

Oxford Competition Law

1 Introduction

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(p. 1) 1 Introduction

Globally, antitrust or competition law is different than a generation ago. In 1995, there were but 35 jurisdictions with competition laws. By 2003, that number had increased to over 100.¹ Today, the International Competition Network (ICN) has 126 authorities from 111 jurisdictions as members.

Many provisions of the competition laws in a number of jurisdictions remain untested. Competition authorities have imported their procedural systems from other juridical contexts to an area of economic law. This transplant creates the potential for issues to emerge in the areas of both transparency and due process. These fundamental aspects of procedural fairness in competition law in comparative perspective motivate this book.

While the focus of scholarship in the area of antitrust/competition law has been on substantive legal issues, there has been very little work on what is a fundamental element in building effective competition policy—procedural fairness. This book attempts to fill the gap in scholarship regarding issues of procedural fairness, particularly in a competition context.

Many procedural fairness concerns are universal but play out differently across jurisdictions. Typically, due process is raised by parties to a merger or conduct investigation in a number of contexts, such as the lack of effective representation, the use of industrial policy by third parties that are masked by a lack of transparency, and procedural tools that do not allow for the most effective advocacy for parties. Each of these limits on procedural fairness distorts antitrust policy and creates opportunity for rent-seeking by competition authorities, other parts of government, or third party complainants. In addition to rent-seeking, the lack of effective procedural fairness impairs competition law and policy. A lack of procedural fairness complicated the ability of (p. 2) businesses to be able to plan effectively because of the greater risk involved in antitrust enforcement generally due to uneven enforcement and uncertainty therein.

There are a number of areas in antitrust enforcement in which procedural fairness may emerge. Before becoming the first CEO of Hong Kong's Competition Commission, Stanley Wong identified six distinct stages for enforcement action in which due process issues may emerge: "initiation, investigation, prosecution, decision on the merits, and decision on sanctions (if any)."² In each of these areas transparency and due process can create better outcomes. Better procedural fairness at each of these levels allows for better decision-making by agencies and improves risk management for firms.

Ultimately, when processes are fair and transparent, parties must focus on stronger substantive arguments. Substance is where the focus of what antitrust/competition law should be, with a particular focus on economic effects to answer the question of whether or not there is harm to consumers. When competition authorities are fair and transparent, they allow for meaningful engagement with the parties to answer this fundamental question of the economic effects of particular conduct or proposed conduct post-merger.

We believe that a book that focuses on these issues of procedural fairness and teases out common problems and distinct issues in particular jurisdictions allows for a rethink of creating a more effective system for procedural fairness in a given jurisdiction and best practices globally. This book explores these issues in each jurisdiction, along with highlights of particular cases in which due process issues have emerged. To better integrate the book, we held a conference to discuss early stage working papers at the University of Southern California Gould School of Law Center for Transnational Law and Business in January 2017.

Each country chapter for this book was organized to answer the same set of questions:

1. Does your system permit legal representation for the parties under investigation, including allowing the participation of both local and foreign counsel?
2. Does your system notify the parties of the legal and factual bases of an investigation and share the evidence on which the agency relies?
- (p. 3) 3. Does your system provide for meaningful engagement between the parties and the agency's investigative staff and decision-makers? and
4. From an institutional design perspective, does your system ensure internal checks and balances on decision-making within the agency by courts?

In framing the answer to these questions, each chapter author included examples from particular cases in their respective jurisdictions. We allowed the description and narrative across each jurisdiction to unfold based on the author's view of the most important issues in the jurisdiction rather than a template that read the same across each jurisdiction to improve readability.

The jurisdictions that we cover in the book are: the United States, European Commission, China, Taiwan, South Korea, Hong Kong, Japan, India, Brazil, Australia, and Canada. Additionally, we included a number of chapters from practitioners and a meta-chapter on international cooperation to provide for a broader framing of the issues.

References

Michael W. Nicholson, "An Antitrust Law Index for Empirical Analysis of International Competition Policy" (2008) 4 (4) *Journal of Competition Law & Economics* 1009-29.
Stanley Wong, "Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach" (ICN Blog, April 24, 2014) <<https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach>> accessed January 4, 2018.

Footnotes:

¹ Michael W. Nicholson, "An Antitrust Law Index for Empirical Analysis of International Competition Policy" (2008) 4 (4) *Journal of Competition Law & Economics* 1009-29.

² Stanley Wong, "Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach" (ICN Blog, April 24, 2014) <<https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach>> accessed January 4, 2018.