

# Competition Regulatory Agency Comparative Review and Evaluation Report

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Center for Transnational Law and Business

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# COMPETITION REGULATORY AGENCY COMPARATIVE REVIEW AND EVALUATION REPORT

## Executive Summary

This report is part of an on-going project for which the primary objective is to promote a uniform set of best practice principles for the procedural aspects of competition law/antitrust investigations among various national agencies. To do so, we researched, evaluated, and graded the competition law regimes of seven jurisdictions: Australia, Canada, China, the European Union, Korea, Taiwan, and the United States. Each jurisdiction is graded on a set of fifteen criteria that address best practice principles concerning due process, transparency, and comity. For each criterion, the question is whether a jurisdiction's regulatory framework adheres to generally accepted principles for due process, transparency, and comity; and whether the national agency effectively adhered to the best practice principle we set forth.

To assign grades to each jurisdiction, we first constructed a set of criteria. We are aware that this is not a straightforward endeavor and concerns can arise if a selected set of criteria appear to favor a specific jurisdiction. To mitigate this concern, we consulted five sets of recommendations for best practices of competition law from the Organisation for Economic Co-operation and Development ("OECD"), the Association of Southeast Asian Nations ("ASEAN"), the International Chamber of Commerce ("ICC"), the American Bar Association ("ABA") and the International Competition Network ("ICN").

By consulting these five organizations' recommendations and understanding what made each set of recommendations unique, we were able to construct a set of objective criteria. We derive our set from three bedrock principles of legitimacy of a modern national competition law agency: due process, transparency, and comity. Furthermore, our set is both in keeping with the spirit of the other organizations, as well as adds something new to the discussion – the growing importance of comity.

Our research, evaluation, and comparative review found that there are three subsets of criteria among our initial set of fifteen with regard to implementation. The first subset consists of criteria in which all seven jurisdictions converged in implementation. All seven jurisdictions make their laws and guidelines available to the public, have statutory deadlines for merger reviews and investigations, ensure parties have the right to appeal decisions at various points in the investigative process, allow for voluntary resolution with the agency, and protect confidential information. Furthermore, all seven jurisdictions lack statutory deadlines for non-merger investigations.

The second subset of criteria are those that enjoy widespread, but not universal, implementation, defined as criteria where we found no more than two jurisdictions to have problematic or no implementation. This subset includes the parties' right to counsel, right to access case files, effective application of procedural rules to enforcement, timely access to confidential information for parties to prepare a defense, opportunities to consult with the agency on legal, factual, or procedural issues, and effective transparency in enforcement. China had either problematic implementation or no implementation at all for all six criteria of this subset, while

Korea performed better, with problematic implementation in three of the six criteria in this subset.

Finally, there is a third subset of criteria in which three or more jurisdictions are lacking in implementation. These are the right to present testimony and evidence in defense, opportunities to consult with the agency on legal, factual, or procedural issues, and whether the final decisions are available in writing. This may reflect a lack of consensus on a best practice or deeper philosophical differences on the importance of the implicated rights.

All in all, China and Korea appear to have the most trouble implementing best practices in keeping with our criteria. Out of fifteen criteria, China received “yes” grades in five, “problematic” grades in five, and “no” grades in five. This means that China only received a “yes” grade on 33% of the criteria. By contrast, Korea received “yes” grades in eight, “problematic” grades in six, and a “no” grade in one. This could suggest that Korea has made strides in moving towards generally accepted best practices and a rights-focused approach, but the transition is not complete.

One of the more interesting points to note is that the EU received four grades of “yes\*.” The “yes\*” grade reflects the critique of commentators monitoring that jurisdiction. That the EU received more “yes\*” grades than any other jurisdiction does not necessarily mean that the EU is less protective or backsliding away from best practices. Instead, it could be that the EU regime receives heightened scrutiny, due to its own highly developed competition policy community and priorities.

We also see a divide between civil-law-dominant and common-law-dominant jurisdictions. For the purposes of this analysis, we classify China, the EU, Korea, and Taiwan as civil law-dominant jurisdictions, and Australia, Canada, and the United States as common-law-dominant jurisdictions.

The results show that the civil law jurisdictions received more “yes\*,” “problematic” and “no” grades for criteria involving access to allegations, right to present testimony, access to case files, access to confidential information, opportunities to consult with agency, transparency, and decisions being available in writing.

We suspect that this result largely derives from two factors. The first is that common-law-dominant jurisdictions tend to utilize adversarial trials in independent courts as forums to determine the validity of agency findings and to issue remedial orders. For these public trials to take place in accordance with principles of procedural fairness, the agencies must necessarily allow parties access to documents and allegations. Although it must be noted that, due to the nature of discovery in common-law-dominant systems, advocacy skill plays a key role in successfully accessing documents.

The second is the different types of governments that exist in the common law and civil law jurisdictions reviewed. The governing philosophy of certain governments may translate to less transparency overall. Even if a government has moved away from an authoritarian model

relatively recently, it may nonetheless take a substantial amount of time before governing philosophy, personnel, and internal agency culture change.

We would like to caution against using the findings of this report without cross-referencing the summary table with the more in-depth individual country reports appended to this report. The grades we assigned represent snapshots of each jurisdiction. They do not take into account the complex history, politics, philosophies, and outside influences that gave rise to each jurisdiction's current state. Furthermore, our results do not take into consideration the age of the jurisdiction's competition law regime. Finally, none of the grades factor in reform proposals on the table for a particular jurisdiction, which we note at the end of the report.

## **Introduction**

### *Competition Regulatory Agency Review and Evaluation Project:*

The primary objective of this on-going project of the Center for Transnational Law and Business (hereinafter "Center") is to promote a uniform set of best practices for the procedural aspects of competition/antitrust investigations among different national competition/antitrust regulatory agencies (hereinafter "national agencies"). In order to achieve this objective, this project consists of two phases.

The purpose of Phase I is to develop a process to review and evaluate the adherence of a jurisdiction's regulatory framework to generally accepted principles for due process, transparency, and comity for a national agency's regulatory action based on a set of objective criteria; and the national agency's effectiveness in adhering to these generally accepted principles. This preliminary comparative report which reviews and evaluates seven different jurisdictions is a culmination of Phase I.

Phase II of this project will be launched with the release of this comparative report. The purpose of Phase II is to identify - and where appropriate - provide recommendations for areas of improvement in a jurisdiction to better adhere to generally accepted principles and best practices for due process, transparency and comity. Phase II will involve conducting an in-country survey of experts, practitioners, and stakeholders utilizing the same objective criteria to determine how effective a jurisdiction's regulatory framework and its national agency's adherence are to generally accepted principles for due process, transparency, and comity from the perspective of those "on the ground" that are impacted by national agency regulatory actions. Phase II will also expand the number of jurisdictions to be reviewed and evaluated.

The results of the Phase II findings will be published in a report in 2021. Subsequently, the Center will produce an annual report providing updates to the findings of Phase I and Phase II.

### *Phase I Preliminary Competition Regulatory Agency Review and Evaluation Report*

In this preliminary comparative report, we evaluate the procedural legal framework and national agencies for competition law of seven jurisdictions: Australia, Canada, China, the European Union, Korea, Taiwan, and the United States. Each jurisdiction is evaluated on a set of objective criteria that address due process, transparency, and comity concerns. For each criterion, the

national agency is evaluated on the degree to which it effectively adheres to generally accepted principles for due process, transparency and comity in effective competition law regimes.

Judging the merits of each jurisdiction's national agency is not a straightforward endeavor. Each national agency grows out of a unique set of political, legal, and economic histories and theories. Moreover, various stakeholders both within each jurisdiction and abroad must accept the aims and enforcement methods of that national agency. This means that certain features that work well in one jurisdiction may be a non-starter in another. For the purposes of this preliminary Phase I report, it further means that there are at least two methods of evaluating, justifying, and explaining the features of any given national agency: through its adherence to its competition law regime's internal logic and goals or through its compliance with a set of generally accepted principles.

In this preliminary Phase I report, we take the latter approach for three reasons. First, we believe that any national agency must be accountable to both a domestic and an international audience for it to be perceived as legitimate. Although competition laws are enacted domestically, foreign parties have strongly vested interests in its design and implementation. Second, by focusing on generally accepted principles for the procedural aspects of a national agency's regulatory actions, we get better traction on common issues across multiple jurisdictions. Third, for this preliminary report, we do not wish to comment on the domestic legitimacy of any jurisdiction's national agency because we do not have the necessary data yet. Instead, we will return to domestic legitimacy after conducting Phase II of this project, which will include in-country surveys of experts, practitioners and stakeholders in each reviewed jurisdiction.

We are cognizant of the drawbacks of choosing the latter approach. No set of principles are completely neutral, and they can be interpreted as being biased towards certain jurisdictions—a real concern if we make one jurisdiction the exemplar. To mitigate this concern, we constructed our own set of objective criteria, consulting recommendations from the Organisation for Economic Co-operation and Development (“OECD”), the Association of Southeast Asian Nations (“ASEAN”), the International Chamber of Commerce (“ICC”), the American Bar Association (“ABA”), and the International Competition Network (“ICN”). By consulting the recommendations of these five organizations, we attempt to capture a consensus view of what a good competition law regime (with respect to due process, transparency and comity) and an effective national agency look like.

While all five organizations' recommendations share similar themes, each is organized differently. The ICN and OECD's recommendations are organized around practice areas, such as mergers, dominance, and investigatory conduct. The ABA's recommendations revolve around different phases of agency proceedings: investigation, asserting contentions of infringement, assessing contentions of infringement, first instance decision, and review. By contrast, the ICC organized its recommendations around high-level principles of transparency, engagement, confidentiality, due process, non-discrimination, accountability, and judicial review. ASEAN, perhaps due to the internal diversity of its members, took a hybrid and expansive approach, providing best practices for all levels of government work, including legislative processes, enforcement, capacity building, and international cooperation. Notably, ASEAN seems most

keen to promote cooperation across national agencies which, again, comports with ASEAN's internal diversity.

Our own objective set of criteria is derived from three bedrock principles of legitimacy of a modern national agency: 1) due process, 2) transparency, and 3) comity.

*Due process and transparency:*

Due process and transparency are universally considered to be bedrock principles under all five organization's recommendations. The two principles are also highly intertwined, so that many recommendations to improve a jurisdiction's performance in one dimension also improve the performance in the other. For example, guaranteeing a party's access to agency allegations is both a due process protection as well as a transparency measure.

Interestingly, a few due process protections can work at cross purposes with transparency measures. Several of the recommendations stress the need to limit publicity early in an investigation, respect legal privilege, and protect witness and third-party confidentiality. By and large, these recommendations are necessary to protect legitimate expectations to privacy, whether of an individual or of a corporation. However, under certain circumstances, they can make it more difficult for a party under investigation to understand allegations and to prepare a defense. In these situations, the best practice may be a discretionary balancing approach.

Such an approach would necessarily implicate the most practical concern around due process and transparency: the ability of investigated parties to change agency behavior and decisions. While it is important for the laws and guidelines on the books to guarantee rights, there must be practical paths for parties to petition for redress as well. The biggest worry is an agency that answers to none but itself; this is why most of the recommendations of these five organizations revolve around accountability, judicial review, confidentiality, independence, and timeliness. Each of these recommendations lessen the chances of an agency unilaterally deciding against a party without redress or unduly prolonging an investigation.

*Comity:*

Comity's inclusion as a bedrock principle is more novel and requires explanation. From a theoretical perspective, comity is traditionally thought of as a set of guidelines or rules about how much deference a country must show to foreign government actors and their legal processes and conclusions. However, for national agencies, comity is less about deference and more about a practical need to cooperate across borders to achieve agency goals. Long gone are the days when enterprises were mostly contained within a single jurisdiction. Instead, national agencies routinely deal with transnational entities that span multiple jurisdictions. The immense market power of these transnational entities means that national agencies must delicately balance the interest of protecting their domestic markets while giving foreign enterprises a fair adjudication on the merits of their alleged anti-competitive actions.

When attempting to balance these interests, national agencies may need to access information and evidence from foreign jurisdictions. To receive such information and cooperation, national agencies must effectively tolerate the legal processes and determinations of foreign national

agencies. This can be true even if there may be disagreements about the underlying conduct. For example, Article II(F) of the US-Australia Mutual Antitrust Enforcement Assistance Agreement allows for each country to provide information requested by the other, even if the underlying conduct would not be a violation of anti-trust laws in the responding country. Furthermore, Article V(C) of the same agreement specifies that the execution of a request shall be conducted according to the laws of the requested party.

Thus, national agencies must often practice a utilitarian form of comity in the interest of balancing their domestic mandate with adjudicatory fairness to foreign enterprises. This balance is difficult to strike if a national agency is siloed and lacks access to critical information from abroad. Since the only real way to secure a counterpart's cooperation is to practice reciprocity, national agencies that silo themselves off may be perceived as less effective and legitimate, particularly if they are also lacking in due process and transparency. An outside observer may conclude that an isolated national agency is more interested in protecting the country's own industries than providing foreign parties a fair adjudication. It follows, then, that comity, cooperation, and information sharing are hallmarks of effectiveness and legitimacy of a modern national agency.

## **Methodology**

To evaluate the various procedural aspects of a jurisdiction's competition law regime, we followed a three-step process: data collection (compiled in the jurisdiction/country-specific reports), review by an outside expert, and grading. Data collection required the researcher to obtain and review the black letter law, agency guidance and recommendations, industry guidelines, and academic commentary on each jurisdiction's competition laws and procedure in response to our set of objective criteria. The data was collected in English, using official translations published by the jurisdiction's competition agency whenever possible. For China and Taiwan, a Mandarin-speaking researcher collected the data. The criteria and responsive information gathered from this research and data collection were then compiled in a jurisdiction/country-specific report. The reports were then reviewed by an expert knowledgeable of the jurisdiction's procedural aspects of its competition law regime. The information from these jurisdiction/country-specific reports were then utilized to provide this comparative and evaluation report of the seven jurisdictions. Finally, we assigned one of four "grades" to each of our criterion: yes, yes\*, no, or problematic. A "yes" grade would mean that, based on the collected data, the jurisdiction is effective at providing a right, privilege, or adherence to the applicable generally accepted principle. A "yes\*" means that, while the jurisdiction is largely successful at adhering to a generally accepted principle, there are notable caveats that have been raised by commentators. By contrast, a "no" grade would mean the jurisdiction is not effective. A "problematic" grade means that there are substantial shortfalls in the rules, but enough safeguards for some level of adherence to the principle.

The results of our comparisons and evaluations of the seven reviewed jurisdictions are presented in two formats provided below. The first is a summary chart of the set of objective criteria and the evaluation of each jurisdiction for each criterion followed by explanatory notes.

The second format which follows the summary chart and explanatory notes is a table in which for each criterion and evaluation, we provide additional notes to supplement and add nuance to the assigned grade. Furthermore, the notes will highlight some critiques that have been raised concerning the particular jurisdiction.

The detailed data we collected on each jurisdiction are presented in the jurisdiction/country-specific reports, which are included as appendixes to this preliminary comparative report.

### Jurisdiction Comparisons and Evaluations: Summary Chart

	<b>Australia</b>	<b>Canada</b>	<b>China</b>	<b>EU</b>	<b>Korea</b>	<b>Taiwan</b>	<b>USA</b>
<b>Laws and guidelines available to public?</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Statutory deadlines for merger reviews/ investigations?</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Statutory deadlines for non-merger investigations?</b>	No	No	No	No	No	No	No
<b>Effective access to allegations and the basis?</b>	Yes	Yes*	No	Yes*	Problematic	Yes*	Yes
<b>Right to counsel?</b>	Yes	Yes	Problematic	Yes	Yes	Yes	Yes
<b>Right to present testimony and evidence in defense?</b>	Yes	Yes	Problematic	Yes*	Problematic	Problematic	Yes
<b>Access to case files?</b>	Yes	Yes	No	Yes*	Problematic	Yes*	Yes



	<b>Australia</b>	<b>Canada</b>	<b>China</b>	<b>EU</b>	<b>Korea</b>	<b>Taiwan</b>	<b>USA</b>
<b>Rules of procedure apply effectively to enforcement proceedings?</b>	Yes	Yes	Problematic	Yes	Yes	Yes	Yes
<b>The right to appeal decisions?</b>	Yes	Yes	Yes	Yes*	Yes	Yes	Yes
<b>Voluntary resolutions with agency allowed?</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Is confidential information protected?</b>	Yes	Yes	Yes	Yes	Yes	Yes	Yes
<b>Timely access to confidential information critical for parties to prepare a defense?</b>	Yes	Yes	No	Yes	Problematic	Yes*	Yes
<b>Opportunity to consult with the agency on legal, factual, or procedural issues?</b>	Yes	Problematic	Problematic	Yes	Yes	Yes	Yes
<b>Enforcement effectively transparent?</b>	Yes	Yes	No	Yes	Problematic	Yes	Yes
<b>Final decisions available in writing?</b>	Yes	Problematic	Problematic	Yes	Problematic	Yes	Yes

## Summary Chart Explanatory Notes

As part of the above summary chart, these explanatory notes focus on the specific problem areas where countries did not receive a “yes” or “yes\*” grade. We found that these countries’ competition law regimes did not conform to best practices for a variety of different reasons that require further explanation.

Here, we provide more detailed explanations for why we assigned “no” and “problematic” grades for Canada, China, Korea, and Taiwan for certain criteria. We note that we assigned “no” and “problematic” grades to China and Korea more frequently than to other jurisdictions. However, this is not necessarily a commentary on the viability of the trends toward reform in both countries. Rather this is a snapshot of the state of affairs of the present and recent past. For example, there are active reform efforts in Korea to conform with internationally recognized best practices, subject to political limitations. As part of this on-going project, jurisdictions will be periodically reviewed to see if any substantive reforms or, backsliding have occurred.

- **Problem area: effective access to allegations and basis**

*China’s grade: “No”*

Historically, China has made it difficult for parties to understand the legal basis for allegations brought by competition authorities. Recent developments have alleviated the concern somewhat, but parties continue to complain that the notices do not sufficiently set forth legal theories of harm. This makes it difficult for parties to understand the legal and economic reasons for the competition authorities’ concerns.

There is no legal obligation to inform parties of the allegations or competition concerns. There are no published guidelines that bind how China’s State Administration for Market Regulation (“SAMR”) will decide. While SAMR and its predecessors prepare internal reports that highlight reasons for taking specific actions, there is no obligation to make this document public. This means that, ultimately, the parties are not privy to the real reasons for SAMR’s decisions.

In addition, foreign companies have historically complained of not being notified of the allegations. For example, there are reports of the competition authorities pressuring parties to admit guilt before being allowed to see the allegations. There are also reports that, in some instances, the competition authorities have outright refused to inform parties of the allegations.

Furthermore, while the competition authorities will usually consult with a wide group of stakeholders, there is no obligation to hold public hearings or reveal from whom the competition authorities receive input. This means that it can be difficult for parties to develop an accurate understanding of why they are being investigated and what kind of evidence is being used against them.

*Korea’s grade: “Problematic”*

Effective access to allegations and the basis of the allegations in Korea is hampered by stringent protections on confidential information. Confidential information can be disclosed only with the

consent of the party that provided the information. As a result, in practice, it can be difficult to obtain necessary information to fully understand the allegations or to respond to them.

Before the examination report is produced, specific alleged violations and material evidence are not given to the defendant. The defendant may communicate with the examiner, however.

Once the examination report is produced, the examiner will serve the report on the defendant. In principle, the defendant should be given sufficient time to submit written replies to the examination report, which is usually two weeks. The examiner may extend the response period.

In the examination report, the examiner will attach data and other supporting evidence. However, the examiner will not reveal confidential materials or materials deemed insignificant. The defendant, if aware of this, can request the excluded information, though this is subject to the consent of the party that provided the confidential materials.

- **Problem area: the right to counsel**

*China's grade: "Problematic"*

The right to counsel under the Chinese system is not robustly protected.

According to the Administrative Procedure Law, parties may be represented by counsel in administrative proceedings. However, the competition authorities may deny a request for counsel to participate, and numerous foreign companies have reported that their counsels are routinely denied access to proceedings. Furthermore, foreign attorneys without a Chinese license cannot practice law in China, and all in-house attorneys are considered employees of the company. There is also suspicion that the competition authorities view parties requesting counsel negatively.

For mergers, parties may file their merger notification with a power of attorney. Parties also call upon attorneys to help respond to additional information requests from the competition authorities. However, the competition authorities may ultimately proceed with their investigation as they see fit and omit counsel from any hearings.

During evidence collection, SAMR has no obligation to wait for legal counsel to arrive before carrying out evidence collection. SAMR is only obligated to have at least two law enforcement officers present when collecting evidence.

Finally, attorney-client privilege does not exist in China. Courts can order attorneys to testify about a client's trade secrets or private information, but such testimony shall be kept confidential. SAMR has the power to request evidence from parties, but it is unclear whether SAMR could compel testimony on the spot.

- **Problem area: right to present testimony and evidence in defense**

*China's grade: "Problematic"*

While Chinese law on the books protects a party's right to present testimony and evidence in defense, in practice it is subject to the near-total discretion of the competition authorities.

Parties have the right to make statements to the competition authorities, but this does not necessarily mean that they will be allowed to attend all hearings or proceedings. In practice this means that parties may request hearings from the competition authorities. The competition authorities may also pro-actively invite parties and third parties to hearings. These hearings can include competitors in related industries, experts, and government departments.

In the past, MOFCOM issued guidelines on how to deal with parties' defenses. Article 10(2) of the Measures on the Review of Concentrations Between Business Operators allows parties to submit written defenses after MOFCOM communicated objections to the parties. MOFCOM would set the deadline for the submissions. If parties do not respond by the deadline, MOFCOM will consider that party to have waived its defense.

However, past practice showed that MOFCOM did not always provide a complete set of information for the parties to craft a suitable defense. Furthermore, deadlines were often short, giving parties scant time to prepare. MOFCOM also rarely, if ever, revealed the source or content of third-party complaints in investigations, which made it harder to offer a defense.

Even if a party is invited to a hearing, there is no right to cross-examination.

*Korea's grade: "Problematic"*

Under current Korean law, parties have the right to present testimony and evidence in defense but may only do so after the examination opinion is filed by the competition authorities. Because this is relatively late in the investigation process, there are significant questions regarding the adequacy of this procedure.

*Taiwan's grade: "Problematic"*

Although parties may present testimony and evidence in Taiwan, the parties must file a written application to request a hearing before the competition authorities. The competition authority has discretion to reject the hearing if it is deemed unnecessary. Similarly, a party must request oral arguments, and the competition authority may reject the request.

- **Problem area: access to case files**

*China's grade: "No"*

Put simply, there are no provisions guaranteeing party access to investigation documents in China. However, the competition authority may release non-confidential versions of the filing documents prepared by the original notifying party to various stakeholders.

*Korea's grade: "Problematic"*

While the parties have the right to request the KFTC to allow copying of case files, actual access can be difficult to obtain. The KFTC may grant a request if it is deemed in the public interest and the party that provided the data consents (Art. 52(2) of MRFTA). The fact that consent is needed means that it is practically difficult to obtain and challenge the information necessary to prepare defenses.

A reform passed by the National Assembly of Korea in May of 2020 amends Article 52(2) of the MRFTA to allow the respondent access to all data, excluding protected and confidential data upon request to the KFTC. If the KFTC still refuses to provide the information, the petitioner may bring a lawsuit that will pause any applicable time limitation periods. This reform has not been signed yet by the president as of the writing of this report.

- **Problem area: effective application of rules of procedure to enforcement proceedings**

*China's grade: "Problematic"*

While there are established procedures for enforcement proceedings in China, it is unclear whether the parties have any real recourse if the rules are broken.

SAMR evidence collection powers are broad and include the power to 1) conduct inspection of business locations or relevant premises, 2) make inquiries and conduct interviews, 3) inspect and copy relevant documents and materials, 4) seize and retain relevant evidence, and 5) enquire into bank accounts. They may also secure premises overnight, though they are not allowed to break locks on cabinets and doors. At least two law enforcement officers are required to be present, and they must present their law enforcement papers. The officers shall record the evidence and obtain the signature of specific individuals investigated.

Several guidelines were issued by the competition authorities to govern procedural guidelines of investigations. In practice, parties have complained that evidence collection powers are too broad and give parties no opportunity to object. Some parties have noted that they were neither informed about the evidence collection raids nor the actual content of the evidence taken. Competition authorities have also conducted raids without waiting for counsel to arrive.

- **Problem area: timely access to confidential information critical for parties to prepare a defense**

*China's grade: "No"*

There is no right to be informed that Chinese competition authorities will use confidential materials during review. The Anti-Monopoly Law is silent on this matter. Article 10(1) of the Measures on the Review of Concentrations Between Business Operators does obligate SAMR to inform the parties of a determination against the merger and the timeline for a response. However, SAMR has no obligation to inform or disclose confidential information to the parties.

Indeed, parties do not have the right, under the Anti-Monopoly Law or any of the guidelines, to get access to the SAMR's files. This means parties do not have access to anything submitted by third parties, any expert studies, any comments from other government ministries, etc.

In the past, MOFCOM tended to communicate with parties orally. There were no guidelines that require MOFCOM to give parties feedback in writing. Whether SAMR will continue with this precedent remains to be seen.

Furthermore, there were no guidelines regarding when MOFCOM had to inform parties of concerns that would derail the merger. MOFCOM was only required to inform parties in a

“timely” fashion, which, combined with chronic understaffing, led to parties receiving such notices late in the review process. Many parties have complained of insufficient time to meet MOFCOM’s demands.

*Korea’s grade: “Problematic”*

There is some concern that the Korean confidentiality rules are so strong that parties may have difficulty obtaining necessary information to prepare defenses.

The general rule is that any party may access case data and if the request is considered to be in the public interest, the KFTC will grant access to the case data. However, the party that originally provided the data must consent. This last requirement privileges confidentiality but can make it difficult to obtain case data.

- **Problem area: opportunity to consult with the agency on legal, factual, or procedural issues**

*Canada’s grade: “Problematic”*

Investigations in Canada are conducted in private, and the law does not ensure that the competition authority affords a party under investigation opportunities to consult with the agency. In merger investigations, the parties may apply for information discussions. However, no guidance is offered until after notification or a request for an Advance Ruling Certificate. In other matters, parties may apply for a binding opinion, but this procedure is rarely used in practice.

*China’s grade: “Problematic”*

There is no obligation for Chinese competition authorities to consult with parties, although for mergers, parties themselves are expected to engage in pre-notification consultation with SAMR. In the past, parties typically consulted with MOFCOM before initiating formal proceedings. This means that parties can try to figure out what MOFCOM would require for the merger to be approved. SAMR continues this practice. The Guiding Opinions on the Notification of Concentrations Between Business Operators sets forth some guidelines for these consultations, including how to define the relevant product and market, as well as formal requirements of notification.

During the notification phase of the merger investigation, MOFCOM may send questionnaires to the parties for more information. MOFCOM rarely, if ever, requests in-person meetings at this point.

For monopoly and abuse of dominance investigations, the competition authorities are not obligated to notify the parties under initial investigation. However, once the competition authorities formally file a case against the party, the party must be informed of the allegations and be given the opportunity to present a defense.

Nonetheless, it does not appear that NDRC or SAIC were as forthcoming with their concerns. Parties had complained that, by the time they received the allegations, it was already too late to

prepare adequate defenses. It also remains unclear whether SAMR will continue NDRC and SAIC's approach to consultations or adopt something more akin to MOFCOM's consultation process.

- **Problem area: enforcement transparency**

*China's grade: "No"*

Although China's competition law and enforcement regime is trending towards greater transparency, key challenges remain.

First, foreign parties looking to acquire a Chinese company through a merger are subject to two opaque procedures: the foreign investment review and national security review. AML article 31 states that any mergers that involve a foreign party acquiring a domestic party will trigger a review.

Originally completely opaque, the foreign investment review system evolved to become a record-filing system. A "negative list" of industries was established. Any merger that did not involve the negative list were approved upon filing. Those that fell into the negative list were reviewed on a case-by-case basis.

The national security review mechanism was established in 2011, which involves a joint review by MOFCOM and the NDRC. The national security review committee has complete discretion to review the proposed merger, and will consider issues of national defense, national economy, and technology development in China. The committee will solicit opinions from other governmental agencies as well.

In 2019, China passed a new Foreign Investment Law, which retains both the foreign investment review and the national security review. Then, on December 19, 2020, the NDRC and MOFCOM issued the Measures for Security Review of Foreign Investments. These new measures expand the scope of investments subject to national security review, specify the review procedures, and set forth a working mechanism between the NDRC and MOFCOM. However, the new measure did not provide clarity on the identity of targeted "key" sectors.

Second, the AML sets forth several very generous exemptions to monopoly conduct, including:

- 1) improving technologies, or engaging in research and development of new products; or
- 2) improving product quality, reducing cost, and enhancing efficiency, unifying specifications and standards of products, or implementing specialized division of production;
- 3) increasing the efficiency and competitiveness of small and medium-sized undertakings;
- 4) serving public interests in energy conservation, environmental protection, and disaster relief;
- 5) mitigating a sharp decrease in sales volumes or obvious overproduction caused by economic depression;

- 6) safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or
- 7) other purposes as prescribed by law or the State Council (AML Art. 15).

Outside observers may suspect that SAMR can effectively exempt any party for any underlying reason, breeding distrust in the system.

*Korea's grade: "Problematic"*

For the most part, enforcement in the Korean competition law regime is transparent. However, there are concerns over parties' ability to access evidence and the communication of decision rationale to the parties.

Currently, the KFTC does not publicly reveal merger notifications or investigations during the initial review period. Usually, the KFTC will only publicly reveal the review if the investigation proceeds to a full commission hearing. Any public disclosure of the investigation will include sufficient information so that the disclosure is effective.

While there is not a general authorization for the Korean government to prevent a merger for national interest reasons, there are exceptions. Article 4(2) of the Foreign Investment Promotion Act allows the government to stop a merger if a foreign company poses a danger to public order. Depending on the type of company being merged, parties may be required to get approval from different ministries. There are also restrictions for mergers involving telecommunications and financial industries (reported to the Korea Communication Commission and the Financial Supervisory Commission respectively).

Likewise, foreign companies that acquire 10% or more of a Korean corporation must report the acquisition to the Ministry of Trade, Industry, and Energy.

The KFTC may also permit a merger if the efficiency gains sufficiently outweigh the anti-competitiveness costs. Exemptions can also be granted if one of the companies in the merger will fail soon, if production facilities will not be used without the merger, and if less restrictive business arrangements are not possible.

- **Problem area: availability of final decisions in writing**

*Canada's grade: "Problematic"*

For mergers, the Canadian competition authority does not provide comprehensive information about merger decisions. It maintains a merger registry, but only provides information about the parties, industry, and result. Sometimes the competition authority will publish position statements for high profile mergers.

