

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Scoping note on Transparency and Procedural Fairness as a long-term theme for
2019-2020****6-8 June 2018, OECD Conference Centre**

This document was prepared by the OECD Secretariat to serve as a scoping note on Transparency and Procedural Fairness as a long-term theme for the Programme of Work and Budget 2019-2020. It is for discussion under Item 13 of the agenda for the 129th meeting of the OECD Competition Committee on 6-8 June 2018.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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Scoping Note by the Secretariat on Transparency and Procedural Fairness

1. Introduction

1. Transparency and fair process are crucial for a well-functioning competition enforcement system. **Transparency** involves making publicly available laws, policies, guidelines, procedures and practices, as well as agency and court decisions. **Procedural fairness** in investigations and decisions involves establishing and following procedures that are fair and clear on the rights and limitations of affected and interested parties, and provide opportunities for parties to take part in investigative and decision-making processes. Procedural fairness includes the right to seek access to the case file and request the independent judicial review of competition enforcement decisions.

2. A transparent and fair process aims to ensure the impartial and reasonable treatment of subjects of competition investigations and provide them with legal certainty and predictability. At the same time, it helps improve the quality, accuracy and comprehensiveness of competition agencies' analyses and decisions by making sure that all arguments are heard and assessed. Ultimately, observing due process builds the credibility of competition enforcement and reinforces the legitimacy of competition law and policy. The benefits of due process extend to the competition agency itself: following standardised procedures for investigations and decisions and ensuring checks and balances imposes internal clarity and self-discipline.

3. Competition agencies have different **institutional structures** to handle and review cases. Institutional choices can be important to guarantee that enforcement actions and decision-making processes are effective, predictable and transparent, and perceived to be so by affected and interested parties, as well as all citizens. Institutional methods to ensure transparency and due process can include: (a) a separation between investigators and decision-makers; (b) using independent internal advisors to provide a "fresh eyes" review of cases; (c) separating the investigating and legal teams using a firewall; (d) having procedures to assess the likely success of an investigation at an early stage; (e) holding frequent meetings between the parties, case teams and senior decision-makers; and (g) publishing commitments with regard to transparency.

4. All enforcement systems should provide a level of transparency and procedural fairness. Regardless of the legal and institutional framework, there are minimum standards which have universal application.

5. Competition Committee delegates have expressed interest in continuing to work on this topic and consolidate knowledge and methods that ensure transparency and fairness in competition law enforcement. At the December 2017 Competition Committee meetings, the Secretariat was asked to prepare a short scoping note on a possible long-term project on *Transparency and Procedural Fairness*. This note sets out the background and provides suggestions for areas of further work and is intended to support the Competition Committee's discussion on this topic in June 2018.

2. Background

6. The Competition Committee has discussed transparency and fairness in competition law enforcement in the past. In 2010, the Working Party 3 (WP3) of the

Competition Committee held two roundtables on *Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings* (February 2010) and *Procedural Fairness Issues in Civil and Administrative Enforcement Proceedings* (June 2010). The roundtables examined transparency and due process issues in civil and administrative (not criminal) merger and non-merger enforcement proceedings. Topics included transparency relating to the law, the enforcement practice and agency decision-making; requests for information; parties' contacts with the agency and opportunities to be heard; decision-making process, timing and publication of decisions; closing statements; settlement procedures; confidentiality rules and practices; and internal and judicial review of enforcement actions and decisions.

7. In October 2011, WP3 held another roundtable on the *Institutional and Procedural Aspects of the Relationship between Competition Authorities and Courts, and Update on Developments in Procedural Fairness and Transparency*, which examined, among others, the role of courts in competition law enforcement, the standard of review applied by the courts in competition cases and ways of ensuring that courts acquire competition law and economics expertise.¹ In December 2017, the Global Forum on Competition held a *Roundtable on Judicial Perspectives on Competition Law* which examined aspects of judicial review of competition enforcement decisions, the assessment of economic evidence and the role of specialised judges and competition law tribunals.²

8. The discussions showed a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems and other legal, cultural, historical and economic differences among jurisdictions.

