

## PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT AND THE

the criticism of frustrated parties subject to a competition investigation or decision that they perceive to be based on unfair or inadequate process.

Having been a senior official and decision maker at two U.S. antitrust agencies, I know that we strive to achieve the right results in the right way, and therefore take seriously concerns about lack of process. As agencies, we must recognize that procedural fairness practices help us get to the right answer. As U.S. Assistant Attorney General Bill Baer recently noted: “If we are to effectively advance our shared goals of protecting competition, we need to be able to talk about all the tools at our disposal and “reach common ground on underlying principles and approaches.”<sup>1</sup>

Advancement of procedural fairness principles is dependent upon the recognition that this is a two-sided issue. First, it's good for government to be fair to targets and other outside parties involved in an investigation. Second, it's also good for the government by enabling informed agency decisions and bolstering the overall credibility of the agency

During an investigation, agency engagement on theories of competitive harm and other key pieces of evidence allows parties better opportunity to respond – and to educate the agency about the market issues thus enabling better understanding about the potential for harm

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parties, and access to information can contribute to divergent conclusions or differing remedies in parallel investigations.

I understand that competition authorities sometimes express concern that transparency about agency process will restrict the options available to it or give a perceived advantage to the party under investigation before the agency fully develops its views. While case specifics may dictate differences in the scope and timing of engagement, a predictable process that ensures basic fairness is not only essential to safeguard the rights of parties, but implementing good process leads to better outcomes, and can ultimately outweigh concerns about limiting an agency's discretion. Commitment to procedural fairness strengthens decision making in individual investigations, fortifies an agency's overall legitimacy, and ultimately adds to the credibility of our increasingly shared international efforts to protect competition and consumers.

## II. What Does Procedural Fairness Entail?

A quote from the United States 2010 submission to the Organisation for Economic Co-operation and Development ("OECD") Roundtable on Procedural Fairness sums up the importance of this topic:

Substance and process in government antitrust investigations go hand in hand. Regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome.<sup>2</sup>

Three key practices used by competition agencies help ensure procedural fairness including: (i) separation between investigation staff and decision making officials, (ii) disclosure to parties about alleged breaches of competition, including factual details and the legal theories upon which the agency relies, and (iii) the opportunity for parties to respond to the allegations. Commitments to institutional checks and balances, transparency to parties, and engagement on the merits are the foundation for these practices that aim to ensure fairness.

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<sup>2</sup> United States Submission to OECD, Roundtable on Procedural Fairness: Transparency in Civil and Administrative Proceedings (Working Party No. 3 on Competition and Enforcement, Feb. 2010) at 2, [https://www.ftc.gov/sites/default/files/attachments/submissions\\_oecd\\_and\\_other\\_international\\_competition\\_fora/transparency\\_us.pdf](https://www.ftc.gov/sites/default/files/attachments/submissions_oecd_and_other_international_competition_fora/transparency_us.pdf)

The OECD and International Competition Network (“ICN”), among others, have dedicated substantial time and effort in multilateral initiatives geared to promote procedural fairness principles around the world. For example, earlier this year, the ICN issued its Guidance on Investigative Processes (“Guidance”).<sup>3</sup> The Guidance was the culmination of workshops and events held by the ICN’s Agency Effectiveness Working Group, chaired by the FTC and DG Competition. The working group compiled and reviewed practices of competition authorities and the Guidance is based on a broad consensus of ICN members. The Guidance is the most far-reaching, agency-led statement to date discussing best practice recommendations for investigations of competition matters. So what’s included in the Guidance?

Before addressing the procedural fairness fundamentals of transparency and engagement, the Guidance recognizes the importance of an effective investigation process. 9(a)(v)-(h)-4(s)-5(t)(i)(ii)(iii)(iv)-(h)-1(-)



### III. What are the Takeaways from the FTC's Experience?

I'd like to spend a few minutes discussing FTC procedures and practices that seek to ensure procedural fairness. Importantly, the exercise doesn't stop once procedures are put in place. While rules that promote procedural fairness are needed, concepts like transparency and engagement cannot always be articulated to match the full degree of agency discretion. Rather, an agency's commitment to act in a fair, predictable, and transparent manner is what gives

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Justice's Antitrust Division has focused on intellectual property, health care, and competition collaborations.<sup>17</sup>

The Commission publicizes its competition advocacy efforts, including staff reports and

