

## Enforcement Harmony: Keeping Competition Regulation and Due Process in Sync

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### I. Introduction

Effective competition regulation seeks to foster a level playing field and promote market efficiency. To do so, some authorities are turning to *ex-ante* interventions aimed at preventing anticompetitive practices before they occur. And while there may be as many opinions about regulation as there are new proposals, one “universal truth” is clear: striking the right balance between regulation and fundamental rights is crucial.

A frequent concern about these proactive *ex ante* frameworks is that, in the pursuit of swift market correction, they can neglect or sideline fundamental due process principles. Procedural safeguards can also provide immense value to the regulator itself. As the International Competition Network (ICN) has stated in its *ICN Framework on Competition Agency Procedures*, “[f]air and effective procedures are essential to sound competition law enforcement and can increase opportunities

for international cooperation.”<sup>1</sup> Adherence to due process ensures that interventions are based on a complete factual record, bolstering confidence in the quality and objectivity of an authority’s decisions. Procedurally sound processes therefore enhance the legitimacy of the regulatory agency in the eyes of the market and the public. In addition, procedural safeguards can lead to a lower frequency of judicial review, ultimately preserving agency resources.

Upholding due process protections is not only a matter of fairness, but also a foundational principle of good *ex ante* regulation, based on universal constitutional protections. The *Ten Principles of Ex Ante Regulation*, a distillation of internationally recognized “best practices” for the creation of competition regulation, concludes with the principle that good regulation should preserve “the fundamental [due process] protections afforded to investigatory targets.”<sup>2</sup> Drawing on the work of a number of international organizations, notably the ICN and the Organization for Economic Cooperation and Development (OECD), this paper sets out the key and generally recognized due process principles. Each principle is examined through the lens of international consensus, importance to fair and effective regulation, and, where

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<sup>1</sup> INT’L COMPETITION NETWORK, *ICN FRAMEWORK ON COMPETITION AGENCY PROCEDURES* (2019), <https://internationalcompetitionnetwork.org/>

[wp-content/uploads/2019/04/ICN\\_CAP.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/04/ICN_CAP.pdf) [hereinafter ICN CAP].

<sup>2</sup> John Taladay & Paul Lugard, *The Ten Principles of Ex Ante Competition Regulation*, *CPI COLUMNS* 5 (Nov. 2022), <https://www.competitionpolicyinternational.com/wp-content/uploads/2022/11/OECD-Column-October-2022-2-Full.pdf>.



available, practical application in recent *ex ante* regulations.

Recognizing these due process principles takes on particular importance in a time when numerous jurisdictions are actively shaping regulations. Thus, the use of common principles can ease implementation and avoid disputes and confusion.<sup>3</sup> In setting out these principles, this paper does not endorse a comprehensive convergence of regulatory regimes or proposals. Instead, this paper advocates for the safeguarding of fundamental rights across diverse regulatory landscapes. The application of due process should not be selectively applied within geographic boundaries but should transcend borders and legislative systems.

This paper examines six due process protections critical to effective *ex ante* regulation, each of them important to ensure the legitimacy of regulatory schemes, whether they are entirely new or being assessed, expanded, or revised.<sup>4</sup> And while these principles loosely follow the sequence of a competition investigation, they have broad applicability outside of competition laws.

## II. Foundational Tenets of “Good Governance”

Before diving into a discussion of specific principles, it is important to acknowledge the overarching principles of good governance that underpin effective regulation – the foundation for a sound regulatory structure. Principles of impartiality,<sup>5</sup> transparency,<sup>6</sup> and respect for

<sup>3</sup> See, e.g., India’s proposed Digital Competition Bill, Australia’s consideration of a new digital competition regime, and Brazil’s *ex ante* competition regulations aimed at digital platforms.

<sup>4</sup> The OECD recommends that authorities “[p]eriodically review their legal framework, public policies and competition authority rules, procedures, and guidelines.” OECD, Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement, OECD/LEGAL/0465 (Oct. 6, 2021), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0465> [hereinafter OECD Recommendation on Transparency and Procedural Fairness].