9. The impetus for more work on this topic comes from renewed focus on transparent and fair competition enforcement process in domestic and international guidelines and fora,³ while new cases continue to clarify standards of due process.⁴

3. Potential areas for future work

10. Given the extensive work that exists on this topic, the areas for future work should be carefully selected to complement existing work rather than to duplicate it.

3.1. Professional privilege

11. The 2011 roundtable on the relationship between competition authorities and courts very briefly touched upon disputes involving the delimitation of professional privilege. The Competition Committee and WP3 have not otherwise examined the topic.

12. Authorities and courts continue to assess and interpret the right balance between the interests of the legitimate search for evidence of competition law violations, on the one hand, and the respect for the confidentiality of advisor-client exchanges on the other. The European Court of Human Rights has in recent cases examined in detail the trade-off between the public interest in gathering evidence and the observance of the rights of defence and privacy with regard to the confidentiality of lawyer-client relations.⁵

13. A roundtable could examine: (a) professional privilege protections offered under domestic laws; (b) how these protections are interpreted and applied in practice; (c) how parties claim legal privileges and how agencies and courts assess these claims and accept or reject them; (d) what the protection of the advisor-client relationship means for

companies and for the organisation of inspections and the collection of evidence by competition agencies.

3.2. Standard of courts' review of enforcement actions and decisions

14. Effective review of competition enforcement actions and decisions allows the parties' rights to be protected and enables setting aside or correcting decisions that may be mistaken. Effective review thus ensures that the rule of law is observed.

15. The 2011 roundtable on the relationship between competition authorities and courts briefly discussed the review by the courts of competition enforcement actions and decisions.

16. The review can be judicial, i.e. examining the lawfulness of the action of the authority based on specific limited grounds which are usually the (il)legality, (un)reasonableness or procedural (in)accuracy of the contested act. Review on those grounds can still involve a fairly detailed examination of facts and evidence and the appropriateness of the action taken on their basis.

17. Court review can also be on the merits, i.e. on the substance of the act or decision, involving a full reassessment of its correctness. The extent of reconsideration of the merits depends on the characteristics of each system, and can extend to the opportunity of the contested act or decision (i.e. whether it was the correct decision to take, rather than whether the decision was taken correctly).⁶

18. Since 2011, there have been new cases re-examining the depth and extent of judicial review of competition enforcement actions and decisions.⁷ A roundtable could examine: (a) standards of review and new cases; (b) how these standards differ depending on the legal and institutional framework; (c) what judicial review standards imply for the exercise of the agencies' powers; and (c) developments in methods to ensure that courts acquire expertise in competition law and economics (training of judges, providing the courts with expert advice by external experts or the competition authority, temporary appointment of competition experts as judges, etc.).

3.3. Access to file and protection of confidential information

19. To ensure that parties in antitrust proceedings and third parties are willing to cooperate with competition agencies and supply information, agencies should protect from unlimited disclosure confidential information such as business secrets, trade secrets and sensitive commercial and personal information. At the same time, parties should have access to information and evidence used against them, both incriminating and exonerating.

20. Competition agencies take different approaches to securing parties' access to the case file and protecting confidential information. Protection can involve not disclosing the confidential information at all, for example through redacting the disclosed documents to remove the protected information. If access to confidential information is nevertheless necessary for the exercise of the rights of defence, agencies may specify confidentiality rings which allow full disclosure of all information but limiting the persons to whom it is made available (for example, disclosing only to legal and economic advisors) and the conditions under which it is made available (for example, requiring the signing of non-disclosure agreements and specifying sanctions in case of unauthorised further disclosure). Some authorities use data rooms, in circumstances where it is very

difficult or burdensome to provide meaningful and timely non-confidential versions of documents.⁸

21. WP3 had looked at access to file and the protection of confidential information at the roundtable on *Procedural Fairness Issues in Civil and Administrative Enforcement Proceedings* (June 2010). Since then, jurisdictions are continuing to refine their approach. Thus, a roundtable or workshop could revisit the topic and look at developments in (a) ways of securing access to file; (b) methods of confidentiality protections; and (c) the relevant rights and defences of the parties, third parties and the public.

