# PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT AND THE FTC EXPERIENCE

**King's College, Centre of European Law**
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**Remarks of Commissioner Terrell McSweeny**

Good afternoon. I am honored to be here today. I would like to thank King's College and Daniel Sokol for the invitation to speak, and thank you to Freshfields for hosting today's event. I would also like to thank the FTC's Office of International Affairs for their assistance in preparing me for today's event and for their tireless work on this important topic. Before I begin, I will give the standard disclaimer that the views I express are my own and do not reflect the Commission's views or the views of any other Commissioner.

I am going to spend some time this afternoon discussing the significance of procedural fairness in competition law enforcement. First, I will discuss what we mean when we say "procedural fairness" and why this concept is so vital generally. Next, I will touch upon why increased procedural fairness not only benefits, but also legitimatizes competition authorities. Finally, I will provide some examples of how the FTC works to protect and promote the principles of fairness, predictability, and transparency within our own agency.

Fairness and due process from the government are fundamental concepts embedded across U.S. law – and I should say, concepts we diligently borrowed from the U.K. legal tradition – and indeed common to European legal systems more generally. While the various institutional arrangements and legal frameworks for competition enforcement in distinct jurisdictions deploy these concepts differently in specific practices, the shared commitment to transparency, predictability, and fairness allow us to share common goals and engage in common dialogue.

## I. Why Talk About Procedural Fairness?

We have seen increasing attention paid by both competition agencies and the private bar around the world to investigational procedures that promote fair and informed enforcement decisions. I view this as a positive development. Unfortunately, when we hear about procedural fairness in competition enforcement, it is often in the negative. That is, we hear about it through

the criticism of frustrated parties subject to a competition investigation or decision that they perceive to be based on unfair or inadequate process.

Having been a senior official and decision maker at two U.S. antitrust agencies, I know that we strive to achieve the right results in the right way, and therefore I take seriously concerns about lack of process. As agencies, we must recognize that procedural fairness practices help us get to the right answer. As U.S. Assistant Attorney General Bill Baer recently noted: "If we are to effectively advance our shared goals of protecting competition, we need to be able to talk about all the tools at our disposal," and "reach common ground on underlying principles and approaches."[1]

Advancement of procedural fairness principles is dependent upon the recognition that this is a two-sided issue. First, it's good government to be fair to targets and other outside parties involved in an investigation. Second, it's also good *for* the government by enabling better-informed agency decisions and bolstering the overall credibility of the agency.

During an investigation, agency engagement on theories of competitive harm and other key pieces of evidence allows parties better opportunity to respond – and to educate the agency about the market at issue, thus enabling better understanding about the potential for harm. Adhering to procedural fairness principles can also promote investigative efficiency by narrowing the relevant issues of disagreement between the parties and agency staff and focusing investigations on the issues that really matter.

At the broader enforcement system level, knowledge of agency investigative processes and access to public decisions and other guidance may assist companies in their antitrust risk calculations and could lead to more effective proactive compliance. Transparency of decision-making and fairness of process reinforce public confidence in competition enforcement and bolsters the credibility of an agency's mission. Additionally, procedural differences can have international impact. Differences in agencies' investigative processes, engagement levels with

[1] Bill Baer, Asst. Attorney Gen., Antitrust Division, U.S. DEPT. OF JUSTICE, Remarks as Prepared for the Georgetown Law 9th Annual Global Antitrust Enforcement Symposium: "Cooperation, Convergence, and the Challenges Ahead in Competition Enforcement" at 6, 9 (Sept. 29, 2015), http://www.justice.gov/opa/file/782361/download.

parties, and access to information can contribute to divergent conclusions or differing remedies in parallel investigations.

I understand that competition authorities sometimes express concern that transparency about agency process will restrict the options available to it or give a perceived advantage to the party under investigation before the agency fully develops its views. While case specifics may dictate differences in the scope and timing of engagement, a predictable process that ensures basic fairness is not only essential to safeguard the rights of parties, but implementing good process leads to better outcomes, and can ultimately outweigh concerns about limiting an agency's discretion. Commitment to procedural fairness strengthens decision-making in individual investigations, fortifies an agency's overall legitimacy, and ultimately adds to the credibility of our increasingly shared international efforts to protect competition and consumers.

