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U.S. FTC Practice and Recent
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Procedural Fairness in Competition Investigations: U.S. FTC Practice and Recent Guidance from the International Competition Network

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I. INTRODUCTION

Procedural fairness has become an increasingly important part of the international dialogue on competition law enforcement. As competition enforcement has expanded, issues and concerns regarding how agencies conduct their investigations have increased. It is important that competition agencies recognize and respond to these concerns for many reasons, including to: (i) ensure that subjects of competition investigations are treated fairly, (ii) ensure the credibility of competition enforcement decisions, and (iii) maximize the quality of competition agencies' analyses and decisions. As discussed below, the United States Federal Trade Commission ("FTC") and the International Competition Network ("ICN") are cognizant of these issues and have developed rules and guidance to address them.

Procedural fairness is a necessary and beneficial ingredient of effective competition enforcement. While competition agencies operate within different legal and institutional frameworks, all enforcement systems can and should provide at least basic levels of fairness. As such, procedural fairness has universal application. Regardless of the chosen enforcement framework, there are specific investigative practices that can promote transparency and better outcomes.

The case for procedural fairness in competition enforcement goes beyond the obligations of good governance to safeguard the rights of parties. Recent international discussion on procedural fairness has recognized that fairness benefits the agencies that provide it.

First, procedural fairness enables better-informed agency decisions. Good process has a direct impact on the quality and accuracy of agency enforcement decisions. A transparent and meaningful dialogue between parties and agencies about process, theories, and evidence increases the likelihood that the agency will consider all the relevant facts and issues prior to making its decision. Understanding the parties' arguments allows the agency to test its theories and sharpen its own conclusions. This also facilitates the agency's ability to narrow the relevant issues, which makes the investigative process more efficient.

Second, procedural fairness enhances the legitimacy and credibility of competition agency enforcement actions. A predictable and transparent investigative process allows both

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parties under investigation and the public to understand how the agency makes decisions. This increases confidence in the substantive results of the agency's enforcement.

This article provides an overview of investigative practices in competition investigations in the United States as well as of broad principles of consensus from global discussion of these issues. First, we introduce some of the investigative practices that the FTC uses to provide procedural fairness. Second, we present and discuss the results of an important recent initiative of the ICN on competition agency investigative process.

II. HOW THE FTC PROVIDES PROCEDURAL FAIRNESS DURING ITS INVESTIGATIONS

The FTC ensures procedural fairness during its investigations through practices that promote transparency and meaningful dialogue between its staff and the parties.² Internal institutional checks and balances reinforce reasoned decision-making.

The FTC highly values open communication with the subjects of its competition investigations. Agency staffs regularly inform parties through written and oral communications as to how an investigation is proceeding, including the legal and factual bases for the investigation. These discussions encompass the procedural course of the investigation, including the scope of document requests and staff's substantive theories of the case. Providing parties with information on the theories of harm and the nature of the evidence on which the agency relied allows parties to respond more effectively. This also helps the agency to focus on the real areas of dispute, and ultimately contributes to making the optimal enforcement decision in an efficient manner.

FTC investigations benefit from engagement with the parties under investigation. Investigative staff and decision-makers regularly seek substantive input from the parties in order to ensure that the agency is aware of counter-arguments and evidence that might support factual and legal theories inconsistent with enforcement action. FTC staffs routinely encourage companies under investigation to present their views of the evidence and case theories, both orally in informal meetings and through written submissions known as "white papers."

The dialogue between investigative staffs and parties continues throughout the course of an investigation. During an FTC investigation, companies have multiple opportunities to discuss their views with staff lawyers. In addition, parties are free to request meetings with agency management, and ultimately, the Commissioners of the FTC, to present their positions and discuss the theories pursued during the investigation. Business executives and industry and economic experts, as well as the parties' lawyers, often participate to explain their views directly

² Although similar rules apply to the two US federal antitrust agencies—the Department of Justice's Antitrust Division (DOJ) and FTC—this section focuses on the FTC's practices. For an overview of relevant FTC and DOJ practices and rules, see Submissions of the United States to the OECD Roundtables on Procedural Fairness (2010-11), available at https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/transparency_us.pdf; <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usprofairness.pdf>; and <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1110oecd-procedural.pdf>.

to agency officials. This dialogue is most productive when parties engage meaningfully on the merits, rather than leaving the other side guessing about areas of concern or potential counterarguments.

