

EFFECTIVE PROCEDURAL SAFEGUARDS IN COMPETITION LAW ENFORCEMENT PROCEEDINGS

DISCUSSION PAPER

Prepared by the ICC Commission on Competition

Summary and highlights

- Effective procedural safeguards in antitrust investigations

1. INTRODUCTION

Meaningful procedural safeguards in competition law enforcement proceedings are essential to ensuring consistent, predictable and fair decision making. Their effective and timely implementation during each step of the proceedings not only ensures procedural fairness for the parties under investigation and other interested parties, but also benefits competition enforcement agencies by enhancing their legitimacy, increasing efficiency and promoting accuracy and better informed decisions. Indeed, the credibility of competition agencies is closely tied to the integrity and public understanding of the investigative process.

The proliferation of competition laws globally and the increased levels of enforcement by competition agencies with diverging procedural and substantive rules has heightened the risk of inconsistent and inappropriate outcomes. The growing international dimension of competition law investigations and the potential for remedies in such cases to produce effects going beyond the relevant domestic markets at issue exacerbate those risks. Effective observance of due process principles is essential to help lessen those risks.

In recent years, governments, competition agencies and private sector organisations have called for a clear framework of best practices on procedural fairness in competition enforcement proceedings. Guidance and international standards have, for example, been advanced by the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), the Business and Industry Advisory Committee to the OECD (BIAC) and the American Bar Association. In some instances, the recommendations of these organisations have been recognized and implemented by competition enforcement agencies.

Nonetheless, ICC notes that fundamental procedural rights are not always guaranteed, are not uniformly available, or are not always effectively applied. The lack of procedural fairness and transparent decision making increases the risk of ill-informed decisions and may give rise to serious concerns regarding competition enforcement agencies' motives to pursue an investigation.

Given these developments, ICC calls for renewed attention to the importance of due process in competition law enforcement proceedings and provides in this document concrete guidance on the scope and effective implementation of procedural safeguards. This guidance complements ICC's 2010 Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings and draws upon ICC member companies' experience.

The guidance highlights a number of fundamental overarching principles of due process that should apply in competition law enforcement proceedings. It then describes specific safeguards that agencies should put in place to ensure their rules and procedures conform to due process norms and reflect current best practice. The list of procedural safeguards is not intended to constitute a comprehensive or exhaustive list of due process protections.

2. IMPORTANCE OF OVERARCHING PRINCIPLES

While specific procedural safeguards should apply to competition agencies use of their investigative powers during the successive stages of the proceedings, ICC emphasizes that the following principles of due process should apply generally to competition law enforcement proceedings.

- 1) Competition law proceedings should be transparent and predictable.
- 2) Agencies should carry out competition law investigations in accordance with principles of impartiality and objectivity and in an effective and time-efficient manner. Agency personnel should not have any interest conflicting with the investigation they are involved in.
- 3) Agencies, including key decision-makers, should have regular, meaningful and genuine engagement with the investigated parties and interested third parties with a legitimate interest throughout the proceedings.
- 4) Agencies should provide investigated parties with a complete and detailed information on the allegations of anti-competitive conduct (the facts of the case, the supporting evidence, the legal and economic theories, *etc*) so that they can respond fully and effectively to the allegations and the agency can come to an informed view by ensuring it has given due consideration to “both sides of the story”.
- 5) Agencies should introduce internal checks and balances to guarantee the proper exercise of their investigative powers and to ensure robust and independent decision-making.
- 6) Agencies’ enforcement actions, infringement decisions and remedial measures should respect proper jurisdictional limitations. Remedies must be limited to rectifying harm on the relevant domestic markets.
- 7) Investigated parties (and interested parties) should have the right to a full judicial review on the merits of their case, either in the context of a court’s review of the agency’s claims, or in the context of an appeal against the agency’s decision. In the latter case, there should be a possibility for the enforcement of the decision to be suspended during the appeal.

3. EFFECTIVE PROCEDURAL SAFEGUARDS

3.1. Initiating proceedings: preliminary issues

ICC CLARIFICATION

- 1) As competition law enforcement proceedings are intrusive and burdensome on parties involved in competition law investigations, agencies should exercise restraint when considering initiating an investigation. In doing so, agencies should be led by the objective to safeguard competition and

consumer welfare and should be independent of political influence, domestic industrial policy considerations and commercial interests of specific economic sectors or individual companies. They should also ensure that they have due regard to enforcement priorities when deciding which allegations of anti-competitive conduct to pursue.