*China's grade: "Problematic"*

The Chinese competition authorities are required to publish decisions when it finds against proposed mergers or imposes restrictions. However, there are concerns about the sufficiency of the reasoning set forth in these decisions. For approved mergers, the competition authority



publishes quarterly reports on its website. These only include the identity of the parties and not the reasoning.

For monopoly and abuse of dominance investigations, the competition authority publishes administrative decisions on its website. Unfortunately, the quality of these decisions has been inconsistent. Common problems include a lack of detail as to the reasons and legal principles for the decision.

*Korea’s grade: “Problematic”*

The Korean competition authority does not need to publicly issue written decisions if no violations are found. In practice, the competition authority has issued written decisions for non-violation cases since 2016. However, there remains substantial critique that these decisions contain insufficient detail and information.

## **Jurisdiction Comparisons and Evaluations**

### **A. Due process issues:**

#### *1. Are laws, regulations, and guidelines available to the public?*

<b>Jurisdiction</b>	<b>Publicly available?</b>	<b>Available where?</b>	<b>Languages</b>
<b>Australia</b>	Yes	Australia Competition and Consumer Commission website	English
<b>Canada</b>	Yes	Competition Bureau Canada and Competition Tribunal websites	English and French
<b>China</b>	Yes	State Administration for Market Regulation website	Chinese and English (limited selection)
<b>EU</b>	Yes	EU-Lex website and European Commission website	All official EU languages
<b>Korea</b>	Yes	Korea Fair Trade Commission website	Korean and English
<b>Taiwan</b>	Yes	Taiwan Fair Trade Commission website	Chinese, English, and Japanese (limited selection)
<b>USA</b>	Yes	All US federal laws are available in commercial databases. The DOJ provides their Antitrust Division Manual, statutes, briefs, policy statements, and guidance documents on their website. The FTC provides rules, statutes, and guidance documents on its website.	English

2. *Are there statutory deadlines for investigations?*

<b>Jurisdiction</b>	<b>Mergers</b>	<b>Other investigations</b>
Australia	<ul style="list-style-type: none"> <li>• Most applicants use the informal process, which has no hard deadlines. There are potentially three steps in the informal process. For the pre-assessment, it typically takes two weeks. For the conditional confidential clearance, it takes from two to four weeks. The public review stage is divided into two phases. Phase one takes anywhere from six to twelve weeks, after which the ACCC may publish a Statement of Issues. If this is published, then phase two begins and the public has another six to twelve weeks to consult with the ACCC.</li> <li>• For the formal process, the ACCC must decide within 90 days of the notification being submitted. The time limit may be extended if the applicant agrees.</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadline.</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• After notification is complete, there is a 30-day waiting period. The Competition Bureau can issue a request for information within the waiting period. If the Competition Bureau issues a supplementary information request, there is a second 30-day waiting period after all parties submit responses.</li> <li>• For complex matters, the Competition Bureau or the parties may seek to extend the review beyond the waiting periods.</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadlines.</li> </ul>

China	<ul style="list-style-type: none"> <li>• No statutory deadlines in pre-consultation phase. After notification, 30 days for preliminary review. If SAMR conducts a further review, 90 days. An extension is available for 60 days.</li> <li>• Simplified review: no formal deadline, but authorities try to complete review within 30 days.</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadlines.</li> </ul>
EU	<ul style="list-style-type: none"> <li>• All parties have a right to decisions within a reasonable time.</li> <li>• Simplified procedure: decision within 25 days.</li> <li>• Regular investigation: Phase I: 25 working days from receipt of complete notification. A 10 working day extension is possible.</li> <li>• Phase II: 90 working days extendable up to 125 working days.</li> </ul>	<ul style="list-style-type: none"> <li>• All parties have a general right to decisions within a general time.</li> <li>• Otherwise, no statutory deadlines.</li> <li>• This has led to criticism that there can be unreasonable delays. Investigations span from just 7 months to 114 months, with an average of 49 months.</li> </ul>
Korea	<ul style="list-style-type: none"> <li>• Regular merger reviews: completed within 30 days of notification. KFTC can unilaterally extend the review period by up to 90 days. KFTC will issue a decision regarding foreign mergers that do not affect the Korean market within 15 days.</li> <li>• Simplified review: KFTC will deliver results within 15 days of notification. However, the clock stops running if the KFTC requests information from parties.</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadlines. Investigations expected to run at least 1 year.</li> </ul>
Taiwan	<ul style="list-style-type: none"> <li>• Merger review: 3 months from submissions. A single extension of 3 months is available.</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadlines. Decisions can be issued as soon as 6 months after initiation of an investigation.</li> </ul>
USA	<ul style="list-style-type: none"> <li>• After the filing of the Hart-Scott-Rodino notification forms, the DOJ and FTC have 30 days to complete a clearance process to determine</li> </ul>	<ul style="list-style-type: none"> <li>• No statutory deadlines.</li> </ul>

	<p>which agency (if any) will continue the investigation. During this time, the investigating agency may issue a request for information.</p> <ul style="list-style-type: none"><li>• If either agency decides to proceed with the investigation, it will issue a second request for information. The second request extends the waiting period for 30 days.</li><li>• The issuance of the second request for information will stop the clock on the investigation. The clock will start again when the parties substantially comply with the second request.</li><li>• There is no hard deadline for this phase of the investigation.</li><li>• Agencies may request parties to “pull and refile,” effectively starting the initial 30-day period again.</li></ul>	
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3. *Do parties have effective access to allegations and the basis for allegations?*

Jurisdiction	Effective access?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Enforcement proceedings filed by the ACCC at the federal courts or Competition Tribunal are made public.</li> </ul>
Canada	Yes*	<ul style="list-style-type: none"> <li>• Investigations conducted by the Competition Bureau are to be done in private. Parties are not informed unless a request is made.</li> <li>• However, once proceedings are filed at the federal courts or Competition Tribunal, allegations and bases are made public.</li> </ul>
China	No	<ul style="list-style-type: none"> <li>• Authorities provide notice of an investigation, but the notice may not contain adequate information to understand the legal theory of harm.</li> <li>• SAMR has no legal obligation to make the internal reasoning for an investigation public.</li> <li>• Furthermore, there is no obligation to reveal the source of information that SAMR relies on.</li> </ul>
EU	Yes*	<ul style="list-style-type: none"> <li>• The Commission will publish a non-confidential notice of merger investigation.</li> <li>• After initial fact-finding and if the Commission intends to impose some sort of remedy, the Commission will convey a Statement of Objections to the parties. The Statement of Objections will set forth the factual and legal concerns.</li> <li>• However, there are concerns over defendant's ability to access case files and the Commission's ability to develop new theories of harm.</li> <li>• If Commission denies access to files, the burden is on the requesting party to show that the requested files are of material importance.</li> <li>• If the Commission develops a novel legal theory harm (see: Dow/DuPont case), parties may not have sufficient opportunity to rebut.</li> </ul>

Korea	Problematic	<ul style="list-style-type: none"> <li>• The KFTC will serve the examination report to the defending party.</li> <li>• No confidential material or material deemed insignificant will be revealed.</li> <li>• Defendant may request excluded information, but it is subject to the consent of the party that provided the confidential material.</li> </ul>
Taiwan	Yes*	<ul style="list-style-type: none"> <li>• If party requests it, parties have right to review and copy TFTC files and materials. Parties must schedule a time with TFTC to access the files, and parties are always to be supervised by TFTC staff.</li> <li>• However, parties do not have access to TFTC internal drafts and documents, as well as confidential materials.</li> <li>• There is criticism that TFTC redacts too much information for parties to prepare an adequate defense.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• For DOJ investigations, allegations of wrongdoing will be set forth in the complaint filed in federal court.</li> <li>• For FTC administrative actions or preliminary injunction applications, allegations will be set forth in the complaint or court filings, respectively.</li> </ul>

4. *Do parties have the right to counsel?*

Jurisdiction	Effective right to counsel?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Penalty proceedings are adjudicated or reviewed by the federal courts and Australian Competition Tribunal; these courts are subject to federal court rules.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• Competition Tribunal is considered a federal court and subject to the federal court rules.</li> </ul>
China	Problematic	<ul style="list-style-type: none"> <li>• SAMR may deny a counsel’s request to participate in proceedings.</li> <li>• Attorney-client privilege is non-existent.</li> </ul>

EU	Yes	<ul style="list-style-type: none"> <li>• Parties may be represented by in-house or external counsel at all proceedings.</li> <li>• Attorney-client privilege does not apply to in-house counsel.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>• Parties may be represented by in-house or external counsel.</li> <li>• Attorney-client privilege does not exist, though counsel may refuse testimony regarding confidential information obtained during professional (i.e. legal) duties.</li> </ul>
Taiwan	Yes	<ul style="list-style-type: none"> <li>• Unless otherwise prohibited, parties may appoint counsel for administrative procedures.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• In criminal matters, the US constitution guarantees right to counsel.</li> <li>• In civil matters, parties may be represented by counsel.</li> </ul>

5. *Do parties have the right to present testimony and evidence in their own defense?*

Jurisdiction	Effective participation in hearings?	What is allowed	What is not allowed
Australia	Yes  Federal court and Australian Competition Tribunal proceedings are governed by normal rules of evidence and procedure.	<ul style="list-style-type: none"> <li>• Normal trial procedures are available.</li> </ul>	
Canada	Yes  Competition Tribunal proceedings are governed by trial rules of evidence.	<ul style="list-style-type: none"> <li>• Witness statements prior to trial.</li> <li>• Experts reports, including rebuttals.</li> <li>• Cross examination of witnesses.</li> </ul>	
China	Problematic  Subject to the discretion of SAMR.	<ul style="list-style-type: none"> <li>• Parties may make statements, but do not necessarily have right to attend hearings and proceedings.</li> </ul>	<ul style="list-style-type: none"> <li>• No right to cross examination.</li> </ul>

		<ul style="list-style-type: none"> <li>• Expert testimony allowed if deemed necessary. Economic analysis encouraged.</li> </ul>	
EU	<p>Yes*</p> <p>Commission has obligation to allow party to be heard before imposing a fine or order. Party may request oral hearing, and the Commission must organize one if so requested. However, there are substantial critiques centered around the fact that third parties are not guaranteed the right to be heard.</p>	<ul style="list-style-type: none"> <li>• Parties make written statements. Experts and evidence allowed at oral hearing.</li> </ul>	<ul style="list-style-type: none"> <li>• However, there is no right of cross examination at hearing.</li> <li>• Hearing officer does not have power to compel answers or attendance.</li> </ul>
Korea	<p>Problematic</p> <p>Parties have right, but only after KFTC examination opinion is filed. The 2020 amendments to the law (passed but not yet signed) allows parties to submit at any stage.</p>	<ul style="list-style-type: none"> <li>• In depth examination of witnesses, experts, and specific evidence.</li> <li>• Other party may cross-examine witnesses and experts.</li> </ul>	<ul style="list-style-type: none"> <li>• Committee may reject aspects of examination deemed inefficient or redundant.</li> </ul>
Taiwan	<p>Problematic</p> <p>Parties may request, but Commission may reject if deemed unnecessary.</p>	<ul style="list-style-type: none"> <li>• Evidence, expert, and statements.</li> </ul>	<ul style="list-style-type: none"> <li>• Depositions and cross-examination.</li> </ul>
USA	<p>Yes</p> <p>Trials are governed by the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure. FTC administrative trials are governed by 16 CFR Part 3.</p>	<ul style="list-style-type: none"> <li>• All normal trial procedures are available.</li> </ul>	



6. *Do parties have access to case files?*

Jurisdiction	Effective right to case files?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Parties to a proceeding may formally request the federal court to order discovery from the ACCC, both prior to and during proceedings.</li> <li>• Discovery usually limited to that which is relevant to pled issues.</li> <li>• After commencement of proceedings, parties have right to request files from ACCC (but not documents prepared by or on behalf of the ACCC).</li> <li>• Parties may subpoena documents from third parties to indirectly obtain documents held by ACCC.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• In civil enforcement cases, the Competition Bureau has an obligation to disclose all relevant documents through the discovery process.</li> <li>• In civil cases, there are two tiers of confidentiality: level A is restricted to a party's counsel, staff, and experts; level B is restricted to those with Level A access and designated representatives.</li> <li>• In criminal cases, the prosecutor has a duty to disclose all material it proposes to use at trial.</li> </ul>
China	No	<ul style="list-style-type: none"> <li>• SAMR may choose to release a non-confidential version of filing documents.</li> </ul>
EU	Yes*	<ul style="list-style-type: none"> <li>• If Commission fails to disclose evidence addressed by the Statement of Objections, the decision may be annulled.</li> <li>• Right of Access does not grant parties to confidential information or internal documents of the Commission.</li> <li>• Access to evidence normally granted only once. But further access may be granted if the Commission receives new evidence.</li> <li>• Access to evidence submitted by 3rd party through Akzo Procedure.</li> <li>• Data room available.</li> </ul>

		<ul style="list-style-type: none"> <li>• If the Commission plans to rely on inculpatory information presented in a defense, the Commission must allow access.</li> <li>• If the information revealed by a defense is exculpatory, the Commission may grant access upon request.</li> </ul>
Korea	Problematic	<ul style="list-style-type: none"> <li>• Actual access can be difficult to obtain.</li> <li>• Parties have right to request access to case files, but the KFTC will only grant this if it is deemed to be in the public interest and the party that provided the data consents.</li> <li>• A reform passed in 2020 amends the law to provide access to all non-confidential data, but it has not been signed into law yet.</li> </ul>
Taiwan	Yes*	<ul style="list-style-type: none"> <li>• Parties have right to review and copy Commission files and materials.</li> <li>• To access the files, the party must apply for permission and schedule a time for access.</li> <li>• There is no right to access the TFTC's internal working documents.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• Primarily through the discovery process. Parties may request documents, depose witnesses, and obtain information regarding the government's expert testimony.</li> </ul>

7. *Do the rules of procedure apply effectively to enforcement proceedings?*

Jurisdiction	Do rules of procedure apply effectively?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Civil and criminal penalties are adjudicated before the federal courts, subject to the normal rules of procedure of Australian courts.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• Enforcement proceedings before the Competition Tribunal or the federal courts are governed by all rules of procedure of courts.</li> <li>• The Tribunal is a court of record and bound by the Competition Tribunal Rules and Federal Court Rules.</li> </ul>

China	Problematic	<ul style="list-style-type: none"> <li>• Unclear if parties have any recourse if rules are not followed by SAMR.</li> <li>• SAMR follows several guidelines about evidence collection that are carried forward from its predecessor SAIC and NDRC.</li> <li>• However, parties note that there is no real way to object to SAMR actions.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>• Procedural rules are set forth in the Rules of Procedure of the Commission. The Commission also refers to the Manual of Operating Procedures and the Antitrust Procedural Manual.</li> <li>• The Commission may apply interim measures if there is prima facie breach of the competition rules and if there is proven urgency.</li> <li>• The Commission may request parties to provide information. If the Commission decides to request information, it is treated as an act of the EU.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>• Civil Procedure Act and the Investigation Procedural Rules govern.</li> <li>• Economic analysis must abide by the principles set forth in the Regulation on the Submission of Economic Analytical Opinions.</li> </ul>
Taiwan	Yes	<ul style="list-style-type: none"> <li>• TFTC maintains guidelines to govern witnesses, statements, and expert evidence.</li> <li>• However, the TFTC has wide discretion to go beyond the allegations during the investigation.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• For FTC administrative complaints, 16 CFR Part 3 governs.</li> <li>• For federal court trials, the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure apply.</li> </ul>

8. *Do parties have the right to appeal and other judicial review?*

Jurisdiction	Are appeals allowed?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• A merger applicant may appeal a formal ACCC decision to the Australian Competition Tribunal. The applicant may further appeal to the Federal Court.</li> <li>• There is no statutory right to appeal if the merger applicant uses the ACCC informal clearance procedure.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• Decisions and orders of the Competition Tribunal may be appealed to the Federal Court of Appeal. However, appeals on questions of fact are only available with leave of the Federal Court of Appeal.</li> </ul>
China	Yes	<ul style="list-style-type: none"> <li>• Parties may apply for administrative reconsideration first.</li> <li>• Following that, parties may bring an administrative action before the Intermediate People's Courts, Higher People's Courts, or the Supreme People's Court, depending on the complexity and importance of the matter.</li> </ul>
EU	Yes*	<ul style="list-style-type: none"> <li>• While it is evident that parties have the right to appeal Commission decisions, there is controversy surrounding the adequacy of the General Court's review of the Commission.</li> <li>• Parties may appeal a decision to the General Court on issues of fact and law. The General Court has the power to annul or change a fine, but not the power to change the Commission's judgment.</li> <li>• Parties and the Commission may further appeal matters of law to the Court of Justice of the European Union.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>• Parties may appeal a KFTC ruling to the Seoul High Court. If parties remain unsatisfied after the Seoul High Court ruling, parties may appeal to the Supreme Court of the Republic of Korea.</li> </ul>

Taiwan	Yes	<ul style="list-style-type: none"> <li>• Parties may file an administrative appeal for matters of fact and law with the High Administrative Courts or the Intellectual Property Court (for certain cases).</li> <li>• Parties may further appeal the matter to the Supreme Administrative Court on matters of law.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• The DOJ will seek preliminary and permanent injunctions through district courts.</li> <li>• The FTC will seek preliminary injunctions through district courts.</li> <li>• Parties may appeal a district court’s decision to impose an injunction to the appropriate US Court of Appeals.</li> <li>• FTC permanent injunction decisions before an administrative law judge may be appealed to the full FTC commissioner panel. This may then be appealed to the appropriate US Court of Appeals.</li> <li>• Decisions at the US Court of Appeals may be appealed to the US Supreme Court.</li> </ul>

9. *Are voluntary resolutions between parties and agency allowed?*

Jurisdiction	Voluntary resolution allowed?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Merger parties can attempt to provide commitments to satisfy the ACCC. Usually the ACCC will require the appointment of an independent auditor.</li> <li>• For cartels, immunity is available if the party is the first to apply for immunity, did not coerce others to join the cartel, will cease its involvement in the cartel, cooperate fully with the ACCC, and maintain confidentiality of the immunity.</li> <li>• Subsequent parties may receive partial reduction of penalties, depending on the timeliness and adequacy of cooperation.</li> </ul>

		<ul style="list-style-type: none"> <li>• In criminal proceedings, the courts retain final discretion, even if the Commonwealth Director of Public Prosecution recommends reduced penalties.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• The Competition Bureau prefers settlement rather than litigation.</li> <li>• Consent agreements possible and preferred when there is a violation.</li> <li>• Immunity and leniency available for conspiracy, bid rigging, implementing foreign conspiracy directives, and aiding and abetting these offenses.</li> <li>• First to disclose to the Competition Bureau before the agency has gathered sufficient evidence may be granted immunity from prosecution.</li> <li>• First to apply for leniency can receive a 50% fine reduction.</li> <li>• Second applicant may receive a 30% fine reduction.</li> <li>• Subsequent applicants may receive a discount based on discretion.</li> </ul>
China	Yes	<ul style="list-style-type: none"> <li>• SAMR can mitigate or exempt a party from punishment if the party voluntarily reports to SAMR.</li> <li>• For horizontal monopoly cases: first to report will receive no less than an 80% fine reduction, up to full immunity. Second to report will receive a fine reduction of between 30-50%. Subsequent parties will receive no more than a 30% reduction.</li> <li>• For traditional monopoly cases: new guidelines allow a leniency program to apply.</li> <li>• For cartels: SAMR may suspend an investigation if a party voluntarily adopts measure to eliminate the harm done by their conduct.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>• For mergers: parties may propose remedies that eliminate competition concerns. The Commission prefers structural remedies.</li> </ul>

		<ul style="list-style-type: none"> <li>• For cartels: The earlier a party contacts the Commission regarding a cartel, the lesser the fines which are levied. The first party to submit information to the Commission receives full immunity. Subsequent parties may receive partial reductions in fines based on the value of the evidence provided. The second party typically receive fine reductions of 30-50%. The third party receives fine reductions of 20-30%. Any subsequent parties may receive up to a 20% reduction in fines.</li> <li>• Almost all member states have their own leniency programs. However, an application to one member state’s program is not automatically treated as an application to another member state’s program. National competition authorities are not bound by the Commission’s decisions regarding leniency.</li> <li>• The Commission can accept commitments without finding infringement, but the settlement must pass the market test.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>• For cartels: First party to come forward with evidence receives immunity to corrective measures and a 100% reduction in fines. Second party receives a 50% reduction in fines and may receive mitigation in corrective measures.</li> <li>• If party reveals a cartel that is unrelated to the cartel under direct investigation, the revealing party can receive a 20% fine reduction if the revealed cartel is equal or less in size than the initial cartel. This reduction is increased to 30% if the revealed cartel is larger but less than double the size of the initial cartel; and 50% if the revealed cartel is more than double but less than quadruple the size of the initial cartel. A 100% reduction in fines is available if the revealed cartel is more than quadruple the size of the initial cartel.</li> <li>• In abuse of dominance cases, the KFTC can accept commitments from parties and close a case without reaching an infringement decision.</li> </ul>

Taiwan	Yes	<ul style="list-style-type: none"> <li>• For cartels: first applicant can qualify for full immunity. 2<sup>nd</sup> to 5<sup>th</sup> applicant can receive progressively smaller reductions in fines. No more than 5 applicants are allowed in one case.</li> <li>• The TFTC can enter administrative settlements, rather than impose sanctions.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• The Antitrust Division of the DOJ administers a leniency program for cartels. The first person or company to report to the DOJ can avoid criminal prosecution. Leniency is not statutory, but of prosecutorial discretion.</li> <li>• A new DOJ program will consider corporate anti-trust compliance programs when it comes to considering reductions in punishments.</li> <li>• For restraint of trade and dominance matters, parties may settle in court at any time. However, the consent agreement with the DOJ must be approved by the agency. Consent is published in the Federal Register for 60 days.</li> <li>• Consent agreement with the FTC are subject to a 30-day publication period in the Federal Register.</li> <li>• Parties may enter plea agreements, subject to approval of the agency and courts.</li> </ul>

10. *Does the agency effectively protect confidential information?*

Jurisdiction	Effective protection of confidential information?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• During the informal process of merger review, information obtained by the ACCC is largely kept confidential.</li> <li>• During the merger authorization process, the information is largely public.</li> </ul>



		<ul style="list-style-type: none"> <li>Information obtained by the ACCC during a restraint of trade/dominance investigation is automatically considered “protected information” or “protected cartel information.” In both cases, confidentiality attaches automatically.</li> <li>In all cases, a party may also request that the information it provides be considered confidential.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>Almost all information received by the Competition Bureau is treated as confidential.</li> <li>Exceptions include: previously public information, provider consents to disclosure, information communicated to another law enforcement agency, information communicated for administration and enforcement of the Competition Act.</li> <li>Parties may request information be kept confidential.</li> <li>Information may nonetheless be disclosed as part of litigation.</li> </ul>
China	Yes	<ul style="list-style-type: none"> <li>The Anti-Monopoly Law obligates SAMR to keep commercial secrets confidential.</li> <li>In mergers, the notifying party will be asked to prepare non-confidential versions of notification documents.</li> <li>Parties may also request that certain information be kept confidential. Third party submissions are similarly protected.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>Commission is obligated to protect confidentiality.</li> <li>Parties may attempt to substantiate claims of confidentiality and submit non-confidential versions of information.</li> <li>Confidentiality may not apply if a piece of evidence is exculpatory or inculpatory.</li> <li>Communication between counsel and client may be protected by the legal professional privilege, but the lawyer cannot be in-house.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>Party may request access to data if it is considered to be in the public’s interest.</li> <li>The party that provided the original data must consent to the disclosure.</li> </ul>

		<ul style="list-style-type: none"> <li>• This makes it practically difficult to obtain confidential data.</li> </ul>
Taiwan	Yes	<ul style="list-style-type: none"> <li>• Records are kept confidential when it concerns national security, personal privacy, occupational and trade secrets, information that would likely result in the infringement of rights of a third party, and information that is likely to result in serious impairment of public interest.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• Both the FTC and DOJ protect the statutory confidentiality of information obtained through the compulsory process. Furthermore, commercial information is specifically exempt from Freedom of Information Act requests.</li> <li>• If a party produces sensitive information in a non-compulsory manner, they may request that the information be kept confidential.</li> <li>• Material used during trial may become public.</li> <li>• Grand jury deliberations are kept confidential unless authorized by the court.</li> </ul>

11. *Does agency provide timely access to confidential information critical for parties to prepare a defense?*

Jurisdiction	Effective access to confidential information?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• During case investigations, confidential information is classified as “protected information” or “protected cartel information.” The former may be disclosed under certain circumstances, including the consent of the provider, while the latter may not be disclosed unless the ACCC is ordered by a court to do so.</li> <li>• During court proceedings, a party can request information obtained by the ACCC if that information may be useful for the party’s case. The party may seek a court order to compel the ACCC to produce such information.</li> </ul>

Canada	Yes	<ul style="list-style-type: none"> <li>Once a matter proceeds to criminal prosecution, the Federal Court Rules govern discovery.</li> <li>60 days before a hearing, a party must serve every other party all documents that they intend to rely on at a hearing, noting any waivers of privilege claimed.</li> </ul>
China	No	<ul style="list-style-type: none"> <li>There is no right to be informed that SAMR will use confidential information during review.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>Parties seeking confidential information can negotiate a “confidentiality ring” agreement with the provider of such information. If the Commission approves, then the agreement will facilitate the sharing of confidential information among a select group of individuals for legitimate purposes.</li> </ul>
Korea	Problematic	<ul style="list-style-type: none"> <li>In practice, it is difficult to gain access to confidential information, primarily because the party that provides the information may refuse consent to release the information.</li> </ul>
Taiwan	Yes*	<ul style="list-style-type: none"> <li>Until the investigation is officially opened by the TFTC, parties do not have a formal way to access information.</li> <li>Once the investigation is official, the onus of access the information is on the party.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>Obtainable through the discovery process.</li> </ul>

12. *Do parties under investigation have opportunity to consult with the agency on legal, factual, or procedural issues?*

Jurisdiction	Effective consultation?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>Parties can get informal guidance regarding mergers from the ACCC prior to notification. Because Australia does not require mandatory notification, the informal guidance can effectively serve as guidance for how the ACCC will act.</li> <li>ACCC encourages parties to discuss the merger with the agency prior to filing notification.</li> </ul>

		<ul style="list-style-type: none"> <li>• For restraint of trade/dominance matters, the ACCC encourages parties to get informal guidance from the agency before notification. However, the ACCC will not give informal guidance for the likely outcome of a request for authorization.</li> </ul>
Canada	Problematic	<ul style="list-style-type: none"> <li>• Investigations are private.</li> <li>• In mergers, parties may apply for information discussion. But no guidance is offered until after notification or a request for an Advance Ruling Certificate.</li> <li>• In other matters, parties may apply for a binding opinion regarding conduct. This is rarely used in practice.</li> </ul>
China	Problematic	<ul style="list-style-type: none"> <li>• Parties may consult with the agency before filing notification for mergers.</li> <li>• However, the agency is not obligated to notify parties under investigation for monopoly and abuse of dominance. This means that, often, by the time parties are notified of the allegations, the investigation is already completed.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>• Commission offers State of Play meetings to inform parties under investigation of the current situation.</li> <li>• These meetings are offered at crucial points of the investigation.</li> <li>• When appropriate, the Commission will hold such meetings with the complainant (or a third party) and the investigated parties in attendance.</li> <li>• When appropriate, investigated parties may discuss the case with senior members of the Commission or the Commissioner.</li> </ul>
Korea	Yes	<ul style="list-style-type: none"> <li>• For planned mergers, parties can ask the KFTC to review before notification is filed.</li> <li>• In restraint of trade and dominance investigations, the parties can request the KFTC for guidance on whether the activity would violate the law.</li> </ul>

Taiwan	Yes	<ul style="list-style-type: none"> <li>• TFTC provides parties with opportunities to consult with the agency regarding important issues during the investigation.</li> <li>• The TFTC may also hold public hearings.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• For mergers, parties can seek the advice of the DOJ and FTC before notification.</li> <li>• There is no formal hearing before the agencies file a complaint.</li> <li>• For DOJ investigations, party does not have absolute right to consult with the agency. However, the opportunity is almost always extended to the party.</li> <li>• For FTC investigations, parties may request meetings with agency staff. However, parties may not have ex parte communication with agency staff after the FTC issues an administrative complaint.</li> </ul>

**B. Transparency issues:**

1. *Is the jurisdiction’s competition law enforcement effectively transparent? What kinds of non-competition agency reviews are parties subject to?*

Jurisdiction	Effective transparency?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>• Civil and criminal penalties require court litigation, resulting in a high level of transparency.</li> <li>• The ACCC publishes outcome and reasoning for formal merger authorization.</li> <li>• For informal merger clearance, the ACCC publishes limited information, including findings.</li> <li>• Mergers involving foreign parties are subject to national interest review by the Foreign Investment Review Board.</li> <li>• Several industries (e.g. financial, media, aviation, shipping, and telecommunications) are also subject to special government investigations.</li> </ul>
Canada	Yes	<ul style="list-style-type: none"> <li>• Because sanctions require court litigation, there is a high level of transparency when it comes to imposing sanctions.</li> </ul>

		<ul style="list-style-type: none"> <li>• Mergers are subject to broad review under Investment Canada Act when it concerns national security.</li> <li>• Mergers may also be reviewed if Canadian businesses above certain financial thresholds will be controlled by non-Canadians. Certain cultural industries are subject to lower financial thresholds.</li> </ul>
China	No	<ul style="list-style-type: none"> <li>• Although China’s competition enforcement is trending towards transparency, great challenges remain.</li> <li>• Historically, the legal reasoning and theories for decisions have not always been articulated sufficiently.</li> <li>• Parties often complain that notices often do not set forth sufficient details on the legal theories of harm.</li> <li>• Competition authorities consult other bureaus and stakeholders without making the input public.</li> <li>• China’s merger controls are subject to two opaque processes: foreign investment review and national security review. The former is a negative list. If a merger involves industries not on the negative list, then it would be approved. If it is on the list, then it will be reviewed on a case-by-case basis.</li> <li>• A national security review considers matters of national defense, national economy, and technology development in China.</li> <li>• China’s restraint of trade/dominance controls are subject to generous exceptions, including any purpose prescribed by the State Council.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>• The Commission’s concerns and allegations are officially transmitted to the parties through a Statement of Objections. The Statement of Objections must contain all relevant documents. Those not mentioned are not valid evidence in the final decision.</li> <li>• All decisions adopted by the Commission are published.</li> </ul>

