USC Gould School of Law
Center for Transnational Law and Business

Competition Regulatory Agency Comparative Review and Evaluation Report

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COMPETITION REGULATORY AGENCY 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 ten jurisdictions: Australia, Brazil, Canada, China, the European Union, India, Korea, Taiwan, the United Kingdom, and the United States. Each jurisdiction is graded on a set of nineteen criteria that address the best practice principles concerning due process, transparency, and comity. For each criterion, the guiding query 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.

We first constructed a set of criteria, being aware that this is not a straightforward endeavor and the specter of bias can arise if the criteria appear to favor specific jurisdictions. 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").

We were able to minimize bias by consulting these five organizations' recommendations and understanding what made each set of recommendations unique. As such, we derive our set from three bedrock principles of legitimacy of a modern national competition law agency: due process, transparency, and comity.

Our research, evaluation, and comparative review found that there are three subsets of criteria among our initial set of nineteen regarding implementation. The first subset consists of criteria in which all ten jurisdictions converged in implementation. All ten 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, protect confidential information, and exchange information with foreign counterparts.

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 that 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, having rules of procedure for evidence and experts, transparency of enforcement, and having the final decision be available in writing.

Finally, there is a third subset of criteria in which three or more jurisdictions are lacking in implementation.[1] These are effective access to allegations and their basis, the right to present testimony and evidence in defense, timely access to confidential information for parties to prepare a defense, and the opportunity to consult with the agency on factual, procedural, or legal issues. This may reflect a lack of consensus on best practice or deeper philosophical differences regarding the importance of the implicated rights.

An interesting point to note here is that while a jurisdiction may be generally considered highly sophisticated, it can nonetheless receive intense scrutiny on its implementation of best practices. We suspect that this is particularly true when the jurisdiction is seen as a model for others to emulate.

Consider the case of the EU, which received all green flags except for having statutory deadlines for non-merger investigations. Even though the EU is rightfully considered an exemplar of procedural fairness, scholars also subject it to heightened scrutiny, making critiques of the EU easy to find. This makes the task of comparative grading more difficult because an overreliance on secondary commentary could skew comparisons between jurisdictions. Therefore, we intentionally relied on primary laws and guidelines, rather than the volume of secondary commentary.

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

The results show that the civil-law jurisdictions received more yellow and red flags than common-law jurisdictions. 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 that there are differences in governing philosophy between common law and civil law jurisdictions that are endemically embedded. The governing philosophy of certain governments may translate to less transparency overall in its legal system. 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.

[1] We excluded from this group the criteria for statutory deadlines for non-merger investigations because we did not want to imply that not having such deadlines is a deviation from what appears to be common practice.

We would like to caution against using the findings of the summary table without cross-referencing the more in-depth individual country reports appended to this report. Each individual country's report includes updates and new amendments for that jurisdiction as of July 2025. Furthermore, the grades we assigned represent snapshots of each jurisdiction. They do not consider the complex history, politics, philosophies, and outside influences that gave rise to each jurisdiction's current state. Our results also do not take into consideration the age of each jurisdiction's competition law regime. Finally, the grades do not reflect any reform proposals that are currently being debated in that jurisdiction.

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"). To achieve this objective, this project consists of two phases.

Phase I develops a process to review and evaluate the adherence of a jurisdiction's regulatory framework to generally accepted principles for due process, transparency, and comity. Its secondary purpose is to consider the national agency's effectiveness in adhering to these generally accepted principles. The culmination of Phase I was the 2022 comparative report, which reviewed and evaluated ten different jurisdictions.

Phase II provides periodic updates and new amendments that arise in each of the ten jurisdictions and notes if such updates and amendments have an impact on that jurisdiction's ability to adhere to generally accepted principles for due process, transparency, and comity. In the future, Phase II may also expand the number of jurisdictions we review and evaluate. This current restated comparative report incorporates all the updates through July of 2025.

Phase II Competition Regulatory Agency Review and Evaluation Report

In this Phase II comparative report, we evaluate the procedural legal framework and national agencies for competition law of ten jurisdictions: Australia, Brazil, Canada, China, the European Union, India, Korea, Taiwan, the United Kingdom, 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 Phase II report, this 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 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 their 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 report, we do not wish to comment on the domestic legitimacy of any jurisdiction's national agency because that is far beyond the scope of our study design.

We are cognizant of the drawbacks of choosing the latter approach. No set of principles is completely neutral. They can be interpreted as being biased towards certain jurisdictions—a real concern if we make a 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 and effective competition law regime looks like (with respect to due process, transparency, and comity).

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. These 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 of 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 that an agency answers only to 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 commercial 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 with 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 information from these jurisdiction/country-specific reports were then utilized to provide this comparative and evaluation report of the ten jurisdictions.

Finally, we assigned a green, yellow, or red flag to each criterion. A green flag indicates that the jurisdiction is effective at honoring a right, privilege, or generally accepted principle. Companies (particularly foreign ones) that do business in such a jurisdiction generally need not worry about the jurisdiction deemphasizing such a criterion. A yellow flag means that, while the jurisdiction is largely successful at adhering to a generally accepted principle, there are notable caveats. Companies must be aware of the risks and take active steps to mitigate unfavorable legal outcomes. By contrast, a red flag signals that the jurisdiction is not effective in this area. Companies operating in these jurisdictions may have to accept that certain rights will not be honored.

The results of our evaluations 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.

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

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

Jurisdiction Comparisons and Evaluations: Summary Chart

	Australia	Brazil	Canada	China	EU	India	Korea	Taiwan	UK	USA
Laws and guidelines available to public?										
Statutory deadlines for merger reviews/ investigations?										
Statutory deadlines for non-merger investigations?										
Effective access to allegations and the basis?										
Right to counsel?										
Right to present testimony and evidence in defense?										

Access to case files?										
Rules of procedure apply effectively to enforcement proceedings?										
Rules of procedure for evidence and experts?										
The right to appeal decisions?										
Voluntary resolutions with agency allowed?[2]										
Is confidential information protected?										
Timely access to confidential information that is critical for parties to prepare a defense?										
Opportunity to consult with the agency on legal, factual, or procedural issues?										
Enforcement effectively transparent?										
Final decisions and reasoning available in writing?										
Final decisions available to public?										

[2] We gave a jurisdiction a green flag for this criterion if they have leniency programs addressing any potential violation of competition law; jurisdictions do not need to have leniency programs for all possible violations. As we note in Jurisdiction Evaluation and Comparison section below, some jurisdictions indeed have leniency programs for cartel or merger behavior but not for other behaviors, such as abuse of dominance.

Does the jurisdiction exchange information with foreign competition authorities?										
Does the jurisdiction cooperate on competition law enforcement?										

Jurisdiction Comparisons and Evaluations

A. Due process issues:

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

Jurisdiction	Publicly available?	Available where?	Languages
Australia		Australia Competition and Consumer Commission website	English
Brazil		Administrative Council for Economic Defense website	Portuguese and limited selection in English
Canada		Competition Bureau Canada and Competition Tribunal websites	English and French
China		State Administration for Market Regulation website	Chinese and English (limited selection)
EU		EU-Lex website and European Commission website	All official EU languages
India		Competition Commission of India's website	English
Korea		Korea Fair Trade Commission website	Korean and English
Taiwan		Taiwan Fair Trade Commission website	Chinese, English, and Japanese (limited selection)

UK		Competition and Markets Authority website	English
USA		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?

Jurisdiction	**Mergers**	**Other investigations**
Australia	 • 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 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. • 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.	 • No statutory deadline.

Brazil	 • Once notification is complete, the SG has 240 days to decide on the transaction, extendable up to 90 days. • For fast-track mergers, CADE usually decides within 30 days of submission.	 • For dominance/vertical agreement investigations, the SG must complete preparatory proceedings within 30 days, and administrative proceedings within 180 days (extendable by 60-day periods). • There is no deadline for the Tribunal to make its final decision on dominance/vertical agreement investigations.
Canada	 • 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. • For complex matters, the Competition Bureau or the parties may seek to extend the review beyond the waiting periods.	 • No statutory deadlines.

China	 • No statutory deadlines in pre-consultation phase. After notification is complete, SAMR has 30 days to complete preliminary review. If SAMR conducts a further review, 90 days. An extension is available for 60 days. • Simplified review: no formal deadline, but authorities try to complete review within 30 days.	 • No statutory deadlines.
EU	 • All parties have a general right to receive a decision within a reasonable time. • Simplified procedure: decision within 25 days. • Regular investigation: Phase I: 25 working days from receipt of complete notification. A 10-working day extension is possible. • Phase II: 90 working days extendable up to 125 working days.	 • All parties have a general right to receive a decision within a general time. • Otherwise, there are no statutory deadlines. • 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.

India	 • An initial review takes place within 30 working days of filing notification. • If CCI determines that the transaction is likely to have an adverse effect, parties have 15 days to explain why an in-depth investigation should not be conducted. • There is a statutorily mandated 150-day deadline from notification day to approve or deny the merger.	 • No statutory deadlines.
Korea	 • 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. • Simplified review: KFTC will deliver results within 15 days of notification. However, the clock stops running if the KFTC requests information from parties.	 • In theory, the KFTC has 9 months to investigate abuse of dominance cases and 13 months to investigate cartel cases. • In practice, the deadline is not binding. • Investigations are expected to run for at least 1 year.

Taiwan	 • Merger review: 3 months from submissions. A single extension of 3 months is available.	 • No statutory deadlines, decisions may be issued as soon as 6 months after initiation of an investigation.
UK	 • Phase I assessment to be completed with 40 working days. Can be extended. • If the investigation is referred to Phase II, parties have 5 working days to propose an Undertaking in Lieu (UIL) to remedy the concerns. The CMA has 10 working days to accept or reject the UIL in principle. If acceptable, the CMA has 50 working days to consider the details of the UIL. This may be extended by 40 days. • After a Phase II decision, the CMA has 12 weeks to issue an order, extendable by 6 weeks. • Fast track procedures available. • Phase 2 investigations have a statutory period of 24 weeks, extendable by 8 weeks.	 • No statutory deadlines.

USA	 • After the filing of the Hart-Scott-Rodino notification forms, the DOJ and FTC have 30 days to complete a clearance process to determine which agency (if any) will continue the investigation. During this time, the investigating agency may issue a request for information. • If either agency decides to proceed with the investigation, it will issue a second request for information. The second request extends the waiting period by 30 days. • 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. • There is no hard deadline for this phase of the investigation. • Agencies may request parties to "pull and refile," effectively starting the initial 30-day period again.	 • No statutory deadlines.

3. Do parties have effective access to allegations and the basis for allegations?

Jurisdiction	Effective access?	Notes
Australia		• Enforcement proceedings filed by the ACCC at the federal courts or Competition Tribunal are made public.
Brazil		• For mergers, notifications are published in the CADE official gazette. When matters are referred to an administrative proceeding, the parties are notified by writing. • For restraint of trade/dominance, SG holds preparatory proceedings in camera, and administrative proceedings may be in camera. • It is not until the SG initiates an administrative proceeding that respondents will be informed of the full allegations.
Canada		• Investigations conducted by the Competition Bureau are conducted in private. Parties are not informed unless a request is made. • However, once proceedings are filed at the federal courts or Competition Tribunal, allegations and bases are made public.
China		• Authorities provide notice of an investigation, but the notice may not contain adequate information to understand the legal theory of harm. • SAMR has no legal obligation to make the internal reasoning for an investigation public. • Furthermore, there is no obligation to reveal the source of information that SAMR relies on.

EU		• The Commission will publish a non-confidential notice of the merger investigation. • 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 factual and legal concerns. • However, there are some concerns over defendants' ability to access case files and the Commission's ability to develop new theories of harm. • If the Commission denies access to files, the burden is on the requesting party to show that the requested files are of material importance. • If the Commission develops a novel legal theory harm (see: Dow/DuPont case), parties may not have sufficient opportunity to rebut.
India		• Current law does not clearly establish the point in time that parties will get access to allegations, including the legal and factual basis. • At the prima facie stage, the CCI generally does not ask for evidence from all parties. • Generally, the opposing party is only informed of the case when the Director General sends notice after the CCI makes a prima facies opinion of a violation. • If no violation is found, the report is not shared with parties.
Korea		• The KFTC will serve the examination report to the defending party. This report will include details of the allegations. • No confidential material or material deemed insignificant will be revealed. • Defendants may request access to excluded information.

Taiwan		• If the parties request it, they have the right to review and copy TFTC files and materials. Parties must schedule a time with the TFTC to access the files, and parties are always supervised by TFTC staff. • However, the parties do not have access to TFTC internal drafts and documents, as well as confidential materials. • There is some criticism that the TFTC redacts too much information for parties to prepare an adequate defense.
UK		• CMA will hold state-of-play meetings to inform parties of the scope of investigation, status updates, and other important information. • The CMA will issue a statement of objections (SO), that sets forth the CMA's provisional view that there is a violation of the law. The SO will include the legal case and economic analysis. • If appropriate, the CMA will issue draft penalty statements and its reasoning.
USA		• For DOJ investigations, allegations of wrongdoing will be set forth in the complaint filed in federal court. • For FTC administrative actions or preliminary injunction applications, allegations will be set forth in the complaint or court filings, respectively.

4. Do parties have the right to counsel?

Jurisdiction	Effective right to counsel?	Notes
Australia		• Penalty proceedings are adjudicated or reviewed by the federal courts and Australian Competition Tribunal; these courts are subject to federal court rules.
Brazil		• Right to counsel guaranteed by the Brazilian constitution and the code of civil procedure. • Attorney-client privilege extends to in-house counsel, so long as communication relates to legal matters.
Canada		• Competition Tribunal is considered a federal court and subject to the federal court rules.
China		• SAMR may deny a counsel's request to participate in proceedings. • Attorney-client privilege is non-existent.
EU		• Parties may be represented by in-house or external counsel at all proceedings. • Attorney-client privilege does not apply to in-house counsel.
India		• Parties may authorize legal practitioners to present their case before the Commission.
Korea		• Parties may be represented by in-house or external counsel. However, the KFTC has several ways to suspend the right. • Attorney-client privilege does not exist, though counsel may refuse testimony regarding confidential information obtained during professional (i.e., legal) duties.
Taiwan		• Unless otherwise prohibited, parties may appoint counsel for administrative procedures.

UK		• Parties have the right to request legal counsel to be present at all CMA interviews, question sessions, and oral hearings.
USA		• In criminal matters, the US constitution guarantees the right to counsel. • In civil matters, parties may be represented by counsel.

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	 • Federal court and Australian Competition Tribunal proceedings are governed by normal rules of evidence and procedure.	• Normal trial procedures are available.	

Brazil		• For mergers, parties may—within 30 days of the SG objecting to a merger—submit written petitions to the Tribunal that present arguments, evidence, studies, and opinions of experts. • For restraint of trade/dominance, respondents have 30 days after the SG initiates an administrative proceeding to present its defense, specify evidence, and identify 3 witnesses.	
Canada	 • Competition Tribunal proceedings are governed by trial rules of evidence.	• Witness statements prior to trial. • Experts reports, including rebuttals. • Cross examination of witnesses.	

China	 • Subject to the discretion of SAMR.	• Parties may make statements, but do not necessarily have the right to attend hearings and proceedings. • Expert testimony is allowed if deemed necessary. Economic analysis encouraged.	• No right to cross examination.
EU	 • The Commission has an obligation to allow parties to be heard before imposing a fine or order. Parties may request oral hearing, and the Commission must organize one if so requested.	• Parties make written statements. Experts and evidence allowed at oral hearing.	• However, there is no right to cross examination at hearing. • Hearing officer does not have the power to compel answers or attendance.

India		• The Commission has a large amount of discretion on whether to hear testimony of the parties. • The Commission has discretion on whether to allow cross examination of witnesses. However, if the DG intends to rely on a witness, the other parties must have the opportunity to cross-examine the witness.	
Korea		• Parties have the right to present their case before the KFTC. • May examine witnesses, experts, and specific evidence.	• The Committee may reject aspects of examination deemed inefficient or redundant.

Taiwan	 • No right to key legal tools such as depositions and cross-examination.	• Parties have the right to present evidence, experts, and statements.	• Depositions and cross-examination.
UK		• Written statements to SO or draft penalty statements. • Testimony at a single oral hearing • The party may respond to questions posed by the CMA at a hearing afterwards in writing. • Expert arguments. • During appeals, parties may cross examine witnesses. • Limited access to opposing witnesses during investigation phases.	

USA	 • 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.	• All normal trial procedures are available.	

6. Do parties have access to case files?

Jurisdiction	**Effective right to case files?**	**Notes**
Australia		• Parties to a proceeding may formally request the federal court to order discovery from the ACCC, both prior to and during proceedings. • Discovery is usually limited to that which is relevant to pled issues. • After commencement of proceedings, parties have the right to request files from ACCC (but not documents prepared by or on behalf of the ACCC). • Parties may subpoena documents from third parties to indirectly obtain documents held by ACCC.
Brazil		• Parties under investigation have full access to documents that CADE uses to make their decision during the evidentiary stage of the administrative proceedings.

Canada		• In civil enforcement cases, the Competition Bureau has an obligation to disclose all relevant documents through the discovery process. • 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. • In criminal cases, the prosecutor has a duty to disclose all material it proposes to use at trial.
China		• At its discretion, SAMR may choose to release a non-confidential version of filing documents.
EU		• If the Commission fails to disclose evidence addressed by the Statement of Objections, the decision may be annulled. • Right of Access does not grant parties confidential information or internal documents of the Commission. • Access to evidence is normally granted only once. But further access may be granted if the Commission receives new evidence. • Access to evidence submitted by 3rd party through Akzo Procedure. • Data rooms are available. • If the Commission plans to rely on inculpatory information presented in a defense, the Commission must allow access. • If the information revealed by a defense is exculpatory, the Commission may grant access upon request

India		• Parties may apply to inspect or obtain copies of documents or records submitted during proceedings. • The Commission's internal documents are not accessible. • Parties inspecting or copying relevant documents must be accompanied by Commission officer. • Parties may apply to be part of a confidentiality ring.
Korea		• Parties have the right to request inspection or copying of case files. • KFTC may grant limited access to sensitive data, sometimes restricted to a special viewing room.
Taiwan		• Parties have right to review and copy Commission files and materials. • To access the files, the party must apply for permission and schedule a time for access. • There is no right to access the TFTC's internal working documents.
UK		• Parties are invited to inspect the case file after the CMA issues the SO. • CMA may provide a list of documents in the file while providing reasonable opportunity to inspect any of those documents.
USA		• Primarily through the discovery process. Parties may request documents, depose witnesses, and obtain information regarding the government's expert testimony.

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

Jurisdiction	Do rules of procedure apply effectively?	Notes
Australia		• Civil and criminal penalties are adjudicated before the federal courts, subject to the normal rules of procedure of Australian courts.
Brazil		• Enforcement proceedings are governed by CADE regulations. • CADE has broad powers to obtain evidence.
Canada		• Enforcement proceedings before the Competition Tribunal or the federal courts are governed by all rules of procedure of courts. • The Tribunal is a court of record and bound by the Competition Tribunal Rules and Federal Court Rules.
China		• It is unclear if parties have any recourse if rules are not followed by SAMR. • SAMR follows several guidelines about evidence collection that are carried forward from its predecessor SAIC and NDRC. • However, parties note that there is no real way to object to SAMR actions.
EU		• 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. • The Commission may apply interim measures if there is prima facie breach of competition rules and if there is proven urgency. • The Commission may request parties to provide information. If the Commission decides to request information, it is treated as an act of the EU.

India		• The Commission has the same powers vested in a civil court as under the Code of Civil Procedure, in respect to 1) witness summons, b) discovery and production of documents, c) receiving evidence on affidavit, d) issuing commission for examination of witnesses or documents; e) requisition of any public record. • Procedural rules set forth in CCI regulations.
Korea		• Civil Procedure Act and the Investigation Procedural Rules govern. • Economic analysis must abide by the principles set forth in the Regulation on the Submission of Economic Analytical Opinions.
Taiwan		• TFTC maintains guidelines to govern witnesses, statements, and expert evidence. • However, the TFTC has wide discretion to go beyond the allegations during the investigation.
UK		• Procedural safeguards of CMA guidance documents apply to all parties. • An independent Procedural Officer oversees the procedural aspects of an investigation. The Procedural Officer can take complaints from parties and issue binding orders on the investigation team.
USA		• For FTC administrative complaints, 16 CFR Part 3 governs. • For federal court trials, the Federal Rules of Civil Procedure or Federal Rules of Criminal Procedure apply.

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

Jurisdiction	Are appeals allowed?	Notes
Australia		• A merger applicant may appeal a formal ACCC decision to the Australian Competition Tribunal. The applicant may further appeal to the Federal Court. • There is no statutory right to appeal if the merger applicant uses the ACCC informal clearance procedure.
Brazil		• Parties may appeal decisions by the SG on mergers to the Competition Tribunal. • If new facts emerge after the trial, parties may request a reexamination within 15 days of the publication of a merger rejection or finding of anticompetitive behavior. • Decisions by CADE are subject to judicial review through the federal courts.
Canada		• Decisions and orders of the Competition Tribunal may be appealed to the Federal Court of Appeal or provincial court of appeals. However, appeals on questions of fact are only available with leave of the Federal Court of Appeal or the appropriate provincial court of appeal.
China		• Parties may apply for administrative reconsideration first. • 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.

EU		• 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. • Parties and the Commission may further appeal matters of law to the Court of Justice of the European Union.
India		• Parties may appeal to the National Company Law Appellate Tribunal. • Parties may further appeal the decision of the appellate tribunals to the Supreme Court.
Korea		• 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.
Taiwan		• 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). • Parties may further appeal the matter to the Supreme Administrative Court on matters of law.
UK		• Parties may appeal to the Competition Appeal Tribunal (Tribunal) on matters of law and facts. • If parties remain unsatisfied with the Tribunal's judgment, they may appeal to the Court of Appeals.

USA		• The DOJ will seek preliminary and permanent injunctions through district courts. • The FTC will seek preliminary injunctions through district courts. • Parties may appeal a district court's decision to impose an injunction to the appropriate US Court of Appeals. • 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. • Parties may appeal decisions at the US Court of Appeals to the US Supreme Court.

