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PROMOTING COMPETITION, PROTECTING HUMAN RIGHTS

Contribution from BIAC

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*More documentation related to this discussion can be found at
www.oecd.org/competition/globalforum/promoting-competition-protecting-human-rights.htm*

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PROMOTING COMPETITION, PROTECTING HUMAN RIGHTS

-- BIAC --

1. The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Global Forum on Competition for its session on promoting competition, protecting human rights.

1. Introduction

2. The business community intersects with issues of human rights on several levels including employee security, environmental issues, etc.¹ The key intersection of business and human rights with respect to antitrust, however, centers around one of the core issues identified by the secretariat: due process. In the European Union, fundamental rights of due process are provided for in both the European Convention on Human Rights and the EU Charter of Fundamental Rights, which has European Treaty status, and both the European Court of Justice and the European Court of Human Rights have recognized that these rights extend to the business community. In the United States, due process is provided for in the Fifth Amendment of the U.S. Constitution. While not defined precisely by law, the U.S. Supreme Court has rendered many decisions on specific due process provisions.

3. Competition agencies and private sector organizations alike have focused on due process in competition law enforcement proceedings. The International Competition Network (ICN), the International Chamber of Commerce (ICC), and American Bar Association’s Section of Antitrust Law (ABA) have also put forward frameworks for best practices. The practices in these frameworks will enhance the respect and legitimacy of agency decisions and procedures with the business community, the general public and with other agencies, as well as increase efficiency and accuracy of agency investigations.

4. *Effective due process procedures* improve the accuracy and reliability of legal outcomes of competition agencies, which is vital if competition decisions are to *provide legally sound and credible guidance to market participants*. Effective due process procedures therefore safeguard the credibility and legitimacy of the competition enforcement system. *Indeed, due process mechanisms* do not inhibit enforcement of competition rules but rather promote sound enforcement.²

¹ In June 2015, the OECD Global Forum on Responsible Business Conduct included a panel titled “Competition Law and RBC.” A representative from the BIAC Competition Committee was invited to participate as a panelist. *See generally 2015 Global Forum on Responsible Business Conduct*, OECD, available at <http://mneguidelines.oecd.org/global-forum/2015-global-forum-on-responsible-business-conduct.htm>.

² *See* A. Douglas Melamed, *Good Competition Law Enforcement Requires Good Process*, 11 COMPETITION L. INT’L 51 (2015).

2. Due process is a recognized human right

2.1 *The European Union recognizes due process as a fundamental right*

5. Article 6 of the European Convention on Human Rights provides that “everyone is entitled to a fair and public hearing.”³ In the case of a criminal proceeding, Article 6 provides for a number of specific elements, including an independent tribunal, the right to be promptly informed, adequate time to prepare a defense, access to legal assistance, and the right to examine witnesses.⁴ Similar rights are provided under Article 47 of the EU Charter of Fundamental Rights.⁵

6. Many rights recognized by the European Convention on Human Rights, notably Article 6 of the Convention, have been applied to corporations by the European Court of Human Rights (ECHR).⁶ Similarly, the European Court of Justice (ECJ) has recognized that Article 47 rights, that mirror Article 6 in substance, extend to corporations and business entities under European Union law.

7. In a landmark case, the ECHR in *Menarini* confirmed that due process protections under Article 6 extend to corporations.⁷ In that case the court considered a complaint challenging a fine levied against Menarini, a pharmaceutical company, for participation in a cartel in a market for diagnostic equipment. The court considered whether due process rights were violated because the fine was imposed by an administrative authority instead of an independent tribunal. In determining what standard of due process should apply, the court considered, *inter alia*, the amount of the fine imposed. Given the severity of the fine, the court ultimately found that the action qualified as a criminal procedure for the purposes of Article 6. Applying the standards of Article 6, the court found that the applied due process provisions were sufficient because the national courts exercised full review of agency’s fining decisions.

