

Investigative Process & Procedural Fairness in Competition Enforcement

a look at the developing international consensus

APEC Workshop
Mexico City
May 30 – June 1, 2016



Why Agencies Care

about procedural fairness

1. Legal requirements; good government

2. Ensuring procedural fairness results in:
 - Better outcomes: more informed decisions
 - Better cooperation with parties
 - Better credibility for competition agency

International Consensus

- **International Competition Network**

- Guidance on Investigative Process
- Recommended Practices for Merger Notification & Review

- **OECD Competition Committee**

- Recommendation on Merger Review
- Procedural Fairness Roundtable “Key Points” Report

- **Trans-Pacific Partnership (TPP)**

- Art. 16.2: Procedural Fairness in Competition Law Enforcement

- **ASEAN**

- Regional Guidelines on Competition Policy



* Expression of procedural fairness differs according to legal system, but certain elements are fundamental.

Same starting point



ICN Guidance: There is a **broad consensus** among ICN members regarding the importance of transparency, engagement and protection of confidential information during competition investigations.

-- Guidance on Investigative Process 4.1



OECD: 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



ASEAN: 7.1.1 Sound institutional framework and due process are **fundamental** in ensuring the effective application of competition law. In particular, procedures should be transparent, certain, accountable and not unduly burdensome or prohibitive. Transparency is also fundamental in order to support the credibility of the competition regulatory body.

-- Regional Guidelines on Competition Policy

Building blocks

for procedural fairness

- Effective investigative tools and powers
- System transparency
- Investigative transparency
- Opportunity to be heard
- Opportunity to respond
- Protection of confidential information
- Internal safeguards: sound decision making
- Reasoned decision
- Review by independent tribunal
- Appropriate timing
- Representation

ICN Guidance on Investigative Process



- I. Competition Agency Investigative Tools
- II. Transparency About Agency Policies and Standards
- III. Transparency During an Investigation
- IV. Engagement During an Investigation
- V. Confidentiality Protections and Legal Privileges

I. Investigative Tools and Powers



- **Sufficient & appropriate**
 - To obtain all relevant information necessary for enforcement
- **Within a legal framework**
 - Contest and compliance
- **Backed by agency procedures**
 - Review and focus

I. Investigative Tools and Powers



Sufficient

 ICN Guidance on Investigative Process 1.2 

- Ability to compel information
- Ability to accept submissions

Legal Framework

 ICN Guidance on Investigative Process 2.1-2.2 

- Confidentiality and legal privileges
- Respondent's ability to contest
- Ability to enforce compliance

I. Investigative Tools and Powers



 ICN Guidance on Investigative Process 3.1-3.5 

Agency Procedures

- Internal review
- Focus requests
- Discretion to discuss; resolve disputes
- Ensure that all information receives appropriate consideration (avoid selective presentation)

II. Transparent Policies and Standards



Enforcement system transparency

What?

- Legislation, rules and regulations
- Agency procedures and policies
 - Guidelines
 - Decisions: explanation of rationale for particular cases
 - Speeches and publications

Why?

- Clear and transparent standards:
 - promote enforcement consistency
 - improve compliance with the law; firms can better conform their conduct to them

III. Transparency During an Investigation



- **Notify parties**

- Open investigation
- Legal basis
- Expected timing

 ICN Guidance on Investigative Process 5.2 

- **Inform parties**

- Facts and nature of evidence
- Theories of competitive harm

 ICN Guidance on Investigative Process 5.3 

- **Update parties**

- Key points during investigation
- Status and significant developments

 ICN Guidance on Investigative Process 5.3 



III. Transparency During an Investigation

“ultimate” transparency

Before a final decision or finding of liability, a party should have:

- Adequate notice of charges
- Access to evidence relied upon by agency
- Opportunity to respond
 - provide evidence, oral or written; rebut opposing claims and arguments

Benefits of Transparency

- Promotes compliance and more efficient investigations
- Providing adequate notice of charges is fundamental to justice in all systems
- Sharing agency concerns about conduct and nature of evidence helps to focus investigations
- Promotes cooperation from parties; can be more responsive to issues
- Drawbacks to transparency are limited:
 - Different considerations when conduct is covert (e.g., cartel) vs. overt (e.g., non-cartel agreements, dominance, mergers)
 - Extent is subject to agency discretion and specific needs of investigation
 - Agencies should remain free to modify or add to theories of harm
 - Agency can keep frequency of engagement reasonable and consistent with staff constraints
 - Agencies need not (and should not) provide confidential information when not required