<sup>5</sup> Impartiality means that regulations should be administered in a neutral and objective manner, without favoring any particular company or industry. It can be found in the *Ten Principles of Ex Ante Regulation* (“good regulation should maintain competitive neutrality”), as well as the *ICN Framework on Competition Agency Procedures*, which

calls for participating member competition authorities to ensure that their “investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.” Taladay & Lugard, *supra* note 2, at 5; ICN CAP, *supra* note 1, at 4.

<sup>6</sup> Transparency is essential in establishing confidence and trust in the regulatory system. See Antonio Capobianco & Gabriella Erdei, *Procedural Fairness and Transparency in Competition Proceedings*, CPI ANTITRUST CHRON. 4 (Nov. 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/11/CPI-Capobianco-Erdei.pdf> (“Transparency is an integral part of due process since it enables individuals to know their rights, be aware of procedures to protect these rights, and learn the rationale and grounds of public authorities’ decisions concerning themselves and other individuals.”). Transparency is particularly important in competition enforcement, as competition laws are often



jurisdictional limits<sup>7</sup> are essential preconditions to establish trust and ensure the legitimacy of regulatory regimes.<sup>8</sup> This trio ensures not only a fair and just legal process but also ensures an atmosphere where regulations can be effectively implemented. Without this bedrock, even the most well-intentioned regulations risk becoming an ineffective façade.

### III. Due Process Principles for Good Regulation

With a firm foundation in place, we can turn to the key principles of due process. These are the scaffolding for a fair and effective competition regulation. Indeed, U.S. Federal Trade Commission Chairman Andrew Ferguson recently reaffirmed global

convergence around due process as a “critical, shared value” in antitrust enforcement.<sup>9</sup>

*A. Principle #1: Good regulation should be enforced in a timely and efficient manner*

In its *Guiding Principles for Procedural Fairness*, the ICN emphasizes the importance of expeditious yet comprehensive enforcement, advocating that authorities conduct investigations “within a reasonable time, appropriate to the circumstances of the matter” while avoiding “unreasonable costs and burdens for parties, third parties, and agencies.”<sup>10</sup> Discussions at an OECD roundtable on procedural fairness put it plainly:

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written as general frameworks and later refined through case-by-case enforcement, which may entail a high degree of enforcement discretion. Transparency “leads to faster, better informed and more robust casework and decision making by following processes that are more consistently applied and better understood by all those that are participating.” OECD, PROCEDURAL FAIRNESS AND TRANSPARENCY: KEY POINTS 42 (2012), [https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/11/procedural-fairness-and-transparency-key-findings\\_ee42a955/17f27597-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2012/11/procedural-fairness-and-transparency-key-findings_ee42a955/17f27597-en.pdf) [hereinafter OECD PROCEDURAL FAIRNESS KEY POINTS].

<sup>7</sup> Adherence to jurisdictional boundaries and the practice of comity prevents conflicts between regulatory bodies and reduces confusion for companies striving to comply with multiple regulatory regimes, simplifying compliance for businesses while also promoting harmonious international and domestic regulatory relationships. Respect for jurisdictional limits also helps to avoid

use of competition regulation as an industrial policy or trade tool.

<sup>8</sup> See INT’L CHAMBER OF COM., EFFECTIVE PROCEDURAL SAFEGUARDS IN COMPETITION LAW ENFORCEMENT PROCEEDINGS 2 (June 2017) (on file with author) [hereinafter ICC PROCEDURAL SAFEGUARDS] (emphasizing “overarching principles” that should apply generally to competition law enforcement proceedings).

<sup>9</sup> Andrew N. Ferguson, Chairman, U.S. Fed. Trade Comm’n, Competition in the 21st Century: Heeding The Rallying Cry for Deregulation, Address Before the Int’l Competition Network Ann. Conf. 2025, at 2 (May 7, 2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/chairman-ferguson-2025-icn-remarks.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/chairman-ferguson-2025-icn-remarks.pdf).