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

Jurisdiction	**Voluntary resolution allowed?**	**Notes**
Australia		• Merger parties can attempt to provide commitments to satisfy the ACCC. Usually, the ACCC will require the appointment of an independent auditor. • Immunity under the cartel provisions may be available to the first member of the cartel to come forward

Brazil		• For cartels, immunity is available if the party is the first to apply for immunity, did not coerce others to join the cartel, ceases its involvement in the cartel, cooperate fully with the ACCC, and maintain confidentiality of the immunity. • Subsequent parties may receive partial reduction of penalties, depending on the timeliness and adequacy of cooperation. • In criminal proceedings, the courts retain final discretion, even if the Commonwealth Director of Public Prosecution recommends reduced penalties. • Parties may be able to negotiate a cease- and-desist agreement with CADE and receive fine reductions. • The first party to negotiate a cease-and-desist receives a 30%-50% reduction in fines. The second receives a 25%-40% reduction. The third receives up to 25% reduction. Subsequent parties may receive up to 25% reduction.
Canada		• The Competition Bureau prefers settlement rather than litigation. • Consent agreements are possible and preferred when there is a violation. • Immunity and leniency are available for conspiracy, bid rigging, implementing foreign conspiracy directives, and aiding and abetting these offenses. • First to disclose to the Competition Bureau before the agency has gathered sufficient evidence may be granted immunity from prosecution. • The first to apply for leniency can receive a 50% fine reduction. • Subsequent applicants may receive a discount based on discretion

China		• SAMR can mitigate or exempt a party from punishment if the party voluntarily reports to SAMR. • For horizontal monopoly cases: first to report will receive no less than an 80% fine reduction, up to full immunity. The second to report will receive a fine reduction of between 30-50%. The third to report will receive a fine reduction of between 20-30%. Subsequent parties will receive no more than a 20% reduction. • For cartels: SAMR may suspend an investigation if a party voluntarily adopts measures to eliminate the harm done by their conduct.
EU		• For mergers: parties may propose remedies that eliminate competition concerns. The Commission prefers structural remedies. • 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 receives 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. • 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. • The Commission can accept commitments without finding infringement, but the settlement must pass the market test.

India		• For cartels: any member of a cartel may file a leniency application at any time prior to the DG submitting its investigation report to the CCI. The CCI is empowered to reduce penalties up to 100% to the first leniency applicant, up to 50% for the second leniency applicant, and up to 30% for any subsequent leniency applicant. • Parties may apply to Commission for settlement in abuse of dominance cases.
Korea		• For cartels: First party to come forward with evidence receives immunity to corrective measures and a 100% reduction in fines. The second party receives a 50% reduction in fines and may receive mitigation in corrective measures. • 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. 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. • In abuse of dominance cases, the KFTC can accept commitments from parties and close a case without reaching an infringement decision.

Taiwan		• For cartels: the first applicant can qualify for full immunity. 2nd to 5th applicants can receive progressively smaller reductions in fines. No more than 5 applicants are allowed in one case. • The TFTC can enter administrative settlements, rather than impose sanctions.
UK		• For mergers, the CMA may accept UILs instead of referring the matter to a Phase II investigation. During Phase II investigations, there is a 12-week window during which remedies can be negotiated. This window is extendable by 6 weeks. • For dominance cases, parties may generally settle with the CMA to receive discounts on financial penalties. If a party fulfills the requirements, it can receive up to 20% discount on the penalty. • Type A immunity applies when there is no existing CMA investigation and could result in 100% immunity against fines and criminal prosecution. • Type B immunity applies when there is already an existing CMA investigation. Parties may receive discretionary immunity on fines and criminal prosecutions. • Type B leniency applies when the CMA does not want to offer immunity and instead grants percentage-based reductions in penalties. • Type C leniency applies when a party provides evidence to the CMA before the statement of objections is issued. This can result in percentage-based reductions in penalties.

USA		• 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. • A new DOJ program will consider corporate anti-trust compliance programs when it comes to considering reductions in punishments. • 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. • Consent agreements with the FTC are subject to a 30-day publication period in the Federal Register. • Parties may enter plea agreements, subject to approval of the agency and courts.

10. Does the agency effectively protect confidential information?

Jurisdiction	**Effective protection of confidential information?**	**Notes**
Australia		• During the informal process of merger review, information obtained by the ACCC is largely kept confidential. • During the merger authorization process, the information is largely public. • 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. • In all cases, a party may also request that the information it provides be considered confidential.

Brazil		• Documents and data classified under four levels of confidentiality: 1) public, 2) restricted access; 3) confidential; 4) under seal. • Parties may request information to be kept confidential. • Leniency and settlement proposals are automatically kept confidential until the final decision on the matter.
Canada		• Almost all information received by the Competition Bureau is treated as confidential. • Exceptions include previously publicly disclosed information, provider consenting to disclosure, information communicated to another law enforcement agency, information communicated for administration and enforcement of the Competition Act. • Parties may request information be kept confidential. • Information may nonetheless be disclosed as part of litigation.

China		• The Anti-Monopoly Law obligates SAMR to keep commercial secrets confidential. • In mergers, the notifying party will be asked to prepare non-confidential versions of notification documents. • Parties may also request that certain information be kept confidential. Third party submissions are similarly protected.
EU		• Commission is obligated to protect confidentiality. • Parties may attempt to substantiate claims of confidentiality and submit non-confidential versions of information. • Confidentiality may not apply if a piece of evidence is exculpatory or inculpatory. • Communication between counsel and client may be protected by the legal professional privilege, but the lawyer cannot be in-house.

India		• Parties may submit a request for documents to be treated as confidential. • Such a request must be accompanied by cogent reasons and the date on which confidential treatment will expire. • Information obtained by or on behalf of the Commission generally not be disclosed without permission except as to comply with legal requirements.
Korea		• Party may request access to confidential data if it is considered to be in the public's interest. • The KFTC can set up special viewing rooms for data access. • Anyone viewing data in the special viewing room is subject to confidentiality pledges and agreements.

Taiwan		• 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.
UK		• Parties may designate and explain why certain information should be confidential. • CMA automatically protects information designated as confidential, except when the party consents to its release, when the information is necessary to the investigation of a criminal matter, or there are statutory requirements for disclosure. • When the CMA wants to disclose information, it must give the party supplying the information opportunity to argue that the information should not be disclosed. • CMA may use confidentiality rings or data rooms.

USA		• 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. • If a party produces sensitive information in a non-compulsory manner, they may request that the information be kept confidential. • Material used during trial may become public. • Grand jury deliberations are kept confidential unless authorized by the court.

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

Jurisdiction	**Effective access to confidential information?**	**Notes**
Australia		• 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. • 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.

Brazil		• Parties get full access to documents CADE uses to make its decision. Access will be granted before the end of the evidentiary phase of the administrative proceeding.
Canada		• Once a matter proceeds to criminal prosecution, the Federal Court Rules govern discovery. • 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.
China		• There is no right to be informed that SAMR will use confidential information during review.
EU		• 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.
India		• Regulations do not clearly establish guarantees or procedures to allow parties under investigation timely access to confidential information that CCI uses. • However, the Commission may set up confidentiality rings for parties and their representatives.
Korea		• Parties may request confidential information and the KFTC may allow special viewing rooms, with participants subject to confidentiality pledges or agreements.
Taiwan		• Until the investigation is officially opened by the TFTC, parties do not have a formal way to access information.

		• Once the investigation is official, the onus of accessing the information is on the party.
UK		• Parties or their advisers may access confidential information to prepare defenses, subject to CMA's safeguards.
USA		• Obtainable through the discovery process.

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

Jurisdiction	**Effective consultation?**	**Notes**
Australia		• 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. • ACCC encourages parties to discuss the merger with the agency prior to filing notification. • 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.
Brazil		• Parties may submit queries to the Tribunal regarding legality of conduct. • Parties may seek informal or formal consultation with the Tribunal regarding a proposed transaction. If the Tribunal issues formal guidance, it is considered binding for 5 years. However, the Tribunal reserves the right to reconsider its opinion later. • Parties may seek informal guidance from the Competition Tribunal.

Canada		• Investigations are private. • In mergers, parties may apply for information discussion. But 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 regarding conduct. This is rarely used in practice.
China		• Parties may consult with the agency before filing notification for mergers. • 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.
EU		• The Commission offers State of Play meetings to inform parties under investigation of the current situation. • These meetings are offered at crucial points of the investigation. • When appropriate, the Commission will hold such meetings with the complainant (or a third party) and the investigated parties in attendance. • When appropriate, investigated parties may discuss the case with senior members of the Commission or the Commissioner.
India		• For mergers, parties are encouraged to approach the CCI for informal pre-filing consultations. The advice furnished in these consultations is non-binding. • However, CCI is not required to give informal guidance on restrictive agreements or abuse of dominance cases.

Korea		• For planned mergers, parties can ask the KFTC to review before the notification is filed. • In restraint of trade and dominance investigations, the parties can request the KFTC for guidance on whether the activity would violate the law.
Taiwan		• The TFTC provides parties with opportunities to consult with the agency regarding important issues during the investigation. • The TFTC may also hold public hearings.
UK		• For mergers, parties may request the CMA to give informal guidance on a confidential basis. Such guidance is not binding on the CMA. • Parties are encouraged to participate in pre-notification discussions with the CMA. • For restraint of trade/dominance cases, the CMA may issue confidential and non-binding ad hoc advice. The CMA may publish such advice if the issue is novel or unresolved.
USA		• For mergers, parties can seek the advice of the DOJ and FTC before notification. • There is no formal hearing before the agencies file a complaint. • For DOJ investigations, parties do not have an absolute right to consult with the agency. However, the opportunity is almost always extended to the party. • 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.

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		• Civil and criminal penalties require court litigation, resulting in a high level of transparency. • The ACCC publishes outcome and reasoning for formal merger authorization. • For informal merger clearance, the ACCC publishes limited information, including findings. • Mergers involving foreign parties are subject to national interest review by the Foreign Investment Review Board. • Several industries (e.g., financial, media, aviation, shipping, and telecommunications) are also subject to special government investigations.
Brazil		• Emphasis is put on transparency. • SG publicizes merger notifications. • Tribunal judgment sessions are public, except proceedings granted secret designation. • Judgments of the Tribunal, including votes, are made public. • Brazil does not currently have a national security exception, a public interest exception, or foreign investment review mechanisms.

Canada		• The Bureau has a large amount of discretion when it comes to notifying parties that they are under investigation. • Those parties subject to investigation should not expect a detailed explanation of the case or internal work products. • However, because sanctions require court litigation, there is a high level of transparency once the process reaches the discovery stage. • Mergers are subject to broad review under Investment Canada Act when it concerns national security. • 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.
China		• Although China's competition enforcement is trending towards transparency, key challenges remain. • 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. • A national security review considers matters of national security, investment in areas surrounding military industrial facilities, sectors deemed critical to China. • There are broad exemptions for monopoly conduct, as set forth in the AML. • Historically, the legal reasoning and theories for decisions have not always been articulated sufficiently. • Parties often complain that notices often do not set forth sufficient details on the legal theories of harm. • Competition authorities consult other bureaus and stakeholders without making the input public. • China's restraint of trade/dominance controls are subject to generous exceptions, including any purpose prescribed by the State Council.

EU		• 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. • All decisions adopted by the Commission have been published. • Before parties enter commitments, the Commission will publish the details for public commentary and the market test. • Hearing Officer's final report is published. • Member states may intervene for legitimate purposes, such as public security, plurality of media, and prudential rules. • 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. • There are industry-specific block exemptions for restraint of trade investigations.
India		• The CCI publishes statutory authorities, administrative regulations, guidelines, decisions, orders, and annual reports. • However, hearings are generally not open to the public. • Parties and actions that are subject to competition law are also often subject to the Foreign Exchange Management Act and rules issued by the Reserve Bank of India.

Korea		• The RoK competition law regime balances the right to transparency and right to confidentiality. • Decisions and reasoning are published. • 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 on 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.
Taiwan		• The TFTC publishes all decisions, including majority and dissenting opinions. • Parties can request access to case files, and hearings are generally open to the public. • 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.
UK		• The CMA operates with a high amount of transparency. • However, one area of concern is the increasing amount of national security exceptions being passed into law. • Transactions may be reviewed retroactively for up to 5 years after closing.

USA		• Because enforcement requires public court hearings, there is a high level of transparency in the system. • 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.

2. Are final decisions available in writing?

Jurisdiction	**Decisions available in writing?**	**Notes**
Australia		• For merger investigations, the ACCC publishes limited information regarding informal clearance. • Decisions made during pre-assessment or application for confidential clearance are kept confidential. • 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. • For restraint of trade and dominance investigations and written decisions, ACCC investigations can result in the agency issuing a letter of closing of the investigation or a letter of warning. • If the matter is referred to courts for civil penalties or CDPP for criminal charges, the appropriate court will issue the final written decisions.
Brazil		• All final decisions of CADE are published on the Federal Official Gazette of Brazil and CADE's official website.

Canada		• 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 results. • Sometimes the Competition Bureau will publish position statements for high profile mergers. • By law, the Competition Tribunal is not required to make available written decisions or written reasoning. • However, in practice, written reasoning is given for nearly all decisions and is available on the Competition Tribunal's website.
China		• 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. • For approved mergers, SAMR 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, SAMR publishes administrative decisions on its website. • 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.

EU		• All decisions are sent in full to the parties and published. Decisions state the names of parties, content of decision, and penalties imposed. • Non-confidential versions of decisions are published on websites. • For commitments, 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. • Press releases are published after the Commission adopts a decision. • Hearing Officer's final report and opinion to the advisory committee is published in the Official Journal. • If a complaint is rejected, the Commission will publish rejection decisions.
India		• All orders or decisions of the Commission are published on the Commission's website. • For mergers, the DG's report must include all evidence, documents, statements collected, and analysis thereof.

Korea		• The KFTC must notify parties of decisions within two weeks. The decision must contain information about the parties involved, the date of the decision, orders issued, and reasoning for the decision. • If no violation is found on a matter, then the KFTC does not have a statutory obligation to issue a written decision. • However, in practice, the KFTC has been issuing written decisions for non-violation cases too.
Taiwan		• All case decisions are published on the TFTC's website in Chinese. Majority and dissenting opinions are published together, along with procedural disposition. • TFTC may translate decisions into relevant languages.

UK		• For mergers, CMA publishes public invitations to comment on an investigation. • During a Phase I investigation, CMA will publish interim orders, statutory deadlines, invitations for third-party comments, decisions on a Phase II reference, and alternative remedies. • During a Phase II investigation, the CMA will publish submissions, hearing summaries, responses, findings, and a final report. • For restraint of trade/dominance, CMA will usually publish a notice of investigation. • Furthermore, the CMA will publish a dedicated public page on its website, which lays out the case, timetable, procedural officer's decisions, a non-confidential decision, fines, SO, notes, and other relevant material.
USA		• Decisions of the FTC administrative hearing and federal courts are public documents. • All consent decrees involve publication of the complaint, agreement, and documents. • 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. • The DOJ must file a Competitive Impact Statement. • If there is a consent order the FTC is required to publish the agreement and analysis in the Federal Register and allow public comment for 30 days. • If the FTC does not take enforcement action, the closing letter is usually public.

C. Comity issues:

1. Does the jurisdiction exchange information with foreign competition authorities?

Jurisdiction	Exchange Info?	Information Exchange Agreements
Australia		• 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. • MOU with the United States. • Treaty with the United States. • Member of the International Competition Network.
Brazil		• Bilateral cooperation agreements with Argentina, BRICS, Canada, Chile, China, Colombia, Costa Rica, Ecuador, the EU, France, Japan, Mexico, Paraguay, Peru, Portugal, Russia, South Africa, South Korea, and the US. • Participates in the International Competition Network, OECD, the UN Conference on Trade and Development, Mercosur, the World Bank, the Inter-American Development Bank, and the Latin American Consumer Protection and Competition Program.
Canada		• Cooperation agreements with Australia, Brazil, the EU, Japan, Korea, New Zealand, United States. • Art. 21 Competition Policy Chapter of the U.S.-Mexico-Canada FTA. • MOU with Chile, Colombia, Hong Kong, India, Mexico, Peru, Singapore, Taiwan. • Member of the International Competition Network.
China		• 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.

EU		• Cooperation agreements with Canada, Japan, South Korea, Switzerland, and the United States. • MOU with Brazil, China, India, Mexico, Russia, and South Africa. • Cooperates and transmits all important documents with the national competition authorities of EU member states. • Member of the International Competition Network.
India		• MOUs with Australia, Brazil, BRICS, Canada, Egypt, the EU, Japan, Mauritius, Russia, and the U.S. (FTC and DOJ). • Member of the International Competition Network, OECD, and the UN Conference on Trade and Development.
Korea		• MOUs with Australia, Brazil, Canada, China, the EU, Indonesia, Japan, Mexico, Romania, Russia, Turkey, the United States, and Vietnam. • Art. 16 Competition Policy Chapter of the U.S.-Korea FTA. • Free trade agreements with Australia, Canada, Central American countries (El Salvador, Costa Rica, Honduras, Nicaragua, and Panama), Chile, China, Colombia, the EU, the European Free Trade Association, India, Indonesia, Israel, New Zealand, Peru, RCEP, Singapore, Turkey, UK, United States, Vietnam. • Statutory authority: MRFTA Art. 56. • Member of the International Competition Network.
Taiwan		• Bilateral cooperation agreements with Australia, Hungary, Panama, Paraguay, and New Zealand. • MOUs with Canada, Eswatini, France, Indonesia, Japan, and Mongolia. • Member of the International Competition Network.

UK		• Frameworks agreements with Australia, Canada, New Zealand, and the United States. • Retains some cooperation with European national competition authorities and the European Commission. • Member of the OECD, International Competition Network, International Consumer Protection and Enforcement Network, and the United Nations Conference on Trade and Development.
USA		• MOUs and cooperation agreements with Australia, Brazil, Canada, Chile, China, Colombia, the EU, Germany, India, Israel, Japan, Mexico, Peru, Russia, and South Korea. • Art. 16 Competition Policy Chapter of the U.S.-Korea FTA. • Art. 21 Competition Policy Chapter of the U.S.-Mexico-Canada FTA. • Member of the International Competition Network.

2. Does the jurisdiction cooperate on competition law enforcement?

Jurisdiction	**Cooperate on Enforcement?**	**Cooperation**
Australia		• Australia engages in enforcement cooperation with Canada, the EU, India, Japan, New Zealand, the United States.
Brazil		• CADE engages in high levels of cooperation with foreign jurisdictions. • There are active information exchange channels. • CADE uses confidentiality waivers when sharing information with foreign counterparts.

Canada		• The Bureau has negotiated numerous cooperation agreements with foreign counterparts.
China		• There is little public data available regarding the extent to which SAMR cooperations with foreign counterparts. • Anecdotal evidence suggests that cooperation regarding major cases is normal.
EU		• The EU can request reciprocal cooperation from Canada, Japan, South Korea, and the United States. • Historically, the Commission has worked closely with the US FTC and DOJ.
India		• The Commission has negotiated numerous cooperation agreements with foreign counterparts.
Korea		• The KFTC has signed numerous cooperation agreements with foreign counterparts. • While cooperation was historically limited, recent developments suggest that the KFTC is increasingly receptive to cooperation.
Taiwan		• The Commission regularly consults foreign agencies.
UK		• Since Brexit, the CMA has signed numerous cooperation agreements with foreign counterparts. • The CMA maintains cooperation with the European Commission and other European national competition authorities

USA		• The US has signed numerous cooperation agreements with foreign counterparts and regularly consult on enforcement matters.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION
FOR
AUSTRALIA

Country Report

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

Due Process Questions

Question	Answer and Source
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 the current laws and regulations are available on the Australian Competition Tribunal website under Legislation which links to Federal Register of Legislation [The legislation is available online from multiple sources, including that listed above. Also, no direct link above to the Act or Regs themselves. Competition and Consumer Act 2010: https://www.legislation.gov.au/Details/C2020C00352 Competition and Consumer Regulations 2010 https://www.legislation.gov.au/Details/F2020C00650]

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?	"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." Competition Law in Australia Ch. 1.320 Efficiency and the role of the courts "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." Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2 protracted. "Peart. "Australian and New Zealand legislatures have consciously traded timeliness and efficiency in favor of due process rights for interested parties." Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2 parties. "Peart. 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, https://www.accc.gov.au/system/files/Compliance%20and%20Enforcement%20Policy%2 02020.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%20time frames.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.[237] 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; ● the case files.	● 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. ● 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%20F_A.pdf

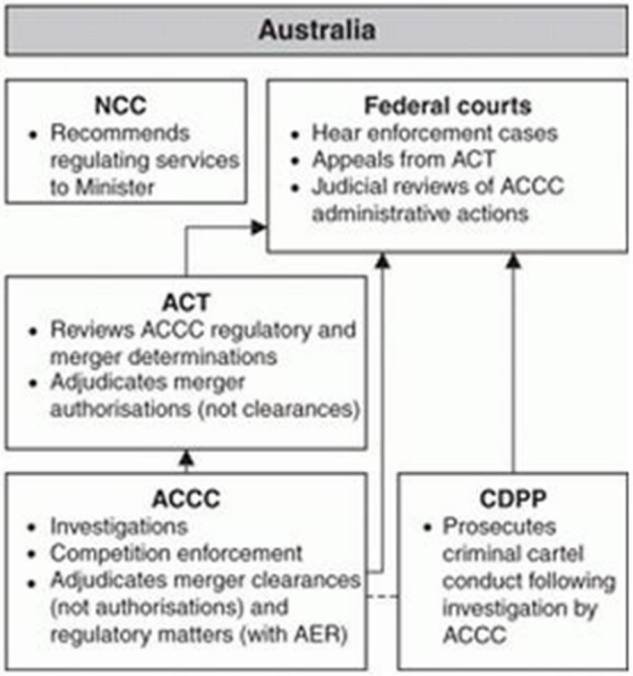
- The opportunity to be represented by counsel: "The CCA is silent on the question of whether the examinee is entitled to be legally represented." Competition Law in Australia 16.240 Legal representation
- As a matter of procedural fairness, the ACCC will permit an examinee the assistance of a legal 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
    - make submissions on any relevant matter at the completion of the examination.

  A legal adviser who prejudices the examination—for example, by continually objecting on minor issues to the extent of being obstructive—may be excluded.

  ACCC Guidelines – use of s 155 powers, p. 12, ACCC Guidelines Use of Section 155 Powers

	• 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. Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2. • Can create a "reasonable search" defense for search requests section 155 issues. • ACCC Section 155 Notices. • In Australia, the ACCC's compulsory investigative powers are extinguished at the point at which it commences court proceedings in relation to a matter. Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2. • 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, https://www.accc.gov.au/system/files/ACCC%20Investigative%20stages%20and%20timeframes.pdf
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? • Do these rules include procedures for introducing evidence, including expert evidence if applicable, and apply equally to all parties to a proceeding?	Section 155 provides the procedure for evidence necessary for investigations. ACCC Guidelines Use of Section 155 Powers. Investigations are conducted in accordance with the Australian Government Investigation Standards 2011. https://www.ag.gov.au/integrity/publications/australian-government-investigations-standards-2011 Post-ACCC investigation civil or criminal proceedings are conducted under the rules of procedure and evidence of the relevant courts hearing the matter. 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. Competition Law in Australia 16.370 Discovery against the ACCC.

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. 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 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 behavior.
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? ● 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?	"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. 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 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, https://www.accc.gov.au/system/files/1582RPT_ACCC%20Guidelines-Use%20of%20section%20155%20powers_FAJune20.pdf; s. 155, https://pinpoint.cch.com.au/360document/legauUio1069681sl156244679/section-155aaa-protection-of-certain-information/overview "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." Competition Law in Australia 16.290 Use of information by the ACCC.