Several internal checks and balances contribute to procedural fairness in FTC investigations. Investigative staff typically includes lawyers from the agency's Bureau of Competition and economists from the Bureau of Economics. The lawyers and economists coordinate their work while bringing their own expertise to investigation and to decision-makers through independent and parallel reviews.

FTC Bureau management is actively involved at all key stages of an investigation, monitoring progress through periodic detailed briefings from staff. At key decision points, staff presents the factual, legal, and economic bases for its recommendations, including expected arguments from the parties and reasoned responses to them. Each Bureau's management makes its own recommendation to the Commission, informed by staff recommendations as well as meetings with the parties. Thus, the Commission routinely receives analyses and recommendations from its legal staff and its economic staff, supplemented by recommendations from the Director of the Competition and Economics Bureaus. Through these types of internal checks, the Commission benefits from a range of perspectives prior to issuing a complaint or settling a case.

Strong confidentiality protections are an important counterbalance to the FTC's investigative transparency. The protection of confidential information—by law and agency policies and practices—is a critical component of effective enforcement.

When FTC cases proceed to adjudication, there are additional opportunities and safeguards for defendants. These include the rights to (i) legal representation, (ii) present witness and documentary evidence, (iii) test the legitimacy of documentary evidence and cross-examine government witnesses and experts, and (iv) appeal an adverse determination to a court. There are also strong procedural protections to ensure separation between FTC staff, as complaint counsel, and the Commission, as adjudicators, once the Commission issues a Complaint initiating formal charges against a respondent.³

III. INTERNATIONAL WORK ON PROCEDURAL FAIRNESS

Procedural fairness during competition investigations has received increased international attention in recent years as enforcement has expanded and firms are subject to different types of procedures around the world. Several competition agencies have issued new rules or statements regarding transparency and related investigative process issues.⁴

³ See 16 CFR Part 4, Rule 4.7.

⁴ See, e.g., *Australian Competition and Consumer Commission, Accountability framework for investigations* (2013), available at <http://www.accc.gov.au/publications/the-acccs-accountability-framework-for-investigations>; Canadian Competition Bureau, *Information Bulletin on Communication during Inquiries* (2014), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03747.html>; UK Competition and Markets Authority, *Transparency and disclosure: Statement of the CMA's policy and approach* (2014), available at <https://www.gov.uk/government/publications/transparency-and-disclosure-statement-of-the-cmas-policy-and-approach>.

In multilateral fora, the Competition Committee of the Organization for Economic Cooperation and Development (“OECD”) held roundtable discussions on transparency and procedural fairness during 2010 and 2011, culminating in a 2012 report.⁵ The Association of Southeast Asian Nations (“ASEAN”) addressed due process issues as part of its Regional Guidelines on Competition Policy, released in 2010.⁶ The International Chamber of Commerce (“ICC”) published a recommended framework for competition law enforcement proceedings to promote procedural safeguards in 2010.⁷

In addition, as part of an ongoing project on antitrust procedures, the Antitrust Section of the American Bar Association recently approved a report on best practices in antitrust investigations, which contains recommendations on many aspects of the investigative and decision-making process.⁸

The ICN recently undertook the most ambitious agency-led effort to study procedural fairness during competition investigations. In 2012, the ICN initiated the Investigative Process Project to increase understanding among ICN member agencies of how investigative practices contribute to enhancing the effectiveness of agencies’ decision-making and ensuring the protection of procedural rights. The premise of the project is that effective competition enforcement depends on investigative procedures that promote fair and informed enforcement actions.⁹ A first for the ICN, this project, led by the FTC and the European Commission’s Competition Directorate, addressed how competition agencies can implement and improve fair and effective investigative process across all institutional frameworks and all competition enforcement areas.

ICN member agencies and non-governmental advisors from over 60 jurisdictions participated in the three-year project by completing surveys on agency investigative practices, participating in a workshop on investigative process in Washington, D.C., and holding many discussion calls including a wide network of private sector lawyers, culminating in the drafting of consensus agency guidance. From 2012-14, the Project issued three reports: *Competition Agency Investigative Tools*,¹⁰ *Competition Agency Transparency Practices*,¹¹ and *Competition Agency*

⁵ Procedural Fairness and Transparency: Key Points, OECD Competition Committee, April 2015, available at <http://www.oecd.org/daf/competition/abuse/proceduralfairnessandtransparency-2012.htm>.