8. In *Schindler*, the Court of Justice of the European Union (CJEU) considered an appeal to annul or reduce fines imposed by the European Commission on cartel participants in markets for elevators and escalators.⁸ *Schindler* argued that, *inter alia*, the flawed institutional design of the European Commission “infringe[d] the principle of separation of powers” under Article 6.⁹ Although the court ultimately upheld the Commission’s fines, its reasoning reinforced the strength of the precedent, set by *Menarini*, of extending the fundamental human right of due process to corporations. The court reasoned that the fines

³ Eur. Convention on Human Rights, art. 6, June 1, 2010, available at www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴ *Id.*

⁵ *EU Charter of Fundamental Rights—Article 47 - Right to an Effective Remedy and to a Fair Trial*, EUR. UNION AGENCY FOR FUNDAMENTAL RIGHTS, available at <http://fra.europa.eu/en/charterpedia/article/47-right-effective-remedy-and-fair-trial>.

⁶ See MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION 4 (2006) (clearly indicating that “under the Convention the notion of companies enjoying rights protection is not disputed in principle: The Court does not per se regard corporate litigation with suspicion.”).

⁷ *Menarini Diagnostics v. Italy*, Application no. 43509/08, Judgment of Sept. 27, 2011, available in Italian at <http://hudoc.echr.coe.int/eng?i=001-146341>; see also Eur. Ct. of Human Rights, Information Note on the Court’s Case-Law, No. 144 (Aug.-Sept. 2011), available at www.echr.coe.int/Documents/CLIN_2011_09_144_ENG_894208.pdf, at 9-10.

⁸ Case C-501/11, *Schindler Holding v. Comm’n* (July 18, 2013), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0501&from=EN>.

⁹ *Id.*, ¶ 24.

were not inappropriate because the requirements of fair process, “as enshrined in Article 6(1) of the ECHR and Article 47” of the Charter, were met.¹⁰

2.2 *The United States recognizes due process as a fundamental right*

9. The Fifth Amendment of the U.S. Constitution provides that, “No person shall be deprived of life, liberty, or property, without due process of law.”¹¹ Due process is not precisely defined under U.S. law and “proceedings may be adapted to the nature of the case.”¹² Fundamentally, due process is “the opportunity to be heard . . . at a meaningful time and in a meaningful manner.”¹³ In deciding which due process measures should be implemented in a given case, courts may consider the potential loss to the defendant, and whether additional safeguards will be outweighed by the costs associated with providing them.¹⁴ The Supreme Court has identified a number of specific due process provisions, including a parties right to: a timely hearing,¹⁵ an impartial tribunal,¹⁶ be informed of the charges against them,¹⁷ confront evidence,¹⁸ cross-examine witnesses,¹⁹ be informed of the reasons for the decision maker’s determination,²⁰ have access to review by an independent tribunal.²¹

3. Due process is an indispensable element of Competition Law

10. A high degree of agency and private sector attention on the topic of investigative due process has resulted in calls for a clear framework for best practices in competition law enforcement proceedings.

¹⁰ *Id.*, ¶ 27. See also, C-386/10 P, Chalkor v. Comm’n, 2011 E.C.R. I-13085, C-389/10 P, KME v. Comm’n, 2011 E.C.R. I-13125, and C-272/09 P, KME v. Comm’n, 2011 E.C.R. I-12789.

¹¹ U.S. CONST. amend. V.

¹² *Ballard v. Hunter*, 204 U.S. 241, 255 (1907).

¹³ *Goldberg v. Kelley*, 397 U.S. 254, 267 (1970) (“The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss.” *Id.* at 262-263.).

¹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976) (“At some point the benefit of an additional safeguard to the individual . . . may be outweighed by the cost.”).

¹⁵ *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (forbidding “oppressive delay”) (see also Speedy Trial Clause, applies to criminal cases).

¹⁶ *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (“[I]t certainly . . . deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case.”).

¹⁷ *Interstate Commerce Comm'n v. Louisville & N.R. Co.*, 227 U.S. 88, 93 (1913) (All parties must be fully apprised of the evidence submitted or to be considered, and must be given [an] opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding. . . .”).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Goldberg v. Kelley*, 397 U.S. 254, 271 (1970) (“[T]he decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. . . . To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on. . . .”).

²¹ *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (“[T]he prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to a subsequent judicial review before the denial of his claim becomes final.”).

