2 The Case for Global Best Practices in Antitrust
Due Process and Procedural Fairness

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The Case for Global Best Practices in Antitrust Due Process and Procedural Fairness

“I’ll be the judge, I’ll be the jury,” said cunning old Fury: “I’ll try the whole cause, and condemn you to death.”

Alice’s Adventures in Wonderland

1. Introduction

Procedural fairness and its two component parts, transparency and due process, are paramount to a well-functioning antitrust/competition law system. Due process and transparency help to shape not merely the process but the substance of antitrust investigations and cases. They are bedrocks of the functioning of the legal system and offer legitimacy to given competition authority. Strong procedural fairness safeguards forces parties to debate only the merits of decisions and not the procedural inputs of how decisions were derived due to failures in due process or a lack of transparency.

Procedural fairness concerns in antitrust have captured headlines for global mergers, cartel investigations, and abuse of dominance cases. Across jurisdictions, parties involved in antitrust matters have raised concerns regarding procedural fairness issues in antitrust.\(^1\) These concerns have grown over time as competition authority emphasis has been placed on global mergers and conduct investigations. Additionally, issues of procedural fairness have remained central in the policy community as practitioner and academic conferences raise the importance of such issues in the competition law context.

The lack of effective procedural fairness impairs effective competition law and policy. It also makes it more difficult for businesses to plan effectively because of the risk involved in antitrust enforcement that is based not on the particular conduct in question but on the uncertainty due to uneven enforcement. The deleterious effects are more far reaching than any individually badly decided case as lack of procedural fairness threatens the legitimacy of the entire competition policy system. This hurts consumer welfare.

This chapter explores the nature of procedural fairness issues in global antitrust. It explains the justifications for procedural fairness and the drivers for why such concerns have become significant in antitrust. Then, the chapter explores global antitrust institutions to understand if and how global best practices are possible for antitrust procedural fairness. The chapter concludes with advocacy of an approach that combines elements of hard law through free trade agreements and soft law through the OECD and ICN in ways that are complementary.

2. Procedural Fairness in its Global Context

The basis of procedural fairness and its components of transparency and due process have been recognized across legal systems as fundamental to the rule of law.\(^2\) For example, in the United States each of these components follows from a common law tradition of procedural fairness that are fundamental to the US legal system, enshrined in Amendment V to the US Constitution. Issues of procedural fairness also apply not merely in the US judicial setting but also to administrative agencies.\(^3\) Notably, due process and procedural fairness issues are not limited to the United States (or even other common law countries) but exist around the world, regardless of legal origin, in the area of administrative agencies.\(^4\) Further, Article 6 of the European Convention on Human Rights provides for due process. Other jurisdictions also make transparency and due process pillars of their legal systems.\(^5\) Efforts toward greater (p. 6) transparency and due process are a part not merely
of different countries but have been championed by international organizations such as the World Bank and Transparency International.

There are legitimate differences in procedural fairness across antitrust systems. However, legitimate differences based on different backgrounds do not mean that best practices are not possible. To be sure, there are tradeoffs between rights of defendants with confidentiality of third parties—but there are ways of handling this based on best practices. As a result of specific incidents and a recognition of systemic shortcomings, there has been an increased push globally to address the problems of procedural fairness. For example, the ICC issued a recommended framework for international best practices in competition law enforcement proceedings highlighting seven different themes for best practices. These include: (1) Transparency, (2) Engagement, (3) Confidentiality, (4) Fairness, (5) Non-discrimination, (6) Accountability, and (7) The role of the courts. Similarly, the American Bar Association created Best Practices for Antitrust Procedure, which include five specific categories of best practices and one category of best practices that are applicable to all phases of antitrust proceedings. It is this last category that could serve as best practices for procedural fairness across different systems:

A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.

B. All rules and practices governing proceedings—procedure, evidence, review, etc.—should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.

C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.

These attempts by practitioners to address issues of procedural fairness are sound as a matter of policy. For them to be adopted by competition authorities requires buy-in, which this chapter discusses later herein.

2.1 Procedural fairness issues around the world

Procedural fairness has been an important issue in global antitrust for some time. Procedural concerns have emerged at times in the United States and Europe.

The United States antitrust authorities have offered a definition of procedural fairness that has seven distinct components: (1) transparency on substantive standards and agency policies and procedures, (2) open and frequent dialogue with parties under investigation, (3) timeliness of information to the parties regarding allegations against them, (4) opportunities that the agencies provide the parties to respond to agency concerns, (5) opportunities that the agencies provide parties to be heard before the agency makes an adverse decision, (6) investigation length, and (7) publication of agency decisions (US OECD 2010).

