Due Process in Antitrust Enforcement Through the Lens of Comparative Law

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Due Process in Antitrust Enforcement Through the Lens of Comparative Law

Christopher S. Yoo,† Yong Huang,‡ Thomas Fetzer,* and Shan Jiang**

Abstract

Due process in antitrust enforcement has significant implications for better professional and accurate enforcement decisions. Not only can due process spur economic growth, raise government credibility, and limit the abuse of powers according to law, it also promotes competitive reforms in monopolized sectors and curbs corruption. Jurisdictions learn from the best practices in the investigation process, decisionmaking process, and the announcement and judicial review of antitrust enforcement decisions. By comparing the enforcement policies of China, the European Union, and the United States, this article calls for better disclosure of evidence, participation of legal counsel, and protection of the procedural and substantive rights of the respondent in the investigation process. In conducting evidence review and arriving at punitive decisions, the enforcement agency should establish a separation between investigatory and adjudicatory functions. Finally, the issued punishment decision should contain more comprehensive information and be subject to judicial review of the court.

Key words: Antitrust, due process, transparency, procedural fairness, judicial review, separation of functions, disclosure of evidence

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I. INTRODUCTION

A global consensus has emerged recognizing the central role that competition law plays in promoting a nation’s prosperity. As the briefing notes on trade and competition policy for the 2003 Cancún WTO Ministerial acknowledged, there is a “growing realization that mutually supportive trade and competition policies can contribute to sound economic development, and that effective competition policies help to ensure that the benefits of liberalization and market-based reforms flow through to all citizens.”\(^1\) Although competition law was eventually deleted from the agenda of the Doha Round of GATT negotiations, having an effective competition law regime has become a de facto prerequisite for joining the WTO.\(^2\) The number of competition law enforcement agencies has continued to grow, with the membership of the global group of competition law authorities known as the International Competition Network (ICN) now including more than 130 countries.\(^3\)

Adherence to basic principles of due process has long been recognized as an essential aspect of proper competition law enforcement. The rule of law is generally understood to include several critical procedural components, such as due process, judicial review by an independent judiciary, equal application of the law, and transparency in decisionmaking processes.\(^4\) The WTO recognized that clarifying “core principles including transparency, non-discrimination and procedural fairness” represented one of the key mandates for its Working Group on the Interaction between Trade and Competition Policy.\(^5\)

China has also increasingly embraced its importance in the wake of its accession to the WTO.\(^6\) In 2018, the Chinese Securities Regulatory Commission has also instituted a system of independent administrative adjudicators to bring Chinese practice in line with international norms.

Recent judicial decisions have further underscored the importance of fair procedures and adequate judicial review. The Chinese Hainan District Court, for instance, recently reversed an AML decision by the local Development and Reform Commission (DRC). Although the Hainan High Court later reversed the district court’s decision,\(^7\) it further resulted in a retrial by the Supreme People’s Court. It was an important sign that decisions by enforcement agencies cannot avoid judicial review. Likewise, on September 6, 2017, the European Court of Justice (ECJ) sent a competition law case against Intel back to the General Court with instructions to examine all

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\(^2\) Beijing Amends Laws to Prepare for WTO Entry, Xinhua News Agency (Mar. 7, 2001) (quoting Zeng Jianhui, spokesman for the Fourth Session of the Ninth National People’s Congress).


\(^5\) WTO, supra note 1.


\(^7\) Case No. 1180 (琼行终 1180 号) (Hainan District Ct. 2017).
the arguments put forward by Intel. Additionally, the ECJ agreed with the ombudsman’s conclusion that enforcement authorities must maintain full records of both formal and informal meetings with competitors and held that the Commission had erred in merely providing a nonconfidential summary of an interview to Intel, although the court concluded error did not influence the decision. This rare rebuke pushed the Commission to adhere more carefully to the procedural rules protecting due process. Both judicial decisions underscore the importance of reasoned decisionmaking, internal controls, and transparency associated with fair enforcement procedures.

The past year has borne witness to an upsurge of interest in due process in the competition law community. For example, at its most recent annual meeting, the International Competition Network (ICN) adopted its Recommended Practices on Investigative Process, which represents the most authoritative type of document the ICN typically adopts; and sixty-two agencies became inaugural signatories of the ICN’s new Framework for Competition Agency Procedures (CAP). In addition, the Organization for Economic Cooperation and Development (OECD) extended its prior work on procedural fairness and transparency by conducting additional roundtables on the topic, and beginning consideration of a Draft Recommendation of

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9 See id. paras. 83–107.
the Council on Transparency and Procedural Fairness in Competition Law laying out principles that could serve as benchmark for due process in antitrust enforcement. The American Bar Association (ABA) Antitrust Section’s International Task Force followed up on the best practices issued in 2015 by conducting an assessment of the extent to which different agencies were complying with them. The Association of Southeast Asian Nations (ASEAN) and the International Chamber of Commerce (ICC) have offered similar guidance.

While the existing guidelines and best practices are helpful, they are pitched at a high level of generality and stop short of detailed application to national law. This report strives to fill that void by engaging in a detailed comparison of procedures employed by competition law officials in China, the European Union (EU), and the United States (U.S.) and tracing how each relates to the guidelines and best practices identified by the leading multilateral initiatives discussed above. Specifically, it breaks down the enforcement process into six major phases, including:

1. Investigations: requests for documents, interviews, and interrogatories
2. Investigations: Inspections of company premises
3. Agency deliberations
4. Issuance of decisions
5. Settlements
6. Judicial review of final decisions

The report then divides each phase into two-to-six individual steps, for a total of twenty-eight steps. Within each step, the report examines the current law in all three jurisdictions, analyze similarities and differences across the jurisdictions. The report concludes by identifying three procedures that are essential to due process and presenting several others that are not essential, but remain important.


17 See, e.g., ASS’N OF SOUTHEAST ASIAN NATIONS, ASEAN REGIONAL GUIDELINES ON COMPETITION POLICY (2010) [hereinafter ASEAN GUIDELINES].

It is now a fitting moment to assess the state of enforcement processes. China’s Anti-Monopoly Law (AML) celebrated its tenth anniversary of implementation in 2018, and China is currently considering possible revisions. The National People’s Congress Standing Committee recently revised China’s Administrative Litigation Law to make it more conducive to economic growth. At the same time, President Xi Jinping led a major anti-corruption campaign designed to stop government decisions that are motivated by personal or parochial interests and other abuses of power. All are part of broader efforts to balance the government-market relationship and make enterprises having operations in China more market responsive and efficient.

II. THE BENEFITS OF STRONG PROCEDURAL PROTECTIONS

Before discussing the existing enforcement procedures in China, the EU, and the U.S., it is worth considering why jurisdictions should use procedures to limit the discretion of enforcers. Although procedural protections can make enforcement more cumbersome, they yield numerous benefits to the agency and society. Determining the appropriate level of procedural protections thus requires striking a careful balance.

A. Compliance with Basic Norms of Impartiality

The right to be judged by an impartial decisionmaker is a cornerstone of due process. The well-established imperative that no person should be a judge in his or her own case is often embodied in the Latin phrase, *Nemo judex in re sua*, a saying with an ancient history, tracing from the Justinian Code, to coined by the celebrated Lord Coke’s in his landmark decision in *Dr. Bonham’s Case*, and to the present day. The historical justification for this principle is that serving as a judge in one’s own case creates an unacceptable appearance of possible bias, regardless of whether such bias actually exists. The emerging literature on cognitive psychology provides a stronger analytical and empirical foundation for this intuition, revealing that even the best-intentioned actors struggle to maintain their objectivity when forced to play the role of both advocate and adjudicator. Although civil law systems rely on inquisitorial procedures in courts, in which the judge both leads the questioning and makes the decision, the safeguards of judicial independence do not apply to administrative decisionmaking in which the decisionmaker also plays the role of investigator.

Administrative agencies are thus especially problematic as they often combine investigatory and prosecutory functions with adjudicatory functions. In the words of Martin Redish and Lawrence Marshall “if the adjudicator is himself an integral part of the governmental...
body on the other side of the case, then it is likely that his decision will be based on considerations other than the merits as developed by the evidence. The government would, in effect, be the judge of its own case.” European scholars have raised similar concerns in the context of competition law. Ian Forrester concludes, “The fusion of investigative and decision-making functions is incompatible with the notion of ‘an independent and impartial tribunal established by law’ enshrined in Art. 6 of the ECHR.” Heike Schweitzer similarly notes, “The Commission, vested both with investigative and prosecutorial powers, cannot be considered an impartial, quasi-judicial body if one takes the pervasive risk of a decisional bias into account.”

The U.S. Supreme Court came to the same conclusion in its 1950 decision in *Wong Yang Sung v. United States*, in which the Court held that asking “the same men . . . to serve both as prosecutors and as judges . . . weakens public confidence” in the fairness of the proceedings. “Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.”

The concern arises even if every official acts conscientiously and in good faith. Being a judge in one’s own cause is a structural conflict of interest that creates the appearance of impropriety even when the person adjudicating the dispute remains completely objective. The European Court of Human Rights (ECHR) has recognized that the combination of prosecutorial and adjudicatory functions may be cured by plenary judicial review. In that case, the independence of the appellate judge provides the necessary safeguard against self-dealing.

### B. Greater Accuracy of Decisions

Although difficult to verify empirically, the conventional wisdom holds that procedural protections lead to more accurate decisions. Professors Martin Redish and Lawrence Marshall conclude in the *Yale Law Journal* that the purpose of due process “is to ensure the most accurate decision possible. . . . The rights to notice, hearing, counsel, transcript, and to calling and cross-examining witnesses all relate directly to the accuracy of the adjudicative process.” Redish later observes that “[t]he connecting link between accuracy and due process is the belief that the adjudicator is more likely to find the facts correctly if the parties possessing both the strongest interest in the outcome and the greatest access to the relevant information are provided a meaningful opportunity to present their cases to the fact finder.” Harvard Law Professor Richard Stewart draws the same conclusion, noting that administrative procedures are “designed

28 339 U.S. 33, 42 (1950) (internal quotation marks omitted) (quoting PRESIDENT’S COMM. ON ADMIN. MGMT., *ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES* 36–37 (1937)).
to promote the accuracy, rationality, and reviewability of agency application of legislative directives.”

Vanderbilt Law Professor Edward Rubin similarly finds that “a consensus exists about the purpose of [due process]: to ensure accurate decisionmaking in government adjudications.”

Modern psychology and the related field of behavioral economics have identified certain common cognitive heuristics that cause decisionmakers to reach inaccurate decisions, summarized succinctly by Ian Forrester and Professor Wouter Wils. First, officials tend to identify with the agencies in which they serve and feel pride when their agency succeeds. Second, as Daniel Zimmer, former Chairman of the German Monopolies Commission, recognizes, human reasoning is subject to confirmation bias, defined as the tendency to accept conclusions consistent with one’s beliefs and to search for evidence that confirms those beliefs. To the extent that confirmation bias is an innate quality of all humans, initial conclusions formed during the early stages of an investigation are difficult to dislodge even in the face of contradictory evidence. Third, people are also subject to hindsight bias, which is the tendency to believe after the fact that the outcome could not have unfolded any other way. Therefore, any finding that the second phase of an investigation was unjustified would conflict with one’s confidence in the officials’ judgment in opening the case, causing considerable cognitive dissonance. The desire to avoid such dissonance can motivate participants to pursue the investigation in order to avoid discovery that the original investigatory decision was erroneous.

Zimmer thus concluded that “it is all too human for decision-makers who in an initial situation have evaluated a factual circumstance in a certain manner to stick to their original assessment even after a proceeding has been held.” Wils regarded an empirical study—which found that of the eighteen competition cases that had been fully adjudicated, courts had overturned twelve of the cases in their entirety and two of the cases in part, with only four cases having withstood judicial scrutiny—as corroborating the problem.

At the same time, there are countervailing considerations that may counterbalance the need for accuracy. For example, investigations may need to be kept secret during their early stages in order to prevent the destruction of evidence and the integrity of the investigation. This justification for a lack of transparency, however, is temporary. As the investigation approaches completion, the need for secrecy disappears and must give way to the respondents’ need for disclosure and the opportunity to contest any factual findings or legal conclusions.

Procedural protections are costly and must be balanced against other considerations like the government’s interest. In the words of Harvard Law Professor Richard Fallon, under certain

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36 *Id.*
37 Wils, *supra* note 34, at 216–18.
circumstances, “the individual's interest in fair and accurate results [must be balanced] against the governmental interest in efficient and expeditious decisionmaking.” The U.S. Supreme Court recognized this need to compromise between accuracy and efficiency in its landmark decision in *Mathews v Eldridge*. That said, subsequent decisions building on *Mathews* have tended to give controlling weight to the need for accuracy. And in any event, due process typically requires notice, the opportunity to present reasons why a particular action should not be taken, and the right to present evidence and to know opposing evidence.

Although due process requires some increase in enforcement costs, it does provide some compensating benefits. Research suggests that entities sanctioned by the government have greater compliance when they perceive the procedures as being fair. Procedural protections and transparency can also reduce future enforcement costs by allowing agencies to communicate their expectations to the regulated individuals or companies, thereby promoting greater compliance with the law.

C. **Stronger Economic Growth**

Economists have long recognized that due process and the rule of law play key roles in promoting economic growth. As Adam Smith wrote in 1776, “Commerce and manufactures, in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of the government.” Nobel Laureate Douglass North similarly noted that one of the greatest threats to a predictable and stable economic environment is a lack of institutional restraints on a powerful, discretionary state and that a non-restrained state will struggle to make consistent commitments to economic actors, making economic growth more difficult.

Modern scholarship concurs with Smith’s observation, confirming that the rule of law is either an important or the most important, statistically-significant factor that drives economic growth. A groundbreaking article by Stephen Knack and Philip Keefer found that protection of property rights has a positive effect on investment and economic growth. This was followed by the landmark work of Robert Barro finding that the rule of law, as measured by the International Country Risk Guide, had a positive effect on economic growth.

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Other corroborating studies drew similar conclusions. Robert Rigobon and Dani Rodrik found that the rule of law has a strong positive effect on income.50 Stephen Haggard and Lydia Tiede attempted to disaggregate the concept of the rule of law into different measures. Their survey of the empirical literature indicated that the rule of law has a positive impact on economic performance regardless of whether it is conceived of as protection of personal security, protection of property rights, checks on executive discretion, or limits on corruption. Their own empirical study found that the World Bank’s aggregate rule of law measure and the Transparency International Corruption Perception Index both had a significant impact on economic growth.51

Although these studies do not measure due process directly, the extent to which due process and the rule of law are correlated suggests that greater due process protections would help promote economic growth.

D. Increased Respect for the Government

Due process increases the perception among citizens that legal proceedings are fair. Procedural fairness in turn increases the perceived legitimacy of the government.52 In 1975 Thibaut and Walker published a simulation in which they varied the procedural protections given to hypothetical participants charged with illegal business espionage to measure which proceedings participants saw as most fair and legitimate. They found that participants were more likely to accept as legitimate: adversarial proceedings over inquisitorial ones, proceedings where there are rigorous procedures regulating the admission of evidence, and proceedings where their attorney was aligned with the defendant instead of the government.53 In another study, Leventhal identified six key characteristics of fair procedures: consistency, suppression of bias, decisionmaking accuracy, the correctability of errors, the presence of representation, and the ethics of the decisionmakers.54 Additional empirical studies confirm that representation and decisionmaker impartiality are essential factors for proceedings to be perceived as fair.55

Prohibiting the same agency officials from serving as both prosecutor and adjudicator further enhances respect for the government. As the President’s Committee on Administrative Management (commonly known as the Brownlow Committee) concluded in 1937, allowing “the

same men . . . [to] serve both as prosecutors and as judges . . . not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.\textsuperscript{56}

Due process protections also lead citizens to perceive the government—and not just particular legal proceedings—as fair. In a survey administered to over 1,500 people who had interacted with a local police department and the courts, Tom Tyler found that the following factors had significant impacts on participants’ perceptions of the government: whether authorities behaved ethically, whether a participant could be represented by counsel, the quality of decisions made, whether procedures were in place to correct errors, and whether procedures were consistent and nonbiased.\textsuperscript{57} Other studies have reached similar conclusions, finding the consistency of decisionmaking to be particularly important in the levels of fairness citizens ascribed to the government.\textsuperscript{58}

A perception that the government is fair produces numerous beneficial consequences. Studies suggest that procedural unfairness causes people to perceive others as responsible for results that occurred. Indeed, “holding someone else accountable for injustice, and directing responses toward the accountable party, emerges as an overall integrative theme across various theories of justice.”\textsuperscript{59} In contrast, when government procedures are fair, citizens are more likely to take responsibility for their own actions, even with outcomes that are unfavorable to them.\textsuperscript{60} This research suggests that due process procedures encourages people to take more responsibility for their actions, transforming them into better citizens.

The perception of fairness generates higher degrees of satisfaction with the government. Although it seems counterintuitive, citizens may care more about whether procedures are fair than their substantive outcomes. In their studies of interactions between citizens and the police, Tyler and Lind discovered that some citizens who received erroneous, but favorable outcomes—for example, when the traffic court dismissed a ticket for making an illegal turn despite the existence of footage showing the driver actually did so—were less satisfied with the court and perceived the proceedings as less legitimate than did citizens who received negative, but fair outcomes.\textsuperscript{61} Another study by Tyler showed that fair procedures had a greater positive impact on respect for law than did the favorableness or fairness of the outcome.\textsuperscript{62} Studies indicate that procedural fairness also plays a key role in shaping views of the legitimacy of executive decisionmaking as well.\textsuperscript{63} Other studies have drawn similar conclusions.\textsuperscript{64}

\textsuperscript{56} PRESIDENT’S COMM. ON ADMIN. MGMT., supra note 28, at 36–37.
\textsuperscript{60} See Joel Brockner, \textit{Procedural Fairness, Outcome Favorability, and Judgments of an Authority’s Responsibility}, 92 J. APPLIED PSYCH. 1657 (2007).
\textsuperscript{61} See LIND & TYLER, supra note 55
\textsuperscript{62} TYLER, supra note 52.
E. Better Compliance with the Law

The perception of fairness can make citizens more likely to comply with the law, particularly in borderline situations where they otherwise would not. Modern scholarship has cast doubt on the notion that the mere threat of punishment can effectively deter lawbreaking.65 Instead of simple threats, the more productive strategy obliges citizens to desire to comply with the law. As Paul Robinson explains in the criminal law context, if the law “earns a reputation as a reliable statement of what the community perceives as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor.”66

Empirical studies have confirmed that procedural fairness increases compliance with the law. Tyler’s landmark survey found that stronger procedural fairness by the courts and policy increased adherence to the law.67 A study by Raymond Paternoster et al. focusing on domestic violence cases similarly found that the use of fair procedures reduced the rate of recurrence.68 Other analyses found that procedural fairness has a similar impact on compliance with arbitral and mediation awards.69 Thus, procedural fairness thus has the additional benefit of increasing compliance among the regulated.

F. Better Control of the Bureaucracy

Procedural fairness also reduces the risk that lower-level bureaucrats will use their broad discretion to pursue priorities different from those of agency leaders. Some scholars hypothesize that agency bureaucrats maximize discretion, minimize work, minimize risk, or take other steps that maximize their prestige within their chosen field and prioritize the interests and concerns of their colleagues over those of agency leaders or the public.70

More generally, lower-level officials may have different visions for how the agency should operate than agency leaders. Research suggests that since agency employees typically join a particular agency because they identify with its mission, they can develop tunnel vision.71 And since agency officials tend to analyze issues in ways reflecting their training, experience,
and professional norms, they sometimes make decisions without critically examining the limits of the assumptions underlying those heuristics or considering alternative perspectives.\footnote{See Jeffrey Rachlinski & Cynthia Farina, \textit{Cognitive Psychology and Optimal Government Design}, 87 \textit{CORNELL L. REV.} 549, 579–80 (2002); Mark Seidenfeld, \textit{Hard-Look Review in a World of Techno-Bureaucratic Decisionmaking}, 75 \textit{TEX. L. REV.} 559, 564 (1997).} Furthermore, experts tend to overestimate their abilities in areas where they believe they have superior knowledge or where their profession has already identified most of the problems and the likely solutions.\footnote{See Rachlinski & Farina, supra note 72, at 559–61, 579–80.} Psychologists have subsequently criticized experts as being “often wrong but rarely in doubt.”\footnote{See Dale Griffin & Amos Tversky, \textit{The Weighing of Evidence and Determinants of Confidence}, 24 \textit{COGNITIVE PSYCHOL.} 411, 412 (1992).}


Conversely, a staff member working on an action that ultimately proves meritless may be cognitively and professionally reluctant to concede that they have devoted several years to a matter that will ultimately amount to nothing, even when terminating the action would be the proper course as a matter of justice.\footnote{See Seidenfeld, \textit{supra} note 72, at 564; Geradin & Petit, \textit{supra} note 75, at 13–14.} Bringing enforcement actions is generally an essential part of promoting an agency official’s career, and terminating an investigation after recommending that it proceed to the second phase can be embarrassing.\footnote{Wils, \textit{supra} note 34, at 218–19.}

As noted above, overly aggressive prosecution can be the product of cognitive dissonance as well. As General Court Judge Ian Forrester observed, “When diligent and honest officials investigate a case over a period of time, say four years, and then issue a statement of objections once the case is, say, 80 percent concluded, it is fully understandable that officials are reluctant to be persuaded that they were wrong.”\footnote{Forrester, \textit{supra} note 26, at 841.} Former European General Court Judge Bo Vesterdorf similarly observed, “It is . . . I think a well known fact that, once you have been working intensively and sometimes for a very, very long time on a particular case, it is easy to acquire a sort of ‘tunnel vision,’ not seeing the forest for the trees.”\footnote{Vesterdorf, \textit{supra} note 576, at 4.} Or, in the words of the U.S. Attorney General’s Committee on Administrative Procedure, “A man who has buried himself on one side of an issue is disabled from bringing to [his] decision that dispassionate judgment . . . demand[ed] of officials who decide questions.”\footnote{U.S. DEP’T OF JUSTICE, \textit{FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE} 56 (1941).} It is simply human nature for anyone who has invested significant time and energy into a case to find it hard to conclude that all their effort was for naught.
G. Restraints on the Influence of Special Interest Groups

Procedural protections can also counter undue pressure by special interest groups. In addition to cognitive and institutional biases that may exist within agencies, decisions may likewise be affected by outside forces acting on agencies. In one of the most cited articles in U.S. administrative law, then-Harvard Law Professor Richard Stewart advanced an “interest representation” model of agency action, which concludes that rather than acting as faithful servants of the legislative process, agencies strengthen minority and special interest voices.

Other scholars have built on this work to explore how pressure from special interest groups can distort agency decisionmaking. Special interest groups in general, and industry groups in particular, can disproportionately influence agency decisions because they possess significant resources and stakes in the outcome of agency decisions. Special interests also often serve as the primary source of information for agency decisionmaking. Moreover, many agency staff come from industry groups and may have ambitions to return to them after leaving the government. In extreme cases, the agency may become so responsive to industry concerns as to become effectively “captured” by the industry. Stewart’s solution to this problem is to increase parties’ rights of participation and to enhance judicial review.

H. Countering Corruption

Finally, unchecked power and discretion in the hands of officials magnify the risk of corruption. Unbridled discretion creates the risk that administrators will base their decisions on personal preferences or connections. Even more problematic is the potential that administrative decisions will be based on political influence or monetary contributions. To cite one celebrated example, in the 1970s, allegations emerged that the U.S. settled a major antitrust case against International Telephone & Telegraph (ITT) in part because of ITT’s promise to provide financial support for the 1972 Republican National Convention, although those charges were never proven. Similarly, in a speech at the 18th Central Committee of the Chinese Communist Party, Chinese President, Xi Jinping, acknowledged that corruption was a major issue for the Chinese government, especially at the regional level. Transparent enforcement procedures and public

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82 Stewart, supra note 32.
85 See KAY SCHLOZMAN & JOHN TIERNER, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986); Nicholas Bagley & Richard Revesz, Centralized Oversight of the Regulatory State, 106 COLUM. L. REV. 1260, 1284–85 (2006); Barkow, supra note 83, at 22; Wagner, supra note 84, at 1331.
87 Stewart, supra note 32, at 1748–60.
89 See Xi Jinping, President of China, Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era Delivered at
participation will make it harder for lower- or mid-level bureaucrats to act corruptly, as higher-level agency leaders will be able to notice deviations from established practices more easily.90

III. COMPARISON OF ENFORCEMENT PROCESSES IN CHINA, THE EU, AND THE U.S.

This report analyzes antitrust enforcement processes in China, the EU, and the U.S. The analysis is based around the six-phase framework listed above of (1) investigations: document requests, interviews, and interrogatories, (2) investigations: inspections of company premises, (3) agency deliberations, (4) issuance of decisions, (5) settlement, and (6) judicial review, with each phase being broken down into two-to-six smaller steps. After discussing the chosen steps for each phase, this report will analyze the similarities and differences across jurisdictions. Finally, the report will argue that three procedures are essential to due process, while presenting several other important ones. Ultimately, the desirability of a procedure depends on a system’s values and priorities. In our analysis, we recommend procedures that promote reasoned decisionmaking, fairness to the parties, and transparency. We believe a system that achieves these ends will reap the benefits of due process.

Differences in enforcement structure make comparisons across the three jurisdictions somewhat challenging. In China, the State Council, the most senior executive body, created the Anti-Monopoly Committee (AMC), responsible for researching and formulating competition policy, organizing investigation and evaluation of the overall competitive landscape, publishing evaluation reports, drafting and publishing antitrust guidelines, and coordinating administrative enforcement efforts.91 The AML gives the Anti-Monopoly Enforcement Authority (AMEA) responsibility for the day-to-day enforcement of the AML.92 In the first decade following the implementation of the AML, enforcement was split among three agencies: the National Development and Reform Commission (NDRC) was responsible for price-related monopolistic conduct, including price monopoly agreements of undertakings and price-related abuse by undertaking with dominant market position to exclude or limit competition;93 the State Administration for Industry & Commerce (SAIC) was responsible for enforcement against nonprice-related monopoly agreements and non-price-related abuses of dominant market position;94 the Ministry of Commerce (MOFCOM) was responsible for the review of

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90 See Hornsby v. Allen, 326 F.2d 605, 609–10 (5th Cir. 1964) (holding that the “first step” towards curbing graft, corruption, and other abuses of governmental office is “require[ing] adherence to the standards of due process”); WU, supra note 44, at 1; WRAGE, supra note 44, at 27.

91 See Antimonopoly Law of the People’s Republic of China art. 9 (adopted on Aug. 30, 2007 by the twenty-ninth session of the Tenth National People’s Congress Standing Committee) [hereinafter the AML].

92 See AML, supra note 91, art. 10.


94 See Procedural Rules by Administration of Industry and Commerce Regarding Investigation and Handling of Cases Relating to Monopoly Agreement and Abuse of Dominant Market Position art. 8 (Decree No. 53 enacted by SAIC on May 26, 2009) [hereinafter SAIC Investigative Procedures for Monopoly Cases].
concentration of undertakings. The Development and Reform Commission (DRCs) or Administrations of Commodity Prices (ACPs) and Administrations for Industry and Commerce (AICs) at provincial level (or autonomous region or municipality) may conduct antimonopoly enforcement activities duly authorized by the State Council antimonopoly enforcement body. The delegation of power by NDRC to local DRCs or ACPs is a blanket authorization, whereas the SAIC delegates its power to local AICs on a case-by-case basis. In the new round of institutional reform of 2018, antitrust functions were centralized by a single agency called the State Administration for Market Regulation (SAMR). Concurrent with the reshuffling, the office functions of the State Council Antimonopoly Commission shifted onto the State Administration for Market Regulation. The SAMR Notice on Antimonopoly Enforcement Authority issued on December 28, 2018, also unified the authorization criteria and adopted blanket authorization. Provincial-level Market Regulation Administrations (MRAs) may investigate and penalize monopolistic conduct in their respective jurisdiction in their own name. For the purpose of this report and for retrospective analysis, we largely stick to the previous agency names and their regulations.

In Europe, responsibility for enforcing competition laws is divided between the European Commission and the enforcement agencies of individual member states. The European Commission has established the Directorate-General for Competition (DG Comp), which is Europe’s primary competition enforcement agency.