- 2) Agencies should have transparent procedures in place to periodically (re)assess the benefits of pursuing enforcement proceedings in light of the evidence gathered during the investigation. Agencies should proactively and swiftly end proceedings where the allegations of anti-competitive conduct do not appear to have any merit or where there is no clear discernable public interest in continuing to pursue an investigation. Agencies are encouraged to signal to e.g. government agencies instances where markets do not function optimally due to other reasons than anti-competitive conduct and to recommend appropriate (legislative) action.
- 3) Subject to appropriate safeguards, agencies should regularly consult with foreign agencies that are carrying out investigations into similar allegations of anti-competitive conduct, or have done so, to ensure consistent approaches and outcomes, including in respect of any remedies. This is particularly important in instances where enforcement action of a given agency may impact firms and business conduct outside its borders.
- 4) Agencies should have specific safeguards in place to protect the confidentiality of information gathered as part of the investigation. However, confidentiality concerns must be balanced carefully with the right to access evidence as a matter of due process.
- 5) Agencies should minimize publicity surrounding enforcement proceedings, especially during the early stages of an investigation and should have full regard to the presumption of innocence in making public and semi-public announcements.

3.2. Agencies should duly inform investigated parties about the fact of an initiation of an investigation and about any significant successive investigative and procedural steps

ICC CLARIFICATION

- 1) Procedural fairness necessitates competition agencies to be transparent about the initiation of an investigation, its scope, the legal basis for the investigation, as well as significant investigative and procedural steps throughout their proceedings. The level of transparency should increase over the course of the investigation.
- 2) Investigated parties should be informed as soon as feasible about the initiation of an investigation unless there are compelling reasons for the

agency to maintain confidentiality, e.g. to ensure the effectiveness of the investigation or to prevent evidence being destroyed.

- 3) Investigated parties should be adequately informed of significant investigative and procedural milestones reached during proceedings. This should include the full disclosure of pertinent facts and the relevant economic and legal theories of harm as well as any changes in the scope and status of the investigation.
- 4) There should be on-going and meaningful engagement between the case team and the investigated parties throughout the proceedings. This includes the opportunity for the investigated party to meet officials and higher-level decision-makers in the agency at critical stages in the procedure to discuss the status of the investigation and merits of the case in an open and frank manner.

3.3. Agencies should make proportionate use of investigative powers

ICC CLARIFICATION

- 1) The proportionate, balanced and timely exercise of investigative powers by competition agencies is essential to a fair and efficient investigative process.
- 2) Competition agencies need to have adequate safeguards in place to ensure that their investigative powers are used appropriately and in accordance with legislative, procedural and/or judicial requirements. This should include internal checks and balances to assess the legitimacy, relevance and proportionality of the use of the investigative powers. For example, competition enforcement agencies may enable a senior official - acting in an independent role - to carry out an impartial and objective review of the enforcement action at the request of the investigated parties.
- 3) Agencies should tailor their investigations to the nature and seriousness of the allegations and potential harm to consumers and seek to avoid unnecessary burdens on parties and interested third parties when applying their investigative powers.
- 4) Agencies should have internal procedures to ensure the diligent and timely investigation of anti-competitive conduct and have the resources and expertise to perform their tasks efficiently.
- 5) Parties involved in investigations should have the possibility to challenge the improper use of investigative powers before the courts in a timely manner, *i.e.* in principle in time for the court to issue its judgment before the investigation is concluded.

3.4. Agencies should inform investigated parties of the allegations before adopting a decision

ICC CLARIFICATION

- 1) Any meaningful exercise of the right of defense requires investigated parties to be informed in a timely manner of the allegations of anti-competitive conduct against them and of the evidence and the legal and economic theories upon which those allegations are based.
- 2) As described above (see point 3.2, ¶4), the investigated party should be able to meet officials and higher-level decision-makers at critical stages in the procedure to discuss the status of the investigation and the merits of the case in an open and frank manner.
- 3) Investigated parties should in particular be provided with a written report containing a description of the factual basis for the charges, the evidence and economic theories and legal analysis, together with copies of the complaints, supporting materials and evidence gathered during the investigation.
- 4) The written report should describe the main elements of any expected remedy and/or penalty in sufficient detail to allow investigated parties and, as appropriate, any third party to provide meaningful comments.
- 5) This should include the agency explaining why the remedy and/or penalty is appropriate to address the specific characteristics of the infringement and the harm to domestic customers.
- 6) The written report should be provided in good time for the investigated parties to have a genuine opportunity to respond to the concerns.

3.5. Agencies should disclose all evidence collected during the investigation

ICC CLARIFICATION

- 1) The agency should compile a record, or case file consisting of all evidence, arguments, analyses, expert opinions, correspondence with all interested parties, requests for information, minutes of any meetings (with the investigated parties, any interested parties, other stakeholders as well as meetings between the case team and other agency officials) relating to the investigation.
- 2) Access to the complete case file is a core element of due process in the context of competition law investigations. Subject to reasonable safeguards for confidential information, both inculpatory and exculpatory evidence should be disclosed to the investigated parties in sufficient time for them to assess the information in preparation for their defense. Only such a process ensures that investigated parties have sufficient knowledge of any potential allegations against them and have a full and effective opportunity to respond. This also ensures that agencies is informed of “both sides of the story” and

can form a better informed view of the facts of the case. This is particularly important in complex cases or where third parties may have a commercial interest which may not be immediately obvious to the agency.

