Due Process in Antitrust Enforcement: Normative and Comparative Perspectives

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DUE PROCESS IN ANTITRUST ENFORCEMENT: NORMATIVE AND COMPARATIVE PERSPECTIVES

CHRISTOPHER S. YOO*, THOMAS FETZER†, SHAN JIANG‡, AND YONG HUANG§

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 can also promote competitive reforms in monopolized sectors and curb corruption. Jurisdictions learn from the best practices in the investigation process, decision-making 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

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adjudicatory functions. Finally, the issued punishment decision should contain more comprehensive information and be subject to judicial review.

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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 World Trade
Organization ("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." Although competition law was eventually deleted from the agenda of the Doha Round of General Agreement on Tariffs and Trade ("GATT") negotiations, having an effective competition law regime has become a de facto prerequisite for joining the WTO. 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.

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 decision-making processes. 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.

China has also increasingly embraced the importance of due process in the wake of its accession to the WTO. For example, 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 Anti-Monopoly Law (“AML”) decision by the local Development and Reform Commission (“DRC”). Although the Hainan High Court later reversed the district court’s decision, 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 Corp. back to the General Court with instructions to examine all 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 European 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 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”).

10. See id. ¶ 83–107.
In addition, the Organization for Economic Co-operation and Development ("OECD") extended its prior work on procedural fairness and transparency by conducting additional roundtables on the topic. It also began consideration of a Draft Recommendation of the Council on Transparency and Procedural Fairness in Competition Law, which lays out principles that could serve as benchmark for due process in antitrust enforcement. As a follow up to its best practices issued in 2015, the American Bar Association ("ABA") Antitrust Section’s International Task Force conducted 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


19. See, e.g., INT’L CHAMBER OF COM., COMM’N ON COMPETITION, RECOMMENDED FRAMEWORK
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 Article 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 and making nine recommendations that would improve due process.

It is now a fitting moment to assess the state of enforcement processes. China’s 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.20 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.21 All are part of broader efforts to balance the government-market relationship and make enterprises operating in China more market responsive and efficient.

I. THE BENEFITS OF STRONG PROCEDURAL PROTECTIONS

Before discussing the existing and recommended enforcement procedures in China, the EU, and the United States, it is worth considering why jurisdictions should use procedures to limit the discretion of their 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

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21. See President Xi Jinping, 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 the 19th National Congress of the Communist Party of China (Oct. 18, 2017) (vowing to let markets play a “decisive role”).
Code to Lord Coke’s landmark decision in *Dr. Bonham’s Case* 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 prosecutorial 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 [Article] 6 of the ECHR.” Heike Schweitzer similarly notes, “The Commission, vested both with investigative and prosecutorial powers, cannot be considered an impartial, quasi-juridical 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. McGrath*, 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.29 “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.”30

The concern arises even if every official acts conscientiously and in good faith. Being a judge in one’s own case 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.31 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. Redish and Marshall conclude 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.”32 Redish later observes that

[the 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.]33

Harvard Law Professor Richard Stewart draws the same conclusion, noting that administrative procedures are “designed to promote the accuracy, rationality, and reviewability of agency application of legislative directives.”34 Vanderbilt Law Professor Edward Rubin similarly finds that “a consensus exists about the purpose of [due process]: to ensure accurate decision making in government adjudications.”35

30. Id.
32. Redish & Marshall, supra note 26, at 476.
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 decisionmakers 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 in part, with only four cases having withstood judicial scrutiny—as corroborating the existence of 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 protect the integrity of the investigation. This justification for a lack of transparency, however, is temporary. As the investigation


38. Id.


40. Zimmer, supra note 37, at 260.

41. Wils, supra note 36, at 214 (citing Frank Montag, The Case for a Radical Reform of the Infringement Procedure Under Regulation 17, 8 EUR. COMPETITION L. REV. 428, 436 (1996)).
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 such as administrative expediency. In the words of Harvard Law Professor Richard Fallon, “Due process analysis typically calls for a balancing of the individual’s interest in fair and accurate results against the governmental interest in efficient and expeditious decisionmaking.”42 The U.S. Supreme Court recognized this need to compromise between accuracy and efficiency in its landmark decision in Mathews v. Eldridge.43 That said, subsequent decisions building on Mathews have tended to give controlling weight to the need for accuracy.44 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.45

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.46 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 can seldom flourish in any state which does not enjoy a regular administration of justice.”47 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.48

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.49 A groundbreaking article by Stephen Knack and Philip Keefer found that protection of property rights has a positive effect on investment and economic growth.50 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.51

Other corroborating studies drew similar conclusions. Roberto Rigobon and Dani Rodrik found that the rule of law has a strong positive effect on income.52 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.53

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.\textsuperscript{54} In 1975, John Thibaut and Laurens 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 the following proceedings as legitimate: adversarial proceedings over inquisitorial ones, proceedings where there were rigorous procedures regulating the admission of evidence, and proceedings where their attorney was aligned with the defendant instead of the government.\textsuperscript{55} Another study 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.\textsuperscript{56} Additional empirical studies confirm that representation and decisionmaker impartiality are essential factors for proceedings to be perceived as fair.\textsuperscript{57}

Prohibiting the same agency officials from serving as both prosecutor and adjudicator further enhances respect for the government. As the U.S. 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{58}

Due process protections also lead citizens to perceive the government—not just particular legal proceedings—as fair. In a survey administered to


\textsuperscript{55} See generally John Thibaut & Laurens Walker, Procedural Justice: A Psychological Analysis (1975).


\textsuperscript{58} Wong Yang Sung v. McGrath, 339 U.S. 33, 42 (1950) (quoting President’s Comm. on Admin. Mgmt., Administrative Management in the Government of the United States 36–37 (1937)) (internal quotation marks omitted).
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.59 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.60

A perception that the government is fair produces numerous benefits. Studies suggest that procedural unfairness causes people to perceive others as responsible for results that occurred. Indeed, “[h]olding someone else accountable for injustice, and directing responses toward the accountable party, emerges as an overall integrative theme across various models of justice.”61 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.62 This research suggests that due process procedures encourage 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, Tom Tyler and Allan 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.63 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.64 Studies indicate that procedural fairness also plays a key role in

63. See generally LIND & TYLER, supra note 57.
64. See generally TYLER, supra note 54.
shaping views of the legitimacy of executive decisionmaking as well. Other studies have drawn similar conclusions.

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. 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.

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. A study by Raymond Paternoster et al. focusing on domestic violence cases similarly found that the use of fair procedures reduced the rate of recurrency. Other analyses found that procedural fairness has a similar impact on compliance with arbitral and mediation awards. Thus, procedural fairness 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

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67. See, e.g., Beaton-Wells, supra note 54, at 8–9.
69. See generally Tyler, supra note 54.
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.72

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.73 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.74 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.75 Psychologists have subsequently criticized experts as being “often wrong but rarely in doubt.”76

Individual officials’ desire to advance their own careers is another potential source of biased decisionmaking. The risk has long existed that agency bureaucrats may engage in overzealous enforcement to promote their professional advancement, even when doing so threatens fair adjudication.77

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.78 Bringing enforcement actions is generally an essential part of promoting an agency official’s career, and terminating an

78. See Seidenfeld, supra note 74, at 564; Geradin & Petit, supra note 77, at 13–14.
investigation after recommending that it proceed to the second phase can be embarrassing.\textsuperscript{79}

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.”\textsuperscript{80} 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.”\textsuperscript{81} Or, in the words of the U.S. Attorney General’s Committee on Administrative Procedure, “[a] man who has buried himself in one side of an issue is disabled from bringing to [his] decision that dispassionate judgment . . . demand[ed] of officials who decide questions.”\textsuperscript{82} 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,\textsuperscript{83} 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.\textsuperscript{84} 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

\begin{itemize}
  \item \textsuperscript{79} Wils, supra note 36, at 218–19.
  \item \textsuperscript{80} Forrester, supra note 27, at 841.
  \item \textsuperscript{81} Vesterdorf, supra note 73, at 4.
  \item \textsuperscript{82} U.S. DEP’T OF JUST., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 56 (1941).
  \item \textsuperscript{84} See Stewart, supra note 34, at 1802–13.
\end{itemize}
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 United States 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 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.

86. See, e.g., Wendy E. Wagner, Administrative Law, Filter Failure, and Information Capture, 59 DUKE L.J. 1321, 1331 (2010).
87. See KAY L. SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 342 (1986); Nicholas Bagley & Richard L. Revesz, Centralized Oversight of the Regulatory State, 106 COLUM. L. REV. 1260, 1284–85 (2006); Barkow, supra note 85, at 22; Wagner, supra note 86, at 1331.
89. See Stewart, supra note 34, at 1748–60.
91. See President Xi Jinping, 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 the 19th National Congress of the Communist Party of China (Oct. 18, 2017) (transcript available at https://www.chinadaily.com.cn/china/19thpcnationalcongress/2017-11/04/content_34115212.htm [https://perma.cc/GJ8N-QYDH]) (“The people resent corruption most; and corruption is the greatest threat to our [p]arty faces.”).
92. 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 “requir[ing] adherence to
II. RECOMMENDED REFORMS TO ENFORCEMENT PROCEDURES

The foregoing framework suggests nine areas in which reforms in practices would prove most helpful in improving due process and transparency in antitrust enforcement. 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”), which is 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. The Anti-Monopoly Law (“AML”) gives the Anti-Monopoly Enforcement Authority (“AMEA”) responsibility for the day-to-day enforcement of the AML. 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; the State Administration for Industry & Commerce (“SAIC”) was responsible for enforcement against non-price-related monopoly agreements and non-price-related abuses of dominant market position; and the Ministry of Commerce (“MOFCOM”) was responsible for the review of concentration of undertakings.

