



**Asia-Pacific  
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## **Procedural Fairness: Update on Recent OECD Activities**

Purpose: Information

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## Procedural Fairness: Update on Recent OECD Activities

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## What is Procedural Fairness?

Three central concepts:

- (i) Governmental measures to be published before they are applied
- (i) Such measures to be administered in uniform, impartial and reasonable manner or in fair and equitable way
- (i) Possibilities should exist for appeal or review of decisions on the application of such measures

(SICE Dictionary of Trade Terms)



## Why is procedural fairness important?

- *For parties:* ensure citizens' confidence and belief in a fair legal system and in those applying the law
- *For authorities:* ensure a better understanding of the facts , help improve the quality of evidence and reasoning on which the agency bases its enforcement actions and decisions, assists agencies in allocating their resources more efficiently,

However:

Two distinct enforcement systems, with very different rules:

- Common law countries → Court based enforcement system
- Civil law countries → Administrative based system



## The Dual Role of the Competition Agency: Investigator & Prosecutor

- Many agencies around the world have dual roles of investigator and prosecutor (particularly in civil law countries)
- Issues for impartiality of competition regulator

Agency response: impose mechanisms to ensure fairness

- **Netherlands:** Chinese wall between investigation and prosecution team with legal team acting as 'fresh pair of eyes'
- **France:** Clear separation of functions , with investigation services acting under direction of General Rapporteur with no involvement of College of Commissioners
- **Ireland:** Members not allowed to sit on judgement of case if they are involved in the investigation



## OECD Work on Procedural Fairness

### Recommendation of the Council on Merger Review (2005)

- Member countries should ensure that the rules, policies, practices and procedures involved in the merger review process are **transparent and publicly available**, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger. (A.2.)
- Merger laws should ensure **procedural fairness** for merging parties, including the opportunity for merging parties to obtain **sufficient and timely information** about material competitive concerns raised by a merger, a meaningful opportunity to **respond** to such concerns, and the right to **seek review** by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such review of adverse enforcement decisions should be completed within **reasonable time periods**. (A.3.)
- Merging parties should be given the opportunity to **consult with competition authorities** at key stages of the investigation with respect to any significant legal or practical issues that may arise during the course of the investigation. (A.4.)
- **Third parties** with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to **express their views** during the merger review process. (A.5)
- The merger review process should provide for the **protection of business** secrets and other information treated as **confidential** under the laws of the reviewing jurisdiction that competition authorities obtain from any source and at any stage of the review process. (A.7.)

(emphasis added)



## OECD Work on Procedural Fairness

### APEC/OECD Integrated Checklist on Regulatory Reform (2005)

*“To what extent do firms and individuals have access to (i) the Competition Authority to become apprised of the case against them and to make their views known, and (ii) to the relevant court(s) or tribunal(s) to appeal decisions of the Competition Authority or seek compensation for damages suffered as a result of conduct contrary to the domestic competition law?”*

(Item C11 of the Checklist)



## OECD Work on Procedural Fairness

### WP3 Roundtable on Procedural Fairness (Feb 2010)

- Transparency relating to the law and agency procedures & practice
- Party contacts with the agency involved
- Notice and opportunities to be heard
- Hearings
- Publication and timing of decisions
- Closing statements.

### WP3 Roundtable on Procedural Fairness (June 2010)

- Confidentiality rules and public disclosure of proceedings
- Avoidance of unreasonable evidentiary requests to subjects of investigations
- Use of "devil's advocate" panels and specialized economists
- Availability of consensus settlement procedures
- Judicial review and interim relief.



## Country Examples

### United States

- *1946 Administrative Procedure Act*
  - Decision maker must be independent from investigators and prosecutors
  - Decision maker must act in impartial manner
  - Decision must not be effected by *ex-parte* contact with prosecutor or parties
- *Appointment of Administrative Law Judge*
  - Holds pre-hearing conferences
  - Resolves discovery, evidentiary and procedural disputes
  - Conducts full adversarial evidentiary hearing on the record
  - Issues initial decision and any orders on remedy



## Country Examples

### European Union

- *Regulation No. 1/2003 & Regulation No. 773/2004 (Antitrust proceedings) and Regulation No. 139/2004 & Regulation No. 802/2004 (Merger proceedings) entitling parties to:*
  - be informed of opening of proceeding, parties involved, scope of investigation
  - be informed in writing of objections against them and evidence on which objections based
  - have access to European Commission file
  - reply in writing to objections and develop arguments in oral hearing
  - receive motivated decision
- *Recent guidance on how EC Antitrust procedures work (January 2010):*
  - Best Practices for antitrust proceedings
  - Best Practices for submission of economic evidence (merger & antitrust)
  - Guidance on the role of the Hearing Officers



## Country Examples

### Korea

- Enhancement of procedural rights
  - Informal written and oral dialogue between parties prior to investigation
  - Moratorium in proceedings to collect additional evidence
  - Measures to ensure business secrets and identities kept confidential
  - Simultaneous interpretation booths for foreign companies

### Australia:

- Dawson Review (2001-2003)
  - New process guidelines published
  - 1974 Trade Practices Act amended to include:
    - requirement for warrant for dawn raid
    - formal voluntary merger review process for ordinary mergers



## International Interest in Procedural Fairness

- A multitude of differences still exist across jurisdictions
- Multi-jurisdictional cases are increasing and firms are subjected to a variety of due process rights
- Globalization has highlighted the importance of efforts to bring greater convergence
- Greater convergence is driven by greater cooperation between NCAs – in particular, through international bodies like the OECD
- A number of jurisdictions (e.g. EC, UK, Korea) are reviewing competition procedures and this offers opportunities for agencies to discuss transparency and fairness issues jointly



## Where next for Procedural Fairness?

- Shared principles and standards are necessary to ensure that parties involved in multi-jurisdictional cases, including different legal and cultural restraints, still perceive the enforcement systems to which they are exposed as generally fair and transparent.
- OECD common principles?