While there tend to be fewer complaints with the US antitrust authorities on these sorts of procedural fairness measurements, the US agencies can improve their practices. Closing statements regarding cases, particularly important cases, tend to be very short and do not always clearly articulate the theories investigated in the case and the evidence gathered to explain why a case was closed without litigation. Similarly, Stolt Nielsen, where a court reversed the DOJ revocation of leniency, suggests more significant concern with regard to procedural fairness in the criminal antitrust setting. Moreover, concerns have been raised about potentially uneven standards for merger litigation between the Department of Justice
and FTC, which has received Congressional attention through the introduction of the SMARTER Act, which would ensure that the DOJ and FTC face the same legal standard for injunctive relief. In some cases, concerns have been raised about the scope of FTC power under Section 5 of the FTC Act, partially remedied by the FTC Statement on Section 5. Other US-based concerns emerge in the chapter in this book by Yoo.

The US antitrust agencies have been the ones that have pushed hardest for global best practices. There have been speeches from agency officials at both agencies. Bill Baer explained: "Process matters. In a global economy, competition and consumers are best served where corporations and individuals have confidence that they will be treated fairly wherever they do business." Other US antitrust leading policy-makers also have embraced procedural fairness in their speeches: Edith Ramirez; Terrell McSweeney; and Maureen Ohlhausen. This theme started at least in the Obama administration with a speech by DOJ Assistant Attorney General for Antitrust Christine Varney, although the origin may have been with regard to procedural fairness in the merger context in the 2000s.

Under the Trump administration, procedural fairness has remained an important concern. Deputy Assistant Attorney General for Antitrust Roger Alford has explained:

> The rule of law is essential for human flourishing and economic prosperity ... Almost every aspect of healthy economic behavior benefits from clear, transparent, and stable laws. Properly-administered laws provide the stability necessary for market behavior to reflect freedom of choice ... As competition enforcers, we enhance rather than limit freedom, by promoting an environment in which people can know the law, expect fair enforcement, and make genuine and informed choices about their conduct.

Some of the limitations of existing systems of procedural fairness are well known, even if competition authorities have not yet corrected the areas of concern. In Europe, DG Competition’s own survey of practitioners revealed, “the overall opinion was that DG Competition is not very transparent.” The stakeholder report also revealed a number of other perceived shortcomings by practitioners. Regarding confidentiality, the report noted:

> There was some criticism among business associations and companies about a perceived lack of transparency in how the information that they provided to DG Communication was used. Some companies mention they were required to provide large amounts of information without fully understanding what it would be used for and DG Competition provided little, if any, feedback on how the information was analysed and used in the final decisions. This also meant that the communication process was not interactive. In addition, after a decision had been reached, participants did not have access to all of the information that led to the decision.

These concerns impact transparency and the lack of sufficient feedback to parties, which are very important to a well-functioning procedural system. However, these were not the only practitioner concerns with DG Competition. Rather, some concerns existed with regard to procedural rules and issues of being informed in a timely manner. Though these concerns seemed to be less systemic than the lack of transparency, the practitioner survey suggested room for improvement, even within DG Competition’s own system (if not by global best practices). We use the example of DG Competition merely to illustrate the types of concerns that emerge across jurisdictions. It is not the only problematic competition authority when it comes to issues of procedural fairness, nor is it the worst offender. The chapter by Martyniszyn in this volume identifies both the structure and some individual cases of concern under European case law and policy in greater detail. Generally, we note that Forrester offers a critique of the current incentives of DG Competition, particularly with
regard to fining. Because the EC’s budget benefits from high fines, there is incentive to push for high fines even when such fines seem disproportionate.

At present, DG Competition has significant discretion that has not been challenged by the courts, at least not in the area of dominance. It may be that an attack on process also is viewed as an attack on substance, whereas the opposite should be the case. Strong process puts the focus rightly on substance and to determine if the cases that DG Competition has brought were correct. In Europe, the courts have been able to push back against DG Competition when there was not sufficient economic analysis in the decision-making in merger cases. There has not been the same sort of significant judicial review with a reversal of DG Competition in conduct cases where DG Competition may have not used sufficient economic analysis or simply gotten the economic analysis of the underlying claim wrong. The lack of limiting principles for DG Competition conduct cases perhaps explains why DG Competition is so sensitive on procedural fairness. Anything that threatens a win streak before the courts, including for procedural issues, may lead to reversals on substance as well.