The Development and Reform Commissions (“DRCs”) or Administrations of Commodity Prices (“ACPs”) and Administrations for the standards of due process”); Wu, supra note 46, at 1; WRAGE, supra note 46, at 27.

94. Id. art. 10.
96. See Provisions on Procedures for the Administrative Departments for Industry and Commerce to Investigate and Handle Cases of Monopolization Agreements and Abuse of Dominant Market Position (State Admin. for Indus. & Com., promulgated May 26, 2009, effective July 1, 2009), art. 2 [hereinafter SAIC Monopoly Cases Investigative Procedures] (China).
Industry and Commerce ("AICs") at the 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 Article 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 or to sanction it adequately. In the early 2000s, the Commission decided to decentralize EU competition enforcement by adopting Regulation 1/2003; under Regulation 1/2003, NCAs not only enforce national competition laws,}

98. See Anti-Monopoly Law of the People’s Republic of China, art. 10.
99. See SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 3.
102. See generally Forrester, supra note 27.
but they also enforce EU competition law unless the Commission decides to take a case itself because it affects the European common market significantly. This 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 also primarily responsible for cases involving agreements or practices that affect competition in more than three member states. However, the European Commission may initiate a proceeding sua sponte based on Article 101 or Article 102 of the Treaty on the Functioning of the European Union (“TFEU”) at any time based on a complaint or ex officio. Since Articles 101 and 102 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. Moreover, at that point, the NCAs are no longer able to apply their national competition law to a case. An advisory committee “composed of representatives of the competition authorities of the Member States” 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. The FTC is an administrative body agency with authority to seek redress for civil antitrust violations. It can initiate proceedings in court or adjudicate them administratively. The DOJ has exclusive authority to prosecute criminal antitrust violations and can also bring civil cases. Unlike the FTC, the DOJ cannot enforce the antitrust laws

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104. See Commission Notice on Cooperation Within the Network of Competition Authorities, arts. 5–15, 2004 O.J. (C 101) 43.
107. Id. art. 3, ¶ 1.
108. Id. art. 14, ¶ 2.
109. U.S. law divides jurisdiction for public 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 the Clayton Act, and the Supreme Court has construed Section 5 of the FTC Act giving the FTC authority to enforce the Sherman Act. The DOJ is charged with enforcing the Sherman, Clayton, and Robinson-Patman Acts. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 15.1, at 749, § 15.2, at 754 (6th ed. 2020).
110. See id. § 15.2, at 754, 757.
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...administratively. Instead, it must proceed exclusively in court. Private antitrust litigants, who sue about ten times more often than government enforcers, can seek damages or injunctive relief for violations of the laws.

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. In contrast to the United States, China’s legal system is predominantly inquisitorial. While some EU countries’ legal systems are adversarial, most are inquisitorial. Further, EU agencies rely on the inquisitorial model. Although we acknowledge the broad differences between the three jurisdictions’ legal systems, we follow the ABA’s 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.

Despite the differences among these systems, we believe that all three jurisdictions would benefit from promoting rational decisionmaking, due process, and transparency. This Article proposes nine reforms to antitrust enforcement procedures that would help achieve these goals.

A. Judicial Review of Document Requests, Interview Requests, Interrogatories, and Inspections

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. Competition authorities investigating possible violations of

111. Id. § 15.1, at 749; § 15.1a, at 750.
112. See id. § 16.1, at 761–62.
114. See id. at 20–23.
115. See id. at 8.
116. See id. at 9.
117. ABA BEST PRACTICES, supra note 16, at 1–2.
competition law can inspect the premises of the suspected company to look for and potentially seize evidence of wrongdoing.

In China, pursuant to the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration published by 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.\textsuperscript{118} The first two scenarios 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.\textsuperscript{119} 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.\textsuperscript{120} 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.\textsuperscript{121} 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, and so forth) that exceeded State Council’s stipulated thresholds had to notify MOFCOM about the proposed transaction and submit certain documents.\textsuperscript{122} The process was broken down into one informal phase (the pre-acceptance period)\textsuperscript{123} and two formal phases (Phase I, Preliminary Review, and Phase II, Further Review).\textsuperscript{124} 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.\textsuperscript{125} If the notification of the proposed merger transaction was...

\begin{flushleft}
\textsuperscript{120} See SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 7.
\textsuperscript{121} See Anti-Monopoly Law of the People’s Republic of China, art. 21.
\textsuperscript{122} See MOFCOM Concentration Notification Measures, supra note 97, art. 10.
\textsuperscript{123} See id. art. 8.
\textsuperscript{124} See Anti-Monopoly Law of the People’s Republic of China, arts. 25, 26.
\textsuperscript{125} See MOFCOM Concentration Notification Measures, supra note 97, art. 11.
\end{flushleft}
incomplete, MOFCOM could request that the parties revise or supplement it before a case is officially accepted.\textsuperscript{126}

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.\textsuperscript{127} 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.\textsuperscript{128} 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.\textsuperscript{129} Both SAIC and NDRC developed additional regulations in 2010, laying out the procedures to govern inspections in more detail. Specifically, NDRC promulgated the \textit{Regulations on Administrative Procedures for Law Enforcement on Anti-Price Monopoly},\textsuperscript{130} and SAIC promulgated its \textit{Procedural Rules by Administration of Industry and Commerce Regarding Investigation and Handling of Cases Relating to Monopoly Agreement and Abuse of Dominant Market Position}.\textsuperscript{131} 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 I (above) or in the pre-acceptance phase predominantly through submissions by the parties.

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.\textsuperscript{132} The Commission and NCAs encourage citizens to report suspected infringement of competition rules by submitting a complaint form or description in email.\textsuperscript{133} Formal complaints must satisfy several formal requirements.\textsuperscript{134} They need to be submitted in writing and they need to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{126} \textit{See id. art. 13.}
\item \textsuperscript{127} \textit{See Administrative Enforcement Law of the People’s Republic of China (Standing Comm. Nat’l People’s Cong., promulgated June 30, 2011, effective Jan. 1, 2012).}
\item \textsuperscript{128} \textit{See id. arts. 18(2), 23.}
\item \textsuperscript{129} \textit{See NDRC Anti-Price Procedures, supra note 95, art. 9; SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 12; Anti-Monopoly Law of the People’s Republic of China, art. 41.}
\item \textsuperscript{130} \textit{NDRC Anti-Price Procedures, supra note 95.}
\item \textsuperscript{131} \textit{SAIC Monopoly Cases Investigative Procedures, supra note 96.}
\item \textsuperscript{132} \textit{See Council Regulation 1/2003, art. 7(2), 2003 O.J. (L 1) 1, 9; Commission Regulation 773/2004, art. 5(1), 2004 O.J. (L 123) 18, 2.}
\item \textsuperscript{133} \textit{Contacts: Antitrust and General Correspondence, EUR. COMM’N (May 9, 2017), https://ec.europa.eu/competition/contacts/electronic_documents_en.html \[https://perma.cc/Y4ZK-5LU3].}
\item \textsuperscript{134} Commission Regulation 773/2004, art. 5(2), 2004 O.J. (L 123) 18, 20.}
\end{enumerate}
\end{footnotesize}
specify the presumed evidence for the violation of EU Competition law. Agencies initiate investigations with requests for information.\textsuperscript{135} 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.\textsuperscript{136} 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 interviewees’ right to an attorney.\textsuperscript{137} 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.\textsuperscript{138} Company staff must answer the Commission’s questions to fulfill their legal duty to cooperate with the investigation.\textsuperscript{139} 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.\textsuperscript{140}

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 threshold level.\textsuperscript{141} The European Commission reviews the proposed transactions in a single procedure under the EU’s “one-stop-shop” principle.\textsuperscript{142} Qualifying parties are required to file a notification with the Commission prior to consummation of the proposed transaction,\textsuperscript{143} or parties must file a Short Form if the proposed transaction is unlikely to raise competition concerns.\textsuperscript{144} After reviewing the information submitted in the notification and potential subsequent requests for information or inspection, the Commission will decide that (1) the proposed

\begin{thebibliography}{99}
\bibitem{135} See Council Regulation 1/2003, art. 18, 2003 O.J. (L 1) 1, 13–14.
\bibitem{136} See id.
\bibitem{138} Council Regulation 1/2003, art. 20(2)(e), 2003 O.J. (L 1) 1, 14.
\bibitem{139} See id. art. 20(2).
\bibitem{143} See Council Regulation 139/2004, art. 4, 2004 O.J. (L 24) 1, 8–9.
\bibitem{144} Commission Regulation 802/2004, Annex II, 2004 O.J. (L 133) 1, 22.
\end{thebibliography}
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. In the first two instances, the Commission will issue a decision declaring so. In the third instance, the Commission will initiate an investigation (Phase II investigation).

The European Commission is also empowered to enter the premises of suspected parties to examine their records and potentially seize relevant evidence. 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 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 the company 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.

In the United States, 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. 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.