		<ul style="list-style-type: none"> <li>• Before parties enter commitments, the Commission will publish the details for public commentary and the market test.</li> <li>• Hearing Officer’s final report is published.</li> <li>• Member states may intervene for legitimate purposes, such as public security, plurality of media, and prudential rules.</li> <li>• While there is no investment review at the EU level, member states may have legislation that permits oversight. Member states retain ultimate power to decide if an investment is allowed.</li> <li>• There are industry-specific block exemptions for restraint of trade investigations.</li> </ul>
Korea	Problematic	<ul style="list-style-type: none"> <li>• High (some argue excessive) levels of protection for confidential information.</li> <li>• While there is no general authorization to prevent a merger for national interest reasons, there are exceptions.</li> <li>• The Foreign Investment Promotion Act allows the government to stop a merger if a foreign company poses a danger to public order. There are also restrictions to mergers involving telecommunications and financial industries. Foreign companies that acquire 10% or more of a Korean company must report to the Ministry of Trade, Industry, and Energy.</li> </ul>
Taiwan	Yes	<ul style="list-style-type: none"> <li>• The TFTC publishes all decisions, including majority and dissenting opinions.</li> <li>• Parties can request access to case files, and hearings are generally open to the public.</li> <li>• However, there is concern that the TFTC redacts too much information when parties access documents. This leads some parties to believe they do not have the ability to adequately prepare defenses.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• Because enforcement requires public court hearings, there is a high level of transparency in the system.</li> </ul>

		<ul style="list-style-type: none"> <li>Foreign investments into American businesses that would result in foreign control of the business can trigger a CFIUS review for national security concerns. CFIUS may negotiate with the parties to mitigate the concerns. If the concerns are not mitigated, the President may block the merger or, undo a completed merger if CFIUS recommends such action.</li> </ul>
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2. *Are final decisions available in writing?*

Jurisdiction	Decisions available in writing?	Notes
Australia	Yes	<ul style="list-style-type: none"> <li>For merger investigations, the ACCC publishes limited information regarding informal clearance.</li> <li>Decisions made during pre-assessment or application for confidential clearance are kept confidential.</li> <li>For formal clearances, all relevant information, along with documents provided to the ACCC and the ACCC’s reasoning, are published on the agency’s website.</li> <li>For restraint of trade and dominance investigations and in respect to written decisions, ACCC investigations can result in the agency issuing a letter of closing of the investigation or a letter of warning.</li> <li>If the matter is referred to courts for civil penalties or CDPP for criminal charges, the final written decisions will be issued by the appropriate court.</li> </ul>
Canada	Problematic	<ul style="list-style-type: none"> <li>The Competition Bureau does not provide comprehensive information about merger decisions. It maintains a merger registry, but it only provides information about the parties, industry, and result.</li> <li>Sometimes the Competition Bureau will publish position statements for high profile mergers.</li> <li>By law, the Competition Tribunal is not required to make available written decisions or written reasoning.</li> </ul>



		<ul style="list-style-type: none"> <li>• However, in practice, written reasoning is given for nearly all decisions and is available on the Competition Tribunal’s website.</li> </ul>
China	Problematic	<ul style="list-style-type: none"> <li>• SAMR is required to publish decisions when it finds against proposed mergers or imposes restrictions. However, there is concern with the sufficiency of reasoning set forth in the decisions.</li> <li>• For approved mergers, SAMR publishes quarterly reports on its website. These only include the identity of the parties and not the reasoning.</li> <li>• For monopoly and abuse of dominance investigations, SAMR publishes administrative decisions on its website.</li> <li>• The quality of the decisions has been inconsistent. Common complaints include a lack of detail as to the reasons and legal principles for the decision. However, SAMR seems to be trending towards providing more complete and reasoned decisions.</li> </ul>
EU	Yes	<ul style="list-style-type: none"> <li>• All decisions are sent in full to the parties and published. Decisions state name of parties, content of decision, and penalties imposed. Non-confidential versions of decisions are published on websites.</li> <li>• For commitments, Commission will publish a notice of the commitment in the Official Journal and the full text of the commitment for a market test on the Commission’s website.</li> <li>• Press releases are published after the Commission adopts a decision.</li> <li>• Hearing Officer’s final report and opinion to the advisory committee is published in the Official Journal.</li> <li>• If a complaint was rejected, the Commission will publish rejection decisions.</li> </ul>
Korea	Problematic	<ul style="list-style-type: none"> <li>• If no violation is found on a matter, the KFTC does not publicly issue a written decision.</li> <li>• In principle, the KFTC will provide written decisions when it finds reason to impose a penalty. The written decision should include the reasoning.</li> </ul>

		<ul style="list-style-type: none"> <li>• However, there are substantial critiques that the KFTC’s approach to decisions has been insufficient.</li> <li>• The legislature has passed an amendment in May of 2020 to increase the amount of information the KFTC must supply regarding its decisions. This amendment has not been signed into law yet.</li> </ul>
Taiwan	Yes	<ul style="list-style-type: none"> <li>• All case decisions are published on the TFTC’s website in Chinese. Majority and dissenting opinions are published together, along with procedural disposition.</li> <li>• TFTC may translate decisions into relevant languages.</li> </ul>
USA	Yes	<ul style="list-style-type: none"> <li>• Decisions of the FTC administrative hearing and federal courts are public documents.</li> <li>• All consent decrees involve publication of the complaint, agreement, and documents.</li> <li>• Consent decrees with the DOJ are governed by the Tunney Act, which requires all DOJ settlements to be published in the Federal Register and subject to public comment for 60 days, and then approved by a federal district court judge.</li> <li>• The DOJ must file a Competitive Impact Statement.</li> <li>• If there is a consent order the FTC is required to publish the agreement and analysis in the Federal Register and subject to public comment for 30 days.</li> <li>• If the FTC does not take enforcement action, the closing letter is usually public.</li> </ul>

**C. Comity issues:**

1. *What information exchange and cooperation agreements are in place for each jurisdiction?*

Jurisdiction	Information Exchange
Australia	<ul style="list-style-type: none"> <li>• Cooperation agreements with Canada, China, the EU, Fiji, India, Japan, Korea, New Zealand, the Philippines, Papua New Guinea, Taiwan, the UK, and the United States.</li> <li>• MOU with the United States.</li> <li>• Treaty with the United States.</li> </ul>

	<ul style="list-style-type: none"> <li>• Member of the International Competition Network.</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• Cooperation agreements with Australia, Brazil, the EU, Japan, Korea, New Zealand, United States.</li> <li>• Art. 21 Competition Policy Chapter of the U.S.-Mexico-Canada FTA.</li> <li>• MOU with Chile, China, Colombia, Hong Kong, India, Taiwan.</li> <li>• Member of the International Competition Network.</li> </ul>
China	<ul style="list-style-type: none"> <li>• MOUs with Australia, Brazil, Canada, the EU, France, Japan, Kazakhstan, Kenya, Mongolia, Portugal, Romania, Russia, South Africa, South Korea, Thailand, the UK, United States, and Vietnam.</li> </ul>
EU	<ul style="list-style-type: none"> <li>• Cooperation agreements with Canada, China, Japan, Korea, and the United States.</li> <li>• Cooperates and transmits all important documents with the national competition authorities of EU member states.</li> <li>• Member of the International Competition Network.</li> </ul>
Korea	<ul style="list-style-type: none"> <li>• MOUs with Australia, Brazil, Canada, China, the EU, Indonesia, Japan, Mexico, Romania, Russia, Turkey, and the United States.</li> <li>• Art. 16 Competition Policy Chapter of the U.S.-Korea FTA.</li> <li>• Letter of Intent: Estonia, Hungary, Latvia, Lithuania, Romania.</li> <li>• Statutory authority: MRFTA Art. 36.2</li> <li>• Member of the International Competition Network.</li> </ul>
Taiwan	<ul style="list-style-type: none"> <li>• Bilateral cooperation agreements with Australia, Hungary, Panama, and New Zealand.</li> <li>• MOUs with Canada, France, Japan, and Mongolia.</li> <li>• Member of the International Competition Network.</li> </ul>
USA	<ul style="list-style-type: none"> <li>• MOUs and cooperation agreements with Australia, Brazil, Canada, Chile, China, Colombia, the EU, Germany, India, Israel, Japan, Mexico, Peru, Russia, and South Korea.</li> <li>• Art. 16 Competition Policy Chapter of the U.S.-Korea FTA.</li> <li>• Art. 21 Competition Policy Chapter of the U.S.-Mexico-Canada FTA.</li> <li>• Member of the International Competition Network.</li> </ul>

#### D. Potential reforms and changes under discussion:

This final section presents a brief overview of some of the proposed reform and change measures under discussion in each jurisdiction. This list is not exhaustive and makes no representation on the likelihood of the reform being implemented.

Jurisdiction	Proposed Reforms and Changes
Australia	<ul style="list-style-type: none"> <li>• Consumer protection related to digital products and services.</li> <li>• Creating a rebuttable presumption that a merger decreases competition unless proven otherwise.</li> </ul>
Canada	<ul style="list-style-type: none"> <li>• Allowing merger parties that raise efficiency concerns to agree to timing agreements.</li> </ul>
China	<ul style="list-style-type: none"> <li>• Defining “control” for mergers.</li> <li>• Increasing civil and criminal penalties across the board.</li> <li>• Adjusting merger filing threshold.</li> <li>• Giving authorities the ability to stop the clock for more time during investigations.</li> </ul>
EU	<ul style="list-style-type: none"> <li>• Various proposals to address digital markets, especially rethinking the proof necessary to demonstrate harm to consumers.</li> <li>• Proposals regarding new vertical block agreements and a review of horizontal block exemptions.</li> <li>• Guidelines to help companies handle the Commission’s requests for voluminous records and documents.</li> </ul>
Korea	<ul style="list-style-type: none"> <li>• The amendment bills of 2020 contain sweeping changes (yet to be signed as of November 2020), key changes are summarized in the following bullet points.</li> <li>• Repeal of KFTC’s exclusive criminal referral authorities in hardcore cartel cases.</li> <li>• Increases party access to data files.</li> <li>• Increases KFTC’s obligation to provide details on decisions.</li> <li>• Addition of civil remedies.</li> <li>• Increases maximum administrative fines.</li> </ul>
Taiwan	<ul style="list-style-type: none"> <li>• Increase fines for failure to comply with TFTC merger orders.</li> <li>• Suspend statute of limitations once investigations start.</li> </ul>
USA	<ul style="list-style-type: none"> <li>• New vertical merger guidelines have been released, but how they will be implemented remains to be seen.</li> </ul>

## COMPETITION REGULATORY AGENCY REVIEW: AUSTRALIA

Major Sources:

[Australian Competition and Consumer Commission \(ACCC\)](#)

[Australian Competition Tribunal](#)

[Competition Laws in Australia](#)

[Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2](#)

[Practical Law: Australia](#)

<b>Due Process Questions</b>	
Question	Answer and Source
<p>Are the country’s current laws, any implementing regulations and the regulatory agency’s procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?</p>	<p>Yes</p> <p>All the current laws and regulations are available on the Australian Competition Tribunal website under <a href="#">Legislation</a> which links to <a href="#">Federal Register of Legislation</a></p> <p>[The legislation is available online from multiple sources, including that listed above. Also, no direct link above to the Act or Regs themselves.</p> <p>Competition and Consumer Act 2010:  <a href="https://www.legislation.gov.au/Details/C2020C00352">https://www.legislation.gov.au/Details/C2020C00352</a>                      Competition and Consumer Regulations 2010  <a href="https://www.legislation.gov.au/Details/F2020C00650">https://www.legislation.gov.au/Details/F2020C00650</a> ]</p>
<p>If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?</p>	<p>“In Australia, the courts, for the most part, are required to assess the effect or likely effect of conduct on the competitive process without regard to efficiency, except where the efficiencies will have a bearing on the future state of competition in the market.”  <a href="#">Competition Law in Australia Ch. 1.320 Efficiency and the role of the courts</a></p> <p>“The ACCC ...are afforded a high degree of independence from political oversight... [T]his high degree of independence is attended by extensive due process obligations, particularly in relation to consultation on decision-making. The result is that the decision-making process—particularly in relation to regulatory determinations—is frequently extremely protracted.”<a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2.</a></p> <p>“Australian and New Zealand legislatures have consciously traded timeliness and efficiency in favor of due process rights for interested parties.”<a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2.</a></p> <p>Timeliness – the ACCC’s investigations and the resolution of enforcement matters are done as efficiently as possible to avoid costly delays and uncertainty for business. 2020 Compliance and Enforcement Policy and Priorities p.3,</p>

<https://www.accc.gov.au/system/files/Compliance%20and%20Enforcement%20Policy%202020.pdf>

Initial investigations will usually be commenced and completed within a 3 month period, while in-depth investigations will usually be commenced and completed within a 12 month period. See, ACCC Investigative Stages and Timeframes, <https://www.accc.gov.au/system/files/ACCC%20Investigative%20stages%20and%20timeframes.pdf>

**Table 2.1 Duration of investigations**

	ACCC		NZCC			
	2008	2010	2011	2008	2010	2011
Average length of dominance investigation	15 months	11.6 months	No info	36 months	19 months	10 months
Average length of cartel investigation	36 months	24.9 months	No info	26 months	10.5 months (cases closed)	5.3 months (cases closed)
					19.5 months (litigation)	10.6 months (litigation)
Longest running investigation	91 months	21 months	17 months	96 months	22 months	No info

Source: Global Competition Review, Rating Enforcement 2008, Rating Enforcement 2010, Rating Enforcement 2011.<sup>237</sup>

[Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2 .](#)

When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:

- information about the regulatory agency’s allegations and competition concerns, including the legal and factual basis for the allegations;
- the opportunity to be represented by counsel;
- the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;

- Formal requirements for a valid s. 155 notice  
It is the ACCC’s practice that a s. 155 notice requiring the recipient to furnish information or produce documents will:
  - identify the matter that constitutes or may constitute a contravention of the CCA;
  - specify the information or documents sought in enough detail to enable the recipient to know what is required; and
  - request information or documents that relate to the matter.

Where a s. 155 notice requires a person to give evidence on a certain date (i.e. attend an oral examination), the description of the matter in the notice determines the scope of the questions that the ACCC can ask at the examination.

Given the investigative nature of the s. 155 notice, there is no requirement that it will set out all the facts necessary to constitute a contravention or possible contravention. Nor is it necessary to set out the relevant evidence or information on which the ACCC based its decision to issue the notice.

The matter that constitutes, or may constitute, a contravention of the CCA is to be described simply but in enough detail for it to be evident on the face of the s. 155 notice that the recipient is capable of furnishing information, producing documents or giving evidence relating to the matter.

[ACCC Guidelines Use of Section 155 Powers](#), p. 5-6.

- the case files.

- Information about regulatory agency’s allegation: “The description of the matter is especially important in relation to a s 155(1)(c) notice (s 155 is the ACCC's compulsory information-gathering mechanism; s 155(1)(c) is notice to appear before the Competition Commission to give evidence), since it will determine the scope of the oral examination. Questions asked during the oral examination that are outside the scope of the matter or contravention as it is described in the notice can be objected to on the ground that they are not relevant to the investigation. It may be possible to object to the adequacy of the description of the matter or alleged contravention in the notice on the ground that it lacks specificity.” [Competition Law in Australia 16.160 Formal requirements of a notice.](#)

- The exercise of s. 155 powers by the ACCC is subject to judicial review by the Federal Court of Australia and there are limits on the ACCC’s s. 155 powers and requirements that the ACCC must follow in order for a s. 155 notice to be valid. Section 155 Guide: A basic guide for individuals and small businesses, p. 5, <https://www.accc.gov.au/system/files/1582%20Section%20155%20notices%20FA.pdf>

- The opportunity to be represented by counsel: “The CCA is silent on the question of whether the examinee is entitled to be legally represented.” [Competition Law in Australia 16.240 Legal representation](#)

- As a matter of procedural fairness, the ACCC will permit an examinee the assistance of a legal adviser when ordered to appear before the Commission. The s. 155 notice will be issued with a covering letter outlining that the examinee may have their legal adviser present, subject to such reasonable conditions as the ACCC may wish to impose (e.g. the provision of a confidentiality undertaking by the legal adviser). While an examinee is generally permitted to be legally represented, there may be objections to a particular legal adviser if that legal adviser’s presence would prejudice or has the potential to prejudice the investigation—for example, where:

- the legal adviser is being instructed by more than one examinee in the same matter;
- the legal adviser also acts for the subject of the investigation, not being the examinee;
- the legal adviser declines to give an undertaking not to disclose the content of the examination to any person other than the examinee until such time as the ACCC has concluded its inquiry or otherwise consents; or
- the legal adviser may themselves be at a real risk of investigation by the ACCC in relation to the matter.

An examinee is entitled to a legal adviser in an examination and it will not usually be appropriate for in-house lawyers and other representatives of an examinee’s employer to attend an examination due to the likelihood of there being a conflict of interest. The examinee’s legal adviser will normally only be permitted to:

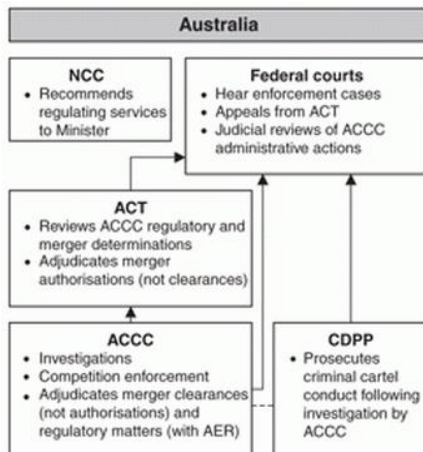
- object to questions asked as being unclear, unfair, likely to reveal information over which a claim of legal professional privilege could properly be made, or irrelevant to the subject matter of the examination;
- re-examine the examinee to clarify any response to an earlier question; or

	<ul style="list-style-type: none"> <li>- make submissions on any relevant matter at the completion of the examination.</li> </ul> <p>A legal adviser who prejudices the examination—for example, by continually objecting on minor issues to the extent of being obstructive—may be excluded.</p> <p>ACCC Guidelines – use of s 155 powers, p. 12, <a href="#">ACCC Guidelines Use of Section 155 Powers</a></p> <ul style="list-style-type: none"> <li>- Accordingly, ordinary rights of criminal defense do not necessarily apply, or apply to the same extent, which leads to a degree of tension around expectations of fairness in the investigatory process. Due process in investigations arises from express statutory protections in the empowering legislation and administrative law principles of natural justice. <a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2.</a></li> <li>- Can create a "reasonable search" defense for search requests section 155 issues. <a href="#">ACCC Section 155 Notices.</a></li> <li>- In Australia, the ACCC’s compulsory investigative powers are extinguished at the point at which it commences court proceedings in relation to a matter. <a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2.</a></li> <li>- If an in-depth investigation concludes that there is a contravention of the Act, the enforcement actions can include commencing litigation, and for cartel offences may include criminal prosecution. In either case, there is an opportunity to be represented by counsel. See, ACCC Investigative Stages and Timeframes, <a href="https://www.accc.gov.au/system/files/ACCC%20Investigative%20stages%20and%20timeframes.pdf">https://www.accc.gov.au/system/files/ACCC%20Investigative%20stages%20and%20timeframes.pdf</a></li> </ul>
<p>Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?</p> <ul style="list-style-type: none"> <li>- Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?</li> </ul>	<p>Section 155 provides the procedure for evidence necessary for investigations. <a href="#">ACCC Guidelines Use of Section 155 Powers</a>. Investigations are conducted in accordance with the Australian Government Investigation Standards 2011. <a href="https://www.ag.gov.au/integrity/publications/australian-government-investigations-standards-2011">https://www.ag.gov.au/integrity/publications/australian-government-investigations-standards-2011</a></p> <p>Post-ACCC investigation civil or criminal proceedings are conducted under the rules of procedure and evidence of the relevant courts hearing the matter.</p> <p>A respondent to an action instituted by the ACCC for pecuniary penalties for a contravention of Pt IV is entitled, as part of the litigation process, to discovery against the ACCC. The Federal Court Rules 2011 provide for the usual discovery mechanisms where litigation is commenced by the ACCC against a corporation for a contravention of Pt IV. <a href="#">Competition Law in Australia 16.370 Discovery against the ACCC.</a></p>
<p>Does the country’s current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek</p>	<p>Yes.</p> <p>In Australia, the Australian Competition Tribunal (“ACT”) reviews adjudicative determinations made by the ACCC. Furthermore, the National Competition Council (“NCC”) works in parallel to the ACCC, investigating and making recommendations to</p>



review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country's laws?

Ministers about the desirability of designating services under the Competition and Consumer Act's Part IIIA access regime. Finally, the Australian Energy Regulator ("AER"), a constituent part of the ACCC, has jurisdiction over certain regulatory matters pertaining to the electricity and gas sectors.



[Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2.](#)

Both the defendant and the ACCC have leave to appeal a decision of the Federal Court of Australia either imposing a sanction or dismissing the ACCC action. The High Court of Australia can take on or refuse the appeal.

Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?

“The ACCC's Cooperation Policy for Enforcement Matters (2002) (Cooperation Policy) applies to all potential contraventions of Pt IV,4 except for cartel conduct, which is dealt with under a separate policy. In short, the Cooperation Policy offers leniency to those who cooperate with the ACCC. The policy applies to individual conduct and corporate conduct. The potential for lenient treatment (including immunity) is designed to encourage the voluntary disclosure of information and to promote the efficient resolution of litigation.” [Competition Laws in Australia 16.40 Cooperation policy.](#)

Immunity under the cartel provisions may be available to the first member of the cartel to come forward, only if they are not on notice of an investigation into the cartel behaviour.

Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?

“At common law, legal professional privilege constitutes a protection from legal compulsion to disclose confidential communications between a client and the client's legal advisers where the communication was made for the dominant purpose of seeking legal advice, or for the dominant purpose of use in relation to the conduct of existing or anticipated proceedings in a court of law or administrative body.” [Competition Law in Australia 16.200 Legal professional privilege.](#)

- If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow

The confidentiality of material provided by a recipient of a notice, including information that may be commercially sensitive, is protected by the provisions of s. 155AAA. The ACCC may use and disclose such material only in accordance with those provisions. Disclosure may be made to relevant Ministers and agencies (such as the Australian Prudential Regulatory Authority or Director of

<p>the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?</p>	<p>Public Prosecutions), by consent, if the information becomes publicly available, or disclosure of statistics or summaries that would not serve to identify any individual. See, ACCC Guidelines – use of s 155 powers, p. 14, <a href="https://www.accc.gov.au/system/files/1582RPT_ACCC%20Guidelines-Use%20of%20section%20155%20powers_FAJune20.pdf">https://www.accc.gov.au/system/files/1582RPT_ACCC%20Guidelines-Use%20of%20section%20155%20powers_FAJune20.pdf</a>; s. 155, <a href="https://pinpoint.cch.com.au/360document/legauUio1069681sl156244679/section-155aaa-protection-of-certain-information/overview">https://pinpoint.cch.com.au/360document/legauUio1069681sl156244679/section-155aaa-protection-of-certain-information/overview</a></p> <p>“Subject to s 155AAA, the CCA provides no limits on the use the ACCC can make of the information, documents or evidence that it obtains pursuant to its s 155 powers, although s 155AAA imposes some restriction on the disclosure of information.” <a href="#">Competition Law in Australia 16.290 Use of information by the ACCC.</a></p> <p>“... the ACCC is of the view that the exercise of its investigative powers under s 155 is confidential and asks the recipients of notices under s 155(1) (a) and (b) to refrain from disclosing or discussing the contents of its Notices and the responses to its Notices with any person other than the recipient's legal practitioner (for the purpose of obtaining legal advice).” <a href="#">Competition Law in Australia 16.210 Confidential compliance.</a></p>
<p>Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?</p>	<p>“A recipient of a notice cannot challenge the validity of a s 155 notice under the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth), unless there is some evidence that the belief is not, in fact, held.<sup>85</sup> However, the notice may be set aside under s 16 of the <i>Administrative Decisions (Judicial Review) Act 1977</i> (Cth) if there is a deficiency in the notice. In <i>Korean Air Lines Co Ltd v ACCC (No 3)</i>,<sup>86</sup> it was alleged that the notice was issued not for the purpose of gathering evidence to enable the ACCC to determine whether it had sufficient evidence to establish a contravention of the Act, but rather to determine the extent of the contraventions for the purposes of establishing the penalty that should be imposed on Korean Air Lines, or for the purpose of obtaining evidence.” <a href="#">Competition Law in Australia 15.270 Judicial review by the Federal Court</a></p> <p>The ACCC takes great care in drafting and issuing notices and seeks to avoid providing parties with a basis for judicial review of a notice. If you have any concerns about the burden, scope and/or terms of a notice, the ACCC encourages you to make contact with the relevant ACCC officer named in the notice and cover letter as soon as possible after receipt of the notice. Section 155 Guide: A basic guide for individuals and small businesses, p. 5, <a href="https://www.accc.gov.au/system/files/1582%20Section%20155%20notices%20FA.pdf">https://www.accc.gov.au/system/files/1582%20Section%20155%20notices%20FA.pdf</a></p>

## Transparency

<p>Does the current law ensure transparency of national competition laws, policies and enforcement activities?</p>	<p>Yes.</p> <p>“agencies periodically update their guidelines and produce new guidelines on emerging issues. During that process they will usually publish draft versions of the guidelines for public comment.” <a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2.</a></p> <p>Principles and approaches underlying this policy</p>
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	<p>The ACCC exercises its enforcement powers independently, in the public interest, and with integrity and professionalism. The following principles govern our compliance and enforcement work:</p> <p>Accountability – the ACCC’s decision-making takes place within rigorous corporate governance processes, and our actions can be reviewed by a range of agencies including the Commonwealth Ombudsman, Parliamentary Committees and the courts.</p> <p>Transparency – the ACCC does not do private deals – enforcement matters that are finalised by litigation or other formal resolution are made public because we are transparent about what action we take and why. ... 2020 Compliance and Enforcement Policy and Priorities, p.2,  <a href="https://www.accc.gov.au/system/files/Compliance%20and%20Enforcement%20Policy%202020.pdf">https://www.accc.gov.au/system/files/Compliance%20and%20Enforcement%20Policy%202020.pdf</a></p>
<p>Does the national law and regulatory agency’s procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?</p>	<p>Section 157 of the CCA is supplementary to discovery against the ACCC under the <i>Federal Court Rules 2011</i> and is intended to ensure that in cases where a pecuniary penalty or authorisation is involved, the corporation is to be treated fairly and is to be given copies of documents which the ACCC has and which would support the corporation's case. However, where the documents contain “protected cartel information” the ACCC may refuse to provide the information. <a href="#">Competition Law in Australia 16.380 General rules: s 157.</a></p> <p>Final decisions are taken by the courts, the decisions of which are reasoned and in writing.</p>
<p>Does the national law and regulatory agency’s procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?</p>	<p>“Both agencies publish press releases about significant decisions or events through their websites, including receipt of applications for clearances or authorization, the initiation of investigations, and the commencement of enforcement proceedings. Generally speaking the agencies will also publicize decisions to settle or discontinue proceedings, and often a public statement will be one of the conditions of settlement, though the level of detail of these releases varies. On the other hand, the agencies are less thorough in their coverage of court decisions that go against them, or decisions to close investigations that have not produced sufficient evidence to warrant enforcement proceedings.” <a href="#">Peart Australia &amp; New Zealand The Design of Competition Law Institutions Ch. 2</a></p> <p>Again, final decisions and orders pursuant thereto are taken by the courts, and are published in accordance with the rules of the relevant court.</p>

## Comity Questions

Do the country's government and competition authorities:

- cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and
- cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information with other national competition authorities?

Yes. International cooperative agreements can be found [here](#)

### **United States and Australia**

The parties intend to assist one another and cooperate on a reciprocal basis in providing or obtaining antitrust evidence that may assist in determining whether a person has violated or is about to violate respective antitrust laws. The Australia United States mutual antitrust enforcement assistance agreement [The Australia United States mutual antitrust enforcement assistance agreement](#), [Agreement between the Government of Australia & the Government of the United States of America relating to cooperation & antitrust matters](#), and [Memorandum of Cooperation between the Federal Bureau of Investigation and the Australian Competition & Consumer Commission](#)

### **Canada, New Zealand, and Australia**

Cooperation arrangement between Canada, NZ, and Australia for cooperation on competition laws. [Cooperation agreement between The Commissioner of Competition \(Canada\), the Australian Competition & Consumer Commission & New Zealand Commerce Commission regarding the application of their competition & consumer laws](#).

### **China and Australia**

The parties (Australia and China) coordinate competition law and policy including enforcement. [Memorandum of understanding between the National Development and Reform Commission and the Australian Competition and Consumer Commission](#)

### **European Union and Australia**

Formed an international agreement in accordance to the OECD guidelines on restrictive business practices, Agreement to technical barriers to trade, and the objective of the United Nations Guidelines for Consumer protection. [Arrangement for information sharing on consumer policy & protection between the Government of Australia & the European Commission](#)

Additional:

Fiji Islands

India

Japan

Papua New Guinea

Philippines

Korea

## COMPETITION REGULATORY AGENCY REVIEW: CANADA

### Review Criteria:

The criteria for reviewing and evaluating individual agencies will be based on the following set of uniform questions for each individual agency:

### **Due Process:**

- **Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes. All laws, regulations, and procedural rules are in written form and available to the public through the websites of the Competition Bureau Canada and the Competition Tribunal. They are also archived for public access on the Justice Laws Website.

The main laws include the Competition Act (*R.S.C., 1985, c. C-34*), the Competition Tribunal Act (*R.S.C., 1985, c. 19 (2nd Supp.)*), together with the accompanying: Competition Tribunal Rules (*SOR/2008-141*) and Competition Regulations (*SOR/2000-324*). The Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service (*SOR/2000-324*), and the Notifiable Transactions Regulations (*SOR/87-348*) are also important. Also important are Canada's Federal Courts Rules (*SOR/98-106*)

All of these are available in English and French. As explained below, some prior decisions and opinions are also published.

### Competition Act

R.S.C., 1985, c. C-34

<https://laws.justice.gc.ca/eng/acts/C-34/FullText.html>

### *Publication of proposed regulations*

*(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the Canada Gazette at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.*

### Regulations Respecting Anti-Competitive Acts of Persons Operating a Domestic Service *SOR/2000-324*

<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2000-324/FullText.html>

### Notifiable Transactions Regulations

*SOR/87-348*

<https://laws-lois.justice.gc.ca/eng/regulations/SOR-87-348/page-1.html>

### Competition Tribunal Act

R.S.C., 1985, c. 19 (2nd Supp.)