In some ways, the focus around the world has been not on North America and Europe but most noticeably regarding Asia. The response against procedural fairness misdeeds by Chinese authorities has been the focus of a number of reports. There have been documents promulgated by the US Chamber of Commerce, US-China Business Council, and the European Union Chamber of Commerce in China. These different documents suggested a difficult situation regarding due process. This included a number of different types of concerns such as the lack of transparency, lack of effective representation, and the use of industrial policy by third parties that is masked by lack of transparency and ability to address concerns effectively.

While issues in China may be more pronounced, they are not substantially different in other jurisdictions in terms of the type of problem, although typically not as severe (at least with regard to the threat of incarceration) elsewhere in Asia, in Europe, and the United States. Other chapters in this book cover individual jurisdictions and these issues therein in local context.

Procedural fairness has taken on particular salience globally because of the rise of increasingly high stakes cases involving cartels, mergers, and unilateral conduct around the world in which large companies who are repeat players in the antitrust system want some amount of consistency in application of legal rules and processes for purposes of business planning and risk assessment. Because these are repeat players, problems with procedural fairness may have important repercussions, especially with regard to the ultimate disposition of matters—such as a blocked merger or a case that involves a significant financial penalty or other remedy. Exacerbating the potential procedural fairness issues are the potentially global reaching effects of remedies, which in turn may create problems of comity.

2.2 Benefits of procedural fairness

Oftentimes, the framing of procedural fairness issues focuses on the problems of a bad system rather than the benefits of a good system. There are significant benefits for antitrust agencies and indeed the antitrust system of a given country to have strong procedural fairness safeguards regarding due process and transparency. This section of the chapter advances the various benefits of strong procedural fairness safeguards.

Procedural fairness removes information asymmetries. That is, more transparency and due process helps an agency and the parties to improve enforcement as it allows all actors...
in the legal system to become better informed as to the appropriate level of risk regarding antitrust liability.

The reduction of information asymmetries allows for a better communication between the antitrust authority and the parties. More information through better due process allows for more and perhaps better gathering of information via evidence. This allows the competition authority to better understand if/when to move ahead with certain cases. It is particularly important at certain significant points in a proceeding to get meaningful feedback from parties, such as early on in the investigation before actual charges are filed.

Related to information asymmetries, better procedural fairness creates better processes for administrability of investigations and cases. This reduces various bumps in the case pipeline and allows for consistent application of procedures and law. In turn, the reduction of various procedural costs (p. 12) allows for a better sense of predicting the timing of a case and its key stages. Improved case management for both the antitrust authority and the parties therefore allows for a better allocation of resources and time spent.

As a result of improved due process, decisions are less likely to be appealed by the parties. Often in competition law, particularly in more recent competition law regimes, parties appeal based on problems of procedural fairness, although such appeals are not limited to younger regimes as these issues have come up both in the United States and under EC law. Better process means fewer appeals because better process means that appeals by the parties must focus on the substantive issues as there will be fewer procedural irregularities. A secondary benefit of improved process leading to fewer appeals is that it creates a more efficient resource allocation for the competition authority as the agency will need to devote fewer resources in defending the decisions on appeal as there will be fewer appeals. This resource allocation allows for a shifting of resources to advocacy and other prosecutions.

Another area that benefits from improved procedural fairness is the legitimacy of the competition system both to actors within the system and those outside of it. Transparency and due process lead to greater legitimacy. When good process is followed and when the process is open and transparent, it is more difficult to criticize decisions undertaken for anything other than on the merits. If we assume that the competition authority was correct to undertake enforcement action in the first instance, strong procedural fairness safeguards should ensure that the final outcome can withstand scrutiny by the parties and others. In contrast, when procedural safeguards are weak and the decision-making process and stages of a case non-transparent, any outcome makes it easier to second guess the outcome where some factor other than the merits may be at play because of the inability to properly monitor the antitrust authority and courts.

Legitimacy issues also emerge with regard to third parties. When parties or third parties do not believe that their information will be sufficiently protected, parties or third parties will be less likely to bring information of potential anti-competitive conduct to the antitrust authority because of the perception that the authority acts in ways that are illegitimate.