Guidance on the issue has been advanced, for example, by the International Competition Network (ICN), Organization for Economic Cooperation and Development (OECD), the International Chamber of Commerce (ICC), Business and Industry Advisory Committee to the OECD (BIAC), International Bar Association (IBA), and the American Bar Association (ABA). Moreover, the recommendations of these international organizations have been recognized and implemented by government agencies – perhaps most recognizably by the European Commission – in reforms to their due process policy and investigative procedures. Demonstrating the substantive similarities and focus of these recommendations, a brief description of best practices suggested by the ICN, ICC, and ABA are provided below.

11. The “ICN Guidance on Investigative Process” was adopted in 2015 and focuses on practices to ensure a “[f]air and effective investigative process.”²² The guide focuses on four specific elements: (1) the availability and use of effective agency investigative tools; (2) transparency about agency policies and standards; (3) engagement with the parties during an investigation; and (3) protection of confidential information.²³

12. The ICC’s Task Force on Due Process issued a guide addressing best practices and procedural fairness in 2010.²⁴ The *ICC Recommended framework for international best practices in competition law enforcement proceedings* focuses on seven elements, including: (1) Transparency, (2) Engagement, (3) Confidentiality, (4) Fairness, (5) Non-discrimination, (6) Accountability, and (7) The role of the courts.²⁵

13. The ABA’s “Best Practices for Antitrust Procedure” was issued in 2015.²⁶ It addresses “the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process.”²⁷ They are divided into six categories, including: (1) investigation; (2) asserting contentions of infringement; (3) assessing contentions of infringement; (4) first-instance decision; and (5) review.²⁸ The main core process elements can be summarized as:²⁹

- The right to know allegations and arguments made, and have access in good time to the evidence in the entire case file;
- The right to a meaningful hearing before the actual decision-maker;
- The existence of a neutral and independent decision-maker;

²² INT’L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2015), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf [hereinafter ICN GUIDANCE].

²³ *Id.*

²⁴ INT’L CHAMBER OF COMMERCE, RECOMMENDED FRAMEWORK FOR INTERNATIONAL BEST PRACTICES IN COMPETITION LAW ENFORCEMENT PROCEEDINGS (Mar. 8, 2010), *available at* www.iccwbo.org/Data/Documents/Competition/Due-Process-International-paper [hereinafter ICC FRAMEWORK].

²⁵ *Id.*

²⁶ Abbott B. Lipsky, Jr. & Randolph Tritell, *Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model*, ANTITRUST SOURCE, Dec. 2015, at 6, *available at* www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec15_lipsky_tritell_12_11f.authcheckdam.pdf.

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ See, Douglas H Ginsburg & Taylor M Owings, *Due Process in Competition Proceedings*, 11 COMPETITION L. INT’L 39 (2015).

- Decision-making without inordinate delay, so as to prevent due process being frustrated by inaction; and
- In the case of an adverse decision, review by an independent tribunal, including a stay of any remedy that causes irreparable harm.

4. Regardless of the size, experience, or mission of a competition agency, adopting proper due process procedures will benefit the agency by enhancing its legitimacy, increasing efficiency, and promoting accuracy

14. Meaningful due process procedures are critical elements to ensure legitimacy in agency action. BIAC is concerned that due process rights are not always guaranteed, are not uniformly available across even some of the more experienced agencies or are not always effectively applied. In jurisdictions with real or perceived due process shortcomings, businesses may feel that they have not been afforded the opportunity to defend themselves, perceive unfairness in the decision making process, or feel that the outcome is a foregone conclusion. As the ABA has advocated, proper due process procedures will enhance respect and legitimacy not only within the business community, but also among the general public, and counterpart agencies.³⁰ According to the ICN, “[t]he credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency’s investigative process and public understanding of such process.”³¹ Leading enforcers have also noted the crucial link between due process and agency credibility. Then-Assistant Attorney General Varney noted that “[c]omplaints about process lead to concern that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the substantive outcome.”³² Former Assistant Attorney General James Rill similarly stated that “[n]ot only is the wide acceptance of basic procedural fairness an elemental foundation of a free economic society, it also enhances respect for the enforcement agency and confidence that its decisions constitute an impartial appraisal of the facts and legal standards with a full understanding of both.”³³ The International Chamber of Commerce Framework noted that “increased procedural fairness can strengthen agency decision-making and increase public confidence in agency decisions, benefitting businesses, competition authorities and the consumers they serve.”³⁴ Thus, agencies that do not provide a full measure of due process protections risk the credibility of their agency and of the decisions they reach.