<https://laws.justice.gc.ca/eng/acts/C-36.4/FullText.html>

*Advance publication of rules and amendments*

17 Where the Tribunal proposes to make any rule under section 16, it shall give notice of the proposal by publishing it in the Canada Gazette and shall, in the notice, invite any interested person to make representations to it in writing with respect thereto within sixty days after the day of the publication; and may, after the expiration of the sixty days referred to in paragraph (a) and subject to the approval of the Governor in Council, implement the proposal either as originally published or as revised in such manner as the Tribunal deems advisable having regard to any representations so made to it.

Competition Tribunal Rules

SOR/2008-141

<https://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-141/FullText.html>

- **If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

“There are very few formal limitations on the amount of time the Bureau can take to initiate or conduct an investigation. Merger review is the exception to this as it is particularly time sensitive. Section 97 of the Competition Act states that an application to the Tribunal for merger review must be made within one year after the merger has been substantially completed [The Competition Act § 97]. Once a merger investigation has been initiated, the Act places further restrictions on waiting periods and specifies an inquiry length of forty-two days [Id., § 100.].

However, the Bureau has adopted service standards which allow investigations to take up to five months” [Competition Bureau, Competition Bureau Fee and Service Standards Policy, March 2003] (Canada the competition law system and the country’s norms, page 133).

The Competition Tribunal

The Tribunal’s constituting act provides that “all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit” [Competition Tribunal Act § 9(2)]. Despite this statutory direction the Tribunal has often focused on due process requirements at the expense of achieving administrative efficiency, resulting in higher costs and longer delays than were anticipated when the Tribunal was first created [Trebilcock and Iacobucci, “Designing Competition Law Institutions,” 2010, supra note 145 at 462; Campbell, Janisch, and Trebilcock, supra note 142 at 306]. (Canada the competition law system and the country’s norms, page 133).

The Tribunal is working to alter the balance between due process and timeliness by treating time limits for pleadings as mandatory, issuing scheduling orders which timetable the major pre-hearing steps and hearing date near the beginning of each proceeding, and refusing to grant extensions of time limits or adjournments of scheduled hearings unless persuasive reasons are offered [Campbell, Janisch and Trebilcock, supra note 142 at 306]. The Tribunal has also attempted to reduce the disruption and delay resulting from third party interventions in three major ways. Firstly, all applications to intervene (and notices of intervention by provincial attorneys general) must be made within sixty days after filing the notice of application [Competition Tribunal Rules § 37, 38, 42, 50]. Secondly, a prospective intervenor must indicate the matters at issue which affect it and the competitive consequences arising from those matters. Lastly, there is a presumption that intervenors (including provincial attorneys general) will be limited to attending and making submissions and motions at pre-hearing conferences and the main hearing unless broader participation is authorized by the Tribunal.” (Canada the competition law system and the country’s norms, page 133).

*Competition Act*  
*R.S.C., 1985, c. C-34*

For Mergers Only:

*Completion of inquiry*

*100 (8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.*

Extensions of Interim Orders are possible,

*R.S.C., 1985, c. C-34*

*Interim Order:*

*103.3 (1) Subject to subsection (2), the Tribunal may, on ex parte application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order (a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1; or (b) to prevent the taking of measures under section 82 or 83.*

*(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.*

*Competition Tribunal Rules*

*SOR/2008-141*

*Rules Applicable to All Proceedings*

*Dispensing with Compliance*

*Variation*

*2 (1) The Tribunal may dispense with, vary or supplement the application of any of these Rules in a particular case in order to deal with all matters as informally and expeditiously as the circumstances and considerations of fairness permit.*

*Urgent matters*

*(2) If a party considers that the circumstances require that an application be heard urgently or within a specified period, the party may request that the Tribunal give directions about how to proceed.*

- **When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**
  - **information about the regulatory agency's allegations and competition concerns, including the legal and factual basis for the allegations;**

Inquiries are performed by the Competition Bureau, "If the Bureau finds there has been a likely contravention of the Act then an application may be made to the Competition Tribunal for civilly reviewable matters and to the Attorney General for prosecution in the provincial courts of criminal jurisdiction for criminal matters." (Canada the competition law system and the country's norms, page 127). [The Competition Act § 10, 22].

Within the investigatory stage (Competition Bureau):

Information is provided only upon request. Unless requested, there is no notification provided of an investigation or its underlying basis. *See below.*

*Competition Act*  
*R.S.C., 1985, c. C-34*

*Information on inquiry*

10 (2) *The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.*

*Inquiries to be in private*

(3) *All inquiries under this section shall be conducted in private.*

*Discontinuance of inquiry*

22 (1) *At any stage of an inquiry under section 10, if the Commissioner is of the opinion that the matter being inquired into does not justify further inquiry, the Commissioner may discontinue the inquiry.*

*Report*

(2) *The Commissioner shall, on discontinuing an inquiry, make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry. Notice to applicant*

(3) *Where an inquiry made on application under section 9 is discontinued, the Commissioner shall inform the applicants of the decision and give the grounds therefor.*

Criminal courts (adjudicative stage)

*Federal Courts Rules (SOR/98-106)*

*General*

*Contents of application*

301 *An application shall be commenced by a notice of application in Form 301, setting out*

(a) *the name of the court to which the application is addressed;*

(b) *the names of the applicant and respondent;*

(c) *where the application is an application for judicial review,*

(i) *the tribunal in respect of which the application is made, and*

(ii) *the date and details of any order in respect of which judicial review is sought and the date on which it was first communicated to the applicant;*

(d) *a precise statement of the relief sought;*

(e) *a complete and concise statement of the grounds intended to be argued, including a reference to any statutory provision or rule to be relied on; and*

(f) *a list of the documentary evidence to be used at the hearing of the application.*

*Service of notice of application*

304 (1) *Unless the Court directs otherwise, within 10 days after the issuance of a notice of application, the applicant shall serve it on*

(a) *all respondents;*

(b) *in respect of an application for judicial review or an application appealing the order of a tribunal,*

(i) *in respect of an application other than one relating to a decision of a visa officer, the tribunal in respect of which the application is brought,*

(ii) *any other person who participated in the proceeding before the tribunal in respect of which the application is made, and*

(iii) *the Attorney General of Canada;*

(c) *where the application is made under the Access to Information Act, Part 1 of the Personal Information Protection and Electronic Documents Act, the Privacy Act or the Official Languages Act, the Commissioner named for the purposes of that Act; and*

(d) *any other person required to be served under an Act of Parliament pursuant to which the application is brought.*



### Competition Tribunal (adjudicative stage)

Because the Competition Tribunal is considered a court, *Federal Courts Rules (SOR/98-106)* rules 301 and 304 are also applicable.

More specifically, under the Competition Tribunal Rules, “*notice shall be served upon each respondent within five days of the application to the Tribunal being filed.*” (Competition Tribunal Rules, section 37).

Notice is also made by publication within the *Canada Gazette* and includes a statement that an application for an order has been made to the Tribunal; the name of each person the order is sought against; the particulars of the order sought; that the notice of application and accompanying documents may be examined at the office of the registrar; and the date on or before which a motion for leave to intervene must be filed. The application (complaint) and accompanying documents may be examined at the office of the Registrar. A copy of the notice must be served on each respondent within five days. (Competition Tribunal Rules, sections 25, 35, 36, 37).

#### *Competition Tribunal Rules*

*SOR/2008-141*

#### *Publication of Notice*

##### *Notice*

*25 (1) The Registrar shall, as soon as the notice of application under Part VIII of the Act has been filed, publish a notice*

*(a) in the Canada Gazette; and*

*(b) over a period of two weeks, in at least two issues of at least two daily newspapers designated by the Chairperson or a judicial member designated by the Chairperson.*

##### *Content*

*(2) The notice referred to in subrule (1) shall state*

*(a) that an application for an order has been made to the Tribunal;*

*(b) the name of each person against whom or in respect of whom the order is sought;*

*(c) the particulars of the order sought;*

*(d) that the notice of application and accompanying documents may be examined at the office of the Registrar; and*

*(e) the date on or before which a motion for leave to intervene must be filed.*

##### *Service of notice*

*37 (1) The applicant shall, within five days after a notice of application is filed, serve the notice on each respondent.*

- **the opportunity to be represented by counsel;**

Yes. “During an investigation, the Commissioner may apply to a judge for an order to have a person attend and be examined on oath or solemn affirmation if he has or is likely to have information relevant to the inquiry. Such persons may also be requested to produce a record or certified true copy of a document to the Commissioner, or make and deliver a written oath [The Competition Act § 11]. Any person examined pursuant to such an order and any person whose conduct is being inquired into has the right to representation by counsel” [Id. § 12(3)] (Canada the competition law system and the country’s norms, page 126.)

Additionally, the government may appoint counsel for inquiries originated by the Commissioner. “Whenever in the opinion of the Commissioner the public interest so requires, the commissioner may apply to the Attorney General of Canada to appoint and instruct counsel to assist in an inquiry under

*section 10, and on such an application the Attorney General of Canada may appoint and instruct counsel accordingly.” (Competition Act, section 21)*

Note, additionally that Section Ten of the Canadian Charter of Rights and Freedoms within the Constitution Act (1982) guarantees the right to counsel upon arrest and detention.

#### *Competition Act*

*R.S.C., 1985, c. C-34*

*12 (3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(a) and any person whose conduct is being inquired into to be represented by counsel.*

*(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(a) and that person’s counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would*

*(a) be prejudicial to the effective conduct of the examination or the inquiry; or*

*(b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.*

*21 Whenever in the opinion of the Commissioner the public interest so requires, the Commissioner may apply to the Attorney General of Canada to appoint and instruct counsel to assist in an inquiry under section 10, and on such an application the Attorney General of Canada may appoint and instruct counsel accordingly.*

Within the Competition Tribunal Act, there is no specific statement of a right to counsel; however, counsel is referenced throughout act as if automatic. For example:

#### Competition Tribunal

*Competition Tribunal Rules*

*SOR/2008-141*

*8(1)(e) in the case of a person referred to in any of paragraphs (a) to (d) who is represented by counsel, by leaving a certified copy of the originating document with the counsel who accepts service of the document.*

Additionally, the Competition Tribunal is considered a court. Per, Federal Courts Rules (SOR/98-106), rule 119 “Subject to rule 121, an individual may act in person or be represented by a solicitor in a proceeding.”

- **the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

Yes. “Competition Act § 11(1)(a). Oral examinations under § 11(1)(a) are conducted before a "presiding officer" designated by the Commissioner. Id. § 12. The designee must have been a member of the bar for at least ten years. Id. § 13. Persons being examined are entitled to have counsel present. Id. § 12(3). Any person whose conduct is being inquired into also can attend, together with counsel. Id. § 12(4). The presiding officer, however, may exclude that person and counsel if satisfied that their presence would be prejudicial to the examination or the Commissioner's inquiry, or would lead to the disclosure of commercially sensitive information. Id. § 12(4)(a)-(b).” (4 Comp. Laws Outside U.S. Canada IV-E)

Within the Competition Tribunal Rules 64, (1) “*Examination for discovery shall occur as of right*” and (2) “*The Tribunal may, in case management, make rulings to deal with the timing, duration, scope and form of the discovery as well as the appropriate person to be discovered.*”

Under the Competition Tribunal Rules 74(4) “*a witness statement may be received in evidence at the hearing only if the witness is in attendance and available for cross-examination or questioning by the Tribunal.*”

Witness statements may be taken and responded to prior to trial, see Competition Tribunal Rules 68-70.

Under rules 77 through 80 from the Competition Tribunal Rules expert reports may be submitted and rebutted, and witnesses may be examined and cross examined.

### Competition Tribunal

#### *Competition Tribunal Rules*

#### *SOR/2008-141*

*65 Subject to any confidentiality order under rule 66, a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, unless those documents are subject to a claim for privilege or are not within the party’s possession, power or control.*

*76(2) Counsel may cross-examine or re-examine witnesses.*

*77 (2) At least 30 days before the commencement of the hearing, a respondent may serve a responding expert report on each other party and any intervenors.*

#### *Content of report*

*(4) A report referred to in any of subrules (1) to (3) shall include a full statement of the evidence of the expert witness, the expert’s qualifications as an expert and a list of the sources and documents relied upon in the report.*

*79 A report referred to in rule 77 shall not be read aloud at the hearing but the expert witness may be examined in chief for the purpose of summarizing or highlighting the evidence contained in the report and may be cross-examined and re-examined.*

- **the case files.**

Case files are not specifically addressed within the statutory framework for the Competition Bureau.

However, Federal Courts Rules (SOR/98-106) govern discovery - Rules 222 through 256.

#### *Discovery and Inspection*

#### *Discovery of Documents*

#### *Definition of document*

*222 (1) In rules 223 to 232 and 295, document includes an audio recording, a video recording, a film, a photograph, a chart, a graph, a map, a plan, a survey and a book of account, as well as data that is recorded or stored on any medium in or by a computer system or other similar device and that can be read or perceived by a person or a computer system or other similar device.*

#### *Marginal note:*

#### *Interpretation*

*(2) For the purposes of rules 223 to 232 and 295, a document of a party is relevant if the party intends to rely on it or if the document tends to adversely affect the party’s case or to support another party’s case.*

*Time for service of affidavit of documents*

223 (1) Every party shall serve an affidavit of documents on every other party within 30 days after the close of pleadings.

*Marginal note:*

*Contents*

(2) An affidavit of documents shall be in Form 223 and shall contain

(a) separate lists and descriptions of all relevant documents that

(i) are in the possession, power or control of the party and for which no privilege is claimed,

(ii) are or were in the possession, power or control of the party and for which privilege is claimed,

(iii) were but are no longer in the possession, power or control of the party and for which no privilege is claimed, and

(iv) the party believes are in the possession, power or control of a person who is not a party to the action;

(b) a statement of the grounds for each claim of privilege in respect of a document;

(c) a description of how the party lost possession, power or control of any document and its current location, as far as the party can determine;

(d) the identity of each person referred to in subparagraph (a)(iv), including the person's name and address, if known;

(e) a statement that the party is not aware of any relevant document, other than those that are listed in the affidavit or are or were in the possession, power or control of another party to the action; and

(f) an indication of the time and place at which the documents referred to in subparagraph (a)(i) may be inspected.

228 (1) Subject to rule 230, a party who has served an affidavit of documents on another party shall, during business hours, allow the other party to inspect and, where practicable, to copy any document referred to in the affidavit that is not privileged, if the document is

(a) in the possession of the party; or

(b) in the power or control of the party and the other party requests that it be made available because the other party cannot otherwise inspect or copy it.

*Marginal note:*

*Copies of documents*

(2) A party who has served an affidavit of documents on another party shall, at the request of the other party, deliver to the other party a copy of any document referred to in subsection (1), if the other party pays the cost of the copies and of their delivery.

*See also:*

*Federal Courts Rules (SOR/98-106)*

*Records*

21 The Administrator shall keep all records necessary for documenting the proceedings of the Court and enter in them all orders, directions, foreign judgments ordered to be registered, pleadings and other documents filed in a proceeding.

(see also, *Federal Courts Rules*, rule 22)

For civil adversarial proceedings (Competition Tribunal)

“Subject to any confidentiality order under rule 66, a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, unless those documents are subject to a claim for privilege or are not within the parties possession, power or control.” (Competition Tribunal Rules, section 65)

*Competition Tribunal Rules*

*SOR/2008-141*

*32 The original and official case record of an electronic hearing shall be kept by the Tribunal only in electronic format.*

*34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Courts Rules may be followed.*

*Inspection of records and things*

*20 (1) All records or other things obtained or received by the Commissioner may be inspected by the Commissioner and also by such persons as he directs.*

- **Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

Yes, within The Competition Act, The Competition Tribunal Act, and the Competition Tribunal Rules.

- **Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes. “The Tribunal is a "court of record" and possesses all the powers, rights, and privileges of a superior court with respect to the attendance, swearing, and examination of witnesses; the production and inspection of documents; the enforcement of its orders; and other matters necessary or proper for the due exercise of its jurisdiction” [Competition Tribunal Act § 8] (4 Comp. Laws Outside U.S. Canada II-D).

*Competition Act*

*R.S.C., 1985, c. C-34*

*Sections 30.1-30.18, 74.14, 107*

*Competition Tribunal Rules*

*SOR/2008-141*

*Sections 71-80*

*Competition Tribunal Rules*

*SOR/2008-141*

*34 (1) If, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Courts Rules may be followed.*

- **Does the country’s current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country’s laws?**

Yes, with some variability.

Appeals from the Tribunal's Decisions

“Decisions or orders of the Tribunal may be appealed to the Federal Court of Appeal, whether a decision or order is final, interlocutory or interim [Competition Act, R.S.C., ch. C-34, § 74.18(1)]. An

important restriction is placed on this right of appeal, however, is that appeals on questions of fact are available only with leave of the Federal Court of Appeal” [Competition Tribunal Act, R.S.C., ch. C-19, § 13 (2d Supp. 1985)] (4 Comp. Laws Outside U.S. Canada II)

Additionally, “The Commissioner may also apply for and obtain an interim cease and desist order where he is able to demonstrate a strong prima facie case that a person is engaging in reviewable conduct under Part VII.1 of the Competition Act, that serious harm is likely to ensue unless the order is issued, and that the balance of convenience favors issuing the order [Competition Act § 74.11(1)]” (4 Comp. Laws Outside U.S. Canada III-C).

“Decisions made under this Part of the Competition Act may be appealed to either the Federal Court of Appeal if the order was made by the Tribunal, or the Federal Court-Trial Division or to a provincial court of appeal if the order was made by the superior court of the province [Competition Act § 74.18(1)-(2)]. Appeals on a question of fact, however, may be brought only with leave of the appropriate appellate court” [Id. § 74.19] (4 Comp. Laws Outside U.S. Canada III-C).

#### *Competition Act*

For “Requests made to Canada from Abroad”

R.S.C., 1985, c. C-34

#### *Appeal on question of law*

*30.24 (1) An appeal lies, with leave, on a question of law alone, to the court of appeal, within the meaning of section 2 of the Criminal Code, from an order or decision of a judge or a court in Canada made under this Part, other than an order or decision of the Federal Court or a judge of that Court, if the application for leave to appeal is made to a judge of the court of appeal within fifteen days after the order or decision.*

#### *Appeal on question of law*

*(2) An appeal lies, with leave, on a question of law alone, to the Federal Court of Appeal, from any order or decision of the Federal Court or the Tribunal made under this Part, if the application for leave to appeal is made to a judge of that Court within fifteen days after the order or decision.*

For “Deceptive Marketing Practices”

R.S.C., 1985, c. C-34

#### *Appeal to Federal Court of Appeal*

*74.18 (1) An appeal may be brought in the Federal Court of Appeal from any decision or order made under this Part, or from a refusal to make an order, by the Tribunal or the Federal Court.*

#### *Appeal to provincial court of appeal*

*(2) An appeal may be brought in the court of appeal of a province from any decision or order made under this Part, or from a refusal to make an order, by a superior court of the province.*

#### *Disposition of appeal*

*(3) Where the Federal Court of Appeal or the court of appeal of the province allows an appeal under this section, it may quash the decision or order appealed from, refer the matter back to the court appealed from or make any decision or order that, in its opinion that court should have made.*

- **Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes.

“The Bureau is very open in stating that prosecution or contested litigation is its "least preferred option," and that it will resort to an adversarial approach only when necessary [see, e.g., Comm'r of Competition, Annual Report of the Comm'r of Competition for the Year Ending March 31, 1999, at 2

(1999)]. This emphasis on alternative forms of dispute resolution, which the Bureau refers to as its "conformity continuum," is part of the Bureau's broader "Program of Compliance." Pursuant to this program, the Bureau attempts to encourage compliance through communication and education efforts-- such as the publication of enforcement guidelines -and through confidential advisory opinions, information contacts, and advance ruling certificates (with respect to mergers)." (4 Comp. Laws Outside U.S. Canada I-A).

*Competition Act*  
*R.S.C., 1985, c. C-34*  
*For Deceptive Marketing Practices*  
*Consent agreement*  
*These are addressed in 74.12-74.13*

*For Matters Reviewable by Tribunal*  
*Consent agreement*  
*These are addressed in 105-106*

*Competition Tribunal Rules*  
*SOR/2008-141*  
*74.12 of the Competition Act*  
*Part 6*  
*Consent Agreements*  
*105 and 106*

- **Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

“The Act also attempts to respect privacy and confidentiality. Section 29 of the Act prohibits disclosure of the identity of informants, of information obtained pursuant to the exercise of formal investigatory powers, as well as certain other information obtained under the Act. However, the Act does allow disclosure to Canadian law enforcement agencies or for the purpose of administration or enforcement of the Act. In the past, if information provided to the Commissioner was not covered by section 29, parties sought assurances of confidentiality from the Commissioner. The prohibition against disclosure under section 29 does not apply to information that has been disclosed with the authorization of the person who originally provided the information.” (2 - Doing Business in Canada § 20.04)

Transparency—confidentiality

“In order to enhance the public credibility of competition laws, high levels of transparency in performing investigative, enforcement, and adjudicative functions are desirable. However, much of the information that a competition law agency is required to evaluate from the immediate parties involved and from competitors, suppliers, and customers is commercially highly sensitive; and public disclosure may be seriously damaging to legitimate business interests. The ideal degree of transparency therefore varies depending on the type of decision being made. For example, formal adjudications are normally on-the-record public proceedings whereas many interim or procedural matters may be determined in a much less open manner” [Andrew Neil Campbell, *The Review of Anti-Competitive Mergers*, thesis for the Degree of Doctor of Juridical Science, Faculty of Law, University of Toronto, 1993 at 78–9]. (3 - Canada - The Competition Law System and the Country’s Norms, page 131).

*Competition Act 29, 29.1, 29.2, 30.29*  
*Competition Tribunal Rules 23, 24, 66,*

*Federal Court Rules (Canada) rule 151*

- **If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

Yes.

For matters referred for criminal prosecution:

the Federal Courts Rules (SOR/98-106) govern discovery - Rules 222 through 256.

Within the framework of the Competition Tribunal:

*"[s]ubject to any confidentiality order under rule 66, a party who has served an affidavit of documents on another party shall allow the other party to inspect and make copies of the documents listed in the affidavit, unless those documents are subject to a claim for privilege or are not within the party's possession, power or control. "*

(Competition Tribunal Rules, rule 65)

Confidentiality order

*(1) The Tribunal may order that a document or information in a document be treated as confidential and make any order that it deems appropriate, (a) upon the motion of a party who has served an affidavit of documents; or (b) upon the motion of a party or intervenor who has filed or will file the document.*

(Competition Tribunal Rules, rule 66)

Pre-hearing Disclosure

*List of documents and witness statements*

*68 (1) The applicant shall, at least 60 days before the commencement of the hearing, serve on every other party and on all intervenors (a) a list of documents on which the applicant intends to rely at the hearing, noting any waivers of privilege claimed in regard to those documents; and (b) witness statements setting out the lay witnesses' evidence in chief in full. (Competition Tribunal Rules, rule 68)*

- **Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

Investigations are conducted in private; the law does not ensure that the regulatory agency affords a person under investigation a reasonable opportunity to consult with the regulatory agency.

Matters referred for criminal prosecution fall under the criminal framework. Per "Federal Courts Rules" (SOR/98-106): rule 53, 54, and 55 provide that a person may bring a motion for directions, and the court may provide directions, impose conditions, or vary or dispense with compliance with a rule.

For civil matters, referred to the Competition Tribunal:

*Competition Tribunal Rules*

*33 (1) The Tribunal may issue practice directions.*

*"[I]f, in the course of proceedings, a question arises as to the practice or procedure to be followed in cases not provided for by these Rules, the practice and procedure set out in the Federal Courts Rules may be followed"* (Competition Tribunal Rules, rule 34 (1)). See *Federal Court Rules sections 222-228*.



## ***Transparency:***

- **Does the current law ensure transparency of national competition laws, policies and enforcement activities?**

Somewhat: “[i]n order to enhance the public credibility of competition laws, high levels of transparency in performing investigative, enforcement, and adjudicative functions are desirable. However, much of the information that a competition law agency is required to evaluate from the immediate parties involved and from competitors, suppliers, and customers is commercially highly sensitive; and public disclosure may be seriously damaging to legitimate business interests. The ideal degree of transparency therefore varies depending on the type of decision being made. For example, formal adjudications are normally on-the-record public proceedings whereas many interim or procedural matters may be determined in a much less open manner” [Andrew Neil Campbell, *The Review of Anti-Competitive Mergers*, thesis for the Degree of Doctor of Juridical Science, Faculty of Law, University of Toronto, 1993 at 78–9]. (Canada the competition law system and the country’s norms, page 131).

### *Competition Act*

*R.S.C., 1985, c. C-34*

#### *Publication of Agreements*

##### *Publication in Canada Gazette*

*30.02 (1) An agreement must be published in the Canada Gazette no later than 60 days after the agreement comes into force, unless it has already been published under subsection (2).*

##### *Publication in Canada Treaty Series*

*(2) An agreement may be published in the Canada Treaty Series and, if so published, the publication must be no later than 60 days after the agreement comes into force.*

##### *Judicial notice*

*(3) Agreements published in the Canada Gazette or the Canada Treaty Series are to be judicially noted.*

### *Competition Tribunal Rules*

*SOR/2008-141*

#### *Public Access*

*22 Subject to any confidentiality order under rule 66, the public is entitled to access the documents filed or received in evidence on the public record, in the format in which they were received by the registry.*

#### *Hearings*

*66 Subject to rule 30, hearings shall be open to the public.*

#### *Power of the Tribunal*

*30 (3) The Tribunal may, if it is of the opinion that there are valid reasons for a hearing not be open to the public, make any other that it deems appropriate.*

Additionally, rules and regulations must be published in advance of their coming into effect.

### *Competition Act*

*R.S.C., 1985, c. C-34*

#### *Regulations*

*24 (1) The Governor in Council may make regulations regulating the practice and procedure in respect of applications, proceedings and orders under sections 11 to 19.*

*Publication of proposed regulations*

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the Canada Gazette at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

*When effective*

(2) No rule made under this section has effect until it has been published in the Canada Gazette.

*Competition Tribunal Act*

R.S.C. 1985, c. 19 (2nd Supp.)

*Advance publication of rules and amendments*

17 Where the Tribunal proposes to make any rule under section 16, it (a) shall give notice of the proposal by publishing it in the Canada Gazette and shall, in the notice, invite any interested person to make representations to it in writing with respect thereto within sixty days after the day of the publication; and (b) may, after the expiration of the sixty days referred to in paragraph (a) and subject to the approval of the Governor in Council, implement the proposal either as originally published or as revised in such manner as the Tribunal deems advisable having regard to any representations so made to it.

- **Does the national law and regulatory agency’s procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?**

Canada’s Federal Rules of Court do not require that decisions be written or that written orders set out findings of fact, reasoning or analysis. Decisions including such information may be reduced to writing. However, this is discretionary. See Federal Courts Rules (SOR/98-106), rules 392 through 394.

However, within the Competition Tribunal framework:

“In contrast to Bureau investigations, Tribunal proceedings are usually open to the public, except where in camera proceedings and restrictions on access to documents are necessary to protect commercially sensitive material. Reasons accompany all Tribunal decisions even for basic consent orders. All of these decisions and many case documents are available to the public on the Tribunal’s website” (Canada the competition law system and the country’s norms, pages 138-139). <https://www.ct-tc.gc.ca/en/home.html>

- **Does the national law and regulatory agency’s procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?**

Competition Bureau:

No, although important decisions may be published as a summary and can include background and analysis in particularly important cases.

“The Bureau places a strong emphasis on confidentiality in its proceedings which critics have claimed reduces transparency. To increase transparency, the Bureau has employed four principal case-specific disclosure techniques:

1. annual report listings of dispositions of cases receiving Significant Assessments (an investigation of more than two days),
2. press releases to announce decisions in high-profile cases,
3. annual and quarterly report summaries of selected cases, and

4. backgrounders to provide detailed commentary on the competition issues and analysis in particularly important cases.

Statutory confidentiality restrictions create a significant barrier to greater transparency. Statutory confidentiality restrictions grant discretion to the Bureau or a judge to conduct parts of an investigation or hearing in private in order to prevent the disclosure of confidential commercial information or to protect witnesses and instigators of investigations who might otherwise fear repercussions.” (3 - Canada - The Competition Law System and the Country’s Norms, page 138)

#### Competition Tribunal:

“In contrast to Bureau investigations, Tribunal proceedings are usually open to the public, except where in camera proceedings and restrictions on access to documents are necessary to protect commercially sensitive material. Reasons accompany all Tribunal decisions even for basic consent orders. All of these decisions and many case documents are available to the public on the Tribunal’s website” (Canada the competition law system and the country’s norms, pages 138-139). <https://www.ct-tc.gc.ca/en/home.html>

#### Consent Agreements:

Consent agreements are published including the identifying the persons part of the agreement, what part of the act the agreement is under, and the terms of the agreement. (Competition Act sections 30.02, 106.1 & Competition Tribunal Rules, rule 126)

#### *Comity:*

- **Do the country’s government and competition authorities:**
  - **cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and**
  - **cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information with other national competition authorities?**

Yes, the national competition authorities work with multiple other government authorities. Canada cooperates with other governments in both enforcement and the development of competition policy, as set out within its various treaties.

“The International Affairs Directorate of the Competition Bureau, in partnership with Innovation, Science and Economic Development Canada and Global Affairs Canada, plays a key role in the negotiation and implementation of competition provisions in international trade agreements (FTAs) and Foreign Investment Promotion and Protection Agreements (FIPAs).

The Competition Bureau advocates for competition considerations in Canada’s agreements to ensure that the benefits of trade liberalization are not offset by anticompetitive business conduct and to provide opportunities for Canadian participation in world markets.

