



# Lessons on Procedural Fairness from U.S. Antitrust Enforcement

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Asian Competition Forum

Hong Kong SAR

November 30-December 1, 2015

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Federal Trade Commission or any individual Commissioner*

# What is Procedural Fairness?

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- Expression of procedural fairness differs according to legal system, but certain elements are fundamental
- Procedural fairness has several critical components, including:
  - Transparency with the public
  - Transparency with parties
  - Engagement with parties and third parties
  - Opportunities to review evidence and present a defense
  - Protections of confidentiality

# Why Do We Care

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- Ensuring procedural fairness results in:
  - Better outcomes
    - More informed decisions and remedies
    - Less likelihood of chilling procompetitive conduct
  - Better cooperation with parties
  - Better credibility for competition agency
  - Fairness to all

# Transparency

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- Two main types:
  - With the public
    - Procedures
    - Substantive standards (regulations, rules, guidelines)
    - Explanation of decisions
    - Speeches and publications



Enforcement system transparency should include the substantive legal standards ..., any agency guidelines for analysis, the processes and investigative tools ..., the framework for judicial review, and the sanctions and remedies available ....

-- ICN Guidance on Investigative Process 4.1

- With the party under investigation

# FTC Investigation Structure-Short Primer

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- Mergers
  - Merger notification starts up to 30-day preliminary investigation; ~95% cleared in this phase
  - In about 5% of cases FTC begins a secondary (full) phase
  - If competition concerns exist, Commission enters into a consent decree allowing merger to proceed but with remedies to preserve competition or seeks injunction
- Conduct
  - Preliminary investigation
  - Full phase investigation with compulsory process
  - Close investigation, reach consent decree, or proceed to administrative trial or court

# Transparency During Investigations

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- Providing adequate notice of charges is fundamental to justice in all systems
- Reaching correct result is highest priority
- Regular engagement with parties prevents surprises for both agency and parties
  - Parties can focus on addressing agency's concerns
  - Agency knows what the defense looks like in advance

# Engagement During Investigations

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- Regular engagement with parties during investigation (both preliminary stage and during second phase)
  - Informing parties of agency concerns about conduct/merger
  - Continuous dialogue – not just at set times
    - Meetings with staff and management
  - Parties may submit oral and written arguments
  - Discussion can help focus investigations
    - Helps identify real issues and eliminate non-issues
    - Allows agency to sharpen and test its theory of harm
    - Helps reduce scope of information requests

# Reasons for Transparency and Engagement

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- Transparency and engagement can make investigations more efficient for agency
  - May reduce amount of information from parties it's necessary to review and evaluate
  - May allow agency to narrow issues of concern
  - May facilitate resolution through consent decree or comparable procedure



# Transparency and Engagement--Drawbacks?

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- The drawbacks of transparency and engagement are limited
  - Agencies should remain free to modify or add to the theories of harm they are investigating
  - Agencies may keep frequency of engagement reasonable and consistent with constraints of staff work
  - Agencies need not (and should not) provide confidential information to parties
  - Lack of “surprise” not a lost benefit

# ICN Guidance re Transparency



To the extent that it does not undermine the effectiveness of an investigation, agencies should notify parties as soon as feasible that an investigation has been opened, and identify its legal basis, the conduct under investigation, and where possible, the expected timing of the investigation.

-- *ICN Guidance on Investigative Process 5.2*



During an investigation, agencies should inform parties of the basic facts and nature of evidence gathered, as well as the agency's theories of competitive harm.

-- *ICN Guidance on Investigative Process 5.3*



At key points in the investigation, agencies should provide the parties with updates of the investigation's scope, status, and any significant developments, such as changes to the competition concerns notified to the parties.

-- *ICN Guidance on Investigative Process 5.3*

# ICN Guidance re Engagement



Agencies should provide parties under investigation with opportunities to discuss the investigation with the agency. As an investigation advances, meetings or discussions between the agency and parties at key points of the investigation are a common and effective means for engagement.