- 3) Confidentiality claims by submitting parties should be carefully evaluated by the competition agency in the specific context of the investigation and in accordance with clear and transparent procedures. In particular, claims of commercial sensitivity raised by a submitting party should be carefully balanced against due process rights, in particular the need for the investigated parties to have access to all the evidence gathered against them.
- 4) Agencies are encouraged to use their investigative powers to require third parties to respond to requests for information, in particular where such parties object to offering meaningful information in light of the agency's rules on access to file.
- 5) Material that is legitimately identified to be confidential should be provided in a non-confidential format, e.g. summaries of the confidential information. Moreover, confidential information can often be disclosed through procedures that permit disclosure in a more limited, but still effective manner, e.g. by using confidentiality rings and data rooms.
- 6) Agencies should have transparent and expeditious procedures for addressing disputes concerning confidentiality claims. In particular, there must be procedures to avoid unacceptable or over-inclusive confidentiality claims, e.g. a senior official - acting in an independent role - to carry out an impartial and objective review of the confidentiality claim and to make a ruling on the issue.

3.6. Investigated parties should have the right to respond to allegations of anti-competitive conduct

A. Opportunity to submit detailed written response

ICC CLARIFICATION

- 1) Investigated parties should have a genuine opportunity to respond in writing to the agency's allegations of anti-competitive conduct.
- 2) Investigated parties should have the full opportunity to set forth in its response the arguments and supporting evidence, including but not limited to factual evidence and expert opinion.
- 3) The agency should provide the investigated party with sufficient time to prepare and present its response, taking into account the length of the investigation, the breadth and complexity of the issues, and the need, if any, for the report containing the agency's allegations and supporting evidence to be translated. As a rule, investigated parties should have a period no shorter than 60 days to respond to the allegations.

B. Opportunity to make presentations at an oral hearing

ICC CLARIFICATION

- 1) The investigated parties should have the opportunity to respond to the agency's allegations of anti-competitive conduct during an oral hearing attended by the case team and senior decision-makers. In particular, investigated parties should be properly informed prior to the hearing of any new allegations made by the agency or third parties and be given sufficient time to respond to those statements. If, nonetheless, new allegations are allowed to be made during the hearing, investigated parties will be given sufficient time to respond to those new allegations, either at the same hearing, or a subsequent hearing.
- 2) The oral hearing should allow for meaningful engagement with the agency officials and with interested third parties on critical substantive and procedural aspects of the investigation.
- 3) The agency should make a transcript of the oral hearing and provide it to the investigated parties and interested third parties, subject to appropriate safeguards.

3.7. Agencies should adopt rigorous decision-making processes

ICC CLARIFICATION

- 1) Prior to the adoption of a decision, competition agencies should conduct a thorough review of the evidence and the legal and economic findings by agency officials that are not members of the case team. Agencies should consider establishing specialist support services such as a Legal Service and a Chief Economist team to help undertake such tasks.
- 2) Decision-making should be based strictly on the facts and evidence gathered during the investigation and the applicable legal standards should be applied objectively and to the requisite standard in each case. Competition agencies have the burden of proving the offences/infringement/allegations against the investigated parties.
- 3) Decisions should be adopted after due deliberation and after applying the rules in a non-discriminatory and objective manner. Decisions should be in writing, fully reasoned and include findings of fact, conclusions of law and detailed explanations thereof.
- 4) Competition agencies should generally apply any published guidelines that are relevant to the case. In case the agency departs from such guidelines, its decision should include the reasons therefor.

- 5) Agencies' decisions, including remedial measures should respect proper jurisdictional limitations. Remedies must be limited to rectifying the harm pertaining to the relevant domestic markets.
- 6) Agencies must consider the modalities of the execution of their decisions, including assessing whether there are legitimate grounds to stay the implementation or execution of the decision pending legal review in light of the impact of any remedies and/or penalties on the affected parties or on competitive conditions.
- 7) Agencies should redact any confidential information prior to making the decision public and should notify the investigated parties and provide them with the opportunity to comment on any proposed press release or public statement.

3.8. There should be effective access to judicial review

ICC CLARIFICATION

- 1) Investigated parties (and interested parties) should have the right to a full judicial review on the merits of their case, either in the context of a court's review of the agency's claims, or in the context of an appeal against the agency's decision. The reviewing court should consist of impartial judges with the required knowledge and experience to effectively evaluate the legal and economic findings.
- 2) Courts should have full jurisdiction to review the merits of the case, including, but not limited to reviewing the nature and level of any (proposed) penalty as well as the appropriateness of the (proposed) remedy.
- 3) Courts should have the power to order the suspension of an agency's decision under appeal, in whole or in part, if its enforcement would have severe consequences on the investigated party or would be against the public interest. The court should take into account all relevant circumstances in its ruling.

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