



**AUTORIDADE DA  
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# **Best practices in publishing case-handling guidance and producing internal procedural manuals**

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# 1. Introduction and General remarks

- Transparency and procedural fairness is a topic of great relevance for competition authorities world wide
- It has been object of discussion in main international fora
- Several work product on transparency and procedural fairness:
  - OECD Procedural Fairness and Transparency - Key Points, recounting the results of Roundtables held in 2010 and 2011
  - ICN Competition Agency Transparency Practices (April 2013)
  - ICN Recommended Practices for Merger Notification and Review Procedures, RP VIII. Transparency
  - International Chamber of Commerce, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings, including topic of Transparency
  - ASEAN Regional Guidelines on Competition Policy, chapter on Transparency

# 1. Introduction and General remarks

- Different legal tradition may require different process yet still providing transparency and due process for the parties.
- Different means to pursue the common goal of transparency.
- There is always room for improvement!

## 2. Transparency and procedural fairness: Why?

- It 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;

## 2. Transparency and procedural fairness: Why?

- It drives efficiency in casework and decision making, and it forces discipline around deadlines allowing cost savings for the agency and the parties;

## 2. Transparency and procedural fairness: Why?

- It provides better outcomes in casework, leading to better respect for decision that are taking and greater understanding of the work of competition agency and the benefits of a competition regime, including in particular the promotion and understanding the aim of competition.

*OECD Procedural Fairness and Transparency Key Points*

# 3. Transparency and procedural fairness: How?

- **Transparency issues in general:**
  - **Transparency in Law and Policies:** information available to the stakeholders relating to the laws and policies governing the agencies activity as well as internal rules and procedures followed by the agency.
    - *E.g.:* Portuguese Competition Authority (PCA) is required by law to publish on its website its enforcement priorities for the coming year; decisions; recommendations; courts rulings.



### 3. Transparency and procedural fairness: How?

- **Transparency issues in general:**
  - **Transparency in Process:** information available to the stakeholders regarding the internal processes
    - *E.g.:* The PCA is required by law to publish on its website guiding lines on setting the amount of fines for breach of antitrust law and guiding lines on enforcement procedures. Apart from these legal transparency requirement, the PCA has also published several other guidelines such on merger proceedings.

### 3. Transparency and procedural fairness: How?

- **Transparency and procedural fairness in the investigative stage:**
  - **Opportunities for the parties involvement in and knowledge of agency decision-making at both interim and final decision-making stages**
    - *E.g.:* opportunities for the parties to meet with investigative staff, agency leadership and other decision makers; opportunities for the parties to review the agency concerns or statement of objections before the adoption of a final decision; disclosure of evidence, etc.

### 3. Transparency and procedural fairness: How?

- **Agencies' internal procedures and rules promoting the quality of the decision and fairness of investigation**
  - *E.g.:* ongoing internal review of investigatory decisions, the use of the devil's advocate review, review by a separate team of specialized economist. Employment of internal manuals of procedures when conducting investigation and possible commitment to time limits on the duration of the investigation.

## 4. International scene - Some examples

### **The OECD Procedural Fairness and Transparency Report :**

- Published in February 2012
- Summarizes three roundtable discussions on transparency and procedural fairness held in 2010 and 2011 and draws from 82 written submissions.
- Recognizes “a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members.”

## 4. International scene - Some examples

- **Key findings of the OECD Procedural Fairness and Transparency Report :**
  - agencies promote transparency with respect to the competition laws they enforce and the policies they implement;
  - agencies promote transparency of their investigative process;
  - agencies inform parties about, and provide opportunities for, engagement with agency decision-making during an investigation

## 4. International scene - Some examples

- **International Competition Network:**

In 2003 and 2004, ICN members approved three Recommended Practices on Conduct of Merger Investigations, Procedural Fairness, and Transparency

They include recommendations to provide:

- opportunities for meetings or discussions between the competition agency and the merging parties
- parties with an explanation of the competitive concerns that give rise to the need for an in-depth review
- parties with sufficient and timely information on the facts and competitive concerns
- parties with meaningful opportunity to respond to competitive concerns
- opportunities for third parties to express their views during an investigation
- transparency with respect to merger laws, procedures, and review standards, subject to appropriate protection of confidential information

## 4. International scene - Some examples

- **ICN Competition Agency transparency practices:**

In 2012 the ICN started a multiyear project on competition agency investigative process. In April 2013 published the results regarding transparency-related work. Results draw from answers from 36 agencies:

- **Agencies value transparency**
- **Transparency is universal**
- **Consistency across enforcement approaches**
- **Consistency across enforcement areas** (mergers, dominance/monopolization, cartels and others)
- **Methods for providing transparency are often linked**
- **Confidentiality is the biggest limit or counterbalance to agency transparency**

## 4. International scene - Some examples

- **International Chamber of Commerce “*Recommended Framework for Best Practices in International Competition Law Enforcement Proceedings*”** - The ICC framework recommends:
  - transparency with respect to competition laws and enforcement procedures and practices
  - informing parties of the existence of an investigation, the allegations, and the evidence supporting the claims
  - regular meetings with the parties to discuss the competition agency’s concerns and working theories
  - parties have the opportunity to submit written responses to competition agency provisional findings



## 4. International scene - Some examples

**The Association of Southeast Asian Nations (ASEAN) Guidelines on Competition Policy contain a chapter on procedural fairness. Its guidance includes statements that:**

- transparency is fundamental in order to support the credibility of the competition regulatory body
- the competition agency should provide transparency with respect to the application of policies, procedures and practices
- alleged infringing undertakings should have access to the investigation evidence gathered by the competition agency
- where feasible, the competition agency may also grant third parties interested in the proceedings access to specific information

**Thank you.**

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