4. Possible outputs

22. The Competition Committee and WP3 can, first of all, continue the policy exchange through roundtables.

23. The Competition Committee could also consider building on the extensive work done so far and aim at identifying common principles to be consolidated into a compendium of best practices or a Recommendation.

24. A first standard-setting output could be a compendium of **best practices**, to be adopted by the Competition Committee.

25. If there is sufficient support, the Competition Committee could develop a **Recommendation** to be adopted by the OECD Council.

26. Formal outputs such as a Recommendation and/or a compendium of best practices would mark progress on this important and topical issue. Formal outputs would enable Members to consolidate areas of consensus as well as serve as a point of reference for non-Members, in their own enforcement work.

27. In all cases, it will be important to ensure that the work builds on, and does not duplicate, work conducted in other international fora, such as the International Competition Network (ICN). For example, the OECD will co-ordinate with the ICN to take into account the proposed update to the ICN's 2015 *Guidance on Investigative Process*⁹ and the *Guiding Principles for Procedural Fairness in Competition Agency Enforcement*¹⁰.

5. Methods of work

28. The long-term theme would last for a period of 2 years, 2019 to 2020.

29. As transparency and procedural fairness are topics of universal application in which delegations have experience, **roundtables**, which allow for sharing of policies, cases and views, seem to be best format for the proposed three new topics (professional privilege, standards of review by the courts, and access to file and protection of confidential information). External experts, such as practitioners, judges and academics would be invited to add their own perspectives, so as to make sure that consideration is given to all relevant interests and thus contribute to the comprehensiveness of the debate and the conclusions.

30. The discussion regarding access to file and protection of confidential information could alternatively be conducted in a **workshop** which will allow a more hands-on exchange of views and experiences on how to secure access, protect confidential

information and ensure that the whole process is not tainted by procedural defects. This workshop could also discuss the organisation of data rooms.

31. During the 2019-2020 period, aspects of the discussion on due process can be taken up by the Global Forum, as they may be relevant to the wider range of countries that participate in it.

32. If it is decided to work towards the **formal outputs** proposed above (a compendium of best practices and/ or a Recommendation), work would be carried out not only during the OECD meetings but also between meetings, to enable timely progress and delve deeper into some issues through more focused discussions. For example, delegates could be asked to volunteer to work with the Secretariat on specific issues that may require more in-depth exchange of views. The outcomes of such joint work would then be presented to the WP3 and the Competition Committee for validation.

33. In the development of formal outputs, the Competition Committee could involve the OECD Regulatory Policy Division and Committee, since transparency and fairness are general principles applicable throughout the public administration.

34. In case it is decided to develop a Recommendation or a compendium of best practices, it may also be useful to hold drafting workshops.

6. Proposed Work Plan

- A roundtable on professional privilege: November 2018
- A roundtable on the standard of courts' review of enforcement actions decisions: June or December 2019
- A roundtable or workshop on access to file and protection of confidential information: June or December 2019
- OECD Competition Committee Best Practices on minimum transparency standards in competition cases: throughout 2020
- OECD Competition Committee Best Practices on minimum due process standards in competition cases: throughout 2020
- [if not included in the Best Practices proposed above] OECD Competition Committee Best Practices regarding due process in the use of specific investigative tools (dawn-raids, interviews, requests for information)
- OECD Council Recommendation on Transparency and Fairness in Competition Cases (which could feed into a broader OECD Council Recommendation on Institutional Design): throughout 2020, to then be formally approved according to the Council's agenda.

