



ICC roundtable
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Procedural Fairness: Update on Recent OECD Activities

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Past 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)

Past 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)

Recent OECD Work on Procedural Fairness: Who? What? When?

- Who?
 - Working Party 3 (WP3): 31 members and 12 observers
- What?
 - Civil and administrative enforcement proceedings, (i.e., not criminal procedures)
 - Both antitrust proceedings (cartels and single-firm conduct) and merger review.
 - Focus is on procedural fairness *vis-à-vis* targets of enforcement proceedings. (i.e. not third parties' rights)
- When?
 - Two roundtables: February and June 2010
 - More?

OECD Competition Committee and WPs



WP3 Roundtables on Procedural Fairness

WP3 Roundtable on Procedural Fairness (February 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)

- Decision making process
- Confidentiality rules and public disclosure of proceedings
- Requests of information to targets of investigations
- Availability of agreed resolutions of enforcement proceedings
- Judicial review and interim relief.

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

Int.l 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 at the OECD ?

- OECD Report on Procedural Fairness expected by end of 2010
- Shared principles and standards? Best practices?
- OECD Recommendation?

Thank you for your attention!