Each member state also has its own national enforcement agency, known as a National Competition Authority (NCA). NCAs are considered well placed to deal with cases that substantially affect competition mainly within a single country’s territory based on national competition laws, as they are better situated to gather the evidence required to prove and effectively eliminate the infringements of competition law whose effects are confined to one member state. Parallel actions by two or three NCAs may be appropriate when an agreement or practice has substantial effects on competition mainly in their respective territories and the action of only one NCA would not be sufficient to eliminate the entire infringement and/or to sanction it adequately. In the early 2000s, the Commission decided to decentralize EU competition enforcement, adopting Regulation 1/2003, NCAs not only enforce national competition laws but also EU competition law unless the Commission decides to take a case itself because it effects the European common market significantly, which is mainly the case for markets “where there are only a few players, where cartel activity is recurrent, or where abuses of market power are generic.” DG Comp is additionally primarily responsible for cases involving agreements or practices that have effects on competition in more than three member states.

95 See MOFCOM Concentration Notification Measures (MOFCOM Decree 2009 No. 11, reviewed and passed by the twenty-sixth ministerial affairs meeting on July 15, 2009), art. 2. [hereinafter MOFCOM Concentration Notification Measures].
96 See AML, supra note 91, art. 10.
97 See SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 3.
100 See generally Forrester, supra note 26.
102 Commission Notice on Cooperation Within the Network of Competition Authorities, arts. 5–15, 2004 O.J. (C 101) 43.
However, the European Commission may initiate a proceeding sua sponte based on Article 101 or Article 102 TFEU at any time based on a complaint or ex officio.\(^{103}\) Since Articles 101 and 102 of TFEU are only applicable if an agreement or abusive behavior affects the internal market, the Commission cannot take purely national cases. However, since the effect on the internal market only needs to be a “potential” one, the Commission’s authority to take cases is rather broad. Once the Commission has decided to initiate a proceeding the NCAs are banned from initiating or continuing a parallel proceeding.\(^{104}\) Moreover, at that point, the NCAs are no longer able to apply their national competition law to a case.\(^{105}\) An advisory committee “composed of representatives of competition authorities from the member states”\(^{106}\) ensures consistency and cooperation between the European Commission and the NCAs.

In the United States, the Federal Trade Commission (FTC), the Antitrust Division of the Department of Justice (DOJ), and private litigants, all share antitrust enforcement power.\(^{107}\) The FTC is an administrative body agency primarily responsible for civil violations of the antitrust laws. It can initiate proceedings in court or adjudicate them administratively.\(^{108}\) The DOJ has exclusive authority to prosecute criminal violations of the antitrust laws and can also bring civil cases. Unlike the FTC, it cannot enforce the antitrust laws administratively. Instead, it must proceed exclusively in court.\(^{109}\) Private litigants, who sue under the antitrust laws about ten times more often than government enforcers, can seek damages or injunctive relief for violations of the laws.\(^{110}\)

Comparisons are somewhat complicated by broad differences in the three jurisdictions’ legal systems. The U.S. legal system has a long adversarial tradition wherein judges are supposed to be neutral arbiters between opposing parties. This adversarial system is sometimes carried over to U.S. agencies; however, many U.S. agency proceedings, such as Social Security Administration disability hearings, are inquisitorial – meaning that the adjudicator participates more actively by soliciting information from the parties before them.\(^{111}\) In contrast to the U.S., China’s legal system is predominantly inquisitorial.\(^{112}\) While some EU countries’ legal systems, like that of the United Kingdom, are adversarial, most are inquisitorial.\(^{113}\) Further, EU agencies rely on the inquisitorial model.\(^{114}\) Although we acknowledge the broad differences between the

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\(^{104}\) Council Regulation 1/2003, art. 11 para. 6, 2002 O.J. (L 1) 1 (EC).

\(^{105}\) Id. art. 3 para. 1.

\(^{106}\) Id. art. 14.


\(^{108}\) See id. U.S. statutes divide jurisdiction for the enforcement of various substantive violations between the DOJ and FTC. The FTC is the sole enforcer of the Federal Trade Commission Act, with the exception of Section 12. The FTC also has concurrent jurisdiction with the DOJ over Sections 2, 3, 7, and 8 of the Clayton Act. The DOJ is charged with enforcing the Sherman, Clayton, and Robinson-Patman Acts. See generally E. THOMAS SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI & CHRISTOPHER R. LESLIE, ANTITRUST LAW, POLICY, AND PROCEDURES: CASES, MATERIALS, PROBLEMS 59–65 (17th ed. 2014).

\(^{109}\) See id.

\(^{110}\) See, id. at 65.


\(^{112}\) See id. at 20–23.

\(^{113}\) See id. at 8.

\(^{114}\) See id. at 9.
three jurisdictions’ legal systems, we follow the American Bar Association’s (ABA) approach to them:

Because antitrust enforcement is embedded in such an enormous variety of indigenous legal systems found in different jurisdictions, the Report identifies practices that are sufficiently “generic” to be capable of inclusion within any basic approach to antitrust law enforcement. Thus, the Report does not presume the superiority of any particular legal system – administrative or prosecutorial/judicial, adversarial or inquisitorial, whether civil-law or common-law based.\(^\text{115}\)

**A. Investigations: Document Requests, Interviews, and Interrogatories**

In all three jurisdictions, competition enforcement authorities have the power to initiate investigations of companies by ordering them to supply documents, submit to interviews, or answer questions in writing, known as interrogatories.

In China, pursuant to the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration published by the State Administration for Market Regulation (SAMR) on December 21, 2018, antimonopoly cases may begin due to investigations ex officio, upon reporting or whistleblowing by private parties, or following a transfer from other agencies or an assignment by higher-level agencies.\(^\text{116}\) The first two make up the bulk of the antimonopoly cases. Under the AML, with respect to whistleblowing, if the tip is made in writing and accompanied with supporting facts and evidence, the enforcement agency must perform necessary investigation.\(^\text{117}\) As previously stated, NDRC adopts blanket authorization to its local offices whereas SAIC follows a case-by-case approach for the delegation of power. In a whistleblowing case, a local ACP may initiate investigation directly. A local AIC needs to review whether the tip points to suspected monopolistic conduct taking place predominantly within its jurisdiction and report such review findings, and its decision regarding whether or not to initiate a case, to the SAIC.\(^\text{118}\) Cases can also originate if a cartel member submits a leniency application.

Prior to the creation of SAMR, MOFCOM oversaw merger control in accordance with Article 21 of the AML.\(^\text{119}\) Parties intending to conduct a transaction that constituted a concentration under the AML (including merger, obtaining of control over another entity through acquisition of shares or assets or based on contracts, etc.) that exceeded State Council’s stipulated thresholds had to notify MOFCOM about the proposed transaction and submit certain documents.\(^\text{120}\) The process was broken down into one informal phase (the pre-acceptance

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\(^{115}\) ABA BEST PRACTICES, supra note 15, at 1–2.


\(^{117}\) See AML, supra note 91, art. 38.

\(^{118}\) See Procedural Rules by Administration of Industry and Commerce regarding Investigation and Handling of Cases relating to Monopoly Agreement and Abuse of Dominant Market Position art. 7 (issued by the SAIC on May 26, 2009) [hereinafter SAIC Monopoly Cases Investigative Procedures].

\(^{119}\) See AML, supra note 91, art. 21.

\(^{120}\) See MOFCOM Concentration Notification Measures, supra note 95, art. 10.
and two formal phases (Phase I – Preliminary Review and Phase II – Further Review). At a maximum, Phase I could last about thirty days; Phase II could last about ninety days, but could be extended for an additional sixty days. Requests for documents could occur during any of these phases. Parties could also submit materials voluntarily. If the notification of the proposed merger transaction was incomplete, MOFCOM could request that the parties revise or supplement it before a case is officially accepted.

In the EU, the European Commission can initiate a proceeding based on a complaint, an agency-initiated investigation, or a leniency application (in the case of cartels), a method that has become increasingly common. The Commission and NCAs encourage citizens to report suspected infringement of competition rules by submitting a complaint form or description in email. Formal complaints must satisfy several formal requirements. They need to be submitted in writing, and need to specify the presumed evidence for the violation of EU Competition law. Agencies initiate investigations with requests for information. EU law authorizes simple requests for documents, which are voluntary, and complex or binding requests, which are compulsory. Although the European Commission has the power to take statements by witnesses, it cannot demand their testimony. Interviewees must give their consent to be interviewed and cannot be forced to answer questions. At the beginning of the interview, the interviewing agent must state and confirm the voluntary nature of the interview, as well as the right to an attorney. Therefore, in the EU, interviews are more an opportunity for the party under investigation to present its views through its employees and have this testimony entered into the record as opposed to an investigative tool for the Commission. However, the Commission’s ability to request information during an inspection is a significant tool. If the Commission inspects a company’s premises, it has the right to ask company staff for an explanation of certain facts or documents relating to the investigation and may record their answers. Company staff must answer the Commission’s questions to fulfill their legal duty to cooperate with the investigation. If the company had not authorized the questioned staff member to provide explanations it has a right to submit rectifications, amendments, or supplements to the staff member’s explanations.

The foregoing procedures likewise apply to the EU merger control regime, whereby the Commission requires notification from parties if a proposed transaction exceeds a certain

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121 See id. art. 8.
122 See AML, supra note 91, arts. 25 and 26.
123 See MOFCOM Concentration Notification Measures, supra note 95, art. 11.
124 See id. art. 13.
129 See id. art. 18.
132 See id. art. 20(2).
threshold level.134 The European Commission reviews the proposed transactions in a single procedure under the EU’s “one-stop-shop” principle.135 Qualifying parties are required to file a notification with the Commission prior to consummation of the proposed transaction136 or a Short Form if the proposed transaction is unlikely to raise competition concerns.137 After reviewing the information submitted in the notification and potential subsequent requests for information or inspection, the Commission will decide that (1) the proposed transaction is not within the scope of the Commission’s merger control regulations, (2) the proposed transaction does not raise anti-competitive concerns, or (3) the proposed transaction raises doubts about anti-competitive effects.138 In the first two instances, it will issue a decision declaring so. In the third instance, it will initiate an investigation (Phase II investigation).139

In the U.S., the FTC or DOJ can gather information by issuing a subpoena or a civil investigative demand (CID) requesting testimony, documents, written reports, and written answers.140 The agencies sometimes have the power to share information with each other or Congress, but otherwise the information must be kept confidential and is exempt from the Freedom of Information Act.141

The agencies may also demand documents in a merger review process. In a merger review proceeding, the Hart-Scott-Rodino (HSR) Act requires parties to file a notification form with both agencies if their proposed merger transaction exceeds certain thresholds for asset size or transaction value.142 Parties must wait thirty calendar days (which may be extended at the agency’s discretion) before consummating the proposed transaction to allow the agencies to review the proposed transaction and determine whether or not a preliminary investigation is required.143 Parties can shorten the thirty-day period, however, by requesting “early termination,” which is usually granted in about two weeks.144 The agencies request documents in three ways: (1) in the HSR filing, (2) in a “voluntary access letter” during the initial waiting period,145 or (3) in a Request for Additional Information and Documentary Material (known as a “second request”), should the agency decide to investigate.146

This section breaks down the process of conducting investigations through requests for documents, interviews, and interrogatories into five separate steps:


139 See id.


141 See Antitrust Civil Process Act, 15 U.S.C. §§ 1311–1314; see also HOVENKAMP, supra note 107, at 644. Practitioners have reported that the agencies sometimes ask the parties to sign confidentiality waivers so that information can be shared with other jurisdictions.


1. **Basis for believing that investigations are justified**

2. **Internal high-level review of requests to investigate**

3. **Description of the documents to be produced**

4. **Presence and advice of legal counsel during interviews**

5. **Judicial review of requests for documents, interviews, and interrogatories**

### 1. Procedural Steps of Document Requests, Interviews, and Interrogatories

#### a. Basis for believing that investigations are justified

Each jurisdiction requires the relevant authorities to have some basis for believing that there has been an antitrust violation before beginning an investigation, although the laws in each jurisdiction differ slightly.

**China**

Article 38 of China’s AML obligates enforcement officials to investigate possible violations of anti-monopoly law, but does not explicitly state that the basis under which an investigation is justified. However, Chinese agencies must state the grounds for their investigatory actions. For instance, when an agency takes certain types of action, such as seizing property, Article 18 of the Administrative Enforcement Law requires officials to simultaneously give reasons for the action. Likewise, development and reform commissions initiating investigations, pursuant to the Price Law and the Provisions on the Procedures for Price-related Administrative Penalties, must adhere to certain procedures. The investigators may issue an Inspection Notice to (1) interview the people concerned or related personnel and demand evidence or other materials relating to price violations; (2) examine and duplicate accounts, bills, vouchers, documents and other materials related to price violations and verify banking data associated with such price violations; (3) check property related to the price violations and, where appropriate, order the people concerned to suspend business operation; (4) and document and preserve evidence that is liable to be destroyed or lost or become inaccessible for which the people concerned or related personnel must not remove, conceal or destroy. The Inspection Notice is issued by the head of the price regulatory body, and (among other things) states the nature of the investigation.

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147 Price Law of the People’s Republic of China (adopted in the twenty-ninth session of the eighth National People’s Congress Standing Committee on Dec. 29, 1997) [hereinafter Price Law].


149 See Price Law, supra note 147, art. 34.

150 See Provisions on the Procedures for Price-Related Administrative Penalties, supra note 148, art. 20.
EU law requires that investigators who wish to initiate an investigation have reasonable grounds for suspecting a violation of competition rules.\textsuperscript{151} What constitutes reasonable grounds has yet to be defined, although in evaluating reasonable grounds to initiate an investigation, courts have emphasized the need for some affirmative showing. The mere fact that a confirmed conspirator in one market cannot deny the possibility that an anti-competitive scheme has spread to another market does not justify the Commission launching a new investigation into that other market.\textsuperscript{152}

Article 17(1) of Council Regulation (EC) No 1/2003 describes circumstances under which the Commission may engage in a sector inquiry.\textsuperscript{153} Specifically, it may conduct an investigation into a sector of the economy and certain types of agreements across various sectors (such as e-commerce or pharmaceuticals) if the Commission believes a market may not be functioning as it should be, possibly due to competition violations.\textsuperscript{154} The Commission may then publish a report of their findings and invite comments from interested parties.\textsuperscript{155} A sector-inquiry can then become the source for initiating proceedings against specific parties provided that the inquiry produces evidence that a violation of competition law is likely.

The EU also requires the Commission to describe the nature of the conduct constituting the alleged antitrust violation. Article 18(2) of Regulation 1/2003, which details regulations on requests for information, requires the Commission to state a “legal basis and purpose” of the investigation request before proceeding.\textsuperscript{156} The level of detail the Commission must provide is lower for a voluntary simple request than for a decision, which is binding. When the Commission issues a binding decision, it cannot simply describe the purpose of their investigation in a succinct, vague, and generic way. The notice must additionally describe both the alleged violating conduct and the geographic and product market under investigation.\textsuperscript{157}

Although the Commission is required to communicate to the party under investigation the presumed facts that it intends to investigate, it is not required to communicate the evidence upon which its suspicions are based in the initial stages of the proceeding.\textsuperscript{158} If a request is challenged in Court questioning the reasonableness of the Commission’s grounds to investigate, the Court may require the Commission to show its evidence to the Court.\textsuperscript{159}


\textsuperscript{153} See Council Regulation 1/2003, art. 17(1), 2002 O.J. (L 1) 1 (EC).


\textsuperscript{155} See id.

\textsuperscript{156} See Council Regulation 1/2003, art. 18(2), 2002 O.J. (L 1) 1 (EC).


Finally, in a merger review, the Commission receives documents from parties proposing a merger transaction. Upon initial review, the Commission can issue either a simple request or a binding decision for additional materials. The Commission must state the legal basis and purpose of its request, specify the information requested, delineate a time period during which the parties must comply, and disclose penalties for incorrect or misleading information, or non-compliance.

United States

U.S. law imposes similar requirements to the EU. The handling of antitrust investigations is split between the FTC and DOJ, and each agency’s process to initiate a preliminary investigation differs slightly. Prior to authorizing an initial investigation, investigators at the FTC must submit a recommendation to the Bureau Director “explain[ing] why [an] investigation is warranted.” In an initial investigation, investigators typically do not use any compulsory techniques (such as issuing CIDs, subpoenas, or access orders), but instead develop their case through voluntary requests for information, interviews, and interrogatories. Any request for information, whether voluntary or compulsory, must be accompanied by notification to the investigated of the “purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law.” If seeking approval to launch a full investigation beyond the initial phase, FTC investigators must first submit for approval a memorandum detailing their justification for the investigation, legal analysis of any novel legal points, the impact of the suspected conduct on consumers, and the extent of consumer injury, among other information. To issue a CID or subpoena, FTC investigators must first obtain approval from the Commission by submitting a memorandum detailing what information is needed, “the reasons why the information is relevant to the inquiry,” and the cost and burden the request will impose on the parties.

Prior to authorizing a preliminary investigation, the DOJ must have a “reason to believe” an antitrust violation has occurred. Particular attention is given to the amount of commerce affected, whether an investigation would duplicate or interfere with other government efforts, and resource allocations. The DOJ will consider whether the violations are sufficient enough to be investigated criminally, and whether the case is significant enough to warrant an investigation and potential grand jury subpoena. The DOJ may issue a CID if it has “reason to believe” an antitrust violation has occurred that is within the scope of the DOJ’s authority.

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162 See id. art. 3.
163 See FTC OPERATING MANUAL, supra note 163, ch. 3, § 2.2.1.1 (2003), https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf [hereinafter FTC OPERATING MANUAL].
164 See FTC OPERATING MANUAL, supra note 164, ch. 3, § 2.3.2.
165 16 C.F.R. § 2.6 (2018).
166 Id. ch. 3, § 3.6.7.5.
167 16 C.F.R. § 2.6 (2018).
168 FTC OPERATING MANUAL, supra note 164, ch. 3, § 2.2.1.1 (2003), https://www.ftc.gov/sites/default/files/attachments/ftc-administrative-staff-manuals/ch03investigations_0.pdf [hereinafter FTC OPERATING MANUAL].
169 See FTC OPERATING MANUAL, supra note 164, ch. 3, § 2.3.2.
“reason to believe” standard is not particularly demanding. The requirements to issue a CID “[do] not imply that the Commission must possess a minimum quantity of evidence before it issues a CID.”171 Rather, a complaint by customers can be a sufficient basis to issue a CID. The DOJ does not need to satisfy the heightened criminal law “probable cause” standard to issue a CID.172 When issuing a CID or subpoena, both agencies must have a “reason to believe” that the receiving party may have documentary material or information “relevant to a civil antitrust investigation.”173

A CID must state in general terms the nature of the conduct constituting the alleged antitrust violation and the applicable provision of law applicable thereto.174 The statement must be sufficient enough for the recipient to determine whether or not the documents demanded are relevant.175 This requirement is not intended to be overly restrictive. A description such as, “restrictive membership and other anticompetitive practices,” was adequate when the DOJ informedly communicated with the recipient prior to the issuance of the CID.176 Even a fairly general description such as “possible violation of Section 1 of the Sherman Act by a contract or combination in unreasonable restraint of trade” was sufficient, where the DOJ communicated with the recipient prior to and after the issuance of the CID.177

U.S. law does not require advance disclosure of the factual basis underlying the investigation.178 The requirements to issue a CID “[do] not imply that the Commission must possess a minimum quantity of evidence before it issues a CID.”179 However, if the CID recipient does not produce the requested documents and the agency moves to enforce the CID in court, or the recipient seeks to quash the CID, the agency must provide an explanation of the factual and legal basis for enforcement of the CID.180 If the recipient seeks to nullify the CID on grounds that its issuance was based on improper motives, then an affidavit from the Assistant Attorney General explaining the agency’s reasoning is typically sufficient to sustain the CID.181

In a merger review process, the FTC and DOJ will request documents in the form of a required HSR notification form, voluntary access letter during the 30-day waiting period, or second request after an investigation has been launched.182 The HSR filing is mandatory according to the HSR Act. During the waiting period, the agencies are not required to justify a request for additional documentation, but “should contact the parties to discuss competitive

172 The U.S. Supreme Court has defined probable cause as “reasonably trustworthy” knowledge “sufficient... to warrant a belief by a man of reasonable caution that a crime is being committed.” Brinegar v. United States, 338 U.S. 160 (1949); Austl./E. U.S.A. Shipping Conference v. United States, 1982-1 Trade Cas. (CCH) ¶ 64,721, at 74,064 (D.D.C. 1981), modified, 537 F. Supp. 807 (D.D.C. 1982), vacated as moot, No. 82-1516, 82-1683 (D.C. Cir. Aug. 27, 1986).
177 See Material Handling Inst. v. McLaren, 426 F.2d 90, 92 (3d Cir. 1970).
178 DOJ ANTITRUST DIV. MANUAL, supra note 168, at III-80.
180 DOJ ANTITRUST DIV. MANUAL, supra note 168, at III-78.
concerns and request information.” Agencies may also issue CIDs during the initial investigation phase and will adhere to the practices described above. If the agencies decide to initiate a full investigation, they will issue a second request for more materials. The agencies are held to the standard that additional requests for materials must not be “unreasonably cumulative, unduly burdensome, or duplicative.”

**International norms**

International authorities generally agree that enforcement agencies should give parties under investigation notice of the nature of the legal basis and the conduct that is the focus of the investigation, but that such considerations should be balanced against the need to preserve the integrity of the investigation. For example, the ICN Guidance on Investigative Process, Article 5.2, states that “[t]o the extent that it does not undermine the effectiveness of an investigation, agencies should notify parties as soon as feasible that an investigation has been opened, and identify its legal basis, the conduct under investigation, and, if possible, the expected timing of the investigation.” Article 5.3 of the ICN Guidance on Investigative Process provides that enforcement authorities “should inform parties of the basic facts and nature of evidence gathered, as well as the agency’s theories of competitive harm.” As the ICC’s recommended framework for international best practices in competition law enforcement proceedings similarly emphasizes, “[a] firm cannot defend itself appropriately unless the competition authority informs the firm of the allegations, the claims, and the evidence supporting the claims.” The ICC best practices framework recommends that, “[u]pon initiation of an investigation, the competition authority should inform the Respondent(s) of the fact of the investigation and the legal authority (that is, the specific statutory and regulatory provisions) under which the agency may proceed.” The ABA Antitrust Section’s International Task Force also included that agency officials should clearly identify to parties the legal, factual, and economic basis of the investigation.

**b. Internal high-level review of requests to investigate**

In China, the EU, and the U.S., enforcement agents are required by statute to seek approval from high-level officials before proceeding with an investigation. However, the approval systems vary widely across the three jurisdictions. Most notably, the U.S. procedure is rather formal and laid out in administrative manuals in considerable detail, while the approval process in China and the EU is less formal and involves fewer procedural steps.

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183 DOJ ANTITRUST DIV. MANUAL, supra note 168, at III-38.
184 See id.
186 See id. § 18(e)(1)(B).
187 See, e.g., ICN GUIDANCE, supra note 11, at 4.
188 See ICC BEST PRACTICES, supra note 18, at 2.
189 See id.
190 ABA BEST PRACTICES, supra note 15, at 5.
China

In China, development and reform commissions (DRCs), administrations of commodity prices (ACPs), and administrations for industry and commerce (AICs) at the provincial level (or an autonomous region or municipality) may conduct antimonopoly enforcement activities duly authorized by the State Council antimonopoly enforcement body.\(^{191}\) The delegation of power by NDRC to local enforcement agencies was a blanket authorization,\(^{192}\) whereas SAIC followed a case-by-case approach.\(^{193}\) However, before an investigation can proceed, an Inspection (Investigation) Notice must be authorized by the head of the authority or an authorized organization and affixed with the organizational seal.\(^{194}\) SAMR adopts a blanket authorization for local market supervision authorities. Before case initiation, an Initiation Approval Form shall be filled out. The case handling agency shall assign two or more case handlers to the case.\(^{195}\)

European Union

Within the European Commission, the approval requirements vary depending on whether the request is a simple request, which is not compulsory for the parties, or a binding decision, which is compulsory. DG Comp consists of roughly forty different units, each specializing in a different subject matter. A Head of Unit or case manager can authorize a simple request for information. The Commission can also directly adopt a binding decision compelling a company to provide information. A formal decision to investigate must be issued first before sending out a binding decision to supply information. The European Commission delegates the authority to issue that decision to the Competition Commissioner,\(^{196}\) who in turn sub-delegates the authority to DG Comp.\(^{197}\) The Commission then decides whether or not to open an investigation based on a report prepared by the case team and a discussion with the case team, senior management, the Commissioner, and the Commission’s legal team.

United States

U.S. antitrust enforcement employs a multitier system of internal approvals, with the process following different paths in the FTC and the DOJ. Antitrust enforcement within the FTC is handled by the Bureau of Competition, which is headed by the Bureau Director, three Deputy Bureau Directors, and nine Assistant Bureau Directors. FTC staff must obtain the approval of the Assistant Bureau Director, to whom they report, before initiating an investigation.\(^{198}\) The Assistant Bureau Director will prepare and send a recommendation and request to the Bureau of

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191 See AML, supra note 91, art. 10.
192 See NDRC Anti-Price Procedures, supra note 93, art. 3.
193 See SAIC Monopoly Cases Investigative Procedures, supra note 118.
195 See SAMR Admin. Penalty Procedures, supra note 116, art. 17.
197 See id.
198 See FTC OPERATING MANUAL, supra note 163, ch. 3, § 2.2.1.1.
Competition’s Office of Policy and Coordination, where it is reviewed by an Evaluation Committee consisting of the Bureau Director, high-level and litigation staff from the Bureau of Competition, and high-level staff from the Bureau of Economics. The Evaluation Committee then issues an advisory recommendation to the Bureau Director, who ultimately makes the final determination on whether to launch an investigation. When a matter advances from the initial phase to a full investigation, the Evaluation Committee and the Bureau Director must review the case once again. A full investigation, which involves the adoption of investigative resolutions to issue CIDs and subpoenas, requires the approval of one of the Commissioners, and each subpoena or CID must be signed by a Commissioner.

The DOJ follows a slightly different multi-tiered process. The Antitrust Division consists of six civil litigation sessions, two criminal sections, and three field offices, each headed by a chief and two or more assistant chiefs. When a DOJ staff attorney has developed a sufficient factual and legal basis to support a formal civil investigation, the attorney must consult with a staff economist in the Economic Analysis Group (EAG) and seek approval by the section or field office chief before commencing the investigation. A notification of the proposed investigation is sent to all chiefs and assistant chiefs. When a DOJ staff member would like to issue compulsory process or open a grand jury investigation, the Antitrust Division Manual advises them to consult with the section or field office chief and the relevant EAG chief to discuss the results of their preliminary investigation. Any staff recommendations to proceed by grand jury investigation, second request, or CID must be processed through the appropriate Director of Enforcement and the assigned Deputy Assistant Attorney General, and require the approval of the Assistant Attorney General.

In a merger review process, second requests are prepared by staff attorneys and economists. The Bureau of Competition management must review all second requests to ensure they are accurate and narrowly tailored before the request can be issued to the investigated parties.

International norms

The emerging international consensus supports requiring some type of high-level approval before an investigation can proceed. Paragraph 2.1 of the ICN Guidance on Investigative Process includes “appropriate internal agency review” as one of the “appropriate limitations on the use of investigative tools.” More specifically, paragraph 3.1 recommends that “Compulsory agency requests for information should be subject to internal review prior to being issued.” The ICN Roundtable on Competition Agency Investigative Process reiterates

199 See id. at 17.
200 See id. at 24.
201 See DOJ ANTITRUST DIV. MANUAL, supra note 168, at III-110.
202 See id. at 20.
203 See id.
204 See FED. TRADE COMM’N, GUIDE 3 – MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL (SECOND REQUEST) 2 (2017).
205 See ICN GUIDANCE, supra note 11 at 2–3.
206 See id.
this directive and emphasizes “the need for staff to seek higher level agency approval for compulsory requests to help ensure appropriateness and consistency.”

c. Description of the documents to be produced

All three jurisdictions require enforcement officials to provide some level of advance notice to investigated parties of the types of documents being sought, although the level of notice required varies across enforcement agencies in China and across the three jurisdictions.

China

China’s AML describes only the documents required in a case of concentration of undertakings, but in practice NDRC, SAIC and their sub-national agencies often produced a “list of evidence for pickup” during investigations. MOFCOM also, in practice, clearly described to the parties the documents required in the review of their proposed transaction. MOFCOM developed detailed guidance on what documents and information had to be submitted for review of concentration transactions that exceeded stipulated thresholds, (e.g., legal and factual issues, such as how the parties are defining relevant product and geographic markets, specific agreements, etc.). In both merger review phases, MOFCOM conducted ongoing discussions with the parties to assist incomplete applications and collected necessary information for their review.