	"... 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)." Competition Law in Australia 16.210 Confidential compliance.
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?	"A recipient of a notice cannot challenge the validity of a s 155 notice under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), unless there is some evidence that the belief is not, in fact, held.85 However, the notice may be set aside under s 16 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) if there is a deficiency in the notice. In *Korean Air Lines Co Ltd v ACCC (No 3)*,86 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." Competition Law in Australia 15.270 Judicial review by the Federal Court 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, https://www.accc.gov.au/system/files/1582%20Section%20155%20notices%20FA.pdf

Transparency	
Does the current law ensure transparency of national competition laws, policies and enforcement activities?	Yes. "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." Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2. Principles and approaches underlying this policy 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: 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. Transparency – the ACCC does not do private deals – enforcement matters that are finalized 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, https://www.accc.gov.au/system/files/Compliance%20and%20Enforcement%20Policy%2 02020.pdf

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?	Section 157 of the CCA is supplementary to discovery against the ACCC under the *Federal Court Rules 2011* and is intended to ensure that in cases where a pecuniary penalty or authorization 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. Competition Law in Australia 16.380 General rules: s 157. Final decisions are taken by the courts, the decisions of which are reasoned and in writing.
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?	"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." Peart Australia & New Zealand The Design of Competition Law Institutions Ch. 2 Again, final decisions and orders pursuant thereto are taken by the courts, and are published in accordance with the rules of the relevant court.

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 AND EVALUATION FOR BRAZIL

INTRODUCTION:

Competition law matters in Brazil are primarily governed by the 2011 Competition Law (Law 12,529/2011) ("Competition Law") and the primary competition law regulatory authority is the Administrative Council for Economic Defense ("CADE"). CADE has issued additional guidelines and resolutions to clarify and expand upon the legal obligations contained within the Competition Law, including the Statutes of CADE 2021 ("Statutes of CADE").

Within CADE, there are three bodies pertaining to the enforcement of competition law: 1) the Superintendent General Office ("SG"); 2) the Administrative Tribunal for Economic Defense ("Tribunal"); and 3) the Department of Economic Studies.

The SG is the primary investigative body of CADE and may approve cases that do not present competition concerns. For cases that do raise competition concerns, CADE will make recommendations and forward the case to the Tribunal. The Tribunal may also review initial determinations that the SG makes on cases. The Tribunal has the power to render final decisions on mergers and other anticompetitive conduct cases, including settlement and interim measures. The Tribunal will also hear third party appeals.

The Department of Economic Studies prepares economic opinions and studies at the request of the SG and Tribunal. It can issue non-binding economic opinions on pending cases in front of the SG and Tribunal.

The members of CADE are appointed by the President of Brazil and approved by the Federal Senate.

In addition to the Competition Law, the rules and regulations this report replies upon are:

- Statutes of CADE 2021 ("CADE Statutes").
- CADE's 2016 Guidelines for Horizontal Merger Review ("Merger Guidelines").
- CADE's 2016 Guidelines for Antitrust Leniency Program.
- CADE's 2016 Guidelines for Cease-and-Desist Agreement for Cartel Cases.

Investigation Process Overview:

There are three basic levels of investigations by the SG: preparatory proceedings, administrative investigations, and administrative proceedings. At the end of each of these investigations, the SG may find that no violations took place and close the matter. The SG may initiate any of the three types of proceedings from the outset; there is no requirement that the SG follow an escalating model of investigation in every case.

The first level of inquiry available to the SG is the preparatory proceeding to determine if specific conduct falls under the purview of competition law in Brazil. These proceedings are limited to 30 days (Competition Law, Art. 66, §3) and may be kept confidential (Competition Law, Art. 66, §10). However, a party under investigation that finds out about the preparatory proceedings may request access to SG records. If the SG finds sufficient cause to believe that the investigated conduct violated Competition Law, the SG may initiate an administrative proceeding.

The second level of inquiry available to the SG is the administrative investigation. These are inquisitorial investigations that allow the SG to gather more information on a potential violation. Administrative investigations must be completed within 180 days and can be extended for 60-day periods (Competition Law, Art. 66, §9). Such proceedings are generally confidential (Statutes of CADE, Art. 51). The SG may request information from parties during administrative inquiries and parties may request access to case files, though the decision rests with the SG.

The third level of inquiry is the administrative proceeding, which is an in-depth investigative and adversarial proceeding (Competition Law, Art. 69). As an adversarial proceeding, defending parties have the right to be informed of the matter, access to case files, and submit arguments to CADE.

Respondent has 30 days from notification to submit a defense and evidence, along with qualifications of up to 3 witnesses (Competition Law, Art. 70). The period for response may be extended by 10 days (Competition Law, Art. 70, §5). This is the primary opportunity for the respondent to address the SG's legal, economic, and procedural concerns.

At the end of the administrative proceeding, the SG will render a recommendation on the matter under investigation. Once the SG makes its recommendation, the case is forwarded to the Tribunal, where it will have discretion to adopt, reject in full, or reject in part the SG's recommendations (Competition Law, Arts. 61, 74.). The respondent may make further submissions to the Tribunal and may request to present oral closing arguments.

If the SG approves of a merger, third parties and relevant regulatory agencies have 15 days to bring an appeal before the Tribunal (Competition Law, Art. 65).

Third parties may also bring private enforcement actions if they suffer losses due to anticompetitive behavior (Competition Law, Art. 47).

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?**

CADE's website allows users access to the laws and guidelines that govern investigations. The website also includes a searchable database for matters, decisions, and other CADE publications.

Some key resources, such as most CADE resolutions, are only available in Portuguese from CADE. Official translations of select CADE guidelines are available in English.

CADE's website is available at: https://www.gov.br/cade/pt-br.

CADE's case law database is available at: https://jurisprudencia.cade.gov.br. The database includes case law, expert opinions, guides and publications, legislation, press releases, and decisions of the Brazilian Federal Court of Accounts.

Note that precedent as a legal concept has only been recently introduced in Brazil (in 2015). CADE may designate certain judgments as precedential if there have been: (1) at least 10 cases decided by a majority of the Tribunal agreeing with the same position and (2) at least 10 final and non-overturned decisions issued by the SG agree with the same position (Statutes of CADE, Art. 64(2)). CADE makes a compilation of current precedents available 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?**

 for mergers.

 for anticompetitive agreements/abuse of dominance cases.

For Merger Cases:

Once the SG decides that notification is complete, it has a statutory limit of 240 days to decide on the transaction (Competition Law, Art. 88, §2). This limit may be extended up to 60 days if requested by parties involved in the transaction, or up to 90 days by the Tribunal (Competition Law, Art. 88, §9(I-II)). If CADE does not complete its review within the statutory limit, the merger is considered automatically approved.

For fast-track mergers, CADE usually decides within 30 days of submission. CADE can request that the parties amend the notification filings, thereby resetting the clock.

Third parties have 15 days from the publication of the merger notice to request admission as an interested party. This time limit may be extended by 15 days (Statutes of CADE, Art. 118).

For Restraint of Trade/Abuse of Dominance Cases:

The SG must complete preparatory proceedings within 30 days (Competition Law, Art. 66 §3) and administrative investigations within 180 days, which can be extended by a 60-day period (Competition Law, Art. 66, §9). After the administrative investigation is concluded, the SG has 10 business days to decide whether to initiate an administrative proceeding against the parties (Competition Law, Art. 67).

Parties subject to an administrative proceeding can present defenses, designate evidence, and submit qualifications of 3 witnesses within 30 days of being notified of the investigation

(Competition Law, Art. 70). The time for response can be extended by 10 days (Competition Law, Art. 70, §5). The SG then has 30 business days to produce evidence and exercise its fact-finding powers (Competition Law, Art. 72).

After the conclusion of the fact-finding phase, the SG has 5 business days to notify the parties to present any new allegations, to be submitted within 5 business days (Competition Law, Art. 73). Thereafter, the SG has 15 business days to submit records to the Tribunal, who will decide to dismiss or reaffirm the violation (Competition Law, Art. 74). Upon receiving such records, the Tribunal may require CADE's Attorney General to determine its position within 20 days (Competition Law, Art. 75). The Tribunal may also determine any measures it will require the SG to implement in the meantime. At this point the parties have 15 additional business days to present final arguments (Competition Law, Art. 76). Once the Tribunal receives final arguments, it must submit the matter to trial within 15 business days (Competition Law, Art. 77).

Despite the above set of mandated deadlines, there is no specified deadline for the Tribunal to make its final decision.

In all cases, the statute of limitations for implementing punitive measures for anticompetitive behavior is 5 years from the date of the illegal act (Competition Law, Art. 46). The statute of limitation is tolled if CADE or any other administrative or judicial act is undertaken with the purpose of determining if a violation occurred (Competition Law, Art. 46, §1). It is also suspended if the parties enter a cease-and-desist agreement with CADE (Competition Law, Art. 46, §2).

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;**

 (with the caveat that in restraint of trade and dominance investigations, parties are not informed of the full allegations and facts until the investigation is well underway).

For Merger Cases:

Merging parties are required to file notifications if their transaction satisfies published threshold requirements. Notifications are then published in the CADE official gazette and nonconfidential versions can be downloaded from the CADE website. CADE may inform the parties that their notification filing requires amendment (Statutes of CADE, Art. 111).

CADE may also, on its own initiative, launch an administrative procedure to assess a merger (Statutes of CADE, Art. 113(1)).

If the SG wants to block the merger, it must submit the reasoning, including identification of the relevant markets, aspects of the merger that are anticompetitive, and the elements necessary to carry out a conclusive review of the effects of the merger (Statutes of CADE, Art. 123).

For Restraint of Trade/Abuse of Dominance Cases:

The SG holds preparatory proceedings *in camera* (Statutes of CADE, Art. 139(1)). Administrative inquiries may be *in camera* (Statutes of CADE, Art. 141(1)). In either case, at this juncture of the investigation, the investigated parties may not be fully informed of the exact allegations.

When the SG initiates an administrative proceeding to impose sanctions, the respondent will be informed of the full allegations, summary of facts, and legal rationale for the investigation (Statutes of CADE, Art. 147).

b. the opportunity to be represented by counsel;

Parties are guaranteed the right to counsel by the Brazilian Constitution and the Brazilian Code of Civil Procedure. Attorney-client privilege extends to in-house counsel, so long as the communication relates to legal matters.

Counsels for parties are entitled to attend Tribunal judgment sessions and present oral arguments (Statutes of CADE, Art. 81(1), (2), (5.III), (8)).

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;

For Mergers Cases:

Within 30 days of the SG objecting to a merger transaction after its investigation, the parties may submit written petitions to the Tribunal, presenting arguments, evidence, studies, and opinions of experts (Competition Law, Art. 58; Statutes of CADE, Art. 124).

If the SG approves the merger but a third party appeals to the Tribunal, the parties may submit written views about the appeal within 5 business days of the appeal being acknowledged by the Tribunal (Competition Law, Art. 65, §2).

For Restraint of Trade/Abuse of Dominance Cases:

When the SG initiates an administrative proceeding, the respondent has 30 days to present its defense, specify evidence, and identify 3 witnesses (Competition Law, Art. 70; Statutes of

CADE, Art. 151). The respondent can request a 10-day extension to present its defense (Statutes of CADE, Art. 152).

For Tribunal Proceedings:

During trials before the Tribunal, the proceedings are made public, unless there are reasons to protect confidentiality (Competition Law, Art. 51.II). During such a trial, the CADE departments (the SG, Tribunal, and Department of Economic Studies), the Chief Prosecutor, and the parties may request oral testimony (Competition Law, Art. 51.III).

d. the case files.

Notwithstanding confidentiality concerns, parties under investigation have full access to documents that CADE uses to make their decision during the evidentiary stage of administrative proceedings (Statutes of CADE, Art. 51(1)).

In most situations, third parties have access to non-confidential case files.

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?

 (note that CADE has broad powers to obtain evidence).

CADE may: (1) request documents, objections, and information from individuals, legal persons, and government or private agencies; (2) request oral explanations from any individuals, legal persons, government or private agencies, and authorities (Statutes of CADE, Art. 71). Furthermore, CADE has the power to carry out inspections on premises related to the investigated firms, examining any objects, documents, ledgers, computer and electronic data, etc. Prior to the inspection, CADE must inform the target firms and the inspection itself must be conducted between 6 am and 8 pm (Statutes of CADE, Art. 72).

During administrative proceedings, the SG may define the determine the relevance and pertinence of evidence, reject unnecessary evidence, and require clarifications from witnesses and parties (Statutes of CADE, Art. 155).

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

CADE may request information from parties under investigation. The request must contain basic information on the object, the response deadline, and potential sanctions for non-compliance. If it is a request to be present at a hearing, the notice must lay out the place and date of the hearing (Statutes of CADE, Art. 71).

The SG may also carry out inspection in the field. The SG will issue a notice to the targeted party, indicating the time, place, and purpose of the inspection (Statutes of CADE, Art. 72).

The Department of Economic Studies of CADE is responsible for the preparation of economic studies and opinions, ex officio or at the request of the SG (Competition Law, Art. 17; Statutes of CADE, Art. 11). Moreover, during administration proceedings, CADE can rely on outside experts (Statutes of CADE, Art. 155(5)(III)).

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?**

Parties can appeal decisions made by the SG to the Tribunal within 5 days of the decision being issued (Statutes of CADE, Art. 213). Within 5 days of the Tribunal publishing any decision, parties may file a Request for Clarification for decisions (Statutes of CADE, Art. 219).

Parties may also request the Tribunal to reconsider its decision by introducing new facts or documents (Statutes of CADE, Art. 223). Such requests must be made within 15 days of publication of the decision (Statutes of CADE, Art. 224).

Preventive measures adopted by CADE may also be appealed to the Tribunal within 5 days (Competition Law, Art. 84, §2).

Decisions by the SG on mergers are appealable by third parties and competent regulatory agencies. SG decisions must be appealed to the Competition Tribunal within 15 days of publication (Statutes of CADE, Art. 122(I)).

Decisions by CADE are subject to judicial review through the federal courts.

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?**

For Leniency Agreements:

The SG may enter into leniency agreements with parties that cooperate with investigations and administrative proceedings (Competition Law, Art. 86). Parties that wish to reach a leniency agreement with CADE must be the first qualified in respect to the alleged violation, cease participation in the alleged violation, admit their involvement in the alleged violation, cooperate fully with the investigation, and identify other parties involved in the alleged violation (Statute of CADE, Art. 198). Furthermore, CADE must not already have sufficient evidence to convict the applicant party (Statute of CADE, Art. 198(III).

Parties may request a marker to determine that they are the first party to start cooperating with CADE. However, they must still reach a settlement with CADE first to get the full benefits of leniency (Statute of CADE, Art. 199). Subsequent applicants are put in the waiting queue for leniency (Statute of CADE, Art. 200).

Parties may withdraw their leniency application at any time before signing the agreement with CADE (Statutes of CADE, Art. 206(1)).

If a leniency agreement is reached, the administrative penalty will be cancelled if the application was presented before SG had any knowledge of the alleged violation (Statutes of CADE, Art. 209(I)). If the SG already had some knowledge of the alleged violation, then the penalty will be reduced from 33% to 66% (Statutes of CADE, Art. 209(II)). The amount of penalty reduction can increase if the party also negotiates a cease-and-desist agreement with CADE.

For Cease-and-Desist Agreements:

Parties may be able to negotiate a cease-and-desist agreement with CADE and receive fine reductions (Competition Law, Art. 85). If the case is under investigation by the SG in a preparatory proceeding, administrative inquiry, or administrative proceeding, then the SG may determine the negotiation period (Statutes of CADE, Art. 181(1)). However, if the case already been submitted to the Tribunal, then the negotiation period is 30 days, extendable for another 30 days (Statutes of CADE, Art. 182(1)). In both situations, the parties have 10 days after the conclusion of negotiations to submit a final cease-and-desist agreement proposal (Statutes of CADE, Arts. 181(3), 182(3).

Although final fine reductions are not mandated for cease-and-desist agreements, CADE takes into consideration the scope and usefulness of a party's contribution to the investigation (Statutes of CADE, Art. 187). Generally, the first to negotiate an agreement receives a 30% to 50% reduction in fines. The second receives a 25% to 40% reduction. Any subsequent parties receive up to a 25% reduction in fines (Statutes of CADE, Art. 187(I-III)).

The SG may propose cease-and-desist agreements to parties while the matter is still under investigation by the SG (Statutes of CADE, Art. 190).

If the parties can reach a leniency agreement with CADE, the party will not be subject to any potential criminal liability as well.

A party can gain the benefits of leniency if it provides CADE information about a second, unrelated cartel conduct. If a party does this, then it can receive further waivers on penalties in the first cartel investigation or up to one-third to two-third of applicable penalty.

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?

Documents and data are classified under four levels of confidentiality. “Public” documents may be accessed by anyone. “Restricted access” documents are limited to the party that files them, the respondents, and CADE. “Confidential” documents are limited to only authorized CADE personnel and the authority responsible for issuing decisions. “Under seal” documents can only be accessed when permission is granted by judicial order (Statutes of CADE, Art. 49).

CADE ensures confidentiality of records, documents, objections, information, and procedures except when required to publish information publicly (Statutes of CADE, Art. 51). The parties themselves are granted full access to all documents considered by CADE to make its decision before the end of the evidentiary phase of the administrative proceedings (Statutes of CADE, Art. 51(1)).

“Restricted Access” documents are those that disclosure may constitute a competitive advantage for competitors (Statutes of CADE, Art. 52). These may include documents related to bookkeeping, economic and financial situations, tax, corporate secrets, industrial processes, billing, transaction data, documents that formalize the transaction under investigation, yearly reports, sales and financial statements, client and supplier lists, capacity reports, costs and expense reports, and research and development documents (Statutes of CADE, Art. 52(I-XIV)).

However, CADE will not grant the “Restricted Access” status to documents that are public in nature, in the public domain in Brazil or elsewhere, or have been disclosed by the interested party (Statutes of CADE, Art. 53(I)). During administrative proceedings, CADE will not restrict access to documents if such restriction would deny the full right of a party to answer or defend (Statutes of CADE, Art. 53(II)). CADE will also refuse to restrict access to the following documents: basic information on the organization of parties, products or services offered, market data relate to third parties, contracts executed before a notary public or commercial registry, or that which the entity is obligated to disclose by another legal or regulatory provision (Statutes of CADE, Art. 53(III)).

Parties may request information to be kept confidential (Competition Law, Art. 49).

Leniency and settlement proposals, whether written or oral, are automatically kept confidential (Statutes of CADE, Art. 201). The identity of the leniency applicant is to be kept confidential until CADE decides on the proposal (Statutes of CADE, Art. 208). CADE also restricts access to commercially sensitive documents and information provided by the leniency agreement signatories (Statutes of CADE, Art. 208(1)).

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?

Respondents get full access to documents that CADE uses to make its decision. This access will be granted before the end of the evidentiary phase of the administrative proceeding (Statutes of CADE, Art. 51).

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?**

Upon payment of a fee, parties may submit queries to the Tribunal regarding the legality of conduct (Competition Law Art. 9, §4). Parties must submit supporting documents when looking for the Tribunal's guidance. Note that guidance is not available when it comes to determining whether notification thresholds have been crossed.

Parties may seek formal consultation with the Competition Tribunal regarding a proposed transaction. If the Competition Tribunal issues formal guidance, it is considered binding for 5 years. However, the Competition Tribunal reserves the right to reconsider its opinion later.

Parties may also seek informal guidance from the Competition Tribunal.

TRANSPARENCY:

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

Brazil's competition law regime puts an emphasis on transparency.

The SG publicizes merger notifications, making public information on the names of applicants, the nature of the transaction, and the economic sector involved (Competition Law, Art. 53, §2). The results of investigations in restraint of trade/abuse of dominance investigations are also published.

Tribunal judgment sessions are public, except for proceedings that are granted confidential designation (Statutes of CADE, Art. 78). Judgments of the Tribunal, including votes, are made public on CADE's website.

Currently, Brazil does not have a national security exception, a public interest exception, or foreign investment review mechanisms. The Competition Law applies to all sectors and some sectors, such as banking, oil and gas, telecommunications, aviation, electricity, hydro transportation, health, and insurance are subject to additional regulatory agencies' oversight.

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?

After the merger notification and after the initial investigation by the SG, the SG may object to the merger. The SG must set forth the context, reasoning, and the potential for the merger to cause harm (Competition Law, Art. 57). Alternatively, the SG may approve the merger and publish it.

All Tribunal decisions on administrative proceedings are published in the Federal Official Gazette within 5 business days of decision (Competition Law, Art. 79).

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?**

All final decisions of CADE are published in the Federal Official Gazette of Brazil and CADE's official website. There is a search functionality on CADE's website that allows users to find specific matters. Currently, the search function is only available officially in Portuguese.

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**

CADE has signed bilateral cooperation agreements with Argentina, BRICS, Canada, Chile, China, Colombia, Costa Rica, Ecuador, the EU, France, Japan, Mexico, Paraguay, Peru, Portugal, Russia, South Africa, South Korea, and the US. It also participates in discussions with multilateral organizations, such as the International Competition Network, the Organisation for Economic Cooperation and Development, the United Nations Conference on Trade and Development, Mercosur, the World Bank, the Inter-American Development Bank, and the Latin American Consumer Protection and Competition Program.

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

CADE has been engaging in high levels of cooperation with foreign jurisdictions. There are active information exchange channels via email, telephone, and video calls. Beyond sharing information, CADE has worked with other agencies to coordinate investigation and enforcement actions, such as multi-jurisdictional dawn raids.

When international cooperation necessitates the exchange of confidential information, CADE makes use of confidentiality waivers. Case handlers are the only people who have access to the confidential information, and the information is transmitted through more secure channels such as encrypted emails. This confidentiality waiver procedure is often used in cartel and merger investigations.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION
FOR
CANADA

INTRODUCTION:

The primary competition law of Canada is the Competition Act of 1985 ("the Act"). While the Act has been amended many times since its inception, the government recently pursued a steadfast campaign to modernize the Act. As a result, the competition law landscape in Canada has changed significantly, with a steady stream of amendments being passed in June of 2022, June of 2023, December of 2023, and, most recently, June of 2024.

Administration and enforcement of the Act in Canada falls under the purview of the Competition Bureau ("the Bureau"). The Bureau was established by the Act and is headed by the appointed Commissioner of Competition (the "Commissioner"). The Commissioner has the power to direct investigations, bring competition matters before the Competition Tribunal ("the Tribunal"), and refer cases for criminal prosecution to provincial courts.

The Tribunal is the specialized court with jurisdiction to hear matters under Art. VII.1 and VIII of the Act. It was established by the Competition Tribunal Act of 1985 and currently operates under the Competition Tribunal Rules (SOR/2008-141). It is an adversarial court subject to a full set of procedural and evidentiary rules. However, the Tribunal does not have power to hear criminal matters.

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?**

The full text of the Act and all amendments are available in English and French on the Canada's Department of Justice's website: https://laws-lois.justice.gc.ca/eng/acts/c-34/page-1.html.

The Bureau's website is available at: https://competition-bureau.canada.ca/. It also maintains a database of its guidelines and publications, including those for pre-merger notification, merger review process merger enforcement, abuse of dominance enforcement, competitor collaboration, immunity and leniency, available at: https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/publications.

The Tribunal's website is available at: https://ct-tc.gc.ca/en/home.html. In addition, the Tribunal maintains a database of its decisions, dating back to 1986, available at: https://decisions.ct-tc.gc.ca/ct-tc/cd/en/nav_date.do. Procedural rules and practice directions are available at: https://ct-tc.gc.ca/en/procedure/notices-practice-directions.html.