⁶ ASEAN Regional Guidelines on Competition Policy, August 2010, Chapter 7: Due Process, available at <http://www.asean.org/archive/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf>.

⁷ ICC Recommended framework for international best practices in competition law enforcement proceedings, International Chamber of Commerce (March 2010), available at <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/due-process/>.

⁸ See Best Practices for Antitrust Procedure, Report of the ABA Section of Antitrust Law International Task Force (publication forthcoming).

⁹ See ICN Investigative Process Project Issues Paper and Mandate (2012), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf>.

¹⁰ ICN Report on Competition Agency Investigative Tools (2013), available at <http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf>.

¹¹ ICN Report on Competition Agency Transparency Practices (2013), available at <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf>.

Confidentiality Practices,¹² and organized an ICN Roundtable on Competition Agencies Investigative Process.¹³

Based on agencies' responses to surveys about their investigative practices, existing ICN and other international work on investigative process and procedural fairness, the 2014 Roundtable, and a series of consensus building discussions around drafts of the guidance, the Project produced *ICN Guidance on Investigative Process* ("Guidance"), which the ICN adopted at its annual conference in April 2015.¹⁴

IV. THE ICN GUIDANCE ON INVESTIGATIVE PROCESS

The *Guidance* is based on a broad consensus among ICN members regarding the importance of transparency, engagement, and protection of confidential information during competition investigations. The *Guidance* presents four principles for good investigative practices: (i) effective agency investigative tools, (ii) transparency to parties about the investigation, (iii) engagement with the parties during an investigation, and (iv) the protection of confidential information. The *Guidance* is written in five parts:

Part 1 reaffirms the need for competition agencies to have effective investigative tools and introduces basic principles to promote their fair and efficient use, including appropriate legal requirements and limitations on those powers, and accompanying internal agency procedures and safeguards.

Part 2 addresses transparency to the public of competition laws, rules, policies, decisions, and enforcement practices to ensure that individuals and companies know what to expect of competition enforcement and the public has a basis to monitor consistency of enforcement.

Part 3 discusses transparency to parties during an investigation. This includes informing parties of the legal basis for an investigation, the facts and nature of evidence gathered, and the agency's theories of harm. This is an ongoing commitment that includes updates of the investigation's scope, status, and any significant developments.

Part 4 focuses on engagement during an investigation—the interaction between agency and party and the value of providing opportunities for parties to respond to identified agency concerns. The engagement section highlights "meetings or discussions between the agency and parties at key points of the investigation" and "early discussion of the evidence and working theories."

Part 5 addresses the importance of the protection of confidential information obtained during an investigation; the considerations that go into the submission and treatment of confidential information; and policies regarding the disclosure of confidential information,

¹² ICN Report on Competition Agency Confidentiality Practices (2014), available at <http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf>.

¹³ Report on the ICN Roundtable on Competition Agency Investigative Process (2014), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1023.pdf>.

¹⁴ ICN Guidance on Investigative Process (2015), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

including the disclosure to parties of confidential information relied upon as the basis for an agency's formal allegations.

The *Guidance* represents the most comprehensive agency-led guidance on procedural fairness during investigations to date. It provides a baseline for agencies to benchmark their investigative procedures against best practices from around the world. The ICN now plans to take steps to help agencies understand and implement the *Guidance*.

V. CONCLUSION

Procedural fairness during competition agency investigations has found an increasingly prominent place on the international competition agenda.¹⁵ The global discussion of investigative process is premised on the fact that an agency's investigative process has a direct impact on its effectiveness and credibility and recognizes that fair process benefits both parties and agencies.

The consensus on the importance of investigative transparency and party-agency interaction within the context of strong confidentiality protections should serve as the foundation for the continued development of international norms of good practice for all competition agencies. The FTC is a strong proponent of procedural fairness standards and will continue to advocate for their improvement and adoption.

¹⁵ See, e.g., Keynote Address by FTC Chairwoman Edith Ramirez, 7th Annual Global Antitrust Enforcement Symposium, Georgetown University Law Center, Washington, DC, September 25, 2013, available at https://www.ftc.gov/sites/default/files/documents/public_statements/7th-annual-global-antitrust-enforcement-symposium/130925georgetownantitrustspeech.pdf; Keynote Address by FTC Chairwoman Edith Ramirez, Core Competition Agency Principles: Lessons Learned at the FTC, Antitrust in Asia Conference, ABA Section of Antitrust Law and Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, Beijing, China, May 22, 2014, available at http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.