European Union

Under EU Law, the Commission is obliged to indicate as precisely as possible the evidence being sought. In part, this is an expression of the general requirement that the Commission’s demands must be proportional. However, this does not indicate that all documents or files need be individually and precisely identified in advance, as this would render the Commission’s power to investigate ineffective. The European Commission thus enjoys a degree of discretion in deciding what evidence is necessary for their investigation. Nevertheless, the Commission must not engage in a so-called “fishing expedition.” Commission requests had been quite narrowly tailored in the past, but have become broader in more recent investigations—partially because modern technology has enhanced the Commission’s ability to analyze the documents. For example, in practice, the Commission will request all the communications of a specific person within a certain time frame. Under Article 28(1) of Council Regulation EC No 1/2003, information obtained during investigations must not

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207 See ICN ROUNDTABLE, supra note 11, at 6.
208 MOFCOM Concentration Notification Measures, supra note 95, art. 10.
be used for purposes other than those indicated in the decision requesting the information.\textsuperscript{214} Additionally, only those documents coming within the scope of the subject matter of the inspection can be requested.

**United States**

U.S. law is analogous to EU law. Governing statutes and regulations require that every CID must describe the type of information being sought “with such definiteness and certainty as to permit such material to be fairly identified.”\textsuperscript{215} The DOJ’s Antitrust Division Manual recommends that CIDs have a narrow scope not just because of procedural requirements, but also because a narrower CID can encourage a faster response.\textsuperscript{216} Courts have refused to enforce CIDs that (1) are “too indefinite,” “unduly burdensome” or “unreasonably broad,” (2) “threaten[] to unduly disrupt or seriously hinder normal operations of a business,” or (3) seek information not “reasonably relevant” as “measured against the scope and purpose of the . . . investigation.”\textsuperscript{217} Merger review second requests adhere to the same standards so as to not be ineffective and delay the merger review process.\textsuperscript{218} Similarly, a subpoena must “be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.”\textsuperscript{219}

**International norms**

International groups that have studied antitrust enforcement procedures generally recognize the need for restrictions on the scope of document requests. Section 3.1 of the ICN Guidance on Investigative Process endorses the need for “appropriate limitations on the use of investigative tools,” including “due consideration of relevance” and “proportionality.”\textsuperscript{220} The ICN Roundtable on Competition Agency Investigative Process “emphasized the efficiency value of ‘focused’ evidence gathering.”\textsuperscript{221} The Report further recommended, “[a]gencies should, to the extent possible, focus their request on information that is potentially relevant to the investigative theories, consider their requests against less intrusive alternatives, and be willing to engage with parties on the theories of harm and requests for information that are used to test those theories.”\textsuperscript{222} Similarly, the ABA Antitrust Section’s International Task Force recommends that agencies design practices that take into consideration the burden upon targets and ensure that practices are “proportionate to the expected value of the evidence sought.”\textsuperscript{223}

\textsuperscript{215} See 15 U.S.C. §§ 57b-1(c)(3)–(5), 1312(b)(2)(A) & (b)(3)(A) (2012); 16 C.F.R. § 2.7(b)–(C) (2017); FTC OPERATING MANUAL, supra note 163, ch. 3, § 6.7.5.3.
\textsuperscript{216} See DOJ ANTITRUST DIV. MANUAL, supra note 168 at III-47.
\textsuperscript{217} See FTC v. Texaco Inc., 555 F.2d 862 (D.C. Cir. 1977).
\textsuperscript{218} See 18 U.S.C. § 18(e)(1)(B).
\textsuperscript{220} ICN GUIDANCE, supra note 11, at 5.
\textsuperscript{221} ICN ROUNDTABLE, supra note 11, at 6.
\textsuperscript{222} Id.
\textsuperscript{223} ABA BEST PRACTICES, supra note 15, at 5.
d. **Presence and advice of legal counsel during interviews**

The three jurisdictions differ regarding the right to have legal counsel present during interviews and the role that legal counsel can play during those interviews. EU and U.S. law recognizes such a right; Chinese law does not explicitly advise on the presence of legal counsel during interviews, and the practice varies.

**China**

In China, there are no clear regulations on the presence of legal counsel in antitrust investigations, and the law neither forbids nor guarantees the presence of lawyers. It is worth stressing however, that China considers in-house lawyers to be company employees, despite having the license to practice. China also requires lawyers to have a license to practice law in China. Domestic Chinese lawyers who work for Chinese law firms are permitted to advise during an investigation and speak on behalf of an interviewee concerning legal issues during an interview. Interviewees must speak on their own behalf on factual issues.

At the provincial and local levels, there are random cases in which agencies are sometimes hesitant to have legal counsel present during an interview because counsel sometimes advise clients to refuse or hinder the authority’s investigation, despite this being a clear violation of the law. The maximum fine for obstruction of an investigation—like refusing to produce documents, hiding evidence, declining to be interviewed—is 100,000 RMB for individuals and 1,000,000 RMB for companies, which is often too low to induce cooperation. Thus, both companies and legal counsel are not sufficiently deterred from refusing to comply, making it difficult for the agency to conduct a proper investigation.

As a general matter, the relevant statute draws a distinction between domestic Chinese lawyers and foreign lawyers. Foreign lawyers without a Chinese lawyer’s license are not permitted to practice Chinese law. They therefore cannot act as domestic counsel during an anti-monopoly investigation. Additionally, in-house counsel acting as company staff are considered employees.

**European Union**

Article 47 of the EU Charter of Fundamental Rights explicitly recognizes a general right to legal assistance during legal proceedings. The ECJ has held that the right to legal representation must be respected starting in the preliminary inquiry stage. This includes interviews during investigations.

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224 The law states: “The investigated person shall cooperate with the price control authority in the latter's fulfillment of duties, and may not refuse or hinder the authority's investigation.” See NDRC Anti-Price Procedures, *supra* note 93, art. 10.
225 See AML, *supra* note 91, art. 52. These figures correlate to approximately USD 14,000 and USD 140,000 respectively. Criminal penalties are available in these situations. See id.
227 See Case C-155/79, AM & S Europe Ltd. v. Commission, 1982 E.C.R. 1575 (citing the “requirement[...], the importance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer”).
United States

In the U.S., when the FTC engages in a nonadjudicative investigation (i.e., before issuing a complaint), it can compel a witness to appear in person in a deposition or investigational hearing. Such witnesses have the right to be accompanied, represented, and advised by counsel subject to some limitations.228

International norms

International organizations widely recognize the right to representation by counsel. Paragraph 6.2 of the ICN Guidance on Investigative Procedures provides, “[p]arties should be allowed to be represented by counsel of their choosing during the investigation, and should be permitted to present their views via counsel, their employees, and outside experts.”229 Paragraph 2.4.9 of the International Chamber of Commerce (ICC) Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings states, “The agency should allow counsel for the party to be present . . . during interviews of a party’s employees and potential witnesses.”230

e. Judicial review of document requests, interviews, and interrogatories

China, the EU, and the U.S. differ as to whether an agency’s request for documents or interviews is subject to preliminary judicial review.

China

In China, administrative investigations and inspections, including anti-monopoly enforcement, are within the scope of accepted cases under the Administrative Litigation Law.231 Investigative measures, including seizure of property during investigations, constitute administrative compulsion, but typically are subject to judicial scrutiny on as part of the overall antimonopoly litigation for administrative penalty. At the same time, minor procedural violation may not necessarily result in the revoking of a decision made by an enforcement agency. The Administrative Litigation Law concludes that where the administrative action’s procedures were slightly unlawful, but did not cause actual impact on the rights of the plaintiff, the people’s court shall make a judgment confirming illegality, but not revoking the administrative act.232

European Union

In the EU, any Commission decision compelling the submission of information is subject to judicial review in an action for annulment in the General Court under Article 263(4) of the

228 See 5 U.S.C. § 555(b) (2012); 16 C.F.R. § 2.9(b) (2017).
229 ICN GUIDANCE, supra note 11, at 5.
230 ICC BEST PRACTICES, supra note 18, at 6.
232 See id. art. 74.
Treaty on the Functioning of the European Union (TFEU). This right must be explained in the inspection decision itself. Parties may appeal the judgment to the ECJ. Simple requests for information or interview requests are not reviewable as they are not mandatory.

United States

In the U.S., parties receiving requests for documents, requests for interviews, or interrogatories may obtain judicial review of those requests. A party may object to a CID or subpoena by filing a petition to limit or set aside the request with the agency in the case of FTC requests or with the district court when the DOJ seeks information. If a party fails to comply with a CID or subpoena (either without filing a petition to quash or after a duly filed petition is denied), the FTC and the DOJ may seek enforcement in federal district court. Courts review such requests to ensure that they are within the authority of the agency, the demand is not too indefinite, and the information is reasonably relevant to the agency’s inquiry. Any final order entered by a district court is appealable to a federal court of appeals.

In merger review, agencies may seek information beyond that included in the HSR filing by issuing a second request. If a party believes the second request to be unreasonably cumulative or unduly burdensome and has exhausted efforts to narrow the request through negotiation, the party may file an appeal with either the General Counsel (for the FTC) or the Deputy Assistant Attorney General (for the DOJ), who do not have direct responsibility over the investigation. The outcome of this administrative appeal is not subject to judicial review.

International norms

International organizations have generally concluded that investigatory tools, such as document requests, should be subject to judicial review. Paragraph 2.1 of the ICN Guidance on Investigative Process includes “external review by courts” in its list of “appropriate limitations on the use of investigative tools” and emphasizes that respondents should have the “ability . . . to contest unlawful use of investigative tools.” Specifically, the ICN recommends respondents have recourse to an “independent court, tribunal, or administrative agency” to contest investigative decisions. The ICN’s Roundtable Report similarly included the need for “a

235 See TFEU art. 256(1).
241 ICN GUIDANCE, supra note 11, at 2.
242 ICN ANNOTATED GUIDANCE, supra note 11, at 3.
mechanism to challenge or question requests for information” as one of the “basic safeguards” of
good investigative process.243

2. Differences in Law and Practice

Enforcement authorities in each jurisdiction approach the request for documents,
interviews, and interrogatories phase of the investigation slightly differently.

Differences in law

Basis for believing investigation is justified. All three jurisdictions provide parties with notice of
the legal basis of the proceeding and the conduct in question. They vary in the extent to which
they are obligated to do so by statute or simply do so as a matter of practice. The jurisdictions
also vary in regard to the specificity required to fulfill these obligations, which can be critical in
preventing arbitrary agency action and allowing parties to adequately represent themselves.
General statements, such as “an investigation for violations of competition law” are vulnerable to
arbitrary conduct by investigators and do not provide the party being investigated with enough
guidance to comply with the request or prepare a defense. Again, this requirement need not be
overly onerous to achieve these goals. A general statement of the nature of anti-competitive
conduct should suffice.

Description of the documents to be produced. Although China’s anti-monopoly laws do not
formally require a description of the documents to be produced, NDRC, SAIC, and MOFCOM
do so in practice. EU authorities are required to specify as precisely as possible all the documents
requested. The U.S. similarly requires CIDs and subpoenas to be narrowly drawn and directed
necessary at material information.

Allowance of legal counsel during interviews. China does not have a statutory requirement to
ensure the presence of legal counsel during interviews, but agencies handling national level
investigations often encourage lawyers to participate in practice. Chinese agencies generally
allow counsels to speak on legal issues but require respondents to speak unaided on factual ones.
The EU recognizes a general right to legal counsel during interviews, as does the U.S. in
nonadjudicative proceedings, subject to some limitations.

Judicial review. China does not permit preliminary judicial review of requests for documents or
interviews unless officials take a specified compulsory action, like seizing property. Further,
China permits challenges to such requests as part of judicial challenges to final decisions after
completion of the investigation and the issuance of a penalty. In the EU, any binding decision
can be challenged in an action for annulment in the General Court, including those made during
investigations. In the U.S., a party can obtain judicial review of CIDs and subpoenas in non-
merger investigations but cannot do so in merger investigations.

243 ICN ROUNDTABLE, supra note 11, at 6.
Differences in practice

Internal approval by a high-level official. China, the EU, and the U.S. require agency staff to seek approval from a high-level official before initiating a formal investigation. For China, before the reshuffling of the enforcement agencies, provincial and local-level agencies must submit a report to their national counterparts and obtain approval before proceeding with an investigation. In the EU, a Head of Unit or case manager can issue voluntary simple requests, but binding decisions must be reviewed by a team consisting of the case team, senior management, the Commission’s legal team, and the Commissioner, who makes the ultimate decision regarding whether or not to initiate an investigation. The U.S. employs a multi-tiered system of internal approvals in both the FTC and DOJ that is more extensive than that required in China and the EU.

B. Investigations: Inspections of Company Premises

Competition authorities investigating possible violations of competition law can inspect the premises of the suspected company to look for and potentially seize evidence of wrongdoing. In China, Article 39 of the AML grants competition authorities the right to conduct inspections of the investigated parties’ premises. China’s Administrative Enforcement Law predominantly governs inspections of company premises.244 Inspections must be conducted by two or more law enforcement personnel from the agency, the investigated party must be notified to be present, and inspections cannot be conducted at night, except in emergency situations.245 China’s AML and the relevant agency regulations also specify that enforcement authorities must keep confidential any commercial secrets they access in the course of their enforcement.246 Both SAIC and NDRC developed additional regulations in 2010, laying out the procedures to govern inspections in more detail. Specifically, NDRC promulgated the Regulations on Administrative Procedures for Law Enforcement on Anti-Price Monopoly,247 and SAIC promulgated its Procedural Rules by Administration of Industry and Commerce Regarding Investigation and Handling of Cases Relating to Monopoly Agreement and Abuse of Dominant Market Position.248 MOFCOM exclusively oversees merger proceedings and therefore does not usually partake in inspections of company premises, although it can do so if necessary. MOFCOM obtains information about the parties primarily before Phase 1 (above) or in the pre-acceptance phase predominantly through submissions by the parties.

The European Commission is empowered to enter the premises of suspected parties to examine their records and potentially seize relevant evidence.249 In order to ensure proper coordination between the European Commission and an individual member state’s NCA, the Commission must notify the NCA about any inspections and is in turn entitled to support from

245 See id. arts. 18(2) and 43.
246 See AML, supra note 91, art. 41; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 12; NDRC Anti-Price Procedures, supra note 93, art. 9.
247 NDRC Anti-Price Procedures, supra note 93.
248 SAIC Investigative Procedures for Monopoly Cases, supra note 94.
national officials in carrying out the inspection. The European Commission can also involve the local police to ensure the inspection is carried out without resistance. The investigated company is obliged to assist the Commission in its inspection, but is not required to actively support the investigators by submitting evidence without request.

Such company inspections are often called “dawn raids” because agencies prefer to conduct them early in the morning. For an international antitrust case, inspections of company premises in other jurisdictions are often executed simultaneously to avoid warning subsidiaries or branches in other countries before they can be inspected. Under certain circumstances the Commission can likewise search premises of third parties if there is reason to believe that relevant evidence can be found there.250

U.S. law typically permits searches only for investigations of criminal law and, unlike EU law, generally requires prior judicial approval before conducting them. Moreover, in civil cases, agencies must obtain prior judicial approval before conducting administrative inspections of private companies.251 The U.S. Supreme Court has recognized a limited exception to this rule that permits warrantless administrative inspections for “closely regulated” industries that are “long subject to close supervision and inspection” in which an owner or operator of commercial property “has a reduced expectation of privacy,” such as liquor sales, firearms dealing, mining, and automobile junkyards.252 The Court later characterized these industries as involving activities that are “intrinsically dangerous” and that “pose[] a clear and significant risk to the public welfare.”253 General rules that are “more akin to the widely applicable minimum wage and maximum hour rules” do not constitute the type of close regulation associated with the exception.254 In addition, the warrantless inspection regime must satisfy three criteria: (1) The government interest furthered by the inspection must be substantial, (2) the inspection “must be necessary to further [the] regulatory scheme,” and (3) “the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.”255 To meet the third criterion, the regulatory “statute must be sufficiently comprehensive and defined” to “limit[] the discretion of inspectors,”256 such as by providing for periodic annual inspections or inspections on a “regular basis” in order to “sufficiently . . . constrain [inspectors’] discretion” so as to substitute for individualized review.257 The Court held that claims that the inspection is necessary to further regulatory scheme are belied by the fact that officials concerned about the destruction of evidence may conduct a surprise inspection by obtaining an ex parte warrant or may guard the property while obtaining a warrant telephonically.258 Antitrust investigations are not restricted to companies involved in intrinsically dangerous activities and do not involve the type of certain and regular inspection program and limits on discretion needed to justify foregoing individualized judicial review. Enforcement officials who want to protect against the destruction of evidence may obtain from a court an ex

254 Id. at 2455.
255 Burger, 482 U.S. at 702–03.
256 Id. at 703 (internal quotation marks omitted).
257 Patel, 135 S. Ct. at 2456.
258 Id. at 2453, 2456.
parte warrant authorizing a surprise inspection or to obtain a telephonic warrant from a court while guarding the premises.

Inspections are often described as one of the most effective investigative tools for gathering incriminating evidence because they minimize the opportunity for document destruction and concealment. They play a particularly important role when enforcement officials have concerns that parties will destroy evidence rather than fulfill the request in good faith. At the same time, inspections represent a significant intrusion into the company’s operations. Inspections often interrupt the everyday business of the company and require expenditure of resources to accommodate the agency’s efforts. Additionally, the physical intrusion into company premises endangers the companies’ interests in maintaining business, trade secrets, and their general privacy. Because the intrusion into private property often involves constitutional issues and the constitutional approaches vary across jurisdictions, the differences in procedural protections that are afforded can vary substantially.

This section breaks down the process of conducting investigations through inspections of company premises into four separate steps:

1. Description of the factual basis for conducting the inspection
2. Description of the places to be inspected and the evidence to be seized
3. Allowance of legal counsel during the search
4. Judicial review of requests to inspect company premises

1. Procedural Steps of Inspections of Company Premises

a. Description of the factual basis for conducting the inspection

China, the EU, and the U.S. differ as to the extent to which agencies must set forth the factual basis justifying the inspections that they wish to conduct. Although each jurisdiction requires its agencies to adduce some factual predicate before conducting an inspection, the specific requirements vary in terms of degree.

China

In China, an Inspection Notice is required before entering an undertaking’s premise to conduct an inspection. Law enforcement personnel must catalog any evidence that is extracted, and both the respondent and law enforcement personnel must sign the manifest. The Inspection Notice contains a summary of the enforcement exercise.259

European Union

EU law requires that investigators have reasonable grounds for suspecting that a violation of the competition rules has occurred before undertaking any coercive investigatory measures.260

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Such grounds may be presented after the inspection.\textsuperscript{261} The law also requires the Commission to state the reasons underlying the decision for an investigation by stating its subject matter and purpose.\textsuperscript{262} This enables the investigated party to assess the scope of their duty to cooperate and to safeguard their rights of defense.\textsuperscript{263}

**United States**

In the U.S., searches to investigate criminal antitrust violations and administrative inspections to enforce civil regulatory regimes typically require prior judicial approval in the form of a warrant. In these cases, a search warrant must be supported by an affidavit setting forth the factual basis justifying the search and containing sufficient credible facts to establish probable cause that a violation has occurred and that evidence of the violation is at the search location.\textsuperscript{264} Warrantless administrative inspections do not require any factual predicate, but are not available for antitrust enforcement.

**International norms**

An international consensus has emerged that requiring officials to have an evidentiary foundation before conducting an inspection helps provide an important safeguard against abuses of agency discretion. The ICN Guidance on Investigative Process provides that enforcement authorities “should inform parties of the basic facts and nature of evidence gathered.”\textsuperscript{265} Paragraph 6.2.5 of the ASEAN Regional Guidelines on Competition Policy similarly requires a “reasonable suspicion that evidence related to the subject matter of the investigation is kept,” as well as “reasonable grounds for believing that the person has in possession any document which has a bearing on the investigation.”\textsuperscript{266} Given the invasive nature of inspections, the expectation is that the evidentiary threshold should be as high, if not higher, than the threshold required for document requests.

*b. Description of the places to be inspected and the evidence to be seized*

Another area where Chinese, EU, and U.S. law differ is with respect to providing an inspection plan to the investigated party. Chinese and EU law do not require such an inspection plan, while U.S. law requires some specification of the location and scope of the inspection.
China

Chinese law does not require the enforcement agency and its personnel to provide investigated parties with an inspection plan, but before the commencement of the inspection, they must request an Inspection Notice from the agency approved by its chief executive. Further, officials must collect evidence in a comprehensive, objective, and impartial manner throughout the inspection.\footnote{See Administrative Penalty Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Sept. 1, 2017), art. 36 [hereinafter Admin. Penalty Law].} Enforcement personnel breaking the procedural rules may be punished under the Trial Measures on Fault Liability Claims in Price-related Administrative Penalties.\footnote{See Trial Measures on Fault Liability Claims in Price-related Administrative Penalties, art. 4 (NDRC Price Investigation (2004) No. 1717).} Before leaving the undertaking’s premise, inspectors are required to prepare a written description of any documents, materials and evidence seized during the inspection, signed by the investigated party.

European Union

EU law similarly does not require enforcement officials to describe the locations to be inspected or the documents to be seized. Article 20 of Regulation 1/2003 generally limits the geographic scope of an investigation to the premises of the investigated party. However, the Commission is authorized to carry out inspections at a third party’s premises provided that a reasonable suspicion exists that evidence relevant to a serious violation of Article 101 or Article 102 TFEU can be found there.\footnote{See Council Regulation 1/2003, art. 21, 2002 O.J. (L 1) 1 (EC).} Officials are required to describe the purpose of the inspection as precisely as possible at the time of the inspection,\footnote{See Council Regulation 1/2003, art. 28(1), 2002 O.J. (L 1) 1 (EC); Case 85/87, Dow Benelux NV v. Commission, 1989 E.C.R. I-3155, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61987CJ0085.} which provides limits to the documents that can be seized. Enforcement officials may not use any information obtained during inspections for purposes other than those indicated in the inspection decision.\footnote{See Case C-37/13 P, Nexans SA v. Commission, ECLI:EU:C:2014:2030 (June 25, 2014), para. 27, curia.europa.eu/juris/celex.jsf?celex=62009TJ0135&lang1=en&type=TXT&ancre=.} Thus, an inspection may be made only for those documents coming within the scope of the subject matter of the inspection. If enforcement officials look for documents outside of the scope of this investigation, courts will set aside any follow-up inspection decisions based on the infringement of the investigated party’s rights of defense.\footnote{See Case C-583/13 P, Deutsche Bank AG v. Commission, ECLI:EU:C:2015:404 (June 15, 2015), paras. 60, 71, curia.europa.eu/juris/celex.jsf?celex=62013CJ0583&lang1=en&type=TXT&ancre=.}

United States

As noted above, antitrust enforcement does not fall within the exception for warrantless administrative inspections recognized under U.S. law. As a result, U.S. civil antitrust investigations rely on document requests, interviews, and interrogatories. For criminal enforcement, any inspections and searches must comply with the constitutional requirement that the warrant describe with the places to be searched and the things to be seized.\footnote{U.S. CONST. amend. IV; FED. R. CRIM. P. 4(b)(1)(A), 41(e)(2).} This
requirement “ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.” The degree of specificity with which the warrant must describe the documents to be seized and the location of the search may vary depending on the circumstances. When seeking business records, it is typically sufficient for the warrant to describe records of a type usually maintained by the business at the business location.

c. Allowance of legal counsel during the inspection

Neither Chinese, EU, nor U.S. law gives legal counsel the explicit right to be present on site during the execution of an inspection. However, the similarity of de jure law masks practices that are quite different.

China

China’s regulations do not explicitly grant the right for legal counsel to be present during an inspection. In many cases, however, legal counsel is encouraged to be present to ensure due process, advise the investigated party of their rights, and promote cooperation with the legal obligation to comply with the enforcement measure. Legal counsel may also be permitted to videotape the inspection for the investigated party’s record. Attorneys are not permitted to interfere with the inspection and may not speak on behalf of the company or any personnel regarding facts in the case. Further, in-house lawyers are considered “employees” of the company rather than lawyers.

European Union

In the EU, Article 47(2) of the EU Charter of Fundamental Rights recognizes the right to legal assistance. The ECJ has held that the right to legal representation begins during the preliminary inquiry stage. This investigation that may be decisive in providing evidence of the unlawful nature of conduct. While it had been a practice of the European Commission to wait for counsel to arrive on site before starting an inspection, this is not legally required, and EU officials sometimes begin their inspections immediately upon arrival.

United States

In the U.S., company representatives may ask the inspecting agents to wait until counsel arrives. Inspecting agents retain the right to decide whether to wait. Although agents do not

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275 Our information in this section is based on conversations with practitioners and bureaucrats in China.
278 Koninklijke Wegenbouw Stevin, Case T-357/06 para. 232.
always wait for legal counsel, they usually allow counsel to be present on site once they arrive so long as they do not interfere with the search.  

**International norms**

International authorities support permitting the presence of legal counsel during on-site inspections. For example, Paragraph 2.4.9 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings determines that “[t]he agency should allow counsel for the party to be present at on-site inspections of a party’s premises.”

**d. Judicial review of requests to inspect company premises**

The three jurisdictions differ is with respect to judicial involvement in authorizing and reviewing inspections. Chinese law does not provide for any prior judicial approval of inspections, but does permit a party to apply for administrative reconsideration of the inspection or to file an administrative lawsuit. EU law does not require prior authorization, but does permit inspected parties to bring an action to annul the inspection immediately afterwards. U.S. law both requires prior judicial authorization of searches and allows for post-search judicial proceedings to return the property and to suppress any evidence obtained.

**China**

In China, judicial authorization is not a prerequisite for the commencement of an inspection, but the approval of the agency and the agency chief is a must. Administrative compulsion used in the investigation such as sealing and seizing property can be included in the administrative litigation against penalty decisions on the grounds of procedural violations. At the same time, minor procedural violations may not necessarily require that an agency determination be set aside. The Administrative Litigation Law provides, where the procedures underlying the administrative action were slightly unlawful but did not have an actual impact on the rights of the plaintiff, the people’s court shall make a judgment confirming illegality, but not revoking the administrative act.

**European Union**

In the EU, Council Regulation EC No 1/2003 does not require judicial approval prior to enforcement officials conducting an inspection. However, a warrant might be necessary if the company refuses the inspection, the Commission asks the local authorities to impose coercive measures, or if national law requires a warrant in such a case. Even then, the national judicial

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283 See Admin. Litig. Law, *supra* note 231, art. 74.
authority has no right to control the legitimacy of the inspection itself and can only check if the Commission’s decision to inspect is authentic and that any plans for coercive measures are not excessive. In a merger control proceeding, the Commission need only deliver notice containing the purpose and subject matter of the inspection to relevant authorities (which may include various authorities from Member States). Following an inspection, EU law permits the party under inspection to bring an action to annul the Commission’s decision ordering the inspection under Article 263(4) TFEU. This right must be explained in the inspection decision itself.\textsuperscript{285} Annulment only concerns the inspection order. Measures carried out by the Commission during an inspection (e.g., copying of documents) can be challenged in court only through a challenge to the final Commission decision ending a proceeding.\textsuperscript{286}

**United States**

As noted earlier, U.S. law typically requires enforcement officials to obtain a court-issued warrant before conducting a search to enforce criminal antitrust law or an administrative inspection of a company’s premises. The exception permitting administrative inspections without a warrant does not apply to antitrust enforcement. Courts will issue warrants only on probable cause that a search will result in evidence of a violation being discovered.\textsuperscript{287} U.S. law gives any person aggrieved by an unlawful search and seizure of property or the deprivation of property the right to move in court for the property’s return.\textsuperscript{288} If the court grants the motion, the court must return the property to the movant, but may impose reasonable conditions to protect access to the property and its use in later proceedings. In addition, if the search is found to be improper, courts typically suppress any evidence obtained during the search or as the result information obtained from the search from any subsequent criminal trial.\textsuperscript{289} People who were subject to an unlawful search or seizure may also sue for damages.\textsuperscript{290}

2. **Differences in Law and Practice**

Within inspections of company premises in the three jurisdictions, three steps are different in law, and one step is different in practice.

**Differences in law**

*Description of the factual basis for conducting the inspection.* Although China’s Administrative Enforcement Law requires officials to disclose to an investigated party its basis and reasons for conducting an investigation, this disclosure can vary from vague to more specific. The EU requires investigators to have reasonable grounds before commencing an inspection and to communicate that basis to the investigated party. It does not require disclosing specific facts to the investigated party. In U.S. law, inspections are not used for civil enforcement. Searches to

\textsuperscript{285} See id. art. 20(4).
\textsuperscript{288} See FED. R. CRIM. P. 41(g).
\textsuperscript{289} See FED. R. CRIM. P. 12(b)(3)(C) and 41(h).
enforce criminal antitrust law require a warrant supported by evidence establishing probable cause.