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?**

 for mergers cases.

 for restraint of trade/abuse of dominance cases.

For Merger Cases:

The Bureau's Merger Review Process Guidelines ("Merger Guidelines") state that pre-merger consultations are generally encouraged, but not required (Merger Guidelines, §2.5). In practice, the Bureau does not provide substantive advice until filings are made by merger parties.

There is an initial 30-day waiting period for notifiable transactions. During this waiting period, the Bureau can issue a supplemental information request ("SIR"). The Bureau will often first send a draft SIR to the parties and engage in pre-issuance dialogue (Merger Guidelines, §3.2). If the SIR is issued, parties are expected to respond in full.

Parties cannot complete the proposed merger during the initial waiting period (Merger Guidelines, §2.1). The Bureau may send voluntary information requests to the parties during this time. If the Bureau completes its review before the end of the waiting period, the Commissioner has the power to waive the rest of the waiting period (Merger Guidelines, §2.1) and issue an advance ruling certificate allowing the merger to proceed (Act, §102(1)). If the review is not complete by the end of the initial waiting period and the Bureau does not issue an SIR, the parties are legally allowed to proceed with the merger. However, the Bureau retains the power to challenge the merger later (Merger Guidelines, §2.3).

A second 30-day waiting period starts when the Bureau receives completed responses to the SIR from all parties. This means that the parties have control over when the second waiting period starts. Note that the Bureau can request a "refreshed" set of responses from the parties if it takes longer than 90 days for the Bureau to certify the completeness of the responses. For some time-sensitive documents, the Bureau may request a refresh after just 30 days (Merger Guidelines, §3.3.3). Finally, the Bureau can extend review beyond the second 30-day waiting period through a timing agreement or by applying for an order by the Tribunal.

The merger itself cannot be completed until the second waiting period expires or the Commissioner issues an advance ruling certificate.

As articulated in the Competition Bureau Fees and Service Standards Policy for Mergers and Merger-Related Matters ("Service Standards Policy"), there is a set of non-binding service time standards for reviewing mergers. For non-complex matters, it is 14 days. For complex matters, it is 45 days, unless an SIR is issued, in which case it is 30 days (Service Standards Policy §4). The Bureau can pause this service time standard if parties do not respond adequately to information

requests. Parties may also request binding written opinions from the Bureau regarding the applicability of article IX of the Act to their transaction (Act, §124.1(1)). If the Bureau chooses to issue a written opinion, it will do so within 14 days, for non-complex matters, or 28 days, for complex matters (Service Standard Policy, §4).

Note that the Tribunal may issue interim orders barring acts that would complete or implement a merger when the Bureau has not completed its review. The Commissioner may apply to the Tribunal for such an interim order and must give 48-hour notice of the submission for such an interim order (Act, §100(1), (2)). The 48-hour notice requirement can be waived if notice would not be in the public's interest (Act, §100(3)). An interim order issued to prevent an action that would impair the Tribunal's ability to remedy the effect of the proposed merger may not last longer than 30 days (Act, §100(5)). The Tribunal can extend the interim order to up to 60 days after the order takes effect (Act, §100(7)).

Finally, mergers that have already been substantially completed for a year are no longer subject to review by the Bureau (Act, §97).

For Restraint of Trade/Abuse of Dominance Cases:

There are no formal timelines for Bureau investigations on non-merger matters.

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;

The Bureau does not have a statutory obligation to convey information to parties under investigation. Instead, the Bureau has vast discretion on the frequency and content of communications.

This discretion is spelled out in the Information Bulletin on Transparency ("Transparency Bulletin"). For example, the Bureau will "often let those who are subject to an investigation know about the nature of our concerns." (Transparency Bulletin, §2.1). Yet the parties should not think there is any obligation on the part of the Bureau, which states that "[w]e may share our approach, reasoning, or the results of our work on a case-by-case basis. *However, those who are subject to investigation should not expect a detailed explanation of the case or our internal work products*" (italics added) (Transparency Bulletin, §2.1).

Parties may submit a written request for information regarding the progress of an inquiry (Act, §10(2)), though the amount of information disclosed is at the discretion of the Bureau.

If the investigation is referred to the Tribunal, then the parties can acquire information through the discovery process.

b. the opportunity to be represented by counsel;

Any person ordered by the Bureau to testify, produce documents, or make written responses may be represented by counsel (Act, §12(3)). Any person subject to proceedings at the Tribunal may be represented by counsel.

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;

Once a matter is referred to the Tribunal, the Tribunal Rules govern all parties, which set forth procedures dealing with admissions of information (§56-59), discovery (§60-64), access to documents (§65-67), pre-hearing disclosures (§68-70) evidence at hearings (§71-74), witness panels (§75-76), and expert evidence (§77-80). These rules allow parties to discover information, rebut information, cross-examine and examine witnesses, and prepare a defense.

d. the case files.

Information and records provided to or seized by the Bureau during an investigation may be accessed by the party that provided it (Act, §18(2)). No other party has the right to access such information.

In proceedings before the Tribunal, parties must serve an affidavit of documents to other parties (Tribunal Rules, §60(1)). Such an affidavit will identify documents that are relevant to the matters at issue that are or were in the possession, power, or control of the party (Tribunal Rules, §60(2)). Except for those documents subject confidentiality orders, parties are allowed to examine the documents and have access to them to make copies (Tribunal Rules, §65).

The applicant to the Tribunal must also serve a list of all documents it plans to rely on at the hearing, along with any witness statements setting out witnesses' evidence in full (Tribunal Rules, §68(1). Expert witness documents are treated slightly differently, as described in 4(a) 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?

Examinations:

The Bureau can, upon ex parte application to a superior or county court, order a person to attend an oral examination, produce records, or make a written statement to provide information about an investigation (Act, §11(1)). Such a person may be located outside of Canada (Act, §11(2), (5)).

Physical Searches:

The Bureau can conduct searches of a party's premises after obtaining a warrant for entry from a superior or county court (Act, §15(1)). The warrant must identify the matter for which it is issued, the premises to be searched, and the records to be searched for (Act, §15(2)).

Searches may be executed between 6 am and 9 pm, though a court may authorize it for a different time (Act, §15(3)). As set forth in a bulletin titled Section 15 & 16 Info Bulletin ("Info Bulletin), the search will be conducted by Bureau staff (Info Bulletin, §2). Any person who has possession or control of any premise or record must permit the Bureau staff conducting the search to examine, copy, or seize it (Act, §15(5)).

In exigent circumstances, the Bureau may conduct a search of a premise without a warrant (Act, §15(8)).

The party being searched may request a delay until a senior corporate official or attorney can arrive at the premises, but the Bureau staff has final discretion over whether to grant the request (Info Bulletin, §6).

Searches of computer systems may be conducted by Bureau staff. The judge issuing the warrant may restrict a party's operation of computer systems during the search (Act, §16(3)).

Electronically Stored Information ("ESI"):

The Bureau maintains a set of enforcement guidelines titled the Production of Electronically Stored Information ("ESI Guidelines"). These guidelines set forth technical requirements of electronic information production, including guidance on format, scope, and metadata. Parties are subject to the ESI Guidelines when responding to SIR requests, when applying for leniency or immunity, or when submitting information voluntarily (ESI Guidelines, §2).

Attorney-client privilege:

If a party is ordered to produce materials that it considers covered by attorney-client privilege, the party must place the materials in a sealed package and label it as such before submitting to the Bureau (Act, §19(1)). During a premise search, if any materials that are examined, copied, or seized are subject to a claim of attorney-client privilege, the Bureau staff shall put the material in a package, seal it, and label it as such before transferring it to a custodian (Act, §19(2)). A judge of a superior or county court of the province where the said record is located, or a judge of the Federal Court, may be called upon to decide the validity of the attorney-client privilege claim (Act, §19(4)).

Tribunal:

The Tribunal operates under the Tribunal Rules and are subject to rules of procedure and evidence. The Tribunal also maintains a set of practice directions and notices to provide guidance on specific procedural topics, including confidentiality, electronic hearings, case management, and mediation.

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

The Tribunal's rules of procedure include rules for evidence, including expert evidence.

At the case management conference, the parties must file an affidavit listing the documents relevant to the matter, claims of confidentiality, and claims of privilege (Tribunal Rules, §60). Parties may need to submit supplementary affidavits if they later come into possession or obtain relevant documents or realize inaccuracies or deficiencies in the original affidavit (Tribunal Rules, §63).

A party may request the other parties admit the truth of a fact or the authenticity of a document (Tribunal Rules, §56).

The applicant must serve upon all parties, at least 60 days prior to the hearing, a list of documents that it intends to rely on during the hearing and witness statements setting out lay witnesses' evidence in full (Tribunal Rules, §68(1)). Each respondent must serve a response, at least 30 days before the hearing, which includes a list of documents it intends to rely on and witness statements setting out lay witness evidence in full (Tribunal Rules, §69(1)). The applicant may then serve, at least 15 days before the hearing, additional reply document and witness statements (Tribunal Rules, §70). Witnesses must be present for cross examination (Tribunal Rules, §74(4)), and counsel may cross-examine or re-examine witnesses (Tribunal Rules, §76(2)).

Evidence not disclosed cannot be used at the hearing without Tribunal order (Tribunal Rules, §71).

Expert Evidence:

Expert evidence must be disclosed to other parties at least 60 days before the hearing (Tribunal Rules, §77(1)). Respondents may then serve a responding expert report at least 30 days before the hearing (Tribunal Rules, §77(2)). The applicant then may serve another expert reply report, at least 15 days before the hearing (Tribunal Rules, §77(3)). Expert reports must have the full statement, expert qualifications, and a list of sources (Tribunal Rules, §77(4)). Expert witnesses may be examined and cross-examined at the hearing (Tribunal Rules, §79).

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?**

A decision made by the Tribunal, or the Tribunal's refusal to issue an order, may be appealed to the Federal Court of Appeals ("FCA") (Act, §74.18(1)). A decision made by a superior court of any province, or that court's refusal to issue an order, can be appealed to the court of appeal of that province (Act, §74.18(2)).

But note that parties must obtain leave of the FCA or the appropriate provincial court of appeal before bringing any appeal on a question of fact (Act, §74.19).

If the parties are not satisfied with the result of the initial appeal, the decision may be appealed further to the Supreme Court of Canada.

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?**

Consent Agreements:

The Bureau and the parties involved may enter into consent agreements regarding matters involving deceptive marketing practices (Act, §74.12), restrictive trade practices, specialization agreements, and mergers (Act, §105). Consent agreements are also authorized in the Tribunal Rules (Tribunal Rules, §106).

The agreed-upon consent agreements are published on the Tribunal's website under case documents. Consent agreements entered into for a case brought by a third party are to be published in the Canada Gazette (Act, §106.1(3)).

Immunity and Leniency:

The Bureau maintains an immunity and leniency program, following the guidelines set forth in Immunity and Leniency Programs Under the Competition Act ("Immunity and Leniency Guidelines"). Immunity may be granted when the applicant is the first to disclose all elements of the offense (if the Bureau is unaware of the offense), or if the applicant is the first to come forward before the Bureau refers the matter to the Director of Public Prosecutions (Immunity and Leniency Guidelines, §24). To show that it is the first in line for immunity, the applicant may contact the Bureau directly to request an immunity marker (Immunity and Leniency Guidelines, §45). After the marker is granted, the applicant has 30 days to give the Bureau a detailed statement describing the illegal conduct (Immunity and Leniency Guidelines, §57). Extensions of the deadline are possible.

There are several conditions for the granting of immunity. The applicant must stop any involvement in the illegal activity (Immunity and Leniency Guidelines, §25), and it must not have coerced others into joining in said activity (Immunity and Leniency Guidelines, §26). Furthermore, the applicant must cooperate fully with the Bureau's investigation of the underlying matter, including in matters of confidentiality, internal records, complete disclosure of information, witness cooperation, and financial cooperation with the Bureau to pay their own expenses (Immunity and Leniency Guidelines, §35). Directors, officers, employees, and agents of the applicant may qualify for immunity if they acknowledge their participation in the offense (Immunity and Leniency Guidelines, §36).

The final grant of immunity does not require judicial approval.

The leniency program is meant for parties that violate the Act's cartel prohibitions. The party must terminate its participation in the cartel, agree to cooperate fully, show that it is a party to the offense, and agree to plead guilty (Immunity and Leniency Guidelines, §117). Parties granted leniency may receive a credit of up to 50% to be applied to the fine recommended by the Bureau. Directors, officers, and employees of the first-in leniency applicant will not be charged separately. For subsequent leniency applicants, the Bureau has discretion to charge current directors, officers, and employees (Immunity and Leniency Guidelines, §149).

The final leniency plea is to be made in open court (Immunity and Leniency Guidelines, §202).

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?

There are two overarching legal provisions dealing with confidentiality. The first is that inquiries conducted by the Bureau are to be private (Act, §10(3)). The second is that information obtained by the Bureau during an investigation and information provided voluntarily to the Bureau are to be considered confidential (Act, §29(1)). The primary exceptions are information that has been made public or information that is authorized for release by the person who provided it (Act, §29(2)). Information may be released to other government agencies for enforcement of other legal obligations (Act, §29.1(1) and §29.2(1)).

Besides the confidentiality provisions in the Act, the Bureau also maintains a set of guidelines titled Information Bulletin on the Communication of Confidential Information Under the Competition Act ("Confidentiality Bulletin").

When publishing documents to inform the public about specific cases, the Bureau abides by the principle of minimal disclosure (Confidentiality Bulletin, §4.2.1.4). If the Bureau needs to communicate confidential information with foreign counterparts, it will seek assurances that the foreign counterpart will maintain confidentiality once in possession of the information (Confidentiality Bulletin, §4.2.2.3). The Bureau also treats information obtained from parties seeking immunity or leniency as confidential (Confidentiality Bulletin, §7.1.3).

Tribunal:

The Tribunal operates on the open court principle and endeavors to conduct proceedings in public. However, some hearing may be conducted in camera (Tribunal Rules, §30). The Tribunal may also order documents to be treated as confidential upon motion by a party (Tribunal Rules, §66(1)). Unless confidentiality is granted by the court, the public is entitled to access to the contents of all documents filed at the Tribunal (Tribunal Rules, §22). Even if a document is deemed confidential, the party must provide a public version of the document that redacts the confidential information (Tribunal Rules, §23-24).

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?

Once the Bureau refers an investigation to the Tribunal, the Tribunal Rules on discovery begins to apply to all parties. This means that all parties now have the opportunity to procure information that may be used against them in the Tribunal decision. Furthermore, all parties must submit affidavits that set forth a list of all documents relevant to any matter at issue that are in the control or possession of the party (Tribunal Rules, §60). Once the affidavit is served to the other parties, each served party may examine and copy the document and information, subject to confidentiality orders (Tribunal Rules, §65).

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?

As noted in Due Process Section 3 above and Transparency Section 1 below, the Bureau does not generally release information to parties during its investigation. Informal discussions can occur, and the Bureau is open to discussions regarding resolutions. However, the Bureau is keen to point out that there should be no expectation of detailed explanation of the case or internal work products (Transparency Bulletin, §2.1).

TRANSPARENCY:

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

As set forth in the Transparency Bulletin, the Bureau has tremendous discretion when carrying out its policy of notifying parties, when appropriate, that they are under investigation for mergers or civil investigations. For notifiable mergers, the Bureau attempts to follow their service standards. For non-notifiable mergers and civil investigations, the Bureau attempts to communicate with the parties, but is under no obligation to do so. Parties may request, in writing, updates on the investigation.

The Bureau can, at its discretion, let the parties know the nature of their concerns, but these communications are not binding. Indeed, the Bureau very clearly sets forth that "[t]hose who are subject to investigation should not expect a detailed explanation of the case or our internal work products" (Transparency Bulletin, §2.1). Furthermore, the Bureau "may take steps to administer and enforce our laws without notifying those who are under review in advance. This happens when the Commissioner believes that notice is not in the public interest" (Transparency Bulletin, §2.1). If the process proceeds to court, the parties may then find information through discovery and disclosure.

Third parties that file complaints are usually not provided with details about the investigation. The Bureau will only inform these complainants that the investigation has been concluded (Transparency Bulletin, §3.1).

Information is only disclosed to the general public on a case-by-case basis, and only when it will not harm the investigation (Transparency Bulletin, §3.3.1).

There is an additional level of concern for transparency when it comes to foreign investments into Canada. Investments by non-Canadians into Canadian businesses can trigger national security review under the Investment Canada Act. Furthermore, designated "cultural businesses" have lower thresholds for review. Mergers in certain industries such as financial institutions and telecommunications can be subject to public interest reviews.

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?**

The Bureau does maintain several databases of decisions for various aspects of competition law. However, except for position statements on complex mergers, the Bureau often only provides brief summaries of their decisions.

Mergers:

Pre-merger notification forms and ARC requests are not published. The Bureau maintains a database of reports on concluded merger reviews. This database is updated weekly and includes the identity of the parties, the industry field, and the review outcome. Available at: https://competition-bureau.canada.ca/mergers-and-acquisitions/report-concluded-merger-reviews.

The Bureau also maintains a database of position statements regarding concluded merger reviews. However, these position statements are only issued for certain complex mergers. Available at: https://competition-bureau.canada.ca/mergers-and-acquisitions/position-statements-regarding-concluded-merger-reviews.

Restrictive trade practices:

The Bureau maintains a database of restrictive trade practice investigations since 2015 and their outcomes. The database includes the identity of the parties, the industry field, the review outcome, and the content of any consent agreement the parties may have entered. Available at: https://competition-bureau.canada.ca/restrictive-trade-practices/cases-and-outcomes/restrictive-trade-practices-cases-and-outcomes.

Cartels:

The Bureau maintains a database of cartel cases since 2014 and their outcomes. These include the identity of the parties, the industry field, the review outcome, and content of any consent agreements the parties may have entered. Available at: https://competition-bureau.canada.ca/bid-rigging-price-fixing-and-other-agreements-between-competitors/cases-and-outcomes/cases-bid-rigging-price-fixing-and-other-illegal-agreements-between-competitors.

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?**

While the above Transparency Section 2 notes the Bureau's problematic compliance with public transparency for its decisions, matters that are referred to the Tribunal are subject to greater transparency to the public. The Tribunal follows the open court principle and provides public access to its decisions, orders, motions, pleadings, and directions. The Tribunal also posts summaries of its decisions. Documents deemed confidential are not available in their original form and are only publicly available in redacted form. Documents deemed to be covered by attorney-client privilege are not available publicly at all (see Tribunal's Policy on Openness and Privacy).

All consent agreements are made public on the Tribunal's website.

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**

The Bureau is a member of the 135-member International Competition Network and regularly participates in Competition Committee meetings of the Organisation for Economic Co-operation and Development.

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

The Act provides substantial statutory direction on the Bureau cooperating with foreign counterparts, dealing with requests from abroad, use of evidence abroad, lending of exhibits, evidence obtained from abroad, and confidentiality (Act, §30.03-30.3).

The Bureau has negotiated 16 cooperation agreements with its international counterparts. These include the following countries and the enumerated agreements:

- Australia:
  - Cooperation arrangement regarding the application of competition and consumer laws.
- Brazil:
  - Cooperation arrangement regarding the application of competition laws.
- Chile:
  - Memorandum of understanding regarding the application of competition laws.
- Colombia:
  - Memorandum of understanding regarding the application of competition laws.
- EU:
  - Agreement regarding the application of their competition laws.
- Hong Kong:
  - Memorandum of understanding regarding the application of competition laws and the sharing of information.
- India:
  - Memorandum of understanding on cooperation in the application of competition laws.
- Japan:
  - Cooperation arrangement 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.
- Mexico:
  - Memorandum of understanding on cooperation in the application of laws.
- Multilateral:
  - Multilateral mutual assistance and cooperation framework for competition authorities.

- New Zealand:
    - Cooperation arrangement regarding the application of competition and consumer laws.
- Peru:
    - Memorandum of understanding regarding the application of competition laws.
- Republic of Korea:
    - Cooperation arrangement regarding the application of competition and consumer laws.
- Singapore:
    - Memorandum of understanding regarding the application of competition and consumer laws.
- Taiwan:
    - Memorandum of understanding regarding the application of competition laws.
- United States:
    - Agreement regarding the application of competition and deceptive marketing practice laws;
    - US-Canadian task force on cross-border deceptive marketing practices;
    - Agreement on the application of positive comity principles to the enforcement of competition laws;
    - Canada-US merger working group;
    - Cooperation arrangement regarding the application of their deceptive marketing practice laws.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION FOR 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 significant amendments to it were passed in 2022. 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 2020, the E-Commerce Law 2018, 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, China established the National Anti-Monopoly Bureau ("NAMB") to enforce competition law. Within NAMB, there are three relevant divisions: Anti-monopoly Enforcement Division 1, Anti-monopoly Enforcement Division 2, and the Competition Policy Coordination Division. Enforcement Division 1 is responsible for investigation into monopoly agreements and abuse of dominance; Enforcement Division 2 is responsible for merger control.

The consolidation of competition law enforcement means that 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 remain independent agencies and are now focused on other matters, SAIC was entirely merged into SAMR. Hereinafter, where relevant, this report refers to NAMB, MOFCOM, NDRC, SAIC, and SAMR collectively as the "Competition Authorities."

Prior to 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. And SAIC was responsible for investigation 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.[1]

SAMR had issued interim implementing provisions during the consolidation. In 2023, SAMR issued: Provision on Prohibiting Abuse of Dominant Market Positions ("Dominance Provisions 2023"), Provisions on Prohibiting Monopoly Agreements ("Monopoly Agreements Provisions

[1] WENDY NG, THE POLITICAL ECONOMY OF COMPETITION LAW IN CHINA 245 (2018).

2023"), and Provisions to Prevent Abuses of Administrative Powers to Exclude or Restrain Competition, and Provisions on Review of Concentration of Undertakings ("Merger Control Provisions 2023"). Although SAMR has issued many new rules to replace those promulgated by MOFCOM and NDRC, this process is not yet complete and there remain some older rules in effect.

Therefore, the conclusions this report reaches about China's competition law enforcement are based on present-day SAMR behavior, while also being informed by the historic behavior of MOFCOM, NDRC, and SAIC. There will undoubtedly be the need to reevaluate this report's conclusions again, as SAMR continues to solidify its own way of enforcing the AML.

One significant change that SAMR implemented is the delegation of some aspects of enforcement actions to the provincial level. SAMR now intends to handle the most crucial and national level cases, while provincial competition authorities carry out enforcement at a less complex and local level. For example, in 2022, SAMR announced a pilot program to delegate some aspects of merger reviews to provincial authorities in Beijing, Shanghai, Guangdong, Chongqing, and Shaanxi. However, provincial authorities will still report to SAMR and SAMR retains final decision authority on any case.

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).[2] 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).[3] This situation has led to a lack of capacity to conduct in-dept 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). In 2021, SAMR announced plans to increase staffing by 50%, but whether this leads to substantial improvements is an open question.

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 states that anti-monopoly work upholds the leadership of the Communist Party of China and that SAMR must formulate and implement competition rules that are compatible with the socialist market economy (AML, Art. 4). In addition, the AML contains a national security exception that applies only to mergers that involve foreign firms (AML, Art.