In a world where increased investigations create headlines, particularly around global companies, the legitimacy of a given competition system becomes more imperilled. This is because of increased political pressure from powerful domestic firms, politicians (both executive and legislative) due to traditional capture, and sometimes merely because of increased scrutiny that may be benign but for which a reversal on procedural fairness hurts future funding, prestige (for staff and agency head), and impacts the ability to bring politically challenging (but correct) cases. How competition authorities deal (p. 13) with headline-creating investigations and cases shapes the external perception of such agencies. In situations in which there is insufficient transparency, the lack of transparency destroys legitimacy of both the process and outcomes of antitrust proceedings. In a time of increasing suspicion of markets and of competition law as a tool to remedy anti-competitive behavior, procedural fairness concerns threaten to subvert the mission of antitrust to
protect consumers and not special interests such as competitors who might use antitrust as a form of rent extraction.

One additional rationale for improved transparency is that it insulates antitrust agencies from overt political interference on the part of the executive branch (such as a powerful government ministry) or members of the legislation. Transparency allows for the work product and process of the competition authority to speak for itself and to protect the agency from political interference in its agency decision-making. Lack of transparency increases the possibility of rent seeking because such demands can more easily be hidden from scrutiny.\textsuperscript{30}

\subsection{2.3 Why procedural fairness has become a major issue}

There has been an increase in problems relating to transparency and due process in antitrust around the world. A number of reasons account for this increase in such problems. Some have to do with institutional structures in certain legal systems.

Procedural fairness issues have not yet been worked out in the law—some antitrust regimes are relatively new. Neither law nor practice in these jurisdictions has tested out the extent of procedural safeguards. The lack of sufficient experience in implementing best practices for procedural fairness issues makes the likelihood of abuses of due process more likely. Gidley and Hyman explain that direct transplants of the antitrust legal systems on the United States or the EC do not ensure that the transplant also will protect procedural rights.\textsuperscript{31} There is a long literature in the law and development literature that suggests limits to legal transplants.\textsuperscript{32} This literature suggests that legal origin is less important than implementation in the local system.\textsuperscript{33} This literature has (p. 14) been extended to the area of antitrust,\textsuperscript{34} with similar results that transplants take hold only when local conditions allow for it. In practice, when certain legal systems generally lack procedural safeguards, this often is extended to antitrust systems.

Some problems of procedural fairness emerge from issues of institutional design. In some systems the separation between the investigation unit and enforcement unit is not well defined. A better practice would be to separate these functions, as separation allows for an additional level of oversight of the investigation unit within a competition authority to ensure that the case and the procedures used are independently verified as valid and that it is worthwhile to pursue the case to the next level. Such an analysis should include whether or not it is worthwhile to bring the case, drop it, or simply attempt settlement.

The increased focus on procedural fairness more generally in the international community has highlighted the potential for stories to emerge about due process concerns. Increasingly the business press has been tuned in to this issue, as have non-antitrust parts of government such as trade ministries. Stakeholders seem increasingly concerned about due process issues and a number of antitrust agencies have responded positively by making changes in their practices to guarantee greater transparency and due process.

With public media increasingly important, high-profile cases may be subject to greater political pressure. Procedural fairness provides safeguards against political results. As part of their job, competition authorities must investigate high-profile firms. Though it is legitimate to investigate such firms for potential anti-competitive conduct, a system that lacks procedural safeguards and effective transparency creates situations in which political pressures to act against high-profile companies (in either merger or conduct cases) may be more pronounced even when the evidence suggests that there is no consumer harm. Effective procedural safeguards are a mechanism to ensure that politics stays outside of antitrust. Otherwise, antitrust agencies and their leaders may be tempted to increase the
size of the agency or its power. Individuals at agencies may want to bring high stakes cases to further their own careers.

(p. 15) There have been a series of cases involving abuse of dominance cases where procedural fairness concerns have been raised. Oftentimes, these cases involve firms in high technology industries—particularly the ITC and online sectors but also in pharmaceuticals. Sometimes these cases are justified but sometimes they may mask industrial policy. As President Obama has said, “We have owned the Internet. Our companies have created it, expanded it, perfected it, in ways [that inefficient competitors] can’t compete [with]. And oftentimes what is portrayed as high-minded positions on issues sometimes is designed to carve out their commercial interests.” The high stakes and high-profile cases invite particular international scrutiny and where there are procedural fairness concerns, these concerns create tensions that can escalate into broader trade battles between countries.