<sup>10</sup> INT’L COMPETITION NETWORK, GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT 2 (2018), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_GuidingPrinciples\\_ProFairness.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf) [hereinafter ICN GUIDING PRINCIPLES].



“investigations should not last for an unreasonable length of time.”<sup>11</sup>

The issue of timeliness is particularly relevant in non-merger matters—where agencies often enjoy broader discretion or open-ended “phases” of investigation—but timeliness is critical to all types of proceedings. Protracted or rushed investigations can erode the legitimacy of the regulatory process and hinder efficient resource allocation within competition agencies.<sup>12</sup> Returning to the foundation of good governance, establishing and adhering to reasonable timeframes signal an authority’s commitment to transparency. The importance of timeliness extends beyond *ex ante* regulation: for example, the European Commission’s 2025 consultation on procedural rules may lead to more defined timelines for investigations, reinforcing the importance of this principle in practice.<sup>13</sup>

While some jurisdictions offer expedited “fast track” procedures for certain types of investigations, it is important to note that the need for clarity does not automatically equate to a need for speed. Rather, regulations that embody this principle recognize the need for clear and

defined timeframes, not simply rapid resolution.

*B. Principle #2: Subjects of regulation should be granted rights of access.*

### *1. Access to Authorities*

The first part of this principle requires that parties be granted access to the relevant authority(ies). Competition enforcement can be particularly efficient when there is a collaborative relationship between the authorities and the entities they regulate. A crucial element of this collaboration is ensuring that regulated entities have clear and meaningful access rights. This applies both to access to the authorities developing and applying the regulation—in order to understand its scope and application—as well as to the authorities that conduct any enforcement actions under the regulation.

Subjects of regulation should have established channels to access rulemaking authorities for clarification and guidance on the scope and application of competition regulations. These channels can be specific to the development of a particular regulation (e.g., formal consultations or market studies) or a standing communication method for a particular

<sup>11</sup> OECD PROCEDURAL FAIRNESS KEY POINTS, *supra* note 6, at 27.

<sup>12</sup> Consider, for example, the relative speed with which the European Commission fined Meta and Apple for breaching the DMA infringements (both fines coming one year and one month after the initial proceedings launched by the Commission) vs. a prior Commission anti-steering case against Apple, which dragged on for nearly a decade. Alba Ribera Martinez, *The DMA’s*

*Meta and Apple Fined by the European Commission*, KLUWER COMPETITION L. BLOG (Apr. 28, 2025), Alba Ribera Martinez, *The DMA’s Teeth: Meta and Apple Fined by the European Commission*, Kluwer Competition Law Blog (April 28, 2025).

<sup>13</sup> *EU Antitrust Procedural Rules – Revision*, EUR. COMM’N, [https://competition-policy.ec.europa.eu/public-consultations/eu-antitrust-revision-procedural-rules-Teethrevision\\_en](https://competition-policy.ec.europa.eu/public-consultations/eu-antitrust-revision-procedural-rules-Teethrevision_en).



agency. Such access serves two purposes: by fostering open communication, regulated entities gain a clearer understanding of regulatory expectations, reducing the risk of unintentional non-compliance or unnecessary burden. Additionally, access encourages a more collaborative regulatory environment. Regulated entities can proactively seek clarification on potential gray areas, which allows authorities to refine regulations and guidance to be more effective and adaptable.

## 2. Access to File

Due process also requires a right of access to file. This is a well-established feature of many competition enforcement regimes and is closely linked to the right of defense. The European Commission's Directorate-General for Competition describes it as "one of the procedural guarantees intended to apply the principle of equality of arms and to protect the rights of the defence."<sup>14</sup> The Commission's *Best Practices* for competition proceedings expresses the right of access in Article 101/102 proceedings in the following manner:

The addressees of the Statement of Objections are granted access to the

Commission's file, in accordance with Article 27(2) of Regulation (EC) No 1/2003 and Articles 15 and 16 of the Implementing Regulation, so as to allow them to effectively express their views on the preliminary conclusions reached by the Commission in its Statement of Objections.<sup>15</sup>

