

Procedural Fairness and Transparency – Key Themes and Issues in Practice

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EU-India Competition Week

Competition Commission of India - December 10, 2019



Introduction

- What's discussed here, stays here
- No agency/jurisdiction has all the answers
- But there are many key concepts commonly accepted
- Where you stand often depends upon where you sit
 - Defendants, complainants, third-parties, agencies
 - Looking for sound and fair procedures no matter the position
- Fair procedures supported by stakeholders:
 - Promote confidence in the agency and its mission
 - Drive better substantive results/resource utilisation
- It's a daily job – issue by issue, case by case – it all adds up
- It's evolutionary and iterative – agencies and parties learn from each other

Top 10 Themes

- 1. Agency Resources**
- 2. Transparency**
- 3. Engagement**
- 4. Confidentiality**
- 5. Privacy/Proportionality**
- 6. Counsel/Privilege**
- 7. Self-incrimination**
- 8. Separation of Powers**
- 9. Appeals**
- 10. Minimize Delay**

Key Peer/Int'l Sources

- *EU Best Practices on Conduct of Merger Control Proceedings (2004)*
- *EU Commission Notice on Best Practices – antitrust (2011)*
- *EU Commission Guidance on voluntary "confidentiality rings" for access to file purposes (2018)*
- *EU Guidance on confidentiality claims during Commission antitrust procedures (2018)*
- *EU Commission Antitrust Manual of Procedures (2019)*
- *UK – CMA Transparency and disclosure: Statement of the CMA's policy and approach (2014)*
- *UK – CMA Guidance on the CMA's investigation procedures in Competition Act 1998 cases (2019)*
- *ICN Guidance on Investigative Process (2015)*
- *ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement (2018)*
- *ICN International Framework on Competition Agency Procedures (2019)*
- *OECD Procedural Fairness and Transparency: Key Points (2012)*
- *OECD Scoping note on Transparency and Procedural Fairness as a long-term theme for 2019-2020 (2018)*

*** See "Select Resources" document for further sources**

Agency Resources

- Sufficient and well-trained staff is job #1
 - Diverse background/skills/experiences
- Affects everything day-to-day
- Necessary to execute well on procedure and substance
- Staff need confidence, experience and flexibility to achieve sound and pragmatic procedural results
- Can increase efficiency and effectiveness of agency
 - Prioritisation – what to pursue, what to let go

Transparency

- Many routes available to agencies today, e.g.,:
 - Regulations/Notices/Guidelines/Practices/Policies
 - Consulting at draft stage with stakeholders
 - Enhances “buy-in” and improves output
- Continuing throughout a case:
 - Follow stated procedures/policies
 - Timely notices and status updates
 - Timely disclosures of evidence/theories of harm
 - Procedural key - “Access to file”
 - Hearings – many models, key is provide meaningful opportunity for response/rebuttal
 - Written decisions with rationale
- Consistency and openness at each stage

Transparency (2)

- EU issue: need for more procedural insight/guidance
 - Reform: publishing Merger Best Practices, Manual of Procedures and Notice on Best Practices (Antitrust)
 - Significant stakeholder dialogue/consult on Best Practices
- EU issue: stated leniency procedure fell behind agency practice
 - Reform: updated the Leniency Notice
 - Significant consult with stakeholders and import from US practice
- EU issue: need for guidance and consistency in access to file and data room procedures
 - Reform: publishing of guidance/practice
 - Evolving debates over procedure - over years

Engagement

- Dialogue and informal contact/staff availability
 - Efficiencies/trust can be gained via informal contact/staff access
- Meaningful opportunities to discuss/debate at key stages of investigation
 - Procedural key - “State of play” meetings
 - Especially key in time-constrained merger investigations/merger process for parties
- Small things can mean a lot – access/openness to discuss
- Facilitates better agency/private sector/bar relationships
 - Seek out cooperation opportunities
 - The compliance program “bridge”
- EU issue: need for more transparency on where agency is in process for parties and complainants
 - Reform: instituted “State of Play” meetings in mergers and antitrust cases

Confidentiality

- Careful balance with transparency to protect rights of defendants, complainants, third-parties and agency mission
- Case type can affect balancing (mergers vs cartels)
- Many tools available to promote transparency while protecting confidentiality
 - Procedural keys:
 - Redactions; non-confidential versions/summaries; confidentiality rings/data rooms; counsel/experts only; Protective orders
 - Guidance on confidential information handling/categories
- EU issue: redactions policy unclear/inconsistent
 - Reform: publishing guidance (redactions; rings)
 - Engaging with parties on content/timing issues

Privacy/Proportionality

- Information gathering issue:
 - Sufficient evidential basis for search/request
 - Authorisation process – scope/terms
 - Dawn raids/requests for information (RFIs)
 - Privacy - scope precision and proportionality
 - No “fishing expeditions”
 - Allow legal counsel representation
 - EU issues: overbroad authorisations/searches/RFIs, unreasonable response timings
 - Court challenges needed by parties to address
 - Fixes: vetting of information used for authorisation scope; discussions with counsel on searches/RFI scope (UK practice)
 - With great power comes great responsibility (AG in Deutsche Bahn)