## II. What Does Procedural Fairness Entail?

A quote from the United States' 2010 submission to the Organisation for Economic Co-operation and Development ("OECD") Roundtable on Procedural Fairness sums up the importance of this topic:

> Substance and process in government antitrust investigations go hand in hand. Regardless of the outcome of an investigation, concerns about process create the impression that substantive results are flawed, whereas a fair, predictable, and transparent process bolters the legitimacy of the enforcement outcome.[2]

Three key practices used by competition agencies help ensure procedural fairness, including: (i) separation between investigation staff and decision-making officials; (ii) disclosure to parties about alleged breaches of competition law, including factual details and the legal theories upon which the agency relies; and (iii) the opportunity for parties to respond to the allegations. Commitments to institutional checks and balances, transparency to parties, and engagement on the merits are the foundation for these practices that aim to ensure fairness.

[2] United States Submission to OECD, Roundtable on Procedural Fairness: Transparency in Civil and Administrative Proceedings (Working Party No. 3 on Co-operation and Enforcement, Feb. 2010) at 2, https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/transparency_us.pdf.

The OECD and International Competition Network ("ICN"), among others, have dedicated substantial time and effort in multilateral initiatives geared to promote procedural fairness principles around the world. For example, earlier this year, the ICN issued its Guidance on Investigative Process ("Guidance").[3] The Guidance was the culmination of workshops and events held by the ICN's Agency Effectiveness Working Group, co-chaired by the FTC and DG-Competition. The working group compiled and reviewed practices of competition authorities, and the Guidance is based on a broad consensus of ICN members. The Guidance is the most far-reaching, agency-led statement to date discussing best practice recommendations for investigations of competition matters. So what's included in the Guidance?

Before addressing the procedural fairness fundamentals of transparency and engagement, the Guidance recognizes the importance of an effective investigative framework. It notes that competition agencies should have "sufficient resources and the appropriate investigative tools" to conduct their investigations.[4] Sufficient resources do not just mean competent agency staff (although that's critical), but also having the proper investigative tools to compel submission of relevant information from parties under investigation and third parties. It also recognizes that such tools should be used appropriately and efficiently, with appropriate checks such as internal agency review and external review by courts.[5] An agency's requests to parties and third parties should be tailored to address the subject matter of the investigation.[6] The evidence gathered by an agency should be subject to applicable legal privileges (such as attorney/client in the United States), confidentiality protections, and consideration of relevance and burden on the responding party.[7] This focus on efficient and effective use of an agency's investigative powers sets the table for procedural fairness practices.

In addition to proper use of investigation tools, procedural fairness requires agency transparency about legal standards and agency policies. The Guidance notes that the transparency "should include the substantive legal standards used for enforcement, any agency guidelines for analysis, the processes and investigative tools that agencies use to conduct their

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[3] ICN Guidance on Investigative Process (May 2015), http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.
[4] *Id*. at 2.
[5] *Id*.
[6] *Id*. at 2-3.
[7] *Id*.

investigations, the framework for judicial review, and the sanctions and remedies available for competition law violations and how they are determined."[8] If a competition authority decides to challenge or prohibit conduct, it should provide the public with an explanation of the agency's findings of fact and legal and economic analyses.[9]

Finally, the Guidance highlights two keystones of fair investigative practices: transparency and engagement during an investigation. Transparency includes proper investigative notice: agency staff should inform the alleged infringer as soon as practicable of the conduct under investigation and its working theories of competitive harm. Staff should share evidence to the extent appropriate, and work to confirm facts and expected timing. Agency staff also should reach out to third parties to solicit their views and obtain additional information to supplement the investigatory record. Sound engagement means providing parties and their lawyers with opportunities to respond to the allegations and working theories during an investigation, including both formal meetings and informal dialogue with staff and other decision makers. As the Guidance notes, engagement with the parties and third parties on the areas of competitive concern helps to promote "informed and robust enforcement."[10]

The Guidance also addresses the counterbalance to transparency: providing appropriate protections for confidentiality and legal privileges.[11] Confidentiality rules are key underpinnings of the ability of agencies to obtain the information needed for sound enforcement. The Guidance recognizes that such rules create a tension with the need for transparency, requiring careful navigation for agencies within their own legal frameworks. In the United States, for example, broadly speaking, confidential information is not shared with the parties during an investigation, but if the matter moves to litigation, comprehensive discovery rules ensure that the defendant gets all the relevant information. While this may differ in timing from European-style "access to file" practices, we again share a common goal that the party is informed of the evidence relied upon by an agency before a final decision is reached.

[8] *Id.* at 3.
[9] *Id.*
[10] *Id.* at 5.
[11] *Id.* at 6-7.