The ICN advises that subjects of an enforcement proceeding should be granted "reasonable and timely access" to information "necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions."<sup>16</sup> The International Chamber of Commerce (ICC) similarly recommends that "[s]ubject to reasonable safeguards for confidential information, both inculpatory **and exculpatory** evidence should be disclosed to the investigated parties in sufficient time for them to assess the information in preparation for their defense."<sup>17</sup>

The fundamental importance of the right of access to file is starkly illustrated by the European General Court's high-profile annulments of the European Commission

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<sup>14</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, 2005 O.J. (C 325) 7, ¶ 1.

<sup>15</sup> Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6, ¶ 92. The Digital Markets Act also notes the importance of respecting "the fundamental right to be heard and to have access to the file

in the context of [DMA] enforcement proceedings." Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 2022 O.J. (L 265) 1, ¶ 80.

<sup>16</sup> ICN CAP, *supra* note 1, at 6.

<sup>17</sup> ICC PROCEDURAL SAFEGUARDS, *supra* note 8, at 5 (emphasis added).



decisions against Intel and Qualcomm.<sup>18</sup> In both cases, the Commission had imposed hefty fines for abuse of dominance under Article 102. However, the Court overturned these decisions on procedural grounds, finding that the Commission had failed to properly record and disclose key evidence. The Court reasoned that by denying the companies access to this information, the Commission had compromised Intel and Qualcomm’s ability to fully exercise their defense. Even if the evidence had not changed the final outcome, the companies were deprived of the opportunity to review it and use it in their defense. These rare and significant reversals underscore the importance of access to file.

There is no single “best way” to grant access to file. Approaches vary by jurisdiction and proceeding type and may involve the use of subpoenas or other procedural tools.<sup>19</sup> What matters is that target companies and stakeholders have a meaningful ability to participate effectively in legal proceedings or regulatory processes.

Beyond the benefits of transparency and accountability (as well as being a fundamental right), access to decisionmakers in competition agencies and regulators can offer significant practical advantages. Open discussions can reduce the overall burden on authorities by

streamlining information exchange. This can also (in appropriate cases) facilitate direct negotiation, compromises, or exploration of alternative solutions that can lead to swifter and more efficient resolutions. As highlighted by the OECD, creating opportunities “for parties to meet with investigative staff, agency leadership, and other decision-makers” opens a pathway to achieving these benefits.<sup>20</sup>

*C. Principle #3: Investigatory targets of regulatory authorities should be given the right to respond to the allegations against them.*

The right of access goes hand-in-hand with the right to respond, i.e., the right to a fair hearing. Competition regulations must guarantee not just access to authorities but the opportunity for targeted entities to “respond to the agency’s allegations of anti-competitive conduct, and present evidence and their views.”<sup>21</sup> The ICC recommends that the right to respond be granted as both an opportunity to submit a written response and to make presentations at an oral hearing.<sup>22</sup>

At the outset, providing a meaningful and objective opportunity to respond means that investigating authorities must be mindful of how public statements may shape opinions and drive judgments before parties

<sup>18</sup> Case T-235/18, *Qualcomm Inc. v. Comm’n*, ECLI:EU:T:2022:358 (June 15, 2022); Case T-286/09, *Intel Corp. Inc. v. Comm’n*, ECLI:EU:T:2022:19 (Jan. 26, 2022).

<sup>19</sup> For further discussion of access to file in two specific regimes—the European Union and the United States—see Despina Pachnou & Eduardo Mangada Real de Asúa, *Due Process in Competition Law Enforcement:*

*Minimum Standards on Accessible and Protected Information*, 85 ANTITRUST L.J. 597 (2024).

<sup>20</sup> OECD PROCEDURAL FAIRNESS KEY POINTS, *supra* note 6, at 13.

<sup>21</sup> ICN GUIDING PRINCIPLES, *supra* note 10, at 1.

