

**Due Process in Competition Law
Enforcement
The New OECD Recommendation on
Transparency and Procedural Fairness in
Competition Law Enforcement**

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Competition law enforcement is part of a country's overall law enforcement and is shaped by a country's legal system, history, and culture. Some competition authorities follow common law, others civil law; in some systems, the competition authority takes enforcement decisions at the first instance, whereas in others the first-instance decision-maker is a court of law.

Regardless of the specific choices, institutions, and legal culture of each law enforcement system, there is fairly broad agreement that minimum Due Process standards should exist related to enforcement, and that these require transparency, fair treatment during procedures, and respect for the right to defense. Over time, governments, competition authorities, and businesses have developed a level of consensus on what the appropriate and necessary Due Process requirements are, as well as which enforcement practices are effective and just.

I. Why a Multilateral Instrument Is Valuable

Market participants may be affected by competition law enforcement, whether as investigated parties in antitrust cases, parties in merger review, or interested third parties. In each case, parties follow the process and rules set by the reviewing jurisdiction. As business activities increasingly cross borders, parties need to follow different domestic laws and may face law enforcement in more than one jurisdiction. Even allowing for legal, institutional, and cultural differences, businesses and governments share an expectation that enforcement will be transparent and fair

everywhere, and that there exists a common understanding of what "transparent" and "fair" enforcement is.

The International Competition Network's Framework for Competition Agency Procedures established fundamental principles of fair and effective procedures for competition authorities.² The OECD and its members started working on guidance for governments on minimum Due Process safeguards back in 2010.³ Finally, on October 6, 2021, OECD Ministers⁴ adopted the [Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement](#) (the "Recommendation"). This document is the first multilateral instrument that provides governments with recommendations on Due Process standards for competition law.

II. Which Are the Specific Principles?

The Recommendation establishes duties of transparency and predictability; independence, impartiality, and professionalism; non-discrimination, proportionality and consistency; timeliness; meaningful engagement of the parties in the enforcement process; protection of confidential and privileged information; and judicial review.

1. Transparency and Predictability

This Recommendation asks for a clear and publicly available framework for competition law enforcement. Transparency includes clarity on parties' rights and obligations, applicable procedures, and deadlines. It requires the publishing of enforcement (authority and/or court) decisions, including their facts and legal

¹ Competition expert at the OECD, responsible for the transparency and procedural fairness work stream.

² www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/.

³ www.oecd.org/fr/daf/concurrence/transparency-and-procedural-fairness-in-competition-law-enforcement.htm.

⁴ The OECD has 38 members. In addition to them, Romania and Brazil (both of which are associated to the OECD Competition Committee) participated in the development of the Recommendation and adhered to it.

basis (except for confidential information protected from disclosure).

2. Independence, Impartiality, and Professionalism

The Recommendation details each requirement. Independence involves guaranteeing that competition authorities are free from political interference or pressure. Impartiality requires addressing any material conflicts of interest that enforcement officials may have and ensuring that the law is enforced based on relevant legal and economic arguments, and sound competition policy principles. Professionalism involves providing competition authorities with sufficient resources to carry out their duties effectively (in terms of human and financial resources, as well as investigation and enforcement tools).

3. Non-discrimination, Proportionality, and Consistency

Non-discrimination requires treating parties equally, without differentiating based on elements such as nationality or ownership. Proportionality involves reasonableness: to avoid imposing unnecessary costs and burdens, limiting procedural actions like inspections and information requests to those necessary, and assessing (when there is sufficient information) whether a case has merit and should be pursued or, if not, is better closed. Consistency involves standardized procedures and steps for ensuring objective decision-making through the application of internal checks and balances.

4. Timeliness

This requires wrapping up cases in a reasonable time, taking into account the nature and complexity of each case and considering that antitrust cases may take a long time to conclude. The Recommendation advises

having in place statutory rules, competition authority guidelines, or internal targets (the choice is for each jurisdiction to make) for deadlines or length of procedural steps, allowing both competition authorities and parties reasonable time to prepare their actions and responses.

5. Meaningful Engagement and Parties' Right to Respond and Be Heard

This principle details the parties' core rights of defense.

First, it is incumbent upon competition authorities to give appropriate and timely information on the opening of a case, its legal basis, competition concerns, and status.⁵ Parties should be able to choose their lawyer, and have opportunities for adequate defense before a final decision is made. This includes opportunities to present their views via counsel, discuss facts and arguments with the competition authority, and have a meaningful chance to present before the key decision-makers a full response to the allegations and submit evidence in support of their arguments.