**Description of the places to be inspected and the evidence to be seized.** Chinese agencies are not required by law to provide a description of their inspection plan to an investigated party, but are required to collect evidence in a comprehensive, objective, and impartial manner. They are also required to prepare a report of any materials seized during the inspection and allow the respondent to sign the report. Further, officials are prohibited from using coercive measures or conducting an inspection beyond the scope of their investigation. EU law similarly requires no inspection plan, but does require officials to describe the purpose behind their inspection, which has a limiting effect on the scope of property they may seize. Moreover, the threshold for inspecting third parties’ premises is higher than for premises of the investigated party. Under U.S. law, inspections are not used for civil enforcement, warrants authorizing searches to enforce criminal antitrust laws must detail with specificity the premises to be search and property sought.

The lack of some ex-ante restriction on the scope of any searches creates opportunities for enforcement officials to exercise unfettered discretion. Therefore, specification of the scope of the search allows courts to ensure that the intrusiveness of the investigation is proportional to the extent of the potential harm indicated by the evidence.

**Judicial review.** In China, judicial authorization is not required to commence an inspection. Judicial review of inspections is available if the agency performs an act of administration compulsion or in the respondent’s challenge to the final decision.291 The EU likewise does not require judicial review prior to an inspection, but allows investigated parties to bring an action to annul the inspection immediately after its completion. In some cases, a warrant may be required if the company refuses the inspection, the Commission asks the local authorities to impose coercive measures, or if national law requires a warrant. Such warrants are also subject to limited judicial review. Under U.S. law, inspections are not used for civil enforcement, and courts must authorize any searches conducted to enforce criminal antitrust laws prior to their commencement. Investigated parties may additionally bring an action in court after the search to suppress any evidence obtained through an illegal search, obtain the return of the property, and for damages.

**Differences in practice**

**Allowance of legal counsel during inspection.** None of the three jurisdictions give investigated parties the statutory right to have legal counsel present during an inspection. However, in practice, enforcement official in China have the discretion to permit legal counsel to be present during inspections. Legal counsel are encouraged to do so in national-level cases and sometimes discouraged in provincial or local-level cases for fear of their potential interference with the inspection. However, even at local level, some authorities actively asked attorneys to be involved since the inspectors could hardly explain technical issues to the investigated parties, for which purpose attorneys can be helpful. The EU’s Charter of Fundamental rights recognizes a right to legal counsel during all legal proceedings, which courts have interpreted to include during an inspection. Enforcement officials sometimes wait for counsel to arrive, but ultimately have the

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discretion to determine how long they will wait for counsel to arrive. Similarly, U.S. law allows legal counsel to be present during inspections so long as counsel does not interfere with the inspection, but officials have the right to begin an investigation without legal counsel being present or to refuse their entry.

C. Agency Deliberations

After completing its investigation, the enforcement agency must evaluate the evidence, analyze the legal issues, and decide whether a violation of the competition laws has occurred. This process is internal to the agency and thus is inherently open to the possibility of bias and abuse. Consequently, many jurisdictions impose transparency and participation requirements during this process. This is advantageous because providing notice to the investigated parties avoids a surprise decision for the parties and allows them to submit evidence relevant to the investigation. It also improves the quality of decisionmaking, fairness to the parties, and transparency—all necessary for a jurisdiction to reap the benefits of due process.

This section breaks down the process of agency deliberations into six separate steps:

1. Disclosure of the evidence upon which the agency wishes to rely
2. Disclosure of exculpatory evidence
3. Disclosure of the legal, economic, and factual bases underlying the agency’s investigation
4. Opportunity for the respondent to submit responses to the allegations and exculpatory evidence
5. Representation by legal counsel during agency deliberations
6. Protection of sensitive information

1. Procedural Steps of Agency Deliberations

a. Disclosure of the evidence upon which the agency wishes to rely

All three jurisdictions require their agencies to disclose the evidence upon which they wish to rely to respondents.

China

In certain situations, China’s Administrative Penalty Law entitles respondents to access to the evidence upon which the agency is relying. First, in an oral hearing, the agency must disclose the evidence it is using.292 Second, the agency must disclose such evidence when issuing its final decision.293 It is not clear, however, how much detail Chinese agencies must provide. It is also uncertain whether they do so at an early enough point to enable respondents to defend themselves effectively. In a merger control proceeding prior to the consolidation of the three enforcement agencies, when MOFCOM determined that the proposed transaction may cause a

292 Admin. Penalty Law, supra note 267, art 42.
293 Id. art. 39.
restriction of competition, it notified the parties of its findings and disclosed the potential competition concerns.\footnote{See AML, \textit{supra} note 91, art. 30}

**European Union**

The European Commission must disclose any evidence on which it wishes to rely to the respondent. The Commission prepares a description of its evidence in its Statement of Objections, which represents the formal charges against the respondent.\footnote{See DG COMP MANPROC, \textit{supra} note 196, ch. 11.3, para. 2. For merger control, see Commission Regulation 802/2004, art. 12(1), 2004 O.J. (L 133) 1.} The Commission may submit new evidence either by way of a Supplementary Statement of Objections or, if the new evidence corroborates previously disclosed objections, in a simple document known as a Letter of Facts.\footnote{See DG COMP MANPROC, \textit{supra} note 196, chs. 8.1–8.2.} Only evidence cited or mentioned in the Statement of Objections, Supplementary Statement of Objections, or Letter of Facts are considered evidence on which the Commission can base its final decision.\footnote{See id. ch. 1.2.2.1.2.} In addition, any party addressed with a Statement of Objections has the right to access the file of the European Commission.\footnote{See Commission Regulation 773/2004, art. 15(a), 2004 O.J. (L 123) 18. For mergers, see Commission Regulation 802/2004, art. 17, 2004 O.J. (L 133) 1.} Information covered by the obligation of professional secrecy\footnote{See Council Regulation 1/2003, art. 28(2), 2002 O.J. (L 1) 1 (EC).} and documents containing business secrets are exempt from this right to access.\footnote{See Commission Regulation 773/2004, art. 15(1), 2004 O.J. (L 123) 18.} As a general rule, parties are not given access to the replies to the Statement of Objections submitted by the other parties involved or to the internal files of the Commission. As discussed below, parties can access confidential information necessary to their defense under certain circumstances.\footnote{See infra note \_ and accompanying text.} Any refusal to grant the applicant access to the file violates its rights of defense if giving access to the applicant could have led to a different disposition.\footnote{See DG COMP MANPROC, \textit{supra} note 196, chs. 12.2.1–12.2.2.}

The EU’s access-to-file system has triggered some controversy. First, postponing access until after the Statement of Objections is sent out can limit the respondent’s ability to defend itself. Moreover, the exemptions to the right to access the file can lead to arguments about which documents must be disclosed. The parties have a right to see all evidence necessary to prove an infringement of competition law,\footnote{See id. ch. 12.2.3.} but an effective defense could require access to information that the Commission does not deem “necessary.” Denied requests for access can be brought before the Hearing Officer but this process does not fully solve the problem because the Hearing Officer makes only a non-binding recommendation to the Competition Commissioner in response.\footnote{See Case C-413/14 P, Intel Corp. v. Commission, ECLI:EU:C:2017:632 (Sept. 6, 2017), curia.europa.eu/juris/celex.jsf?celex=62014CJ0413&lang1=en&type=TXT&ancre=.} In \textit{Intel}, however, the European Court of Justice decided that the Commission must also disclose exculpatory evidence to the respondent.\footnote{See id. ch. 12.2.3.} The Commission must similarly disclose the evidence upon which it wishes to rely in the merger context. In the \textit{United Parcel Service} case, the General Court recently annulled the
Commission’s decision to block a proposed merger between UPS and TNT Express NV because the Commission failed to disclose the economic models upon which it relied its final decision, thus infringing the merging parties’ right of defense. This decision additionally articulated the relatively unforgiving standard that courts will annul Commission decisions for withholding evidence if “there was even a slight chance that [the respondent] would have been better able to defend itself” but for the non-disclosure.

**United States**

In the U.S., defendants in criminal antitrust cases are entitled to full access to the evidence contained in the prosecution’s case files. When the DOJ or FTC brings civil enforcement actions in court, the government is obligated to make initial disclosures of evidence and of witnesses “likely to have discoverable information.” Similarly, in administrative adjudications, the FTC must make a mandatory initial disclosure of the names of any individual likely to have information relevant to the allegations of the FTC’s complaint as well as a description of any document, transcripts of investigational hearings and depositions, and any tangible things serving the same purpose. All agencies are forbidden from concealing or misrepresenting evidence. In a merger review, prior to the issuance of a second request, agency staff will endeavor to host consultation meetings with the parties to discuss both the parties’ and the agency’s views on the transaction and possible areas of concern. Once a second request is issued, agency staff will, again, hold a second request conference with the parties to have a “frank exchange of ideas and [review] evidence that allows both sides to identify and test the competitive theories for and against the transaction.”

**International norms**

There is an international consensus that enforcement agencies should provide parties charged with antitrust violations with complete access to the factual record. Paragraph 5.4 of the ICN Guidance on Investigative Process provides, “After formal allegations of competition violations and presentation of legal arguments are made, parties should be provided with access to the evidence relied upon as the basis for the agency’s allegations.” Likewise, the ABA Antitrust Section’s International Task Force advises officials to disclose “all potential contentions of infringement and (in reasonable detail) the underlying evidence, analysis and argumentation relevant to the defense.”

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The OECD Policy Roundtable on Procedural Fairness similarly observes, “Many agencies offer the parties an opportunity to examine the evidence—subject to legitimate confidentiality concerns—forming the basis for the agency’s conclusion that a violation of the competition laws has occurred,” particularly where sanctions may be imposed.317 The OECD further states, “A right to access the evidence used to support the allegations against them ensures that parties to an antitrust proceeding have full knowledge of the case and details concerning the alleged violations against them, allowing them to substantially respond before a decision is taken.”318 The OECD notes that agencies commonly do not provide such access until “after the main investigation has taken place and the written document setting out the allegations has been issued.”319 The OECD Secretariat Background Note on Access to the Case File emphasizes that “access to the case file is essential to protect the rights of the defence of the parties, given that it provides them with the opportunity to examine the basis on which the agency or court, depending on the competition enforcement system, will adopt its decision.”320

The ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings echoes this idea when it recommends that “all complaints, documents and other evidence relating to the subject matter of the investigation . . . should be disclosed to the Respondent” with the additional recommendation that such disclosure occur “prior to preparation of any written statement of the charges against the parties.”321

b. Disclosure of exculpatory evidence

Although there is a duty to actively disclose exculpatory evidence in the U.S., the EU and China have not embraced the obligation to do so.

China

Under Chinese law, there is no duty to actively disclose exculpatory evidence. Chinese officials emphasize that they consider all evidence—both favorable and unfavorable to the respondent—and adjust their decisions accordingly. For example, Chinese officials cited cases where they dropped charges against a defendant after it produced documents proving it was not involved in a cartel.322

Moreover, respondents can gain access to exculpatory evidence by requesting a hearing. First, pursuant to the Administrative Penalty Law, before reaching an administrative penalty decision involving a large fine, the administrative agency must advise the parties concerned of the right to request a hearing. When the parties so request, a hearing shall be arranged by the administrative agency and the parties shall not bear the expenses for the hearing organized by the administrative agency.323 In accordance with the Rules for the Administrations for Industry and Commerce on the Hearing of Evidence in Administrative Penalty Cases, the parties may present evidence in the hearing to justify their claims, and the moderator shall admit it. The parties and

317 OECD ROUNDTABLE REPORT, supra note 12, at 10.
318 Id.
319 Id.
320 OECD BACKGROUND NOTE ON ACCESS TO THE CASE FILE, supra note 13, at 4.
321 ICC BEST PRACTICES, supra note 18, at 2.
322 The information in this section is based on discussions with Chinese practitioners and bureaucrats.
323 See Admin. Penalty Law, supra note 267, art. 42.
the investigators may, with the permission of the moderator, conduct examination on the admissibility of the evidence submitted by their counterparts, or may question witnesses, forensic experts, and inspectors present. In accordance with the Provisions on the Procedures for Price-related Administrative Penalties, price authorities shall review the facts, reasons and evidence presented by the parties in statements, defense or hearing, and may make additional investigation and evidence collection where necessary. It is worth noting that since the enforcement agency also produces evidence extraction lists or on-site transcripts while pulling evidence on the premise of the investigated party, even if the enforcement agency is suspected of selectively applying the evidence, the respondent could question such motif in the hearing by comparing the evidence introduced in the hearing with the entirety of evidence extracted. After the consolidation of anti-monopoly enforcement agencies, the State Administration for Market Regulation (SAMR) issued the Interim Provisions on the Procedures for Administrative Supervision of Market Supervision and Administration on December 21, 2018. These provisions and the Interim Measures for Administrative Penalty Hearings in Market Regulation provide that the enforcement authority is obligated to inform the parties of the right to a hearing. When informing the parties of their right to a hearing, the authority shall also inform in writing the facts, reasons, and basis on which they intend to make a penalty decision. Such regulations took effect on April 1, 2019, at which time, the Rules for the Administrations for Industry and Commerce on the Hearing of Evidence in Administrative Penalty Cases was abolished.

European Union

While EU law does not impose an explicit obligation on the Commission to actively disclose exculpatory evidence, it does give the parties the right of access to the entire case file, which includes both inculpatory and exculpatory evidence. Indeed, in its recent Intel decision, the European Court of Justice rebuked the Commission’s failure to disclose an interview with a complainant, articulating a rule that the Commission must record all interviews “in full” and that it erred in not doing so. The court emphasized that this rule was necessary to preserve the respondent’s right of defense. However, if an exculpatory document has not been communicated during a request to access the file, the respondent must establish that the nondisclosure was prejudicial and relevant to the disposition before a court will reverse the Commission decision. This is puzzling because it leaves the respondent with a burden of proof, which is hard to satisfy if the respondent does not know about the existence of exculpatory evidence. Moreover, the

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324 See Rules for the Administrations for Industry and Commerce on the Hearing of Evidence in Administrative Penalty Cases (SAIC Decree No. 29, published on Sept. 4, 2007 and implemented on Oct. 1, 2007), art. 33 [hereinafter SAIC Hearing Rules].


326 See SAMR Admin. Penalty Procedures, supra note 116, art. 51.

327 See Interim Measures for Administrative Penalty Hearings in Market Regulation, art. 6 (SAMR (2019) No.3).

328 See id. art. 35.


330 See Case C-413/14 P, Intel Corp. v. Commission, ECLI:EU:C:2017:632 (Sept. 6, 2017), paras. 90–102, curia.europa.eu/juris/celex.jsf?celex=62014CJ0413&lang1=en&type=TXT&ancre=. Although the ECJ also reaffirmed the rule that the respondent must prove prejudice to get the Commission’s judgment annulled on that ground, it emphasized that the Commission had erred. Id. paras. 94–102

331 Id. paras. 96–98; see also Case C-204/00 P, Aalborg Portland A/S v. Commission, 2004 E.C.R. I-403, para. 74.
agency cannot exclude evidence that is necessary for the defense from the file because it contains business secrets.\(^{332}\)

**United States**

In U.S. criminal antitrust proceedings, the prosecutor has the obligation to turn over any exculpatory evidence\(^ {333}\) as well as any evidence tending to impeach any material witness.\(^ {334}\) Civil enforcement actions brought by the DOJ or the FTC in court should also result in the disclosure of exculpatory evidence under the Federal Rules of Civil Procedure.\(^ {335}\) As noted above, in administrative adjudications, the FTC is obligated to make a mandatory initial disclosure of the names of any individual likely to have information relevant to the defenses of the respondent.\(^ {336}\) It similarly must disclose a description of any document, transcripts of investigational hearings and depositions, and other tangible things serving the same purpose.\(^ {337}\) This standard applies to all covered evidence, whether inculpatory or exculpatory.

**International norms**

Paragraph 2.1.4 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings recommends that enforcement authorities disclose all evidence to respondents "whether inculpatory or exculpatory."\(^ {338}\) Similarly, paragraph 2.4.14 suggests, “The agency’s obligation to disclose both inculpatory and exculpatory evidence to the Respondents should continue following the submission of the Report through the close of the hearing.”\(^ {339}\) Moreover, the ICN Guidance on Investigative Process advises, “Agencies should ensure that all of the evidence and information, whether exculpatory or inculpatory, obtained during an investigation receive appropriate consideration during the agency decision-making process.”\(^ {340}\) The OECD Secretariat Background Note on Access to the case file and protection of confidential information emphasizes that access to the case file must include both incriminating and exculpatory evidence.”\(^ {341}\)

c. **Disclosure of the legal, economic, and factual bases for the agency’s investigation**

By law, the enforcement agencies in China, EU, and U.S. are all required to inform the parties under investigation about the legal and factual bases of their investigation. Although, this requirement is generally fulfilled, the details of the notification can differ widely in practice.


\(^{333}\) See Brady v. Maryland, 373 U.S. 83 (1963).

\(^{334}\) See Giglio v. United States, 405 U.S. 150 (1972).

\(^{335}\) See FED. R. CIV. P. 26(a)(1)(A)(i)–(ii).

\(^{336}\) See 16 C.F.R. § 3.31(b)(1) (2017).

\(^{337}\) See id. § 3.31(b)(2).

\(^{338}\) ICC BEST PRACTICES, supra note 18, at 6.

\(^{339}\) Id.

\(^{340}\) ICN GUIDANCE, supra note 11, at 7.

\(^{341}\) OECD BACKGROUND NOTE ON ACCESS TO THE CASE FILE, supra note 13, at 4, 5–6.
China

In China, before DRCs and AICs take a penalty decision, they shall issue an Advance Notice of Administrative Penalty to the respondent, stating the legal, economic and factual basis on which the investigation is based. Upon receipt of an Advance Notice, the concerned party shall have three days to request an opportunity for statement, defense and hearing. If a party formally requests a hearing, the agency shall organize it within thirty days and disclose in writing the time, location, format, and moderator’s name to the parties no later than seven days before the hearing. In other words, the parties will have from day 7 until day 30 to prepare the examination on the admissibility of the evidence submitted by their counterparts in accordance with the Advance Notice. The AIC hearing rules require that the AIC confirm the hearing moderator within three days upon receipt of the party’s request for hearing, and the case investigators shall transfer the case file to the hearing moderator within three days of the date confirming the hearing moderator. The hearing moderator shall then, finalize the time and place of the hearing within five days of receipt of the case file transferred from the investigators and notify the party no later than seven days before the hearing. This means the party will have from day 7 to day 21 to prepare evidence questioning in accordance with the Advance Notice.

Following the consolidation of anti-monopoly enforcement agencies, the deadline for the party to request a hearing was changed to no more than 3 days after receipt of the Advance Notice. This change took effect on April 1, 2019. Apart from the hearing, the respondent can also consult with the law enforcement agency. For example, in the Qualcomm case, the NDRC Anti-monopoly Bureau and Qualcomm held twenty-eight rounds of consultation, eight of which involved Xu Kunlin, the then Director-General of the Anti-monopoly Bureau. Qualcomm’s president came to the first round of talks accompanied by six vice presidents, who introduced their business model mainly for explanatory and defensive purpose. The law enforcement agency also came fully prepared and raised issues pertaining to facts, evidence, conflicts, and what is reasonable.

European Union

The European Commission must provide a description of the legal and economic bases and factual allegations underlying the agency’s investigation once it opens formal proceedings. The Commission opens formal proceedings when the initial assessment leads to the conclusion

342 See Provisions on the Procedures for Price-Related Administrative Penalties, supra note 148, arts. 35 and 36.
343 See id. art. 33.
344 See SAIC Hearing Rules, supra note 324, art. 23.
345 See id. art. 24.
346 See id. art. 25.
347 See SAMR Admin. Penalty Procedures, supra note 116, art. 51.
348 See Fǎn lǒngduàn jú cháng tán gāo tōng fǎn lǒngduàn àn: Qián hòu gōu tōnggéle 28 lún (反垄断局局长谈高通反垄断案: 前后沟通了 28 轮) [Antimonopoly Bureau Director-General talks about Qualcomm’s antimonopoly case: 28 rounds of consultation], Fènghuáng wǎng kējī (凤凰网科技) [PHOENIX NETWORK TECH.] (June 25, 2015, 14:43), http://tech.ifeng.com/a/20150621/41115898_0.shtml.
that the case merits further investigation, that is, when there is a reasonable indication of a likely infringement and where the scope of investigation has been sufficiently defined.\footnote{See Council Regulation 1/2003, art. 11(6), 2002 O.J. (L 1) 1 (EC). The Commission may exercise its powers of investigation before initiating formal proceedings, but has to initiate formal proceedings before settling a case or issuing a Statement of Objections. See Commission Regulation 773/2004, art. 2, 2004 O.J. (L 123) 18.}

When the Commission decides to issue a Statement of Objections, it must provide a written copy to each of the parties concerned.\footnote{See Commission Regulation 773/2004, art. 10(1), 2004 O.J. (L 123) 18.} The Statement of Objections includes a description of the legal and economic bases and factual allegations underlying the agency’s investigation. If the Commission discovers new evidence after issuing the Statement of Objections, it supplies either a Supplementary Statement of Objections or, if the new evidence simply corroborates concerns in the Statement of Objections, a simple Letter of Facts to the parties and the opportunity for them to respond.\footnote{See DG COMP MANPROC, supra note 196, ch. 11.8.2.}

This obligation likewise exists in the merger context. In the 2017 \textit{United Parcel Service} case, the General Court annulled the Commission’s decision to block a merger when the Commission failed to disclose an updated version of the economic model on which it ultimately relied.\footnote{Case T-194/13, United Parcel Serv., Inc. v. Commission, ECLI:EU:T:2017:144 (Mar. 7, 2017), paras. 198–210, curia.europa.eu/juris/celex.jsf?celex=62013TJ0194&lang1=en&type= TXT&ancre=.}

\textbf{United States}

For administrative proceedings before the FTC, the Commission must advise anyone compelled or requested to furnish information about the purpose and scope of the investigation, the nature of the activities under investigation, and the applicable provisions of law.\footnote{See 16 C.F.R. § 2.6 (2017).} Towards the end of the investigation, both FTC and DOJ staff are expected to contact the respondent before making their final recommendation and offer them the opportunity to submit their views.\footnote{See FTC OPERATING MANUAL, supra note 163, ch. 3, § 6.1; DOJ ANTITRUST DIV. MANUAL, supra note 168, at III-111.}

When the FTC initiates a formal administrative enforcement proceeding, it issues a complaint, which includes a “recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated” and a “clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law.”\footnote{See infra notes 699–703 and accompanying text.} As discussed in greater detail below in the discussion of judicial review, agencies must also disclose any economic models on which they wish rely and the evidence corroborating or showing the limits of the model.\footnote{See 16 C.F.R. § 2.6 (2017).} After the respondent has filed its answer, a scheduling conference will be held at which factual and legal theories are addressed.\footnote{See infra notes 699–703 and accompanying text.} Before the commencement of the evidentiary hearing, a final prehearing conference is held, during which the respondent and the agency exhibit and witness lists are and designate testimony to be presented by deposition.\footnote{See id. § 3.21(e).} The result
is that the FTC provides full discovery well in advance of an evidentiary hearing and pre-hearing briefing. At the evidentiary hearing, the FTC bears the burden of proof and must therefore present the evidence it relies upon.359

When the U.S. antitrust laws are enforced in court, the complaint should inform the defendant of the factual allegations and the legal and economic theories that form the basis for the charges.360 Courts provide the parties with full discovery and a pretrial conference where the agencies must identify the witnesses, documents, and expert testimony on which it plans to rely.361

**International norms**

International authorities universally recognize disclosure of the legal, economic, and factual bases underlying the agency’s investigation as an essential part of fair procedures. Paragraph 4.2 of the ICN Guidance on Investigative Process explicitly states that “the agency should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency’s findings of fact and legal and economic analysis.”362 The OECD Key Points on Procedural Fairness and Transparency similarly notes that “during the investigative stage, many agencies advise parties under investigation of the legal and economic bases and factual allegations underlying the agencies’ investigations, as well as the agencies’ theories of harm.”363

Moreover, Paragraph 2.1.4 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings stresses that “as soon as the investigators have completed their initial evidence gathering and assessment of the case, they should provide the Respondent(s) with a description of the factual basis for the charges, the evidence and the economic theories and legal analysis proposed, along with copies of the complaints, supporting materials and evidence assembled to date, both inculpatory and exculpatory.”364 The respondents should be given the opportunity to address the evidence and discuss the proposed charges, evidence, economic theories, and legal analysis with the agency.365 Similarly, the ABA Antitrust Section’s International Task Force envisions agencies disclosing their economic rationales so that respondents can respond with economic arguments.366 Together these analyses encourage enforcement agencies to disclose the factual allegations, legal theories, and economic rationales on which they are relying.

359 See *id.* § 3.43(a).
362 See *e.g.*, ICN GUIDANCE, *supra* note 11, at 3.
365 *Id.*
d. Opportunity for the respondent to submit exculpatory evidence and responses to the allegations

All three jurisdictions provide a formal right to submit a response and present exculpatory and rebuttal evidence. While the parties in the U.S. have a right to a trial-like hearing, the EU and China have different kinds of hearings.

China

In China, companies under investigation are entitled to make statements and defenses regarding the investigation.367 They are further warranted to request an oral hearing,368 where they can defend themselves and make arguments.369 Respondents may also submit exculpatory evidence in writing, a right guaranteed by Chinese law.370 Chinese officials emphasize that they have internal procedure and practices of submitting an Advance Notice/Hearing Notice on Administrative Penalty to respondents and inviting responses. In administrative penalty hearings, the relevant parties can conduct examination on the admissibility of the evidence submitted by their counterparts. After receiving the respondent’s response, the agencies will issue a final decision. Similar procedures apply to MOFCOM merger control investigations.371

European Union

EU law gives respondents two opportunities to present their arguments to the Commission. First, respondents can inform the Commission of their views in writing.372 This right encompasses the right to submit exculpatory evidence.373 The Commission can base its decision only on the grounds to which the parties had an opportunity to respond.374 Second, the parties can request an oral hearing in their written submissions, and they have the right to be heard in a nonpublic, recorded hearing by a Hearing Officer.375 However, this hearing is not comparable to a U.S. hearing. The parties can present their views, but they do not

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367 AML, supra note 91, art. 43.
368 See Admin. Penalty Law, supra note 267, art. 42; Rules for the Departments of Industry and Commerce on the Hearing of Evidence in Admin. Penalty Cases art. 6(3).
370 See Admin. Penalty Law, supra note 267, art. 32; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 13.
371 See MOFCOM Concentration Review Measures (MOFCOM Decree 2009 No. 12, reviewed and passed by the twenty-sixth ministerial affairs meeting on July 15, 2009), arts. 5, 7, 14. [hereinafter MOFCOM Concentration Review Measures].
have the right to cross-examine the Commission’s witnesses. Additionally, the hearing officer has no decisionmaking power, but only serves as a procedural safeguard. The Commission’s case team and other Commission officials are often present at the hearing.\textsuperscript{376} The hearing officer makes a report of the substantive issues raised at the hearing, but this report is not available to the parties and is not binding in any form.

Further, at these hearings, complainants and other competitors may have the chance to express their views in addition to the accused company, at the hearing officer’s discretion.\textsuperscript{377} In a situation where most of the market participants have little reason to support the accused company, respondents sometimes consider hearings to be counterproductive. However, the OECD observed that most respondents take advantage of the hearings.\textsuperscript{378}

United States

In the U.S., the defending party in a judicial enforcement action enjoys the full procedural benefits associated with jury trials. A respondent in an administrative adjudication has a right to a hearing to “show cause why an order should not be entered.”\textsuperscript{379} For that purpose, the respondent can file an answer within 14 days after being served with the complaint.\textsuperscript{380} At the evidentiary hearing itself, every party has the right of due notice, cross examination, presentation of evidence, objection, motion, argument, and all the other rights essential to a fair hearing.\textsuperscript{381} In a merger review, agency staff will discuss the contents of the second request with the parties, and the parties are encouraged to negotiate limitations and modifications to the request.\textsuperscript{382} Parties can present evidence to reduce the scope of the second request, in what is called a “quick look” investigation.\textsuperscript{383} Agency staff may ultimately determine the parties’ compliance with parts or the entirety of the second request is not necessary, and may close the investigation.\textsuperscript{384}

International norms

An international consensus is emerging in support of giving respondents the right to submit a response to charges. The ICN features the opportunity to respond to adverse evidence as one of its nine fundamental fairness principles.\textsuperscript{385} Further, Paragraph 5.4 of the ICN Guidance on Investigative Process recognizes that enforcement authorities should provide subjects of formal allegations with “an effective opportunity to respond” after “presentation of legal arguments are made” and the “parties [are] provided with access to the evidence relied upon as the basis for the


\textsuperscript{380} See 16 C.F.R. § 3.12(a) (2017).