In such cases involving high-profile firms, the importance of due process concerns should receive heightened scrutiny, particularly because the conduct in question involves complex business behavior where the economic analysis will be more sophisticated than the typical case and where existing case law may not be directly on point due to the novelty of the theory of harm in the particular markets. In high stakes abuse of dominance cases involving foreign firms, effective due process protections ensure that investigative and adjudicative teams are able to receive information from the investigated parties and third parties that allow for a better synthesis of information and that protects the rights of all parties.

High stakes cases create opportunities for third parties to abuse limited due process regimes to use competition law as a way to punish competitors. That is, antitrust systems that lack sufficient with procedural fairness protections make strong targets for third parties who use weak levels of transparency and due process to strategically punish their (more efficient) competitors. Sometimes these companies act directly. In other circumstances, they may front domestic firms to raise concerns as third parties. These actions act as a way to raise the costs of their efficient competitors, often who are large-US based multinationals and often companies in the tech sector.

(p. 16) 3. Global Best Practices

Global best practices present interesting institutional choices for antitrust. The basic distinction in international law is between hard law and soft law institutions. This part identifies the institutional choices generally and their applicability to competition law.

3.1 Hard law

Hard law in international law involves countries creating a binding agreement (which is what makes it “hard”). In antitrust, hard law takes the form of trade agreements. Trade agreements entail precise obligations to bind countries to these commitments. These hard law commitments serve to make domestic policies more credible. The idea of reciprocity across countries for their acceptance of international agreements helps with coordination. Reputation of the ability to abide by commitments matters for countries and sub-state actors, as market actors such as businesses need to perceive a state as trustworthy in order to make investments. Thus, it is possible to build compliance through reputation and shaming.

Within global trade agreements, there is no standalone competition policy agreement in the WTO although some WTO cases have addressed competition policy. International law institutions, largely in the form of WTO commitments specific to antitrust, have been lacking ever since the decision to drop competition policy from what was the Doha round of trade negotiations. The reason why this choice was not followed has much to do with the binding nature of hard law and the concerns that countries had about global adjudicators
with little economic background to hear cases involving substantive antitrust concerns as well as a lack of consensus at the time of what the substantive goals of antitrust were or the proper economic theories applied to legal cases should be (Fox 2001).

There is no standalone antitrust agreement at the WTO level akin to the TRIPS agreement for intellectual property. The inclusion of a competition policy chapter bilaterally or regionally through free trade agreements (FTAs) often creates a set of commitments beyond commitments found at the WTO level. The impact of such chapters is difficult to measure, although some early work suggests that such provisions have provided benefits.

Procedural fairness issues can be dealt with in that capacity by signaling the importance of the issue and getting better commitments of enforcement on transparency and due process from agreement signatories as a result.

3.2 Soft law

In contrast with hard law, soft law is a term first coined by international relations scholars to explain commitments that lack the formal binding power of hard law institutions that require treaties. Thus, by definition, soft law is lower stakes because of the lack of binding formal agreement made at the country level. Soft law institutions are soft in part because they are not hard—they lack the coercion that formal enforcement mechanisms ensure of international law.

Soft law and its inter-relation between international relations and international law was famously conceptualized by Abbott and Sindal. Soft law is particularly pervasive in international networks.

Because of the failure at the WTO for a hard law institutional choice to address procedural fairness issues, competition law procedural fairness issues focused instead on soft law institutional alternatives. The migration to soft law for antitrust pushed governance to the level of antitrust agencies and the various non-state actors with interests in the topic.

Soft law is an institutional arrangement which focuses on sub-state level governance (sometimes with the involvement of non-state actors) in networks. The benefit of soft law is that it can increase cooperation and coordination across sub-state units. Certainly this has been the case in antitrust with (p. 18) the ICN and OECD, but also in other areas of regulation such as financial institutions.

The dynamic of soft law is that it involves the creation of norms and understandings among sub-state units that may have somewhat divergent interests (and hence unable to have more formal and binding hard law) across actors that have various levels of power to better achieve compliance with the soft law created by the international organizations. There are two forms of soft law in antitrust—transgovernmentalism and transnationalism. Transgovernmentalism was first identified in the 1970s by political scientists Robert Keohane and Joseph Nye as “sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.” In contrast, transnationalism includes the participation of non-state actors in the network.