15. Due process procedures can increase efficiency. Perceptions of unfairness can create a caustic relationship between the agency and the business community, significantly impeding the “cooperation and engagement from parties and third parties,” one of the “key contributing factors to an agency’s ability to pursue fair and effective investigations.”³⁵ Perceptions of unfairness can also affect the ability to negotiate settlements and inspire businesses to be more likely to appeal agency decisions, thus significantly increasing the resources needed to handle each individual case.

³⁰ *Id.*

³¹ ICN GUIDANCE, *supra* note 22, at 1.

³² Christine Varney, Asst. Atty. Gen., Antitrust Div., U.S. Dep’t of Justice, Procedural Fairness, Address Before 13th Annual Competition Conference of the International Bar Association (Sept. 12, 2009), available at www.justice.gov/atr/file/519876/download, at 1.

³³ James F. Rill, A Comparison of Business and Agency Views on Certain Procedural Fairness Issues, Before the ABA Section of Antitrust Law Spring Meeting 2 (Mar. 28-30, 2012), available generally at www.americanbar.org/groups/antitrust_law.html.

³⁴ ICC FRAMEWORK, *supra* note 24, ¶ 1.2.2.

³⁵ ICN GUIDANCE, *supra* note 22, at 1.

16. Due process can promote accuracy. “The quality of competition enforcement depends on agencies’ ability to conduct effective investigations.”³⁶ Pursuing best practices “enables an agency to evaluate fully the accuracy and import of the allegations before it,”³⁷ and the “consistency in process and procedures” contribute to “accurate and predictable enforcement by competition agencies.”³⁸ Considering agency behavior in the context of obtaining funding, scholars have noted that some arrangements can create perverse incentives where “agencies might be tempted to strain to ‘discover’ infringements of the law” and accept settlements that “have questionable substantive merit.”³⁹ Similarly, agencies that feel they are struggling to establish legitimacy may be tempted to sacrifice long-term credibility and effectiveness for a perceived short term-gain. By hampering an agency’s ability to make unprincipled decisions, due process protects both the parties affected and the agency and reduces calls for structural reform.

5. Beyond mere rhetoric: Ensuring adequate due process requires practical application

17. Although a clear framework for best practices in competition law enforcement proceedings has emerged, some agencies have shown a reluctance to even consider reforming their existing deficient practices. Other jurisdictions have shown a willingness to make significant due process commitments, but have failed in their implementation and/or enforcement of those commitments.

18. Ultimately, success in building a due process culture among competition regimes worldwide will require engagement and support from agencies of all sizes and experience levels. However, not unlike corporate antitrust compliance programs, success must begin with a very clear message from the top. As noted in the ICC’s Antitrust Compliance Toolkit, to build a “compliance culture” you need “buy-in and commitment from your senior management” who must “demonstrate a clear and unambiguous commitment.”⁴⁰ The “senior management” of antitrust enforcement must send a clear and unambiguous message that they are committed to due process protections, ensure that such protections are effectively and transparently applied, and invite other jurisdictions to join that culture.

³⁶ INT’L COMPETITION NETWORK, INVESTIGATIVE PROCESS PROJECT ISSUES PAPER AND MANDATE (2012), available at www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf, at 1.

³⁷ ICC FRAMEWORK, *supra* note 24, ¶ 2.2.1.

³⁸ ICN GUIDANCE, *supra* note 22, at 1.

³⁹ William E. Kovacic & Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 IOWA L. REV. 2085, 2013 (2015) (noting the perverse incentives of self-funded agencies).

⁴⁰ INT’L CHAMBER OF COMMERCE, ICC ANTITRUST COMPLIANCE TOOLKIT 5-6 (2013), available at www.iccwbo.org/Data/Policies/2013/ICC-Antitrust-Compliance-Toolkit-ENGLISH/.