\textsuperscript{381} See 5 U.S.C. § 554(e)(1); 16 C.F.R. § 3.41(c).

\textsuperscript{382} See DOJ ANTITRUST DIV. MANUAL, \textit{supra} note 168, at III-40 to III-41.

\textsuperscript{383} See \textit{id.} at III-42.

\textsuperscript{384} See \textit{id.} at III-42 to III-43.

\textsuperscript{385} See ICN GUIDING PRINCIPLES, \textit{supra} note 11, at 1.
agency’s allegations.” Paragraph 6.4 of ICN Guidance further provides, “Parties under investigation should be given the opportunity to exercise their rights of defense and respond to agency concerns and evidence. Parties should be permitted to express views, present factual, legal, and economic evidence to the agency and make substantive submissions during the investigation.” The ICN Roundtable Report similarly endorses giving charged parties the “opportunity to meet with the agency and provide additional arguments and insights.” Likewise, the ABA Antitrust Section’s International Task Force states there should be “reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation.”

The OECD discussion on the final decisionmaking stage recognizes that “most agencies provide parties the right to a hearing,” although some rely on written responses and informal discussions. The fifth finding of the OECD Roundtable similarly notes, “Jurisdictions reported allowing the subjects of competition enforcement proceedings to respond orally or in writing to the allegations against them before a decision is taken. These opportunities allow the subjects of the proceeding to present evidence and rebut opposing claims and arguments.” The OECD further notes that “[s]ome jurisdictions also allow parties to review and comment on key submissions by third parties contained in the case file, or submit memoranda or observations at any point during the investigation stage.” Moreover, “[s]ome jurisdictions allow parties to submit counter evidence and question any witnesses that have been called.”

The OECD Policy Roundtable also recommends that “defendants should have the right to a hearing before the decision-maker(s) or fully empowered agents” in addition to the opportunity to respond in writing. The Roundtable Report continues:

The purpose of this hearing is to provide the defendant with the opportunity for a live, in-person presentation of their response to the charges, for the defendant to question the evidence and witnesses relied upon by the investigators, including any complainants and others who have provided evidence on which the agency relies, to question the investigators and bring forward witnesses for the defence, who will also be available for questioning.

The OECD emphasizes that “merely providing a perfunctory hearing . . . does not in itself constitute adequate due process.” Other mechanisms include “more informal discussions between the agency and the party.” Together these authorities represent a strong endorsement

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386 See, e.g., ICN GUIDANCE, supra note 11, at 4.
387 Id. at 5.
388 ICN ROUNDTABLE, supra note 11, at 8.
389 ABA BEST PRACTICES, supra note 15, at 6.
390 OECD KEY POINTS, supra note 12, at 18.
391 OECD ROUNDTABLE REPORT, supra note 12, at 11.
392 Id.
393 Id.
394 Id.
395 Id. at 265.
396 Id.
397 Id.
398 Id. at 11.
of extending to defendants the right of a full opportunity to interrogate the arguments and evidence submitted against them.

e. **Representation by legal counsel during agency deliberations**

The jurisdictions additionally diverge with respect to representation by legal counsel during hearings and other stages of agency deliberations.

**China**

In China, the procedural rules clearly provide that the respondent can be represented by legal counsel in a hearing. Pursuant to the Rules for the Administrations for Industry and Commerce on the Hearing of Evidence in Administrative Penalty Cases, the parties and third parties may entrust one or two persons to participate in the hearing on their behalf. According to information publicized by Chinese law firms, lawyers have actively participated in and represented the investigated parties in anti-monopoly enforcement cases. The biography page of lawyer Ma Chen of Han Kun Law Offices indicates that he has “represented many well-known international and Chinese clients in China . . . in responding to cartel investigations.” The profile of Dentons lawyer Deng Zhisong similarly shows that “Lawyer Deng has represented a number of multinational firms in responding to investigation on monopoly agreement and abuse of dominant market position initiated by the NDRC and SAIC. He is familiar with the investigative procedures and experienced in developing strategies for response.” The profile page of lawyer Cen Zhaoqi of Zhong Lun enumerates his involvement in anti-monopoly investigations, stating that he has “represented a Fortune 500 IT firm and provided legal counsel in an SAIC anti-monopoly investigation, represented a Fortune 500 communications firm and provided legal counsel in a NDRC anti-monopoly investigation, represented a Fortune 500 pharmaceutical company and provided legal counsel in a NDRC anti-monopoly investigation, represented a state-owned gas company and provided legal counsel in an anti-monopoly investigation by the Jiangsu AIC, represented a private gas firm and provided legal counsel in an anti-monopoly investigation by the Shandong AIC.” This indicates that involving legal counsel in anti-monopoly investigations is common practice.

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399 See SAIC Hearing Rules, supra note 324, art. 19.
400 See id. art. 32.
401 See Ma Chen (马辰), HAN KUN LAW OFFICES https://www.hankunlaw.com/professionals/professionalDetail.html?id=5f4aa842550b97b0015595db005400b2 (last visited Jan. 1, 2020).
As noted earlier, Article 47(2) of the EU Charter of Fundamental Rights recognizes the right to legal assistance. The ECJ has held that the right to legal representation must be respected during any stage that may be decisive in providing evidence of the unlawful nature of conduct.404

Under U.S. law, criminal antitrust defendants are guaranteed right to counsel, including the appointment of counsel at the public expense if the defendant is too indigent to afford paid counsel.405 Defendants in civil court actions have the right to be represented by counsel as well.406 In order to represent a client in the U.S. District Courts, counsel must be admitted to the bar of that court. The local rules usually restrict practice in front of these courts to attorneys who are members of the bar of a U.S. state. Attorney fees can be awarded to the winning party of an adversary adjudicative proceeding if it fulfills certain conditions, such as being a small business.407

The right to counsel is also statutorily guaranteed in FTC administrative proceedings.408 As noted earlier,409 representation by counsel is presumed in all stages of the proceeding starting at the prehearing procedures,410 when filing motions,411 when requesting witness testimony,412 or when filing for an appeal from initial decision of the hearing officer to the Commission.413 Representation in front of the Commission is possible by any member of the bar of a federal court or of the highest court of any state or territory of the United States and all persons who are qualified to practice law in a Member State of the European Union.414 The U.S. allows licensed in-house counsel to represent clients in criminal, civil, and administrative proceedings.

There is an international consensus that representation by counsel is essential to fair processes. Paragraph 6.2 of the ICN Guidance on Investigative Process provides, “Parties should be allowed to be represented by counsel of their choosing during the investigation, and should be permitted to present their views via counsel, their employees, and outside experts.”415 Paragraph 2.4.7 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings suggests, “The agency should allow the parties to be represented not only by counsel licensed to practice in the agency’s jurisdiction, but should also allow counsel

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408 See 5 U.S.C. § 555(b).
409 See supra Parts II.A.1.d, II.B.1.c.
410 See 16 C.F.R. § 3.21(a).
411 See id. § 3.22(e).
412 See id. § 3.39(b).
413 See id. § 3.52(g).
414 See id. § 4.1(a).
415 ICN GUIDANCE, supra note 11, at 5.
licensed in other jurisdictions to participate in such representation before the agency, acting in conjunction with the former.\textsuperscript{416}

\textbf{f. Protection of sensitive information}

Chinese, EU, and U.S. agencies all handle confidential information differently. The most common types of confidential information involved in competition proceedings include customer lists, prices paid by customers, sales data, production statistics, internal business strategies, information about new projects/products, and proprietary information.\textsuperscript{417} There are two distinct confidentiality problems worth examining. First, how do agencies preserve the confidentiality of information they collect from respondents? Second, how do agencies preserve the confidentiality of information provided by third parties without compromising respondents’ right to create an effective defense?

\textbf{China}

Both the NDRC and SAIC were statutorily required to preserve the confidentiality of trade secrets obtained during an enforcement proceeding.\textsuperscript{418} Both agencies derived their provisions for confidentiality from Article 41 of the AML.\textsuperscript{419} MOFCOM had a more developed law on confidentiality and scheduled private hearings for parties wishing to disclose confidential information.\textsuperscript{420} While the NDRC and SAIC regulations bound agency officials only to the confidentiality of only “trade secrets,” MOFCOM’s regulations imposed broader obligations, requiring agency officials, the declarant, other related organizations, and individuals to keep confidential “any trade secrets and other necessary confidential information revealed.”\textsuperscript{421} Unlike the EU and U.S., China does not have an obligation to disclose exculpatory evidence to the parties, and thus confidentiality in this respect is not addressed in its regulations.

\textbf{EU}

Several sources of EU law establish general principles of confidentiality that bind the European Commission.\textsuperscript{422} DG Comp has taken several steps to preserve confidential information. First, it has appointed Authorized Disclosure Officers to ensure “confidential information is being transmitted in an appropriate way” between NCAs and DG Comp.\textsuperscript{423} Second, it has exempted “confidential documents, including business secrets,” from the

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\textsuperscript{416} ICC BEST PRACTICES, \textit{supra} note 18, at 8.
\textsuperscript{417} ICN CONFIDENTIALITY PRACTICES, \textit{supra} note 11, at 13–14.
\textsuperscript{418} NDRC Anti-Price Procedures, \textit{supra} note 93, art. 9; SAIC Investigative Procedures for Monopoly Cases, \textit{supra} note 94, art. 12.
\textsuperscript{419} AML, \textit{supra} note 91, art. 41.
\textsuperscript{420} MOFCOM Concentration Review Measures, \textit{supra} note 371, art. 7.
\textsuperscript{421} Id. art. 17.
\textsuperscript{422} See Council Regulation 1/2003, art. 27(2), 2002 O.J. (L 1) 1 (EC) (“The right of access to the file shall not extend to confidential information . . . .”); Commission Regulation 773/2004, arts. 15 (2), 16(1) 2004 O.J. (L 123) (“The right of access to the file shall not extend to business secrets, other confidential information . . . .”).
\textsuperscript{423} DG COMP MANPROC, \textit{supra} note 196, ch. 4.1.
respondent’s broad right to access the case file.\textsuperscript{424} Third, it has established rules protecting the identity of informants during investigations.\textsuperscript{425}

However, DG Comp also recognizes that the need to prove infringement or the respondent’s right of defense may outweigh the interests of confidentiality.\textsuperscript{426} Indeed, DG Comp has developed factors that it weighs in making such determinations: the relevance and probative value of information in determining whether an infringement has occurred, the indispensability of the information, the harm that would result from disclosure, and the preliminary view of the seriousness of the competition infringement.\textsuperscript{427} When it decides to release confidential information, DG Comp usually sets up a data room where the parties and their lawyers get access to the Commission’s file under certain restrictions.\textsuperscript{428} While DG Comp has discretion not to disclose confidential information, it is limited in its ability to use non-disclosed confidential information in its final decision.\textsuperscript{429}

**United States**

U.S. law features a strong default commitment to confidentiality. There is a general recognition in U.S. law that confidentiality protections make parties less hesitant to share information with courts and agencies.\textsuperscript{430} The FTC maintains several practices consistent with this commitment. First, the FTC requires that the existence of investigations be kept confidential.\textsuperscript{431} Second, the FTC appoints custodians to care for confidential information.\textsuperscript{432} Third, the FTC has a highly specific list of procedures for processing, storing, and returning documents. For example, the FTC must log confidential documents and catalog the date, name of custodian, the submitter, and the extent to which the submitter has asserted confidentiality.\textsuperscript{433} Furthermore, the Freedom of Information Act (FOIA) does not reach such documents, as it exempts “trade secrets” and “privileged or confidential” information.\textsuperscript{434} When they issued memorandums on FOIA, the Bush and Obama Administrations both emphasized that sensitive business information was protected from disclosure.\textsuperscript{435}

Additionally, the FTC’s discovery regulations give respondents access to any information relevant to their defense or that the agency could use against them. However, the regulations also
acknowledge the power of the FTC’s administrative law judges to issue protective orders to prevent “improper” disclosure of confidential information and protect third parties.436

International norms

First, there is a strong international norm in favor of protecting confidential information against accidental disclosure. The ICN recognizes confidentiality protections as one of its nine essential enforcement principles437 and states that “the protection of confidential information is a common component of competition enforcement frameworks.”438 The ICC counsels that this protection should apply both to information submitted by the respondent and third parties.439 The OECD encourages competition agencies to protect the confidentiality of business secrets, trade secrets, and personal information.440 Relatedly, the ABA Antitrust Section’s International Task Force recommends that agencies keep the investigation itself confidential.441

Second, it is an international norm to allow respondents limited access to confidential information necessary to mount an effective defense.442 On the one hand, agencies must ensure respondents do not obtain “competitively sensitive information about their rivals.”443 On the other hand, agencies must ensure respondents can access the information they need to mount an effective defense. Other policy-based considerations may also come into play. Elaborating on one of its nine essential enforcement principles, the ICN states that the “decision to disclose confidential information should include consideration of the confidentiality claims, rights of defense, rights of third parties, incentives to provide information, effects on competition, and transparency to the public.”444

2. Differences in Law and Practice

There are currently no similarities between the three jurisdictions in law and practice; three differences in law; and three areas where the law is similar, but practices are different.

Differences in law

Disclosure of exculpatory evidence. EU and U.S. law require agencies to disclose or make available to respondents the exculpatory evidence they have gathered, while Chinese law does not impose a similar obligation. However, Chinese agencies sometimes disclose information if the respondent requests a hearing. Further, Chinese agencies will disclose information informally while interacting with respondents.

436 See 16 C.F.R. § 3.31(d) (2017).
437 See ICN GUIDING PRINCIPLES, supra note 11, at 2.
438 ICN CONFIDENTIALITY PRACTICES, supra note 11, at 8.
439 ICC BEST PRACTICES, supra note 18, at 3.
440 OECD KEY POINTS, supra note 12, at 14.
441 ABA BEST PRACTICES, supra note 15, at 6.
442 ICN CONFIDENTIALITY PRACTICES, supra note 11, at 9.
443 Id. at 15.
444 ICN GUIDING PRINCIPLES, supra note 11, at 2.
Representation by legal counsel. As we saw during the investigatory stages, EU and U.S. agencies consistently allow participation by legal counsel throughout the decisionmaking process. While Chinese law allows respondents to be represented by an agent during hearings, such agents are usually allowed to speak only on legal issues, not factual ones. Further, Chinese agencies do not allow foreign lawyers to represent clients before them and Chinese agencies generally consider companies’ in-house lawyers acting as staff to be employees, not attorneys.

Protection of confidential information. While China, the EU, and the U.S. all require the preservation of the confidentiality of sensitive information, the EU and U.S. have developed more robust systems. China’s laws required NDRC and SAIC officials to maintain confidentiality only of trade secrets, while MOFCOM employs broader confidentiality regulations capturing generally all relevant parties and all confidential information disclosed during a review or investigation. The EU and U.S. maintain strong commitments to confidentiality through various measures, such as designating disclosure officials and custodians of confidential information. Additionally, both the EU and U.S. allow respondents access to exculpatory evidence with varying degrees of restrictiveness on what kinds of documents may be viewed.

Differences in practice

Disclosure of the evidence upon which the agency wishes to rely. Although all respondents in all three jurisdictions are entitled to the evidence on which the agency is relying, China often discloses it later in the process after a tentative decision has been made or at formal hearings. Further, Chinese agencies sometimes disclose information during exchanges with the respondent during the investigation.

Disclosure of the legal and economic theories and factual allegations underlying the agency’s investigation. Formally, all three jurisdictions require their agencies to disclose the legal, economic, and factual bases underlying their investigations. However, Chinese agencies usually wait to make such disclosures until they reach a tentative decision on the disposition of the investigation. Chinese officials emphasize that they provide these disclosures and the tentative disposition to respondents and that they are open to changing their minds on the disposition. However, some companies have asserted that the agencies do not disclose enough to allow them to prepare effective defenses.

Opportunity for the respondent to submit exculpatory evidence and responses to the allegations. All three jurisdictions recognize respondents’ right to defend themselves by responding to arguments and submitting exculpatory evidence. To effectuate this, all three jurisdictions allow respondents to request hearings. However, the three legal systems operate differently in practice. In allowing responses to the agency’s allegations, the U.S. provides the most robust hearings, which include the right to cross-examine, submit evidence, and make arguments. While China and the EU formally allow hearings, the utilization differs. In China, there is no cross-examination according to current procedure law, but similar institution has been provided by relevant rules in hearing process. Chinese agencies allow arguments to be heard and debated, and permit examination on the admissibility of the evidence submitted by both parties. The EU does not allow cross examination at its hearings and it allows industry rivals to make appearances to criticize the respondent. Consequently, respondents in China and the European Union usually
rely primarily on submitting their arguments and evidence in writing. Chinese officials emphasize that they want to hear respondents’ views.

D. Issuance of Decisions

Once the agency has collected all the relevant information and has given the parties an opportunity to present their views and evidence, it must decide whether a violation of the competition rules has occurred and, if so, what action it will take. The agency then communicates its decision to the parties and to the public.

The Chinese agencies have historically followed a multi-level system. At the different AICs, investigators who had concluded their investigations submitted an investigation completion report to the legal affairs division, which reviewed it and assigned a case-handling staffer to examine it. The legal affairs body then offered its written opinions and suggestions. The person in charge of the agency then reviewed these opinions, which included a draft of the administrative punishment decision. After reviewing the arguments by parties and consulting with various people, including both agency non-agency officials, the person in charge of the agency then made a decision whether to impose an administrative punishment. When the decision concerned a major or complicated case, the decision was made through collective deliberation at the relevant meeting of the administrative AIC.\textsuperscript{445} NDRC and MOFCOM followed similar procedures.\textsuperscript{446}

Following the creation of SAMR, the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration provide that upon conclusion of an investigation, the case-handling agency shall prepare an investigation conclusion report, and submit together with the case files to the review body for review.\textsuperscript{447} The review shall be performed by the legal department or other relevant departments of the market supervision and administration authority, not the case-handlers.\textsuperscript{448} After the review is complete and the case files are returned, the case handling agency shall submit the case files, the proposed administrative penalty and the re-examination result to the principal of a market supervision and administration department for approval decision.\textsuperscript{449} The SAMR administrative penalty procedure took effect on April 1, 2019.

In the EU, the principle of collegiality\textsuperscript{450} formally requires that all decisions of the European Commission be taken collectively by all Commissioners after a confidential discussion. In practice, the other Commissioners typically defer to the Competition Commissioner’s judgment.\textsuperscript{451}

When U.S. antitrust laws are enforced in court, the case follows the normal judicial litigation process. In U.S. administrative adjudication, the Administrative Law Judge (ALJ) files an initial decision after conducting an evidentiary hearing. This decision can be appealed to the

\textsuperscript{445} SAIC Admin. Penalty Procedures, supra note 369, arts. 47–55.
\textsuperscript{446} See Admin. Penalty Law, supra note 267, arts. 27–39.
\textsuperscript{447} See SAMR Admin. Penalty Procedures, supra note 116, art. 5.
\textsuperscript{448} See id. art. 46.
\textsuperscript{449} See id. art. 50.
\textsuperscript{441} TFEU art. 17(6).
\textsuperscript{450} TFEU art. 17(6).
\textsuperscript{451} See Forrester, supra note 26; Pieter Van Cleynenbreugel, Effectiveness Through Fairness? “Due Process” as an Institutional Precondition for Effective Decentralized EU Competition Law Enforcement, in PROCEDURAL FAIRNESS IN COMPETITION PROCEEDINGS 44, 49 (Paul Nihoul & Tadeusz Skoczny eds., 2018).
Commission as a whole, and the Commission can then review the issues in question de novo. After that, the decision may be challenged in court.

We divide this phase into six steps.

1. Separation of investigatory and decisionmaking staff
2. Publication of decisions
3. Description of the essential facts upon which decision is based
4. Disclosure of economic evidence, assumptions, and methodology underlying decisions
5. Obligation to give reasons in the decision
6. Obligation to respond to relevant and significant arguments made by the respondent

1. Procedural Steps of the Issuance of Decisions

a. Separation of investigatory and decisionmaking staff

The three jurisdictions offer a range in the extent to which they separate investigatory and decisionmaking staff, a principle called the separation of functions. Although none of the jurisdictions provide a complete separation of investigatory and decisionmaking staff, the U.S. generally observes a stricter separation of functions than China or the EU.

China

In enforcement agencies, the procedural requirements and related provisions of the AML exist in accordance with the procedural requirements and related provisions of the Administrative Penalty Law. It is worth noting that although anti-monopoly enforcement agencies do not assign investigatory power and review power to different departments, the officials responsible for investigation are often different than those making the final decisions. As Article 38 of the Administrative Penalty Law provides, following the conclusion of the investigation, responsible persons of the administrative agency shall examine the findings of the investigation. Then, before imposing more hefty administrative penalties on complex or aggravated violations, the leading members of the administrative agency shall discuss and decide collectively (often called a “case review meeting” internally). Article 38 also declares that before the responsible persons of the administrative agency reach a decision, review shall be performed by the people engaged in the review of administrative penalty decisions (review by the legal division of the anti-monopoly bureau within the former NDRC and by the department of laws and regulations within the former SAIC). The personnel who are involved in administrative penalty decision for the first time in the administrative agency shall have passed the national bar examination and have obtained a license to practice law.

452 See 16 C.F.R. § 3.52(b) (2017).
453 See id. § 3.51(b).
454 See Admin. Penalty Law, supra note 267, art. 38.
455 See id. art. 38.
Following the creation of the State Administration for Market Supervision (SAMR), the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration also dictate a collective panel of department heads\(^{456}\) and a recusal system whereby personnel on the case with direct conflict of interest vis-à-vis the interested parties shall recuse themselves from administrative penalty decisions. The recusal of any principal department head shall be discussed and decided collectively by all principal department heads; the recusal of other heads of a department shall be decided by the principal department head; the recusal of other personnel shall be decided by a department head.\(^{457}\) However, even though all administrative enforcement agencies are required to comply with the Administrative Penalty Law, their organizational structure may not be exactly the same. For example, although the anti-monopoly enforcement agencies do not assign investigatory and review powers to different departments, CSRC had separated the investigative power from the punishment power as early as 2002 and created separate departments. Enforcement investigation is the responsibility of the general inspection team, whereas review and punitive decisions fall under the responsibility of the administrative penalty committee (APC). The APC hires professionals with relevant trial experience, as well as lawyers.

**European Union**

Like many European National Competition Agencies (NCAs), DG Comp operates as an integrated agency—in which the same staff that conduct the investigations issue the Statement of Objections and make the final agency decision about liability.\(^{458}\) The European Court of Human Rights ruled that this arrangement does not violate the right to a fair trial under Article 6 of the European Convention on Human Rights so long as full judicial review of the agency decision is possible.\(^{459}\) The Court emphasized that competition law investigations are administrative in nature and, therefore, need not satisfy the same procedural safeguards as criminal investigations, but that fact does not render Article 6 inapplicable.\(^{460}\) The ECJ has held that the standard of review applied by the General Court satisfies the requirements to guarantee a fair trial.\(^{461}\) A Hearing Officer oversees proceeding in DG Comp, but this official simply ensures that all of the necessary procedures are followed and does not participate in the substantive decision.\(^{462}\) Indeed, the final decision on the disposition of a particular case is formally made by the collective twenty-eight Commissioners of the European Commission, although in practice the other Commissioners defer to the Commissioner handling the particular case.\(^{463}\) Apparently, the Commissioners are known to lobby each other over and horse trade on the outcomes of these cases.\(^{464}\)

\(^{456}\) See SAMR Admin. Penalty Procedures, *supra* note 116, art. 54.

\(^{457}\) See *id.* art. 4.

\(^{458}\) See Geradin & Petit, *supra* note 75, at 14–16.


\(^{460}\) Id. paras. 39, 58, 59.


\(^{463}\) See OECD EU REPORT, *supra* note 378, at 37 (noting that between 1990 and 2005, “the Commission has not disagreed with the Competition Commissioner’s recommendation on a major enforcement matter”).

\(^{464}\) See Forrester, *supra* note 100, at 831–32.
Subsequently, EU law does not require any separation of investigatory, prosecutorial, and adjudicatory functions. Like China, DG Comp employs some internal checks on agency discretion. For example, DG Comp uses “devil’s advocate” teams in an attempt to recreate an adversarial process, though the team’s members are still DG Comp officials.\footnote{See Geradin & Petit, supra note 75, at 17.} Moreover, the Legal Service of the Commission is consulted during all stages of an investigation for a second opinion. Nevertheless, the decision not to require a separation of functions within DG Comp remains controversial. Leading academics have criticized the use of the same personnel for investigation, prosecution, and adjudication.\footnote{See Forrester, supra note 26, at 817; Wils, supra note 34.} Reform suggestions include separating investigatory and adjudicatory teams, turning the hearing officer into an independent decision maker, or having the Commission litigate its cases in front of a court.

The EU does employ some internal checks on agency discretion. If the parties so request, DG Comp normally offers the respondent and the complainant the opportunity to discuss the case with either DG Comp staff, the Deputy Director General for antitrust, or if appropriate, with the Commissioner responsible for competition.\footnote{See Commission Notice on Best Practices for the Conduct of Proceedings Concerning Articles 101 and 102 TFEU, 2011 O.J. (C 308) 6, para. 70.} Before submitting a draft for a decision to the Commission for a vote, DG Comp must consult with the Legal Service of the Commission and other interested Directorates General and give them an opportunity to respond to the draft.\footnote{See OECD EU REPORT, supra note 378, at 63–64 (discussing and criticizing these internal checks).} However, the Competition Commissioner—who, in practice, makes the decision—rarely attends the hearing, which means she depends on briefings from staff previously involved in the investigation.\footnote{See id.}

**United States**

The U.S., in contrast, generally provides for greater separation of investigatory and adjudicatory personnel. During the 1930s, when the separation of functions was less common in U.S. agencies, the ABA harshly criticized the threat the agencies posed to due process, arguing agency decisionmakers could not fairly review their colleagues’ decisions due to an *esprit de corps* which emphasized political loyalty.\footnote{Am. Bar Ass’n, Report of the Special Committee on Administrative Law, in AM. BAR ASS’N ANNUAL REP. 337 (1938).} Indeed, the legislative history of the APA reflects the overriding concern of the drafters on the importance of the separation of functions.\footnote{See, e.g., STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REPORT (Comm. Print 1945), reprinted in S. COMM. ON THE JUDICIARY, 79TH CONG., ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, 1944–46 (1946). See generally Barkow, supra note 75, at 888–93.} Just a few years after the APA’s passage, Justice Jackson (who, as Attorney General, was a key player in drafting the APA) affirmed the essential importance of the separation of functions under the APA.\footnote{Wong Yang Sung v McGrath, 339 U.S. 33, 41–45 (1950) (Jackson, J.).}

For criminal and civil enforcement actions brought in court, the adjudicatory decisionmaker is a judge nominated by the President and confirmed by the Senate who has complete independence from the agency. In administrative adjudications at the FTC, the initial decision is made by a duly qualified Administrative Law Judge (ALJ), with Commissioners
sitting as ALJs on rare occasions.473 While ALJs are nominally part of a particular agency, they exercise substantial independence because they hold tenured positions and can only be discharged by the Merit Systems Protection Board for good cause.474 Further, ALJs are selected through a competitive examination475 and not subject to supervision by anyone in the agency.476 Their compensation and advancement is decided by the Office of Personnel Management, a government office outside the agency.477

Once the Commission votes to issue a complaint, any communication between investigative or prosecuting staff and the ALJ or any other employee involved in the decisionmaking process is prohibited unless made on the public record.478 The ALJ’s decision may be appealed to the full Commission,479 in which case the Commissioners hear submissions from the FTC staff as well as the accused company.480 When members of the Commission sit as the ALJ, they typically recuse themselves from voting on the complaint or the appeal.481 The result is a fairly strong division of authority between investigatory and prosecutorial staff and adjudicatory staff. However, it is worth noting that the Commissioners both vote to issue a complaint and decide on appeals from the ALJs.482 In practice, the Commissioners rarely overturn an ALJ’s decision, a practice that legal scholars have criticized.483

International norms

An international norm exists supporting the separation of functions. For example, the OECD recognizes “establishing a clear separation between the role of the investigators and those making enforcement decisions” as one of the leading methods adopted by competition agencies to ensure transparency and fairness in enforcement processes.484 Similarly, Paragraph 2.4.3 of the ICC Recommended Framework supports assigning prosecutorial and adjudicatory functions to separate and independent departments or at least employing factfinders who are independent of investigatory and prosecutory personnel, with strict limits on ex parte contacts after the report is issued.485

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475 See 5 C.F.R. § 930.201(b).
477 See 5 C.F.R. § 930.205.
478 See 5 U.S.C. §§ 554(d), 557(d) (2012); 16 C.F.R. § 4.7(b) (2017).
479 5 U.S.C. § 557(b) (2012); 16 C.F.R. § 3.52(b)(1).
480 16 C.F.R. § 3.54(c)–(d); FTC OPERATING MANUAL, supra note 163, ch. 3, § 10.25.3.
482 See Malcolm Coate & Andrew Kleit, Does It Matter That the Prosecutor Is Also the Judge? The Administrative Complaint Process at the Federal Trade Commission, 19 MANAGERIAL & DECISION ECON. 1, 2 (1998); Barkow, supra note 75, at 894–95.
484 OECD KEY POINTS, supra note 12, at 29.
485 ICC BEST PRACTICES, supra note 18, at 5.
b. Publication of decisions

The three jurisdictions differ with respect to the obligation to publish decisions. While there is an obligation to publish all fully adjudicated decisions in the EU and the U.S., Chinese law only requires its agencies to publish decisions concerning merger review decisions. However, the other two agencies also routinely publish decisions in practice, with increasing amounts of detail and legal reasoning.