3.2.1 OECD

The antitrust transgovernmental soft law institution is the OECD Competition Committee. A number of times a year, the Competition Committee members and observers meet to discuss various procedural and substantive issues in antitrust. Each member and observer jurisdiction send delegates to the meeting. The discussion and work products of the Competition Committee create what the international relations literature calls an
"epistemic community." This epistemic community creates opportunities for norm creation and diffusion through information sharing and cooperation across its members.

Based on the sharing of ideas and cooperation in creating various best practices, the OECD has been able to help shape global antitrust norms. It most famously did so for cartel enforcement and merger procedures, as discussed later in the chapter, and has the capacity to do so for issues of procedural fairness.

The OECD also uses country peer reviews of a given antitrust system to diffuse norms. A peer review is an expert analysis of the strengths and weaknesses of a given country’s antitrust system that the OECD undertakes on a regular basis. An outside consultant is brought in to meet with government officials and other stakeholders to better understand the competition system of a country and then to write up an initial report. The report is presented at a regularly scheduled OECD Competition Commission meeting in which the competition authority provides input, as do other OECD members, and is then further revised.

The peer reviews cover institutional, procedural, and substantive issues (Sokol 2009). A peer review provides an outside assessment but also provides a mechanism for antitrust agencies to get their domestic governments to make changes to laws or policies that allow the agencies to function better.

The OECD also releases reports based on its meetings. The OECD Competition Committee released a report on Procedural Fairness and Transparency, based on a series of three roundtables in 2010–11 (OECD 2013). The OECD background paper on procedural fairness concluded: “Fairness and transparency are essential for the success of antitrust enforcement, and regardless of the substantive outcome of a government investigation it is fundamental that the parties involved know that the process used to reach a competition decision was just.”

The OECD followed up in 2016 with a roundtable on the protection of human rights.

3.2.2 ICN

The second major antitrust soft law institution, one that embraces transnationalism, is the International Competition Network (ICN). The ICN is run directly by its member competition authorities and has a much broader membership of antitrust authorities than does the OECD. It also has more active participation from antitrust stakeholders, such as practitioners from law firms and economic consulting firms, consumer groups, and academics. Unlike the OECD, there is no permanent headquarters to the ICN. Rather, the ICN operates as a virtual network with a rotating chair. While there are live meetings every year, much of the day-to-day ICN work is via email and conference calls by the antitrust authorities and their various stakeholders. Because the work product that emerges is from the various stakeholders, there is typically more buy-in for the work product from the entire antitrust system—government officials, academics, and practitioners.

The competition authorities dominate the debate within the ICN—they set the agenda and the non-state actors help to build the substantive work products in terms of reports and best practices. However, the non-state actors have little voice in setting the agenda as to which topics will be the focus of (p. 20) ICN work products and ultimately have little say on the final language of such work products, even if they are actively involved in drafting.

The ICN has been active in the area of procedural fairness. The ICN (2013) released a report on Competition Agency Transparency Practices and on Procedural Fairness. It also issued a Guidance on Investigative Process in 2015. The ICN Guidance expressed areas of convergence as well as divergence. The Guidance explained:
There is a broad consensus among ICN members regarding the importance of transparency, engagement and protection of confidential information during competition investigations. Competition agencies operate within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented. Consequently, there can be different approaches to achieving fairness during investigations.50

This paragraph encapsulates the tension within the ICN. The Guidance recognized that procedural fairness was important as well as its limits but did not articulate “best practices” as it had with regard to other areas of process.

A problem with competition authorities and the creation of best practices is that while every agency believes in the importance of procedural fairness, every agency also believes that it does not have problems with procedural fairness. This results in an agency-level illusory superiority effect,51 also known as the Lake Wobegon effect. The illusory superiority effect holds that a cognitive bias leads to overestimations of one’s own abilities. While the recognition that different legal systems afford different approaches for procedural fairness is certainly true, it is also the case that a benchmarking exercise that ranks a given procedural fairness system would show that some competition authorities have weaker systems than others. There needs to be political will to overcome the Lake Wobegon effect by competition authorities. While it was possible to overcome this with regard to merger processes and cartels, the same political will does not seem to exist with regard to procedural fairness.