Endnotes

¹ The key points out of three roundtables of 2010 and 2011 are compiled here: www.oecd.org/competition/mergers/50235955.pdf

² www.oecd.org/competition/globalforum/judicial-perspectives-competition-law.htm

³ For example, the U.S. Department of Justice and Federal Trade Commission 2017 Antitrust Guidelines for International Enforcement and Cooperation (www.justice.gov/atr/internationalguidelines/download) stress that the U.S. agencies promote convergence of substantive enforcement standards that seek to advance consumer welfare, “based on sound economics, procedural fairness, transparency and non-discriminatory treatment of parties”. Also in 2017, the International Chamber of Commerce’s Commission on Competition prepared a discussion paper on procedural safeguards in competition law enforcement proceedings <https://iccwbo.org/publication/icc-effective-procedural-safeguards-competition-law-enforcement-proceedings/>. The ICN is currently working on new Guiding Principles for Procedural Fairness in Competition Agency Enforcement.

⁴ For example: General Court of the European Union, Judgment in Case T-194/13 United Parcel Service, Inc. v Commission, in which the Commission was found to have infringed UPS’ rights of defence by relying on an econometric analysis which had not been discussed in its final form during the merger review procedure. The decision has been appealed by the Commission before the Court of Justice of the European Union. Also, Court of Justice of the European Union, Judgement in Case C-413/14 P, Intel Corporation Inc. V. European Commission, in which the Court of Justice of the European Union held that the Commission failed to record a meeting with a Dell executive and keep the recorded information in the case file.

⁵ In 2015, the European Court of Human Rights in Vinci Construction and GTM Génie Civile et Services v. France (applications 63629/10 and 60567/10) found a violation of article 8 of the European Convention of Human Rights (right to respect for private and family life, home and correspondence) with regard to attorney-client confidentiality. In particular, legal professional privilege had been breached during surprise inspections at the premises of the applicant companies as a result of the seizure of documents, many of which contained correspondence between lawyers and their clients. The applicant companies had been unable to discuss the appropriateness of the documents being seized or inspect their content while the inspection was conducted. In 2017, the European Court of Human Rights dismissed the applicant’s allegations in Janssen Cilag S.A.S. v. France (application 33931/12) that article 8 had been breached, as, in that case, the applicant company did not specifically identify any protected documents and thus a fair balance had been struck between the public interest in gathering evidence for competition infringements and the applicants’ rights of defence.

⁶ OECD (2016), The resolution of competition cases by specialised and generalist courts: Stocktaking of international experience, www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf

⁷ The European Court of Human Rights (ECHR) in Menarini Diagnostics v. Italy (application 43509/08) rejected the allegation of a violation of the right to a fair hearing under article 6 of the European Convention of Human Rights, since, in that case, the reviewing court could go further than mere control of legality and assess whether the competition authority had made an appropriate use of its powers. The ECHR thus requires the availability of thorough judicial review for the purposes of complying with article 6. The ECHR reaffirmed this in Janssen Cilag S.A.S. v. France (application 33931/12) and Vinci Construction and GTM Génie Civile et Services v. France (applications 63629/10 and 60567/10).

⁸ Best Practices on the disclosure of information in data rooms in proceedings under Articles 101 and 102 TFEU and under the EU Merger Regulation http://ec.europa.eu/competition/mergers/legislation/disclosure_information_data_rooms_en.pdf; Terms Of Disclosure Of Business Secrets And Other Confidential Information On "External Advisor Only" Basis http://ec.europa.eu/competition/mergers/legislation/data_room_rules_en.pdf

⁹ International Competition Network, Guidance on Investigative Process, www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf

¹⁰ The ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement were adopted at the ICN 2018 annual conference in Delhi: <http://icn2018delhi.in/images/AEWG-Guiding-Principles-4PF.pdf>