China

China’s AML stipulates that, after the AML enforcement agency investigates and verifies the alleged violation and establishes that it constitutes monopolistic conduct, it shall take a decision according to law and publicize it. The AML also stipulates that the anti-monopoly enforcement agency shall publicize its decision to prohibit a concentration or attach restrictive conditions on concentration to the general public in a timely fashion. Clearly, the AML has slightly different requirements on the three former antimonopoly agencies in terms of publicizing decisions. Decisions of prohibition and clearance with restrictive conditions attached “shall” (i.e. must) be publicized and publicized in a timely fashion. However, for other cases involving suspected violations, the law says “may” (i.e. selectively) publicize, which works in favor of the company. For companies, punishment by the government already incurs an economic loss, publicizing the decision would be a second punishment likely more serious than economic fines. Therefore, if the enforcement agency believes that the penalty has served its purpose, it will likely relent on publicizing the decision. There is no mandatory provision for publicizing the decision under the AML, but the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration published by the State Administration for Market Regulation establish public disclosure as a statutory requirement in administrative enforcement. When the enforcement agency announces the final results after reaching a penalty decision, the public can then see that the respondents had disagreement or objection during the investigation, and that the enforcement agency has documented and responded to such disagreement or objection in the penalty decision. In general, Chinese agencies have started to publicize decisions with increasing frequency.

European Union

The European Commission is required to publish in the Official Journal of the European Union (O.J.) the main content of the decisions that it takes pursuant to Articles 7 through 10, 23, and 24 of Council Regulation EC No 1/2003. This publication must contain a summary of the decision that consists of the name of parties and the main content of the decision. This includes

486 See AML, supra note 91, art. 44.
487 See id. art. 30.
489 See SAMR Admin. Penalty Procedures, supra note 116, art. 56.
490 For example, Qualcomm case of abuse of dominant market position, NDRC administrative penalty decision 2015 No. 1; Tetra Pak case of abuse of dominant market position, SAIC competitive enforcement announcement 2016 No. 10.
491 See Council Regulation 1/2003, art. 27(1), 2002 O.J. (L 1) 1 (EC); DG COMP MANPROC, supra note 196, ch. 28. For merger control, see Council Regulation 139/2004, art. 13, 2004 O.J. (L 24) 1 (EC).
any penalties imposed, a final report of the Hearing Officer, and the opinion of the Advisory Committee (if recommended). Additionally, the European Commission will publish online versions of all documents published in the Official Journal as well as the full text of the non-confidential versions of its decisions as soon as possible on its website.

United States

In the U.S. the FTC is required to make all final opinions available for public inspection in an electronic format. The FTC also publishes a bound volume of its decisions and orders entitled Federal Trade Commission Decisions, usually covering a period of six months and containing all final orders of the Commission, along with any Commission opinions and the initial decision of the ALJ in the case. The decisions are likewise available on the FTC’s website. The FTC additionally frequently publishes analyses of its reasons for terminating major investigations.

In merger reviews, HSR filings, second request materials, and information provided voluntarily are all confidential. However if an early termination is granted, the identity of the parties and the fact that a filing was made are disclosed. If the agencies challenge the proposed transaction in court after complying with a second request, there will be a public record of the case in the court filings.

International norms

There is a strong international norm favoring the publication of decisions. Paragraph 4.2 of the ICN Guidance on Investigative Process provides, “Competition agency decisions to challenge or prohibit conduct should be transparent and the agency should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency’s findings of fact and legal and economic analysis.” The OECD similarly concludes that “[t]ransparency with respect to enforcement decisions is also achieved by agency publication of outcomes and performance data, and by providing public access to information about ongoing investigations” and that “[t]he publication of decisions is strongly connected to transparency.” In addition, the publication of “details and justifications when a case is closed” via a short press release can help educate the public.

c. Description of the essential facts upon which each decision is based

In China, the EU, and the U.S., the competition agency must describe the essential facts upon which its decision is based. However, their practices of doing so differ.

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497 ICN GUIDANCE, supra note 11, at 3.
498 OECD KEY POINTS, supra note 12, at 10, 65.
499 Id. at 31.
China

Chinese agencies are obligated to describe the facts upon which their decisions are based.\textsuperscript{500} However, in practice the decisions are comparably relatively short. Often in the past, the agency would only refer to the kind of evidence, such as, generically referring to “business documents,” followed by a standard phrase. Recently, Chinese agencies have begun to make their decisions more detailed. For example, in the decision on the Tetra Pak case of abuse of dominant market position, the essential facts have been discussed at great length.

European Union

Similarly, Article 296 TFEU obligates the European Commission to include a description of the facts in its decisions. In practice, Commission decisions meticulously list and describe every note and business document found and each meeting between the conspirators that can be proven. As a result, Commission decisions can be hundreds of pages long. For mergers, the Commission’s published decision must contain the “names of the parties and the main content of the decision.”\textsuperscript{501}

United States

In court proceedings initiated by the FTC or DOJ, courts must spell out their factual findings so that their judgments can survive judicial review. An appellate court can review the record and set aside lower court findings if it is “left with the definite and firm conviction that a mistake has been committed.”\textsuperscript{502} In an administrative adjudication at the FTC, the initial decision must include a statement of findings of fact with specific page references to principal supporting items of evidence in the record.\textsuperscript{503} The decision must be based on the record before the agency.\textsuperscript{504} The agency may defend its decision on judicial review only on the basis of evidence and rationales that were explicitly considered and relied on by the agency in its final decision.\textsuperscript{505}

International norms

Some international guidance documents encourage competition enforcement agencies to describe the essential facts upon which their decisions are based. Paragraph 4.2 of the ICN Guidance on Investigative Process provides that competition agencies “should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency’s findings of fact and legal and economic analysis.”\textsuperscript{506}

\textsuperscript{500} For SAIC, see SAIC Admin. Penalty Procedures, supra note 369, art. 56; Admin. Penalty Law, supra note 267, art. 39; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 19.


\textsuperscript{503} See 16 C.F.R. § 3.51(c)(1) (2017).


\textsuperscript{505} SEC v. Chenery Corp., 318 U.S. 80, 87 (1942).

\textsuperscript{506} ICN GUIDANCE, supra note 11, at 3.


d. Disclosure of economic evidence, assumptions, and methodology underlying decisions

Each jurisdiction varies in the extent to which agency decisions disclose and analyze economic evidence, assumptions, and methodology.

China

China does not require its AML enforcement agencies to explain and defend their use of economic evidence. In general, Chinese agencies have been utilizing economic analysis in complicated merger reviews and started to include more economic evidence in their opinions concerning other monopolistic conduct. For example, SAIC earned praise for its recent Tetra Pak decision, in which it described the economic evidence and methodology in great detail.  

All three national Chinese enforcement agencies and enforcement officials on the local level often consulted outside experts to help them understand and respond to complicated economic issues; and they have already included economic information in some decisions.

European Union

EU law requires the agency to disclose the economic evidence, assumptions, and methodology upon which a decision relies. In the 2017 United Parcel Service case, the General Court held that the right of defense required the Commission to disclose the final version of the economic model it relied on to the respondent. Further, the obligation to state reasons generally leads DG Comp decisions to include a description of the economic evidence and the analytical methodology.

United States

Under the U.S. doctrine of “hard-look” review, agencies must provide complete disclosure and an analytic defense of the assumptions, evidence, and methodology upon which every decision is based. The agency must adduce all empirical data that can readily be obtained and the agency cannot use grossly inaccurate methodology or a methodology that is predicated on an unverified, untested hypothesis. If the problem is new or of a nature that no empirical data is available, the agency must disclose its assumptions in a candid manner. Agencies must also subject their analyses to public comment and respond to major objections with a reasoned presentation.

508 Chinese enforcement officials recounted this to us.
512 See Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 972 (9th Cir. 2002).
513 See Lands Council v. Powell, 379 F.3d 738, 752 (9th Cir. 2004).
International norms

Prominent international organizations endorse encouraging competition enforcement agencies to disclose the evidence, assumptions, and economic theories upon which their decisions are based. Paragraph 4.2 of the ICN Guidance on Investigative Process states that competition agency decisions should “explain[] the agency’s findings of fact and legal and economic analysis” as a basic matter of transparency.\footnote{See ICN GUIDANCE, supra note 11, at 3.}

\textbf{e. Obligation to give reasons in the decision}

While the U.S. and EU require the agency to present and support the reasoning behind its decision in a clear manner capable of judicial understanding, Chinese law contains no similar requirement.

\textbf{China}

Chinese law is developing in providing reasons in the decision, even though it does not require agency decisions to include the same degree of reasoning as does EU and U.S. law. Chinese officials emphasize that ongoing communication between the parties and the enforcement authorities helps to ensure that the parties understand the agencies’ thinking.\footnote{Chinese officials emphasized this in our interactions with them.} Although these efforts are governed by internal procedures, Chinese agencies are becoming more consistent in this area. However, Chinese agencies sometimes release written decisions that resemble press releases asserting that the relevant reasoning is in the case file, rather than provide detailed, reasoned considerations of the respondents’ arguments.

\textbf{European Union}

Article 41 of the European Fundamental Rights Charter obligates government agencies to give reasons for their actions.\footnote{Charter of Fundamental Rights of the European Union, art. 41(2)(c), 2012 O.J. (C 326) 391, 404.} Article 296 of TFEU enshrines this obligation.\footnote{TFEU art. 296.} Furthermore, the DG Comp Antitrust Manual explicitly states that “the legal basis of the decision should be indicated” in the published decision.\footnote{DG COMP MANPROC, supra note 196, ch. 19.7.} The ECJ has held that the statement of reasons must disclose the rationale underlying each decision in a clear and unequivocal fashion.\footnote{See Case C-417/11 P, Council of the European Union v. Bamba, ECLI:EU:C:2012:718 (Nov. 15, 2012), para. 50, curia.europa.eu/juris/celex.jsf?celex=62011CJ0417&lang1=en&type=TXT&ancre=. For mergers, see Council Regulation 139/2004, art. 20, 2004 O.J. (L 24) 1 (EC).} For the Commission, this process should follow from its obligation to give reasons in its Statement of Objections. As DG Comp acknowledges, the purpose of the Statement of Objections is to provide respondents with “all the information they need to defend themselves effectively and to comment on the allegations against them.”\footnote{See DG COMP MANPROC, supra note 196, ch. 11.1.} This is even more relevant for final Commission
decisions. DG Comp further acknowledges that “Commission decisions must state the reasons on
which they are based.”523

United States

Under the U.S. court-created doctrine of hard-look review, an agency’s reasoning must
not be cryptic or confusing. Instead the agency must present its decision in a manner capable of
judicial comprehension.524 Agencies must respond in a reasoned manner to the major arguments
raised, explain how the agency resolved any significant problems, and show how that resolution
led the agency to its ultimate determination.525 Brief, conclusory statements are insufficient.526
The discussion should ensure that all the “major issues of policy were ventilated” and disclose
“why the agency reacted to them as it did.”527 An agency “cannot simply declare its ‘expertise’;
it must exercise that expertise and demonstrate sufficiently that it has done so.”528

International norms

There is an international consensus that agencies should disclose the reasoning
underlying their decisions. The OECD succinctly states that “decisions should provide clear
detailed description of the case facts, the applicable rules and the reasons for the legal and factual
findings” to make judicial review possible.529 The OECD also requires that agency decisions
provide “sufficient detail so as to identify the basis and rationale for the decision.”530 A proper
explanation of the court’s reasoning plays a critical role in avoiding corrupt decisions, providing
a sense of fairness, providing guidance to the public, promoting public confidence, and in
supporting judicial review. Finally, the ICN emphasizes, “All final written enforcement decision
on violations should include detailed explanations of the findings of fact, conclusions of law,
evidence relied upon, party arguments, and sanctions.”531

f. Obligation to respond to relevant and significant arguments made by the respondent

Only U.S. and EU law obligates agencies to respond in their decisions to the respondent’s
major arguments. Chinese agencies sometimes do so in practice.

523 See id. ch. 1. Pt. 5.3.2.
524 See, e.g., E. I. Du Pont de Nemours & Co. v. Train, 541 F.2d 1018, 1038 (4th Cir. 1976); Thomas Merrill,
Dep’t of the Treasury, 670 F.2d 296, 304 (D.C. Cir. 1981); United States v. Nova Scotia Food Prods. Corp., 568
F.2d 240, 252 (2d Cir. 1977).
528 See Village of Bensenville v. FAA, 376 F.3d 1114, 1122 (D.C. Cir. 2004).
529 OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 13, at 19.
530 OECD KEY POINTS, supra note 12, at 18.
531 ICN GUIDANCE, supra note 11, at 7.
China

Although Chinese law obligates agencies to review the evidence and arguments submitted by parties, it does not obligate agencies to answer the respondents’ arguments in their decisions.\(^\text{532}\) However, the agencies have done so in practice in an increasingly detailed manner.\(^\text{533}\) Chinese agencies emphasize that they consider all arguments made by respondents, but they often do so internally and do not share all responses with respondents. Moreover, Chinese agencies emphasize that they sometimes respond to the respondents’ arguments during face-to-face communications.

However, anti-monopoly enforcement cases are subject to the same set of criteria of judicial review in an administrative court as other types of administrative penalty cases. Therefore, the court’s position on the respondent’s right to statement and defense in other administrative penalty cases can be applied to anti-monopoly administrative litigation cases that may arise in the future. In *Zhang Yiwu v. China Securities Regulatory Commission (CSRC)*,\(^\text{534}\) the court held that CSRC established Zhang’s illegal facts as “divulging insider information to Li Jiemiao” in the Administrative Penalty Advance Notice. Zhang Yiwu subsequently made statements and defense against only such notified illegal facts. However, CSRC concluded in the final punitive decision that “Zhang Yiwu and Li Jiemiao were collectively engaged in insider trading,” which was inconsistent with the facts, reasoning and basis set forth in the advance notice. The court thus determined that not only did CSRC fail to inform Zhang of the facts, reasoning or basis for the punitive decision, it also deprived Zhang of the rights for statement and defense. In the end, the court annulled the administrative penalty on the defendant. This is evidence that an administrative litigation affords much higher protection of the respondent’s right of statement and defense, which helps discipline the anti-monopoly enforcement agency.

European Union

In contrast, DG Comp ordinarily responds to the parties’ significant arguments in its decisions. DG Comp states that the “Commission decisions must state the reasons” on which its conclusions are based.\(^\text{535}\) This should ordinarily push the Commission to respond to the respondents’ major arguments. Moreover, DG Comp states that it will consider “relevant third parties’ arguments” when appropriate.\(^\text{536}\) Finally, The ECJ’s recent decision in the *Intel* case requires the General Court to consider all the arguments raised by the parties.\(^\text{537}\) This obligation may affect DG Comp as well.

United States

In judicial enforcement actions, U.S. enforcement agencies must necessarily respond to the major arguments being advanced by the parties. In administrative enforcement actions, U.S.

\(^{532}\) See Admin. Penalty Law, supra note 267, art. 39; SAIC Admin. Penalty Procedures, supra note 369, art. 53.

\(^{533}\) The observations in this paragraph mostly came from conversations with Chinese officials.

\(^{534}\) Beijing No. 1 Intermediate People’s Court (2015) Yi Zhong Hang Chu Zi No. 236 administrative decision.

\(^{535}\) DG COMP MANPROC, supra note 196, ch. 1.5.3.2.

\(^{536}\) See id.

law requires the FTC to respond to the parties’ major arguments in its decisions. Under the U.S. doctrine of “hard-look” review, the agency must respond to “relevant” and “significant” arguments. The response must be sufficient to ensure that the major policy issues were ventilated and disclose why the agency reacted to them as it did.

International norms

There is an international norm that agencies should respond to important arguments made by respondents. Paragraph 3.5 of the ICN Guidance on Investigative Process states, “Agencies should ensure that the evidence and information obtained during an investigation receive appropriate consideration.” The OECD further concludes that agency decisions should “include[e] consideration of the parties’ contentions.”

2. Differences in Law and Practice

There are no areas in which the three jurisdictions are similar in law and practice; five areas where the jurisdictions differ as a matter of law; and one area where they are similar in law, but different in practice.

Differences in law

Separation of investigatory and decisionmaking staff. None of the three jurisdictions maintains perfect separation of investigatory and adjudicatory functions. In all three, the highest level of the agency votes on whether to initiate an investigation and whether to assess liability. U.S. law does entrust, however, initial adjudicatory responsibility to ALJs whose compensation, advancement, and removal are governed by an outside agency. U.S. law also imposes strict restrictions on communications between investigatory and adjudicatory personnel. The EU and China do less to ensure separation of functions. Although both jurisdictions internally make efforts to monitor decisions on liability, the same staff members that investigate respondents ultimately help determine whether they are liable.

Publication of decisions. While EU and U.S. agencies are required to publish their decisions, only some Chinese agencies are subject to such obligations. MOFCOM was required to publish decisions that blocked or attached conditions to mergers, but the agency did not need to publish unconditional clearances. NDRC and SAIC also adopted the practice of publishing its decisions, although there are significant exceptions involving sensitive information. In general, Chinese agencies are starting to publish decisions with increasing frequency.

Obligation to give reasons in decision. While EU and U.S. agencies are obligated to articulate the reasons for their determinations in their published decisions, Chinese agencies are not. In practice, however, Chinese agencies have sometimes articulated reasons in an increasingly detailed manner, especially more recently.

540 ICN GUIDANCE, supra note 11, at 3.
541 OECD KEY POINTS, supra note 12, at 18.
Disclosure of economic evidence, assumptions, and methodology underlying decisions. Unlike U.S. agencies, neither EU nor Chinese agencies are legally obligated to disclose the economic evidence, assumptions, and methodology underlying their decisions. Nevertheless, the EU’s DG Comp normally does so, and Chinese agencies are starting to do so with increasing frequency.

Responses to relevant and significant arguments made by respondents. Only EU and U.S. agencies are obligated to publicly respond to major arguments made by respondents. In contrast, Chinese agencies emphasize that they internally consider the respondents’ arguments.

Differences in practice

Description of the essential facts upon which each decision is based. In China, the EU, and the U.S., the competition agency must describe the essential facts upon which its decision is based. In practice, though, the decisions of Chinese agencies are comparably short. Recently, Chinese agencies have begun to make some of their decisions more detailed.

E. Commitments/Settlements

All three jurisdictions vary widely in respect to settlements, which are quite common. Competition authorities and parties under investigation often find it mutually advantageous to enter into settlement agreements instead of proceeding to a full adjudication on the merits. The process of obtaining consent decrees is typically much faster and avoids the high costs of adversarial proceedings. Moreover, the parties under investigation are often more forthcoming with information when a settlement is proposed, and they can avoid an official admission of liability. As a result, settlements are legal in all three jurisdictions.

China

Article 45 of the Anti-Monopoly Law permits enforcement agencies to suspend an investigation if the investigated party commits to specific measures that can eliminate the consequences of their suspected unlawful behavior.542 This commitment system is not used for cartels or mergers. Modeled on the Article 9 of the EU’s Council Regulation (EC) No. 1/2003 commitment system, Article 45 is a way for the investigated party to come to a mutual agreement with the antitrust enforcement agency without having to litigate the matter, benefiting both parties by saving time and litigation costs. Under the commitment system, an investigated party may apply to an agency for a suspension. And the suspension would make a termination of the investigation possible without a formal decision to penalize the party being made, if the commitments have been fulfilled to the satisfaction of the authority. The application must include (1) facts of the party’s involvement in the alleged monopoly, (2) measures it commits to taking to eliminate the harm caused by its alleged monopolistic conduct, (3) the time period in which it can perform its commitments, and (4) any other proposed commitments.543 The commitment proposal is negotiated between the party and agency, and if ultimately accepted, the

542 See AML, supra note 91, art. 45.
543 See NDRC Anti-Price Procedures, supra note 93, art. 15; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 16.
agencies may suspend the investigation. The party must then submit written reports on its performance of its commitments, and the agency must supervise its performance. If the party fulfills its commitments to the satisfaction of the agency, the agency can, at its discretion, terminate the investigation. The agency has the authority to resume the investigation, however, if the party fails to perform its commitments, there are material changes in facts on which the suspension was granted, or the suspension was granted on the basis of incomplete or untrue information provided by the party.

European Union

In the EU, one must distinguish two very different procedures for ending an investigation without a formal decision stating a violation of EU Competition Law: Commitment decisions in Art. 102 TFEU cases and settlements in Art. 101 TFEU cases. The Commission initially used a number of informal mechanisms to settle disputes on a case-by-case basis, including its leniency program. The European Commission began formalizing its settlement rules in 2003 by adopting a regulation that explicitly authorizes the Commission to accept commitments for non-cartel cases. These commitments do not establish an infringement or impose a fine. Instead, they make the commitments offered by the companies legally binding, thereby bringing suspect behavior (and the need for further investigation) to an end. DG Comp and the relevant NCAs also consider and accept commitment proposals during merger control proceedings.

Distinct from these commitment decisions, the Commission introduced a separate settlement procedure for cartel cases in 2008. Cartel settlements are still formal decisions, but they aim to simplify and expedite the procedure leading to the adoption of a formal decision, and also reward parties for participating in the procedure by reducing fines by 10%.

The European Commission has the discretion to determine which cases are suitable for a settlement procedure. After the Commission gathers and analyzes the relevant evidence, it may invite the parties to express their interest in engaging in settlement discussions.

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544 See NDRC Anti-Price Procedures, supra note 93, art. 16; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 17.
545 See NDRC Anti-Price Procedures, supra note 93, art. 17; SAIC Investigative Procedures for Monopoly Cases, supra note 94, arts. 18, 19.
546 See NDRC Anti-Price Procedures, supra note 93, art. 18; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 19.
547 See NDRC Anti-Price Procedures, supra note 93, art. 19; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 19.
Commission will then begin bilateral settlement discussions. A party who seeks to settle must formally declare its interest and submit a settlement submission (1) acknowledging liability for infringement, (2) indicating the maximum fine the party anticipates the Commission will levy, (3) confirming that the Commission has given the party the opportunity to be heard, (4) confirming that the party will not request access to the file or a formal oral hearing, (6) and agreeing to receive the Statement of Objectives and final decision in an EU language. The Commission then issues a Statement of Objections detailing the objections raised against the parties, although the Statement of Objections is typically much shorter for commitments than for standard procedures, and the party will agree to the contents of the statement. A final decision can then be adopted by the Commission.

United States

In the U.S., most cases, whether criminal or civil, are resolved via settlements. Of 367 individual defendants charged between 1996 and 2005 with criminal antitrust violations, 307 resolved their cases with a plea bargain. The DOJ also settles almost all civil cases and rarely takes any to trial. From 2011 to mid-2016, the FTC settled 26 non-merger civil cases and litigated 4, while settling 82 merger cases and litigating 7. During the same period, the DOJ settled 24 non-merger civil cases and 46 merger cases, only litigating 2 and 2 respectively.

The DOJ pursues settlements by filing consent decrees or civil consent judgments in a U.S. federal district court to obtain relief without having to go to trial. Consent decrees, however, cannot be used to settle certain severe horizontal conduct cases such as price-fixing and market allocations, which are instead prosecuted criminally. The DOJ’s settlement procedures are set out in the Antitrust Procedures and Penalties Act of 1974, more commonly known as the Tunney Act, which was enacted to address concerns of abuse of agency discretion in antitrust settlements. The Tunney Act establishes a process for public scrutiny of and comment on proposed settlements and allows for participation by interested parties and the public. The court must accept the settlement proposed by the DOJ if it is within the “reaches of the public interest,” which gives the DOJ broad discretion over the remedy.

The FTC Rules of Practice create a settlement process that is parallel to the one imposed by the Tunney Act. Settlements are negotiated by FTC staff, senior management, and sometimes a Commissioner. The FTC staff is encouraged to pursue settlement negotiations, and any investigated party must be afforded the opportunity to propose a settlement. Proposed

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556 See id. art. 32; Council Regulation 1/2003, art. 20, 2002 O.J. (L 1) 1 (EC).
559 See id.
560 See id. § 2.31(a).
564 See id. § 2.31(a).
settlements are detailed in a consent order, and the Commission votes to approve the order.\textsuperscript{565} If the Commission approves the order, the parties and the staff will execute an Agreement Containing Consent Order (ACCO) detailing the critical representations and waivers. Parties agree to waive their rights to judicial review and acknowledge the finality and enforceability of the consent order. In the ACCO, the parties will also confirm receipt of a complaint prepared by the FTC laying out the factual basis for bringing the case and the alleged violations of antitrust law. After execution of the ACCO, the Commissioners will vote again to approve the settlement. If a majority of the Commission finds a “reason to believe” that a law has been violated and that the proposed consent order provides a sufficient remedy for that violation, the agency will open the proposed order for public comment.\textsuperscript{566} If no changes are warranted after receiving public comment, the Commission will vote again for final approval of the consent order.\textsuperscript{567}

This section breaks down the settlement process into two steps.

1. Public scrutiny of proposed settlements
2. Judicial review of settlements

1. **Procedural Steps of Commitments and Settlements**

   a. **Public scrutiny of proposed commitments and settlements**

      The three jurisdictions follow different practices with respect to public scrutiny of proposed settlements. U.S. law provides for a formal process of notice and comment, while EU law requires that any proposed settlement be subject to a “market test” in which complainants and interested third parties are invited to submit their observations. Chinese law has not traditionally exposed proposed settlements to public scrutiny, although recent reforms to merger review procedures now require MOFCOM to submit simple cases to public scrutiny and market tests.