Rather than embrace a set of best practices for procedural fairness, the ICN chose merely to provide a general Guidance. Behind the scenes, the procedural fairness project faced opposition from one of its two co-chairs, DG Competition. The initial draft that DG Competition prepared was far (p. 21) less favorable than the ultimate draft agreed upon for the Guidance paper in terms of procedural fairness concerns. Had there not been pushback from both the other co-chair (United States Federal Trade Commission) and the business community, the Guidance would have said that procedural fairness protections are not capable of best practices. The reason for DG Competition’s pushback suggests one or more possibilities. DG Competition might believe that there are no best practices for procedural fairness. If that was generally true, then the ICN would not have been able to get better protections, which it was in a number of other areas such as merger procedures. However, by that logic, based on “different legal and institutional frameworks” one might argue the same for all other types of both procedural and substantive antitrust best practices, such as those agreed upon for mergers and cartels.

An alternative theory is that DG Competition pushed hard against a more substantive set of procedural fairness principles because it understood that its procedural safeguards lagged in comparison to other jurisdictions. By creating a high bar for procedural safeguards that it might not be able to meet, it threatened the legitimacy of its own investigations.

The ICN has further to go to make progress. In terms of substance, the ICN Guidance specifically articulated that, “[t]ransparency to the public about an agency’s process and procedures can help to reinforce the values of accountability, predictability and fairness in the application of competition enforcement.” However, this Guidance was limited only to the investigation stage. Ideally, the ICN should push for similar shared practices at later stages of a case.

The ICN also established an Investigative Process Project as part of a broader set of procedural fairness-related issues in its Agency Effectiveness Working Group.52 These efforts have not moved the global competition community toward best practices far or fast.
enough. Yet, such best practices are critically important to a well-functioning competition policy.

### 3.3 The current and future use of soft law in global antitrust

Both OECD and ICN help to shape global antitrust. At present, the two seem to be complementary rather than substitutes. Together, these soft law institutions improve global antitrust. From a comparative institutional standpoint, soft law in this area seems to provide for more flexibility than hard law to anticipate changes and to get consensus from antitrust agencies. This flexibility allows for global norms (best practices) to emerge from both top-down and bottom-up approaches. The limit to soft law in antitrust is the potential for hold-up by one or more of the important forces in the OECD and ICN. Currently, the laggard in procedural fairness among the antitrust major powers is DG Competition, although some jurisdictions in Asia seem to present problems as well.

Going forward, soft law’s ability to create credible compliance with its agreed practices is a function of global power relationships and asymmetries. Within the world of antitrust, power is bipolar, with the United States and the European Commission exercising significant control over the shape of international antitrust soft law. While the future of antitrust may become increasingly multipolar (particularly with regard to China), at present the Chinese antitrust agencies are not involved in the ICN.

Given the present bipolar power within international antitrust, if there is not strong support to pursue best practices and considerable resources on procedural fairness by both of the antitrust powers, the issue of procedural fairness becomes more difficult to address globally. Procedural fairness seems unlike process-related work in mergers and cartels because of the lack of buy-in as to what procedural fairness would entail by DG Competition and potentially others.

One can contrast procedural fairness issues with those areas where there has been significant progress in the areas of antitrust mergers and cartels by the OECD and ICN. At the time of OECD and ICN work that created best practices in mergers and cartels, there was no significant disagreement as to the major antitrust authorities as to the consumer welfare reducing effects of ineffective merger systems or of global cartel activity.

Antitrust agencies are concerned how their sister agencies perceive them. This explains why there has been some compliance with regard to antitrust regulatory networks. The ability of soft law to get agencies to comply is perhaps the most important output to measure for a soft law institution. For the most part, the ICN and OECD have changed behavior for their members. The lack of further movement at the ICN is a function of a roadblock by members who do not want to push convergence further with regard to due process issues.

The view that procedural fairness issues should not create too high a bar for purposes of measuring performance may suggest that agencies may be acting in what they incorrectly see as their short-term interest (because certain current investigations in which the agencies have expended significant time and resources may be compromised). In fact, a set of strong transparency and due process protections lead to better long-term outcomes for the agencies.

Such higher standards seem to be an increasingly important part of the international competition system. The Antitrust Effectiveness Study, which surveyed antitrust agencies from around the world, found that agencies are active in stakeholder outreach. Such outreach creates legitimacy for the goals of the competition authority and its enforcement priorities. Similarly, the US Chamber of Commerce offered a recommendation to the new
US Administration that the OECD and ICN focus on improving transparency and due process protections.\textsuperscript{56}

One possible approach would be to make soft law agreements harder by also including the same sort of best practices in bilateral free trade agreements that have competition policy chapters. It is possible to do so by keeping the reach of a competition policy chapter very limited as to what is subject to dispute settlement. This prevents the concern that competition policy chapters in trade agreements will be used for industrial policy purposes not based on the promotion of consumer welfare.