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 the FTC and the DOJ if their

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146. Id.
150. See Antitrust Civil Process Act, 15 U.S.C. §§1311–1314; see also HOVENKAMP, supra note 109, 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.
proposed merger transaction exceeds certain thresholds for asset size or transaction value.\textsuperscript{151} 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.\textsuperscript{152} Parties can shorten the thirty-day period, however, by requesting “early termination,” which is usually granted in about two weeks.\textsuperscript{153} The agencies request documents in three ways: (1) in the HSR filing; (2) in a “voluntary request letter” or “access letter” during the initial waiting period;\textsuperscript{154} or (3) in a Request for Additional Information and Documentary Material (known as a “second request”), should the agency decide to investigate.\textsuperscript{155}

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.\textsuperscript{156} 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.\textsuperscript{157} 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.”\textsuperscript{158} 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.\textsuperscript{159} In addition, the warrantless inspection regime must satisfy three criteria: (1) the government interest furthered by the inspection must

\textsuperscript{152} See 15 U.S.C. § 18a(b).
\textsuperscript{155} 15 U.S.C. § 18a(a).
\textsuperscript{159} Id. at 425.
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.”\footnote{160} To meet the third criterion, the regulatory “statute must be sufficiently comprehensive and defined” to “limit[] the discretion of the inspectors,”\footnote{161} 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.\footnote{162} 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.\footnote{163} 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 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 expenditures 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.

China, the EU, and the United States differ as to whether an agency’s request for documents or interviews is subject to preliminary judicial review. The three jurisdictions also differ with respect to judicial involvement in

\footnote{160} \textit{Burger}, 482 U.S. at 702–03 (internal quotation marks omitted).
\footnote{161} \textit{Id.} at 703 (internal quotation marks omitted).
\footnote{162} \textit{Patel}, 576 U.S. at 427.
\footnote{163} \textit{Id.} at 447, 450–52.
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.

1. China

In China, administrative investigations and inspections, including antimonopoly enforcement, are within the scope of accepted cases under the Administrative Litigation Law.\textsuperscript{164} Investigative measures, including seizure of property during investigations, constitute administrative compulsion, but typically are subject to judicial scrutiny as part of the overall antimonopoly litigation for administrative penalty. At the same time, minor procedural violations 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.\textsuperscript{165}

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.\textsuperscript{166} 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.\textsuperscript{167}

2. 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

\textsuperscript{165} See id. art. 74.
\textsuperscript{166} See Provisions on the Procedures for Price-Related Administrative Penalties, NDRC Decree No. 22 (promulgated by the Nat’l Dev. & Reform Comm’n, effective July. 1, 2013; invalidated by the Nat’l Dev. & Reform Comm’n People’s Republic China, Apr. 1, 2019) published Mar. 6, 2013, at art. 20 (China).
\textsuperscript{167} See Administrative Litigation Law of the People’s Republic of China, art. 74.
General Court under Article 263(4) of the 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.

Council Regulation 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 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 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) of the TFEU. This right must be explained in the inspection decision itself. Annulment only concerns the inspection order. Measures carried out by the Commission during an inspection (for example, copying of documents) can be challenged in court only through a challenge to the final Commission decision ending a proceeding.

3. United States

In the United States, parties receiving requests for documents, 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

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170. TFEU, supra note 168, art. 256(1).
172. Id. art. 20(4).
within the authority of the agency, the demand is not too indefinite, and the information is reasonably relevant to the agency’s inquiry.\textsuperscript{176} Any final order entered by a district court is appealable to a federal court of appeals.\textsuperscript{177}

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.\textsuperscript{178} The outcome of this administrative appeal is not subject to judicial review.

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{179}

U.S. law gives any “person aggrieved by an unlawful search and seizure of property or by the deprivation of property” the right to “move [in court] for the property’s return.”\textsuperscript{180} 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 of information obtained from the search from any subsequent criminal trial.\textsuperscript{181} People who were subject to an unlawful search or seizure may also sue for damages.\textsuperscript{182}

4. International Norms

International organizations have generally concluded that investigatory tools should be subject to judicial review. Paragraph 2.1 of the ICN Guidance


\textsuperscript{177} 28 U.S.C. § 1291.


\textsuperscript{180} FED. R. CRIM. P. 41(g).

\textsuperscript{181} See FED. R. CRIM. P. 12(b)(3)(C), 41(h).

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.” \textsuperscript{183} Specifically, the ICN recommends respondents have recourse to an “independent court, tribunal, or administrative entity” to contest investigative decisions. \textsuperscript{184} The ICN’s Roundtable Report similarly included the need for “a mechanism to challenge or question requests for information” as one of the “[b]asic safeguards” of good investigative process. \textsuperscript{185}

5. Analysis

As noted above, judicial review of investigatory measures varies across the three jurisdictions. China does not permit preliminary judicial review of requests for documents, interviews, or inspections 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. Likewise, the EU does not require judicial review prior to an inspection, but any binding decision can be challenged in an action for annulment in the General Court, including those made during investigations. In the United States, a party can obtain judicial review of CIDs and subpoenas in non-merger investigations but cannot do so in merger investigations. Inspections are used only for criminal enforcement, and criminal search warrants require advance judicial authorization and the immediate opportunity to seek return of any seized property, suppression of any evidence gathered, and damages.

Allowing ex ante judicial review of investigatory measures 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. \textsuperscript{186}

We do not suggest particularly severe restrictions on the ability of agencies to seek information. Even the United States, which has the most

\textsuperscript{183} ICN GUIDANCE, supra note 12, at 2.
\textsuperscript{184} ANNOTATED ICN GUIDANCE, supra note 12, at 3.
\textsuperscript{185} ICN ROUNDTABLE REPORT, supra note 12, at 6.
\textsuperscript{186} See Rachlinski & Farina, supra note 74, at 559–61, 579–80, 588–90.
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.

B. DISCLOSURE OF THE EVIDENCE UPON WHICH THE AGENCY PLANS TO RELY

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. All three jurisdictions require their agencies to disclose the evidence upon which they wish to rely to respondents, although they vary in the degree of detail and the timing involved.

1. China

In certain situations, China’s Administrative Penalty Law entitles respondents to access the evidence upon which the agency is relying. First, in an oral hearing, the agency must disclose the evidence it is using. Second, the agency must disclose such evidence when issuing its final decision. 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 restriction of competition, it notified the parties of its findings and competition concern.

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188. Id. art. 39(2).
2. 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.\(^{190}\) 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.\(^{191}\) Only evidence cited or mentioned in the Statement of Objections, Supplementary Statement of Objections, or Letter of Facts is considered evidence on which the Commission can base its final decision.\(^{192}\) In addition, any party addressed with a Statement of Objections has the right to access the file of the European Commission.\(^{193}\)

Information covered by the obligation of professional secrecy,\(^{194}\) and documents containing business secrets are exempt from this right to access.\(^{195}\) 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. However, DG Comp also recognizes that the need to prove infringement or the respondent’s right of defense may outweigh the interests of confidentiality.\(^{196}\) 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.\(^{197}\) 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.\(^{198}\) While DG Comp has discretion not to disclose confidential information, it is

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\(^{191}\) See DG COMP ANTITRUST MANUAL, supra note 190, chs. 8.1–8.2.

\(^{192}\) See id. ch. 12.2.1.


\(^{194}\) Council Regulation 1/2003, art. 28(2), 2003 O.J. (L 1) 1, 20.


\(^{196}\) See DG COMP ANTITRUST MANUAL, supra note 190, ch. 2.3.3.

\(^{197}\) See id. at ch. 2.2.3.43.

limited in its ability to use non-disclosed confidential information in its final
decision.199 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.200

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,201 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 nonbinding recommendation to the Competition
Commissioner in response.202 In Intel, however, the European Court of
Justice decided that the Commission must also disclose exculpatory evidence
to the respondent.203

The Commission must similarly disclose the evidence upon which it
wishes to rely in the merger context. In United Parcel Service, the General
Court 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 for its final decision, thus
infringing the merging parties’ right of defense.204 This decision additionally
articulated the relatively unforgiving standard by which 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 nondisclosure.205

3. United States

In the United States, defendants in criminal antitrust cases are entitled
to full access to the evidence contained in the prosecution’s case files.206

199. See Case T-44/00, Mannesmann Röhrenwerke v. Commission, 2004 E.C.R. II-2223, para. 84.
200. See DG COMP ANTITRUST MANUAL, supra note 190, chs. 12.2.1–12.2.2.
201. See id.
202. Id. ch. 12.2.3.
203. See Case C-413/14 P, Intel Corp. v. Comm’n, ECLI:CU:C:2017:632, ¶¶ 100–101 (Sept. 6,
205. Id. ¶ 210.
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 documents, transcripts of investigational hearings and depositions, and 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 evidence that allows both sides to identify and test the competitive theories for and against the transaction.”

4. 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 that “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.”

The OECD Policy Roundtable on Procedural Fairness similarly observes that “[m]any 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...

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208. 16 C.F.R. § 3.31(b)(1) (2021).
209. Id. § 3.31(b)(2).
210. See Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1167 (9th Cir. 2006).
212. Id. at 4.
213. ICN GUIDANCE, supra note 12, at 4.
214. ABA BEST PRACTICES, supra note 16, at 6.
occurred,” particularly where sanctions may be imposed.\textsuperscript{215} The OECD further states that “[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.”\textsuperscript{216} 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.”\textsuperscript{217} 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 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.”\textsuperscript{218}

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(s)” with the additional recommendation that such disclosure occur “prior to preparation of any written statement of the charges against the parties.”\textsuperscript{219}

5. Analysis

Although respondents in all three jurisdictions are entitled to access 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.