A full list of Canada’s trade agreements, FIPAs and ongoing negotiations can be found on the website of [Global Affairs Canada.](#)”

*From:* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03763.html#tab2>

**Australia**

- Cooperation Arrangement Between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Law

**Brazil**

- Cooperation Arrangement Between the Commissioner of Competition, Competition Bureau of the Government of Canada, and the Council for Economic Defense, the Secretariat of Economic Law of the Ministry of Justice, and the Secretariat for Economic Monitoring of the Ministry of Finance of the Government of the Federative Republic of Brazil Regarding the Application of their Competition Laws

**Chile**

- Memorandum of Understanding Between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws

**Colombia**

- Memorandum of Understanding between the Commissioner of Competition, Competition Bureau of the Government of Canada, and the Superintendence of Industry and Commerce of the Republic of Colombia, regarding the application of Competition Laws

**European Union**

- Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws

**Hong Kong**

- Memorandum of Understanding between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Competition Commission of the Hong Kong Special Administrative Region of the People's Republic of China regarding the application of Competition Laws and the Sharing of Information

**India**

- Memorandum of Understanding Between the Commissioner of Competition, Competition Bureau Canada and the Competition Commission of India on Cooperation in the Application of Competition Laws

**Japan**

- Cooperation Arrangement between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Fair Trade Commission of Japan in relation to the Communication of Information in Enforcement Activities
- Agreement Between the Government of Canada and the Government of Japan Concerning Cooperation on Anticompetitive Activities

**New Zealand**

- Cooperation Arrangement Between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in Relation to the Sharing of Information and Provision of Investigative Assistance

- Cooperation Arrangement Between the Commissioner of Competition (Canada), the Australian Competition and Consumer Commission and the New Zealand Commerce Commission Regarding the Application of their Competition and Consumer Law

### **People's Republic of China**

- Memorandum of Understanding on Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the National Development and Reform Commission of the People's Republic of China
- Memorandum of understanding on Anti-Monopoly Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Ministry of Commerce of the People's Republic of China
- Memorandum of Understanding on Cooperation Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the State Administration for Industry and Commerce of the People's Republic of China

### **Republic of Korea**

- Cooperation Arrangement Between the Commissioner of Competition, Competition Bureau of the Government of Canada and the Fair Trade Commission of the Government of the Republic of Korea Regarding the Application of their Competition and Consumer Laws

### **Mexico**

- Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws
- [U.S.-Mexico-Canada FTA \(USMCA\) Competition Policy Chapter](#)

### **Taiwan**

- Memorandum of Understanding Between the Taipei Economic and Cultural Office in Canada and the Canadian Trade Office in Taipei Regarding the Application of Competition Laws

### **United States**

- Agreement between the Government of Canada and the Government of the United States of America on the Application of Positive Comity Principles to the Enforcement of their Competition Laws
- [U.S.-Mexico-Canada FTA \(USMCA\) Competition Policy Chapter](#)
- Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Competition and Deceptive Marketing Practices Laws
- Cooperation Arrangement between the Commissioner of Competition, Competition Bureau of the Government of Canada, and the United States Postal Inspection Service, Regarding the Application of their Deceptive Marketing Practices Laws
- U.S. — Canadian Task Force on Cross-Border Deceptive Marketing Practices
- Canada-U.S. Merger Working Group — Best Practices on Cooperation in Merger Investigations

## **International Competition Network**

The Bureau is a founding member of the [International Competition Network \(ICN\)](#), sits on its Steering Group and also acts as the ICN Secretariat. The Bureau is currently the Co-Chair of the ICN's Agency Effectiveness Working Group, a member of the ICN's Mergers Working Group and the ICN-OECD Liaison.

The ICN advocates the adoption of superior standards and procedures in competition policy around the world, formulates proposals for procedural and substantive convergence, and seeks to facilitate effective international cooperation for the benefit of member agencies, consumers and economies worldwide. Competition agencies exchange enforcement experiences through the ICN and develop practical guidance and best practices to increase cooperation and convergence.

The ICN has grown to include over 130 members from all regions of the globe. The ICN also encourages the participation of non-governmental advisors (NGAs) in all aspects of its work. Information on how to get involved in the ICN as an NGA can be found on the Bureau's [international resources](#) page.

## **The Organization for Economic Cooperation and Development**

The Bureau participates regularly in meetings of both the Organisation for Economic Co-operation and Development (OECD) [Competition Committee](#) and the [Committee on Consumer Policy](#).

The Bureau is a member of the OECD Competition Committee's Executive Group, which guides the work of the Committee, and also acts as the liaison between the Competition Committee and the ICN.

The OECD Competition Committee promotes the regular exchange of views and analysis on competition policy issues through best practice roundtables. The Committee develops guidance and recommendations for competition authorities and Member governments to achieve greater convergence towards recognised best practices and to strengthen cooperation and coordination in competition law enforcement. The Bureau regularly participates in OECD Competition Committee meetings and makes [submissions to the Committee's best practice roundtables](#).

The Bureau also participates, along with Canada's Office of Consumer Affairs, in the OECD Committee on Consumer Policy. The Committee on Consumer Policy examines questions relating to domestic and international consumer law and policy, and contributes to the further development and strengthening of cooperation between Member countries in policy development and law enforcement.

## **The International Consumer Protection and Enforcement Network**

The Bureau is a past Secretariat of the [International Consumer Protection and Enforcement Network \(ICPEN\)](#), and a current member of its advisory body.

ICPEN is comprised of consumer protection authorities from over 50 countries. Its aim is to protect consumers' economic interests around the world, share information about cross-border commercial activities that may affect consumer welfare, and encourage global cooperation among law enforcement agencies.

## COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION: THE PEOPLE'S REPUBLIC OF CHINA

### INTRODUCTION:

The foundational legal document governing competition law in mainland China—excepting Hong Kong and Macau—is the Anti-Monopoly Law (“AML”). The AML was adopted in 2008 and there are significant amendments currently under discussion in 2020. Besides the AML, some aspects of the competition regime are regulated by other laws, including the Anti-Unfair Competition Law of 1993 (“AUCL”), Price Law of 1998, Bidding Law of 2000, Contract Law of 1999, Patent Law of 2009, and Foreign Trade Law of 2004. Various governmental agencies have also issued guidelines and regulations clarifying and governing the enforcement of the AML.

In 2018, as part of an overhaul of all government agencies, China consolidated the responsibility of enforcing and interpreting domestic competition law into the State Administration for Market Regulation (“SAMR”) agency, organized under the State Council. Specifically, the Anti-Monopoly Bureau and the Price Supervision and Anti-Unfair Competition Bureau within SAMR inherited the responsibilities previously held by the Ministry of Commerce (“MOFCOM”), the National Development and Reform Commission (“NDRC”), and State Administration of Industry and Commerce (“SAIC”). While MOFCOM and NDRC remains independent agencies and are now focused on other matters, SAIC was entirely merged into SAMR. Hereinafter, this report refers to MOFCOM, NDRC, SAIC, and SAMR collectively as the “Competition Authorities.”

Prior to the consolidation, MOFCOM was responsible for merger investigations and merger control enforcement. NDRC was responsible for investigation into price-related non-merger matters, such as price fixing and resale price maintenance. SAIC was responsible for investigations into non-price-related non-merger matters, such as market sharing agreements and the AUCL. Despite the obvious potential for jurisdictional overlap, NDRC and SAIC pragmatically agreed to stay out of each other’s way, largely opting for a “first to discover, first to investigate” philosophy.<sup>1</sup>

Because the consolidation of enforcement responsibilities into SAMR was a recent development (and not fully completed), there has not been sufficient time for observers to fully judge whether the enforcement of competition law has changed in China. SAMR has issued new regulations as part of its consolidation effort, though this process is ongoing. While SAMR is not expected to deviate greatly from the previously established behavior of MOFCOM, NDRC, and SAIC, it remains unclear whether SAMR will adopt all the guidelines and precedents of its predecessor organizations.

Therefore, the conclusions this report reaches about China’s competition law enforcement are based on present-day SAMR behavior as well as the historic behavior of MOFCOM, NDRC, and SAIC. There will undoubtedly be the need to reevaluate this report’s conclusions in a few years’ time, as SAMR establishes its own way of enforcing the AML.

One change we know that SAMR has already implemented is the delegation of some enforcement actions to the provincial level. SAMR now handles national and trans-regional cases, while provincial competition authorities carry out enforcement at the local level. However, this division of responsibilities is not absolute, as provincial authorities will report complex or controversial cases to

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<sup>1</sup> WENDY NG, THE POLITICAL ECONOMY OF COMPETITION LAW IN CHINA 245 (2018).

SAMR for guidance.

A few notes are warranted here regarding the current state of the competition law system in China:

Regarding practical enforcement, Chinese competition law agencies have historically been understaffed. For example, in 2014, it was reported that MOFCOM only had approximately 50 full-time competition law staff members (and around 12 case handlers).<sup>2</sup> Although calls for vastly increased staffing have been made, it remains to be seen if rapid staffing expansion is compatible with maintaining personnel quality. Furthermore, the role of economists has been limited historically. Various commentators have noted that economist involvement in AML enforcement is a relatively new phenomenon, and neither the NDRC and the SAIC had specialized economists on staff for enforcement (though it is not uncommon for Competition Authorities to solicit outside economic analysis).<sup>3</sup> This situation has led to a lack of capacity to conduct in-depth investigations, created a preference for settlements and structural/behavioral remedies, increased the time duration of investigations, caused under-monitoring of imposed obligations, and resulted in under participation in activities other than enforcement (such as issuing guidelines). Efforts were made to hire competent staff for the Competition Authorities, and the 2018 consolidation into SAMR may further help fix some of the staffing issues.

Regarding the overall legitimacy and efficacy of the AML, the main cause of concern is whether China will incorporate industrial policy into competition law enforcement. There is strong indication that this is the case, given the history of cases and the text of the laws themselves. Indeed, the AML explicitly mentions that authorities should consider Chinese economic development alongside traditional competition law principles (AML Art. 4). In addition, the AML contains a national security exception that applies only to mergers that involve foreign firms (AML Art. 31). Finally, the AML has a substantial and vague carve out for state-owned enterprises (“SOEs”) (AML Art. 7).

Commentators have long suspected that the Competition Authorities are actively protecting the Chinese economic interests and its SOEs. Because many aspects of AML enforcement are not transparent, there is little evidence to show that China will stop using competition law enforcement as a tool to promote industrial policy and SOEs. Past experiences have strongly suggested that the Competition Authorities targeted multi-national companies for fines and other enforcement measures. That being said, the Competition Authorities and courts are also now willing to take up cases against SOEs, albeit very cautiously. For the time being, then, it is safe to say that outsiders will continue to have a healthy amount of skepticism towards the Chinese competition law regime due to the opacity of Chinese domestic politics.

Despite the many valid concerns about the legitimacy of the Chinese competition law regime, it is nonetheless important to remember that China’s foray into competition law is still in its infancy. Many changes are expected in the near future. On the legal side, amendments to the AML are currently being prepared. On the enforcement side, the Competition Authorities have developed substantial expertise and experience in the last decade, building up a cadre of competent personnel. Caseloads have risen while processing time has fallen, signs of increasing agency competence. Meanwhile, private enforcement has become an important aspect of the Chinese competition law regime, with courts rendering substantial decisions recently in abuse of dominance and vertical agreements cases.

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<sup>2</sup> TIANCHENG JIANG, CHINA AND EU ANTITRUST REVIEW OF REFUSAL TO LICENSE IPR 78 (2015).

<sup>3</sup> See, NG, *supra* note 1 at 177.



Finally, with Europe and the United States increasingly questioning whether their traditional competition law regime is adequate to deal with new business models, particularly in the technology sector, there may also be a day when China rethinks its own regime. Needless to say, it is difficult to know ex-ante whether China's relative lack of experience and jurisprudence in competition law will be a benefit or detriment, should that day ever come.

## **DUE PROCESS:**

### **1. Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes, in Chinese. English translations of the main legal texts are available from the government, but English translations of guidelines and other regulations are only readily available through private paid databases.

SAMR hosts a repository of the relevant laws and regulations on its website, available at <http://www.samr.gov.cn/fldj/zcfg/>. As of the writing of this report, SAMR has posted a number of new guidelines in Chinese on competition law, mainly adapted from its predecessor agencies. These are: 1) Interim Provisions on Prohibition of Monopoly Agreements, 2) Interim Provisions on the Prohibition of Abuse of Market Dominant Status, 3) Interim Provisions on the Suppression of Abuse of Administrative Power to Exclude and Restrict Competition, 4) Guidance on the Standardization of Party Naming in Merger Reviews, 5) Guidance Opinion on Simplified Cases of Merger Review, 6) Guidance on Documents and Data in Merger Reviews, 7) Guidance Opinion on Merger Reviews, 8) Provisions Prohibiting the Abuse of Intellectual Property Rights to Exclude and Restrict Competition, 9) Antitrust Guidelines for the Automotive Sector, 10) Guidelines Regarding Exemption of Monopoly Agreements, and 11) Guidelines Regarding Leniency Applications for Horizontal Monopoly Agreements.

The number of SAMR approved guidelines and regulations is expected to grow, as it is expected to adopt many of its predecessor organizations' practices. Prior to the agency consolidation, MOFCOM's policy announcements had been available on its website, in English, since 2015.

The NDRC also maintained a website in Chinese with a searchable database for official announcements, policy documents, and decisions. However, the NDRC's English language website did not offer a searchable database. Until it was merged into SAMR, SAIC maintained a website in Chinese with the major laws and policy documents available in Chinese.

Currently SAMR publishes all of its notices, announcements, and case decisions on its website.

### **2. If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

Yes, for mergers. No for all other areas of competition law enforcement.

#### *Mergers:*

For mergers, once formal review begins, there are statutory deadlines. However, during the pre-consultation phase, SAMR has discretion on how long to investigate the pending merger.

Parties are expected to engage in pre-notification consultations. During these consultations, the parties and SAMR will refine the procedural and substantive issues at question. At this stage, any opinions from SAMR is non-binding.

After pre-notification consultations, merger parties submit to SAMR notification documents and materials pertaining to the proposed merger. After SAMR declares notification complete, it has 30 days to complete a preliminary review and decide on whether it will conduct further review (AML Art. 25). If SAMR does not make a request for further information from the parties or issues no decision at all, the merger is considered cleared.

If SAMR chooses to conduct further review, it has 90 days from the date of that decision to complete the review. SAMR may extend the period of review by another 60 days (AML Art. 26).

In practice, the initial stage of SAMR investigation can last an indefinite amount of time, as SAMR has discretion on when it considers complete the notification and submission of documents and materials requirement. Because the AML is vague on how much materials is required, it is unpredictable how long SAMR will take to certify that the notification is complete (AML Art. 23). The more complex a case, the more likely SAMR will take additional time to certify notification. The initial stage can take between several weeks to several months.

Starting in 2014, MOFCOM began evaluating some proposed mergers on a fast-tracked and simplified basis. MOFCOM published guidance on the procedure for simple mergers (Interim Provisions on the Standards Applicable to Simple Cases of Concentration of Business Operators 2014). SAMR has issued similar guidelines since its inception (Guidance Opinion on Simplified Cases of Merger Review). If a party thinks that the proposed merger should be considered simple, then it may file a simplified notification form with SAMR. SAMR will then issue a public notice and third parties have 10 days to object to the merger. While there is no formal deadline for review simple cases, MOFCOM and SAMR have tried to stick to a 30-day review period.

#### *Monopoly Agreements:*

There appears to be no formal regulations specifying the length of SAMR's investigations into dominance.

The Interim Provisions on Prohibition of Monopoly Agreements ("Interim Monopoly Provisions") states that provincial authorities that investigate monopoly agreements must file a notification with SAMR within 7 working days of filing the initial case (Interim Monopoly Provisions Art. 17) and 7 working days of making a decision (Interim Monopoly Provisions Art. 29).

#### *Abuse of Dominance:*

There appears to be no formal regulations specifying the length of SAMR's investigations in abuse of dominance.

The Interim Provisions on Prohibition of Abuse of Market Dominant Status ("Interim Dominance Provisions") states that provincial authorities that investigate monopoly agreements must file a notification with SAMR within 7 working days of filing the initial case (Interim Dominance Provisions Art. 25) and 7 working days of making a decision (Interim Dominance Provisions Art. 34).

#### *Abuse of Administrative Power:*

There appears to be no formal regulations specifying the length of SAMR's investigations into abuse

of administrative power.

The Interim Provisions on the Suppression of Abuse of Administrative Power to Exclude and Restrict Competition (“Interim Administrative Abuse Provisions”) states that provincial authorities have 7 days to report to provincial market supervision agencies that they received a report of violation (Interim Administrative Abuse Provisions Art. 13). Provincial market supervision agencies must file a notification with SAMR within 7 working days of opening the case (Interim Administrative Abuse Provisions Art. 14) and 7 working days of making a proposal regarding the alleged violation of the AML (Interim Administrative Abuse Provisions Art. 21).

**3. When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**

**a. information about the regulatory agency’s allegations and competition concerns, including the legal and factual basis for the allegations;**

No. While the Competition Authorities now provide adequate notice to parties, there is still a lack of meaningful engagement. For example, parties often complain that the notices do not sufficiently set forth legal theories of harm. This makes it difficult for parties to understand the legal and economic reasons for the Competition Authorities’ concerns.

There is no legal obligation to inform parties of the allegations or competition concerns. There are no published guidelines that bind how SAMR will decide. While SAMR and its predecessors prepare internal reports that highlight reasons for taking specific actions, there is no obligation to make this document public. This means that, ultimately, the parties are not privy to the real reasons for SAMR’s decisions.

In addition, foreign companies have historically complained of not being notified of the allegations. For example, there are reports of the Competition Authorities pressuring parties to admit guilt before being allowed to see the allegations. There are also reports that, in some instances, the Competition Authorities have outright refused to inform parties of the allegations.

Furthermore, while the Competition Authorities will usually consult with a wide group of stakeholders, there is no obligation to hold public hearings or reveal from whom the Competition Authorities receive input. This means that it can be difficult for parties to develop an accurate understanding of why they are being investigated and what kind of evidence is being used against them.

**b. the opportunity to be represented by counsel;**

Yes, in principle, but there are serious questions regarding whether the Competition Authorities respect the right to counsel.

According to the Administrative Procedure Law (“APL”) parties may be represented by counsel in administrative proceedings (APL Arts. 29, 30). However, the Competition Authorities may deny a request for counsel to participate, and numerous foreign companies have reported that their counsels are routinely denied access to proceedings. Furthermore, foreign attorneys without a Chinese license cannot practice law in China, and all in-house attorneys are considered employees of the company.

There is also suspicion that the Competition Authorities view parties requesting counsel negatively.

For mergers, parties may file their merger notification with a power of attorney (2009 Guiding Opinions on documents for Concentration of Business Operators). Attorneys are also helpful when responding to additional information requests from the Competition Authorities. However, the Competition Authorities may ultimately proceed with their investigation as they see fit and omit counsel from any hearings.

During evidence collection, the SAMR has no obligation to wait for legal counsel to arrive before carrying out evidence collection. SAMR is only obligated to have at least two law enforcement officers present when collecting evidence (AML Art. 40).

Finally, attorney-client privilege does not exist in China. Courts can order attorneys to testify about a client's trade secrets or private information, but such testimony shall be kept confidential (Civil Procedure Law Art. 66). SAMR has power to request evidence from parties (APL Art. 34), but it is unclear whether SAMR could compel testimony on the spot.

- c. the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

Yes, but subject to the near-total discretion of SAMR.

Parties have the right to make statements to the Competition Authorities (AML Art. 43), but this does not necessarily mean that they will be allowed to attend all hearings or proceedings. In practice this means that parties may request hearings from the Competition Authorities. The Competition Authorities may also pro-actively invite parties and third parties to hearings. These hearing can include competitors in related industries, experts, and government departments.

In the past, MOFCOM issued guidelines on how to deal with parties' defenses. Article 10(2) of the Measures on the Review of Concentrations Between Business Operators allows parties to submit written defenses after MOFCOM communicated objections to the parties. MOFCOM would set the deadline for the submissions. If parties do not respond by the deadline, MOFCOM will consider that party to have waived its defense.

However, past practice showed that MOFCOM did not always provide a complete set of information for the parties to craft a suitable defense. Furthermore, deadlines were often short, giving parties scant time to prepare. MOFCOM also rarely, if ever, revealed the source or content of third-party complaints in investigations, which made it harder to offer a defense.

Even if a party is invited to a hearing, there is no right to cross-examination.

The Competition Authorities can allow expert testimony if it deems it necessary (APL Art. 35). Furthermore, there is a government-wide emphasis on increasing expert participation in decision-making. For example, Article 10 of the Provisions of the Supreme People's Court on Application of Laws in the Trial of Civil Disputes Arising from Monopolistic Practices states that parties may apply to the court to present expert reports on economic analysis. Article 7 of the Guidelines of the Anti-monopoly Commission under the State Council Concerning the Definition of Relevant Markets states that SAMR will encourage economic analysis.

**d. the case files.**

No.

There are no provisions guaranteeing party access to investigation documents. However, the Competition Authorities may release non-confidential versions of the filing documents prepared by the original notifying party to various stakeholders.

**4. Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

**a. Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes, but it is unclear what recourse parties have if they are broken.

SAMR evidence collection powers are broad and include the power to 1) conduct inspection of business places or relevant premises, 2) make inquiries and conduct interviews, 3) inspect and copy relevant documents and materials, 4) seize and retain relevant evidence, and 5) enquire into bank accounts (AML Art. 39). They may also secure premises overnight, though they are not allowed to break locks on cabinets and doors. At least two law enforcement officers are required to be present, and they must present their law enforcement papers (AML Art. 40). The officers shall record the evidence and obtain the signature of specific individuals investigated (AML Art. 40).

Several guidelines were issued by the Competition Authorities to govern procedural guidelines of investigations. SAIC issued the Measures on the Procedures for Investigating and Handling Cases Concerning Monopoly Agreements and Abuse of Dominant Market Positions. The NDRC issued the Measures on the Administrative Enforcement Procedures of the Prohibition of Price Monopoly. SAMR has not issued replacement guidelines yet, so it remains to be seen whether SAMR will adopt the previous guidelines directly.

In practice, parties have complained that evidence collection powers are too broad and give parties no way to object. Some parties have noted that they were neither informed of the evidence collection raids nor the actual content of the evidence taken. Competition Authorities have also conducted raids without waiting for counsel to arrive.

**5. Does the country's current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country's laws?**

Yes, although to date there have been no instances of judicial review for merger cases.

If a party is unsatisfied with SAMR's decision, they may apply for administrative reconsideration (AML Art. 53). Parties have 60 days to submit a request for administrative review. If the party remains unsatisfied, it may bring an administrative action before the court within 15 days of receiving the results of the administrative review. In theory the applicant may alternatively bring an action to

the courts directly within 6 months of learning the decision.

If the original decision finding anti-competitive behavior was made at the provincial level, the appeal can be brought before the provincial government or at the national-level SAMR.

In theory, administrative decisions taken by SAMR are reviewable in the first instance by the Intermediate People's Courts, Higher People's Courts, or the Supreme People's Court, depending on the complexity or importance of the matter (APL Arts. 14, 15, 16). However, there are serious critiques as to whether parties have fair access to the courts. Some commentators have noted that foreign companies are very unlikely to file appeals because of the single-party nature of the Chinese government and the outsized role of SAMR in other approvals needed by business to operate in China.

The courts have nonetheless played decisive roles in abuse of dominance, and vertical agreements cases, issuing guidance on legal standards and how the Competition Authorities should conduct their review.

During any appeal, sanctions imposed by the Competition Authorities are not suspended (APL Art. 44).

**6. Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes.

AML Article 46 sets forth the leniency regime. SAMR can, at its discretion, mitigate or exempt a party from punishment if that party voluntarily reports to SAMR for the purpose of enforcing the AML. The leniency program is available only for monopoly agreements, not abuse of dominance situations. Prior to the regulatory consolidation, NDRC and SAIC had each issued guidelines toward their own leniency regime. SAIC's leniency rules only covered fines (meaning SAIC could still confiscate gains). But NDRC's former guidelines do not make such a distinction.

Under the Rules for Prohibition of Monopoly Agreements issued by SAIC, in order to receive full exemption from fines, a party must be the first to report, provide material evidence, and offer thorough and voluntary cooperation during the subsequent investigation. Any parties that report to SAIC after the first-in will not receive full exemption but may receive partial exemption.

The Procedural Rules on Administrative Law Enforcement Against Price Monopoly issued by NDRC specifies a similar system. The key differences are that the first-in reporting party may be fully exempt, the second-in party may be 50% exempt, and subsequent parties may be exempt up to 50%.

SAMR appears to be moving towards a new leniency regime, outlined in the Draft Guidelines for the Application of the Leniency Program to Cases Involving Horizontal Monopoly Agreements ("Draft Leniency Guidelines"). The first-in party will receive no less than an 80% fine reduction, up to full immunity. The second-in party will receive a fine reduction between 30%-50%. Any subsequent parties will receive no more than a 30% fine reduction. The Draft Leniency Guidelines also set forth a marker program that allows parties to apply for leniency by filing a preliminary report (Draft Leniency Guidelines Art. 7), even if the party is not capable of providing all the necessary information. If a party states that it is engaging in monopolistic conduct and provide sufficient details on the actual violation, SAMR would "mark" the party's place in the leniency rankings. SAMR then has 30 days (extendable to 60), to provide written comments to the party. The preliminary report for leniency may be made orally

or by writing (Draft Leniency Guidelines Art. 8). Leniency applications should be kept confidential and not disclosed without the party's consent (Draft Leniency Guidelines Art. 16).

For individual whistleblowers, SAMR will keep the whistleblower's identity confidential (AML Art. 38). Prior to the agency consolidation, Article 5 of SAIC's Provisions and Procedures on Investigation and Handling Cases of Monopoly Agreements and Abuse of Dominant Market Position and Article 5 and 6 of NDRC's Procedural Rules on Administrative Law Enforcement Against Price Monopoly similarly protect whistleblowers.

For cartel investigations, SAMR may suspend investigation if the party voluntarily adopts measures to eliminate the harm done by their conduct (AML Art. 45). When SAMR agrees to such an arrangement, it will oversee the commitment to make sure the cooperating party follows through. If the commitment is executed satisfactorily, SAMR may terminate the investigation completely. However, if the commitment is breached, SAMR will restart the investigation (AML Art. 45).

Traditionally, the leniency program does not apply to vertical agreements and dominant firm conduct. However, on September 1, 2019, SAMR published the Interim Provisions on the Prohibition of Monopoly Agreements, allowing the leniency program to apply to vertical monopoly agreements. SAMR may suspend the investigation if the investigated party and SAMR reach an agreement that obligate the investigated party to take on certain commitments.

**7. Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

Yes.

AML Article 41 obligates SAMR and its staff to keep commercial secrets confidential. Article 16 of the Measures on the Review of Concentrations Between Business Operators also address confidentiality. It appears that the confidentiality obligation includes parties other than SAMR and encompasses any information that is "necessary to be kept confidential."

In merger reviews, the notifying party will generally be asked to prepare a non-confidential version of the notification documents. These documents will be used when SAMR consults other stakeholders.

In theory, Article 54 of the AML imposes administrative or criminal liability on SAMR officials for breaching confidentiality. Other administrative guidelines also suggest that officials may be punished severely for breaching confidentiality (e.g. Article 26 of the Regulation on Sanctions Against Public Servants of the Administrative Organs and Article 219 of the Criminal Law).

Parties can request that information be kept confidential. When preparing notification materials, SAMR will request the notifying party to prepare a non-confidential version of the materials.

This non-confidential version is what will be circulated among government agencies and other stakeholders for input.

Third party submissions are also protected under the existing confidentiality rules.

- a. If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

No. There is no right to be informed that SAMR will use confidential materials during review. The AML is silent on this matter. Article 10(1) of the Measures on the Review of Concentrations Between Business Operators does obligate the SAMR to inform the parties of a determination against the merger and the timeline for a response. But it does not obligate SAMR to anything on confidential information.

Indeed, parties do not have the right, under the AML or any of the guidelines, to get access to the SAMR's files. This means parties do not have access to anything submitted by third parties, any expert studies, any comments from other government ministries, etc.

In the past, MOFCOM tended to communicate with parties orally. There were no guidelines that require MOFCOM to give parties feedback in writing. Whether SAMR will continue with this precedent remains to be seen.

Furthermore, there were no guidelines regarding when MOFCOM had to inform parties of concerns that would derail the merger. MOFCOM was only required to inform parties in a "timely" fashion, which, combined with chronic understaffing, led to parties receiving such notices late in the review process. Many parties have complained of insufficient time to meet MOFCOM's demands.

- 8. Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

No, though for mergers parties are expected to engage in pre-notification consultation with SAMR. In the past, parties typically consulted with MOFCOM before initiating formal proceedings being initiated. This means that parties can try to figure out what MOFCOM would require for the merger to be approved. SAMR continues this practice. The Guiding Opinions on the Notification of Concentrations Between Business Operators sets forth some guidelines for these consultations, including how to define the relevant product and market, as well as formal requirements of notification.

During the notification phase of the merger investigation, MOFCOM may send questionnaires to the parties for more information. MOFCOM rarely, if ever, requests in-person meetings at this point.

For monopoly and abuse of dominance investigations, the Competition Authorities are not obligated to notify the parties under initial investigation. However, once the Competition Authorities formally file a case against the party, the party must be informed of the allegations and be given the opportunity to present a defense (Administrative Penalty Law Art. 41).

Nonetheless, it does not appear that NDRC or SAIC were as forthcoming with their concerns. Parties had complained that, by the time they received the allegations, it was already too late to prepare adequate defenses. It also remains unclear whether SAMR will continue NDRC and SAIC's approach to consultations or adopt something more akin to MOFCOM's consultation process.



## **TRANSPARENCY:**

### **1. Does the current law ensure transparency of national competition laws, policies, and enforcement activities?**

Although China's competition law and enforcement regime is trending towards greater transparency, key challenges remain.

First, foreign parties looking to acquire a Chinese company through merger are subject to two opaque procedures: the foreign investment review and national security review. AML Article 31 states that any mergers that involve a foreign party acquiring a domestic party will trigger a review.

Originally completely opaque, the foreign investment review system evolved to become a record-filing system. A "negative list" of industries was established. Any merger that did not involve the negative list were approved upon filing. Those that fell into the negative list were reviewed on a case-by-case basis.

The national security review mechanism was established in 2011, which involves a joint review by MOFCOM and NDRC. The national security review committee has complete discretion to review the proposed merger, and will consider issues of national defense, national economy, and technology development in China. The committee will solicit opinions from other governmental agencies as well.

In 2019, China passed a new Foreign Investment Law. The new law appears to retain both the foreign investment review and the national security review, but it provides no details as to their procedure or implementation (strongly diverging from the 2015 draft version, which had a CFIUS-like structure for national security review). Since the new law went into effect in 2020, this is a matter worth reexamining once SAMR issues guidelines.

Second, the AML sets forth several very generous exemptions to monopoly conduct, including:

- 1) improving technologies, or engaging in research and development of new products; or
- 2) improving product quality, reducing cost, and enhancing efficiency, unifying specifications; and standards of products, or implementing specialized division of production;
- 3) increasing the efficiency and competitiveness of small and medium-sized undertakings;
- 4) serving public interests in energy conservation, environmental protection and disaster relief;
- 5) mitigating sharp decrease in sales volumes or obvious overproduction caused by economic depression;
- 6) safeguarding legitimate interests in foreign trade and in economic cooperation with foreign counterparts; or
- 7) other purposes as prescribed by law or the State Council (AML Art. 15).