There may be benefits to creating stronger commitments for procedural fairness through competition chapters in free trade agreements for any new agreements that countries enter. The benefit is two-fold. The first is that it would create a hard law binding commitment on the part of antitrust authorities to guarantee procedural fairness for parties involved in antitrust disputes. This hard law commitment might require some countries to amend their legal systems to increase procedural fairness protections directly. The second benefit is more indirect. As countries create higher binding standards, it may increase the commitment of antitrust agencies of those countries with higher standards to push for a similar high-level standard in the soft law antitrust networks. To be clear, hard law through free trade agreements does not mean binding competition policy chapters on substantive antitrust law, where agreement as to both law and economics of antitrust may not be the same across jurisdictions,\textsuperscript{57} but rather binding mechanisms as to the importance of respecting procedural fairness issues, where common understanding and best practices may be easier to reach across parties.

(p. 24) An institutional choice to augment soft law with hard law may be explained through an analogy to formal contracting. There is a rich literature on contracting that provides details.\textsuperscript{58} In short, formal contracts create a set of rights and obligations between the various contracting parties. Contracts serve as governance mechanisms and may reduce economic friction. A trade agreement with binding adjudication when there is breach may be a form of formal contracting used to reduce opportunism and hold-up through the creation of a credible commitment mechanism for each party to the contract.

Breaching a contract may have costs. In the trade context, a party that breaches a commitment to transparency and due process may be found to be non-compliant. An adverse ruling requires, in the typical circumstance, a country to change its procedural fairness regime to make it compliant with its commitment. Yet, the cost of violation may lead to a broader set of penalties, such as shaming of a country and its legal regime (and in particular due process for its competition system). This shaming also extends to soft law organizations and to international practitioners in which agency officials will be asked about a suit involving procedural fairness. Further, lack of compliance has a broader impact at the country level. Reputational sanctions may occur for countries than are non-compliant for their procedural fairness obligations. A lack of compliance in one part of a free trade agreement may make other potential FTA partners less likely to enter into future agreements with a non-compliant country or to demand stronger concessions in the free trade agreement negotiations with regard to substantive provisions or stronger dispute resolution mechanisms because of a history of non-compliance.

All of this discussion regarding compliance with binding provisions and agreements assumes compliance on some level. Countries and their sub-state governmental organs are more likely to comply where there is both the intent and capacity to comply.\textsuperscript{59} Thus, competition policy chapters are only as strong as the commitment of the countries that make such commitments. This commitment may change over time and the inter-relationship
between hard and soft law may serve to improve the commitment to comply because the commitment might come from both top down and bottom up mechanisms of compliance.

The mere threat of a suit for violation also may force a country (or its competition authority) to make changes in the shadow of the law. Scholars (p. 25) recognize that reputational effects and social shaming may create credible commitments without the formal contracting of hard law. Soft law, with its relational-based networks may create commitment without the need for hard law. Thus, in these settings, relational contracting may have a lower cost than formal adjudication. For relational contracting to hold with regard to antitrust due process, there must be trust across antitrust agencies and a set of repeat players to facilitate relational contracting. All of this discussion regarding compliance with binding provisions and agreements assumes compliance on some level.

These additional mechanisms will create binding commitments for countries, which in turn will create more active voices at the competition authority level of stronger protections in soft law regulatory networks.

4. Conclusion

Procedural fairness remains a work in progress at the global level. A combination of hard law through free trade agreements and soft law through the OECD and ICN can help bind competition authorities to higher standards of procedural fairness. For such an approach to be successful and lead to greater compliance with global norms of transparency and due process, there needs to be global leadership by the major powers in competition law—the United States and DG Competition. While the United States has championed a robust discussion and efforts to promote increased procedural fairness, DG Competition has not embraced procedural fairness with the same level of rigor in both public statements and actions both internally and in international organizations. Until DG Competition is willing to undertake an honest self-assessment of its shortcomings, the growth of better practices for procedural fairness face a roadblock by a critical competition law enforcer.

References


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**Footnotes:**


9 Ibid., 10.


21 Roger Alford, “Deputy Assistant Attorney General Roger Alford Delivers Remarks at China Competition Policy Forum” (Shanghai, China, August 30, 2017) <https://
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50 Ibid., 7.