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

\textsuperscript{215} OECD ROUNDTABLE REPORT, supra note 13, at 10.
\textsuperscript{216} Id.
\textsuperscript{217} Id.
\textsuperscript{218} OECD BACKGROUND NOTE ON ACCESS TO THE CASE FILE, supra note 14, at 4.
\textsuperscript{219} ICC BEST PRACTICES, supra note 19, at 2.
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.220

C. THE RIGHT TO LEGAL REPRESENTATION

The right to legal representation is particularly relevant in three phases of the enforcement process: (1) investigations: document requests, interviews, and interrogatories; (2) investigations: investigations of company premises; and (3) agency deliberations.

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. While 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. None of the jurisdictions give 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. The jurisdictions additionally diverge with respect to representation by legal counsel during hearings and other stages of agency deliberations.

1. 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 law. 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.221

221. The law states: “The investigated person shall cooperate with the price control authority in the
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.\textsuperscript{222} 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.

Similar principles govern inspections. China’s regulations do not explicitly grant the right for legal counsel to be present during an inspection.\textsuperscript{223} 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.

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.\textsuperscript{224} The hearing procedure also regards “the parties and their proxies making representations and defense” as a necessary procedure.\textsuperscript{225} 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.”\textsuperscript{226} 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, and 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.

2. European Union

Article 47 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. The ECJ has held that the right to legal representation begins during the preliminary inquiry stage, including interviews during investigations, and that any stage 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.

231. See Case 155/79, AM & S Eur. Ltd. v. Comm’n, 1982 E.C.R. 1577, 1610, ¶ 18 (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”).
3. United States

Under U.S. law, criminal antitrust defendants are guaranteed the right to counsel, including the appointment of counsel at the public’s expense if the defendant is too indigent to afford paid counsel.235 Defendants in civil court actions have the right to be represented by counsel as well.236 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.237

The right to counsel is also statutorily guaranteed in FTC administrative proceedings.238 As noted earlier,239 representation by counsel is presumed in all stages of the proceeding, starting at the prehearing procedures,240 when appearing for a deposition or investigational hearing,241 when filing motions,242 when requesting witness testimony,243 or when filing for an appeal from initial decision of the hearing officer to the Commission.244 When subject to a search warrant, 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 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.245

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.246 The United States allows licensed in-house counsel to represent clients in criminal, civil, and administrative proceedings.

238. See 5 U.S.C. § 555(b).
239. See supra Sections II.A.1.d, II.B.1.c.
240. 16 C.F.R. § 3.21(a) (2021).
241. See 5 U.S.C. § 555(b); 16 C.F.R. § 2.9(b) (2021).
242. 16 C.F.R. § 3.22(c) (2021).
243. 16 C.F.R. § 3.39(b) (2021).
244. See id.; 16 C.F.R. § 3.52(g) (2021).
4. International Norms

International organizations widely recognize the right to representation by counsel. 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.”

Paragraph 2.4.9 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings states that “[t]he agency should allow counsel for the party to be present . . . during interviews of a party’s employees and potential witnesses.”

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.”

Representation need not be restricted to counsel licensed to practice in the country in which the enforcement action is underway. Paragraph 2.4.7 of the ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings states that “[t]he 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 licensed in other jurisdictions to participate in such representation before the agency, acting in conjunction with the former.”

5. Analysis

EU and U.S. agencies consistently allow participation by legal counsel throughout the investigatory process. 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. 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.

247. ICN GUIDANCE, supra note 12, at 5.
248. ICC BEST PRACTICES, supra note 19, at 6.
249. Id.
250. ICC BEST PRACTICES, supra note 19, at 5.
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 has [sic] 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.251

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. Thus, lawyers can occasionally aid officials in their work. More often, lawyers will ensure that respondents articulate their positions in the best light. Administrative decisions are then strongest, and least vulnerable to criticism, if they can answer the respondents’ best positions.

D. OPPORTUNITY FOR THE RESPONDENT TO SUBMIT EXCULPATORY EVIDENCE AND RESPOND 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 United States have a right to a trial-like hearing, the EU and China have different kinds of hearings.

1. China

In China, companies under investigation are entitled to make statements and defenses regarding the investigation.\(^{252}\) The Administrative Penalty Law gives them the further right to request an oral hearing,\(^ {253}\) where they can defend themselves and make arguments.\(^ {254}\) Respondents may also submit exculpatory evidence in writing, a right guaranteed by Chinese law.\(^ {255}\) Chinese officials emphasize that they have internal procedures and practices for notifying respondents and inviting responses. Chinese officials emphasize that they want to hear respondents’ views.\(^ {256}\) 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.\(^ {257}\) Similar procedures apply to MOFCOM merger control investigations.\(^ {258}\)

2. 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.\(^ {259}\) This right encompasses the right to submit exculpatory evidence.\(^ {260}\) The Commission must base its decision only on the grounds to which the parties had an opportunity to respond.\(^ {261}\)

Second, the parties can request an oral hearing in their written submissions, and they have the right to be heard in a nonpublic, recorded


\(^{254}\) SAIC Admin. Penalty Procedures, supra note 224, art. 32.

\(^{255}\) See Administrative Penalty Law of the People’s Republic of China, art. 32; see also SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 13.

\(^{256}\) The authors conducted interviews with various Chinese officials and bureaucrats in the course of collecting information and support for this Article. All interviews were conducted in confidentiality, and the names of the interviewees are withheld by mutual agreement. Notes from the respective interviews are kept on file with the authors.

\(^{257}\) Administrative Penalty Law of the People’s Republic of China, art. 59.


hearing by a hearing officer. However, this hearing is not comparable to a U.S. hearing. The parties can present their views, but they do not have the right to cross-examine the Commission’s witnesses recognized in the U.S. Additionally, the hearing officer has no decision-making power and only serves as a procedural safeguard. The Commission’s case team and other Commission officials are often present at the hearing. 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, in addition to the accused company, may have the chance to express their views at the hearing officer’s discretion. 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.

3. United States

In the United States, 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.” For that purpose, the respondent can file an answer within fourteen days after being served with the complaint. At the evidentiary hearing itself, every party has the rights of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all the other rights essential to a fair hearing. In a merger review, agency staff will discuss the contents of a second request with the parties, and the parties are encouraged to negotiate limitations and modifications to the request. Parties can present evidence to reduce the


264. DG COMP ANTI-TRUST MANUAL, supra note 190, ch. 13.3.4; Wils, supra note 36.


266. OECD, COMPETITION LAW AND POLICY IN THE EUROPEAN UNION 39 (2005) [hereinafter OECD EU REPORT].


268. 16 C.F.R. § 3.12(a) (2021).

269. See 5 U.S.C. § 554(c)(1); 16 C.F.R. § 3.41(c) (2021).

270. See DOJ ANTI-TRUST DIV. MANUAL, supra note 206, at III-40 to III-41.
scope of the second request, in what is called a “quick look” investigation.\textsuperscript{271} 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{272}

4. 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{273} 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 agency’s allegations.”\textsuperscript{274} Paragraph 6.4 of the ICN Guidance further provides that “[p]arties under investigation should be given the opportunity to exercise their rights of defence 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.”\textsuperscript{275} The ICN Roundtable Report similarly endorses giving charged parties the “opportunity to meet with the agency and provide additional arguments and insights.”\textsuperscript{276} 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.”\textsuperscript{277}

The OECD discussion on the final decision-making stage recognizes that “most agencies provide parties the right to a hearing,” although some rely on written responses and informal discussions.\textsuperscript{278} The fifth finding of the OECD Roundtable Report similarly notes that “[j]urisdictions 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

\begin{itemize}
\item \textsuperscript{271} See id. at III-43.
\item \textsuperscript{272} See id. at III-44.
\item \textsuperscript{273} ICN GUIDING PRINCIPLES, supra note 12, at 1.
\item \textsuperscript{274} ICN GUIDANCE, supra note 12, at 4.
\item \textsuperscript{275} Id. at 5.
\item \textsuperscript{276} ICN ROUNDTABLE REPORT, supra note 12, at 8.
\item \textsuperscript{277} ABA BEST PRACTICES, supra note 16, at 36.
\item \textsuperscript{278} OECD KEY POINTS, supra note 13, at 18.
\end{itemize}
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 Roundtable Report 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 parties and the agency.” Together these authorities represent a strong endorsement of extending to defendants the right of a full opportunity to interrogate the arguments and evidence submitted against them.

5. Analysis

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 United States 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 a similar institution has been provided by relevant rules in the hearing process. Chinese agencies allow

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279. Id.
280. Id.
281. Id.
282. Id. at 265.
283. Id.
284. Id. at 524.
285. Id. at 11.
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 EU usually primarily rely on submitting their arguments and evidence in writing.

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 alteram partem”: listen to the other side. Second, a hearing gives respondents a chance to present evidence and make arguments, thereby serving as a proxy 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. 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. 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. Finally, a hearing (particularly a public one) increases transparency and allows the regulated and the broader public to better understand the agency’s actions.

E. SEPARATION OF INVESTIGATORY AND DECISION-MAKING STAFF

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,

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287. The authors conducted interviews with various Chinese officials and bureaucrats in the course of collecting information and support for this Article. All interviews were conducted in confidentiality, and the names of the interviewees are withheld by mutual agreement. Notes from the respective interviews are kept on file with the authors.
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 and 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{289} NDRC and MOFCOM followed similar procedures.\textsuperscript{290}

Following the creation of SAMR, the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and Administration now provide that upon conclusion of an investigation, the case-handling agency shall prepare an investigation conclusion report and submit it together with the case files to the review body.\textsuperscript{291} 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{292} 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 an approval decision.\textsuperscript{293} The SAMR administrative penalty procedure took effect on April 1, 2019.