Outside observers may suspect that SAMR can effectively exempt any party for any underlying reason, breeding distrust in the system.

**2. Does the national law and regulatory agency’s procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?**

Yes, with major caveats. AML Article 30 requires SAMR to publish decisions when it finds against proposed mergers or is imposing restrictive conditions on proposed mergers. However, AML Article 30 also does not require SAMR to publish reasoned decisions approving mergers.

In 2018, SAMR published 4 conditional approval decisions (approving the other 444 merger cases), 13 decisions on penalties against companies that failed to file for mergers, 13 cartel decisions, 4 abuse of dominance decisions, and 1 vertical restriction decision. One concern with these decisions is that they do not necessarily set forth reasoning or the evidence consulted in sufficient detail.

For merger cases that are approved, MOFCOM (and SAMR presumably will continue this practice) publishes quarterly reports on its website. These reports only contain information about the identity of the merging entities and the date of approval, not any detailed reasoning for the decision.

For monopoly and abuse of dominance investigations, SAMR publishes administrative decisions on its website at: <http://www.samr.gov.cn/fldj/tzgg/xzcf/>. The legal basis for publishing investigation decisions is flimsy, however. Art. 44 of the AML sets forth that:

“Where after investigation into and verification of the suspected monopolistic conduct, the authority for enforcement of the Anti-monopoly Law concludes that it constitutes a monopolistic conduct, the said authority shall make a decision on how to deal with it in accordance with law and may make the matter known to the public.”

Based on the AML, it could seem that SAMR is publishing decisions purely for policy reasons, rather than to conform with the law.

**3. Does the national law and regulatory agency’s procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?**

Yes, with important caveats. SAMR (and its predecessors) is required to issue a timely written decision if it finds against a merger or imposes restrictive conditions on a merger (AML Art. 30). There is no requirement to publish reasoned decisions for unconditional clearances. However, the Competition Authorities have historically published lists of approved mergers without comment.

Even with the requirement to issue written decisions for some cases, MOFCOM had historically been inconsistent with the quality and completeness of their issued decisions. Earlier written decisions presented very few details to justify the factual or legal basis for MOFCOM’s ruling. However, this has improved with time and SAMR is expected to continue the trend towards more complete and reasoned decisions.

For monopoly and abuse of dominance investigations, SAMR is obligated to publish the decision in order to impose any administrative penalty (Administrative Penalty Law Art. 39). The decision must set several details, including the facts and evidence for finding the violation. In practice, however, many of these decisions are short and lacking in detail.

**COMITY:**

**1. Do the country's government and competition authorities:**

- a. cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and**

Yes.

MOFCOM, NDRC, and SAIC (SAMR may choose to be bound as the successor agency) have signed memoranda of understandings with foreign counterparts, including with Australia, Brazil, Canada, the EU, France, Japan, Kazakhstan, Kenya, Mongolia, Portugal, Romania, Russia, South Africa, South Korea, Thailand, the United Kingdom, the United States, and Vietnam. MOFCOM consulted with the US and EU regularly. However, to date there has not been publicly acknowledged cooperation between the Competition Authorities (specifically NDRC and SAIC) and foreign counterparts in monopoly investigations.

Furthermore, Chinese officials have spent substantial effort to learn from the best practices of foreign competition authorities. This is reflected in the dialogue between academia, industry, and government experts on the subject.

- b. cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation, and the exchange of information with other national competition authorities?**

There is little publicly available information on the extent to which the Chinese regulatory agencies cooperate on pending cases. However, anecdotal data suggests that cooperation with foreign agencies is normal and routine on major cases. For example, there are reports that the NDRC and South Korea's Fair Trade Commission exchanged expertise during the Qualcomm investigation.

One important point to note is that the AML explicitly states that it applies extraterritorially to conduct outside of China, so long as the conduct affects market competition within China (AML Art. 2). This grant of extraterritoriality means that there are opportunities for SAMR to cooperate with its foreign counterparts on key cases.

## **COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION: THE EUROPEAN UNION**

### **INTRODUCTION:**

The foundational law of the European Union's competition policy is the Treaty on the Functioning of the European Union ("TFEU"). Article 101 of TFEU prohibits agreements between two or more independent market operators that restrict competition. This covers both horizontal and vertical agreements. Article 102 of TFEU prohibits dominant firms from anticompetitive behavior, such as setting unfair prices, limiting production, or harming consumers by refusing to innovate. Hereinafter, this review refers to Articles 101 and 102 jointly as the "EU Competition Laws."

The European Commission Directorate General for Competition ("the Commission") is empowered to investigate firms and impose fines. Council Regulation (EC) 1/2003 sets forth the basic procedures for implementing the EU Competition Laws.

Cases regarding alleged infringements of TFEU Art. 101 or 102 may be brought by undertakings, natural and legal persons, and EU Member States ("Member States").

National Competition Authorities ("NCAs") are the competition agencies of each individual Member State, and NCAs form a larger European Competition Network ("ECN"). While the ECN has no formal power, it is an important organization that facilitates the sharing of information and cooperation between NCAs.

NCAs have the authority to apply EU Competition Laws and investigate firm behavior. National courts have the authority to hear cases regarding EU Competition Laws, including hearing cases regarding damages. National implementation of EU Competition Laws cannot be less favorable to similar actions implementing domestic rules. Furthermore, national procedural rules cannot make implementation of EU Competition Laws impossible or excessively difficult.

The Commission may allocate cases it receives to NCAs within the ECN. Furthermore, the Commission has the power to transmit information to the NCAs, give its opinion to the NCAs regarding the application of rules, and may submit *amicus curiae* briefs to national courts (Regulation 1/2003, Art. 15).

National courts must submit to the Commission a copy of any decision that applies the EU Competition Laws (Regulation 1/2003, Art. 15(2)). The national courts may ask the Commission to render an advisory opinion. However, this opinion is non-binding. It also does not preclude the national courts from asking the Court of Justice of the European Union ("CJEU") to issue a preliminary ruling (TFEU, Art. 267). CJEU interpretations of the EU Competition Laws are binding on national courts, while Commission opinions are not.

Recently, the EU has moved towards further strengthening NCAs, a key component of the continent's competition strategy. With NCAs already accounting for 85% of the competition cases in Europe, the Commission wishes to further empower and standardize NCAs. To that end, in 2017 the Commission proposed a directive to the European Parliament and Council to strengthen NCAs.

## DUE PROCESS:

- 1. Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes.

All EU laws regulations and guidelines are available on the European Union EUR-Lex website at <https://eur-lex.europa.eu>. All documents are available in each of the official languages of the European Union. The Commission also maintains a website with the procedural rules at: [https://ec.europa.eu/competition/publications/legislation\\_en.html](https://ec.europa.eu/competition/publications/legislation_en.html). Some procedural manuals are also available at the websites of the corresponding agencies.

- 2. If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

Yes for mergers. No direct rules governing the timing of other investigations.

Nonetheless, parties have a general right to a decision within a reasonable time. A number of court cases have ruled that expedient proceedings is part of the principle of effective judicial protection (SCK and FNK v. Commission, [2008] ECR II-01739). The right is also implied from the European Convention on Human Rights. While the courts have not defined "reasonable time," the court analyzes four factors: 1) importance of the case for the person concerned, 2) complexity of the case, 3) conduct of the applicant, and 4) conduct of the competent authorities (Baustahlgewebe GmbH v. Commission, Case C-185-95).

### *Mergers:*

Parties must notify the Commission before implementing a merger. Parties are encouraged to engage in pre-notification consultation with the Commission to iron out any preliminary issues to avoid having the submitted notification being deemed incomplete. A formal notification is complex and can take months to prepare.

Before the Commission undertakes a formal investigation, there will often be informal meetings between the notifying parties and the Commission. These meetings will typically take place at least 2 weeks before the date of the notification. However, there is no time limit for pre-notification consultation.

After the undertakings notify the Commission of a proposed merger, the Commission will determine whether the case should be determined with a simplified procedure or the regular procedure. The simplified procedure is for cases that do not raise competition concerns. If the case is to be determined using the simplified procedure, the Commission will issue a decision within 25 working days.

Otherwise, each merger transaction can be investigated in potentially two phases by the Commission. Phase I lasts 25 working days, starting from the working day following the receipt of the complete notification to the Commission. A single 10-working-day extension could be granted when remedies are offered or a request comes from a member state. If the Commission clears the merger, with or without conditions, then Phase I concludes.

Phase II starts when the Commission believes that the proposed merger may run afoul of the competition law. Phase II lasts up to 90 working days and can be extended by 15 working days in two instances: first, if remedies are offered by the parties, or second, by the Commission after the 55th working day after

Phase II begins. The Commission may extend Phase II by a cumulative maximum of 20 working days at the request of the notifying parties, if requested within the first 15 days of Phase II, or at any time with the agreement of the Commission and the notifying parties. In theory, the maximum amount of time Phase II can take is 125 working days.

The clock is suspended if the Commission issues a decision that orders inspection or requires the production of information. The Commission may also suspend the counting of days when the notifying parties are deemed to have failed to supply the requested information.

There are also statutes of limitations concerns for bringing enforcement actions (including starting investigations). The Commission can impose penalties within 5 years of the infringement being committed. Any actions that the Commission or NCAs take to investigate will interrupt the statute of limitations period (Art. 25 of Regulation 1/2003).

*Other investigations:*

In theory, the Commission can take as much time as it needs to conduct preliminary investigations. The Commission may invite parties to a meeting and set up a timetable for the case. After this stage, the Commission will issue a Statement of Objections, which gives the parties a chance to respond in writing and participate in oral hearings with the Commission.

However, some commentators have noted that Commission investigations can vary widely in duration and occasionally last an unreasonably long time: a study in 2014 found that cartel investigations ranged from 7 months to 114 months, with an average of 49 months.<sup>4</sup>

The statute of limitations is 5 years from the day the infringement was committed. Any action that the Commission or NCAs take to investigate the matter interrupts the limitation period (Art. 25 of Regulation 1/2003).

**3. When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**

**a. information about the regulatory agency's allegations and competition concerns, including the legal and factual basis for the allegations;**

Yes, but there are concerns over the defending parties' ability to access case files and the way in which the Commission develops new theories of harm. For example, if the Commission denies file access to the defending parties, the burden of proof on appeal is often on said parties to show that the denied files are of material importance to the outcome of the case. Along a similar vein, commentators have noted that the Commission can develop novel theories of harm (such as in the Dow/DuPont case), without giving parties sufficient opportunity to rebut or consider such theories.

In a merger investigation, the Commission will publish a non-confidential notice of every notification on the Commission website and the Official Journal of the European Union ("Official Journal"). The Commission will also publish non-confidential versions of its decisions at the end of phase I and phase II of investigations.

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<sup>4</sup> See Florian Smuda, Patrice Bougette, and Kai Hüschelrath, *Determinants of the Duration of European Appellate Court Proceedings in Cartel Cases: Discussion Paper No. 14-062*, CTR. FOR EUROPEAN ECON. RESEARCH, 13 (2014).

The primary mechanism by which the Commission informs a party of its allegations and concerns is the Statement of Objections (“SO”). The Commission must produce an SO when it intends to: 1) find infringement of TFEU Art. 101 or 102, 2) impose behavioral or structural remedies, 3) order interim measures, 4) assess fines and penalties, and 5) withdraw a block exemption from an individual case.

The SO is issued after the completion of fact-finding by the Commission. If new facts arise after the issuance of the SO, then the Commission must issue supplementary SOs or letters of facts.

Prior to the SO being issued, the Commission should offer parties a State of Play (“SoP”) meeting. At an SoP meeting, the Commission will lay out its preliminary views and specific competition concerns.

The SO must set forth the Commission’s concerns in a sufficiently clear manner so that parties can understand and respond to the Commission’s concerns. Both the factual and legal concerns must be set forth clearly. For the Commission, proper drafting of the SO is paramount. Documents that are not mentioned in the SO do not constitute valid evidence of the final decision (Case 107/82, AEG [1983] ECR p. 3193).

The SO must set forth the Commission’s intention on fines (Art. 23 of Regulation 1/2003), periodic penalty payment (Art. 24 of Regulation 1/2003), or other structural or behavior remedies). The SO must also contain the factual and legal reasoning for why such remedies are to be imposed. The Commission must articulate why structural remedies are necessary and no behavioral remedy would be equally effective.

Along with the SO, the Commission will inform the parties that they have a right to access the file at the Commission premises or have it sent through the mail.

The amount of time a party has to reply to the SO depends on the complexity of the case. Parties have at least 4 weeks to reply to the SO, though in normal cases, parties will get 2 months. The time limit is calculated from the time the main documents in the file are provided to the party. Parties may request for an extension as long as it is submitted at least 10 working days before the expiration of the original time limit.

The Commission must issue supplementary SOs if new facts or evidence change the nature of the infringement or cause the Commission to raise supplementary objections. A new SoP meeting should be offered to the parties in this situation. Parties may submit responses to a supplementary SO.

If new facts or evidence does not raise new concerns and merely corroborates existing objections, the Commission will send a letter of facts. Parties may submit responses within an established deadline.

**b. the opportunity to be represented by counsel;**

Yes.

Parties may be represented by in-house or external counsel at all proceedings. One particular issue does arise in relation to the right to counsel:

The EU attorney-client privilege rule only applies to communications between independent lawyers and the client. In-house counsel does not apply for the privilege. Privilege does apply to internal documents that describe the contents of communications with external counsel. In theory, the privilege only applies to lawyers qualified in at least one EU Member State, but the Commission has refrained from seeking documents that originate from attorneys from the United States.

- c. the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

Yes, with some caveats.

The Commission is obligated to give an accused party the opportunity to be heard before imposing a fine or order (Art. 27 of Regulation 1/2003). This right to be heard consists of written replies to the SO, as well as oral hearings. The Commission must organize an oral hearing if the party requests it.

In most cases, a bona fide complainant (one that filed an official complaint and has legitimate interest in the matter) will be given a non-confidential version of the SO and be allowed to reply to that. The SO will set forth proposed remedies. The complainant is not given the SO in a cartel case.

After receiving the SO and the supporting documents from the Commission, an undertaking has a minimum of 4 weeks to reply. More typically, a party has 2 months to file a reply. An undertaking can make a reasoned request for an extension.

One of the primary critiques of the EU competition regime enters at this stage: third parties are not guaranteed a right to be heard by the ultimate decisionmaker. Third parties may apply to make written statements, but the Hearing Officer has discretion on the matter. Likewise, the Hearing Officer has discretion over whether third parties will be allowed to participate in oral hearings.

If the parties addressed in the SO request, the Commission will hold an oral hearing. Third parties and complainants do not have the right to request an oral hearing. The oral hearing is not a public proceeding and usually takes place 6 to 8 weeks after the reply to the SO is submitted. The Hearing Officer will preside over the oral hearing.

At the oral hearing any of the parties may appear in person, be represented by counsel or authorized representatives. Parties may bring experts admitted by the Hearing Officer, and the Commission may invite persons to the oral hearing to express views (Art. 13(3) of Regulation 773/2004). The Commission will usually invite important members of the Commission, as well as officials from the relevant NCAs or member states themselves.

The oral hearing is not a trial, and there is no right of cross examination. However, participants have the right to question any other participants in the hearing. Nonetheless, there is no obligation to answer any specific question. In fact, the Hearing Officer does not have any power to compel any answers or attendance.

Any statements made by any party at the oral hearing must be recorded and made available upon request to those who attended the hearing (Art. 14(8) or Regulation 773/2004).

After the oral hearings, the Hearing Officer will draft an interim report and record observations on key issues and missing information. The interim report will be forwarded to Competition Commissioner. The Commission will then offer an SoP meeting to the parties, at which the Commission will let the parties know the Commission's preliminary view of the matter. In cartel cases, the Commission will offer only one SoP meeting. After more deliberations, the Hearing Officer will draft a final report and the final decision will be adopted by the College of Commissioners.



**d. the case files.**

Yes.

The right to access case files is found in the Charter, the ECHR, and various other legislation and guidelines. The legal framework is laid down in Art. 27(1) and (2) of Regulation 1/2003 and Article 15(1) and Article 16 of Regulation 773/2004.

The right to the case files is crucial. If the Commission fails to disclose evidence to the parties addressed by the SO, the party may be able to annul whatever decisions the Commission reaches.

The right of access to case files does not grant parties access to confidential information (Art. 16, Regulation 773/2004). Furthermore, the right does not grant parties access to internal documents of the Commission or NCAs (Art. 28, Regulation 1/2003).

Access to the file is granted to the parties that are addressed in a SO from the Commission. It is normally only granted on a single occasion (Art. 15(1) of Regulation 773/2004). Business secrets, confidential information, and Commission/NCA internal documents are not accessible. Commission/NCA internal documents are not considered evidentiary and so are excluded from party access. Final expert reports are accessible, but correspondence with experts are not.

The Commission will label every document received. When a party requests access, the Commission will transmit the accessible file to the party in PDF format on a CD-ROM/DVD. For cartel leniency cases, access includes the aforementioned CD-ROM/DVD as well as corporate statements and leniency decisions. The corporate statements and leniency decisions are only available at Commission premises, and generally only once.

Although access to files is only granted once, further access can be granted if the Commission receives new incriminating or exonerating evidence.

For particularly voluminous files, the parties may negotiate a disclosure agreement.

The Commission may also organize a data room, which is a literal room with computer workstations, software to utilize the data, and no network connections. Data rooms are frequently used for quantitative data used in econometric analysis. Legal counsel and other advisers may use the data in the data room to mount defenses, but may not disclose confidential information to their clients. Copies may not be made of the data, and counsel and advisers must sign a confidentiality agreement before entering the room.

EU courts have ruled that there is no right to access other parties' defenses when they reply to the SO. However, the Commission may choose to give parties a copy of the non-confidential version of other parties' replies to the SO. This is usually done before the oral hearings and with enough time for parties to prepare comments.

If the new information in another parties' defense is inculpatory, the Commission has an obligation to allow access to specific evidence the Commission intends to rely on in the final decision. If the information is exculpatory, the Commission may grant access upon request of a party.

If a party wishes to access information submitted to the Commission by a third party, the Hearing Officer will implement the "Akzo Procedure." This procedure requires the Commission to consult with the submitter of the information before disclosure. If the submitting party deems the information to be confidential, then the Commission must inform in writing its intention to disclose, then give the party an opportunity to object. If the submitter continues to object and the Commission is determined to disclose

the information, the Commission must prepare a reasoned explanation. This reasoned explanation may be challenged in the European General Court (“General Court”) (Akzo v. Commission, [1986] E.C.R. p. 1965).

Complainants are not treated the same as parties under investigation. Generally speaking, the complainant does not have the right to access Commission files. The primary exception is that the General Court has ruled that the complainants have the right to access information that led to the Commission rejecting the complaint (Art. 8(1) of Regulation 773/2004).

If the Commission intends to reject a complaint, the complainant may request access to documents “on which the Commission bases its provisional assessment.” (773/2004, Art. 8(1)). Business secrets and confidential information are not included in this form of document access.

Third parties do not generally have access to files for cartel investigations. However, third parties can request access of Commission documents on a case-by-case basis (Regulation (EC) 1049/2001).

**4. Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

Yes.

The procedural rules of the Commission are set forth in the Rules of Procedure of the Commission. These rules are supplemented by the Rules giving effect to the Rules of Procedure of the Commission (C(2010)1200). The Commission also refers to the Manual of Operating Procedures and the Antitrust Procedural Manual.

In the special case under which the Commission imposes interim orders to combat the suspected infringement of the EU Competition Laws, a special set of procedural rules apply. The Commission may only impose interim orders if two conditions are fulfilled: 1) there is a prima facie breach of EU competition rules and 2) there is proven urgency so that there will likely be serious and irreparable damage to the party applying for interim measures, or intolerable damage to the public interest (T-184/01 R IMS Health [2001] ECR II-3193). Various court cases have expanded on the requirements, such as noting that the interim measure must be indispensable, urgent, and temporary.

The Commission can apply the interim measure for a specified amount of time (Art. 8(2) of Regulation 1/2003). In one case, this amount of time has been as long as 8 months.

Due to the heightening urgency of interim measures, parties are given truncated response periods. Nonetheless, parties have a right to be heard and to submit written replies. The decision to impose interim measures may be appealed to the courts.

**a. Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes.

The Commission may request undertakings to provide necessary information (Art. 18, Regulation 1/2003). This can be done through a letter or decision.

In a letter request, the Commission must give the undertaking reasonable time to reply, generally no less than two weeks. Extensions may be granted.

In a Commission decision requesting information, the decision is treated as an act of the EU (Art. 296 of TFEU). The decision can be annulled if the reasoning in the decision is invalid. A time limit for the reply will be set forth in the decision. Fines may be imposed if undertakings fail to respond. The undertaking may invoke the privilege against self-incrimination.

For the purposes of an investigation, the Commission may interview natural or legal persons who consent to be interviewed (Art. 19 of Regulation 1/2003). Interviews are voluntary, and the interviewee may be accompanied by an assistant or lawyer. The interviewee may discontinue participation in an interview after the interview has commenced. Interviewees may also refuse to answer specific questions. Interviews should be carried out by at least two people, at least one of which needs to be from the Commission. The Commission may record the entire interview (Art. 3(2) of Regulation 773/2004).

The Commission may also order a party to submit to an inspection (Article 20 of Regulation 1/2003), with or without judicial authorization. Unannounced on-site inspections are often known as dawn raids. The written authorizations will name the officials and other personnel who will act as inspectors.

Inspectors are empowered to: 1) enter any premises, land, and means of transport of undertaking and associations of undertakings; 2) examine the books and other records related to the business, irrespective of the medium on which they are stored; 3) take or obtain any form copies or extracts from such books or records; 4) seal any business premises, books or records for the period and to the extent necessary for the inspection; 5) ask any representative or member of staff of the undertaking, or association of undertakings, for explanations on facts or documents relating to the subject matter of the inspection and to record the answers (Art. 20(2) of Regulation 1/2003). The inspectors may use forensic software and search the IT-environment, including all computers, mobile devices, and storage media.

The inspection is limited to the areas originally identified by the Commission. Mere suspicion of violations is not enough to justify searching all areas of the premises. Inspectors should not search and seize evidence that are unrelated to the subject matter of the inspection.

The party being inspected may consult external legal counsel. But the presence of counsel is not required before the inspection is valid. Inspectors do not have to wait for the party's counsel.

Inspections may be held at the homes of directors, managers, and other members of a party's staff (Art. 21(1) of Regulation 1/2003) for alleged hard-core violations. However, such an inspection cannot be executed without the authorization of the national judicial authority of the Member State where the premises is located (Art. 21(3) of Regulation 1/2003).

When the Commission is inspecting an undertaking, the Commission may ask questions of representatives of the undertaking. In these cases, the representatives have an obligation to answer the questions. Failure to do so, or providing incorrect, incomplete, or misleading answers, can subject the undertaking to fines (Art. 23(1)(d) of Regulation 1/2003).

When the Commission conducts a dawn raid, there are typically 5-10 officials present. There will also typically be officials from the relevant NCA. While Commission officials do not have the power to force entry onto premises, NCA officials usually will have procured a warrant through the relevant national court channels.

**5. Does the country's current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country's laws?**

Yes, but there is controversy regarding the adequacy of the General Court's judicial review of the Commission, which is an organization with expansive powers.

Direct parties to a decision of the Commission have the right to appeal the infringement decision to the General Court on issues of fact and law (TFEU Art. 263). The General Court has the power to annul or change the fine imposed by the Commission, but it cannot order the Commission to change its judgment. The General Court's will focus on five issues: 1) whether the decision was based on a correct interpretation of the law, 2) whether there was sufficient factual evidence to support the decision, 3) whether the Commission made manifest errors, 4) whether the Commission employed proper reasoning, and 5) whether procedural rights were observed.

Historically, the General Court has shown the Commission substantial deference when it comes to the substantive analysis that inform case findings. This has led some to criticize the court for only doing a marginal review. More recently, there appears to be a move to have the General Court do more substantive review of the cases, though the results remain to be seen.

The General Court does have nearly unlimited power over fines imposed by the Commission, however.

Cases before the General Court can take several years. For particularly urgent cases, there is a fast-track procedure that can shorten the time span of the case to around 8 months.

Appeals to the General Court must be brought within 2 months and 10 days of the decision becoming known to the affected party. The Commission's decision remains effective during the appeal, unless the appellant can show that interim relief is warranted based on the likelihood of serious and irreparable harm, the need for urgent relief, and at least a reasonable case that the appellant will prevail. This is a high bar to cross and decisions are rarely suspended.

If a party is unsatisfied with the judgment of the General Court, they can appeal to the CJEU. The Commission may appeal a judgment to the CJEU as well. Appeals to the CJEU are limited to matters of law only.

**6. Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes.

*Merger Remedies:*

In a merger investigation, parties may propose a remedy to the Commission that eliminates the competition concerns. Only the notifying parties may propose remedies, and the Commission has a strong preference for structural (rather than behavioral) remedies.

*Cartel Leniency:*

The EU adopted a rule regarding immunity and reduction of fines for cartel cases in the Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases 2006/C298/11. Fine calculations and fine reductions are set forth under Art. 23(2)(a) of Regulation 1/2003. The earlier a party contacts the

Commission, the less that party will have to pay in fines. The fine reduction will also be determined by the usefulness of the information provided.

Almost all Member States have also adopted immunity/leniency programs. However, application to one Member State's program is not automatically treated as an application to another Member State's program (or to the Commission's program, for that matter). In the DHL v. AGCM case, the CJEU ruled that there is no "one-stop-shop" for cartel immunity/leniency applications (C-428/14, DHL v. AGCM). Instead, NCAs are not bound by the decisions made by the Commission regarding leniency decisions.

A party may apply for immunity/leniency by submitting a formal application. On the application, the party must provide all information and evidence necessary to meet the immunity/leniency threshold, or provide a list of information and evidence that the party intends to forward to the Commission (the latter case is termed a hypothetical application).

When submitting a formal immunity/leniency application, the party may give information as written submissions or oral statements. The Commission will take oral statements according to procedure set forth in Section IV of the 2006 Leniency Notice.

A party will receive full immunity if they are the first to submit information and evidence that the Commission believes will allow it to carry out a targeted inspection of the alleged cartel. Alternatively, the Commission can grant immunity to the first party that submits information and evidence that the Commission believes will allow it to find an alleged cartel in infringement of the EU Competition Laws.

In addition, the party seeking immunity/leniency must fully cooperate, terminate its involvement in the alleged cartel, not destroy, falsify, or conceal evidence, refrain from disclosing its application for immunity, and refrain from coercing other companies to participate in the alleged cartel.

Any party after the first party to apply for immunity/leniency may receive partial reduction in fines. However, subsequent parties will only receive a reductions in fines if the information and evidence they provide adds significant value to the investigation. This means that the earlier a party seeks leniency, the more likely it will provide relevant information.

In terms of actual percentages, the second party to submit information and evidence may receive a fine reduction of 30-50%. The third party may receive a fine reduction of 20-30%. Any subsequent parties may receive up to a 20% reduction in fines.

The Commission may grant conditional immunity for a hypothetical application. The party does not need to reveal its identity in the application. However, it does need to reveal the product or service implicated in the alleged cartel, the geographic scope of cartel behavior, and the duration of the cartel behavior. The Commission will determine whether to grant immunity after the informant submits evidence. If the immunity/leniency application is rejected by the Commission, the applicant party may choose to withdraw submitted evidence, or consider the submitted evidence for a possible reduction in fines.

A party may also apply for a marker, which will protect its place in line so that the appropriate fine reductions may be awarded for cooperation with the Commission. If the Commission is open to granting a marker to a party, the Director of the Commission will send a letter to the party. Once the letter is sent, the party may perfect the marker by submitting all the information and evidence required for an immunity/leniency application. If the marker is not perfected, the party will lose its place in line.

There is no set time timetable for immunity or leniency applications, though leniency decisions will occur before the Statement of Objections is issued. The Commission may withdraw immunity and leniency if the party fails to comply with conditions.

The identity of applicants for leniency and immunity are kept confidential until the Commission issues the SO. The SO will identify the applicants to the addressees of the SO, while the public will not learn the identity of the applicants until the final decisions are published by the Commission.

*Settlements:*

The settlement procedure for cartels is Commission Regulation (EC) 622/2008.

The Commission is allowed to accept commitments from companies without finding infringement (Regulation (EC) 1/2003, Art. 9). Any such settlements must undergo a market test. A market test requires that the Commission publish in the official journal a summary of the case and the content of the commitment proposal. Third parties are invited to submit comments within the time limit, usually no less than one month. The Commission will usually issue a press release along with the market test publication. It is important to note that a market test is not a requirement for market approval, and the content of the settlement may change depending on the results of the market test. After the market test, the Commission will hold an SoP meeting with the parties.

Any discussion for a settlement with the Commission must begin before the formal initiation of proceedings and the adoption of the SO. A party that wishes to settle with the Commission must acknowledge its participation in a cartel. However, if the Commission terminates the settlement discussions before it is finalized, the party's acknowledgement of violating behavior cannot be used against them.

Parties that are interested in a settlement will be allowed access to the Commission's file to see the Commission's objections to the merger, relevant evidence, and potential fines. After all parties have knowledge of the facts of the case, each party has 15 working days to submit a settlement proposal, which includes the amount each party is willing to pay.

The Commission will issue a revised SO, to which parties must reply within 2 weeks. At the end of that time period, assuming the parties are still interested in settlement, the Commission will adopt its decision and give the parties a 10% reduction in fines. This reduction in fine is cumulative with leniency reductions.

**7. Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

Yes.

The Commission is obligated to respect the confidentiality of sensitive information. Parties may substantiate a claim of confidentiality on information and submit non-confidential versions of the information.

Confidentiality may not apply if a piece of information is inculpatory or exculpatory. In these cases, the right of defense or need to prove infringement may outweigh the right of confidentiality. The parties and the Commission will make a determination on a case-by-case basis. In all cases the Commission prefers that the parties settle all confidentiality claims before the issuance of the SO.

When the Commission requests information in a letter, the addressee must let the Commission know if it considers the information provided is confidential. In order to receive confidentiality, the addressee has to substantiate its claim. The confidentiality of each piece of information must be claimed separately (Regulation 773/2004 Art. 16(3)).

Communications between counsel and client may be protected by legal professional privilege and considered confidential. However, the lawyer must be independent (not in-house) and privilege only applies to communication made for the purpose of defending the client in competition proceedings. To claim confidentiality based on privilege, an undertaking must submit redacted documents so that the Commission may determine the validity of the claim. The undertaking may also claim that the redaction will not be sufficient and refuse to submit the entire document. The Commission may nonetheless gain access to such information if it invokes lengthy review procedures that can include submitting the matter to CJEU.

- a. If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

Yes.