-- *ICN Guidance on Investigative Process 6.3*



Parties under investigation should be given the opportunity to exercise their rights of defence and respond to agency concerns and evidence. Parties should be permitted to express views, present factual, legal, and economic evidence to the agency and make substantive submissions during the investigation.

-- *ICN Guidance on Investigative Process 6.4*



Agencies should provide interested third parties with the opportunity to submit views to the agency during an investigation, and where appropriate, the opportunity to meet or discuss their views with the agency.

-- *ICN Guidance on Investigative Process 7*

# Reviewing Evidence and Presenting a Defense

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- Before a finding of liability, a party should have:
  - Adequate notice of charges
  - Access to evidence supporting charges
  - Opportunity to provide evidence and arguments in defense, with reasonable time to provide response



After formal allegations of competition violations and presentation of legal arguments are made, parties should be provided with access to the evidence relied upon as the basis for the agency's allegations and an effective opportunity to respond.

-- *ICN Guidance on Investigative Process 5.4*



An agency's communication of competitive concerns should be made in time for the parties to have an opportunity to respond to the concerns.

-- *ICN Guidance on Investigative Process 6.4*

# Reviewing Evidence and Presenting a Defense

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- Depending on legal system, these opportunities may be provided during a formal adjudication process.



Parties under investigation should be given the opportunity to exercise their rights of defence and respond to agency concerns and evidence. Parties should be permitted to express views, present factual, legal, and economic evidence to the agency and make substantive submissions during the investigation.

-- *ICN Guidance on Investigative Process 6.4*

# Confidentiality

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- Maintaining the confidentiality of information submitted to a competition agency 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 both:
  - 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

# ICN Guidance re Confidentiality

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Any legal framework for competition law enforcement should include protections for confidential information submitted during investigations. That protection should cover not only disclosures to parties and third parties, but also to the public through agency decisions and other statements.

-- *ICN Guidance on Investigative Process 8*



Confidentiality rules and determinations of confidentiality during an investigation should take into account the commercial interests of submitters, the procedural rights of parties under investigation, and the overall public interest in the efficiency and transparency of enforcement efforts.

-- *ICN Guidance on Investigative Process 8.1*

# Lawyers

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- 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



Parties should be allowed to be represented by counsel of their choosing during the investigation, and should be permitted to present their views via counsel, their employees, and outside experts.

-- *ICN Guidance on Investigative Process 6.2*



# Universal Principles

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- Principles of procedural fairness do not depend on the legal regime--they are generally adaptable to different legal systems and can be implemented in any system.
- It remains important to account for legal traditions and customs, within the objective of providing procedural fairness.

# Implementation of Universal Principles

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- Principles often can be implemented without legislative change, just agency commitment to improve fairness and investigative rigor
  - Engagement with parties usually needs only commitment by management and staff to have ongoing discussions during investigation
  - Transparency with parties needs willingness to test theories in advance with party
    - Modern antitrust typically requires careful analysis both of harms to competition and business justifications (efficiencies) of conduct

# Implementation of Universal Principles (cont.)

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- Other ideas for implementation
  - Internal procedures to focus decision-making
    - Staff memos that address parties' arguments and both helpful and harmful evidence
    - Internal debate/scrutiny panels regarding recommendations
    - Use of separate economic analysis and recommendations
  - Promoting high-quality decisions
    - Separation of investigation and decision-making by senior officials
    - Reasoned, public decisions address factual and legal issues, as well as party counter-arguments

# Resources

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- Joint agency effort through ICN to articulate international norms on procedural fairness, including recommendations on transparency, engagement, and confidentiality:
  - [ICN Guidance on Investigative Process](#) (2015)
- US agency submissions to OECD, describing our practices:
  - [Transparency](#) (2010)
  - [Procedural Fairness](#) (2010)
  - [OECD Report on Procedural Fairness and Transparency](#) (2012)
- Recent speeches by FTC Chairwoman Edith Ramirez on procedural fairness:
  - [2014 ABA Antitrust Section in Asia Speech](#)
  - [2013 Georgetown Global Antitrust Symposium Speech](#)

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Thank you!

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