In the EU, the principle of collegiality\textsuperscript{294} formally requires that all decisions of the European Commission be taken collectively by all Commissioners after a confidential discussion.\textsuperscript{295} In practice, the other Commissioners typically defer to the Competition Commissioner’s judgment.\textsuperscript{296}

When U.S. antitrust laws are enforced in court, the case follows the

\textsuperscript{289} SAIC Admin. Penalty Procedures, supra note 224, arts. 47–55.
\textsuperscript{291} See SAMR Admin. Penalty Procedures, supra note 118, art. 5.
\textsuperscript{292} See id. art. 46.
\textsuperscript{293} See id. art. 50.
\textsuperscript{294} TFEU, supra note 168, art. 250.
\textsuperscript{296} See Forrester, supra note 27, at 834; Pieter Van Cleyenbreugel, 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., 2015).
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 Commission as a whole,\textsuperscript{297} and the Commission can then review the issues in question de novo. After that, the decision may be challenged in court.\textsuperscript{298}

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

1. 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. 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).\textsuperscript{299} Article 38 also declares that before the responsible persons of the administrative agency reach a decision, a 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 an administrative penalty decision for the first time in the administrative agency shall have passed the national bar examination and obtained a license to practice law.\textsuperscript{300}

Following the creation of SAMR, the Interim Provisions on Administrative Penalty Procedures Relating to Market Supervision and

\textsuperscript{297} See 16 C.F.R. § 3.52(b) (2021).

\textsuperscript{298} See id. § 3.52(a).


Administration also dictate a collective panel of department heads and a recusal system whereby personnel on the case with a 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. 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 Sanction Committee (“ASC”). The ASC now includes senior members of the judiciary as well as lawyers.

2. 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. 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. The Court emphasized that competition law investigations are administrative in nature and,  

301. See SAMR Admin. Penalty Procedures, supra note 118, art. 54.
302. See id. art. 4.
304. Xi & Pan, supra note 303, at 99.
306. See GERADIN & PETIT, supra note 77, at 14–16.
therefore, need not satisfy the same procedural safeguards as criminal investigations, but that fact does not render Article 6 inapplicable. The ECJ has held that the standard of review applied by the General Court satisfies the requirements to guarantee a fair trial. A hearing officer oversees proceedings in DG Comp, but this official simply ensures that all of the necessary procedures are followed and does not participate in the substantive decision. 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. Apparently, the commissioners are known to lobby each other and horse trade on the outcomes of these cases.

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. 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. Reform suggestions include separating investigatory and adjudicatory teams, turning the hearing officer into an independent decisionmaker, 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. Before submitting a draft for a

308.  Id. ¶¶ 39, 58, 59.
310.  See GERADIN & PETIT, supra note 77, at 16.
311.  See OECD EU REPORT, supra note 266, at 37 (noting that between the early 1990s and 2005, “the Commission has not disagreed with the Competition Commissioner’s recommendation on a major enforcement matter”).
312.  See Forrester, supra note 27, at 831–32.
313.  See GERADIN & PETIT, supra note 77, at 17.
314.  See Forrester, supra note 27, at 817; Wils, supra note 36, at 12–19.
315.  E.g., Forrester, supra note 27, at 840–43; Wils, supra note 36, at 218–20.
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.\textsuperscript{317} 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.\textsuperscript{318}

3. United States

The United States, 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 \textit{espirit de corps} which emphasized political loyalty.\textsuperscript{319} Indeed, the legislative history of the Administrative Procedure Act ("APA") reflects the overriding concern of the drafters on the importance of the separation of functions.\textsuperscript{320} 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.\textsuperscript{321}

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.\textsuperscript{322} In administrative adjudications at the FTC, the initial decision is made by a duly qualified ALJ, with commissioners sitting as ALJs on rare occasions.\textsuperscript{323} 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.\textsuperscript{324} Further, ALJs are selected through a competitive examination\textsuperscript{325} and are not subject to supervision by anyone in the agency.\textsuperscript{326} Their compensation and advancement are decided by the Office of Personnel Management, a

\begin{itemize}
\item \textsuperscript{317} See OECD EU REPORT, supra note 266, at 63–64 (discussing and criticizing these internal checks).
\item \textsuperscript{318} See id.
\item \textsuperscript{319} Report of the Special Committee on Administrative Law, 63 ANN. REP. A.B.A. 331, 337 (1938).
\item \textsuperscript{321} Wong Yang Sung v. McGrath, 339 U.S. 33, 41–45 (1950) (Jackson, J.).
\item \textsuperscript{322} 15 U.S.C. §§ 4, 9, 57b(a).
\item \textsuperscript{323} See 16 C.F.R. §§ 3.42(a), 3.51(a) (2021).
\item \textsuperscript{324} 5 U.S.C. § 7521(a); 5 C.F.R. § 930.211(a) (2021).
\item \textsuperscript{325} 5 C.F.R. § 930.201(b) (2020).
\item \textsuperscript{326} See 5 U.S.C. § 4301(2)(D); 5 C.F.R. § 930.206 (2021).
\end{itemize}
government office outside the agency.\textsuperscript{327}

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 decision-making process is prohibited unless made on the public record.\textsuperscript{328} The ALJ’s decision may be appealed to the full Commission,\textsuperscript{329} in which case the commissioners may hear further submissions from the FTC staff as well as the accused company.\textsuperscript{330} When members of the Commission sit as the ALJ, they sometimes recuse themselves from voting on the complaint or the appeal.\textsuperscript{331} 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.\textsuperscript{332} In practice, the Commissioners rarely overturn an ALJ’s decision, a practice that legal scholars have criticized.\textsuperscript{333}

4. International Norms

An international norm exists supporting the separation of functions. For example, the OECD recognizes the establishment of “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.\textsuperscript{334} 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 prosecutorial personnel, with strict limits on ex parte contacts after the report is issued.\textsuperscript{335}

\textsuperscript{327} 5 C.F.R. § 930.205(a) (2021).
\textsuperscript{328} 5 U.S.C. §§ 554(d), 557(d); 16 C.F.R. § 4.7(b) (2021).
\textsuperscript{329} 5 U.S.C. § 557(b); 16 C.F.R. § 3.52(b)(1) (2021).
\textsuperscript{330} 16 C.F.R. § 3.54(c) (2021).
\textsuperscript{332} See Malcolm B. Coate & Andrew N. 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 77, at 894–95.
\textsuperscript{334} OECD KEY POINTS, supra note 13, at 29.
\textsuperscript{335} ICC BEST PRACTICES, supra note 19, at 5.
5. Analysis

None of the three jurisdictions maintain 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 the 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.

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 has 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. 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. 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.”

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. Such officials will be vulnerable to confirmation bias, a natural tendency to favor and focus on evidence favoring the prosecution. 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.

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.”  

In the leadup to the passage of the Administrative Procedure Act in the United States, 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 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. 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.

In both the EU and the United States, the head of the agency undertakes the final administrative decisions to charge and to adjudicate. In the case of administrative enforcement in the United States, 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, multiple scholars have observed that commissioners almost never vote to overturn ALJ decisions in situations where the ALJ has issued a decision against the investigated party. The only complete solution to this bias would be judicial enforcement.

Furthermore, the European Court of Human Rights has held that the permissibility of allowing a person to exercise both prosecutorial and adjudicatory functions depends on the depth of judicial review. Even though the EU has not yet accessed the ECHR, the enshrined rights belong to the general principles of EU law according to Article 6, paragraph 3, of the Treaty on European Union. Hence, the interpretation of the ECHR by the ECtHR is also relevant for the European Courts. The ECtHR decided that

343. STAFF OF S. COMM. ON THE JUDICIARY, supra note 320, at 189, 215, 216.
344. Barkow, supra note 77, at 888–90.
346. Barkow, supra note 77, at 894–95; Coate & Kleit, supra note 332, at 7; Posner, supra note 333, at 53.
based on Article 6 of the 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 Article 6, paragraph 2, of the ECHR. In line with this decision, the ECJ explicitly confirmed this view in its Schindler decision regarding Article 47 of the EU Fundamental Rights Charter, which provides for a fair trial and can be seen as equivalent to Article 6 of the ECHR. The court stated that Article 47 of the Fundamental Rights Charter requires unlimited judicial review of Commission decisions given the fact that there is no separation of powers within the Commission. 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.

Moreover, the ECJ held in 2017 that the fact that 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.