## III. What are the Takeaways from the FTC's Experience?

I'd like to spend a few minutes discussing FTC procedures and practices that seek to ensure procedural fairness. Importantly, the exercise doesn't stop once procedures are put in place. While rules that promote procedural fairness are needed, concepts like transparency and engagement cannot always be articulated to match the full degree of agency discretion. Rather, an agency's commitment to act in a fair, predicable, and transparent manner is needed to give life to the rules. For instance, agency decision makers can establish an expectation or mindset that staff should actively seek parties' views on key issues by asking staff every time they present a recommendation: "How do the parties respond?"

### A. Internal Checks and Balances

As I mentioned earlier, internal checks and balances are a key component of procedural fairness. At the FTC, antitrust investigations typically are staffed with members of the Bureaus of Competition and Economics, also known as BC and BE. The attorneys in BC evaluate the investigation from a legal perspective, and the economists in BE provide an independent view on the economic evidence. BC and BE staff have separate reporting structures up the chain. BC and BE management are actively involved at all key stages of an investigation, from oversight of information requests, key questions of investigative strategy, and ultimately, by questioning and testing staff recommendations. The Bureaus' managements have independent decision-making processes from one another, and from their staffs.

The Commissioners serve as independent decision makers as well. At key decision points, such as prior to submitting a recommendation to file an enforcement action or to close an investigation, the Bureaus' staff and management each submit separate memoranda to the Commission that includes the factual, legal, and theoretical bases for their recommendations. The memoranda also set forth the parties' arguments or defenses and staffs' counter-responses. If it is a recommendation to sue, staff routinely includes in the memoranda a discussion of any litigation risks. The FTC's Office of General Counsel may also supply its thoughts. These interactions among staff, parties, senior management, and Commissioners allow us to test and retest what we think we know given the evidence and our theories of harm, and ultimately are a key ingredient that shapes what we think we should do.

Moreover, while the Bureaus strive to achieve consensus, it is not unheard of for me to receive mixed recommendations from BC and BE – or to receive differing recommendations from staff and management. I carefully consider each recommendation and it is helpful for me to receive all of the perspectives.

While I have focused my remarks on procedural fairness in the investigative and decision-making stages, it is important to recognize the ultimate in checks on an agency: appellate review. Alongside internal checks, investigative transparency, and the opportunity to respond, review by an independent body (whether a specialized tribunal or general court) is a fundamental component of a system that aims to provide due process, and a common feature to competition regimes.

B. Transparency and Engagement with Subjects of Investigations

In addition to internal checks and balances, the Commission values open communication with the subjects of our investigations. Consistent with the ICN Guidance, this engagement allows for more informed discussions on both sides, and helps focus investigative efforts on the significant areas of dispute. Subjects of an investigation and their counsel have several opportunities to discuss their positions with staff lawyers and economists, and with senior management through frequent status calls, regular face-to-face meetings, and the opportunity to submit white papers on key issues. In meetings, staff and parties regularly discuss timing, staff's working theories, and the nature of the evidence obtained. These meetings also can include exchanges between agency and party economists on how they view the market and interpret any relevant data. FTC staff encourages parties to submit evidence or arguments during all stages of the investigation.

I also have an open door policy. If I am presented with a recommendation to sue on a particular matter, the targets or merging parties routinely meet with me to present their positions and to respond to staff's theories. I find it helpful to meet not only with the lawyers, but also with relevant company executives. When parties and their counsel meet with me, I try to ask pointed questions and be candid about where I think any competition concerns lie. In conjunction with these meetings, the parties often submit white papers and other materials to my office, which further helps me evaluate their arguments.

Importantly, discussions between agency officials and parties are a two-way street.[12] In our experience, to the extent that either FTC personnel or the parties "hide the ball" for strategic reasons, it becomes more difficult to engage meaningfully on the merits. Moreover, an unwillingness to communicate leaves the other side speculating about areas of competitive concern or potential counterarguments.