The right to respond to allegations involves an attendant right to access relevant evidence held by the competition authority or court, in particular information on which an adverse decision may be based. The main exception to the right to access the case file is the protection of confidential information.

6. Protection of Confidential and Privileged Information

Not all competition laws define confidential information and those that do define it differently.⁶ The fact that the Recommendation defines confidential information (as "*business secrets and other sensitive information, as well as any other information treated as confidential*

⁵ This is consistent with EU law. Council Regulation 1/2003 and Regulation 773/2004 (for antitrust proceedings) refer to the rights of defence of the parties, including the right to be informed of the opening of a case, the objections against the parties and the arguments and evidence for the objections. Council Regulation 139/2004 and Commission Regulation 802/2004 have similar provisions for parties in merger cases. See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty; and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

⁶ The definition of confidential information varies across jurisdictions, but commercially sensitive information and sensitive personal information are typically considered confidential. See OECD(2019), Access to the case file and protection of confidential information.

under applicable law") is, therefore, significant progress, even if additional definitions "under applicable law" mean that the exact scope of confidential information and the intensity of its protection may ultimately vary.

The fact that information is confidential means that, in principle, it is not disclosable. Competition authorities have an obligation to protect such information. Still, jurisdictions typically allow for disclosure of confidential information if this is necessary to protect the parties' rights of defense, usually under protective measures. Examples include disclosure to limited persons (like the parties' external legal counsel), the signing of non-disclosure agreements to stop further dissemination, disclosure in data rooms, or closed hearings.⁷

The Recommendation advises protecting against unlawful disclosure of confidential information and having clear public rules for the identification and treatment of confidential information, and having policies in place to protect privileged communications between attorneys and clients.⁸

7. Impartial Judicial Review

Competition law enforcement decisions should be reviewed by a court, tribunal, or appellate body that is independent and separate from the competition authority.

Judicial review is a core element of the right to be heard, and crucial for the effectiveness and credibility of competition law enforcement. It is a necessary complement to internal checks and balances, and the procedural guarantees that competition authorities put in place to ensure due process.

The review body may assess whether procedural due process was followed, and/or substantive rules were complied with. All investigations and decisions need to be sufficiently robust to withstand judicial scrutiny. Thus, *ex post* review promotes the thoroughness of the case *ex ante*, as the investigating authority knows that it is likely to have to defend the case before the court.⁹ The Recommendation requires that judicial review include the examination of facts, evidence and grounds of competition law enforcement decisions and that court decisions are in writing, based only on matters of record and published, subject to the protection of confidential information.

III. CONCLUSION

Transparency and procedural fairness standards are fundamental. They should be reflected in the clarity and fairness of procedural rules and guidelines; in the resources, professionalism and independence of competition authorities; and in the effectiveness, reasonableness and consistency of day-to-day enforcement.

Observing due process is not only about parties' rights: it also adds to the legitimacy, quality and success of competition law enforcement. Decisions based on due process investigations can reasonably be expected to be upheld by a reviewing judge, in terms of procedure at least. This is not negligible. While some judges might lack competition law expertise (though this is a skill likely to develop over time, as long as they hear more cases), they are experts in the interpretation, application and review of due

⁷ The factors to decide whether confidential information should be disclosed include: whether, and to which degree, harm could be caused to the person to which the information relates; whether the information is inculpatory or exculpatory, as such information directly affects parties; the availability of alternative non-confidential documents that can prove or disprove the allegations; and whether summaries can be used to desensitise information without robbing the information of its meaning. *Id.*

⁸ Legally privileged communications (confidential communications between clients and their legal advisors) usually benefit from absolute protection from forced disclosure. Privileged information should not be requested, collected or used, and its disclosure can be opposed and challenged at any stage, during investigations and in litigation, and against anyone, including competition authorities, other domestic or foreign public bodies and courts, and third parties (including against the lawyers themselves, if they are asked to disclose). If privileged information is unlawfully collected, it should be excluded from the case file, not used as evidence, and returned to the party. See OECD (2018), Treatment of legally privileged information in competition proceedings.

⁹ OECD (2019), The Standard of Review by Competition Cases.

process principles, and are unlikely to miss, or allow, procedural defects.

Due process is indispensable in all law enforcement, both in competition and beyond it.

Observing it protects the rule of law, helps maintain trust in the law and those enforcing it, and ultimately serves justice.