<sup>22</sup> ICC PROCEDURAL SAFEGUARDS, *supra* note 8, at 7.



have had their chance to speak. The OECD recommends that “any public notice by the competition authority of the opening of investigations and the publication of allegations against parties are not presented as a determination of the matter.”<sup>23</sup>

Critically, the right to respond also requires that parties are properly informed of the allegations against them if they are to exercise their “right to confront evidence and arguments.”<sup>24</sup> An investigating authority’s communication of such allegations, whether via public notice or otherwise, must be specific enough to allow the targeted party to prepare an effective defense to all claims. In order to be effective, however, the right to respond must be meaningful. Regulations should mandate that evidence and information presented by the target is considered by the decisionmaker and weighed against the evidence supporting the allegations. It is also critical that authorities are cautious about implementing any interim measures or remedies until the targeted entity is given a meaningful opportunity to present its defense, as such measures can inflict significant (and often irreparable) harm. A defense that falls on deaf ears or comes too late, no matter how compelling, undermines the very essence of due process and can lead to demonstrably unfair outcomes, as well as weakening the regulator’s case in the event of an appeal and the perception of legitimacy of decision making.

*D. Principle #4: All decisions of the regulating agency should be in writing and made public.*

Once a company has exercised its right to respond and the evidence has been assessed comes a critical stage in the enforcement process: an agency’s decision. Ideally, as described in Principle #1, this decision should be issued in a timely manner. Additionally, all decisions by a competition authority should be issued in writing and a non-confidential version made available to the public. As the ICN prescribes, decisions should “set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions” and should be “publicly available, subject to confidentiality rules and applicable legal exceptions.”<sup>25</sup> The OECD’s 2021 *Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement* links publication of “facts, legal basis and sanctions relating to decisions” as a core component of ensuring the transparency and predictability of competition law.<sup>26</sup>

Written decisions are fundamental to the development of the law. In a lament over agency settlements, Whish says, “[Without infringement decisions] how does the law develop? . . . What is the law in cases like [the European Commission’s investigations of]

<sup>23</sup> OECD Recommendation on Transparency and Procedural Fairness, *supra* note 4.

<sup>24</sup> Douglas H. Ginsburg & Taylor M. Owings, *Due Process in Competition Proceedings*, 11

COMPETITION L. INT’L 39, 42 (2015), <https://ssrn.com/abstract=3845576>.

<sup>25</sup> ICN CAP, *supra* note 1, at 7.

<sup>26</sup> OECD Recommendation on Transparency and Procedural Fairness, *supra* note 4.



*Google and Samsung? I suspect I will never find out.”<sup>27</sup>*

The need for written decisions extends beyond enforcement decisions. Equally important is the publication of the background research and decision-making process behind the creation of new regulations, and the publication of interpretation and guidance documents by a regulating authority. Publishing such “ancillary” materials reduces the risk of non-compliance by providing a clear public record of a regulation’s meaning and intent, as well as the regulatory agency’s prioritization and interpretation. It also signals an agency’s commitment to an open and accountable regulatory process. Without clarity, “[p]articipants in the global antitrust community cannot in turn adjust their own behavior to align with a particular institution’s expectations of what constitutes lawful conduct under that regime’s antitrust law.”<sup>28</sup>

This type of transparency is beneficial even in situations where an agency decides *not* to pursue an

enforcement action. Following debate in the House of Lords, the UK Digital Markets, Competition, and Consumers Bill was amended to include a requirement that, in situations where the Competition and Markets Authority (CMA) decides that an undertaking should not be designated as having strategic market status (SMS), the CMA must publish a notice that includes the reasons for the decision.<sup>29</sup> This increased transparency benefits both companies uncertain about their potential SMS status as well as those that may be looking to challenge their designations.