Please see answer above in Section 3(d).

- 8. Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

Yes.

The Commission regularly offers SoP meetings during the proceedings to inform parties of the current situation. Although these meetings are voluntary, SoP meetings are crucial to facilitate transparency and discussion between the parties and the Commission. Generally speaking, SoP meetings are only offered to parties under investigation and not complainants or third parties. Each party being investigated will be offered a separate SoP meeting.

SoP meetings are typically conducted at Commission premises. However, they may also be held by phone or video. Where possible, a senior member of the Directorate-General for Competition will chair the meeting.

SoP meetings are offered at crucial points in the investigation. For non-cartel cases, SoP meetings are offered once after the opening of the proceedings, and again after the investigation has proceeded to a relatively advanced stage. The latter meeting allows the parties and opportunity to learn the Commission's preliminary views on the entire investigation. After an SO is issued by the Commission, the Commission will offer an SoP meeting.

In a cartel investigation, a single SoP meeting will be offered after the oral hearings take place. Two further SoP meetings will be offered between the commitment decisions are made.

In appropriate situations, the Commission will hold triangular meetings between the Commission, a party under investigation, and a complainant or third party. This is often done when the Commission receives

conflicting data and evidence. Triangular meetings are voluntary and usually held before the Commission issues the SO.

Parties may also discuss their case with senior members of the Committee or directly with the Commissioner.

#### **TRANSPARENCY:**

##### **1. Does the current law ensure transparency of national competition laws, policies and enforcement activities?**

In light of the answers in this report, yes.

##### **2. Does the national law and regulatory agency's procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?**

Yes.

All decisions adopted by the Commission will be sent in full to the parties and published. The decisions shall state the names of the parties, the content of the decision, and penalties imposed.

When a party enters a commitment with the Commission regarding a competition concern, the Commission will adopt a decision to make the commitment binding. Before the decision is made final, the Commission will publish a notice of the commitment in the Official Journal, and the full text of the commitment for a market test on the Commission's website.

A press release will be published after the Commission adopts a decision. The press release will describe the scope of the case and the nature of the infringement. It will also note the amount of the fines and types of remedies imposed on the party.

The Hearing Officer's final report and the opinion of the advisory committee is published in the Official Journal.

The Commission will publish a non-confidential version of the decision on its website. If a complaint is rejected, the Commission will publish rejection decisions. The complainant may not be named, if appropriate.

##### **3. Does the national law and regulatory agency's procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?**

Yes.

For prohibition decisions, the Commission will notify the parties and NCAs directly. The Commission will then send a certified copy of the decision to the parties.

The Commission will hold a press conference and issue a press release after sending the decision to the parties. Publication follows. All decisions made by the Commission are available at: <https://ec.europa.eu/competition/elojade/isef/>.



All NCA cases are available at: <https://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>.

COMITY:

**1. Do the country's government and competition authorities:**

- a. cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and**

Yes.

The EU has dedicated cooperation agreements on competition matters with Canada, China, Japan, South Korea, and the United States. For these agreements, the countries agree to mutual coordination on enforcement, and exchange of non-confidential information. One state party may request another state party to take enforcement actions. Parties may also take other parties' interests into account when taking enforcement actions.

The Commission cooperates with EU member states and transmits important documents to NCAs. The Commission will also transmit other documents at the request of NCAs. NCAs are obligated to provide a summary of any decision bringing an infringement to an end, including when accepting commitments and withdrawing block exemptions.

The EU has concluded Association, Economic Partnership, and Free Trade Agreements with Morocco, Algeria, Chile, Mexico, the Caribbean Community, a number of Central American countries, Colombia, and Peru. Although these agreements are not strictly competition agreements, they contain basic provisions related to competition matters.

There is a customs union agreement with Turkey. The EU has non-binding arrangements with Brazil, China, and Russia.

- b. cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information with other national competition authorities?**

Yes.

The EU can request cooperation from Canada, Japan, South Korea, and the United States (and vice versa). The requesting party may call upon the other party to take appropriate measures to curb anti-competitive behavior in that country's territory.

The Commission works closely with the Federal Trade Commission and Department of Justice Antitrust Division of the United States.

## **COMPETITION REGULATORY AGENCY REVIEW: THE REPUBLIC OF KOREA**

### **INTRODUCTION:**

The primary regulatory framework of the Republic of Korea's ("RoK") competition policy is the Monopoly Regulation and Fair Trade Act ("MRFTA"). Articles 7(1) and 12(1) of the MRFTA establishes the framework regarding mergers, while Articles 19(1) and 26 deal with restraint of trade, and Article 3 and 3-2 with dominance.

The Korean Fair Trade Commission ("KFTC") is the enforcement agency for competition law in RoK and is established by Art. 35 of the MRFTA. There are nine commissioners on the KFTC and none can be removed from office barring imprisonment or for health-reasons.

The KFTC is divided between the decision-making Committee (which includes the commissioners) and the investigative Secretariat. The Secretariat is body that investigates possible violations and acts akin to a civil-law prosecutorial body.

Since its founding in 1981, the KFTC has become a robust agency. However, the agency's role has substantially evolved through the years. In the earlier years, the KFTC was primarily concerned with regulating the massive chaebols, which are family controlled mega-conglomerates that wield tremendous power in the RoK. During the 1980s and 1990s, chaebols were mostly seen as non-negotiable drivers of Korean economic development. However, the Asian Financial Crisis of 1997 hit the RoK particularly hard and exposed critical weaknesses of chaebols. Later in the 2000s, with major foreign companies such Microsoft and Qualcomm entering the Korean market, the environment became conducive for the KFTC to become a more general-purpose competition regulator.

Cases come before the KFTC in three general ways: 1) through leniency application filings (voluntary submissions), 2) through third-party tips; 3) the agency's ex officio investigations.

The workload of the KFTC is considered high. In 2018, the agency processed 3,517 cases (this includes matters unrelated to the MRFTA) and imposed 181 penalties on companies totaling KRW 310.5 billion. Furthermore, in 2019, 766 mergers were notified to the agency.

### **DUE PROCESS:**

**1. Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes. The statutes and guidelines governing competition enforcement are available to the public on the website of the KFTC. They are available in English on the English version of KFTC's website. Laws that have been translated into English include those dealing with general competition laws, unilateral conduct, cartels, mergers and acquisitions, large business groups, and procedural rules. The website also contains an archive of laws and guidelines that have since gone out of force.

The statutes and guidelines are available in Korean and English at: <http://www.ftc.go.kr/eng/index.do>.

**2. If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

Yes, there are timelines for investigations.

After the opening of an investigation by the KFTC, in principle the examiner forwards the matter to the Commission for decision making within six months. For abuse of dominance and unfair assistance cases, the time period is extended to nine months. For cartel cases, it is thirteen months. However, in practice, the deadline is not binding, and it can take longer for the examiner to forward the matter.

If the examiner finds that there is a violation of the law, the examiner will prepare an examination report to file with the Committee of the KFTC. This report will be presented to the defendants as well. Within the report, there will be details regarding factual evidence, investigations, laws, allegations of the violation, and proposed sanctions.

The process then moves to a plenary or chamber hearing with the KFTC commissioners. Hearings are typically scheduled within thirty days of the defendant submitting replies (Art. 31 of the Rules on the FTC's Committee Operation and Case Handling Procedures, hereinafter "Case Handling Procedures"). The defendants will be notified of the hearing at least five days before the hearing date (Art. 33 of Case Handling Procedures).

For leniency cases, the KFTC must begin investigation within ninety days of receiving the initial report (Art. 10(2)(2) of Case Handling Procedures).

For mergers:

Regular merger reviews should be completed by the KFTC within thirty days of notification. However, the KFTC can unilaterally extend the review period by up to ninety days (for a total of one hundred twenty days). If the KFTC requires additional information and documentation from the parties, the agency will set a time limit for the parties to submit the information. In theory, the KFTC will issue a decision with fifteen days regarding foreign mergers that do not affect the Korean market (Merger Review Guidelines).

The KFTC can request information from parties, suspending the review period until it receives submissions from parties.

There is a simplified review procedure for transactions that qualify and run on a different timeline than regular reviews. Simplified reviews may be triggered when any of the following factors are satisfied: 1) transactions between affiliates; 2) no controlling relationship within the target company is formed by the transaction; 3) mergers by small or medium-sized companies; 4) mergers between companies where there is no complementarity or substitutability between the parties; 5) establishment of private equity fund or a transaction involving asset-backed securitization of a company. For simplified reviews, the KFTC only consider facts submitted by the notifying party.

In theory, the KFTC will deliver results of a simplified review to the notifying party within fifteen days of the date of notification. However, the KFTC can request information from the parties and the fifteen-day review period does not count the time between the sending of information request and the submission of answers.

Companies may request the KFTC to review a proposed merger before officially filing notification. For this kind of pre-notification review, the review period is thirty days, but the KFTC may be extend it to one hundred twenty days.

For restraint of trade and dominance:

The KFTC does not set a specific deadline for such investigations. Parties should expect an investigation to take at least one year from beginning to end.

There are upper limits to the amount of time KFTC can investigate any matter. The agency has five years to impose sanctions after it starts an investigation. Alternatively, the KFTC has seven years to impose sanctions after the parties cease to engage in the problematic conduct. The 2020 amendments to the MRFTA (passed but not yet signed as of the writing of this report) changes the law so that the limitation period is uniformly seven years from the date the violation ceased, with the exception of cartel cases, which retain the previous statute of limitations rules.

If the KFTC unilaterally suspects that there is a violation of the MRFTA, the KFTC may hold a pre-examination. A pre-examination takes place before the formal investigation procedures are initiated.

**3. When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**

**a. information about the regulatory agency's allegations and competition concerns, including the legal and factual basis for the allegations;**

Yes, with caveats.

Before the examination report is produced, specific alleged violations and material evidence are not given to the defendant. The defendant may communicate with the examiner, however.

Once the examination report is produced, the examiner will serve the report on the defendant. In principle, the defendant should be given sufficient time to submit written replies to the examination report, usually two weeks. The examiner may extend the response period.

In the examination report, the examiner will attach data and other supporting evidence. However, the examiner will not reveal confidential materials or materials deemed insignificant. The defendant, if aware of this, can request the excluded information, though this is subject to the consent of the party that provided the confidential materials (Art. 29(2) of Case Handling Procedure).

After the defendant submits replies to the examination report, the KFTC may hold preparatory sessions with the defendant to better inform the defendant of the allegations and evidence to be used against the defendant (Art. 30(2) of Case Handling Procedures). Multiple rounds of preparatory sessions may be necessary for the parties to adequately communicate with each other.

For onsite investigations (dawn raids), the KFTC will issue a notice to the party being investigated, detailing the duration, purpose, object, and method of investigation, sanctions to be imposed if the party hinders investigation, and the party's legal rights to present evidence to the KFTC (Art. 6(1) of KFTC Investigation Procedural Rules, hereinafter "Investigation Rules").

The KFTC must also give notice of the provisions of law believed to be violated and the name and locations of the party investigated on-site (Art. 6(2) of Investigation Rules). The investigator must also

compile a list of objections by the investigated party (Article 14(1) of Investigation Rules), and a list of materials collected and submitted to the KFTC (Article 17(2) of the Investigation Rules).

The party subject to an onsite investigation may request a copy of the protocol of statement or the written confirmation that has been prepared against the investigated party (Art. 12(3) of Investigation Rules).

The KFTC will inform the investigated party of the progress of the investigation within 90 days of ending an onsite investigation (Art. 16(2) of Investigation Procedural Rules).

**b. the opportunity to be represented by counsel;**

Yes.

Counsel may be appointed for KFTC examination sessions (Art. 36 of Case Handling Procedures). It is important to note that common-law-style attorney-client privilege does not exist in the RoK, though the Civil Procedure Act does allow lawyers to refuse testimony regarding confidential information obtained through the course of professional duties (Art. 315(1) of Civil Procedure Act). This makes the situation of in-house counsel particularly tricky, as an attorney may not be able to refuse testimony on non-legal matters.

A company subject to an onsite investigation by the KFTC can request the participation of legal counsel, whether in-house or outside) (Art. 13(1) Investigation Rules). The investigators will not recommend any specific counsel (art. 10(3) of Investigation Rules). The right to counsel may be suspended if: 1) the request for counsel is deemed to be a delay or interfering tactic; 2) legal counsel intervenes in questioning without the investigator's approval or uses insulting words or conduct; 3) counsel answers on behalf of company, induces an answer, or alters the company's statement; 4) counsel films, records, or takes note of the matters questioned, other than brief notes; 5) any other circumstances in which counsel causes "noticeable difficulty to achieve the purpose of the investigation." (Art. 13(1)(1-5) of Investigation Rules).

Furthermore, the KFTC can proceed with an onsite investigation without granting parties legal representation if there is concern over the destruction of evidence and for other urgent reasons. (Art. 13(2) of Investigation Rules).

**c. the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

Yes, but there are concerns over sufficiency of the time window allotted to parties to submit their opinions.

The parties have the legal right to present their case before the KFTC issues a decision on their investigation (Art. 52 of MRFTA). Currently parties may only officially submit opinions after the examination report is filed. However, in practice, parties submit opinions earlier, especially when there are issues and facts to be clarified. The 2020 amendments to the MRFTA (passed but not yet signed as of the writing of this report) allows parties to submit opinions at any stage.

After the examination report is filed by the initial KFTC investigators, the agency will hold either a plenary hearing (with all nine commissioners) or a chamber session (with three commissioners). Plenary hearings are reserved for the most important cases, re-hearings, and cases where the chamber sessions were inconclusive.

The hearing is akin to a trial. The case examiner and defendants will be present and make opening statements, present evidence, ask questions, and make replies. The specific procedure of the hearing is laid out as follows: 1) the chair opens the hearing and identifies the parties; 2) the examiner provides an overview of the examination report, and the defendant gives its own opening statement; 3) the commissioners proceed to question the examiner and defendant on any relevant topics; 4) the examiner proposes the remedy; 5) the defendant makes a closing statement.

Both the examiner and defendant may request an in-depth examination of witnesses, experts, and specific evidence (Art. 41 of Case Handling Procedure). The chair of the committee may reject the request if the examination is inefficient or redundant (Art. 41(3) of Case Handling Procedure). The other party may cross examine witnesses and experts (Art. 41-2 of Case Handling Procedure).

**d. the case files.**

Technically yes, but currently with a big caveat.

The parties have the right to request the KFTC to allow copying of case files. The KFTC may grant this request if it is deemed in the public interest and the party that provided the data consents (Art. 52-2 of MRFTA). The fact that consent is needed means that it is practically difficult to obtain and challenge the information necessary to prepare defenses.

A reform passed by the National Assembly of Korea in May of 2020 amends Article 52(2) of the MRFTA to allow the respondent access to all data, excluding protected and confidential data upon request to the KFTC. If the KFTC still refuses to provide the information, the petitioner may bring a lawsuit that will pause any applicable time limitation periods. This reform has not been signed yet by the president as of the writing of this report.

**4. Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

Yes, the Case Handling Procedures and Civil Procedure Act govern the rules of procedure and evidence.

For rules governing sanctions and remedies, there are numerous guidelines published by the KFTC. These include: Public Notice of Detailed Guidelines for Imposing Administrative Monetary Penalties, Guidelines for the Operation of the Fair Trade Commission's Corrective Measures, Rules on Operation of, Procedure for, etc., System for Resolution by Agreement, Standard for Imposing Surcharge to Compel Compliance with Remedies on Business Combination, and the Guidelines for Corrective Measures in Corporate Combination.

**a. Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes, the Civil Procedure Act applies. Articles 303 – 332 govern witness testimony. Article 333 – 342 govern expert testimony. Articles 343 – 363 govern documentary evidence. Article 367 – 373 govern examination of parties.

The KFTC also has a set of guidelines for the collection of evidence during onsite investigations (The Investigation Procedural Rules).

Economic analysis is specially marked when submitted by a party. Moreover, the economic analysis must abide by general principles set forth in the Regulation on the Submission of Economic Analytical Opinions.

**5. Does the country's current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country's laws?**

Yes.

Parties may appeal a KFTC ruling to the Seoul High Court within thirty days of receiving the written ruling. The appellant may also request a KFTC reconsideration of the decision within thirty days of receiving the initial written ruling. If a reconsideration is requested, the KFTC has sixty days to issue a second decision (Art. 53 of MRFTA). The KFTC has the power to suspend enforcement of any sanctions during this reconsideration period (Art. 53-2 of MRFTA).

Requesting the KFTC reconsideration does not preclude filing a later appeal for judicial review within thirty days of receiving a second unfavorable decision from the KFTC. If the parties remain unsatisfied after appeal to the Seoul High Court, the decision can be appealed to the Supreme Court of the RoK.

Third parties do not have a right to appeal.

**6. Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes.

The KFTC cannot settle a case without reaching a decision regarding infringement. However, there is a cartel immunity/leniency regime for parties to a cartel. Such parties may apply for leniency under MRFTA Art. 22-2 and Enforcement Decree Art. 35. The first party to come forward with evidence of a cartel can receive a 100% reduction in fines and can either be exempt from corrective measures or have those measures mitigated. The second party can receive a 50% reduction in fines and may have corrective measure be mitigated.

If a party reveals a cartel that is unrelated to the cartel under direct investigation, the revealing party can receive a 20% fine reduction if the revealed cartel is equal or less in size than the initial cartel, a 30% reduction if the revealed cartel is larger but less than double the size of the initial cartel, a 50% reduction in fines if the revealed cartel is more than double but less than quadruple the size of the initial cartel, and a 100% reduction in fines if the revealed cartel is more than quadruple the size of the initial cartel (Art. 13(2) of Public Notification on Leniency Program).

A party may apply for leniency without submitting all information necessary (Art. 8 of Public Notification on Leniency Program). When this occurs, the party marks its place in the leniency queue. Parties have fifteen days to submit supplemental information, though the KFTC may give the applicant party up to sixty days to provide evidence, upon request. Verbal leniency applications are allowed (Art. 9 of Public Notification on Leniency Program).

A party that coerced other parties into joining the cartel is ineligible for any leniency, and the first and second party to come forward are immune from criminal liability as well.

From 2013 to 2018, there have been 198 cases of the parties using the cartel leniency program.

For abuse of dominance cases, the KFTC can accept commitments from parties and close a case without reaching an infringement decision. But if the violation is gross and clear, the KFTC must reach an infringement decision before closing such a case.

**7. Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

Yes. In fact, there is some concern that the confidentiality rules are so strong that parties may have difficulty obtaining necessary information to prepare defenses.

The general rule is that any party may access case data and if the request is considered to be in the public interest, the KFTC will grant access to the cases data. However, the party that provided the data originally must consent (Art. 52-2 of MRFTA). This last requirement privileges confidentiality but can make it difficult to obtain case data.

For KFTC examination sessions, parties may request that certain information be kept confidential (Art. 40-2 of Case Handling Procedure). The requesting party must submit the request at least five days before the sessions.

For mergers:

Business secrets and related information is automatically kept confidential by the KFTC. A third party may request access to the information on a merger investigation, but the KFTC must receive the consent of the submitting party before disclosing information to satisfy third-party requests.

For restraint of trade/dominance:

Trials and resolutions made by the KFTC are disclosed to the public. However, the KFTC can refuse to disclose certain aspects of the case to protect trade secrets (MRFTA Art. 43).

Except for enforcing the MRFTA, KFTC commissioners and officials must not disclose confidential information during the investigation (MRFTA Art. 62).

**a. If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

No. It is difficult for parties to gain access to confidential information, even if the KFTC is relying on it for decision-making. See answer in Due Process Question 6. This is in fact the crux of the complaint that the United States has brought against the KFTC.

**8. Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

For mergers:

Parties can request the KFTC to review a planned merger before notification is filed. The KFTC has thirty days to respond and can extend the time period by ninety days.



For restraint of trade and dominance:

Parties can request the KFTC for guidance on whether an activity would violate the MRFTA. The KFTC has thirty days to respond and the agency considers its response official and binding upon itself. If the KFTC does not find the parties in violation of the MRFTA, the KFTC will be bound by this guidance.

#### **TRANSPARENCY:**

##### **1. Does the current law ensure transparency of national competition laws, policies, and enforcement activities?**

For the most part, yes. However, there are concerns over parties' ability to access evidence and the communication of decision rationale to the parties.

Currently, the KFTC does not publicly reveal merger notifications or investigations during the initial review period. Usually, the KFTC will only publicly reveal the review if the investigation proceeds to a full commission hearing. Any public disclosure of the investigation will include sufficient information so that the disclosure is effective.

Regarding national interest interventions: while there is not a general authorization for the RoK government prevent a merger for national interest reasons, there are exceptions. Article 4(2) of the Foreign Investment Promotion Act allows the government to stop a merger if a foreign company poses a danger to public order. Depending on the type of company being merged, parties may be required to get approval from different ministries. There are also restrictions for mergers involving telecommunications and financial industries (reported to the Korea Communication Commission and the Financial Supervisory Commission respectively).

Likewise, foreign companies that acquire 10% or more of a Korean corporation must report the acquisition to the Ministry of Trade, Industry, and Energy (Article 5(1), 2(1)(4) of the Foreign Investment Promotion Act).

The KFTC may also permit a merger if the efficiency gains sufficiently outweigh the anti-competitiveness costs. There can also be exemptions if one of the companies in the merger will fail soon, if production facilities will not be used without the merger, and if less restrictive business arrangements are not possible.

##### **2. Does the national law and regulatory agency's procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?**

There are major critiques about the way the KFTC handles the publication of decisions. However, there is also reform underway.

The KFTC has historically been criticized for a lack of transparency, due process safeguards, and well-defined investigative procedures. In 2015, the agency began a reform effort of its enforcement procedures.

The KFTC does not publish merger notifications. It will publish the result of merger reviews if it is in the public interest. The KFTC will also publish any decisions that involve remedial orders. If a merger is of substantial importance to the RoK, the KFTC will issue a press release even if the merger was approved unconditionally.

Currently, if no violation is found on a matter, the KFTC does not have a statutory obligation to issue a written decision. However, in practice, the KFTC has been publicly issuing written decisions for no-violation cases since July of 2016.

In theory, the KFTC will provide written decisions when the commissioners find reason to impose a penalty. The written decision should include the penalty and reasoning for imposing it.

A May 2020 amendment to the MRFTA (passed but not yet signed as of the writing of this report) increases the amount of information the KFTC must give regarding its decision. If this amendment is signed by the president, the KFTC must give written notice of the outcomes of an investigation, and “the grounds for the decision, details of the decision, and the reasons thereof, even when it decides not to impose corrective measures or cease the investigation).

**3. Does the national law and regulatory agency’s procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?**

See answer of Transparency Question 2. Furthermore, press releases detailing certain decisions are available on the KFTC website in English and Korean.

**COMITY:**

**1. Do the country’s government and competition authorities:**

**a. cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and**

Statutorily, yes. Historically in practice, less so.

Article 36.2 of the MRFTA grants the KFTC broad powers to cooperate with foreign counterparts. While cooperation has been historically limited, recent developments suggest that the KFTC is beginning to be more receptive to international cooperation, particularly on cartel matters. The KFTC has signed memoranda of understanding or cooperation with Australia, Brazil, Canada, China, the EU, Indonesia, Japan, Mexico, Romania, Russia, Turkey, and the United States. It also has signed letters of intent to cooperate with Estonia, Hungary, Latvia, Lithuania, Romania. In addition, Article 16 of the U.S.-Korea (“KORUS”) FTA provides a more formalized commitment for cooperation between the two countries. Korea is a member of the International Competition Network.

**b. cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation, and the exchange of information with other national competition authorities?**

Increasingly yes. See answer to Comity Question 1(a).

In recent years, the United States has increasingly criticized the KFTC and competition law in the RoK. This came to a head in March 15, 2019, when the United States Trade Representative (“USTR”) requested the first-ever consultations with the KFTC regarding procedural rules. The USTR claims that the KFTC was denying US companies the opportunity to obtain evidence and information. Specifically, the USTR is bringing the complaint through the U.S.-Korea Free Trade Agreement.

## **COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION: THE REPUBLIC OF CHINA (TAIWAN)**

### **Due Process:**

- 1. Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes.

All laws, regulations, and procedural rules are in written form and available to the public through the website of the Taiwan Fair Trade Commission ("TFTC"). Important laws include the Taiwan Fair Trade Act ("TFTA"), the Enforcement Rules of Fair Trade Act of 2015, the Administrative Procedure Act ("APA"), the Organic Act of the Fair Trade Commission, Regulations Governing Access to Documents ("Document Access"), Guidelines for Public Hearings ("Public Hearings"), Guidelines for Oral Arguments ("Oral Arguments"), and Directions for Foreign Enterprises. All of these are available in Chinese and English, while the TFTA is available in Japanese.

Furthermore, there are also numerous soft law instruments, including guidelines that govern regulatory, investigative, and evidentiary procedures. These are available on the TFTC's website in Chinese and English.

The TFTC is also heavily reliant on soft law instruments such as statements about its methods and external guidance to specific industries. These statements are designed to inform industries about the TFTC's views, though they are not meant to be legally binding. The TFTC may issue warnings to industries or firms when it observes conduct that is likely to violate the TFTA or "affect the trading order." The purpose of this kind of soft guidance is to assist and admonish in order to encourage compliance.

Since these soft statements have no compulsory legal effect, they generally do not use compulsory or restrictive language. A warning to an industry is to be sent to the relevant trade association and posted on the TFTC's website. The TFTC will not undertake enforcement action based solely on a party's rejection of administrative guidance.

- 2. If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

Yes, in a merger review. No in other matters.

For a merger review, the TFTC is statutorily bound to make a decision within 3 months of submission, with a single extension of another three months if necessary (TFTA, Art. 15).

For other investigations, the TFTC moves relatively quickly to make decisions. Decisions can be issued as soon as six months after the formal initiation of the investigation. However, there is no definitive deadline for resolving investigations.

- 3. When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**

**a. information about the regulatory agency’s allegations and competition concerns, including the legal and factual basis for the allegations;**

Yes, if the party requests it.

Parties and related persons have the right to review and copy the TFTC’s files and materials in order to make claims and defenses (APA, Art. 46; Document Access). Parties must apply to the TFTC for permission, and schedule a time to access the documents. TFTC Regulations Governing Access to Documents governs access to materials and files, setting out qualifications and rules about time, method, fees and scope. The parties may photocopy, print, or transcribe the allowed materials, but must be supervised at all times by TFTC staff.

The laws and regulations do not permit access to the TFTC’s internal working drafts and documents. Access is also denied to materials that are protected by law, materials for which the provider has justifiably claimed confidentiality, and materials where access is likely to infringe third-party rights or seriously obstruct performance of official duties.

There have been critiques that too much information is being redacted by the TFTC for the parties to prepare sufficient defenses.

**b. the opportunity to be represented by counsel;**

Yes.

Unless otherwise prohibited, parties may appoint counsel for administrative procedures in Taiwan (APA, Art. 24).

Specifically, parties are allowed by Article 32 of the Enforcement Rules of the Fair Trade Act of 2015 to retain counsel to appear and make statements on behalf of the party.

**c. the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

Yes, to presenting evidence, experts, and statements. No, to depositions, cross-examination. The civil law inquisitorial system generally disfavors party submissions.

Parties may file a written application requesting a hearing before the TFTC. Such a hearing will be held publicly, unless the hearing will damage the public interest or cause major harm to parties. If such harm is likely, the TFTC may make all or part of the hearing confidential. Parties will be given 30-day notice of a hearing, unless the situation is demonstrably urgent (Public Hearings, Art. 6). Any person who wishes to attend the hearing may apply to attend 10 days prior to the hearing (Public Hearings, Art. 9). Written submissions are also due 10 days prior to the hearing (Public Hearings, Art. 10). Any party or interested person may submit additional opinions within 5 days after the hearing is held (Public Hearings, Art. 11).

At the hearing, the parties may present witnesses, expert witnesses, and other third parties (Public Hearings, Art. 18(3)(A)(c)). The commissioners may ask any parties questions, and parties may ask other parties, witnesses, or Commission staff questions upon approval by the

moderator (Public Hearing, Art. 18(5)). Strictly speaking, this is not a right to cross-examination.

Because the hearing is an administrative matter held in a non-trial setting, there is no power to depose individuals beforehand.

Parties may also request oral arguments (Oral Arguments, Art. 2). The Commission retains the right to reject oral arguments if they are deemed unnecessary. All parties will be notified 10 days prior to the date of the oral arguments. Included in the notification are the summary of opinions provided by the respondents to the case (Oral Arguments, Art. 5). At the oral argument, parties will have the opportunity to present their cases. The commissioners will have the right to ask parties clarification questions (Oral Arguments, Art. 9(4)). While there is no right for the parties to cross examination other parties, the chairperson of the Commission has the right to “urge” a party to submit evidence or make additional statements (Oral Arguments, Art. 10).

In the past, TFTC meetings have usually not been fully public. The meetings would resemble roundtable discussions that included industry experts, competitors, consumer groups, government agencies with related jurisdiction, and academics. Notably, complainants and respondents would not necessarily be present, although they might be invited in order to provide further explanations.

**d. the case files.**

Yes, with limits.

Parties have access to the case files, governed by the Regulation Governing Access to Documents. Please see answer to questions 3(a) above and 7 below.

**4. Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

**a. Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes, with major caveats.

The TFTC maintains several guidelines to govern the introduction of witnesses, statements, and expert evidence at public hearings and oral arguments. It is also subject to the APA. However, the TFTC is a civil-law inquisitorial administrative body, meaning that it has wide discretion when conducting its own evidentiary investigation, including going beyond the allegations that have been made by any party (APA, Art. 36). In the course of the investigation, the TFTC may unilaterally request evidence, information, testimony, and experts from any party (APA Arts. 39-42).

The TFTC has the power to order parties and third parties to appear before the TFTC. It can also order organizations and individuals to submit books and records. The TFTC can conduct on-site inspections and seize articles discovered, but it does not have the power to apply for warrants or conduct dawn raids. If TFTC does conduct an unscheduled visit, it cannot compel the production of evidence.

**5. Does the country's current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country's laws?**

Yes.

Parties that are not satisfied with the outcome of TFTC determinations can file an administrative appeal with the High Administrative Courts or Intellectual Property Court (when the case involve matters of intellectual property). If the appealing party is unsatisfied with the outcome of the initial appeal, they may appeal to the Supreme Administrative Court (TFTA, Art. 48). The administrative courts can review matters of fact and law, and will often remand the case to the TFTC for further disposition. However, because Taiwan operates on the inquisitorial principle and is primarily interested in substantive justice, procedural matters cannot be independently appealed unless substantive issues are also being appealed concurrently (APA, Art. 174).