If a particular investigation proceeds to adjudication, there remain a number of opportunities for defendants to present evidence and make arguments. As most of you are well aware, the U.S. judicial system affords significant procedural rights, including, but not limited to, the right to: legal representation; present witnesses and documentary evidence; cross-examine the government's witnesses; present legal arguments as to why the case should be dismissed; test the legitimacy or sufficiency of evidence; and appeal adverse determinations.[13] Procedural rights granted to respondents appearing before the FTC's administrative court are similar to those in a federal court proceeding.[14] According to the FTC's Rule of Practice, at the administrative trial, respondents have, for example, the rights of due notice, cross-examination, presentation of evidence, and "all other rights essential to a fair hearing."[15]

C. Transparency of Overall Enforcement

In addition to engagement with parties over a specific investigation, the FTC seeks to promote transparency through a variety of formal and informal methods. For example, the 2010 *Horizontal Merger Guidelines* provides the public with a framework for how the federal antitrust enforcers will review mergers and acquisitions involving actual or potential competitors under the federal antitrust laws.[16] Other formal guidance issued by the FTC and Department of

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[12] *See* United States Submission to OECD, Procedural Fairness in Civil and Administrative Enforcement (Working Party No. 3 on Co-operation and Enforcement, June 2010) at 3, https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/usprofairness.pdf.
[13] Roundtable on Procedural Fairness, *supra* note 2 at 7.
[14] *See id.*
[15] *Id.* (citing 16 C.F.R. § 3.41(c)).
[16] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf.

Justice's Antitrust Division has focused on intellectual property, health care, and competitor collaborations.[17]

The Commission publicizes its competition advocacy efforts, including staff reports and comments, and amicus briefs filed in private litigation. The FTC also posts the speeches of individual Commissioners, including myself, and other agency officials on its website. Although these speeches are limited to one person's views, they likewise serve to provide increased transparency. The FTC's individual bureaus and offices also publicize substantive and procedural guidance. For example, roughly three years ago, the Bureau of Competition started an excellent blog called " Competition Matters."[18] The blog discusses a host of topics – from helpful HSR filing hints to practical takeaways from our enforcement actions for companies and their counsel.

Transparency extends to our investigative processes as well. For example, the Bureau of Competition recently finished a review of its merger investigation practices and published a "best practices" document.[19] The review identified practices that promote efficiency and balance the burden on the merging parties with the agency's need for the information.[20]

In addition to formal guidance, the Commission also issues statements, closing letters, advisory opinions, and analyses to aid public comment that explain our reasons for taking particular actions in certain investigations. These documents often include detailed discussion of analytical techniques and policy considerations involved in the case. In some circumstances, the Commissioners may split on a vote and wish to provide the public with additional information on the rationale for his or her vote. For example, in the past year, the Commission settled two monopolization cases with remedies that included disgorgement (Cephalon and Cardinal Health).

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[17] Roundtable on Procedural Fairness, *supra* note 2 at 3.
[18] *See generally* Fed. Trade Comm'n, Competition Matters Blog, https://www.ftc.gov/news-events/blogs/competition-matters.
[19] *See* Debbie Feinstein, Bureau of Competition, "A fine balance: toward efficient merger review" (Aug. 4, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/fine-balance-toward-efficient-merger-review.
[20] These best practices were themselves follow-on efforts from prior efforts to strengthen FTC procedures, building upon guidelines implemented in 2002, and additional reforms put in place in 2006 by then-Chairman Majoras, BC staff issued new "best practices for merger investigations" and revised Model Second Requests.

The Commission issued public majority and dissenting statements in conjunction with the resolution of each of those matters.[21]

## IV. Conclusion

In conclusion, I am encouraged by the increasing acceptance of the need for and basic principles of procedural fairness in competition investigations around the globe. But there remains work to be done. As our world and our enforcement efforts become ever more interconnected, the commitment to fair application of these principles becomes all the more critical. Thank you, and I look forward to your questions.

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[21] *See* Statement of the Fed. Trade Comm'n in the Matter of Cephalon, Inc., May 28, 2105, https://www.ftc.gov/system/files/documents/cases/150528cephalonstatement.pdf; Separate Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright in the Matter of Cephalon, Inc., May 28, 2015, https://www.ftc.gov/system/files/documents/cases/150528cephalonohlhausenwright.pdf; Statement of the Fed. Trade Comm'n in the Matter of Cardinal Health, Inc., Apr. 17, 2015, https://www.ftc.gov/system/files/documents/public_statements/637781/150420cardinalhealthcommstmt.pdf; Dissenting Statement of Commissioner Maureen K. Ohlhausen in the Matter of Cardinal Health Inc., Apr. 17, 2015, https://www.ftc.gov/system/files/documents/public_statements/637761/150420cardinalhealthohlhausen.pdf; Dissenting Statement of Commissioner Joshua D. Wright in the Matter of Cardinal Health, Inc., Apr. 17, 2015, https://www.ftc.gov/system/files/documents/public_statements/637771/150420cardinalhealthwright.pdf.