*E. Principle #5: Regulatory agencies should protect confidential information.*

Given that transparency is a foundational tenet of good governance, it is unsurprising that many of these principles of due process touch in some way on access to information. Principle #5, however, introduces a necessary counterpoint: the crucial role of confidentiality. While open communication and public decision-making are vital, regulatory agencies also bear the responsibility to safeguard confidential

<sup>27</sup> Faez Samadi, *Whish: Be Wary of DG Comp Settling Too Many Cases*, GLOB. COMPETITION REV. (2013), <https://globalcompetitionreview.com/article/whish-be-wary-of-dg-comp-settling-too-many-cases>. See also Ginsburg & Owings, *supra*, note 24, at 42 (identifying “a lack of transparency in the law” as a potential obstacle to due process).

<sup>28</sup> Jana I. Seidl & James F. Rill, *Advances in International Due Process Considerations: Proper Compliance Mechanisms Could Propel Convergence*, CPI ANTITRUST CHRON. 3 (Nov. 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/11/CPI-Seidl-Rill.pdf>.

<sup>29</sup> Digital Markets, Competition, and Consumers Bill [As Amended in Grand Committee] 2023-24, HL Bill [47] cl. 15(1), <https://bills.parliament.uk/publications/54208/documents/4421>. Similarly, national competition authorities in Europe are able to issue “no grounds for actions” decisions that can provide clarity to companies. See Mathew Heim, *The Curious Case of the European Commission’s Miss Jurisprudence: Lessons from Abandoned Article 102 Investigations*, 16 J. EUR. COMPETITION L. & PRAC. 285 (2025), <https://doi.org/10.1093/jeclap/lpaf046>.



information—“[b]usiness secrets, trade secrets or commercially sensitive information”—entrusted to them, as well as respecting legal privilege.<sup>30</sup>

The rationale for protecting confidential information is twofold. First, failure to do so can cause significant harm to the entities disclosing sensitive information. Leaked business secrets can give competitors an unfair advantage, impacting a company’s market position and incentives to innovate. Second, a lack of confidentiality can hinder an agency’s ability to gather information in future investigations. Companies may be hesitant to share vital details if they fear that confidential information could be inadvertently disclosed. As exemplified by the 2021 disclosure of a confidential Competition Commission of India report into an antitrust investigation into Google, such leaks can erode trust and discourage cooperation from investigated entities.<sup>31</sup>

Striking a balance between transparency and protection of confidential information is a delicate act, and there is no “one size fits all” approach. Competition authorities should foster a culture of open collaboration with companies providing confidential information. This can involve working with these entities to identify the

scope of sensitive information and determine the most effective methods for protection.

*F. Principle #6: Decisions and remedies of regulatory authorities should be subject to independent judicial review.*

The final principle underscores the importance of independent judicial review as a cornerstone of fair and effective enforcement. It recognizes that, in addition to internal procedures within competition agencies aimed at ensuring procedural fairness and catching “bad” cases, decisions by these bodies should also be subject to scrutiny by an independent judicial body.<sup>32</sup> This external review process is particularly crucial when competition authorities are structured as administrative bodies, which can lack the same level of judicial oversight as courts.

In considering the role of judicial review in competition proceedings in particular, Geradin and Petit describe its importance in the context of its many “functions:”

Lawyers, economists and political scientists assign three distinct functions to judicial review. First, lawyers conceive judicial review as a means to safeguard universal values (1). Second, economists

<sup>30</sup> OECD PROCEDURAL FAIRNESS KEY POINTS, *supra* note 6, at 27.

<sup>31</sup> Aditya Kalra, *Google Suing India Antitrust Watchdog for Investigation Report Leak*, REUTERS (Sept. 23, 2021), <https://www.reuters.com/world/india/google-suing-india-antitrust-watchdog-investigation-report-leak-2021-09-23>. See also Statement of Chairwoman Edith Ramirez, and Commissioners Julie Brill and Maureen K. Ohlhausen regarding the Google Investigation (Mar. 25, 2015),

<https://www.ftc.gov/news-events/news/press-releases/2015/03/statement-chairwoman-edith-ramirez-commissioners-julie-brill-maureen-k-ohlhausen-regarding-google>.