[2] TIANCHENG JIANG, CHINA AND EU ANTITRUST REVIEW OF REFUSAL TO LICENSE IPR 78 (2015).
[3] See, NG, *supra* note 1 at 177.

38). Finally, the AML has a substantial and vague carve out for state-owned enterprises ("SOEs") (AML, Art. 8).

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 multinational 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, SAMR continues to issue new guidance and rules further clarifying its positions. 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.

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?**


The documents are available in Chinese. English translations of some legal texts are available from the government, but English translations of guidelines and other regulations are only available through private paid databases or, in some cases not at all.

SAMR hosts a repository of the relevant laws and regulations on its website, available at https://www.samr.gov.cn/. Both laws and guidelines are available through the SAMR website in Chinese. There is an English version of SAMR's website, but it provides extremely limited functionality compared to the Chinese version.

The number of guidelines and regulations approved by SAMR 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 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?**

 for mergers.

 for investigations into monopoly agreements, abuse of dominance, and abuse of administrative power.

Mergers:

During the pre-notification consultation phase, SAMR has discretion on the length of time to investigate a pending merger. If a pre-notification meeting is granted by SAMR, the parties will be able to discuss the state of the merger with the agency.

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, opinions from SAMR are non-binding.

After pre-notification consultations, merger parties should submit notification documents and materials pertaining to the proposed merger to SAMR. There is no deadline for how long SAMR may take to declare notification complete.

In practice, this 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 (AML, Art. 29; Merger Control Provisions 2023, Art. 16). Generally, 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.

After SAMR declares notification complete, it has 30 calendar days to complete a preliminary review and decide on whether it will conduct further review (AML, Art. 30). If SAMR does not make a request for further information from the parties or issues no decision at all, the merger is considered approved.

If SAMR chooses to conduct further review, it initiates a phase II investigation and has 90 calendar days from the date of that decision to complete the review. SAMR may extend the period of review by another 60 calendar days in certain situations or with the consent of the parties (AML, Art. 31).

SAMR may "stop-the-clock" for several reasons, including failure of parties to submit

documents and information, the emergence of new facts that have significant impact on the merger under scrutiny, or when the applicant submits restrictive condition to SAMR (Merger Control Provisions 2023, Arts. 23-26).

Starting in 2014, MOFCOM began evaluating some proposed mergers on a fast-tracked and simplified basis. Fast-tracked and simplified reviews are now built into the modern SAMR guidelines (Merger Control Provisions, Art. 19). If a party thinks that the proposed merger should be fast-tracked, 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 (Business Operators Guiding Opinion 2018, Arts. 8-9). While there is no formal deadline for the review fast-tracked and simplified 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. Investigations have ranged from a few months to several years.

SAMR may assign provincial authorities to investigate suspected cases of monopoly agreements (Monopoly Agreements Provisions 2023, Art. 25).

Abuse of Dominance:

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

SAMR may assign provincial authorities to investigate suspected cases of abuse of dominance (Dominance Provisions 2023, Arts. 27-28). Such provincial authorities must consult SAMR before making any decisions and must file any decisions made with SAMR within 7 working days (Dominance Provisions 2023, Art. 38).

Abuse of Administrative Power:

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

When a case of suspected abuse of administrative power is brought before to local authorities, it must be reported to provincial competition law authorities within 7 working days (Administrative Abuse Provisions 2023, Art. 14). The provincial authorities may investigate and file a case, which must be reported to SAMR within 7 working days (Administrative Abuse Provisions 2023, Art. 15).

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;

While the Competition Authorities now generally provide adequate notice of an impending investigation of parties, there is still a lack of meaningful engagement with SAMR overall. 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 SAMR's concerns.

There is no legal obligation to inform parties of the allegations or competition concerns until the agency intends to implement an administrative penalty. 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 SAMRs decisions.

In addition, foreign companies have historically complained about 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;

In principle, yes. But there are serious concerns regarding whether the Competition Authorities respect the right to counsel, due to the nature of the Chinese legal system.

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 (Guiding Opinion on Business Operations Concentrations 2018, Art. 3(a)). 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. 48). However, ever

since the 2014 China-US Joint Commission on Commerce and Trade produced an agreement between China and the US, the Chinese government has been more willing to allow counsel for foreign companies to be present during investigations and dawn raids.

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;

 In principle yes. But it is subject to the near-total discretion of SAMR.

Parties have the right to state their opinions to the Competition Authorities (AML, Art. 51), 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 proactively invite parties and third parties to hearings. These hearings can include competitors in related industries, experts, and government departments.

In all investigations, SAMR should inform the parties that they have the right to request a hearing (Administrative Penalty Law, Art. 63). During this hearing, SAMR should present their case, evidence, and proposed penalties, and the parties can articulate their defenses (Administrative Penalty Law, Art. 64(7)).

In investigations of abuse of dominance, SAMR may schedule a regulatory interview with the party or legal representative (Dominance Provisions, Art. 37). During this interview, the parties have the opportunity to understand SAMR's concerns, address SAMR on specific points, and propose solutions.

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 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.

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?

There are some broad rules, but it is unclear what recourse parties have if they are broken.

SAMR evidence collection powers are broad and include the power to: 1) enter business or other relevant premises to conduct inspection, 2) make inquiries and conduct interviews of parties or other relevant actors and requiring them to explain matters to SAMR, 3) inspect and copy relevant documents and materials, 4) seize and retain relevant evidence, and 5) examine a party's bank accounts (AML, Art. 47). 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. 48). The officers shall record the evidence and obtain the signature of specific individuals investigated (AML, Art. 48).

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?

If a party is unsatisfied with SAMR's decision, they may apply for administrative

reconsideration (AML, Art. 65). 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 can be reluctant 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.

Nonetheless, the courts have played decisive roles in abuse of dominance, and vertical agreements cases, issuing guidance on legal standards and how the Competition Authorities should conduct their reviews. In March of 2025, the Beijing Intellectual Property Court issued a landmark ruling that represented the first instance in which a party challenged a SAMR merger decision (Simcere Pharmaceutical Group and Beijing Tobishi).

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?

AML article 53 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. The leniency regime is further permitted under guidelines issued by the Anti-Monopoly and Anti-Unfair Competition Committee of the State Council in 2024 (Antitrust Compliance Guidelines for Business Operators 2024, Art. 35). Prior to the regulatory consolidation, NDRC and SAIC each had 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.

In order for a party 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. The information given to SAMR must not have been known by agency already (Leniency Guidelines 2019, Art. 6). Any parties that report to SAMR after the first-in will not receive full exemption but may receive partial exemption.

The first-in party will receive no less than 80% reduction, up to full immunity. The second-in party will receive a fine reduction between 30%-50%. The third-in party will receive a fine

reduction between 20%-30%. Any subsequent parties will receive no more than a 20% fine reduction (Leniency Guidelines 2019, Art. 13). There is also a marker program that allows parties to apply for leniency by filing a preliminary report (Leniency Guidelines 2019, Art. 7), even if the party is not capable of providing all the necessary information. The preliminary report for leniency may be made orally or by writing (Leniency Guidelines 2019, Art. 9). Leniency applications should be kept confidential and not disclosed without the party's consent (Leniency Guidelines 2019, Art. 16).

For individual whistleblowers, SAMR will keep the whistleblower's identity confidential (AML, Art. 46).

SAMR may suspend investigation of a suspected monopoly agreement if the parties voluntarily adopt measures to eliminate the harm caused by their conduct (AML, Art. 53). 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. 53).

It is unclear from the language of the Monopoly Agreements Provisions 2023 whether the leniency program applies to both horizontal and vertical agreements, so the scope of applicability of the current rules remains to be seen.

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?**

AML article 49 obligates SAMR and its staff to keep personal information and trade secrets confidential. 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.

Parties can request that information be kept confidential (Merger Control Provisions 2023, Art. 15), although ultimately SAMR has discretion. 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?**

There is no right to be informed that SAMR will use confidential materials during review. The AML is silent on this matter. Article 63 of the Merger Control Provisions 2023 does obligate SAMR to inform the parties of a determination against the merger and the parties have five working days to make a statement or defense. However, it does not obligate SAMR to reveal 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. 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?**

For mergers, parties are expected to engage in pre-notification meetings with SAMR. Through this mechanism, parties can get a better idea of the potential issues that SAMR may have with the transaction (Merger Control Provisions, Art. 12). These pre-notification meetings are voluntary, and the discussion can include factual and legal questions, procedural questions, and any other relevant concerns (Guiding Opinions on Mergers 2018, Art. 11). SAMR may convene a non-binding pre-notification meeting.

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. 44). Parties under investigation can apply to meet with SAMR to discuss matters during the investigation. But this is subject to SAMR discretion.

Nonetheless, SAMR is rarely fully forthcoming with their concerns. Parties have complained that, by the time they received the allegations, it was already too late to prepare adequate defenses.

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 fairly opaque procedures: the foreign investment review and national security review. Any merger that involves a foreign party acquiring a domestic party will trigger a review (AML, Art. 38). Also, it is important to note that SAMR has the authority to review any enterprise and transaction anywhere in the world if it implicates competition in China's domestic market (AML, Art. 2).

Originally completely opaque, the foreign investment review system evolved to become a record-filing system. MOFCOM and NDRC established a "negative list" of industries and any merger that did not involve the negative list was approved upon filing. Those that fell into the negative list were reviewed on a case-by-case basis. In 2020, MOFCOM and NDRC passed the Measures for the Security Review of Foreign Investment, which limited the scope of foreign investment review to:

1. Investment in military industry, military industry ancillary equipment, or other fields related to national defense security, as well as investment in military facilities and areas surrounding military industry facilities;

2. Investments in and obtaining actual control over enterprises in important sectors such as important agricultural products, important energy sources and resources, important equipment manufacturing, important infrastructure, important transportation services, important cultural products and services, important information technology and Internet products and services, important financial services, and key technologies. (Foreign Investment Security Review Measures 2020, Art. 4).

These new rules represent a further development of the legal regime and, overall, the government has been progressively relaxing foreign investment in China since the passage of the Foreign Investment Law of 2019.

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 transaction, and will consider issues of national defense, national economy, and key technology development in China. The committee will solicit opinions from other governmental agencies as well.

Second, the AML sets forth several broad exemptions for 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 by unifying the specifications or standards of products or by implementing specialized division of labor;

3) increasing the operating efficiency of small and medium-sized undertakings or to increase their competitiveness;
4) achieving energy conservation, environmental protection, disaster relief, and such other public interests;
5) mitigating sharp decline in sales volumes or obvious overproduction due to an economic recession;
6) safeguarding legitimate interests in foreign trade and in economic cooperation; or
7) other purposes as prescribed by law or the State Council (AML, Art. 20).

Given the wide-ranging scope of the exemptions, outside observers may suspect that SAMR can effectively exempt any party for any underlying reason, thereby 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?**

 While SAMR does publish decisions, this is largely based on policy considerations rather than legal requirements.

SAMR is required to publish decisions when it finds against proposed mergers or imposes restrictive conditions on proposed mergers (AML, Art. 36). SAMR is not required to publish reasoned decisions that approve mergers but keeps a running list of approved mergers on its website that is updated weekly.

In 2024, SAMR concluded 643 merger cases, of which 623 were unconditionally approved. 19 were withdrawn by the reporting parties after approval was granted, and one was approved with restrictive conditions.

Conditional approvals and their reasoning are posted on the SAMR website. However, one concern with these decisions is that sometimes they do not adequately set forth the reasoning, theories of harm, or the evidence consulted in sufficient detail.

For monopoly and abuse of dominance investigations, SAMR publishes administrative penalty decisions on its website. Although the legal basis for publishing investigation decisions is thin, SAMR now publishes short decisions with reasoning. Art. 52 of the AML sets forth that:

> "Where after investigating and verifying the suspected monopolistic practices, the anti-monopoly law enforcement agencies deem them to constitute monopolistic practices, they shall make decisions on how to handle them in accordance with law and may release the decisions to the public" (AML, Art. 52).

Therefore, based on the AML, it would seem that SAMR is publishing these decisions for policy reasons, rather than to conform with the legal requirements.

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?

 There are questions as to whether SAMR's publications provide sufficient detail and reasoning behind the decisions.

SAMR is required to issue a timely written decision if it finds against a merger or imposes restrictive conditions on a merger (AML, Art. 36). There is no requirement to publish reasoned decisions for unconditional clearances, but SAMR does publish lists of approved mergers without comment.

There does not appear to be a legal obligation for SAMR to publish decisions on monopoly and abuse of dominance investigations. However, SAMR does publish administrative penalty decisions and its reasoning on its website, as required by the Administrative Penalty Law, Art. 39.

The main concern with SAMR's publication of decisions is that, historically, they have been inconsistent in quality and completeness. Earlier written decisions (under MOFCOM) presented very few details to justify the factual or legal basis for MOFCOM's ruling. There is also some concern about SAMR not fully articulating theories of harm. However, the situation has improved over time and SAMR is expected to continue the trend towards more complete and fully reasoned decisions.

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

China has 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.

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. SAMR maintains a database of events and meetings between Chinese and foreign competition law authorities on its website.

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 data on the extent to which the SAMR cooperates with foreign counterparts on pending cases. However, anecdotal evidence 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.

It appears that, to date, there has not been publicly acknowledged cooperation between the Competition Authorities (specifically NDRC and SAIC) and foreign counterparts in monopoly investigations.

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 FOR 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 90% of the competition

cases in Europe, the Commission wishes to further empower and standardize NCAs. In 2019, the EU passed Directive EU 2019/1, which strengthened NCA enforcement tools, applied Europe-wide standards, mandated leniency programs, and increased mutual assistance among Member States.

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?**

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, implementing regulations, notices, and other explanatory notes at: https://competition-policy.ec.europa.eu/index_en. 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?**

 for mergers investigations.

 for abuse of dominance and anticompetitive agreement investigations.

Parties have a general right to receive 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 by the European Convention on Human Rights. While the courts have not defined "reasonable time," the court analysis 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).

Investigation of Mergers:

Parties must notify the Commission before implementing a merger (Regulation 139/2004, Art. 4(1)). 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. 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 (Commission Notice 2023/C 160/01, §26).

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 (Regulation 139/2004, Art. 10(1)). A single 10-working-day extension could be granted when remedies are offered, or a request comes from a member state (Regulation 139/2004, Art. 10(1)). 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 (Regulation 139/2004, Art. 10(3)).

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 (Regulation 139/2004, Art. 10(4)).

Investigations of Abuse of Dominance and Anticompetitive Agreements:

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.[1]

[1] 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 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 (Regulation 1/2003, Art. 25).

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;**

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") (Regulation 139/2004, Art. 4(3)). The Commission will also publish non-confidential versions of its decisions at the end of phase I and phase II of investigations (Regulation 139/2004, Art. 20).

The primary mechanism by which the Commission informs a party of is allegations and concerns is the Statement of Objections ("SO") (Regulation 2023/914, Art. 13(2)). 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, or (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 (Regulation 2023/914, Art. 13(2)).

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 (Antitrust Manual of Procedures, §13(56)).

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 Commissions intention on fines (Regulation 1/2003, Art. 23), periodic penalty payment (Regulation 1/2003, Art. 24), 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 granted to the party. Parties may request 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 corroborate existing objections, the Commission will send a letter of facts. Parties may submit responses within an established deadline.

While the protections stated above are robust, some commentators have raised 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.[2]

b. the opportunity to be represented by counsel;

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:

For competition law concerns, the EU attorney-client privilege rule (known as legal professional privilege) only applies to communications between independent lawyers and the client. In-house counsels do not qualify for the privilege. Privilege does apply to internal documents that describe the contents of communications with external counsel.[3] 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;

[2] See 2023 Booking/eTraveli case, where the Commission used a novel "ecosystem" theory of harm. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573.
[3] See Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission, Case C-500/07 P.

The Commission is obligated to give an accused party the opportunity to be heard before imposing a fine or order (Regulation 1/2003, Article 27). 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 (filed an official complaint and have 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 (Regulation 773/2004, Art. 17(2)). More typically, a party has 2 months to file a reply. An undertaking can make a reasoned request for an extension (Regulation 773/2004, Art. 17(4)).

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 parties request, the Commission will hold an oral hearing (Regulation 773-2004, Art. 12(1)). 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 (Antitrust Manual of Procedures, §13(32)).

At the oral hearing any parties may appear in person, be represented by counsel or authorized representatives (Antitrust Manual of Procedures, §13(33)). Parties may bring experts admitted by the Hearing Officer, and the Commission may invite persons to the oral hearing to express views (Regulation 773/2004, Art. 13(3)). 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 (Regulation 773/2004, Art. 14(7); Antitrust Manual of Procedures, §13(50)). Nonetheless, there is no obligation to answer any specific question during the proceedings. In fact, the Hearing Officer may allow the questioned party to give an answer or further comments in writing (Antiturst Manual of Procedures, §13(50)-(51)). 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 (Regulation 773/2004, Art. 14(8)).

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 the Competition

Commissioner (Antitrust Manual of Procedures, §60)). 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 (Antirust Manual of Procedures, §13(57)). After more deliberations, the Hearing Officer will draft a final report, and the final decision will be adopted by the College of Commissioners (Antitrust Manual of Procedures, §13(63)).

d. the case files.

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) of Regulation 773/2004, Article 18(1) and (3) of the Regulation 139/2004, and Article 17 of Regulation 2023/914.

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 to access case files does not grant parties access to confidential information (Regulation 773/2004, Art. 16). Furthermore, the right does not grant parties access to internal documents of the Commission or NCAs (Art. 28, Regulation 1/2003; Regulation 773/2004 Art. 15(2)).

Access to the file is granted to the parties that are addressed in a SO from the Commission (Regulation 773/2004, Art. 15(1)). It is normally only granted on a single occasion (Commission Notice 139/2004, §27). 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 (Commission Notice 139/2004, §12). Final expert reports are accessible, but correspondences with experts are not.

For merger investigations, parties will be given access to the files upon request at every stage of the procedure following notification up to the consultation of the Commission's Advisory Committee (Commission Notice 139/2004, §28).

The Commission will label every document received. When a party requests access, the Commission will transmit the accessible electronic copy to the party. For cartel leniency cases, access includes the aforementioned electronic copy 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 (Commission Notice 139/2004, §27).

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 (Merger Manual of Procedures: Life of a case, §221; Commission Best Practices on Disclosure of Data Rooms). 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 party's 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 (Regulation 773/2004, Art. 8(1)).

If the Commission intends to reject a complaint, the complainant may request access to documents "on which the Commission bases its provisional assessment." (Regulation 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 to 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?**

The Commission follows the Manual of Procedures for the Application of EU Merger Regulation and the Manual of Procedures for the Application of Articles 101 and 102 TFEU. Both are available on the Commission's website.

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 (Regulation 1/2003, §8(2)). In one case, this amount of time has been as long as 8 months.

Because of 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?

The Commission may request undertakings to provide necessary information (Regulation 1/2003, Art. 18). 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 (Antitrust Manual of Procedures: Internal documents, §25). Extensions may be granted (Antitrust Manual of Procedures: Internal Documents, §41).

The Commission can adopt a decision that requires a party to supply information (Regulation 1/2003, Art. 18(3)). This type of decision is treated as an act of the EU and can be annulled if the reasoning in the decision is invalid (Antitrust Manual of Procedures: Internal Documents, §49). 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 (Antitrust Manual of Procedures: Internal Documents, §71).

For the purposes of an investigation, the Commission may interview natural or legal persons who consent to being interviewed (Regulation 1/2003, Art. 19). Interviews are voluntary, and the interviewee may be accompanied by an assistant or lawyer, and the interviewee may discontinue participation in an interview after the interview has commenced (Antitrust Manual of Procedures: Power to Take Statements, §3.3(16)-(17)). 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 (Antitrust Manual of Procedures: Power to Take Statements, §3.1(13)). The Commission may record the entire interview (Regulation 773/2004, Art. 3(3)).

The Commission may also order a party to submit to an inspection (Regulation 1/2003, Art. 20; Merger Regulation 139/2004, Art. 13)), 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 (Regulation 1/2003, Art. 20(2)). The inspectors may use forensic software and search the IT-environment, including all computers, mobile devices, and storage media (Commission Explanatory Note on Inspections, §10).

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 is 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 (Commission Explanatory Note on Inspections, §6).

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

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 (Regulation 1/2003, Art. 23(1)(d)).

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 (Regulation 1/2003, Art. 20(6)-(7)).

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?**

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 informs case findings. This has led some to criticize the court for only doing marginal review. More recently, there appears to be a move to have the General Court do a 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 (TFEU, Art. 256). 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?

Merger Remedies:

In a merger investigation, parties may propose remedies 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 ("Leniency Notice"). Fine calculations and fine reductions are set forth under §26 of the Leniency Notice. 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 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 (Leniency Notice §8). 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 (Leniency Notice, §12).

Any party after the first party to apply for immunity/leniency may receive partial reduction in fines. However, subsequent parties will only receive reductions in fines if the information and evidence they provide adds significant value to the investigation (Leniency Notice, §23-24). 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 20% reduction in fines (Lenience Notice, §26).

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 (Leniency Notice, §16(b)). 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 (Leniency Notice, §15).

There is no set 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 2008/C 167/01 ("Settlement Procedures").

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 (Settlement Procedures, ¶9). A party that wishes to settle with the Commission must acknowledge its participation in a cartel (Settlement Procedures, ¶20(a)). 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 settlement will be allowed access to the Commission's file to see the Commissions 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 (Settlement Procedures, ¶16-17).

The Commission will issue a revised SO, to which parties must reply within 2 weeks (Settlement Procedures, ¶26). 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 (Settlement Procedures, ¶32-33).

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?**

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 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); Regulation 2023/914, Art. 18)).

Communication 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 the 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?**

Please see the 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?**

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?**

Considering 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?**

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 fines and types of remedies imposed on the party.

The Hearing Officer's final report and the opinion of the advisory committee are 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?**

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://competition-cases.ec.europa.eu/search.

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**

The EU has dedicated cooperation agreements on competition matters with Canada, Japan, South Korea, Switzerland, and the United States. For these agreements, the countries agree to mutual information, 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 EU has signed memoranda of understanding with Brazil, China, India, Mexico, Russia, and South Africa.

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.

EU has concluded bilateral agreements with the EU candidate countries of Albania, Montenegro, North Macedonia, Serbia, and Turkey. It has also signed bilateral agreements with potential EU candidate countries of Bosnia and Herzegovina and Kosovo.

The EU is a member of the International Competition Network and participates in the activities of the Organisation for Economic Cooperation and Development, the United Nations Conference on Trade and Development, and the World Trade Organization.

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

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.

Historically, the Commission worked closely with the Federal Trade Commission and Department of Justice Antitrust Division of the United States.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION FOR INDIA

INTRODUCTION:

The primary competition law of India is the Competition Act of 2002 (the "Competition Act"). This law has been amended several times, with the most recent being the 2023 amendments. These amendments include—for this report's purposes—a major overhaul of merger rules, the implementation of leniency plus regime, and the introduction of settlement mechanism for anticompetitive/abuse of dominance cases and the statutory introduction of the dawn raid. In addition, a revised set of regulations regarding mergers went into effect in 2024.

