ lack of opportunity to review and rebut the evidence supporting allegations against them may provide a useful indication of how effective this particular avenue for dispute resolution will ultimately turn out to be.

In addition, the CAP creates a “review process” that requires CAP participants to submit templates to the CAP Co-Chairs detailing their procedures and explaining how they meet the CAP principles. CAP participants are also required to convene dedicated sessions to review how well the CAP is functioning, to advocate for implementation of the CAP principles, report on general trends and to consider possible modifications to the principles. The CAP held its initial meeting in June 2019. The co-chairs were the Australian Competition and Consumer Commission, the German *Bundeskartellamt*, and the U.S. Department of Justice Antitrust Division.

These measures go beyond the ICN’s usual mechanisms of promoting awareness via teleseminars, fostering transparency through public templates, and encouraging self-assessments. Instead, the CAP envisions agencies taking a more active role in evaluating their peers.

## IV. OECD DRAFT RECOMMENDATION ON TRANSPARENCY AND PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT

The other organization that has taken a leading role in promoting due process in antitrust enforcement is the Competition Committee of the OECD. They took an early interest, convening a series of policy roundtables in 2010 and 2011,<sup>10</sup> which they consolidated into a *Key Points* document in 2012.<sup>11</sup> OECD interest in the topic revived in June 2018, where the Competition Committee identified transparency and procedural fairness as a long-term theme for 2019-20.<sup>12</sup>

All of these preliminary efforts eventually led to begin consideration of a *Draft Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement* on June 4, 2019. Although the text of the draft recommendation is not yet available to the public, the scoping note launching the initiative identified two aspects as “crucial for a well-functioning competition enforcement system.” The first is transparency, which the scoping note described as making publicly available laws, policies, guidelines, procedures and practices, as well as agency and court decisions. The second is procedural fairness in investigations and decisions, including:

<sup>10</sup> ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMM., POLICY ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS (2010), available at <http://www.oecd.org/daf/competition/48825133.pdf>; ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMMITTEE, POLICY ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT PROCEEDINGS (2010), available at <http://www.oecd.org/daf/competition/mergers/48825133.pdf>; ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMM., POLICY ROUNDTABLE ON PROCEDURAL FAIRNESS: COMPETITION AUTHORITIES, COURTS AND RECENT DEVELOPMENTS (2011), available at <http://www.oecd.org/daf/competition/ProceduralFairnessCompetition%20AuthoritiesCourtsandRecentDevelopments2011.pdf>.

<sup>11</sup> ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMM., PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS (2012), available at <http://www.oecd.org/daf/competition/mergers/50235955.pdf>.

<sup>12</sup> ORG. FOR ECON. COOPERATION & DEV. COMPETITION COMM., SCOPING NOTE ON TRANSPARENCY AND PROCEDURAL FAIRNESS AS A LONG-TERM THEME FOR 2019-2020 (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).

- Establishing and following procedures that are fair and clear on the rights and limitations of affected and interested parties
- Providing opportunities for parties to take part in investigative and decision-making processes.
- The right to seek access to the case file and request the independent judicial review of competition enforcement decisions.

Transparency and procedural fairness promote important goals, including:

- Ensuring the impartial and reasonable treatment of subjects of competition investigations and provide them with legal certainty and predictability.
- Improving the quality, accuracy and comprehensiveness of competition agencies' analyses and decisions by making sure that all arguments are heard and assessed.
- Building the credibility of competition enforcement and reinforcing the legitimacy of competition law and policy.
- Imposing internal clarity and self-discipline on agency decision-making.

The institutional choices that agencies make play a key role in “guarantee[ing] that enforcement actions and decision-making processes are effective, predictable and transparent, and perceived to be so by affected and interested parties, as well as all citizens.” They can include:

- A separation between investigators and decision-makers.
- Using independent internal advisors to provide a “fresh eyes” review of cases.
- Separating the investigating and legal teams using a firewall.
- Having procedures to assess the likely success of an investigation at an early stage.
- Holding frequent meetings between the parties, case teams and senior decision-makers.
- Publishing commitments with regard to transparency.

To support this initiative, the Competition Committee held roundtables on the treatment of legally privileged information in competition proceedings in December 2018 and on the standard of review by courts in competition cases in June 2019. The scoping note suggests that the Competition Committee may schedule an additional roundtable on access to file and protection of confidential information in December 2019.

The OECD's renewed interest in this area is a potentially significant development. First, the scoping note endorses separating the investigative and decision-making teams within the competition authority. Second, unlike ICN work product, which is created by the agreement of competition agencies, OECD work product is approved by national governments. As such, the Draft Recommendation is likely to have greater visibility within governments and may be regarded as carrying more weight.

## V. THE PATH FORWARD

The amount of high-level attention that due process in antitrust enforcement is receiving is as startling as it is welcome. The recent focus provided by the proposal of the MFP appears to have galvanized widespread interest that had been laying latent in the community. That said, several factors will likely have a significant influence on the future success of these efforts.

As an initial matter, the ICN and OECD documents both recognize the complexity of applying uniform procedural standards to legal systems that are quite diverse. For example, the reliance of civil law systems on inquisitorial processes in which the judge controls questioning of witnesses and the evaluation of evidence instead of the parties means that due process concepts as developed in common law regimes will require some degree of adaptation. That said, this particular concern is somewhat inapt in the context of competition law, which is enforced administratively instead of judicially in most civil law countries. Although some commentators have been tempted to equate the role of administrative enforcement officials with that of a judge, those enforcement officials are interested parties in the litigation and lack the independence and impartiality needed to justify permitting the decisionmaker to control the presentation of evidence and counter evidence.

In addition, the procedural protections contained in these various instruments largely overlap one another, although sometimes they vary in terms of emphasis. The overall similarity of the procedures contained in these instruments suggests that their impact may depend more on the robustness of their implementation than on the principles embodied in them. As a result, the fact that the initial Co-Chairs of the ICN CAP are all vigorous champions of due process is heartening. The long-term future of the initiative depends on supporting the current leadership and consistently finding successors who are just as strongly committed to this endeavor.

Lastly, the process of implementation and evaluation will necessarily depend on the active involvement of parties who have been subject to enforcement proceedings in the past. That said, parties who are either currently subjects of antitrust enforcement or who believe they are likely to be subject to them in the future are often reluctant to participate candidly in such proceedings. The parties' willingness to overcome these concerns and to share their experiences as inputs into review processes will be a critical determinant of whether we will look back at 2019 as a turning point or a missed opportunity.



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