<sup>32</sup> See OECD Recommendation on Transparency and Procedural Fairness, *supra* note 4 (recommending that adherents “ensure access to an impartial review by an adjudicative body . . . that is independent and separate from the competition authority”).



consider that the function of judicial review is to promote economic welfare (2). Third, political scientists argue that judicial review purports to ensure accountability (3).<sup>33</sup>

Geradin and Petit argue that judicial review is “particularly essential” in competition law, in part because competition authorities are often “confronted with a patchwork of inconsistent theories concocted by clever plaintiffs and defense counsel” that can lead to “confused, and thus generally misguided, enforcement initiatives.”<sup>34</sup> Concerns also exist with the administration of newly-created *ex ante* regulations, many of which are borne out of a need to act quickly to regulate fast-moving industries without a great deal of case-based experience.<sup>35</sup>

While some jurisdictions limit judicial review to considering adherence to procedural rules, a broader scope of review allows the independent judicial body to evaluate the entire decision-making process.<sup>36</sup> This ensures that an enforcing agency has not only followed proper

procedures but has also reached a sound conclusion based on the applicable law and evidence presented.

Just as with an initial decision issued by a competition agency (as described in Principle #4), a “decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.”<sup>37</sup> Requiring a reasoned and detailed decision on review promotes clarity and accountability within the judicial system.

Remedies under review generally should be suspended during the appeal process unless irreversible harm would result from the suspension. This safeguards the rights of investigated entities by preventing the imposition of potentially unwarranted or burdensome remedies while a decision is under review. Notably, Germany’s 11th Amendment to its competition law—which empowers the Bundeskartellamt to impose *ex ante* behavioral and structural remedies following a market inquiry—maintains the existing competition law’s suspension of legal remedies when a decision is under appeal,

<sup>33</sup> Damien Geradin & Nicolas Petit, *Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment* 4 (TILEC Discussion Paper No. 2011-008, 2011), <https://ssrn.com/abstract=1698342>.

<sup>34</sup> *Id.* at 9.

<sup>35</sup> Some have touted the benefit of *ex post* enforcement over *ex ante* regulation as helpful to these concerns. In remarks at the 2025 ICN Annual Conference, FTC Chairman Andrew Ferguson argued that *ex post* enforcement better preserves procedural fairness by requiring evidence-based, tailored interventions. Ferguson, *supra* note 9, at 3.

<sup>36</sup> This trend towards more intensive scrutiny is exemplified by the European Union’s Court of Justice, which now effectively provides a

full review of both law and fact in competition cases. This evolution has been largely driven by the increasing significance of antitrust sanctions and the need to ensure conformity with fundamental rights, particularly the right to a fair hearing as guaranteed by the European Convention on Human Rights. *See, e.g.*, Case C-185/15, *Groupe Gascogne v. Comm’n*, ECLI:EU:C:2017:3 (June 25, 2017).

<sup>37</sup> A.B.A., BEST PRACTICES FOR ANTITRUST PROCEDURE: REPORT OF THE SEC. OF ANTITRUST L. INT’L TASK FORCE 13 (May 22, 2015), <https://www.americanbar.org/content/dam/aba/publications/antitrust/comments-reports-briefs/2015/at-comments-bestprac-20150522.pdf>.



demonstrating that protection of rights can and should co-exist with imposition of remedies.<sup>38</sup>

#### IV. Conclusion

Just as a sound structure requires a solid foundation and sturdy scaffolding, effective competition regulation depends on a framework that upholds both good governance and due process. The three pillars of good governance—impartiality, transparency, and respect for jurisdictional limits—provide the essential foundation upon which the six principles of due process can be applied. Competition regulations incorporating these principles will provide clarity to investigated parties, encourage greater compliance, and ensure the vital protection of due process.

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<sup>38</sup> Competition Act [Gesetz gegen Wettbewerbsbeschränkungen – GWB], Oct. 25, 2023, BGBL. I at 294, §§ 66-67 (Ger.), *translation at* [https://www.gesetze-im-](https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0924)

[internet.de/englisch\\_gwb/englisch\\_gwb.html#p0924](https://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html#p0924).