Enforcement of the Competition Act falls to the Competition Commission of India ("the Commission"). The Commission has the power to inquire into any alleged violation of the Competition Act, call for additional investigations, and issue penalties for violations of law and noncompliance with orders. The Director General ("DG") of the Commission is empowered to investigate alleged violations when directed to do so by the Commission.

The National Company Law Appellate Tribunal ("Tribunal") was established under the Companies Act of 2013. The Tribunal is considered the appellate body for the purposes of the Competition Act and has the power to hear appeals against decisions made and penalties assessed by the Commission.

In addition to the Competition Act, the regulations this report relies on are:

- Competition Commission of India (General) Regulations, 2024 ("General Regulations");
- Competition Commission of India (Combinations) Regulations, 2024 ("Combinations Regulations");
- Competition Commission of India (Lesser Penalty) Regulations, 2024 ("Lesser Penalty Regulations");
- Competition Commission of India (Settlement) Regulations, 2024 ("Settlement Regulations");
- Pre-filing Consultation Guidelines.

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?**

The Commission's website is available in English and Hindi at: https://www.cci.gov.in/.

The full text of the Competition Act and its most recent amendments are available on the website of the Commission at: https://www.cci.gov.in/legal-framwork/act. The Commission also maintains a database of rules, regulations, notifications, and judgments governing competition law on the same website. Antitrust orders issued by the Commission are available on a searchable database at: https://www.cci.gov.in/antitrust/orders. Merger notices, green channel notices, orders, and press releases are available at: https://www.cci.gov.in/combination/legal-framwork/regulations.

The Tribunal's website is available at: https://nclat.nic.in/. The Tribunal also maintains a searchable database of its current cases and resolved cases. For judgments before May 31, 2021, the Tribunal maintains a separate database. All relevant rules, regulations, and procedures that govern tribunal operation are available at: https://nclat.nic.in/act-rules.

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?**

 for mergers cases.

 for anticompetitive/abuse of dominance cases.

Mergers:

The Commission may investigate a merger on its own initiative or after receiving relevant information, so long as the Commission acts within 1 year of a merger taking effect. (Competition Act, §20(1)).

Parties to a merger must notify the Commission after either the internal approval of the merger or the execution of any agreement giving effect to the merger, but before the practical completion of the merger (Competition Act, §6(2)). The Commission has 30 days to form a prima facie opinion regarding the merger (Competition Act, §29(1B)). Note that the general rule governing mergers is that they cannot be completed until 150 days after notification of the Commission, or the Commission passes an order allowing the merger (Competition Act, §6(2A)).

If the Commission forms a prima facie opinion that the merger is likely to cause (or has already caused) adverse effects on competition in India, it will issue a notice to show cause to the parties. The parties have 15 days to respond with arguments for why an investigation should not be conducted (Competition Act, §29(1)).

After the Commission receives the responses from the parties, it has 7 days to direct the parties to publish details of the merger within 10 days (Competition Act, §29(2)). After the publication of these details, the Commission may invite 3rd parties to file written objections regarding the merger within 10 days of the aforementioned publication. (Competition Act, §29(3)). At the end of this 10-day period, the Commission has 7 days to request additional information from the parties themselves (Competition Act, §29(4)). Parties then have another 10 days to provide the Commission with the requested information (Competition Act, §29(5)).

At this point, if the Commission remains of the opinion that the merger is problematic, it will issue a statement of objections. The parties will then have 25 days to respond (Competition Act, §29A). At this point, the parties may submit proposals for modifications to the merger (Competition Act, §29A(2)). If the Commission rejects the proposal, it must inform the party within 7 days of receiving the proposal and give the parties 12 additional days to submit a revised proposal (Competition Act, §29A(3)). The Commission may propose modifications on its own initiative.

The Commission may approve a merger if the parties are willing to undertake modifications within a prescribed time frame (Competition Act, §31(3)).

The Commission has a statutorily mandated 150-day deadline from the notification day to approve the merger or issue any orders determining that the merger has adverse effect on competition in India. If no order is passed against the merger within the 150-day period, the merger is deemed to be approved (Competition Act, §31(6)).

Non-merger investigations:

There are no statutorily imposed deadlines on inquiries and investigations into suspected violations of the prohibition against anti-competitive agreements or abuse of dominant positions. The Commission does establish a 60-day target to record its opinion about the existence of a prima facie case of alleged ani-competitive/abuse of dominance behavior (General Regulations, §17(2)), though this is not a requirement. Finally, any information that may prompt an inquiry should generally be filed with the Commission within 3 years of the actions in concern. (Competition Act, §19(1)).

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;

Upon receipt of information from a government agency, or on its own initiative, the Commission may form an opinion on whether there is a prima facie case of parties violating the prohibition against anti-competitive agreements or abuse of dominance (Competition Act, §26(1)). The Commission may then instruct the DG to investigate the matter further. At the end of the DG's investigation, the Commission may forward a copy of the DG's report to the parties (Competition Act, §26(4)). If the Commission believes further investigation is called for, it may order it or conduct inquiries itself (Competition Act, §26(7)).

If the Commission believes a violation has occurred, it may pass an order after issuing a notice to show cause, detailing the alleged violations and giving the parties reasonable opportunity to be heard (Competition Act, §26(9)).

The Commission may call a preliminary conference to discuss whether a prima facie case exists against parties. When calling these conferences, the Commission may invite the parties to the conference (General Regulations, §18(2)).

In abuse of dominance/anticompetitive behavior cases, the Commission is directed to forward a non-confidential version of the DG's investigation report to the parties within 8 weeks of receiving the report (General Regulations, §22(2)(i)). The parties are invited to file objections or comments to the report. After receiving the objections, the Commission may pass a final order, order more investigations, or make further inquiries itself (General Regulations, §22(4)). Any supplementary DG investigation reports would trigger the opportunity for parties to file objections or comments (General Regulations, §22(6)).

At the end of the investigative process, the Commission may issue a show-cause notice to the parties and specify the time period for responses from the parties (General Regulations, §22(8)). After parties have had a reasonable opportunity to be heard, the Commission may pass its final order (General Regulations, §22(9)).

In merger cases, if the Commission has formed prima facie opinion that the merger will cause adverse effects on competition, the parties will have to publish details of the merger within 7 days (Combinations Regulations, §21(1)). Such publication will be made in the all-India edition of four leading daily newspapers (Combination Regulations, §21(5)).

b. the opportunity to be represented by counsel;

Any party appearing before the Commission may be represented by legal counsel. (Competition Act, §35). A person summoned for questioning by the DG may be accompanied by an advocate upon written request, though the advocate may not speak to or for the person at the examination (General Regulations 2024, §47(c)).

Any party appearing before the Tribunal to appeal an act of the Commission may be represented by counsel. (Competition Act, §53S).

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;

The Commission has a large amount of discretion on whether to hear the testimony of parties.

In merger cases, the Commission may give the parties an opportunity to be heard, specifying the date and time of the hearing (Combination Regulations, §23).

The Commission or DG may request parties to give evidence by oral submission and has the discretion to allow cross examination of the witness (General Regulations, §41(5)). If the DG intends to rely on evidence given by a witness, it must give the other parties an opportunity to cross examine that witness (General Regulations, §41(5)).

In anticompetitive behavior/abuse of dominance cases, parties wishing to make oral submissions or file written arguments before the Commission must declare its intent to the Commission at the earliest opportunity (General Regulations, §30(1)).

d. the case files.

Parties may submit written requests to inspect or obtain copies of documents submitted to the Commission for the matter at dispute, though no access is granted for Commission internal documents (General Regulations, §38(1)). Parties inspecting or copying relevant documents must be accompanied by an officer authorized by the Commission. (General Regulations, §38(3)).

While confidential information is usually not accessible by the parties, the parties may now apply to be part of a confidentiality ring (General Regulations, §36(6)-(7)). If admitted to the confidentiality ring, the party will be allowed to access confidential information that the Commission may rely on for decision making.

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?

The Commission's rules on procedure and evidence are governed by the Competition Act, General Regulations, the Code of Civil Procedure of 1908 ("Civil Procedure Code"), the Bharatiya Sakshya Adhiniyam, 2023 (hereafter "Indian Evidence Act"), and the Code of Criminal Procedure of 1973.

The DG of the Commission is empowered to investigate any suspected violation of the Competition Act (Competition Act, §41(1)). The DG has the same powers as civil courts in India, operating under the Civil Procedure Code, with respect to summoning witnesses, requiring discovery, receiving affidavits, issuing commissions for examinations of witnesses or documents, and requisitioning public records (Competition Act, §41(2)). The DG also has powers to require persons to furnish records, keep custody of information for 180 days, examine people under oath (Competition Act, §41(4-6). The Commission may direct any person to produce information and documents under their control (Competition Act, §36(4)).

Furthermore, the DG may apply to the Chief Metropolitan Magistrate of Delhi for an order to seize information, books, papers, documents, and other records that the DG reasonably believes may be at risk, sometimes called a "dawn raid" (Competition Act, §41(8)). The DG may call

upon the police or any officer of the central government to assist with the dawn raid (Competition Act, §41(9)). There is no statutory right for an attorney to be present at a dawn raid, though the DG has discretion to grant a party's request to delay commencement of the search until an attorney is present. After seizing such documents, the DG may keep it in its custody until the end of the Commission's investigation. At the conclusion of the investigation, the seized materials will be returned to the party (Competition Act, §41(11)). Besides the relevant part of the Competition Act, search and seizures are governed more generally by the Code of Criminal Procedure of 1973.

The Commission or the DG may determine how to admit evidence to be considered (General Regulations, §41(1)). The Commission or DG may also require affidavits or witnesses to give oral evidence (General Regulations, §41(4)). The Commission also relies on the Indian Evidence Act to govern the admissibility of evidence (General Regulations, §41(3)).

At any point before passing orders, the Commission may require parties or individuals to produce documents or other evidence as necessary (General Regulations, §43(1)). The Commission or DG may also procure evidence and requisition records from any person considered relevant to the investigation (General Regulations, §43(2)). Finally, the Commission or DG may summon and enforce the attendance of any person to be examined under oath (General Regulations, §43(3)).

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

The Commission may invite experts on terms and conditions set by the Commission. Furthermore, the Commission has absolute discretion regarding the evaluation of expertise of those invited as experts to assist the Commission (General Regulations, §53)). Parties under investigation may call upon experts (Competition Act, §35(2)).

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?

Parties and the government may appeal the Commission's orders to the Tribunal. Once a party receives a Commission's order/decision, they have 60 days to appeal to the Tribunal (Competition Act, §53(A)(1)). The Tribunal may accept an appeal past the 60-day deadline if it finds good cause to do so. If a party wishes to appeal an order to pay penalties, it must deposit 25% of the ordered penalty in order to lodge an appeal (Competition Act, §53(B)(2)). The

Tribunal endeavors to dispose of any appeal within 6 months of the filing date (Competition Act, §53(B)(5)).

If any parties are not satisfied with the result of the appeal to the Tribunal, they may appeal to the Supreme Court of India. Parties must file this appeal within 60 days of the Tribunal's decision, though the Supreme Court may waive the deadline if it finds sufficient cause to do so (Competition Act, §53T).

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?

 for cartels.

Cartel leniency is governed by Section 46 of the Competition Act and the Lesser Penalty Regulations. The Commission is empowered to impose lesser penalties (i.e. leniency) on cartel parties if: (1) the party ceases further participation in the cartel (Lesser Penalty Regulations §3(1)(a)), (2) the party provides vital disclosure in respect to the alleged cartel violations (Lesser Penalty Regulations, §3(1)(b)), (3) the party provides all relevant information, documents, and evidence that the Commission requires (Lesser Penalty Regulations, §3(1)(c)), (4) the party continues to cooperate with the Commission until the completion of the proceedings (Lesser Penalty Regulations, §3(1)(d)), (5) the party does not conceal, destroy, or remove any documents that would help establish the existence of the cartel (Lesser Penalty Regulations, §3(1)(e)), and (6) the party does not provide any false evidence (Lesser Penalty Regulations, §3(1)(f)). The party must also provide the names of individuals involved in the cartel (Lesser Penalty Regulations, §3(2)).

A party to an alleged cartel may withdraw its application for leniency (Lesser Penalty Regulations, §10).

The first party to apply for leniency and be approved by the Commission can receive up to a 100% reduction in penalties (Lesser Penalty Regulations, §4(a)). The second applicant may receive up to 50% reduction in penalties (Lesser Penalty Regulations, §4(c)(1)). Subsequent applicants may receive up to 30% reduction in penalties (Lesser Penalty Regulations, §4(c)(ii)). The Commission does not evaluate subsequent applicants until the first applicant's submission has been evaluated (Lesser Penalty Regulations, §6(6)).

A party that qualifies as the first party to apply for lesser penalty may apply for lesser penalty plus if it provides information about a newly disclosed cartel. Such a party may receive a 30% reduction in penalty for the first cartel and up to a 100% reduction in penalty for the newly disclosed cartel (Lesser Penalty Regulations, §5(1)).

 for anticompetitive/abuse of dominance cases.

Parties may apply to the Commission for settlement within 45 days of receiving an investigation report from the DG ("Settlement Regulations, §3(2)). Parties may also withdraw the settlement application at any time before the Commission decides on the application ("Settlement

Regulations, §3(4)). The proceedings before the Commission will be halted until a decision is reached on the settlement applications (Settlement Regulations, §4(3)). Information gathered by the Commission during settlement negotiations may not be used against the party proposing the settlement unless the applicant fails to comply with Commission orders (Settlement Regulations, §12(1)-(2)).

 for mergers.

The Commission may propose modifications as conditions for merger approval (Combinations Regulations, §25).

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?

The general rule is that no information relating to any party that has been obtained by the Commission or DG will be disclosed without the written permission of the party the information was obtained from, unless the disclosure is to comply with the Competition Act (Competition Act, §57).

Further confidentiality protections are robust as well. The Commission will maintain the confidentiality of the identity of an informant upon request in writing (General Regulations, §36(1)). The party requesting confidentiality for information must set forth cogent reasons for the request and certify that making the information public will result in the disclosure of trade secrets, the loss of commercial value of that information, or cause serious injury (General Regulations, §36(2)). A full and complete version of the information must be filed with the Commission, together with a non-confidential version (General Regulations, §36(3)). The Commission may also set up confidentiality rings for authorized representatives of the parties (General Regulations, §36(6)).

If the Commission relies on any information granted confidentiality, the Commission will present a public version that is redacted (General Regulations §36(13)). Experts and other professionals engaged by the Commission are bound by the same confidentiality decisions as the Commission (General Regulations, §36(14)).

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?

Although there is no guarantee of access to confidential information relied upon by the Commission, the 2024 version of the General Regulations allows the Commission to set up a confidentiality ring for the parties and their representatives. Any confidential information relied upon by the DG in their investigation shall be made accessible to members of the confidentiality ring (General Regulations, §36(6)). Parties seeking access to the confidentiality ring must submit affidavits declaring that their representatives will not disclose any information, and that the information will only be used for the purposes of proceedings under the Competition Act (General Regulations, §36(8)).

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?**

 While the Commission has an informal guidance program for mergers, it does not for anticompetitive/abuse of dominance cases.

For mergers:

The Commission maintains a pre-filing consultation process for parties seeking informal and verbal guidance regarding a merger (Pre-filing Consultation Guidelines, §1). Parties may file a request, including details about the proposed merger, market sector, and key issues (Pre-filing Consultation Guidelines, §4).

Mergers that qualify to be in the Green Channel are fast tracked to approval. These mergers are deemed approved upon the filing of the notice. Green Channel approvals are published on the Commission website.

For anticompetitive/abuse of dominance cases:

No law directly addresses the possibility of consultation on such cases.

TRANSPARENCY:

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

India's competition law regime has trended towards more transparency and predictability for the parties involved. The latest amendments to the laws and regulations contribute to this trend by establishing the use of confidentiality rings, which allow parties to access previously inaccessible information that the Commission intends to rely on for decision making. Furthermore, the Commission and Tribunal take their mandate to inform the public seriously, ensuring that decisions, orders, penalties, and other documents are available for public viewing on their respective websites.

However, the Commission and DG maintains a large amount of discretion over whether to hear oral submissions from the parties, meaning that more could be done to ensure parties' procedural access to the decision-making process.

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?**

All orders or decisions of the Commission made regarding mergers and anticompetitive/abuse of dominance behaviors shall be published on the website of the Commission (General Regulations, §55(2)).

If the Commission issues a final order, it will be served on the parties within 4 weeks of the date of the order (General Regulations, §33(3)).

In merger cases, the DG's report of their conclusion must include all evidence, documents, or statements collected during the investigation and analysis thereof (Combination Regulations, §20(1)). If the Commission issues a statement of objections to the merger, such a statement must be given to the parties within 4 days. (Combinations Regulations, §24). If the Commission proposes modifications to the merger, the parties are to be informed within 7 days and have 5 days thereafter to signal acceptance or rejection of the proposed modifications (Combinations Regulations, §25(1)).

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?**

For mergers:

Orders and decisions of the Commission about mergers are to be published on its website (General Regulations, § 55(2); Combinations Regulations, §28(2)). The published orders include the names of the parties, the order itself, the rationale behind the decision, and the parties' main arguments. The website includes Green Channel notices/approvals, notices under review, orders under Section 31, orders under section 43A and 44, cases approved with modification, and press releases regarding selected cases.

For anticompetitive/abuse of dominance cases:

The Commission shall publish a summary of all its orders and decisions on its website (General Regulations, §55(2)).

However, note that proceedings before the Commission itself are not open to the public by default. Rather, the Commission has discretion in the matter (General Regulations, §48).

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**

The Commission is empowered by the Competition Act to enter into memoranda or arrangements with foreign counterparts in the course of carrying out its duties. (Competition Act, §18).

Multilaterally, India is a member of the International Competition Network, the Organisation for Economic Cooperation and Development, and the BRICS competition program.

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

The Commission has negotiated and signed 9 cooperation agreements with its international counterparts. These include the following countries and the enumerated agreements:

- Australia:
    - MOU between the Commission and the Australian Competition and Consumer Commission, signed on June 3, 2013.
- Brazil:
    - MOU between the Commission and the Administrative Council for Economic Defense of Brazil, signed on June 18, 2021.
- BRICS:
    - MOU between the competition authorities of Brazil, Russia, India, China, and South Africa, signed on May 19, 2016.
- Canada:
    - MOU between the Commission and the Competition Bureau of Canada, signed on December 1, 2014.
- European Union:
    - MOU between the Commission and the Directorate General for Competition of the European Commission, signed on November 21, 2013.

- Japan:
    - MOU between the Commission and the Japan Fair Trade Commission, signed on August 6, 2021.
- Mauritius:
    - MOU between the Commission and the Competition Commission of Mauritius, signed on February 23, 2022.
- Russia:
    - MOU between the Commission and the Federal Antimonopoly Service of Russia, signed on December 16, 2011.
- United States:
    - MOU between the Commission and the Department of Justice and Federal Trade Commission of the United States, signed on September 27, 2012.

COMPETITION REGULATORY AGENCY REVIEW
FOR
THE REPUBLIC OF KOREA

INTRODUCTION:

The primary competition law of the Republic of Korea's ("RoK") is the Monopoly Regulation and Fair Trade Act ("MRFTA"), which was amended most recently in 2024. Chapter II of the MRFTA establishes the framework regarding abuse of dominance, Chapter III does the same for mergers, Chapter IV for concentrations of economic power, Chapter V for cartels, and Chapter VI for unfair trade practices.

The Korean Fair Trade Commission ("KFTC") is the enforcement agency for competition law in RoK and is established by Art. 54 of the amended MRFTA. There are nine commissioners on the KFTC and they serve a fixed term defined under the State Public Officials Act.

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

Since its founding in 1981, KFTC has become a robust agency and its role has substantially evolved through the years. In 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) voluntary submissions such as merger notices and leniency application, 2) through third-party tips; 3) the agency's ex officio investigations.

The workload of the KFTC is considered high. In 2024, the agency processed 2,496 cases (this includes matters unrelated to the MRFTA), issued 220 corrective orders, and imposed 124 instances of penalty charges. Furthermore, in 2024, the agency reviewed 798 mergers and conducted in-depth investigations of 36 of them.

Besides the MRFTA, this report relies on the following decrees, rules, and guidelines:

- Enforcement Decree of the Monopoly Regulation and Fair Trade Act ("Enforcement Decree")
- Rules on Fair Trade Commission Meeting Operations and Case Procedures ("Case Handling Procedures");
- Fair Trade Commission Investigation Procedure Rules ("Investigation Procedure Rules);

- Guidelines for Viewing and Copying Materials ("Viewing and Copying Materials");
- Regulation on the Submission of Economic Analysis Opinions ("Economic Analysis");
- Enforcement Decree of the Monopoly Regulation and Fair Trade Act ("Enforcement Decree");
- Notice on the Operation of the Leniency Program ("Notice on Leniency Program");
- Operational Guidelines for Requestion Preliminary Examinations ("Preliminary Examinations");
- Guidelines on Disclosure of KFTC Decisions ("Disclosure Guidelines").

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?**

The statues and guidelines governing competition enforcement are available in Korean to the public on KFTC's website, available at:

https://www.ftc.go.kr/www/index.do

Currently, a limited selection of laws and guidelines have been translated to English and are available on the English version of KFTC's website, available at:

https://www.ftc.go.kr/eng/index.do

At the moment, the English version of the website only provides limited information. It remains to be seen if KFTC will add additional functionality to it.

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?**

 for merger cases.

 for abuse of dominance, monopolies, and cartel cases

For mergers:

In principle, regular merger reviews should be completed by the KFTC within thirty days of notification. However, KFTC can unilaterally extend the review period by up to ninety days (for a total of one hundred twenty days). Furthermore, KFTC can suspend the clock at any time during the review process by issuing a request for information ("RFI") if it requires additional information and documentation form the parties. RFIs suspend the review clock until the KFTC

receives adequate responses from the parties. Using RFIs, KFTC can extend the effective review period for a merger far beyond the one hundred and twenty day limit.

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 (though note that online platforms beyond a certain user-base threshold are not covered by this factor); 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 and; 6) the acquisition of real estate for the sole purpose of obtaining investment income. For simplified reviews, the KFTC only considers facts submitted by the notifying party.

In principle, KFTC will deliver the results of a simplified review to the notifying party within fifteen days of the date of notification. However, the KFTC can issue RFIs to the parties and the fifteen-day review period does not count the time between the sending of an RFI and submission of answers.

For mergers that do not affect the Korean market, the KFTC aims to conduct a simplified review within fifteen calendar days.

For abuse of dominance, monopolies, and cartel cases:

After the opening of an investigation by 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 is extended to nine months. Likewise, for cartel cases, it is thirteen months (Case Handling Procedures, Art. 13). However, in practice, the deadline is not binding, and extensions are approved regularly.

If the examiner decides that there a violation of the law occurred, the next step is to prepare an examination report for 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. Parties have four weeks to submit a response (Case Handling Procedures, Art. 25-10). Hearings are typically scheduled within thirty days of the defendant submitting replies, and defendants will be notified of the hearing at least five days before the hearing date (Case Handling Procedures, Art. 30-1).