   **China**

      In China, publication of commitments is not mandatory either before or after their adoption. In practice, regarding the termination of investigations upon fulfillment of commitments by an undertaking, the enforcement agency will publish a Decision to Terminate Investigation, which contains a statement of facts, commitments and their fulfillment. Commitment decisions must be issued to investigated parties and must include a description of the facts of the alleged violation, the law being allegedly violated, the specifics of the commitment, the time limit to perform the commitment, measures of performance, and legal liability in the event of non-performance or incomplete performance of the commitment.\textsuperscript{568} Additionally, for standard cases, MOFCOM may market test remedy proposals by engaging with the public via hearings, investigations, and consultations with experts,

\textsuperscript{565} See id. § 2.34(a).
\textsuperscript{566} See id. § 2.34(c).
\textsuperscript{567} See id. § 2.34(c).
\textsuperscript{568} See NDRC Anti-Price Procedures, supra note 93, art. 16; SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 17.
representatives of trade associations, other relevant government agencies, and consumers, among others.\footnote{See MOFCOM Concentration Review Measures, supra note 371, art. 7.}

**European Union**

In the EU, proposed cartel settlements are not made available to the public. Article 6(6) of Directive 2014/104/EU protects the settlement submissions from disclosure in private follow-on litigation.\footnote{Directive 2014/104/EU, art. 6(6), 2014 O.J. (L 149) 1 (EC).} Final settlement decisions are published, but the decisions are typically shorter and less detailed than standard decisions. Specifically, the law requires the publication to state the names of the parties, the main content of the decision, and any penalties imposed.\footnote{See Council Regulation 1/2003, art. 30(1), 2002 O.J. (L 1) 1 (EC).} Settlement decisions are published in the European Commission’s Official Journal, and although it is not required by law, it is common practice for the decision to be published on DG Comp’s website.\footnote{Org. for Econ. Cooperation & Dev., Commitment Decisions in Antitrust Cases, Note by the European Union, para. 17 (June 2, 2016), https://one.oecd.org/document/DAF/COMP/WD(2016)22/en/pdf.}

Public notice is given in cases pursuing a commitment rather than a settlement. Article 27(4) of the Council Regulation No. 1/2003 states that if the Commission intends to pursue a commitment with an investigated party, it must “publish a concise summary of the case and the main content of the commitments or of the proposed course of action.”\footnote{See Council Regulation 1/2003, art. 27(4), 2002 O.J. (L 1) 1 (EC).} This publication is often called a “market test notice.”\footnote{See id.} The Commission also typically issues a press release and, when applicable, delivers the market test to the complainant. Interested third parties are invited to “submit their observations” for a specified time period, which must be a minimum of 30 days. The case team may additionally orally discuss the commitments with market participants and informs the investigated party of the market test results.\footnote{Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, 20044 O.J. (L 24) 1, 5.} The market test should not be misunderstood as requiring the public approval of the commitments. Instead, it is a tool that supplies useful information to the Commission on possible improvements to the proposed commitments. On occasion, the case team and Commission may make minor or significant revisions based on the market test results before formally approving the commitments. The market test approach is similarly used in merger control proceedings.\footnote{See DG COMPETITION, BEST PRACTICES ON THE CONDUCT OF EC MERGER CONTROL PROCEEDINGS § 5.2 (Jan. 20, 2004), http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.}

The ECJ has recognized that publication of proposed commitments provides numerous benefits. Publication serves the public’s interest to know the reasoning behind Commission decisions as fully as possible. Economic operators should know “the sort of behavior for which they are liable to be penalized,” persons harmed by the violation should be “informed of the details thereof so that they may, where appropriate, assert their rights against the undertakings punished, and in view of the fined undertaking’s ability to seek judicial review of such a decision.”\footnote{See Case T-198/03, Bank Austria Creditanstalt v. Commission 2006 E.C.R. II-1429, para. 77.}
Commitment decisions have triggered criticism mainly for two reasons. First, their limited publicity raises transparency concerns.578 Second, such decisions do not contribute to the development of the case law. Since commitment decisions do not state whether a certain behavior violates competition law provisions, such decisions do not increase the predictability of Commission decisions in the future.579

United States

Both the FTC and the DOJ have established processes for public scrutiny of and comment on proposed settlements. The Tunney Act requires the DOJ to submit to the court and publish in the Federal Register the proposed settlement along with a Competitive Impact Statement (CIS).580 In it, they must describe the nature and purpose of the proceeding and the facts giving rise to the alleged violation of antitrust law; explain the proposed final judgment, why it is appropriate, its anticipated effects on competition, how it is in the public interest; and describe and evaluate any alternative remedies.581 The proposed judgment and CIS must be published in the Federal Register at least sixty days prior to the effective date of the proposed settlement, allowing time for interested parties to submit comments and amicus briefs via the DOJ’s website.582 The DOJ must also publish a summary of the proposed settlement in a newspaper.583 These measures are intended to seek countervailing arguments and alternatives from the public or other interested parties and to reduce arbitrary exercises of discretion by implementing more transparency. The DOJ must publish all comments received (typically done through its website), unless doing so would be so burdensome that the public would be unable to benefit from public access to comments. In that case, the court may authorize an alternative method of disseminating public comments.584 The DOJ is also required to consider relevant comments and publish responses to them in order to ensure that the agency meaningfully examines any significant points raised by the public and all relevant alternatives.585 Once the agency has completely reviewed all evidence collected, it announces whether it intends to finalize the settlement or pursue its complaint in court.586 Parties may propose remedies (e.g., divestitures, conduct restriction agreements, etc.) at any point during the investigation, although, it is typically at this stage that remedy negotiation takes place.587

FTC regulations require the agency to follow a similar process for obtaining public scrutiny and input of proposed settlements. Promptly after preliminary approval of the consent
order, the FTC must issue a press release that includes the proposed order, the complaint, and the ACCO. At the same time, the FTC must place on the public record and publish in the Federal Register an explanation of the provisions of the proposed settlement, the relief to be obtained thereby, and any other information that it believes may help interested persons understand the order. This explanation is commonly known as the “Analysis to Aid Public Comment” and is similar to the DOJ’s CIS. The public is invited to comment on the published materials (typically published to the FTC website) for 30 days, unless the FTC shortens or extends the time period. Public comments are made public on the FTC website, and although the FTC is not required to respond to comments, it regularly addresses significant comments in public statements at the time it makes the consent order final.

International norms

In general, international authorities support the use of settlements in antitrust cases, as they help “facilitate prompt resolution and help reduce the costs and burdens on parties, agencies, and markets.” Additionally, they endorse the publication of proposed settlements. The OECD notes that publication of proposed settlements helps address a lack of transparency in the settlement process, because settlement publications often contain detailed justifications for the proposed action. These detailed justifications can serve to educate the public about competition law as well as inform interested third parties about the proposed settlement’s existence and terms.

International authorities provide some support for subjecting proposed settlements to either third party or public scrutiny. The ICN’s 2018 Annotated ICN Guidance on Investigative Process report recommends that enforcement agencies “[c]onsider procedures that allow for consultations with market participants to seek perspectives on proposed commitments or remedies, as appropriate and within confidentiality rules.”

In 2012, the ICN conducted a survey of 36 member countries asking if the respondent’s antitrust regime provided third parties with the opportunity to comment on proposed remedies or settlement commitments. The responses on this question were a slight plurality for “Yes” in mergers (48% Yes, 45% No, 6% Varies), and a plurality and slight majority for “No” in dominance cases (38% Yes, 50% No, 12% Varies), cartel cases (32% Yes, 56% No, 12% Varies), and other cases (30% Yes, 57% No, 13% Varies). The report concludes that there is no consistent practice across nations to provide third parties with the opportunity to comment on proposed remedies, but did note that many respondents found it valuable to either market test proposed remedies, or seek input from third parties through either formal or informal channels.
The same ICN survey asked respondents if the general public is provided with the opportunity to comment on proposed remedies or settlement commitments. A majority of respondents reported “No” in each category: mergers (22% Yes, 72% No, 6% Varies), dominance cases (18% Yes, 76% No, 8% Varies), cartel cases (15% Yes, 82% No, 3% Varies), and other cases (22% Yes, 74% No, 4% Varies). Again, the report concluded that there is no common practice among the respondents, but that for those countries which seek public comment, the agency has discretion in determining how much public comment will weigh in a settlement.

Ultimately, international authorities tend to focus more on encouraging antitrust regimes to establish a settlement or consent decree system or on ensuring greater transparency and predictability in such a system, than on advocating for third party or public scrutiny of proposed settlements.

b. Judicial review of commitments and settlements

China

China’s commitment system has no mechanism for judicial review prior to the issuance of a commitment. An investigated party that proposes and negotiates commitments with an agency may be held liable for non-performance. Parties who are not satisfied with a proposed commitment may challenge it in court only after it is finalized. However, if the courts consider commitment as a decision delivered by the agencies, there might be a possibility to challenge the agencies’ decision to suspend the investigation or terminate the investigation by applying for administrative reconsideration or bringing an administrative action before court according to article 53 of the AML.

European Union

In the EU, judicial review is available for both commitments and settlements. The scope of judicial review of commitments is limited to obvious errors of law. Settlements, on the other hand, can only be appealed by the involved parties. Although the investigated party has acknowledged infringement in the settlement, it can still appeal the settlement to the General Court on grounds of the Commission’s “lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers.”

596 See id.
597 See id.
598 See id. at 27.
599 OECD KEY POINTS, supra note 12, at 19.
600 See NDRC Anti-Price Procedures, supra note 93, art. 18(1); SAIC Investigative Procedures for Monopoly Cases, supra note 94, art. 17.
601 NDRC Anti-Price Procedures, supra note 93, art. 21; SAIC Investigative Procedures for Monopoly Cases, supra note 94, arts. 28, 29.
603 See TFEU art. 263(2) and (4).
successful, appeal claim between 2007 and 2017 was that the Commission miscalculated the amount of the fine charged to the appellant, in violation of the EC’s fining guidelines.604

United States

Before entering any consent judgment proposed by the DOJ, the court must determine whether the proposed settlement is in the public interest.605 The court is not required to conduct an evidentiary hearing, but may do so.606 The court must weigh a number of factors to determine the competitive impact of the proposed settlement, including the termination of the alleged violations, enforcement and modification provisions, duration of settlement, anticipated effects of alternative remedies considered, if the terms of the settlement are ambiguous, and any other competitive considerations the court deems necessary to the evaluation of public interest.607 The court must also consider the impact of the proposed settlement on competition in relevant markets, the public generally, individuals alleging injury from the violations, as well as a consideration of the public benefit, if any, to be derived from the proposed settlement.608 When courts consider these statutory factors, however, the DOJ is entitled to “broad discretion to settle with the defendant within the reaches of public interest.” Approval should be denied only if the decree would make a “mockery of judicial power.”609 Thus, the court cannot evaluate the best way to resolve the DOJ’s claims, but rather must only make a determination on whether or not the proposed settlement is within the reaches of the public interest. Courts have also held that subsequent statutory amendments do not materially change this standard.610 Parties to the settlement waive further appeals of the consent decree. Additionally, because consent decrees are court orders, the DOJ cannot unilaterally modify or terminate them, and parties wishing to do so must petition the court. If a consent decree has been violated, the DOJ will institute an action to enforce the decree in the court that retains jurisdiction over the case.

The FTC does not require court approval prior to issuing a consent order. The FTC need only seek approval from the Commissioners. In executing the ACCO, parties waive any right to seek judicial review of the consent order.612 If a consent order is violated, the FTC has statutory authority to seek penalties and further injunctive relief from federal court.613

2. Differences in Law

Public scrutiny of proposed settlements. Each jurisdiction differs in their public scrutiny of proposed commitments or settlements. As a matter of practice, but not formal law, Chinese

606 See id. § 16(e)(2).
608 See id.
609 See id. at 1461.
610 See id. at 1462.
enforcers publish a Decision to Terminate Investigation, which contains a statement of facts, commitments and their fulfillment, but are not required to seek public comment. The EU’s commitment system, on which China’s system was modeled, does permit public scrutiny through market tests. The EU does not, however, publish observations submitted or respond to observations publicly. For settlement decisions in the EU, no public scrutiny is mandated. The U.S. has the most developed public scrutiny system for both the DOJ, in the form of a CIS and invitation for public comment, and the FTC, in the form of an Analysis to Aid Public Comment and invitation for public comment. The DOJ is required by the Tunney Act to solicit comments, publish them, and respond to them. The FTC solicits comments, but has no formal obligation to publish or respond to them. Nonetheless, in practice they typically do so upon issuing the final consent order.

**Judicial review.** All three jurisdictions vary with respect to ex ante judicial review for settlements and commitments. Neither Chinese nor EU law permits judicial scrutiny of proposed commitments, although both jurisdictions seem to permit parties to file an appeal after a commitment has been entered. The U.S., in contrast, requires judicial review of proposed DOJ consent decrees prior to their issuance, but does not require it for FTC consent decrees. However, FTC typically subjects its proposed settlements to public comment. DOJ consent decrees can be appealed, but FTC administrative consent decrees cannot.

**F. Judicial Review of Final Decisions**

Judicial review of legal decisions after they have been issued is essential to due process. Only through such independent and external review can a legal system ensure that the decision is consistent with substantive and procedural law. This is particularly true for administrative decisionmaking, in which the same institutional actor serves as investigator, prosecutor, and adjudicator. Without meaningful judicial review, the agency runs the risk of exercising unfettered, unilateral discretion.

The institution of judicial review of administrative decisions in China, established by the 1989 Administrative Litigation Law, is relatively new. A party dissatisfied with an administrative decision by MOFCOM in a merger case must first apply for an administrative reconsideration by the agency itself. If this internal review does not satisfy the parties, they can file an administrative litigation in court. In all other cases, the parties have the right to choose whether to apply for administrative reconsideration first or to file an administrative litigation in court directly. However, in 2014, China’s newly enacted Administrative Litigation Law expanded judicial review of agency actions, which led to an increase in

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616 See AML, *supra* note 91, art. 53(2); see also STEPHEN HARRIS ET AL., ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 49 (2011) (noting that earlier drafts of the Anti-Monopoly Law required parties to first seek administrative review before judicial review, but that the final draft of the law eliminated this requirement to more expressly provide a right to judicial review).
administrative litigation. During the initial period when there were three enforcement agencies, the Supreme People’s Court indicated that administrative appeals would be heard by intellectual property (IP) tribunals, which are generally established at the intermediate appellate level of the Chinese judicial system. Currently, administrative appeals from SAMR decisions will be heard by the Administrative Tribunal of the Beijing No. 1 Intermediate Court.

In the EU, the General Court has unlimited jurisdiction to review decisions in which the Commission has fixed a fine. Under Article 263 of the TFEU, the General Court typically reviews the legality of the Commission decision. Additionally, it exercises de novo review of the appropriateness of the fine and has the power to cancel, reduce, or increase that fine. The decision of the General Court may be appealed to the ECJ, which reviews only the legality of the agency’s decision. It does not review the facts of the case unless it can be shown that the General Court clearly distorted the obvious meaning of the evidence before it. However, in the 2017 Intel case, the ECJ reversed the General Court’s decision for its failure to consider all of the major arguments made by the parties. It is worth emphasizing that Intel was a rare setback for DG Comp, which has rarely lost in court.

In a U.S. judicial enforcement proceeding, the federal district court makes the initial decision, and that decision may be appealed to the federal appellate courts. In administrative adjudication before the FTC, the initial decision of the ALJ is first reviewed de novo by the full Commission without according any deference to the ALJ’s factual or legal findings. FTC settles around 80% of the adjudications it initiates against parties, and these cases are not subject to judicial review. For cases that are not settled, the Commission’s decision may be appealed to the federal appellate courts. Although the judiciary affirmed Commission liability findings in only 50% of cases from 1987 to 1996, since 2007 it has affirmed 100% of appealed administrative cases in which the Commission found liability.

The following section will discuss the way that judicial review of final decisions is applied in China, the EU, and the U.S. This section breaks down the process of judicial review into six separate steps.

1. Review of the agency’s adherence to procedural requirements
2. Consideration only of rationales contained in the record
3. Consideration only of rationales adopted by the agency
4. Review of factual findings

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617 See He Haibo, supra note 19, at 178 (noting a 55% increase in administrative litigation generally from 2014 to 2015).
618 See HARRIS ET AL., supra note 616, at 296–97.
620 See id.; see also Schweitzer, supra note 27.
622 See DG COMP MANPROC, supra note 196, ch. 26.1.2.5.
623 See Schweitzer, supra note 27, at 521.
625 See Maureen Ohlhausen, Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?, 12 J. COMPETITION L. & ECON 1, 4 (2016).
1. **Procedural Steps of Judicial Review**

   a. **Review of agency’s adherence to procedural requirements**

      In all three jurisdictions, courts invalidate an administrative decision when the agency fails to follow procedural requirements.

   China

      A Chinese People’s Court has the power to revoke an administrative action entirely or partially if it violates a statutory procedural requirement. However, courts have historically refrained from setting aside agency actions based on procedural violations alone. The 2014 Administrative Litigation Law gave courts greater power to set aside agency actions based solely on procedural violations. Indeed, since then, in some cases, the People’s Court has revoked some decisions based solely on procedural violations. For example, a court revoked the local DRC’s decision to issue a project approval notification solely because of its procedural violation. But according to the judicial interpretation of Supreme Court, an agency can still reach the same decision on remand even after a People’s Court has revoked its action based on procedural violations. Thus, the substantial impact of such relief for parties seeking a tangible remedy is not yet clear.

   European Union

      EU courts will set aside an agency decision if the Commission violates a procedure and such violation prejudices the respondent. In an EU action for annulment, Article 263 TFEU provides that the infringement of a procedural requirement that may have influenced the course of the procedure or the content of the decision may justify setting aside a Commission decision. As one commentator observes, “In reaction to an increased awareness of fundamental rights and based on ‘general principles of EU law’ derived from the Member States’ administrative law traditions, the courts of the Union have started early on to develop tight procedural standards that the Commission must adhere to when investigating and prosecuting competition law infringements.” In *United Parcel Service*, the General Court articulated the

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626 Admin. Litig. Law, *supra* note 231, art. 70(3).
631 See Schweitzer, *supra* note 27, at 496.
unforgiving standard that the Commission’s decision will be annulled if “there was even a slight chance that [the respondent] would have been better able to defend itself” but for the non-disclosure of evidence.632

United States

In the U.S., courts reviewing administrative decisions must set them aside if they were made “without observance of procedure required by law.”633 Unlike in areas where courts tend to defer to agency expertise, judicial review of an agency’s compliance with procedural requirements is exacting.634

b. Consideration only of rationales contained in the record and adopted by the agency

As a general matter, China, the EU, and the U.S. adhere to the “closed record” principle that permits agency decisions to be upheld only on evidence that is part of the official record. In addition, U.S. law permits agency decisions to be upheld only on rationales explicitly invoked by the agency in its official decision.

China

Of the three jurisdictions, China is the least committed to the closed record principle. A People’s Court reviewing an agency decision has the power to subpoena evidence from other organizations and citizens, but may not subpoena any new evidence not in the agency’s record to prove the legality of agency’s administrative action.635 The courts have applied this principle to exclude evidence not in the agency’s record.636 There are limited exceptions to this principle, however. If the complaining party raises an argument or introduces evidence for the first time at the litigation stage, the agency can introduce additional evidence to react to this argument.637 Finally, Chinese law does not limit courts from considering only rationales cited in the agency’s official decision. Instead, courts may consider any rationale so long as it is in the record.

European Union

In an EU action for annulment, the Commission decision is reviewed for legality based on the reasoning and the evidence put forward in the decision itself.638 Under normal circumstances, additional evidence submitted after the administrative proceeding has closed is not admissible.639

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635 See Admin. Litig. Law, supra note 231, art. 40.
637 See Admin. Litig. Law, supra note 231, art. 36.
United States

Under U.S. general administrative law principles, formal adjudications must be made on the record,640 and such record building is even required in some informal adjudications.641 Consequently, review of administrative actions is traditionally based on the closed record principle, which means that the court can only review the evidence that was before the agency at the time it made its decision.642 Courts will base their review on the “whole record or those parts cited to it by a party.”643 In particular, courts will refuse to rely on any evidence or rationales that were not considered and relied on by the agency itself.644 They will also refuse to consider positions advanced during litigation that were not adopted by the agency in its formal decision.645 This practice, known as the Chenery doctrine, prevents the views of agency lawyers from trumping the expertise the agency presumably applied in formulating its initial decision.646

International norms

The propriety of closed record review is supported by paragraph 2.4.16 of the ICC’s Recommend Framework of International Best Practices in Competition Law Enforcement proceedings, which states, “During the hearing, the agency should not be allowed to rely on theories or evidence not disclosed to the Respondents in the Report.”647 However, the desirability of “closed-record” review should depend on how reliable the agency’s adjudicative processes are; the more protections that agencies originally offer, the more compelling it is to adhere to the “closed-record” principle.648

c. Review of factual findings

The three jurisdictions’ courts vary in their willingness to set aside agency factual findings. Chinese law permits more extensive review of agency factual findings than EU or U.S. law.

China

In China, the courts conduct a comprehensive reexamination of the facts of the case and are not bound by any of the agency’s findings. China requires under the Administrative

646 See Chenery, 318 U.S. at 87 (“The grounds on which an administrative order must be judged are those upon which the record discloses that its action was based.”).
647 ICC BEST PRACTICES, supra note 18, at 7.
648 See Asimow, supra note 111, at 11–16.
Litigation Law that the administrative agency as the defendant shall bear the burden of proof for administrative actions it has taken and shall produce the evidence and normative documents on which such administrative actions are based. The courts are able to replace the agency’s findings with their own assessment of the facts based on the evidence obtained during the trial.

**European Union**

In the EU, the General Court undertakes an exhaustive review of both the Commission’s substantive findings of fact and the application of the law to those facts. The Court checks if the evidence upon which the Commission relied is accurate, reliable, and consistent. Article 32 of the Protocol on the “Statute of the Court of Justice of the European Union” authorizes the General Court to engage in fact-finding of its own, but in practice such actions are rare. The ECJ holds that courts “cannot use the Commission’s margin of discretion . . . as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.” However, courts are highly deferential towards agency factual findings. Indeed, the General Court has often been criticized for its superficial review of the Commission’s factual findings. But, EU courts can and have voided decisions on the grounds that the Commission produced insufficient evidence.

**United States**

In the U.S., courts may set aside factual findings only if they are unsupported by substantial evidence. This standard requires more than the existence of any evidence supporting the agency’s conclusions of fact. Instead, courts “take into account contradictory evidence or evidence from which conflicting inferences could be drawn.” Such review is required by the mandate that review take place on the “whole record.” In so doing, courts must strike a careful balance: “The Board’s findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board’s decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed

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649 See Admin. Litig. Law, supra note 231, art. 34.
652 See id. para. 17.
653 See EC Treaty art. 32.
658 See Universal Camera Corp. v. NLRB, 340 U.S. 474, 481 (1951) (quoting ATTORNEY GEN.’S COMM. ON ADMIN. PROCEDURE IN GOV’T AGENCIES, FINAL REPORT, S. DOC. NO. 77-8, at 210–11 (1941) (dissenting views)) (internal quotation marks omitted).
659 See id. at 487.
660 See id. at 488.
judgment on matters within its special competence or both.”\textsuperscript{662} The relationship is similar to that of a trial court and appellate court, with the appellate court intensively reviewing conclusions of law, but disturbing findings of fact only for clear error, although agencies appear to get slightly more deference than trial courts.\textsuperscript{663} The APA framework is supported by the FTC Act, which forbids courts from making their own appraisal of the testimony or picking and choosing for themselves among uncertain and conflicting inferences.\textsuperscript{664} The U.S. Supreme Court has found this provision to be “essentially identical” to the substantial evidence standard of the APA.\textsuperscript{665} In summary, U.S. courts must carefully examine the factual record and be only somewhat deferential to agency factual decisions.

**International norms**

Jurisdictions must strike a balance in the extent to which their courts disturb agency factual findings. In general, since administrative agencies combine prosecutorial and adjudicative functions, some degree of judicial review of agency fact finding is essential. The European Court of Human Rights has emphasized that it is the presence of such judicial review that harmonizes administrative enforcement with the right to a fair trial.\textsuperscript{666} In addition, the OECD has included review of factual assessments in its list of areas subject to judicial review and has placed on courts the obligation to ensure that “the facts have been accurately found.”\textsuperscript{667} The OECD also expects that “[i]mpartial judges should . . . come to their own appraisal of the law and facts.”\textsuperscript{668} The OECD’s Background Note on the Standard of Review recognize that many jurisdictions review findings of fact less intensively than conclusions of law, reflecting deference to the factfinding expertise of the initial decisionmaker.\textsuperscript{669} Paragraph 2.7.2 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings similarly calls on courts “to review the evidence used to support the complaint as well as any exculpatory evidence not relied upon by the competition authority to come to its own appraisal of the facts and evidence.”\textsuperscript{670} If agencies fail to adhere to strict separation of functions, there is a good argument that stronger judicial review of agency factual findings is necessary to ensure fairness to the parties.

At the same time, courts should hesitate before substituting their judgment on factual issues for that of the agency. Appellate bodies are not in a position to evaluate demeanor evidence or other aspects that are inherent in taking live testimony. Moreover, agencies possess specialized expertise. Thus, the OECD acknowledges that courts should give a degree of deference to the agency’s expertise and should take care not to substitute their judgment for the agency’s.\textsuperscript{671} As a result, no clear consensus has emerged as to how searching this review should

\textsuperscript{662} See id. at 490.
\textsuperscript{663} See id. at 468.
\textsuperscript{666} See supra note 459-462 and accompanying text.
\textsuperscript{667} OECD KEY POINTS, supra note 12, at 30.
\textsuperscript{668} Id. at 31.
\textsuperscript{669} OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 13, at 17.
\textsuperscript{670} ICC BEST PRACTICES, supra note 18, at 8.
\textsuperscript{671} OECD KEY POINTS, supra note 12, at 31, 34.
be and whether the more searching standard adopted by China or the more deferential standard employed by the EU and the U.S. strikes the right balance.

d. Review of legal conclusions

Chinese and EU courts engage in de novo review of agencies’ conclusions of law, although they consider agency interpretations of the regulations they enact. While U.S. courts defer to agency legal interpretations in some situations, they do not defer to agency interpretations of the antitrust laws.

**China**

In China, courts review agency conclusions of law de novo and additionally check for an appropriate exercise of discretionary power when agencies set fines.\(^{672}\) Pursuant to China’s Administrative Litigation Law, where the wrong laws and regulations are applied to administrative actions, the people’s court may revoke or partially revoke its decision, and rule that the defendant remakes the administrative actions. Meanwhile, in *Hainan Yutai Technology Feed Co. Ltd. v. Hainan Administration of Commodities Price*,\(^{673}\) the court of first instance held that “the determination of the monopoly agreement defined in Article 14 of the AML cannot be based solely on whether the parties to the transaction have reached a fixed or limited resale price agreement, but shall also include considerations under Article 13.2 of the AML to further examine whether the related price agreement has the effect of precluding or restricting competition.” The Hainan ACP, as the local DRC in Hainan, based its appeal request on the ground that “the first-instance decision has misinterpreted the law.” Then, the court of second instance concluded that the case was an administrative case concerning a vertical agreement, and “eliminate or restrict competition” is not a legal requirement to determine the legitimacy of vertical agreement that restricting the lowest prices for commodities resold to a third party according to AML (art. 14). Eventually, at retrial, the Supreme People’s Court finds that, the definition of monopolistic agreements in article 13 of AML applies to article 14 on vertical monopolistic agreements. Also, the Court holds, to serve the AML’s legislative purpose of preventing and halting monopolistic behavior and protecting consumers and public interests, the administrative agency’s determination of a vertical monopoly agreement may differ from a civil subject’s claim for actual losses caused by the monopolistic conduct in terms of proving damages.

**European Union**

In the EU, conclusions of law are reviewed de novo. No deference is given to the Commission, as the “margin of discretion” standard of review has been held inapplicable to legal interpretations.\(^ {674}\) Indeed, courts are expected to undertake a full and exacting scrutiny of the

\(^{672}\) *Admin. Litig. Law, supra* note 231, arts. 6, 77.

\(^{673}\) *Supreme People’s Court (2018) Zui Gao Xing Shen No. 4675 Decision.*

\(^{674}\) *See* Schweitzer, *supra* note 27, at 504–12.
Commission’s legal conclusions. This non-deferential standard of review extends to the Commission’s interpretation of the substantive antitrust statutes.

**United States**

The situation under U.S. law is similar. The U.S. Supreme Court has held that “[i]t is for the courts, not the commission, ultimately to determine as matter of law” the exact meaning of “unfair competition.” The Supreme Court later reaffirmed this position, holding that “[t]he legal issues presented—that is, the identification of governing legal standards and their application to the facts found—are... for the courts to resolve,” although courts should “give some deference to the Commission’s informed judgment that a particular commercial practice is to be condemned as ‘unfair.’” Lower courts have interpreted this language as indicating that they should apply de novo review to the FTC’s conclusions of law. Admittedly, the Supreme Court’s *Chevron* doctrine requires courts to defer to agencies’ conclusions of law with respect to statutes they administer.

Although the FTC has sometimes received *Chevron* deference with respect to other statutes that it administers, the FTC generally does not receive *Chevron* deference for its interpretations of the antitrust laws.