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

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 United States, Chinese law only requires its

349. Id. ¶ 36.
350. Id. ¶ 38.
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.

1. 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 make a decision according to law and may 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 anti-monopoly agencies in terms of publicizing decisions. Decisions of prohibition and clearance with restrictive conditions attached “shall” (that is, must) be publicized in a timely fashion. However, for other cases involving suspected violations, the law says decisions “may” (that is, selectively) be publicized, which works in favor of the company. For companies, punishment by the government already results in 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 SAMR 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

353. Id. art. 30.
355. See SAMR Admin. Penalty Procedures, supra note 118, art. 56.
356. For example, the NDRC concluded that Qualcomm had abused its dominant market position. NDRC Imposes Record Fine on Qualcomm for Abuse of Market Dominance, H.K. LAW. (May 2015), http://www.hk-lawyer.org/content/ndrc-imposes-record-fine-qualcomm-abuse-market-dominance [https://perma.cc/M9X6-ZTXV]. Tetra Pak was similarly found to have abused its dominant market position. Michael Gu & Sun Sihui, Tetra Pak Receives SAIC’s Severest Antitrust Penalty, CHINA L. VISION (Jan. 18, 2017), https://www.chinalawvision.com/2017/01/competition-law-anti-monopoly-law/tetra-pak-receives-saic-severest-antitrust-penalty [https://perma.cc/V8D9-PLUD].
agencies have started to publicize decisions with increasing frequency.\textsuperscript{357}

2. European Union

The European Commission is required to publish in the Official Journal of the European Union the main content of the decisions that it takes pursuant to Articles 7 through 10, 23, and 24 of Council Regulation No. 1/2003.\textsuperscript{358} 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 any penalties imposed, a final report of the hearing officer, and the opinion of the Advisory Committee (if recommended).\textsuperscript{359} 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.\textsuperscript{360}

3. United States

In the United States, the FTC is required to make all final opinions available for public inspection in an electronic format.\textsuperscript{361} 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.\textsuperscript{362} 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.\textsuperscript{363} If the agencies challenge the proposed transaction in court after complying with a second request, there will be a public record of


\textsuperscript{358} Council Regulation 1/2003, art. 27(1), 2003 O.J. (L 1) 1, 19; DG COMP ANTITRUST MANUAL, supra note 190, ch. 28. For merger control, see Council Regulation 139/2004, art. 13, 2004 O.J. (L 24) 1, 14–15.

\textsuperscript{359} DG COMP ANTITRUST MANUAL, supra note 190, chs. 15.3.2, 18.4, 18.7.

\textsuperscript{360} Id. ch. 28. For guidance on the preparation of public versions of Commission decisions, see Council Regulation 1/2003 arts. 7–10, 23–24, 2003 O.J. (L 1) 1, 9–10, 16–17.


the case in the court filings.\footnote{364}

4. 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, legal and economic analysis.”\footnote{365} 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.”\footnote{366} In addition, the publication of “details and justifications when a case is closed” via a short press release can help educate the public.\footnote{367}

5. Analysis

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.

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{368} 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.\textsuperscript{369} The laws can help shape and reinforce a nation’s collective social consciousness, ensuring compliance through stigmatizing pressure.\textsuperscript{370} In order for a citizenry to embrace and be pressured by its country’s laws, its people must know the laws.\textsuperscript{371} 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.\textsuperscript{372} More specifically, publishing opinions allows the regulated (that is, 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 made by human decisionmakers. Second, publication pushes agency decision makers 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, which is why written submissions dominate advanced legal systems.

G. OBLIGATION TO GIVE REASONS IN THE DECISION

While the United States 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.

1. China

Chinese law is developing in providing reasoning in decisions, 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

\begin{itemize}
  \item \textsuperscript{369} See, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 104–05 (1921) (explaining how most of the law’s work is done silently and passively).
  \item \textsuperscript{370} See, e.g., EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 62–63 (W.D. Halls trans., Free Press 1984) (1893) (concluding that punishment’s “real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor”).
  \item \textsuperscript{371} See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 311 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (discussing how law “envelops the whole of society . . . and in the end shapes it to its own desires”).
  \item \textsuperscript{372} See DURKHEIM, supra note 370, at 63.
\end{itemize}
communication between the parties and the enforcement authorities helps to ensure that the parties understand the agencies’ thinking. 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.

2. European Union

Article 41 of the European Fundamental Rights Charter obligates government agencies to give reasons for their actions. Article 296 of the TFEU enshrines this obligation. Furthermore, the DG Comp Antitrust Manual explicitly states that “[t]he legal basis of the decision should also be indicated” in the published decision. The ECJ has held that the statement of reasons must disclose the rationale underlying each decision in a “clear and unequivocal fashion.” 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 made against them.” 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.”

3. 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

373. The authors conducted interviews with various Chinese officials and bureaucrats in the course of collecting information and support for this Article. All interviews were conducted in confidentiality, and the names of the interviewees are withheld by mutual agreement. Notes from the respective interviews are kept on file with the authors.
376. TFEU, supra note 168, art. 296.
377. DG COMP ANTITRUST MANUAL, supra note 190, ch. 18.7.
379. DG COMP ANTITRUST MANUAL, supra note 190, ch. 11.1.
380. Id. ch. 5.3.
its decision in a manner capable of judicial comprehension. 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. Brief, conclusory statements are insufficient. The discussion should ensure that all the “major issues of policy were ventilated” and disclose “why the agency reacted to them as it did.” An agency “cannot simply declare its ‘expertise’; it must exercise that expertise and demonstrate sufficiently that it has done so.”

4. 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. The OECD also requires that agency decisions provide “sufficient detail so as to identify the basis and rationale for the decision.” 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 decisions on violations should include detailed explanations of the findings of fact, conclusions of law, evidence relied upon, party arguments, and sanctions.”

5. Analysis

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 articulated reasons in an increasingly detailed manner, especially more recently.

The obligation of a legal authority to give reasons for its decision is a fundamental principle of justice. As two European scholars recently

386. OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 14, at 19.
387. OECD KEY POINTS, supra note 13, at 18.
388. ANNOTATED ICN GUIDANCE, supra note 12, at 16.
observed, it is “inconceivable” not to honor this rule.\textsuperscript{389} 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 for their actions, 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.\textsuperscript{390} As Opdebeek and De Somer observe, “[t]he 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.”\textsuperscript{391}

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.\textsuperscript{392} 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.\textsuperscript{393} As the Court explained in a later case, “Congress has delegated to the administrative official and not to appellate


\textsuperscript{390} See Burlington Truck Lines v. United States, 371 U.S. 156, 167–68 (1962) (holding that “for the courts to determine whether the agency has” exercised its discretion within the bounds of the law, the agency “must disclose the basis of its order and give clear indication that it has exercised the discretion with which Congress has empowered it”); SEC v. Chenery Corp., 318 U.S. 80, 94 (1943) (holding that “the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review” and that “the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained”).

\textsuperscript{391} Opderbeck & De Somer, supra note 389, at 131.


\textsuperscript{393} SEC v. Chenery Corp., 318 U.S. 80, 92–95 (1943).
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 unreasoned is [to treat him] as a mere object of the law or political power, 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. As Mashaw explains, “[a]uthority without reason is literally dehumanizing.” 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. PUBLIC SCRUTINY AND JUDICIAL REVIEW OF SETTLEMENTS AND COMMITMENTS

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.

The three jurisdictions follow different practices with respect to public

395. OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 14, at 19.
397. Opdebeek & De Somer, supra note 389, at 137.
398. Mashaw, supra note 396, at 118.
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.

1. 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.399 This commitment system is not used for cartels or mergers. Modeled on Article 9 of the EU’s Council Regulation 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; a 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.400 The commitment proposal is negotiated between the party and agency, and if ultimately accepted, the agency may suspend the investigation.401 The party must then submit written reports on its performance of its commitments, and the agency must supervise its performance.402 If the party fulfills its commitments to the satisfaction of the agency, the agency can, at its discretion, terminate the investigation.403 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

400. See NDRC Anti-Price Procedures, supra note 95, art. 15; SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 16.
401. See NDRC Anti-Price Procedures, supra note 95, art. 16; SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 17.
402. See NDRC Anti-Price Procedures, supra note 95, art. 17; SAIC Monopoly Cases Investigative Procedures, supra note 96, arts. 18, 19.
403. See NDRC Anti-Price Procedures, supra note 95, art. 18; SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 19.
which the suspension was granted, or the suspension was granted on the basis of incomplete or untrue information provided by the party.\textsuperscript{404} 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 nonperformance or incomplete performance of the commitment.\textsuperscript{405} Additionally, for standard cases, MOFCOM may market test remedy proposals by engaging with the public via hearings, investigations, and consultations with experts, representatives of trade associations, other relevant government agencies, and consumers, among others.\textsuperscript{406}

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 nonperformance.\textsuperscript{407} Parties who are not satisfied with a proposed commitment may challenge it in court only after it is finalized.\textsuperscript{408} However, if the courts consider the commitment as a decision delivered by the agencies, there might be a possibility to challenge the agencies’ decision to suspend or terminate the investigation by applying for administrative reconsideration or bringing an administrative action before court according to article 53 of the AML.

2. 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 Article 102 TFEU cases and settlements in Article 101 TFEU cases. The European Commission initially used a number of informal mechanisms to settle disputes on a case-by-case basis.

\textsuperscript{404} See supra note 403.  
\textsuperscript{405} See NDRC Anti-Price Procedures, supra note 95, art. 16; SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 17.  
\textsuperscript{406} See MOFCOM Concentration Review Measures, supra note 258, art. 7.  
\textsuperscript{407} See NDRC Anti-Price Procedures, supra note 95, art. 18(1); SAIC Monopoly Cases Investigative Procedures, supra note 96, art. 17.  
\textsuperscript{408} NDRC Anti-Price Procedures, supra note 95, art. 21; SAIC Monopoly Cases Investigative Procedures, supra note 96, arts. 27, 28, 29.
basis, including its leniency program. The 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. The Commission will then begin bilateral settlement discussions. A party who seeks to settle must formally declare its interest and submit a settlement submission acknowledging liability for infringement, indicating the maximum fine the party anticipates the Commission will levy, confirming that the Commission has given the party the opportunity to be heard, confirming that the party will not request access to the file or a formal oral hearing, 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

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411. See id. art. 9(1).
418. See id. at 3–4; Council Regulation 1/2003, arts. 7, 23, 2003 O.J. (L 1) 1, 9, 16–17.
procedures—and the party will agree to the contents of the statement.\textsuperscript{419} A final decision can then be adopted by the Commission.