In principle, in leniency cases, the KFTC must begin investigation and update the parties within three months of receiving the initial report (Case Handling Procedures, Art. 15(1)(5)). However, extensions are granted as deemed appropriate.

Given the flexibility with which the KFTC considers its deadlines, parties should expect investigations to take at least one year. It is also not unheard of for an investigation to last two or three years.

The general statute of limitations that applies to most cases is that the KFTC must impose sanctions within seven years of the date the violation stopped (MRFTA, Art. 80(4)). Cartels are subject to a special statute of limitations of five years from the commencement of investigation or, in cases where the KFTC does not investigate, seven years from the date the violation is terminated (MRFTA, Art. 80(4)).

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;**

Before the examination report is produced, specific alleged violations and material evidence are not given to the defendant. Nevertheless, the defendant may communicate with the examiner to clarify issues and state opinions. At any time before the production of the examination report, parties under investigation may wish to submit opinions or statements to the KFTC. In such cases, the examiner will hold a preliminary hearing to clarify basic facts related to the alleged violation, explain complex law, or if the issue is novel (Investigation Procedure Rules, Art. 22-2)

When the examiner produces an examination report, that report must include information summarizing the allegedly prohibited conduct, an overview of facts relied upon in the case, the details of illegality under investigation, the examiner's proposed sanctions or other actions (Case Handling Procedures, Art. 25(1)).

Once the examination report is produced, the examiner will serve the report on the defendant, along with data and supporting evidence (Case Handling Procedures, Art. 25(10)(12)). However, the examiner will not reveal confidential materials or materials deemed insignificant. The parties under investigation will be given a set period of time to file a response to the examination report (Case Handling Procedures, Art. 25(16)).

For onsite investigations (dawn raids), the KFTC will issue a notice to the party being investigated, detailing the duration, purpose, subject, method of investigation, sanctions to be imposed if the party hinders investigation, and the party's legal rights to present evidence to the KFTC (Investigation Procedure Rules, Art. 10).

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, with the exception that the KFTC may withhold such information during a cartel investigation (Investigation Procedure Rules, Art. 10(2)). The investigator must compile a list of materials collected and submitted to the KFTC (Investigation Procedure Rules, Art. 18).

At the end of the onsite investigation, the KFTC must provide the party sufficient explanation of the investigation procedures. The investigating officer will also provide the party a report of the investigation (Investigation Procedure Rules, Art. 17).

b. the opportunity to be represented by counsel;

While parties have the right to appoint legal counsel (as set forth in the MRFTA), the KFTC has several ways to suspend that right.

Parties may appoint counsel as agents for KFTC meetings (Case Handling Procedures, Art. 42). However, 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.

When the KFTC intends to investigate a party, counsel to the parties have the right to participate in the investigation process. Nonetheless, 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 the 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 the KFTC significant difficulty to achieve the purpose of the investigation (Investigation Procedure Rules, Art. 4(1)).

Furthermore, the KFTC can proceed with an onsite investigation without permitting legal counsel if there is concern over the destruction of evidence and for other urgent reasons. (Investigation Procedure Rules, Art. 4(2)).

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;

The parties have the legal right to present their case before the KFTC issues a decision on their investigation (Art. 93 of MRFTA). Parties are allowed to submit their opinions to the KFTC at any stage of the investigation.

After the examination report is submitted, KFTC will give the parties three to four weeks (depending on the type of case) to file responses to the report (Case Handling Procedures, Art. 25(10)). In special circumstances, the period for responses may be truncated.

KFTC may conduct opinion hearings when parties dispute facts or the law, there are complex issues of fact or law, or if the matter is on the plenary session's agenda (Case Handling Procedures, Art. 29). Participants to the hearing must be given at least five days' notice (Case handling Procedures, Art. 30). The hearing may be 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 presiding judges must conduct the hearing from a neutral perspective and allow equal opportunities for both sides to make their arguments. Parties may bring witnesses to submit opinions (Case Handling Procedures, Art. 43). Both the examiner and defending parties may request an in-depth examination of witnesses, experts, and specific evidence (Case Handling Procedure, Arts. 45 & 48). If presentation of confidential information is expected, parties may request a separate hearing or other measures to preserve confidentiality. Such requests must be made at least five days before the hearing (Case Handling Procedure, Art. 47).

The general 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.

d. the case files.

The parties have the right to request that the KFTC allow the inspection or copying of case files. The KFTC shall grant this request unless the material relates to trade secrets, is part of a leniency application, or confidential under law (MRFTA, Art. 95). The current MRFTA does away with a previous requirement that the party providing the data must consent to inspection and copying, though the submitter of the data still have an opportunity to submit a written opinion on the matter (Viewing and Copying Materials, Art. 5).

KFTC may grant limited access to sensitive data, with a set period for access. Limited data access may also restrict the viewing of material to a special viewing room. Parties accessing the data must sign confidentiality agreements (Viewing and Copying Materials, Art. 8). Parties may not copy or record materials in the special viewing room and must submit a report of access to the KFTC (Viewing and Copying Materials, Art. 11).

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?

The Civil Procedure Act and the KFTC Rules on Case Handling Procedures govern the rules of procedure and evidence.

For rules governing sanctions and remedies, there are numerous relevant guidelines published by the KFTC. These include: (1) Fair Trade Commission's Corrective Action Operation Guidelines; (2) Criteria for Imposing Enforcement Fines for Non Compliance with Corrective Measure Related to Mergers; (3) Notice on Detailed Criteria for Imposing Fines; (4) Criteria for Imposing Corrective Measures for Mergers; (5) Criteria for Imposing Fines for Violations of Merger Reporting Regulations; (6) Criteria for Imposing Fines for Violations of the Obligation to Disclose Information by Companies Belonging to Public Disclosure Groups.

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

The Civil Procedure Act applies to all evidence. 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 has also promulgated a set of guidelines for the collection of evidence during onsite investigations (The Investigation Procedural Rules).

KFTC treats economic analysis differently from other evidence. It must be specifically marked when submitted by a party and the party must notify the KTFC of the incoming submission (Economic Analysis, §VI.1) Moreover, any economic analysis must abide by a set of general principles (Economic Analysis, §IV-V).

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?**

Parties may appeal a KFTC ruling to the Seoul High Court within thirty days of receiving the written ruling (MRFTA, Art. 99). The appellant may also request that the KFTC reconsider a decision within thirty days of receiving the initial written ruling (MRFTA, Art. 96(1)). If reconsideration is requested, the KFTC has sixty days to issue a second decision (MRFTA, Art. 96(2)). The KFTC has the power to suspend enforcement of any sanctions during this reconsideration period (MRFTA, Art. 97).

Requesting KFTC reconsideration does not preclude later filing an appeal for judicial review within thirty days of receiving a second unfavorable decision from the KFTC. If the parties remain unsatisfied after appealing 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 directly appeal. However, there was instance in 2015 where a third-party filed a case against the KFTC, arguing that KFTC's decision on a merger review violated said third party's constitutional rights.

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?

Generally speaking, the KFTC cannot settle a case without reaching a decision regarding infringement. However, there is a leniency/immunity regime for parties involved in a cartel. Such parties may apply for leniency under Article 44 of the MRFTA and Article 51 of the Enforcement Decree. The first party to file a leniency application receives a 100% reduction in administrative fines and exemption from corrective measures. The second party receives a 50% reduction in administrative fines and partial exemption from corrective measures. In either case, the KFTC has the discretion to provide immunity to criminal sanctions.

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

A party may apply for leniency without submitting all information necessary (Notice on Leniency Program, Art. 8). 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 (Notice on Leniency Program, Art. 3)). Oral leniency applications are allowed (Notice on Leniency Program, Art. 8(2)).

A party that coerced other parties into joining the cartel is ineligible for any leniency (Enforcement Decree, Art. 51(2)).

From 1999 to 2024, 576 out of 976 cartel cases before the KFTC have been a result of the 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?**

The general rule is that the KFTC must keep business secrets confidential (MRFTA, Art. 65). Parties to a KFTC case may request access to non-confidential case data (MRFTA, Art. 95). The KFTC shall grant access to such case data except in the case of trade secrets, voluntary reporting data, and other non-public information under the law (Viewing and Copying Materials, Art. 6(1)). If the party that supplied the data consents, then the KFTC may allow copying of trade secrets and voluntary reporting data as well (Viewing and Copying Materials, Art. 6(2)). KFTC can determine when and where the requester can access the data. If the data requested is considered trade secrets, then the KFTC will limit access to an agent of the party (Viewing and Copying Materials, Art. 7). Special viewing rooms may be used for data access. Those who are granted access to these special viewing rooms must sign a confidentiality pledge and/or confidentiality agreement (Viewing and Copying Materials, Art. 8). Those granted access may not bring electronic devices into the special access room and no materials may be removed from the room either (Viewing and Copying Materials, Art. 9). Anyone who breaches the confidentiality pledge or agreement is subject to disciplinary action (Viewing and Copying Materials, Art. 13).

Before a KFTC examination session, parties may request that certain information be kept confidential. The requesting party must submit the request at least five days before the sessions (Case Handling Procedures, Art. 47(1)).

   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?**

Although it used to be very difficult for parties preparing defenses to gain access to confidential information, recent amendments have set up mechanisms to facilitate access to such information. The former method of allowing access to trade secrets if the original source of the information consents remains in place (Viewing and Copying Materials, Art. 6(2)). However, now the KFTC may also allow limited access to confidential data within special viewing rooms. Anyone viewing such information is subject to confidentiality pledges or agreements. See the answer to Question 6 above for more details.

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?**

During investigations, parties may communicate with the KFTC to clarify facts and law.

Parties can request that the KFTC review a planned merger or other potentially problematic activity before the investigation starts (MRFTA, Art. 11(9)). The KFTC has thirty days to respond but this can be extended a further thirty days (Preliminary Examinations, Art. 7). If the KFTC issues a response finding no violation, then the agency shall not take subsequent action against the merger or activity that was reviewed (Preliminary Examinations, Art. 9). However, this does not apply if the KTFC discovers that the original submission by the party was false, incomplete, or if the party engages in a different prohibited activity (Preliminary Examinations, Art. 9). KFTC can also withdraw a preliminary finding if it believes that circumstances have changed significantly (Preliminary Examinations, Art. 10).

TRANSPARENCY:

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

From a high-level perspective, RoK's competition law regime balances the right to transparency and right to confidentiality. KFTC's decisions are published and available on their website. Those decisions contain not only the ruling itself but also reasoning. The agency also endeavors to issue press releases for matters of significant public importance. Furthermore, the laws and guidelines that KFTC is subject to are all available on their website, albeit most are only available in Korean.

There are some facets of the regime that may be considered less transparent, however. Currently, the KFTC does not publicly reveal merger notifications or investigations during the initial review period. Usually, 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: Article 4(2) of the Foreign Investment Promotion Act allows the government to stop a merger if a foreign company threatens national security and public order, has harmful effects on public health, the environment, or Korean morals and customs, or violates any law of RoK. 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 (Foreign Investment Promotion Act, Art. 5(1)).

KFTC may also permit a merger if the efficiency gains sufficiently outweigh the anti-competitiveness costs (MRFTA, Art. 9(2)). However, this provision is rarely invoked. There can also be exceptions if one of the companies involved 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 (Merger Review Criteria, §VIII).

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?**

The KFTC must notify the parties of decisions within two weeks (Disclosure Guidelines, Art. 4(1)). The decision must contain information about the parties involved, the date of the decision, the order issued by the KFTC, reasoning for the decision, and (if applicable) minority opinions (Case Handling Procedures, Art. 62(4)-(5)).

That being said, the KFTC does not publish merger notifications. In cases where a merger is approved without conditions, KFTC will issue letters of clearance but will not publish them. In cases where KFTC imposes remedial orders or if a merger is blocked, the agency will send written decisions to the parties and publish a non-confidential version of it. In all cases, if a merger is considered of substantial importance to the RoK, the KFTC will issue a press release even if the merger is approved unconditionally.

Currently, if no violation is found on a matter under investigation, 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 non-violation cases since July of 2016.

Case decisions are published on the KFTC website in searchable Korean language databases.

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 to 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**

The KFTC has signed memoranda of understanding or cooperation with Australia, Brazil, Canada, China, the EU, Indonesia, Japan, Mexico, Romania, Russia, Turkey, the United States, and Vietnam. The RoK has also signed free trade agreements with provisions regarding competition law with Australia, Canada, the Central American countries of El Salvador, Costa Rica, Honduras, Nicaragua, and Panama (as part of the Korea-Central America Free Trade Agreement), Chile, China, Colombia, the EU, the European Free Trade Association, India, Indonesia, Israel, New Zealand, Peru, the Regional Comprehensive Economic Partnership (aka RCEP), Singapore, Turkey, United Kingdom, United States, and Vietnam.

Article 56 of the MRFTA grants the KFTC broad powers to cooperate with foreign counterparts. While cooperation was historically limited, recent developments suggest that the KFTC is beginning to be more receptive to international cooperation, particularly on cartel and merger matters.

In terms of multilateral cooperation, the RoK is a member of the International Competition Network and the Organisation of Economic Co-operation and Development. The KFTC also hosts the Seoul International Competition Forum, which has been held every year since 2002.

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

See answer to Comity Question 1(a).

Prior to the passage of the most recent set of amendments to RoK's competition regime, the United States had become critical of KFTC and competition law in the RoK. For example, 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 claimed that KFTC was denying US companies the opportunity to obtain evidence and information. Specifically, USTR brought the complaint through the United States-Republic of Korea Free Trade Agreement.

However, the new amendments to RoK's competition regime may have addressed the most pressing concerns that the Americans had.

Nonetheless, it is important to note that three recent developments have made cooperation unpredictable and difficult. The first is that RoK presidential politics have become increasingly chaotic. The second is that American positions on competition policy have become deeply tied to the political preferences of the presidential administration in power. The third is that there is no global consensus on how to apply competition law to the technology giants. So, while agency-to-agency cooperation remains on the books, it has become more difficult to align the interests of multiple countries, corporations, and other stakeholders.

Competition Regulatory Agency Review and Evaluation
for
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?**

All laws, regulations, and procedural rules are in written form and available to the public through the website of the Taiwan Fair Trade Commission (the "Commission"). Important laws include the Taiwan Fair Trade Act ("Trade Act"), the Enforcement Rules of Fair Trade Act of 2015 (the "Enforcement Rules"), the Administrative Procedure Act ("APA"), the Organic Act of the Fair Trade Commission, Directions on Application for Access to Files and Documents ("Document Access"), Guidelines for Public Hearings ("Public Hearings"), Guidelines for Oral Arguments ("Oral Arguments"), and Regulations on Immunity and Reduction in Fines in Illegal Concerted Action Cases ("Leniency Guidelines"). All of these are available in Chinese and English, while the Trade Act is available in Japanese.

Furthermore, the Commission is heavily reliant on statements about its methods and external guidance to specific industries. These statements are designed to inform industries about the Commission's views, though they are not meant to be legally binding. The Commission may issue warnings to industries or firms when it observes conduct that is likely to violate the FTA 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. Instead, such guidance uses phrases such as: "it is suggested," "please note," "please be sure to," and "it is advisable." Guidance must also be written and specific. A warning to an industry is to be sent to the relevant trade association and posted on the Commission's website. The Commission will not undertake enforcement action based solely on a party's rejection of administrative guidance.

Commission decisions regarding specific investigations are available in Chinese. These decisions include both the majority and dissenting opinions of the commissioners.

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?**


for merger reviews.

 for anticompetitive agreements/abuse of dominance cases.

Merging parties must submit a filing for approval from the Commission regarding the relevant transaction. Parties may not merge with 30 working days of formal acceptance of the filing materials and the Commission may extend this period by 60 working days (Trade Act, Art. 11).

For investigations into "concerted action" between parties, the Commission has three months to decide (with a single extension allowed), calculated from the day it receives the parties' application for approval of that concerted action (Trade Act, Art. 15). However, if the application is incomplete, then the time calculation starts when the Commission receives the requested supplementation and amendments (Enforcement Rules, Art. 23). If the Commission imposes any conditions on the merger approval, the conditions may not exceed five years (Trade Act, Art. 16). During the time the merging parties are subject to these conditions, the Commission may at any time revoke the approval, alter its contents, or order the parties to take corrective actions (Trade Act, Art. 17).

For other investigations, the Commission 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;

Parties and related persons have the right to review and copy the Commission's files and materials in order to make claims and defenses (APA, Art. 46). Parties must apply to the Commission for permission, and schedule a time to access the documents (Document Access, §2). The scope of files and documents available for access are set out in a "Access Reference List of the Fair Trade Commission for the Classification of the Files and Documents" (Document Access, §3). The parties may photocopy, print, or transcribe the allowed materials, but must be always supervised by Commission staff in a special Inspection Room (Document Access, §7).

The laws and regulations do not permit access to the Commission'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.

b. the opportunity to be represented by counsel;

Unless otherwise prohibited, parties may appoint counsel for administrative procedures in Taiwan (APA, Art. 24).

Furthermore, parties called upon to make any statements, produce information, or be physically inspected by the Commission are allowed to retain counsel to appear and make statements on behalf of the party (Enforcement Rules, Art. 32).

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;

 because, while there is a right to present evidence, experts, and statements, there is no right to take depositions or engage in cross-examinations. The civil law inquisitorial system generally disfavors party submissions.

Parties may file a written application requesting a hearing before the Commission. 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 Commission may make all or part of the hearing confidential (Public Hearings, Art. 5). 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. 8). 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 (Oral Arguments, Art. 5(3)). To be 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, the Commission's 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.

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?

The Commission 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 Commission 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 Commission may unilaterally request evidence, information, testimony, and experts from any party (APA, Arts. 39-42).

The Commission has the power to order parties and third parties to appear before the Commission. It can also order organizations and individuals to submit books and records (Trade Act, Art. 27). The Commission 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 the Commission does conduct an unscheduled visit, it cannot compel the production of evidence.

Parties may submit their own written opinions and materials for a hearing at the Commission (Public Hearings, Art. 10).

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?

Parties that are not satisfied with the outcome of Commission 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 (Trade Act, Art. 48). The administrative courts can review matters of fact and law and will often remand the case to the Commission 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 Commission more than the administrative courts have. Between 2000 and 2020, the Commission lost only 32 out of 785 appeals to the Committee, about 4 per cent, while in the administrative courts, the Commission lost 23 out of 251, about 9 per cent. Most appeals are by respondents seeking reversal of the Commission's decision finding liability, but about one-fourth are objections to the Commission'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?

The Commission may grant exemptions from fines for parties that violate the prohibition against illegal concerted action (Trade Act, Art. 35). The party seeking leniency must report the illegal conduct to the Commission and submit evidence of such illegal conduct before the Commission is aware of its existence (Trade Act, Art. 35(1-2)). A party may not apply for leniency if they have destroyed, forged, altered, or concealed evidence (Leniency Guidelines, Art. 2). The applicant must also provide concrete details of the concerted action and evidence to support the Commission's investigation (Leniency Guidelines, Art. 5). Applicants must follow the instructions of the Commission to help with the investigation (Leniency Guidelines, Art. 6).

The Commission may grant full immunity under two conditions: 1) to the first party who applies for leniency and cooperates before the Commission is aware of illegal conduct, 2) to the first party who applies for leniency and cooperates in an ongoing investigation when no other enterprise would qualify (Leniency Guidelines, Art. 7).

In other circumstances, parties applying for fine reduction will be judged as follows: 1) the first shall be granted 30%-50% reduction in fine; 2) the second will be granted a 20%-30% reduction

in fine; 3) the third will be granted a 10%-20% reduction in fine; 4) the fourth will be granted a reduction in fine of up to 10% (Leniency Guidelines, Art. 8). Individuals of involved parties may also be granted leniency (Leniency Guidelines, Art. 9).

The priority of the parties applying for leniency will depend on the time they file applications.

The Commission 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.

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?

Evidence is governed by a combination of the APA as well as the Directions on Application for Access to Files and Documents. Art. 2 and 3 of the Regulations Governing Access to Documents defines who is considered a relevant party to the case that can request access to documents. It also sets forth the public accessibility of specific types of materials provided by the parties to the Commission by allowing the providing party to object to disclosure of confidential information (Document Access, Art. 4-5).

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 preliminary operation documents made by the Commission, 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 Commission itself, some highlights of the accessibility rules are: (1) interview statements obtained through investigation by the Commission are accessible in principle, but may be kept confidential where secrets are involved or justifiably requested by the maker of the statements (2) statistical findings are accessible in principle, though individual questionnaire materials are not; (3) expert opinions are generally accessible in principle, though the identity of experts is not; (4) all opinions voiced in public hearings are accessible in principle; and (5) 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?

 because there is some doubt on whether parties are given sufficient notice to the subjects of investigation.

The Commission 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 Commission 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?**

Upon petition of the parties, the Commission provides parties with opportunities to consult regarding legal, factual, or procedural issues during the course of the investigation. The Commission may also (on its own volition or via party petition) hold public hearings and oral arguments to allow the parties to present evidence. Finally, the Commission does have the ability to issue administrative guidance to parties regarding certain conducts.

Transparency:

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


There is criticism around the sufficiency of notice to parties and the high level of redaction when parties do access documents.

The Commission 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?**

All case decisions are published on the Commission'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 Commission may publish very thorough explanations of its

decision, including legal and economic analysis. However, there is criticism that the Commission does not employ sufficient economic analysis in its decisions.

When it is appropriate, the Commission may also translate its decisions into the relevant languages. For example, the Commission 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 Commission 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?**

See answer of previous section.

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**

 (but with political limits imposed by Taiwan's sovereignty dispute with China).

The Commission has concluded bilateral international cooperation agreements with Australia, Hungary, Panama, Paraguay, and New Zealand. The Commission has also signed Memorandums of Understanding regarding the application of competition laws with Canada, Eswatini, France, Indonesia, Japan, and Mongolia.

The Commission 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 co-operation 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 Commission about possible enforcement actions on multi-level sales operations. To help facilitate regional collaboration, the Commission also maintains the Asia Pacific Economic Cooperation Competition Law and Policy Database.

The Commission 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?**

 (but with political limits imposed by Taiwan's sovereignty dispute with China).

Taiwan is a member of the International Competition Network.

It is not uncommon for the Commission 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 Commission will often consult foreign agencies in merger reviews.

On specific cases, the Commission will work with foreign competition authorities, though in practice, the Commission will seek the parties' consent before sharing information with foreign jurisdictions.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION
FOR
THE UNITED KINGDOM

INTRODUCTION:

The primary competition law regulatory authority in the UK is the Competition and Markets Authority ("CMA"). The CMA was established by the Enterprise and Regulatory Reform Act 2013 ("Reform Act"), superseding and inheriting the functions of the Competition Commission and Office of Fair Trading.

The primary law governing competition law in the UK is the Competition Act 1998 ("Competition Act"). This is augmented by the Enterprise Act 2002 ("Enterprise Act"), as amended by the Enterprise and Regulatory Reform Act 2013. The Digital Markets, Competition and Consumer Act 2024 further increases the scope of CMA enforcement. Mergers are governed by the Enterprise Act; restraint of trade and abuse of dominance investigations are governed by Chapter 1 and 2 of the Competition Act 1998, respectively. Cartels are governed by Chapter 1 (Sections 2-3) of the Competition Act 1998. Criminal prosecution for individuals involved in cartels is governed by Part 6 (Sections 188-202) of the Enterprise Act.