Prior to 2015, the first appeal must be made to the Appeal and Petition Committee of the Executive Yuan, which is the executive branch of the government (n.b.: the presidency is considered a separate branch of government from the Executive Yuan). The chair of this committee is the general counsel of the Executive Yuan, but most of its members are outside experts and academics in administrative and constitutional law. Its role is not to provide a means for overriding agency decisions on policy grounds, but to assure compliance with administrative standards. Its decisions could be appealed further to the administrative courts. The Appeal and Petition Committee had tended to support the TFTC more than the administrative courts have. Since 2000, the TFTC lost only 32 out of 785 appeals to the Committee, about 4 per cent, while in the administrative courts, the TFTC lost 23 out of 251, about 9 per cent. Most appeals are by respondents seeking reversal of the TFTC's decision finding liability, but about one-fourth are objections to the TFTC's decision not to take action.

**6. Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes.

In 2011, the TFTA introduced a leniency program for cartel participants (TFTA, Art. 35). In 2012, the TFTC promulgated regulations for the leniency program, specifying the requirements. The first application of the leniency program was in 2012, in a case against optical disk drive manufacturers.

Leniency is granted to no more than 5 applicants for any one case. The first applicant can qualify for full immunity. The liability of the second to fifth applicant can be reduced by progressively smaller amounts.

The TFTC may also enter an administrative settlement, rather than impose sanctions, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, and in order to achieve its administrative objectives and resolve a dispute. In this regard, the TFTC's settlement with Microsoft in 2003 was a precedent-setting action.

**7. Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

Yes.

Evidence is governed by a combination of the APA as well as the Regulations Governing Access to Documents. Arts. 2 and 3 of the Regulations Governing Access to Documents define who is considered a party to the case, and who are considered related persons. It also sets forth the public accessibility of specific types of materials provided by the parties to the TFTC.

Factual materials provided by complainants, respondents, and related persons are accessible unless confidential by nature or justifiably requested to be confidential by the relevant party. Records are to be kept confidential when it concerns national security, personal privacy, occupational and trade secrets, information the disclosure of which will likely result in the infringement of rights of any third party, and information that will likely result in serious impairment of public interest (APA, Art. 46).

As for materials obtained by the TFTC itself, some highlights of the accessibility rules are: interview statements obtained through investigation by the TFTC are accessible in principle, but may be kept confidential where secrets are involved or justifiably requested by the maker of the statements. Statistical findings are accessible in principle, though individual questionnaire materials are not. Expert opinions are generally accessible in principle, though the identity of experts is not. All opinions voiced in public hearings are accessible in principle. Material objects are not accessible, but photographs are in principle.

**a. If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

Yes, with major caveats. The onus is on the parties under investigation to access the necessary information to prepare its own defense.

The TFTC will conduct an initial review of facts confidentially before formally opening an investigation. The parties do not have a formal way to know what is being investigated at this point. Once the investigation has been formally opened, parties are notified and they can request access to the case files, request consultations, hearings, and oral arguments to present their own evidence and arguments.

There has been criticism of this process suggesting that the TFTC does not provide sufficient notice to parties under investigation on what is being investigated.

**8. Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

Yes.

Upon petition of the parties, the TFTC provides parties with opportunities to consult regarding legal, factual, or procedural issues during the course of the investigation. The TFTC may also (on its own volition or via party petition) hold public hearings and oral arguments to allow the parties to present evidence.

## Transparency:

### 1. Does the current law ensure transparency of national competition laws, policies and enforcement activities?

Yes, but there is substantial criticism around the sufficiency of notice to parties and the high level of redaction when parties do access documents.

The TFTC publishes on its website all statutory authority, administrative regulations, guidelines, and decisions, including majority opinions and dissenting opinions. Parties can request access to the case files. Hearings are generally public, although verbatim transcription of proceedings are not taken. Confidential information is typically protected, which encourages parties to participate in good faith.

### 2. Does the national law and regulatory agency's procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based?

Yes.

All case decisions are published on the TFTC's website in Chinese. Both the majority and dissenting opinions are published together, along with procedural disposition. Depending on the complexity of the investigation, the TFTC may publish very thorough explanations of its decision, including legal and economic analysis. However, there is criticism that the TFTC does not employ sufficient economic analysis in its decisions, such as in the recent Qualcomm decision.

When it is appropriate, the TFTC may also translate its decisions into the relevant languages. For example, the TFTC posted a 125-page English translation of the 2017 Qualcomm decision, including vigorous dissents to the majority opinion (n.b. Qualcomm has since settled with the TFTC and vacated the initial decision).

### 3. Does the national law and regulatory agency's procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?

Yes. See above.

## Comity:

### 1. Do the country's government and competition authorities:

#### a. cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and

Yes, but with political limits imposed by Taiwan's sovereignty dispute with China.

The TFTC has concluded bilateral international cooperation agreements with Australia, Hungary, Panama, and New Zealand. The TFTC has signed Memorandums of Understanding regarding the application of competition laws with Canada, France, Japan, and Mongolia.



The TFTC has signed a trilateral anti-trust cooperation agreement with the enforcement bodies of Australia and New Zealand as well as a cooperation agreement with France's Conseil de la Concurrence. It has had a cooperation arrangement with the Australian Competition and Consumer Commission (ACCC) since 1996. The co-operation arrangement with the ACCC was invoked in a 1998 investigation, when the ACCC queried the TFTC about possible enforcement actions on multi-level sales operations. To help facilitate regional collaboration, the TFTC also maintains the Asia Pacific Economic Cooperation Competition Law and Policy Database.

The TFTC has also cooperated on specific cases with competition authorities in the EU and US.

**b. cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information with other national competition authorities?**

Yes, but with political limits imposed by Taiwan's sovereignty dispute with China.

It is not uncommon for the TFTC to order the filing parties to report the current status in another jurisdiction where a combination notification has also been made. Even without formal coordination between national competition authorities, the TFTC will often consult foreign agencies in merger reviews.

On specific cases, the TFTC will work with foreign competition authorities. For example, in the 2015 Aluminum Capacitor case, the TFTC investigated the subject parties with authorities from the US, EU, and Singapore from the very beginning. The TFTC also exchanged enforcement information with those agencies. While Taiwan has concluded the case, the same subject matter is under investigation in the EU, US, Japan, Korea, Singapore, and China. This means that there will likely be further collaboration with competition authorities in those jurisdictions.

# COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION PROJECT:

## UNITED STATES

### Review Criteria:

The criteria for reviewing and evaluating individual agencies will be based on the following set of uniform questions for each individual agency:

### *Due Process:*

**Are the country's current laws, any implementing regulations and the regulatory agency's procedural rules pursuant to which its national competition law investigations are conducted all in written form and available to the public?**

Yes, the primary laws applicable to US Antitrust are:

Sherman Antitrust Act, 15 U.S.C. §§ 1-7  
Wilson Tariff Act, 15 U.S. C. §§ 8-11  
Clayton Act, 15 U.S.C. §§ 12-27  
Antitrust Civil Process Act, §§ 1311-14  
International Antitrust Enforcement Assistance Act of 1994, 15 §§0 6201-12  
Federal Trade Commission Act (FTC) 15 U.S.C. § 45  
Hart-Scott-Rodino Antitrust Improvements Act of 1976 15 U.S.C. § 18a  
Robinson-Patman Act 15 U.S.C. § 23  
Foreign Trade Antitrust Improvements Act (FTAIA) 15 U.S.C. § 6a  
Antitrust Criminal Penalty Enhancement & Reform Act (ACPERA) 15 U.S.C. §§ 1311-1314

The Department of Justice provides a copy of its Antitrust Division Manual's Chapter II: Statutory Provisions and Guidelines of the Antitrust Division at <https://www.justice.gov/atr/file/761131/download>.

The Federal Trade Commission provides a "[Guide to Antitrust Laws](#)" stating, "The FTC's Bureau of Competition, working in tandem with the Bureau of Economics, enforces the antitrust laws for the benefit of consumers."

The Federal Trade Commission Bureau of Economics provides the Economics Best Practices, "To clarify processes and procedures in antitrust investigations and to enable the Commission and the Parties to reach the best decisions in the most efficient manner, this document provides suggestions of the Bureau of Economics ("BE") for "Best Practices" for data, and economic and financial analyses in an investigation." Available at: <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/best-practices>.

## Guidance Resources and Checklist for the FTC and DOJ

### [FTC and DOJ Antitrust Guidance and Resources Checklist](#)

The main enforcement agencies, the FTC and the DOJ provide multiple guidelines and policy statements:

[Antitrust Guidelines for the Licensing of Intellectual Property](#) (DOJ and FTC 2017) (see [Practice Note, Antitrust Issues in Intellectual Property Licensing: Overview](#))

[Horizontal Merger Guidelines](#) (DOJ and FTC 2010) (see [Practice Note, How Antitrust Agencies Analyze M&A: Horizontal Mergers](#))

[Commentary on the Horizontal Merger Guidelines](#) (DOJ and FTC 2006)

[Negotiating Merger Remedies](#) (FTC 2012)

[FTC Guidance for Voluntary Submissions](#)

[FTC Model Timing Agreement](#) (2019)

[DOJ Model Timing Agreement](#) (2018)

[DOJ Model Second Request](#) (2015)

[Remedies for Standard-Essential Patents](#) (DOJ, USPTO and NIST 2019)

[Antitrust Guidelines for Human Resources Professionals](#) (DOJ and FTC 2016)

### **If these investigations are not subject to definitive deadlines, is there a requirement that the regulatory agency shall endeavor to conduct their investigations within a reasonable time frame?**

The investigations themselves are not subject to particular guidelines and can take a significant amount of time. Statutes of limitations apply for criminal cases and civil cases seeking monetary damages, but not for merger investigations. The statutes of limitations are all tollable for one year where the conduct was fraudulently concealed under the fraudulent concealment doctrine, they are also tollable under Mutual Legal Assistance Treaties see 18 U.S. Code § 3292.

**Civil actions** (Clayton Act) are subject to a 4 year statute of limitations.

**Criminal actions** (Sherman Act) are subject to a 5 year statute of limitations.

### **When the regulatory agency alleges a violation of its national competition laws and before an agency imposes a sanction or remedy against a person for allegedly violating its national competition laws, does the current law afford that person access to:**

- **Information about the regulatory agency's allegations and competition concerns, including the legal and factual basis for the allegations;**

Yes, the DOJ provides this information as part of its practice of informing individuals that they are targets of an investigation, under certain circumstances. Per Department of Justice, Justice Manual:

7-3.400 - Notifying a Target

The Antitrust Division follows the Department's practice of informing individuals under certain circumstances that they are targets of the investigation. See [Justice Manual § 9-11.153](#); see also [Justice Manual § 9-11.151](#) (defining "target") and [§ 9-11.152](#) (discussing requests by targets to testify).

9-11.153 - Notification of Targets.

When a target is not called to testify pursuant to JM 9-11.150, and does not request to testify on his or her own motion (see JM 9-11.152), the prosecutor, in appropriate cases, is encouraged to

notify such person a reasonable time before seeking an indictment in order to afford him or her an opportunity to testify before the grand jury, subject to the conditions set forth in JM 9-11.152. Notification would not be appropriate in routine clear cases or when such action might jeopardize the investigation or prosecution because of the likelihood of flight, destruction or fabrication of evidence, endangerment of other witnesses, undue delay or otherwise would be inconsistent with the ends of justice.

- **The opportunity to be represented by counsel;**

Yes,

#### Criminal

The United States constitution guarantees the right to counsel for criminal matters. U.S. Const. amend. VI

#### Civil

Parties may be represented by counsel, however this is not a right. 16 CFR Ch. I, Subch. A, Pt. 4 discusses requirements for counsel to practice in front of the FTC.

Note that:

“Classification of civil sanction as punitive does not automatically transform the sanction proceeding into a criminal prosecution with all the attendant procedural safeguards required by the Constitution; applicability of Sixth Amendment protection to the statutory proceedings and the standard proof used in those proceedings are determined, not with reference to the particular sanction ultimately imposed but, rather, by considering the proceeding's inherent nature.” USCA Const Amend. VI-Jury Trials 13. Civil proceedings, proceedings to which amendment applies.

- **the opportunity to be heard and present evidence or testimony in its defense, including: to offer the analysis of a properly qualified expert, to depose individuals, to cross-examine any testifying witness, and to review and rebut the evidence introduced in the enforcement proceeding;**

16 C.F.R. § 3.41(c) Rights of parties. Every party, except intervenors, whose rights are determined under § 3.14, shall have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

See also: 16 C.F.R. § 3.43 (Evidence); 16 C.F.R. § 3.33\_(Depositions); § 3.14 (Intervention)

#### Criminal

Yes, see the Federal Rules of Criminal Procedure Rule 26 - referencing the Federal Rules of Evidence.

See also:

Federal Rules of Evidence  
103 – Rulings on Evidence  
611 – Mode and Order of Examining Witnesses and Presenting Evidence  
702 – Testimony by Expert Witnesses

Federal Rules of Criminal Procedure for the United States District Courts  
15 – Depositions  
16 – Discovery and Inspection  
17 – Subpoena

## Civil

See also: Federal Rules of Civil Procedure for the United States District Courts  
26 – Duty to Disclose; General Provisions Governing Discovery  
30 – Depositions by Oral Examination  
31 – Depositions by Written Examination  
43 – Taking Testimony  
45 – Subpoena

Note per 16 C.F.R. § 4.1 (ii) “At the request of counsel representing any party in an adjudicative proceeding, the Administrative Law Judge may permit an expert in the same discipline as an expert witness to conduct all or a portion of the cross-examination of such witness.”

- **the case files.**

Yes, the discovery process in US litigation requires that the investigative agency turn over case files to the defendant once charges have been filed with exceptions for certain internal agency documents and witness statements.

See the Federal Rules of Civil Procedure rule 26 and Federal Rules of Criminal Procedure rule 16.

**Does the regulatory agency maintain rules of procedure and evidence that apply to enforcement proceedings concerning alleged violations of its national competition laws and the determination of sanctions and remedies thereunder?**

Yes,

DOJ:

Justice Manual, Title 7: [Antitrust](#)

[7-1.000 - Antitrust Division](#)

[7-2.000 - Antitrust Statutes](#)

[7-3.000 - Investigating and Enforcing an Antitrust Violation](#)

7-3.100 Authorization to Investigate

7-3.200 Standards for Initiating a Criminal Investigation

7-3.300 Case Recommendations

7-3.400 Notifying a Target

7-3.500 Sentencing Recommendations

7-3.600 Appeals

FTC:

16 CFR I:A – Organization, Procedures, and Rules of Practice

[Part 1 – General Procedures](#)

[Part 2 – Nonadjudicative Procedures](#)

[Part 3 – Rules of Practice for Adjudicative Proceedings](#)

[Part 4 – Miscellaneous Rules, Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the Federal Trade Commission Part 14—Administrative Interpretations, General Policy Statements](#)

[Enforcement Policy Statements](#)

[Part 16—Advisory Committee Management](#)

- **Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?**

Yes, under the Federal Rules of Civil Procedure rule 26. However, under the Federal Rules of Criminal Procedure rule 16 there are variations in these procedures and requirements, and variations in automatic requirements versus triggering events requiring disclosure.

**Does the country’s current law provide a person that is subject to the imposition of a sanction or remedy for violation of its national competition laws with the opportunity to seek review of the sanction or remedy, including review of alleged substantive or procedural errors, in a court or other independent tribunal established under that country’s laws?**

Yes,

Within proceedings at the FTC, appeals to decisions regarding Requests for Additional Information appeals can be made, “to the General Counsel of the FTC to hear an appeal on unresolved issues.”

For Administrative Adjudications before the FTC:

Either complaint counsel or respondent, or both, may appeal the initial decision to the full Commission. In limited cases, including certain merger cases, the Commission’s rules provide that the appeal is automatic.

Upon appeal of an initial decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Commission’s final decision is appealable by any respondent against which an order is issued. The respondent may file a petition for review with any United States court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was used. FTC Act Section 5(c), 15 U.S.C. Sec. 45(c). If the court of appeals affirms the Commission’s order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court. Commission decisions and orders are available on this site. See: “A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority” (2019) at <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>

For anti-trust matters before the DOJ:

Matters may be appealed to the Appellate Courts. Appellate Decisions may be appealed to the US Supreme Court. See: Federal Rules of Appellate Procedure Rules 3-12.1, 28 U.S.C.A. and U.S.Sup.Ct. Rule 18, 28 U.S.C.A.

See also:

Merger control in the United States: Overview

- All aspects of orders made by the Federal Trade Commission or by a District Court (in the case of a Department of Justice transaction) are appealable. This includes restrictions relating to implementation of the transaction, divestiture orders and other remedial orders.
- Appeals of FTC orders are made to the US Court of Appeals for the District of Columbia. Appeals of Federal District Court orders issued in DOJ cases are made to the US Court of Appeals for the relevant circuit. Appeals must be made within 30 days of a decision. They can take up to six months or more to complete.

- Third parties do not have standing to intervene or to seek the overturning of a decision on the merger in a challenge brought by the agency. However, they can bring their own case against the transaction. Such cases are rare.

**6. Does the regulatory agency have the authority to resolve alleged violations voluntarily by consent of the authority and the person subject to the enforcement action?**

Yes, for the FTC see 16 C.F.R. § 2.34, for the DOJ see 15 U.S.C.A. § 16 governing consent decrees (judgments).

See also,

FTC and DOJ Antitrust Guidance and Resources Checklist

- [DOJ Model Voluntary Request Letter](#) (2018).
- [Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters](#) (DOJ 2017).

Restraints of trade and dominance in the United States: Overview

- If the DOJ decides criminal prosecution is appropriate, it can use the grand jury process to further its investigation. The grand jury decides whether a criminal indictment is warranted. If the parties want to resolve the matter they can enter into a plea agreement. Although there are no specific types of criminal conduct listed in the Sherman Act, the government typically seeks criminal prosecution for *per se* violations like horizontal price-fixing, bid-rigging and market allocation.
- Parties can request to settle at any time, but that settlement must be approved by the presiding judge. Typically, parties willing to modify a restrictive agreement or practice enter into a consent agreement. Consent agreements with the Department of Justice (DOJ) must be approved by the Assistant Attorney General and filed with a competitive impact statement in a federal court. The consent is published in the Federal Registrar to facilitate public comment for 60 days. The court reviews the comments and decides whether the consent is in the public interest. If the consent is with the Federal Trade Commission (FTC), it is subject to a 30-day public comment period and must be approved by a FTC vote. Proposed FTC consents are published in the Federal Registrar for public comment and a final consent is entered after the FTC reviews the public comments and determines that the consent is in the public interest.
- A plea can be entered at any time. The DOJ staff negotiate plea agreements. The key provisions of a plea agreement include:
  - o The proposed charging language.
  - o An explanation of the methodology used to compute the defendant's sentencing range under the US Federal Sentencing Guidelines.
  - o An explanation of how staff arrived at the recommended sentence.
  - o Any unique provisions in the plea agreement.
  - o Any substantive deviations from the DOJ's standard plea agreement language.
  - o A description of the potential charges faced by the proposed defendant had the case proceeded to indictment.
  - o A discussion of relevant victims' rights issues.
 Pleas are subject to final approval by the Assistant Attorney General and then must be submitted to a US District Court for approval and entry.
- There is no notification requirement for entering into restrictive agreements or practices and there is no official procedure to follow. However, it is advisable to voluntarily meet with the agencies about any action that is likely to lead to a significant number of consumer or competitor complaints.

- The FTC is made up of five commissioners who are nominated by the President and confirmed by the Senate and serve a seven-year term. No more than three commissioners can be from the same political party and the political affiliations of the commissioners can impact the timing and viability of settlements.

#### Merger control in the United States: Overview

- Failure to comply with the terms of a consent decree settlement can constitute an order violation and subject the parties to penalties and other relief under section 5(l) of the FTC Act (for FTC orders) or contempt proceedings (for DOJ consent orders entered by a District Court). In addition, the consent decree itself may include provisions for appointment of monitors, trustees and/or requirements to divest alternative assets ("crown jewels") if the initial divestiture fails.

#### **Does the current law require the regulatory agency to protect business confidential information and other information treated as confidential under its law, obtained by its national competition authorities during the investigative process?**

Yes, see:

FTC –

FTC Compulsory submissions: 15 U.S.C. § 57b-2; 16 C.F.R. § 4.10(a)(2); 16 C.F.R. § 4.11; 5 U.S.C. § 552

Voluntary submissions: 15 U.S.C. § 57b-2; 15 U.S.C. § 46(f); 16 C.F.R. § 4.10-4.12

Under Hart Scott Rodino: 15 U.S.C. § 18a(h)

DOJ –

Compulsory submissions: 15 U.S.C. § 1313; 15 U.S.C. § 1314; 5 U.S.C. § 552

Voluntary submissions: 5 U.S.C. § 552(b)(4), (7); 28 C.F.R. § 16.7; 28 C.F.R. § 16.23

Freedom of Information Act - 28 C.F.R. § 16.7

#### **If the regulatory agency uses or intends to use that information in an enforcement proceeding, does the agency provide a procedure to allow the person under investigation timely access to information that is necessary to prepare an adequate defense to the regulatory agency's allegations?**

Yes, see discovery provisions above and:

#### FTC and DOJ Antitrust Guidance and Resources Checklist

- 15 U.S.C. § 18a(g) (HSR Act submissions).
- 15 U.S.C. §§ 1313 and 1314 and 5 U.S.C. § 552 (to the DOJ).
- 15 U.S.C. § 57b-2; 16 C.F.R. §§ 4.10(a)(2) and 4.11; 5 U.S.C. § 552 (to the FTC).
- 15 U.S.C. §§ 46(f) and 57b-2 and 16 C.F.R. §§ 4.10 to 4.12 (to the FTC).

For more on these statutory provisions and confidentiality generally, see Confidentiality of Agency Submissions in Merger Investigations Chart and Practice Note, Confidentiality in Merger Investigations: Disclosures to Other Agencies.

#### Restraints of trade and dominance in the United States: Overview

- Generally, government investigations remain confidential unless the parties make a public statement. The reviewing agency rarely comments publicly on a pending investigation. However, it will sometimes issue a statement on closing an investigation. If enforcement action is taken, the agency will issue a press release and any court filings will become part of the public record.



- Confidentiality is statutorily required for information submitted to the federal agencies. In civil litigation or administrative proceedings, certain information and documents may be disclosed. Information obtained from parties in criminal grand jury investigations is confidential. However, witnesses are not bound by the same confidentiality provisions.
- Parties can and often do request that information is kept confidential during an investigation by designating the information or documents as confidential. In the event of litigation, parties can seek a protective order to prevent commercially sensitive information from being disclosed in the court record.

**Does the current law ensure that the regulatory agency affords a person under investigation for possible violation of its national competition laws a reasonable opportunity to consult with the regulatory agency with respect to significant legal, factual or procedural issues that arise during the investigation?**

See Federal Rules of Civil Procedure 26(f) and 37

If a party is under investigation by the Federal Trade Commission, significant legal, factual or procedural issues that arise during the investigation can be addressed during a “Meet and Confer.” After the “Meet and Confer” if any additional questions or issues arise, the party may discuss such matters with the FTC.

See also, “So You Received a CID: FAQs for Small Businesses”

By: Thomas B. Pahl, Acting Director, FTC Bureau of Consumer Protection | Jan 19, 2018

<https://www.ftc.gov/news-events/blogs/business-blog/2018/01/so-you-received-cid-faqs-small-businesses>

***Transparency:***

**Does the current law ensure transparency of national competition laws, policies and enforcement activities?**

Yes, see 5 U.S.C. § 552; 5 U.S.C. § 552(b)(4) and (7); 28 C.F.R. §§ 16.7 and 16.23 (to the DOJ).

See also,

Restraints of trade and dominance in the United States: Overview

- Generally, government investigations remain confidential unless the parties make a public statement. The reviewing agency rarely comments publicly on a pending investigation. However, it will sometimes issue a statement on closing an investigation. If enforcement action is taken, the agency will issue a press release and any court filings will become part of the public record.
- Confidentiality is statutorily required for information submitted to the federal agencies. In civil litigation or administrative proceedings, certain information and documents may be disclosed. Information obtained from parties in criminal grand jury investigations is confidential. However, witnesses are not bound by the same confidentiality provisions.
- Parties can and often do request that information is kept confidential during an investigation by designating the information or documents as confidential. In the event of litigation, parties can seek a protective order to prevent commercially sensitive information from being disclosed in the court record.
- Parties can settle at any time. Typically, parties willing to modify a restrictive agreement or practice enter into a consent agreement. Consent agreements with the Department of Justice (DOJ) must be approved by the Assistant Attorney General and filed with a competitive impact statement in a federal court. The consent is published in the Federal Register to facilitate public comment for 60 days. The court reviews the comments and decides whether the consent is in the

public interest. If the consent is with the Federal Trade Commission (FTC), it is subject to a 30-day public comment period and must be approved by a FTC vote. Proposed FTC consents are published in the Federal Register for public comment and a final consent is entered after the FTC reviews the public comments and determines that the consent is in the public interest.

**Does the national law and regulatory agency's procedural rules ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based ?**

Yes, see Federal Rules of Civil Procedure rule 58 and Federal Rules of Criminal Procedure rule 32

**Does the national law and regulatory agency's procedural rules ensure that a final decision and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public?**

Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System

- The FTC and DOJ also utilize ex post mechanisms to shed light on specific matters after an investigation has concluded. The majority of filed civil cases are settled by consent decree. At both agencies, the consent decree process involves publishing the proposed complaint, the consent agreement and any related documents, and information about the merits of the proposed consent decree, and then inviting public comments before the consent decree is made final. This process is observed for every matter settled by consent decree, although the specific procedures differ between the agencies. Harry First et al., *Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System*, at 50 (N.Y.U. L. & Econ. Working Papers, Paper 303, 2012).
- The DOJ's consent decree procedure is governed by the 1974 Antitrust Procedures and Penalties Act, also known as the Tunney Act. The Tunney Act requires that all DOJ settlements of civil antitrust actions be approved by a federal district court judge as being in the public interest, following a minimum 60-day public comment period that commences when the proposed consent judgment is filed with the court and published in the Federal Register. The DOJ must file, together with the proposed consent decree, a Competitive Impact Statement that explains the nature of the proceeding and why the proposed judgment is appropriate under the circumstances. In making the public interest finding, courts have recognized that their inquiry is limited and have accorded substantial deference to the DOJ, in order to preserve the practical benefits of settlement through the consent decree process as an alternative to the cost and burden of litigation. If the court does conclude that a consent decree is not in the public interest, the court only has the power to reject the decree. The Tunney Act does not give the court the power to modify the decree according to its view of what constitutes appropriate relief, although, in practice, courts have suggested modifications that the parties have then accepted. Harry First et al., *Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System*, at 50-51 (N.Y.U. L. & Econ. Working Papers, Paper 303, 2012).
- The FTC's consent order procedure is governed by Part 2 Subpart C of the FTC's Rules of Practice. There is no court involvement in FTC consent decrees. The FTC publishes the proposed complaint, the consent agreement, and an Analysis to Aid Public Comment (similar to the DOJ's Competitive Impact Statement) on the FTC website and in the Federal Register. There is a 30-day public comment period, following which the FTC decides whether to withdraw from the proposed consent agreement, modify it, or make the order final. In practice, it is rare for the FTC to withdraw or modify its proposed order based on public comments received. Harry First et al.,

*Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System*, at 52 (N.Y.U. L. & Econ. Working Papers, Paper 303, 2012).

**Comity:**

**Do the country's government and competition authorities:**

- cooperate in the area of competition policy by exchanging information on the development of competition policy with other national competition authorities; and
- cooperate, as appropriate, on issues of competition law enforcement, including through notification, consultation and the exchange of information with other national competition authorities?

Yes, for a listing of applicable MOUs and treaties, see the FTC's "[International Competition and Consumer Protection Cooperation Agreements](#)" and

[U.S.-Mexico-Canada FTA \(USMCA\) Competition Policy Chapter](#)

[U.S.-Korea FTA \(KORUS\) Competition Policy Chapter](#)

[International Waivers of Confidentiality in FTC Antitrust Investigations](#)

[Antitrust Guidelines for International Enforcement and Cooperation](#)

The FTC's [International Fellows Program](#)

[Competition & Consumer Protection Authorities Worldwide](#)

[U.S. Department of Justice Antitrust Division's International Program](#)

**Restraints of trade and dominance in the United States: Overview**

- The federal anti-trust enforcement agencies share information with competition authorities in other jurisdictions through bilateral agreements and informal understandings with other countries. Often, large scale international cartels and conduct investigations are pursued simultaneously by competition authorities in multiple jurisdictions. Agencies must request the parties to grant the anti-trust agencies written waivers of the confidentiality provisions of the mandatory disclosures for information obtained through compulsory process or under to a Hart-Scott-Rodino filing. This permits the agencies share confidential information with competition authorities in other jurisdictions.

References:

**Antitrust Division Manual. Department of Justice**

<https://www.justice.gov/atr/file/761131/download>

**"Economics Best Practices Manual." Federal Trade Commission**

<https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/best-practices>

First, Harry; Fox, Eleanor M.; and Hemli, Daniel E., "**Procedural and Institutional Norms in Antitrust Enforcement: The U.S. System**" (2012). New York University Law and Economics Working Papers. 303.

First, H., Fox, E., & Hemli, D. (2012-12-20). **The United States Competition Law System and the Country's Norms. In "The Design of Competition Law Institutions: Global Norms, Local Choices."** Oxford University Press.

## **FTC and DOJ Antitrust Guidance and Resources Checklist**

by Practical Law Antitrust

Related Content

Westlaw - Maintained • USA (National/Federal)

<https://us.practicallaw.thomsonreuters.com/w-019-5792>

## **“Guide to Antitrust Laws” Federal Trade Commission**

<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws>

## **International Competition and Consumer Protection Cooperation Agreements**

<https://www.ftc.gov/policy/international/international-cooperation-agreements>

## **Justice Manual. Department of Justice**

<https://www.justice.gov/jm/justice-manual>

## **Merger control in the United States: overview**

by Lisl Dunlop and Shoshana Speiser, Manatt, Phelps & Phillips, LLP

Westlaw - Law stated as of 01 Jun 2017 • USA (National/Federal)

<https://us.practicallaw.thomsonreuters.com/5-501-2849>

## **Restraints of trade and dominance in the United States: Overview**

by Lisl Dunlop and Shoshana Speiser, Manatt Phelps & Phillips, LLP

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## **“So You Received a CID: FAQs for Small Businesses”**

By: Thomas B. Pahl, Acting Director, FTC Bureau of Consumer Protection | Jan 19, 2018

<https://www.ftc.gov/news-events/blogs/business-blog/2018/01/so-you-received-cid-faqs-small-businesses>