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.\textsuperscript{420} 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.\textsuperscript{421} 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.\textsuperscript{422}

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.”\textsuperscript{423} This publication is often called a “market test notice.”\textsuperscript{424} 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 thirty days.\textsuperscript{425} The case team may additionally orally discuss the commitments with market participants and inform the investigated party of the market test results.\textsuperscript{426} 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.\textsuperscript{427}

The ECJ has recognized that publication of proposed commitments provides numerous benefits. Publication serves the public’s interest to know

\begin{itemize}
\item \textsuperscript{419} See Commission Notice on Settlement Procedures, supra note 414, ¶ 23.
\item \textsuperscript{420} Council Directive 2014/104/EU, art. 6(6), 2014 O.J. (L 349) 1, 13.
\item \textsuperscript{421} See Council Regulation 1/2003, art. 30(1), 2003 O.J. (L 1) 1, 20.
\item \textsuperscript{422} OECD COMPETITION COMMM., COMMITMENT DECISIONS IN ANTITRUST CASES: NOTE BY THE EUROPEAN UNION 4 (2016).
\item \textsuperscript{423} See Council Regulation 1/2003, art. 27(4), 2003 O.J. (L 1) 1, 19.
\item \textsuperscript{424} See DG COMP ANTITRUST MANUAL, supra note 190, ch. 16.3.5.1.
\item \textsuperscript{425} See Council Regulation 1/2003, art. 27(4), 2003 O.J. (L 1) 1, 19.
\item \textsuperscript{426} Council Regulation 139/2004, 2004 O.J. (L 24) 1, 5.
\item \textsuperscript{427} See DG COMPETITION, BEST PRACTICES ON THE CONDUCT OF EC MERGER CONTROL PROCEEDINGS § 5.2 (2004).
\end{itemize}
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,” and 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.”

Commitment decisions have triggered criticism mainly for two reasons. First, their limited publicity raises transparency concerns. 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.

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 of any rule of law relating to their application, or misuse of powers.” The most common, and most 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.

3. United States

In the United States, most cases, whether criminal or civil, are resolved via settlements. Of 367 individual defendants charged between 1996 and 2005 with criminal antitrust violations, 307 (84%) resolved their cases with

430. See generally Heike Schweitzer, Commitment Decisions Under Article 9 of Regulation 1/2003: The Developing EC Practice and Case Law, in EUROPEAN COMPETITION LAW ANNUAL 2008: ANTITRUST SETTLEMENTS UNDER EU COMPETITION LAW 547 (Claus-Dieter Ehlermann & Mel Marquis eds., 2010).
432. See TFEU, supra note 168, art. 263.
a plea bargain.\textsuperscript{434} The DOJ also settles almost all civil cases and rarely takes any to trial. From 2010 to 2019, the DOJ settled 88% of its civil cases.\textsuperscript{435} From 2011 to 2016, the FTC similarly settled 91% of its civil cases.\textsuperscript{436}

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.\textsuperscript{437} 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.\textsuperscript{438} The court must accept the settlement proposed by the DOJ if it is within the “reaches of the public interest,”\textsuperscript{439} 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.\textsuperscript{440} Proposed settlements are detailed in a consent order, and the Commission votes to approve the order.\textsuperscript{441} 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.\textsuperscript{442} 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 that lays 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

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\footnote{F. Joseph Warin, David P. Burns & John W.F. Chesley, \textit{To Plead or Not to Plead?: Reviewing a Decade of Criminal Antitrust Trials}, \textit{Antitrust Source}, July 2006, 1–2.}
\footnote{OECD \textit{COMPETITION COMM., COMMITMENT DECISIONS IN ANTITRUST CASES: NOTE BY THE UNITED STATES} 7 (2016).}
\footnote{Pub. L. No. 93-528, 88 Stat. 1706 (codified at 15 U.S.C. § 16(b)–(h)).}
\footnote{15 U.S.C. § 16(b)–(c).}
\footnote{See United States v. Microsoft Corp., 56 F.3d 1448, 1461–62 (D.C. Cir. 1995).}
\footnote{See 16 C.F.R. § 2.31(a) (2021).}
\footnote{See id. § 2.34(a).}
\footnote{16 FED. PROC. FORMS § 65:111 (2021); 16 C.F.R. §§ 2.32, 3.25 (2021).}
\end{footnotes}
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{443} If no changes are warranted after receiving public comment, the Commission will vote again for final approval of the consent order.\textsuperscript{444}

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 \textit{Federal Register} the proposed settlement along with a Competitive Impact Statement (“CIS”).\textsuperscript{445} In it, the DOJ 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.\textsuperscript{446} The proposed judgment and CIS must be published in the \textit{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.\textsuperscript{447} The DOJ must also publish a summary of the proposed settlement in a newspaper.\textsuperscript{448} 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.\textsuperscript{449} 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.\textsuperscript{450} Once the agency has completely reviewed all evidence collected, it announces whether it intends to finalize the settlement or pursue its complaint in court.\textsuperscript{451} Parties may propose remedies (for example, divestitures, conduct restriction agreements, and so forth) at any point during the investigation, although, it is typically at this stage that remedy negotiation takes place.\textsuperscript{452}

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\textsuperscript{443} See 16 C.F.R. § 2.34(c) (2021).
\textsuperscript{444} See id. § 2.34(e).
\textsuperscript{445} See 15 U.S.C. § 16(b), (c)(ii).
\textsuperscript{446} See id. § 16(b).
\textsuperscript{447} See id. § 16(d).
\textsuperscript{448} See id. § 16(c).
\textsuperscript{449} See id. § 16(b), (d).
\textsuperscript{450} See id. § 16(d).
\textsuperscript{451} See DOJ ANTITRUST DIV. MANUAL, supra note 206, at III-111 to III-119.
\textsuperscript{452} See Peter Mucchetti, Sharis Pozen, Timothy Cornell, Esther Lee & Julius Pak, Merger Control in the United States: Overview, THOMPSON REUTERS PRAC. L. (Dec. 1, 2020).
\end{flushleft}
FTC regulations require the agency to follow a similar process for obtaining public scrutiny and input on 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.\textsuperscript{453} At the same time, the FTC must place on the public record and publish in the \textit{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.\textsuperscript{454} The public is invited to comment on the published materials (typically published to the FTC website) for thirty days, unless the FTC shortens or extends the time period.\textsuperscript{455} 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.

Before entering any consent judgment proposed by the DOJ, the court must determine whether the proposed settlement is in the public interest.\textsuperscript{456} The court is not required to conduct an evidentiary hearing, but may do so.\textsuperscript{457} 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.\textsuperscript{458} 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.\textsuperscript{459} When courts consider these statutory factors, however, the DOJ is entitled to “broad discretion to settle with the defendant within the reaches of the public interest.”\textsuperscript{460} Approval should be denied only if the decree would make a “mockery of judicial power.”\textsuperscript{461} 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

\textsuperscript{453} 16 C.F.R. § 2.34(c) (2021).
\textsuperscript{454} OECD \textit{COMPETITION COMM.}, \textit{supra} note 436, at 4–5.
\textsuperscript{455} § 2.34(c).
\textsuperscript{457} \textit{See id.} § 16(e)(2).
\textsuperscript{458} \textit{See id.} § 16(e)(1)(A).
\textsuperscript{459} \textit{See id.} § 16(e)(1)(B).
\textsuperscript{460} See United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995).
\textsuperscript{461} \textit{See id.} at 1462.
proposed settlement is within the reaches of the public interest. Courts have also held that subsequent amendments to the Tunney Act did not materially change this standard. 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. If a consent order is violated, the FTC has statutory authority to seek penalties and further injunctive relief from a federal court.

4. International Norms

In general, international authorities support the use of settlements in antitrust cases, as they help “facilitate prompt resolution and help reduce 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 thirty-six member countries asking if the respondent’s antitrust regime provided third parties with the opportunity to comment on proposed remedies or settlement

465. ANNOTATED ICN GUIDANCE, supra note 12, at 2; see also OECD KEY POINTS, supra note 13, at 31.
466. OECD KEY POINTS, supra note 13, at 31.
467. ANNOTATED ICN GUIDANCE, supra note 12, at 2.
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 it 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, 6% 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.

5. Analysis

As noted above, each jurisdiction differs in allowing public scrutiny of proposed commitments or settlements. As a matter of practice, but not formal law, Chinese 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 submitted observations or publicly respond to observations. For settlement decisions in the EU, no public scrutiny is mandated. Neither Chinese nor EU law permits judicial scrutiny of proposed commitments, although both jurisdictions seem to permit parties

468. ICN TRANSPARENCY PRACTICES, supra note 12, at 3, 26.
469. Id. at 26.
470. Id.
471. Id.
472. Id.
473. Id. at 26–27.
474. OECD KEY POINTS, supra note 13, at 19.
to file an appeal after a commitment has been entered. The United States 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, publish, and respond to comments. 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. U.S. law also requires judicial review of proposed DOJ consent decrees prior to their issuance but does not require it for FTC consent decrees. However, the FTC typically subjects its proposed settlements to public comment. DOJ consent decrees can be appealed but FTC administrative consent decrees cannot.