The CMA has obligations to transparency under the Competition Act, Enterprise Act, Reform Act, Freedom of Information Act 2000, and the Data Protection Act 1998.

The same laws govern competition law in England, Wales, Scotland, and Northern Ireland.

While the EU's competition law regime and regulations no longer apply to the UK, the UK did initially retain much of EU competition law as domestic law under the European Union (Withdrawal) Act 2018. For example, the UK retained Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). However, with the passage of the Retained EU Law (Revocation and Reform) Act 2023, the UK is now empowered to amend or repeal retained EU competition law provisions, to diverge from EU precedents, and to enhance policy autonomy of the UK.

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?**

All key laws pertaining to competition are available on the legislation website of the UK government, available at: https://www.legislation.gov.uk.

The major relevant guidance documents from the CMA regarding mergers are: (1) Mergers: Guidance on the CMA's jurisdiction and procedure ("CMA2"); (2) Merger Assessment

Guidelines ("CMA129"); (3) Disclosure of Information in CMA work ("CC7"); (4) Guidance on the CMA's mergers intelligence function ("CMA56"); (5) Merger Remedies Guidance ("CMA87"); (6) Suggested best practice for submissions of technical economic analysis from parties to the Competition Commission ("CC2com3"); (7) Administrative Penalties: Statement of Policy on the CMA's Approach ("CMA4"); (8) CMA rules of procedure for merger, market and special reference groups ("CMA17"); (9) Applications for leniency and no-action in cartel cases – OFT's detailed guidance on the principles and process ("OFT1495"); and (10) Transparency and Disclosure: Statement of the CMA's Policy and Approach ("CMA6"). These documents are available on the CMA website, located at https://www.gov.uk/topic/competition/mergers.

The major relevant guidance documents for restraint of trade and abuse of dominance investigations are: (1) Market investigation guidelines ("CC3"); (2) Market studies and investigations – guidance on the CMA's approach ("CMA3"); (3) CC7; (4) CC2com3; (5) Guidance on the CMA's investigation procedures in Competition Act 1998 cases ("CMA8"); and (6) Market investigation references ("OFT511"). These documents are available at: https://www.gov.uk/topic/competition/markets.

The major relevant guidance documents for cartels include: (1) CMA8; (2) Guidance on the application of the Chapter I prohibition in the Competition Act 1998 to horizontal agreements ("CMA184"); and 2) Cartel Offence Prosecution Guidance ("CMA9"). These documents are available at: https://www.gov.uk/topic/competition/competition-act-cartels.

The major guidance document for transparency disclosure issues is known as CMA6: Transparency and Disclosure: Statement of the CMA's Policy and Approach.

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?**

 for merger cases.

 for restraint of trade and abuse of dominance cases.

For mergers:

While there is technically no obligation to notify the CMA of a pending merger, the CMA can always investigate on its own initiative. Among other concerns, not notifying the CMA risks the merger being investigated and unwound after the fact. Parties may submit a Case Team Allocation Form, which will start the pre-notification process. This process gives the CMA a chance to ensure it has all the information it needs before starting formal merger inquiries. At the end of the pre-notification process, the parties will submit a Merger Notice.

Once the Merger Notice is complete, investigations are divided into Phase 1 and Phase 2. Phase 1 is conducted by the CMA Board, while Phase 2 is conducted by an inquiry group made up of at least 3 CMA panel members (CMA2, §10.4).

The CMA must complete Phase 1 assessments of mergers within 40 working days after submission of the completed Merger Notice (CMA2, §6.21). For voluntary notifications, the period starts the first day after the CMA confirms that it has received a completed merger notification. For investigations taken by the CMA on its own initiative, the period starts the working day after the CMA confirms that it has enough information to begin the investigation (CMA2, §6.22). The 40-working-days period can be extended under certain circumstances, such as when relevant information requested by the CMA remains outstanding. For mergers that have not been notified to the CMA, including already completed mergers, there is a 4-month statutory deadline for the CMA to decide whether to refer the matter to a phase 2 investigation (CMA18, §2.14).

Between days 15 and 20 the CMA will hold discussions with the relevant parties regarding the "state of play."

Typically, by day 25, the CMA will hold a meeting on complex or material competition issues. Prior to the meeting, the CMA will inform the parties in writing of the meeting and invite responses.

By day 40, the CMA will issue either a clearance decision or a decide to refer the matter to a phase 2 investigation. The matter will be referred to phase 2 if the CMA believes the merger is likely to result in a substantial lessening of competition ("SLC"). Upon CMA's decision regarding the phase 1 investigation, parties have 5 working days to propose an Undertaking in Lieu ("UIL") with remedies that fix the competition concerns. The CMA then has 10 working days to accept or reject the proposed UILs in principle. If the UILs are acceptable in principle, the CMA has 50 working days from the decision to further consider the UIL in detail. This period may be extended by 40 working days by the CMA.

If the investigation is referred to phase 2, the parties may request a suspension of the clock by 3 weeks to decide whether to abandon the transaction completely.

Phase 2 investigations have a statutory period of 24 weeks. The CMA has power to extend the period by 8 weeks. Phase 2 investigations include written submissions and oral hearings between the CMA and investigated parties and third parties. If the CMA finds that there is substantial danger of an SLC, then the CMA may decide on a remedy.

Once the CMA decides in a Phase 2 investigation, it has a statutory deadline of 12 weeks to issue an order or accept a UIL to effectuate its findings. This 12-week deadline may be extended by 6 weeks by the CMA.

There is a fast-track procedure for parties that request it either during pre-notification or during Phase 1. There are two potential outcomes of fast-tracking an investigation. Parties may try to fast-track to reach a faster Phase 1 clearance with UIL remedies. Alternatively, parties may request a fast-track to proceed directly to a Phase 2 investigation (CMA2, §7.5). In the latter

situation, the CMA typically makes the reference to a Phase 2 investigation within 10 to 15 days after receiving a completed merger notification.[1]

For restraint of trade/ abuse of dominance:

There is no formal timeline for investigations into restraint of trade/dominance.

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;

During investigations, the CMA will usually update the investigated parties on the status of the investigation. The CMA will hold state-of-play meetings to inform parties of the scope of investigation, updates to status, and any other important information. The first state-of-play meeting will usually be held during the initial stages of an investigation. The second one typically happens before the CMA issues the Statement of Objections ("SO").

The SO sets forth the CMA's provisional view that there is an infringement of the law (CMA8, §11.6). It sets forth the full case against the parties, including the CMA's legal and economic analysis. SOs are generally announced to the public (CMA8, §11.9). If appropriate, the CMA will issue a draft penalty statement at the same time as the SO. The draft penalty statement will set forth the proposed penalty and the reasoning for proposing such a penalty (CMA8, §11.15).

Once the CMA issues an SO, the agency will review each party's response before informing the parties of the CMA's updated concerns.

For mergers:

After the CMA identifies potentially problematic transactions, the agency may ask the parties involved to provide information. This information will be used to determine whether a formal investigation is necessary. Requests will typically be sent to a publicly available email address of the party. The information requested may include turnover, share of supply, and other basic information about the business and parties.

For restraint of trade/dominance:

Once the CMA has gathered the amount of information necessary in the preliminary investigation, it will issue an SO to the parties. The parties will then be granted access to the case file and prepare their response to the CMA's concerns.

b. the opportunity to be represented by counsel;

[1] https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide-uk-merger-control-phase-2-references/

Parties may request to have legal counsel present during all formal CMA interviews, question sessions, and oral hearings (CMA8, §6.22, 12.14).

When the CMA inspects a premise, whether with or without a warrant, the party may request for the presence of legal counsel. If notice was not given for the inspection, then officers may wait for a reasonable amount of time for legal counsel to arrive (CMA8, §6.43). The officer has discretion to determine whether it is reasonable in the circumstance to wait, how long to wait, and whether the party is complying with conditions that the officer imposes to facilitate the request for legal counsel. (Competition Act 1998 Order 2014 Rule 4.1(a)-(b)).

The CMA cannot force anyone to produce privileged communications—including those between attorney and clients—or information that requires an admission of infringing the law (Competition Act, §30; CMA8, §7.1).

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;

Parties that receive an SO or draft penalty statement can respond in writing to the concerns articulated within (CMA8, §12.1). The deadline to respond is determined on a case-by-case basis, but in no case will it be more than 12 weeks from the issuance of the SO or draft penalty statement (CMA8, §12.3).

The CMA gives all parties addressed by an SO the opportunity to testify at a single oral hearing (CMA8, §12.13). Parties should clearly state that they wish to attend the oral hearing. Legal advisers are allowed to assist at the hearing. The oral hearing is held after the submission of written responses to the SO or draft penalty statement. Parties should let the CMA know what it intends to discuss at the hearing. Any questions posed by the CMA to the party at a hearing can be answered in writing afterwards if the party so wishes (CMA8, §12.19).

In both the written response to the SO and the oral hearing, parties may introduce expert arguments. The CMA staff may ask parties questions, although there is no obligation to answer at the time the question is posed.

If the CMA receives new evidence that supports the SO or draft penalty statement, then the CMA will present the evidence in writing to the relevant party and give that party an opportunity to respond. The CMA may also issue a supplementary SO if new facts emerge or the nature of the investigation changes. The parties will have a chance to respond to any new supplementary SO (CMA8, §12.29).

During an appeal to the Competition Appeal Tribunal ("Tribunal"), parties may be allowed by the Tribunal to introduce expert witnesses and cross examine witnesses (although the court may limit cross examination in any way it deems appropriate). Witnesses may be required to give written evidence by way of affidavit.

d. the case files.

After the CMA issues the SO in a case, the parties are invited to inspect the file (CMA8, §11.21). The CMA will give parties a reasonable amount of time to inspect the file, with the amount of time dependent on the complexity and size of the investigation (CMA8, §11.23). The parties and the CMA may discuss further specifics of file access prior to the issuance of the SO.

The CMA may also provide a list of documents in its file while granting parties a reasonable opportunity to inspect any of the documents upon request.

Confidential information may be revealed to parties as part of a confidentiality ring or in data rooms (CMA8, §11.27). Typically, this is only done when external advisers need access to confidential information (CMA8, §11.29). Parties may request to use a confidentiality ring or data rooms, though the CMA retains the power to deny such a request (CMA8, §11.30).

During restraint of trade/dominance investigations, the CMA may provide formal complainants with access to the same information as the parties under investigation.

Third parties are generally not granted access to investigation files or submissions by parties.

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?

The procedural safeguards contained in the guidance documents apply to all parties.

The CMA has four main powers once it opens a formal investigation. It may: 1) require disclosure of documents and information; 2) require individuals to answer questions regarding the investigation; 3) conduct on-site search without warrant and request document production; 4) conduct dawn raids with a warrant to search for documents, including at residences.

To gather information, the CMA may send Section 26 formal information requests. These will inform the recipient of the subject of the investigation and the information that CMA seeks. The CMA can also require an individual with a connection to the business to answer questions on any relevant matter to the investigation. Such interviews may occur at any time, including immediately after the notice is given.

In merger investigations, the CMA may send Section 109 requests, which allow the CMA to access internal documents of the merging parties. Any potentially relevant document can be requested (CMA100, §18). The CMA may also request third party documents (CMA2, §9.9(a)).

Furthermore, the CMA may enter premises to gather information. The CMA may enter a business premise without a warrant if it gives the occupier of the premises two working days' written notice (CMA8, §6.27). Advance noticed is not required at all in instances when the CMA suspects that the premises are occupied by a party that is directly under investigation (CMA8, §6.28). A warrantless search grants CMA fewer powers than a search authorized by warrant.

The CMA must obtain a warrant to enter a domestic premise.

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

 See answer to Question 4.

Technical and expert economic analysis that are submitted to the CMA should follow the guidelines set out in CC2com3. This sets forth requirements on the completeness and replicability of the results, presentation of data analysis and econometric modelling, and the provision of data and program files.

Parties that are unsatisfied with the CMA's procedures regarding certain evidence can complain to the Procedural Officer, who is independent of the investigation. The Procedural Officer's decision is binding on the investigative team during Phase 1 merger investigations and market studies. The Procedural Officer's decision is advisory during a Phase 2 merger investigation or market investigation references (See: Guidance – Procedural Officer: raising procedural issues in CMA cases). Using the Procedural Officer does not prejudice the party's rights when it comes to appealing to the Tribunal (CMA8, §15.12).

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?

Both the merging parties and interested third parties may request a review of the CMA decision to the Competition Appeal Tribunal on matters of law and facts. Parties have 4 weeks from the date of notification of a decision or its publication to appeal to the Tribunal. The Tribunal does not face statutory time limits when it comes to making a judgment on appeals.

The Tribunal can take one of four possible actions on appeal: uphold the original CMA decision, set aside the decision, remit to the CMA for reconsideration, or make a decision that the CMA could have made in the first place.

If parties remain unsatisfied with the Tribunal's judgment on matters of law, they may appeal to the Court of Appeal within 14 days of the Tribunal judgment.

Note that, theoretically, parties may appeal to the Tribunal under the laws of any of the UK's three jurisdictions (England/Wales, Scotland, and Northern Ireland), though it appears that all have chosen English/Welsh law so far.

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?

For mergers:

The CMA may accept UILs instead of referring the merger to a phase 2 investigation (CMA2, §9.68). Parties may submit proposed UILs within 5 days of the CMA making a decision in a phase 1 investigation. Proposed UILs must address the SLC identified by the CMA in clear cut ways. The CMA must believe that the proposed UILs will sufficiently address issues identified in the phase 1 investigation (CMA87, §3.27). Potential remedies range from divestiture of assets, intellectual property remedies, enabling measures to promote competition, controlling outcomes to limit adverse effects of the merger, to a full prohibition of the merger.

During phase 2 investigations, there is a 12-week window after the CMA decision where remedies can be negotiated and implemented. The window can be extended by 6 weeks.

Note that the CMA cannot impose UILs during phase 1 investigations; it can only accept proposals (CMA87, §3.26). During phase 2, the CMA can accept UILs as conditions for approving a merger or imposing remedies as administrative orders.

The CMA prefers structural remedies over behavioral remedies. That is to say, there is a preference to restore competitive dynamic over regulation firm behavior.

For restraint of trade/dominance:

Parties may voluntarily settle with the CMA to receive discounts on the imposed financial penalty. To do so, the party must admit to breaching competition law. If the settlement is received before the filing of the Statement of Objections, the party may receive up to a 20% discount on the penalty. If the settlement is reached after the filing of the Statement of Objections, the discount is limited to 10%.

Settlement is technically not the same as immunity/leniency.

In order to gain benefit from the immunity/leniency rules, the party must fulfill several conditions. Type A immunity applies only if there is no existing CMA investigation on the matter and if the applicant: 1) is the first to inform CMA of the cartel behavior; 2) admits participation in cartel activity; 3) gives CMA all available non-privileged information; 4) cooperates with the CMA through the entire investigation; 5) ceases any further cooperation in the cartel activity; and 6) never coerced another party to participate in the cartel activity. The

party that receives type A immunity may be offered 100% immunity against fines, blanket immunity from criminal prosecution for individuals, and protection against actions to disqualify directors (OFT1495, §2.10).

Type B immunity applies if there is already an existing CMA investigation, and the applicant: 1) is the first to provide the CMA information; 2) admits participation in cartel activity; 3) gives CMA all available non-privileged information; 4) cooperates with the CMA through the entire investigation; 5) ceases any further cooperation in the cartel activity; and 6) never coerced another party to participate in the cartel activity. Those who receive Type B immunity may be offered discretionary immunity from fines, up to 100%, discretionary immunity from criminal prosecution for individuals, and protection from actions to disqualify directors (OFT1495, §2.16).

Type B leniency applies when Type B immunity is available, but the CMA chooses not to offer immunity. Instead, the CMA can grant up to 100% reduction in financial penalties. Typically, the CMA will not grant more than a 50% reduction on the financial penalty. The requirements are similar to Type B immunity.

Type C leniency applies when a party provides evidence to the CMA about an infringing activity before the issuing of the statement of objections in the investigation. The CMA can offer up to 50% reduction in fines, discretionary immunity from criminal prosecution from individuals, and protection from actions to disqualify directors (OFT1495, §2.25). For a party to receive Type C leniency, it must provide information that adds significant value to CMA's investigation (OFT1495, §2.26).

Parties may seek a marker to secure their position in the immunity/leniency line.

If a party produces information that is relevant to a separate investigation, then the party may receive Type B leniency in that separate matter. It may also receive an additional reduction in the fines imposed in the original investigation.

After the Brexit transition, parties must apply for leniency with the UK and EU separately.

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?

Parties may designate certain information as confidential, though the designation must be accompanied by sufficient explanation. Blanket claims of confidentiality are not accepted by the CMA (CMA6, §4.13).

The CMA automatically protects the confidentiality of information designated as such, except in cases where the party for whom the information pertains consents to release, where disclosure is necessary to comply with the law, where disclosure is proportionately necessary to the

investigation of a criminal matter, and where disclosure is necessary for the CMA to perform its statutory functions (CMA6, §4.20).

When the CMA wishes to disclose information, it must give the party supplying the information a reasonable opportunity to argue that the information should not be disclosed. When the information is disclosed, the CMA may redact, anonymize, or aggregate information as appropriate (CMA6, §4.30).

The CMA may use confidentiality rings or data rooms to disclose information. Usually, access to confidentiality rings and data rooms are limited to the parties' external advisers to allow them to fulfill their duties. Access is conditioned on these advisers not sharing the information with the parties (CMA6, §4.31-4.35).

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?

 See answer to Questions 7. There are mechanisms so that parties or advisers can access confidential information to prepare defenses.

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:

In the past, merging parties may request that the CMA give informal guidance on a confidential basis (without third party input) before the pre-notification phase of the investigation. Although the guidance is usually given by a senior member of CMA's mergers unit, the guidance is not binding on the CMA. Typically, the CMA will render informal guidance within 5 days of receiving a request. Note, however, that the latest CMA2 (as of 2025) does not include a provision for informal guidance before the pre-notification phase.

Once the pre-notification phase begins, parties are encouraged to participate in informal discussions with the CMA about the intended merger and potential remedies (CMA2, §6.19-6.20). Parties can do so by submitting a case team allocation form and the CMA attempts to review these submissions in a timely fashion.

The parties may also file short briefings to the CMA regarding an upcoming transaction. Such a note may explain why the parties have not or will not submit a merger notice to the CMA, including giving notice that the merger transaction is being investigated by a different jurisdiction.

For restraint of trade/dominance:

CMA may issue confidential and non-binding ad hoc advice. When appropriate, the CMA may publish such advice if the issue is new or unresolved.

TRANSPARENCY:

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

 with the caveat that an increasing amount of national security exceptions are being passed into law, which may decrease systemic transparency.

As answers to the previous questions show, the CMA has ample protections in place to ensure the transparency of enforcement activities. The relevant guidance document is CMA6, which lays out the CMA's approach and policy towards transparency.

The major concern for transparency is the increasing focus on national security reviews for transactions. On April 29, 2021, the UK passed the UK National Security and Investment Bill, which dramatically increases the amount of power the government has over inbound investment. On May 21, 2024, the UK government published an additional guidance document on this law, setting for the relevant risks that will trigger investigation. The law gives the government the ability to impose conditions and block transactions that may be considered national security risks. One noteworthy aspect of the law is that transactions may be retroactively reviewed for up to 5 years after closing.

The threshold that triggers a CMA investigation is especially low for enterprises involving a) development or production of items of military or military and civilian use; b) design and maintenance of computer hardware; c) development and production of quantum technologies; d) artificial intelligence; e) cryptographic authentication; and f) specified advance materials.

In addition, the government can intervene in cases involving media plurality, financial system stability, and public health emergencies. When such a case arises, the CMA may have to hand over decision-making power to the relevant Secretary of State.

Mergers involving water or sewage enterprises are subject to a special set of rules under the Water Act 2014.

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?**

For mergers, the CMA must publish a public invitation to comment if it chooses to investigate a matter. The Enterprise Act 2002 also generally requires the CMA to publish a reasoned decision on the decision to refer or not to refer a matter to a phase 2 investigation.

During the phase 1 investigation, the CMA will publish interim orders, any statutory deadlines, invitations for third-party comments, decisions on a phase 2 reference, and alternative remedies. The phase 1 notification is not published. During phase 2 investigations, the CMA will publish submissions, hearing summaries, responses, findings, and a final report. Sometimes the CMA will publish the phase one notification during the phase 2 investigation.

For restraint of trade/dominance investigations, the CMA will usually publish a notice of investigation, if doing so will not prejudice the investigation itself.

The results of restraint of trade/dominance investigations are published on the CMA website. Each case has a dedicated public page, which lays out the case overview, timetable, the procedural officer's decisions, a non-confidential decision, any fines levied, statement of objections, notes, and other information relevant to the case.

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?

All CMA cases are listed on the CMA website at: https://www.gov.uk/cma-cases.

For merger cases:

All merger orders in force are available on the CMA website at: https://www.gov.uk/government/publications/mergers-orders-and-undertakings.

For restraint of trade/abuse of dominance cases:

All decisions made by the CMA based on the Competition Act 1998 are available on the CMA website at: https://www.gov.uk/government/publications/ca98-public-register/ca98-register.

All commitments currently in force are listed on the CMA website as well: https://www.gov.uk/government/publications/competition-act-1998-directions-and-commitments-register/ca98-register-of-directions-and-commitments-currently-in-force.

All orders, undertakings, and directions relating to markets and monopolies are available at: https://www.gov.uk/government/collections/markets-orders-and-undertakings-register.

All CMA letters to companies in breach of orders and undertakings are available at: https://www.gov.uk/government/collections/cma-letters-to-companies-in-breach-of-market-investigation-orders.

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**

The CMA is a member of organizations such as the Organisation for Economic Cooperation and Development, the International Competition Network, the International Consumer Protection and Enforcement Network, and the United Nations Conference on Trade and Development. It is empowered to share information with other international agencies or international forums.

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

CMA has signed new framework agreements with Australia, Canada, New Zealand, and the United States (both the Department of Justice as well as the Federal Trade Commission). The UK retains some cooperation with European national competition authorities as well as the European Commission.

COMPETITION REGULATORY AGENCY REVIEW AND EVALUATION
FOR
THE UNITED STATES

Country Report

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)[28]
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.

[28] New merger guidelines scheduled to be released in latter part of 2023.

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:
    - The proposed charging language.
    - An explanation of the methodology used to compute the defendant's sentencing range under the US Federal Sentencing Guidelines.
    - An explanation of how staff arrived at the recommended sentence.
    - Any unique provisions in the plea agreement.
    - Any substantive deviations from the DOJ's standard plea agreement language.
    - A description of the potential charges faced by the proposed defendant had the case proceeded to indictment.
    - 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.

<u>Merger control in the United States: Overview</u>

- 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. Retrieved 7 Aug. 2019

FTC and DOJ Antitrust Guidance and Resources Checklist
by Practical Law Antitrust Related Content
Westlaw - Maintained • USA (National/Federal)
“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

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