**International norms**

The Key Points promulgated by the OECD clearly envision that judicial review will include legal assessment. As noted above, the OECD Key Points specify that “[i]mpartial judges should... come to their own appraisal of the law and facts.” The OECD’s Background Note on the Standard of Review recognize that “courts do not usually defer to the legal

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679 See McWane, Inc. v. FTC, 783 F.3d 814, 824–25 (11th Cir. 2015); N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 373 (4th Cir. 2013); Chicago Bridge & Iron Co. v. FTC, 534 F.2d 410, 422 (5th Cir. 2008); Rambus Inc. v. FTC, 522 F.3d 456, 462 (D.C. Cir. 2008); Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005); Toys “R” Us v. FTC, 221 F.3d 928, 934 (7th Cir. 2000); Ticor Title Ins. Co. v. FTC, 998 F.2d 1129, 1133 (3d Cir. 1993).
682 See Maciej Bernatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275, 317 (2014) (“There is not a single judicial opinion in which the courts suggest that the FTC is entitled to *Chevron* deference when reviewing its statutory interpretations.”); Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITTS. L. REV. 209, 212 (2014) (“[T]here is widespread consensus within the antitrust bar that Chevron does not apply to FTC interpretations of Section 5.”). *But see* Mattox v. FTC, 752 F.2d 116, 123 (5th Cir. 1985).
684 *Id.* at 31.
conclusions reached by first-instance decision makers, whether competition authorities or lower courts, since the review of the right application of the law is precisely their task.”

e. Review of economic rationales

Finally, the jurisdictions differ regarding the depth to which courts will review the economic rationales underlying antitrust enforcement actions. Chinese law and EU law have historically adopted a deferential approach. U.S. law expects courts to engage in more searching scrutiny of the economic rationales on which antitrust decisions are based.

China

It is hard to evaluate this element in current Chinese law because judicial review of agency decisions has been rare up until this point. Since Chinese courts can rely on their own factual findings, it is possible that China’s courts will closely examine economic evidence when relevant cases arise in the future. Of course, this will depend on the willingness of Chinese judges to engage with economic theory. Although some judges in other jurisdictions have struggled to grapple with complex antitrust economic rationales because of inexperience, Chinese judges can engage with outside economic experts to help them understand economic issues.

In two recent cases, the Tencent and Johnson & Johnson cases, the Chinese judges examined the proposed economic rationales, suggesting the Chinese judiciary is exploring how to fully exercise this responsibility.

European Union

In the EU, courts have historically been reluctant to second-guess the economic theories and conclusions advanced by DG Comp and have instead taken care not to substitute their judgment for that of the Commission in the decision under review by giving agencies a wide “margin of discretion.” In the case of competition law, this has meant that courts will not overturn a decision based on its economic reasoning unless the agency commits a “manifest error of appraisal or a misuse of powers.” In the 1990s, the General Court employed an economist to help it understand economic issues. Today, while judges may have some knowledge of

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685 OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 13, at 16.
688 Johnson and Johnson Case (沪高民三(知)终字第63号) (Shanghai Intellectual Property Ct. 2012).
691 See KME Germany, Case C-389/10 para. 121. Other cases use the alternative terminology of “margin of appraisal” or “margin of assessment.”
competition law, they generally do not have formal economic training, meaning that litigants must carefully present economic arguments to make them understandable.692

Over time, the EU courts have gradually strengthened judicial scrutiny of economic considerations. Beginning in 2002, the ECJ has emphasized that the margin of discretion “does not mean that the Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature.”693 Quite the contrary, courts “cannot use the Commission’s margin of discretion . . . as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.”694 This change appears to stem in part from growing concerns that more searching review is required to satisfy the ECHR’s standard of fair trials in criminal case, defined to apply to any sanction intended to have a punitive and deterrent effect, including competition law.695 Courts have also recognized that the need for searching judicial review is particularly strong when the agency does not provide a clean separation between prosecutorial and adjudicatory functions.696

The General Court’s 2017 UPS decision examined the agency’s economic evidence in the course of annulling the Commission’s decision to block a merger.697 One set of commentators identified this case as a turning point, arguing it demonstrates that “EU judges are increasingly willing to scrutinize complex economic appraisals made by the Commission.”698 Future cases should provide clarity on how strict the EU’s level of scrutiny is.

United States

Judicial review of agencies’ economic reasoning is more searching under U.S. law than under Chinese or EU law. The courts have held that “[r]easoned decisionmaking can use an economic model to provide useful information about economic realities” so long as it is supported by “empirical confirmation of accuracy” or alternatively “a complete analytical defense of [the] model to respond to each objection with a reasoned presentation.”699 In particular, courts require agencies to “explain[] the assumptions and methodology used in preparing the model”700 and show “a rational connection between the factual inputs, modeling assumptions, modeling results and conclusions drawn from these results” as well as “evidence that the agency is conscious of the limits of the model.”701 Courts will reject economic models

693 See Case C-12/03 P, Commission v. Tetra Laval BV, 2005 E.C.R. I-1047, para. 39; see also OECD EU REPORT, supra note 378, at 59–60 (describing DG Comp’s “chastisement” in 2002 by the courts, which apparently “doub[ed] that the Commission was any more expert than the court about economic matters”).
694 See KME Germany, Case C-389/10 para. 129.
696 See KME Germany, Case C-389/10 para. 68.
that bear “no rational relationship to the reality it purport to represent” or “generate apparently arbitrary results particularly where, as here, the agency has failed to justify its choice.”

International norms

International organizations emphasize the importance of judicial review of agencies’ economic rationales. For example, the OECD’s Key Points on Procedural Fairness and Transparency acknowledge that judicial review “is particularly important when competition agencies are an administrative body” and typically covers economic assessment as well as an evaluation of adherence to procedural rules and the factual and legal basis of the decision. The OECD’s Background Note on the Standard of Review recognizes that courts may grant deference to economic assessments or the use of economic models “as long as these are supported by sufficient evidence and appropriate analysis (and, depending on the case, discussion with the parties).” Paragraph 2.7.1 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings similarly recognizes that “[t]he courts, particularly when competition authorities are an administrative body, play or should play a significant role in safeguarding due process.”

2. Differences in Law and Practice

Although China’s limited experience with judicial review of agency decisions complicates any assessment of the similarities and differences in the different jurisdictions’ approaches to judicial review, there appear to be two areas where the jurisdictions are similar in law, and four areas where they differ in law.

Similarities in law

Review of agency’s adherence to procedural requirements. All three jurisdictions require their courts to set aside agency determinations if they failed to adhere to procedural requirements. U.S. judges are particularly demanding in this area. While Chinese judges traditionally showed some deference, the 2014 Administrative Litigation Law gave courts greater power to set aside agency actions based on procedural violations alone.

Consideration only of rationales supported by the record and adopted by the agency. All three jurisdictions generally adhere to the “closed record” principle, which limits courts to only considering evidence that the agencies included in their administrative records. However, only U.S. and EU courts strictly limit themselves to considering rationales advanced during agency proceedings.

703 See Appalachian Power Co. v. EPA, 251 F.3d 1026, 1035 (D.C. Cir. 2001).
704 OECD KEY POINTS, supra note 12, at 30. The OECD acknowledged that the degree of deference given the agency varies from country to country.
705 OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 13, at 18.
706 ICC BEST PRACTICES, supra note 18, at 8.
Review of legal conclusions. All three jurisdictions review agencies’ legal conclusions de novo. The deference that U.S. courts sometimes accord to agency interpretations of the statutes they administer do not apply to the antitrust laws.

Differences in law

Review of factual findings. Of the three jurisdictions, Chinese judges show the least amount of deference to agencies’ factual findings. In contrast, EU and U.S. judges show significant deference to agencies’ factual findings.

Judicial review of economic rationales. U.S. courts scrutinize agencies’ economic rationales more closely than Chinese or EU courts, although the Tencent and Johnson & Johnson decisions in China and the UPS decision in Europe may reflect greater interest in more searching review of economic rationales.

IV. RECOMMENDED ENFORCEMENT PROCEDURES

Much of this report serves an explanatory function, analyzing the similarities and differences across the world’s three primary antitrust enforcement regimes. The three jurisdictions are remarkably different from each other, in part, because they have different needs and societal priorities. Yet for the reasons discussed above, we believe that all three jurisdictions would benefit from promoting rational decisionmaking, due process, and transparency. This report concludes that three antitrust enforcement procedures are essential to achieving these goals.

A. Judicial Review of Document Requests

Allowing ex ante judicial review of document requests promotes fairness to parties and transparency. In general, procedures at this phase of agency action help protect against “fishing expeditions,” broad searches for wrongdoing without individualized suspicion. Allowing administrative agencies to proceed freely in such fishing expeditions is unfair to citizens and gives too much power to lower-level bureaucrats, sharpening risks of corruption and decisions made for improper reasons. Judicial review of agency requests for information will protect against more extreme versions of administrative probing. The feedback given in judicial review can also counter the cognitive tendency of agency experts to be overconfident.707

We do not suggest particularly severe restrictions on the ability of agencies to seek information. Even the United States, which has the most rigorous procedural protections in this area, sets only a minimal bar for agencies to satisfy in requesting information. Allowing judicial review at this stage of agency action will also promote transparency, helping the regulated understand what specific practices are worthy of investigation by the agency and thus worthy of avoiding.

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B. Agency Disclosure of the Evidence on Which It Wishes to Rely

By disclosing the economic and legal bases underlying their investigations, agencies can ensure fairness to the defendant, better decisionmaking, and transparency. First, disclosure of such information is necessary for the respondent to properly defend itself, an essential part of any due process regime. Second, such disclosures will have the ultimate effect of strengthening agency decisions. If respondents cannot prepare bona fide defenses, an agency’s decisions will be weaker and less accurate. This, in turn, will result in more erroneous agency decisions, undermining public confidence in the agency. Third, disclosure will promote transparency by informing other regulated parties about what actions the agency is taking. This will help warn other parties about what behaviors will be prosecuted by the agency, thus leading them to adjust their practices to ensure compliance with the law. Such disclosure can be enforced through judicial review by only allowing the agency to defend its decision based on information disclosed to the parties and specifically referenced in its decision.\(^{708}\)

C. The Right to Legal Representation

Consistently honoring the right to legal counsel promotes fairness to the parties and rational decisionmaking. The right to counsel ensures that a respondent understands the legal proceedings affecting his interests. Although respondents may often be sophisticated parties even well-educated people can struggle to understand legal procedures. As Justice Sutherland once noted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . . He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.\(^{709}\)

Without consistently recognizing the right to counsel, there is an omnipresent specter looming over every administrative proceeding, creating a risk that it will be tainted by unfairness to the respondent, thus upsetting due process. Second, consistently allowing legal representation will promote better agency decisionmaking. Skillful lawyers help judges and adjudicators better understand the issues at stake by framing them.\(^{710}\) Thus, lawyers can occasionally aid officials in their work. More often, lawyers will ensure that respondents articulate their positions in the best


\(^{710}\) See, e.g., Diane Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1775 (1997) (discussing the insights generalist judges can provide into specialized issues).
light. Administrative decisions are then strongest, and least vulnerable to criticism, if they can answer the respondents’ best positions.

D. Opportunity for Respondents to Answer the Agency’s Arguments Against Them Before a Decision Is Made

Giving respondents a legitimate opportunity to respond to the agency’s arguments promotes fairness to the parties, better agency decisionmaking, and transparency. First, doing so fulfills an ancient and fundamental principle of justice captured in the Latin phrase, *Audi Alternam Partem*: Listen to the other side.\(^{711}\) Second, a hearing gives respondents a chance to present evidence and make arguments, thereby serving as proxies for a “day in court.” Citizens will perceive legal proceedings to be fairer if they have an opportunity to be heard, so much so that many litigants will forgo an economically rational settlement option just to get it.\(^{712}\) Third, the exercise of considering and responding to these arguments will sharpen agency decisionmaking. A rational decisionmaker considers alternative options to the one ultimately pursued, and this process directly ensures that decisionmakers go through this important exercise.\(^{713}\) Relatedly, failing to engage with the respondent’s arguments can cause the agency to overlook important aspects of the problem, exposing it to public criticism later on.\(^{714}\) Finally, a hearing (particularly a public one) increases transparency and allows the regulated and broader public to better understand the agency’s actions.

E. Separation of Investigative and Adjudicative Functions

The separation of functions can be essential to ensuring fairness to parties and rational decisionmaking. First, it is a fundamental principle of fairness that people cannot be judges in their own causes. An agency official that has chosen to initiate a complaint and invested significant time investigating a party will hesitate to absolve it, because doing so can be seen as evidence that the investigation should not have been initiated in the first place.\(^{715}\) While we have no reason to think that antitrust enforcement officials are more self-interested than any other group of people, the structure within which these enforcers work should incentivize them to favor prosecution over dismissals.\(^{716}\) As Judge Richard Posner noted, “An agency that dismissed many of the complaints that it issued would stand condemned of having squandered the taxpayer’s money on meritless causes.”\(^{717}\)

\(^{711}\) *See* Rex v. Univ. of Cambridge, 88 Eng. Rep. 111, 115 n.(a) (K.B. 1722).

\(^{712}\) Several bureaucrats, from multiple agencies, told us so directly.


\(^{716}\) *See* Geradin & Petit, *supra* note 75, at 13–14.

\(^{717}\) *See* Posner, *supra* note 483, at 53.
Second, separation of functions guards against faulty agency decisionmaking. As noted above, officials that act as both investigator and prosecutor are vulnerable to cognitive biases beyond those that normally affect agencies.718 Such officials will be vulnerable to confirmation bias, a natural tendency to favor and focus on evidence favoring the prosecution.719 These officials will also be susceptible to hindsight bias, the natural desire to justify one’s past efforts while looking at evidence in the present.720

The solution is, in the words of the U.S. Supreme Court, to “curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge.”721 In the leadup to the passage of the Administrative Procedure Act in the U.S., administrators disagreed on how to situate adjudication within the administrative structure. Although some advocated for a complete separation by placing the adjudicatory function in courts, others argued that placing both functions in a single agency yielded substantial efficiencies. The Administrative Procedure Act reflects a compromise between the two positions by allowing matters to be adjudicated by an agency official known as an administrative law judge (ALJ), while simultaneously mandating a separation of functions within the agency that insulated adjudicatory personnel from ex parte communications and from review and evaluation by the agency heads. Everyone agreed that both functions should not be lodged in the same person.722 Such a separation of functions serves to prevent “a psychological commitment to achieving a particular result because of involvement on the agency’s team” from distorting the final decision.723

In both the EU and the U.S., the head of the agency undertakes the final administrative decisions to charge and to adjudicate. In the case of administrative enforcement in the U.S., the decisions are made by all five of the FTC Commissioners. In the case of the EU, the decisions are officially taken by the College of Commissioners, although the Competition Commissioner receives great deference. Indeed, empirical evidence suggests that failure to separate functions completely may produce decisions with a clear pro-agency bias. With the FTC, several scholars have documented that Commissioners almost never vote to overturn ALJ decisions in situations where the ALJ has issued a decision against the investigated party.724 The only complete solution to this bias would be judicial enforcement.

Furthermore, the European Court of Human Rights has held that permissibility of allowing a person to exercise both prosecutorial and adjudicatory functions depends on the depth of judicial review.725 Even though the EU has not yet accessed the ECHR, the enshrined rights belong to the general principles of EU law according to Art. 6 par. 3 TEU. Hence, the interpretation of the ECHR by the ECHR is also relevant for the European Courts. The ECHR decided that based on Art. 6 ECHR the European lack of separation of powers within the agency is adequately counterbalanced by the existing level of judicial review and therefore, does not violate Art. 6 par. 2 ECHR. In line with this decision, the ECJ confirmed this view explicitly in its Schindler Decision regarding Art. 47 EU Fundamental Rights Charta, which provides for a

718 See supra note 32–36 and accompanying text.
719 See Forrester, supra note 26, at 836, 841.
720 See id.
721 See Wong Yang Sung v. United States, 339 U.S. at 41.
722 Barkow, supra note 75, at 888–90.
724 See Barkow, supra note 75, at 894–95; Coate & Kleit, supra note 482, at 7; Posner, supra note 483, at 53.
fair trial and can be seen as equivalent to Art. 6 ECHR.\footnote{See Case C-501/11 P, Schindler Holding Ltd. et al. v. Commission, ECLI:EU:C:2013:522 (July 18, 2013), curia.europa.eu/juris/celex.jsf?celex=62011CJ0501&lang1=en&type=TXT&ancre=.} The court stated that Art. 47 Fundamental Rights Charter requires unlimited judicial review of Commission decisions given the fact that there is no separation of powers within the Commission.\footnote{See id. para. 36.} The court found that

As the review provided for by the Treaties involves review by the European Union judicature of both the law and the facts, and means that it has the power to assess the evidence, to annul the contested decision and to alter the amount of a fine, the Court has concluded that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not contrary to the requirements of the principle of effective judicial protection which is currently set out in Article 47 of the Charter.\footnote{See id. para. 38.}

Moreover, the ECJ held in 2017 that though judicial review is limited “to the claims of the parties, as set out in the forms of order sought in their written pleadings, is not contrary to the principle of effective judicial protection, as that principle does not require those courts to extend their review to cover aspects of a decision that have not been put in issue in the dispute before them.”\footnote{See Case C-122/16 P, British Airways plc v. Commission, ECLI:EU:C:2017:861, at 109 (Nov. 14, 2017), curia.europa.eu/juris/celex.jsf?celex=62016CJ0122&lang1=en&type=TXT&ancre=.}

Clearly, plenary reconsideration of all issues by a court would cure any defects stemming from the administrative decisionmakers’ lack of independence. Conversely, any weakness in judicial review makes the combination of prosecutorial and adjudicatory functions in one personnel more troubling.

F. Publication of Decisions with Sufficient Information

The obligation to publish decisions with sufficient information, including the essential facts, answers to the respondents’ arguments, and economic analysis, promotes fairness to the parties, transparency, and rational decisionmaking.

First, publishing decisions promotes fairness to interested parties. Publishing decisions helps create precedents to guide future agency action. A fundamental notion of fairness is that a legal body should reach the same result when looking at two identical sets of facts.\footnote{See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175 (1989) (listing regularity and the reduction of uncertainty as one of five fundamental rule of law values).} Publication will help the courts, the regulated, and lawyers push for consistent results, thus promoting basic fairness.

Second, publication promotes transparency to the public. The law has the potential to shape public behavior in profound and often unseen ways.\footnote{See, e.g., BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) (explaining how 95% of the law’s work is done silently and passively).} The laws can help shape and reinforce a nation’s collective social consciousness, ensuring compliance through stigmatizing
pressure. In order for a citizenry to embrace and be pressured by its country’s laws, its people must know the laws. More so, as Durkheim explained, people must know when laws are violated and punishment is issued, so that they know that a particular element of the collective social consciousness is being reaffirmed. More specifically, publishing opinions allows the regulated – i.e. companies – to understand the law’s expectations for them, lowering future enforcement costs and promoting compliance.

Third, publication promotes more rational agency decisionmaking in two interconnected ways. First, publication enables judicial review, which provides a crucial second look at agency decisionmaking, weeding out the occasional irrational decisions that human decisionmakers make. Second, publication pushes agency decisionmakers – mindful of the potential for judicial review – to carefully articulate their position in a way that can withstand judicial scrutiny. In the United States, this usually pushes agency decisionmakers to produce coherent, thorough, and well-reasoned decisions. Although decisionmakers can theoretically make well-reasoned decisions without putting them into writing for public scrutiny, the process of writing usually helps one see weaknesses in one’s own argument and is why written submissions dominate advanced legal systems.

G. The Obligation to Publicly Give Reasons

The obligation of a legal authority to give reasons for its decision is a fundamental principle of justice. As two European scholars recently observed, it is “inconceivable” to not honor this rule. However, the obligation to articulate one’s decision in writing does not necessarily capture an agency’s need to give its reasons publicly. Indeed, agencies might initially prefer to keep their written decisions private. However, an agency’s obligation to publicly give reasons for its decisions also promotes transparency, rational decisionmaking, and fairness to the parties.

First, requiring agencies to publicly give reasons promotes transparency. Permitting agencies to produce reasons for their decisions post hoc during judicial review creates a risk that judges will be given reasons different from those the agencies relied on at the time of the decision. This creates an opportunity for agency officials to hide the true reasons they acted, potentially helping to mask arbitrary decisionmaking or corruption. Moreover, this requirement helps judges evaluate the true reasons for agency action, enabling them to set aside decisions based on improper considerations. As Opdebeek and DeSomer observe, “The core idea behind the duty to give reasons is that it offers transparency on the level of the motives or justifications that have inspired a decision.”

732 See, e.g., EMILE DURKHEIM, THE DIVISION OF LABOR IN Society 62–63 (W.D. Halls trans., Free Press 1984) (1893) (“[The law’s] real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor.”).
733 See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN America (Harvey Mansfield and Debra Winthrop trans., University of Chicago Press, 2009) (1831).
734 See DURKHEIM, supra note 732, at 63.
736 Id. at 132.
737 Id. at 131.
Second and relatedly, requiring agencies to publicly give reasons promotes more rational decisionmaking. If agencies may produce reasons for their decisions post hoc during judicial review, they will forward reasons meant to please courts – not necessarily the real reasons they originally acted. The primary reason governments employ administrative agencies is to concentrate expertise. Forcing agencies to publicly give reasons for their decisions helps push decisionmakers to make and defend decisions based on expertise. American legal scholars capture this idea through the *Chenery* doctrine, named for a Supreme Court case holding that judges will only look to the rationales the agency gave at the time of the decision – not those given post hoc during judicial review. As the Court explained in a later case, “Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possesses the expertise that can enlighten and rationalize . . . .”

Third, an agency’s obligation to publicly give reasons promotes fairness to the parties during judicial review. As the OECD explains, “decisions should provide clear detailed description of the case facts, the applicable rules and the reasons for the legal and factual findings” to make judicial review possible. Administrative agencies are given vast amounts of concentrated power to bring government expertise to bear on difficult problems; this justifies sacrifices by individual citizens. But fairness requires that individual citizens only make sacrifices for the sake of agency expertise, not other improper considerations that might have contaminated agency decisionmaking. As Jerry Mashaw explains, subjecting a citizen “to administrative authority that is unrestrained is [to treat him] as a mere object of the law, not a subject with independent rational capacities.” In other words, the obligation to state reasons is essential to ensuring the dignity of citizens in the face of the modern administrative state. Requiring agencies to publicly give reasons for their decisions ensures that their decisions will be evaluated according to the merits of the expertise that motivated them. This promotes the appropriate amount of fairness to citizens in their interactions with agencies.

### H. Availability of Rigorous Judicial Review of Economic Reasoning

Judicial review is essential for promoting reasoned decisionmaking, due process, and transparency. It is worth remembering that judges, more than any other branch of government, created U.S. administrative law. Judicial review promotes reasoned decisionmaking and due process.

First, judicial review promotes rational decisions by ensuring a rational decisionmaking process. While judges are often not experts in substantive antitrust law, they are experts on procedures and rational deliberative processes. Indeed, judges’ insights from different areas of

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740 OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 13, at 19.
742 Opdebeek & DeSommer, supra note 735, at 137.
743 Id.
law may help them see perspectives that agency officials – occasionally susceptible to tunnel vision – overlooked.  

Second, judicial review helps protect due process by ensuring that procedural requirements are met. As China recognized when it amended its administrative law, agencies were not adequately protecting individual rights in their proceedings. Consequently, the amendment made it easier for individuals to sue for procedural violations. As the Chinese government recognized, judicial review is a potent tool for ensuring procedural compliance by agencies.

Third and more substantively, judicial scrutiny of agency economic rationales promotes rational decisionmaking and transparency. One of the central justifications for the burdens of judicial review is that it ensures agencies are exercising their expertise as intended. Antitrust enforcement agencies are supposed to concentrate economic expertise to ensure the nation’s economic laws are obeyed. To properly scrutinize and check agency reasoning – a necessary prerequisite to the benefits of judicial review – judges must be willing to examine and critically evaluate agencies’ economic analyses, if only to counter the cognitive tendency of agency experts to be overconfident. Of course, a properly balanced system of judicial review does not normally let judges displace agency rationales – agency officials, not judges, are the experts. One additional, incidental benefit is that judicial scrutiny and explication of agency economic theories may promote transparency. Judges will undoubtedly attempt to translate complex economic theories into language they can understand. By putting such explications in judicial opinions, regulated parties will better understand what the agency expects of them, helping them comply in the future. Further, judicial review guards against cognitive biases, such as over-identification.

China has demonstrated its commitment to strengthening its system of judicial review. Before the recent reforms, administrative litigation in general had been difficult in China for several reasons. First, it was difficult to initiate lawsuits, and it was estimated that around 33% or more of attempted suits were not heard by the court in the end. Second, as to cases for which administrative suits did proceed, judgments were not made since the suits were withdrawn by the plaintiffs, which accounts for an estimated 30% to 57% of cases. Third, successful plaintiffs sometimes encountered difficulty seeing judgments enforced.

However, in November 2014, China passed an amendment to the Administrative Litigation law to combat these issues. First, the amendment emphasizes the right of citizens to file complaints, and provides an appeal if a court declines to accept a complaint. Second, the law creates sanctions for agencies that improperly coerce a plaintiff to drop his case and gives judges more power to nullify agency actions. Third, the law imposes monetary sanctions on

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745 See, e.g., Diane Wood, Generalist Judges in a Specialized World, 50 SMU L. REV. 1775 (1997) (discussing the insights generalist judges can provide into specialized issues).
746 See He Haibo, supra note 19, at 161.
748 See id. at 559–61, 579–80, 588–90 (discussing how feedback given in judicial review can counter the cognitive tendency of agency experts to be overconfident).
749 See He Haibo, supra note 19, at 145.
750 See id. at 147–48.
751 See id. at 162.
752 See id. at 163–64.
753 See id. at 164.
agency leaders and staff that refuse to honor a court judgment. The evidence suggests that the reforms have been at least partially successful: from 2014 to 2015, the number of administrative cases filed during the year increased to around 220,000, a 55% increase. For now, there is not enough administrative litigation concerning antitrust issues to support a general evaluation. However, although it remains to be seen whether this law will see an increase in judicial review of antitrust enforcement agency actions in China, the initial numbers in administrative litigation are promising with the amendment to the Administrative Litigation law.

All three jurisdiction permit de novo judicial review of interpretations of law and provide for substantial review of factual findings as well. There is one area in which the practice with respect to judicial review varies across the jurisdiction. Whereas U.S. courts subject economic reasoning to hard look review, European courts have given the Commission a wider margin of discretion with respect to economic reasoning, overturning decisions on that basis only for manifest errors of assessment. However, in recent years—the Intel decision being a landmark decision—the level of deference given to the agency has been reduced by the Court. This is especially important, since a too deferential judicial review of economic reasoning renders the combination of investigative/prosecutorial and adjudicatory functions problematic.

I. Opportunity for Public Scrutiny and Judicial Review of Settlements and Commitments

Our final recommendation is to create a process that permits some public scrutiny and judicial review of proposed commitments and settlements. We are agnostic whether the public scrutiny takes the form of the market test process employed by the EU or the notice-and-comment approach followed in the U.S. The important element is to ensure that any proposed resolution have the benefit of public input.

Subjecting settlements and commitments to courts for approval provides several benefits. Judicial review ensures that any settlements are in the public interest. In addition, judicial action enshrines the settlement in a court order, thereby entitling it to full faith and credit around the world.

V. Conclusion

As global markets integrate and national economies develop, antitrust law is an essential part of a modern legal system. Thus, countries around the world are empowering government agencies to enforce antitrust laws. Although agencies are powerful instruments, they also threaten due process, transparency, and even rational decisionmaking – the main advantage of

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755 See id. at 166.
756 See id. at 178.
their existence. Imposing procedural restraints on enforcement agencies can help countries reap the benefits of antitrust laws without incurring the social costs that unrestrained agencies impose.

This report forwards three procedural requirements that are essential to achieve rational, fair, and transparent agencies. First, agencies must allow investigated parties to access the evidence against them. Second, agencies should separate functions – it is fundamentally unfair to let a prosecutor be the judge in his own cause. Only strict judicial review can remedy this threat. Third, judicial review must be available and rigorous. Without these protections, rational decisionmaking, due process, and transparency will be practically impossible for a nation’s agencies to achieve.

The tenth anniversary of China’s Anti-Monopoly Law provided the impetus for this report. As China’s economy makes up an increasingly large share of the global economy, much depends on the health of China’s antitrust enforcement system. In comparing China’s procedures to those of the U.S. and EU – both of which have much older antitrust enforcement systems – it was inevitable that China’s procedures would be relatively less developed. Yet this investigation revealed substantial problems with the EU’s enforcement regime, and even some problems with the U.S. system, the world’s oldest. While China’s enforcement system has room for growth, this report acknowledges that China has made incredible progress in the ten years since it promulgated the Anti-Monopoly Law. All three jurisdictions have room for improvement in pursuing rational, fair, and transparent antitrust enforcement regimes. The procedures proposed in this report can help bolster the three jurisdictions’ systems. If China, the EU, and the U.S. can strike the right balance, the global economy will have much to celebrate in the coming years.