Due process would be better served by creating processes that permit some public scrutiny and judicial review of proposed commitments and settlements. We are agnostic about 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 United States. 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.

I. RIGOROUS JUDICIAL REVIEW OF ECONOMIC REASONING

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.475 A party dissatisfied with an administrative decision by MOFCOM in a merger case must first apply for an administrative reconsideration by the agency itself.476 If this internal review does not satisfy the parties, they can

475. See He, supra note 20, at 140.
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 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

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478. Anti-Monopoly Law of the People’s Republic of China, art. 53; see also H. Stephen Harris Jr., Peter J. Wang, Yizhe Zhang, Mark A. Cohen & Sebastien J. Evrard, Anti-Monopoly Law and Practice in China 49–50 (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 provide a more express right to judicial review).
480. He, supra note 20, at 178 (noting a 55% increase in administrative litigation generally from 2014 to 2015).
484. TFEU, supra note 168, art. 263.
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.” 487 However, in the Intel case, the ECJ reversed the General Court’s decision for its failure to consider all of the major arguments made by the parties. 488 It is worth emphasizing that Intel was a rare setback for DG Comp, which has rarely lost in court. 489

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. 490 In administrative adjudications before the FTC, the initial decision of the ALJ is first reviewed de novo by the full Commission without affording any deference to the ALJ’s factual or legal findings. 491 The FTC settles around 80% of the adjudications it initiates against parties, and these cases are not subject to judicial review. 492 For cases that are not settled, the Commission’s decision may be appealed to the federal appellate courts. 493 Although the judiciary affirmed Commission liability findings in only 50% of cases from 1987 to 1996, since 2007 and as of 2016 it has affirmed 100% of appealed administrative cases in which the Commission found liability. 494

Judicial review of final decisions is applied in each of the three jurisdictions. The three jurisdictions differ regarding the depth to which courts 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. 495

1. 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

487. See DG COMP ANTITRUST MANUAL, supra note 190, ch. 26.1.2.5.
489. See SCHWEITZER, supra note 28, at 521.
491. Id. at 643.
493. See Olhausen, supra note 490, at 643.
494. Id. at 626.
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, Beijing Qihu Technology Co. v. Tencent Technology Company and Beijing Ruibang Yonghe Technology & Trade Co. v. Johnson & Johnson, the Chinese judges examined the proposed economic rationales, suggesting the Chinese judiciary is exploring how to fully exercise this responsibility.

2. 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 appreciation.” 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 competition law, they generally do not have formal economic training, meaning that litigants must carefully present economic arguments to make


497. Beijing Qihu Keji Youxian Gongsi Su Tengxun Keji (Shenzhen) Youxian Gongsi (Beijing Qihu Technology Co., Ltd. v. Tencent Technology (Shenzhen) Co. Ltd.), Min San Zhong Zi No. 4 (Sup. People’s Ct. 2014) (China).


501. KME Germany AG, ECLI:EU:C:2011:816, ¶ 121. Other cases use the alternative terminology of “margin of appraisal” or “margin of assessment.” See id. ¶ 109.

502. SCHWEITZER, supra note 28, at 498.
them understandable.\textsuperscript{503}

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 Community Courts must refrain from reviewing the Commission’s interpretation of information of an economic nature.”\textsuperscript{504} 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.”\textsuperscript{505} 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 cases, defined to apply to any sanction intended to have a punitive and deterrent effect, including competition law.\textsuperscript{506} 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.\textsuperscript{507}

The General Court’s 2017 decision in United Parcel Service, Inc. v. Commission examined the agency’s economic evidence in the course of annulling the Commission’s decision to block a merger.\textsuperscript{508} One set of commentators identified this case as a turning point, arguing that it demonstrates that “EU judges are increasingly willing to scrutinise complex economic appraisals made by the Commission.”\textsuperscript{509} Future cases should provide clarity on how strict the EU’s level of scrutiny is.

3. 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

\textsuperscript{503} Id. at 498–99.
\textsuperscript{504} Case C-12/03 P, Comm’n v. Tetra Laval BV, 2005 E.C.R. I-1047, ¶ 39; see also OECD EU REPORT, supra note 266, at 59 (describing DG Comp’s “chastisement” in 2002 by the courts, which apparently “doubt[ed] that the Commission was any more expert than the court about economic matters”).
\textsuperscript{505} KME Germany AG, ECLI:EU:C:2011:816, ¶ 129.
\textsuperscript{507} See KME Germany AG, ECLI:EU:C:2011:816, ¶ 68.
defense of [the] model—to respond to each objection with a reasoned presentation. In particular, courts require agencies to “explain the assumptions and methodology used in preparing the model” 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. Courts will reject economic models that bear “no rational relationship to the reality it purports to represent” or that “generates apparently arbitrary results, particularly where . . . the agency has failed to justify its choice.”

4. 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 [they] are supported by sufficient evidence and appropriate analysis (and, depending on the case, discussion with the parties).” The ICC Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings similarly recognizes that “[the courts, particularly when competition authorities are an administrative body, play or should play a significant role in safeguarding due process.”

5. Analysis

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 a greater interest in more a searching review of economic rationales.

Judicial review is essential for promoting reasoned decisionmaking, due

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512. Sierra Club v. EPA, 167 F.3d 658, 662 (D.C. Cir. 1999) (quoting Columbia Falls Aluminum Co. v. EPA, 139 F.3d 914, 923 (D.C. Cir. 1998)).
514. OECD KEY POINTS, supra note 13, at 30. The OECD acknowledges that the degree of deference given the agency varies from country to country. Id. at 31.
515. OECD BACKGROUND NOTE ON THE STANDARD OF REVIEW, supra note 14, at 18.
516. ICC BEST PRACTICES, supra note 19, at 8.
process, and transparency. It is worth remembering that judges have played a critical role in creating U.S. administrative law.517 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.518 Indeed, judges’ insights from different areas of law may help them see perspectives that agency officials, occasionally susceptible to tunnel vision, overlooked.519

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.520 Consequently, the amendment made it easier for individuals to sue for procedural violations.521 As the Chinese government recognized, judicial review is a potent tool for ensuring procedural compliance by agencies.522

Third and more substantively, judicial scrutiny of agencies’ economic rationales promotes rational decisionmaking and transparency. One of the central justifications for the burdens of judicial review is that it ensures that agencies are exercising their expertise as intended.523 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.524 Of course, a properly balanced system of judicial review does not normally let judges displace agency rationales as agency officials, not judges, are the experts. One additional incidental benefit of judicial review is that judicial scrutiny and explication of agency economic theories may promote transparency. Judges will undoubtedly

517. See, e.g., Gillian E. Metzger, Embracing Administrative Common Law, 80 GEO. WASH. L. REV. 1293, 1295 (2012); Pierce, supra note 220, at 65.
519. See, e.g., id. at 1767–68 (discussing the insights generalist judges can provide into specialized issues).
520. See He, supra note 20, at 172.
521. See id.
522. See id.
523. See supra notes 510–511 and accompanying text.
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.\textsuperscript{525}

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, with one survey estimating that around 43% or more of attempted suits were not heard by the court in the end.\textsuperscript{526} 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 thirty to 57% of cases.\textsuperscript{527} Third, successful plaintiffs sometimes encountered difficulty seeing judgments enforced.\textsuperscript{528}

However, in November 2014, China passed an amendment to the Administrative Litigation Law to combat these issues.\textsuperscript{529} First, the amendment emphasizes the right of citizens to file complaints and provides an opportunity to appeal if a court declines to accept a complaint.\textsuperscript{530} Second, the law creates sanctions for agencies that improperly coerce a plaintiff to drop a case and gives judges greater power to nullify agency actions.\textsuperscript{531} Third, the law imposes monetary sanctions on agency leaders and staff that refuse to honor a court judgment.\textsuperscript{532} 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 by 55% to around 220,000.\textsuperscript{533} 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 create an increase in judicial review of antitrust enforcement agency actions in China, the initial numbers in administrative litigation are promising.

\textsuperscript{525}See \textit{id.} (discussing how feedback given in judicial review can counter the cognitive tendency of agency experts to be overconfident).
\textsuperscript{526}He, \textit{supra} note 20, at 143.
\textsuperscript{527}\textit{Id.} at 145.
\textsuperscript{528}\textit{Id.} at 147–48.
\textsuperscript{529}\textit{Id.} at 162.
\textsuperscript{530}\textit{Id.} at 163–64.
\textsuperscript{531}\textit{Id.} at 164.
\textsuperscript{532}\textit{Id.} at 166.
\textsuperscript{533}\textit{Id.} at 178.
All three jurisdictions 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, EU 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\textsuperscript{534}—the level of deference given to the agency has been reduced by the Court.\textsuperscript{535} This is especially important, since a too deferential judicial review of economic reasoning renders the combination of investigative or prosecutorial and adjudicatory functions problematic.

**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 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 Article identifies nine procedural requirements that would promote rational, fair, and transparent agency decisionmaking. The tenth anniversary of China’s Anti-Monopoly Law provided the impetus for this Article. 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 United States 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 room for improvement in the world’s oldest system, that of the United States. While China’s enforcement system has room for growth, this Article 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 Article can help bolster all three jurisdictions’ systems. If China, the EU, and the United States can strike the right balance, the global economy will have much to celebrate in the coming years.