Counsel/Privilege

- Access to legal counsel and representation at all stages
 - Key to confidence building and investigation integrity
- Respect legally privileged materials
 - Don't target them at raids/requests for information
 - Procedural key: provide identification/disputes fixes
 - Privilege logs
 - EU "sealed envelope" procedure
- Allow legal counsel at interviews, dawn raids
- EU issue: privilege disputes
 - Reform: on-site discussions with counsel; sealed envelope
 - Not targeting in-house legal team offices/files

Self-incrimination

- Ensure safeguards to protect against self-incrimination questions/procedures
- In particular when criminal/near-criminal sanctions involved
- Allow legal counsel representation to serve the party at risk
- EU tends not to seek interviews (contra: US experience)

Separation of Powers

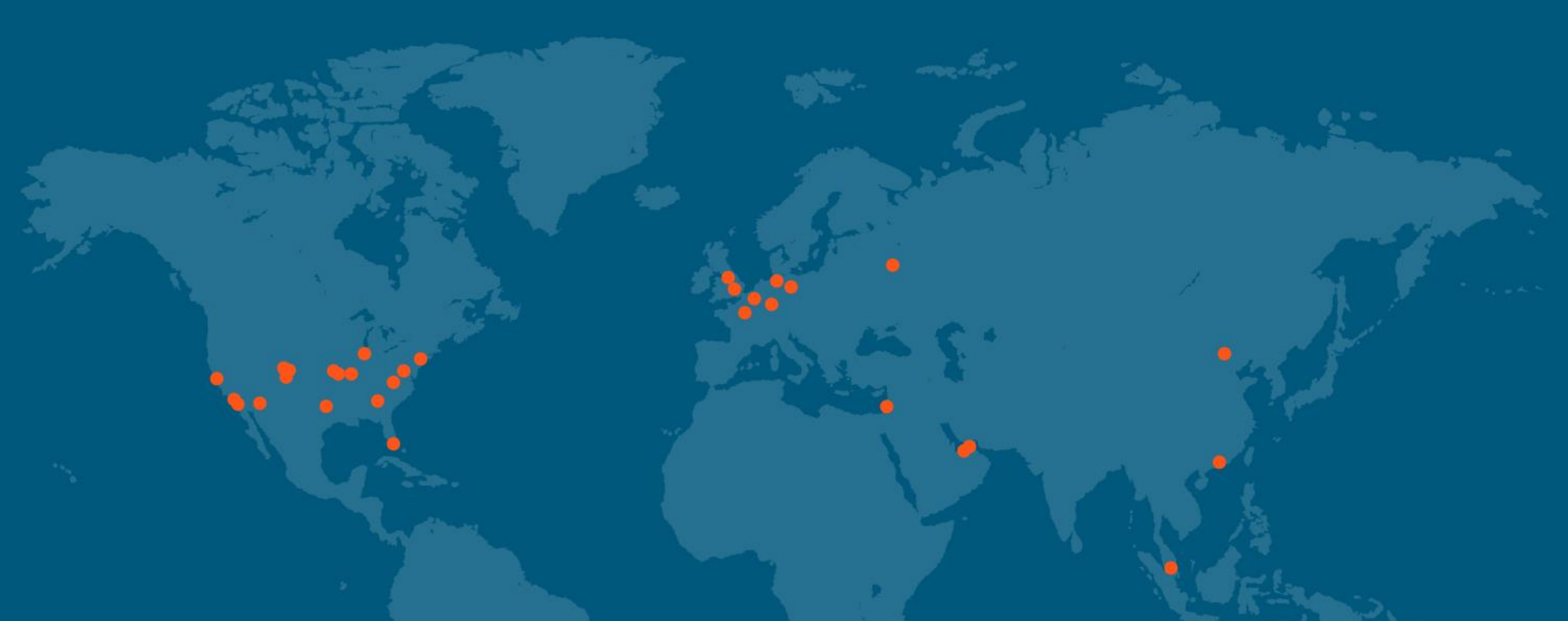
- Separation of investigation team from decision-maker(s) inspires confidence in system
- Court procedure (adversarial) or within singular agency (administrative)
 - Procedural key: many administrative models include separation and near-adversarial format
 - France, Belgium, Netherlands, Brazil, Mexico
 - Evidence access, hearings with investigators/decision-makers, appeals
 - “Devils Advocate” panels, other checks/balances can help in some administrative models
 - EU issue: agency hearings not substantively effective, not before an independent decision-maker (contra: Appeals, Ombudsman)

Appeals

- Meaningful opportunity to contest binding findings/decisions before independent arbiter, can be:
 - During the investigative procedure (Hearing Officer)
 - After enforcement decision (Tribunal/Court/Ombudsman)
- Arbiter with experience of antitrust/competition procedures/issues will inspire confidence in system
 - E.g., UK Competition Appeals Tribunal or New Zealand High Court w/expert “lay member”
 - A new “Competition bench” for the NCLAT?

Minimize Delay

- Justice delayed is justice denied
 - For investigated parties, harmed parties/consumers
- Economies and businesses can be adversely affected during protracted procedures/uncertain timing-outcome
- Fast-moving markets affected by delayed enforcement decisions (one way or the other); agency decisions can lose impact
- Build in efficiencies, timing goals at every stage
- Procedural key: simplified/fast-track procedures; industry specialists
- EU issue: responding to complainants/decisions/appeals delays
 - Reform(-ish): engagement, State of Play, shortened decisions (settlement/commitments)



Thanks!

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