IV. Engagement During an Investigation



Provide opportunities for meaningful engagement

 ICN Guidance on Investigative Process 6 

- Open discussion of investigative theories
- Explanation of competitive concerns

Opportunity to be heard

 ICN Guidance on Investigative Process 6.3 

- To discuss investigation with agency
- Meetings or discussions

Opportunity to respond

 ICN Guidance on Investigative Process 6.4 

- Respond to agency concerns and evidence

Benefits of Engage ment

- **Can focus investigations**
 - Helps identify real issues, eliminate non-issues
 - Allows agency to test its theory of harm
- **Can improve the quality of the evidence**
 - If parties know what the issues are, they can address concerns, focus document production, propose remedies
- **Prevents surprises for agency**
 - Better understanding of the facts and issues
 - Agency knows what the defense looks like in advance
- **Can lead to settlements by consent (saves resources)**
 - Remedies more effective when informed by understanding of business considerations

V. Protecting Confidential Information



- Provide protections for confidential information submitted during investigations

 ICN Guidance on Investigative Process 8-8.6 

- Clear, publicly available criteria for confidentiality protections
- Clear policies for handling confidential information; procedures for evaluation
- Notice and opportunity to object before disclosure

- Clear policies regarding disclosure

 ICN Guidance on Investigative Process 9-9.3 

- Avoid unnecessary public disclosure; e.g. redactions
- Appropriate limitations on access when disclosed, e.g., data rooms, protective orders

- Respect legal privileges

 ICN Guidance on Investigative Process 10 

- Policies for handling

Confidentiality

[redacted]

- Maintaining the confidentiality of information is critical to effective competition enforcement
 - Parties will not cooperate if confidentiality is not ensured
 - Disclosure of confidential information can harm competition
- Competition agencies must address:
 - Protection of business confidential information
 - Providing firms with the information they need to be able to respond to concerns
- Procedures may include protective orders that redact sensitive information



Other building blocks of fairness



Representation

- Parties should be allowed to express views via counsel, their employees, and outside experts

 ICN Guidance on Investigative Process 6.2 

Why?

- Legal representation is an important component of procedural fairness
 - Counsel can facilitate communications between agency investigators and businesses
 - Parties use counsel as effective advocates for their views



Reasoned Decision:

Explaining the Rationale

- Transparency is reinforced when agencies:
 - Publish their decisions
 - Explain the rationale for their decisions, including findings of fact and analysis
 - Explain, when appropriate, decisions not to bring a case
- Publication on website, through media, and explained in speeches and other outreach efforts
- *Keep in mind: audience is beyond parties*



4.2 Competition agency decisions to challenge or prohibit conduct should be transparent and the agency should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency's findings of fact and legal and economic analysis.

-- ICN Guidance of Investigative Process 4.2

Timing



“Justice delayed is justice denied.”

- Goal: avoid undue delays
- Comply with statutory deadlines
- In the absence of deadlines, use internal procedures, such as timeline projections

Example:



In the absence of deadlines, procedures should ensure that merger review occurs without delay.

-- ICN Recommended Practice on Merger Notifications IV.C

Internal safeguards to agency process

Examples

- Meetings between the parties, case teams and senior decision makers
- Encourage “white papers” from parties
- Independent analysis by investigators, economists and/or lawyers
- Objective review of the case with ‘fresh eyes’
 - Pre-decision evaluation committee, “devil’s advocate” or scrutiny panels
 - Use of independent advisors
- Separation between the role of the investigators and those making enforcement decisions
- Ethics rules; e.g., conflicts of interest

Judicial Review

Recourse to an independent, neutral and meaningful judicial review on both substance and process is essential to procedural fairness

Example:



Merger review systems should provide an opportunity for timely review by a separate adjudicative body.

-- ICN Recommended Practice on Merger Notifications VII.B.

Challenges

- We're all different
 - institutional frameworks, legal traditions
- It's too hard
 - require legislative change
- Giving up too much
 - loss of strategy

Conclusions

- Attention to procedural fairness benefits agencies, parties, and markets
- Transparency to parties is a key part of effective and efficient case management
- Substantive engagement means agencies are more likely to get it right
- Doubts about procedural fairness cast doubts on substantive outcomes & enforcement mission
- A process seen as fair bolsters agency credibility