

Meeting of the Council at Ministerial Level, 5-6 October 2021**RECOMMENDATION OF THE COUNCIL ON TRANSPARENCY AND
PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT****(Adopted by the Council at Ministerial level on 6 October 2021)****JT03482387**

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)], the Recommendation of the Council on International Co-operation in Competition Investigations and Proceedings [[OECD/LEGAL/0408](#)] and the Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0452](#)];

HAVING REGARD to the work on transparency and procedural fairness in the area of competition law enforcement in other international fora, including the International Competition Network;

CONSIDERING that transparency and procedural fairness are important for effective and impartial competition law enforcement, and essential to the rule of law, with due regard to the effectiveness of enforcement;

CONSIDERING the long-standing work of the Competition Committee on transparency and procedural fairness in the area of competition law enforcement, which demonstrates that there are minimum transparency and procedural fairness standards of universal applicability;

CONSIDERING the value in agreeing to transparency and procedural fairness standards in competition law enforcement for Members and non-Members having adhered to this Recommendation (hereafter the “Adherents”) in order to promote government support for their implementation;

RECOGNISING that competition law enforcement should be fair, predictable and transparent, and perceived as such by interested parties and the public, and should include effective rules, impartial and independent institutions and sound practices;

RECOGNISING that co-operation and engagement by parties and third parties are key contributing factors to fair, efficient, and effective investigations;

RECOGNISING that Adherents have different legal and institutional frameworks through which they will implement this Recommendation;

On the proposal of the Competition Committee:

I. AGREES that, for the purposes of the present Recommendation, the following definitions are used:

- **Competition law enforcement:** refers to all investigative, prosecutorial or decision-making activities undertaken by Adherents’ authorities competent to enforce competition law.
- **Decision:** refers to enforceable administrative decisions, and court orders or judgments.
- **Confidential information:** refers to business secrets and other sensitive information, as well as any other information treated as confidential under applicable law.

II. RECOMMENDS that Adherents have a clear legal framework for competition law enforcement with clearly defined and publicly available competition laws and regulations as well as rules, policies, or guidance regarding the identification and treatment of confidential information, and fair and clear rights and obligations for parties and third parties. To that effect, Adherents should:

1. **Ensure that competition law enforcement is transparent and predictable**, by:
 - a) ensuring that the legal framework and procedures of their competition authorities, as well as the applicable procedures and deadlines to lodge applications for court review of decisions, are publicly available;
 - b) publishing the facts, legal basis and sanctions relating to decisions, including decisions to settle cases, subject to the protection of confidential information;
 - c) promoting transparency of competition authorities' enforcement priorities; and
 - d) supporting the implementation of international competition law enforcement transparency and procedural fairness best practices.

2. **Ensure that competition law enforcement is independent, impartial and professional**, by:
 - a) guaranteeing that competition law enforcement is conducted by accountable public bodies that enjoy independence, i.e. are free from political interference or pressure, and that interpret, apply and enforce competition law on the basis of relevant legal and economic arguments grounded in sound competition policy principles;
 - b) ensuring that competition authorities and courts give appropriate consideration to all relevant information and evidence that they obtain;
 - c) having clear and transparent rules to prevent, identify and address any material conflicts of interest of competition authority and court officials involved in competition law enforcement;
 - d) ensuring that competition authorities possess sufficient human, financial and enforcement resources as well as expertise in competition law, economics or other relevant disciplines to be able to conduct their duties effectively;
 - e) maintaining professional secrecy obligations for officials for information received in their official capacity; and
 - f) providing adequate investigative and co-operation tools to competition authorities to conduct competition law enforcement effectively.

3. **Ensure that competition law enforcement is non-discriminatory, proportionate and consistent across similar cases**, in particular by:
 - a) carrying out competition law enforcement in a reasonable, consistent and non-discriminatory manner, including without prejudice to the nationalities and ownership of parties under investigation;
 - b) tailoring investigations to the seriousness and nature of each case, and avoiding the imposition of unnecessary costs and burdens on parties and third parties or on the competition authority;
 - c) having consistent rules and guidelines for procedural steps in competition law enforcement such as requests for information, inspections and interviews and ensuring that these steps do not go beyond the scope of the investigation;
 - d) applying internal safeguards for procedural steps in order to ensure lawfulness, proportionality and consistency;
 - e) assessing, at key stages, the progress of an investigation and deciding whether to pursue or close the case;

- f) ensuring objective decision-making through the thorough examination of facts and evidence, and the application of internal checks and balances for evaluations and decisions; and
 - g) ensuring that communications between the decision maker (e.g., competition authority or court, as applicable) and the parties and third parties are in writing, or, if oral, recorded, to the extent possible, in written minutes that form part of the case file or record.
4. **Ensure that competition law enforcement is timely**, by:
- a) concluding competition law enforcement in a reasonable time, taking into account the nature and complexity of the case and the efficient use of the resources of the competition authority;
 - b) establishing and following statutory rules or competition authority guidelines or setting internal targets, as appropriate, for the deadlines or length of procedural steps, taking into account the nature and the complexity of the case;
 - c) ensuring that competition authorities, parties and third parties have reasonable time to prepare their actions and responses;
 - d) encouraging co-operation from parties to avoid delay, since party or third party choices or actions can affect investigative timing.
5. **Inform parties and offer them opportunities to engage meaningfully in the competition law enforcement process**, with due regard to the effectiveness of the investigation, by:
- a) ensuring that parties are notified in writing as soon as feasible and legally permissible that an investigation has been opened and of its legal basis and subject matter, to the extent that this does not undermine the effectiveness of the investigation;
 - b) explaining to the parties, as soon as reasonably possible and appropriate during the competition law enforcement process, the factual and legal basis, competition concerns, and the status of the investigation;
 - c) ensuring that any public notice by the competition authority of the opening of investigations and the publication of allegations against parties are not presented as a determination of the matter;
 - d) affording parties a reasonable opportunity to present views regarding substantive and procedural issues via counsel, in accordance with applicable laws, rules or guidelines. This includes not denying, without due cause, the requests of parties to be represented by a legal counsel of their choosing;
 - e) providing parties with meaningful opportunities at key stages to discuss with the competition authority the investigation's facts, progress, and procedural steps, as well as relevant legal and economic reasoning;
 - f) offering parties the opportunity to present an adequate defence before a final decision is made. This should include:
 - i) informing parties of all allegations against them and granting them access to the relevant evidence collected by or submitted to the competition authority or court, subject to the protection of confidential and privileged information; and

- ii) providing parties a meaningful opportunity to present a full response to the allegations and submit evidence in support of their arguments before the key decision makers;
 - g) respecting parties' applicable rights against self-incrimination; and
 - h) considering the views of third parties with a legitimate interest in the case before a final decision is taken.
6. **Protect confidential and privileged information**, while taking into consideration the rights of defence and other legal rights, and the public interest in transparent and effective competition law enforcement, in particular by:
- a) ensuring that competition authorities appropriately protect against unlawful disclosure of confidential information in their possession; and
 - b) considering developing, updating or strengthening policies regarding the handling of privileged communications between attorneys and clients and respecting applicable legal privileges.
7. **Ensure access to an impartial review** by an adjudicative body (i.e. court, tribunal, or appellate body) that is independent and separate from the competition authority, of decisions, including intermediate compulsory procedural decisions. To this effect, Adherents should:
- a) enable the examination by courts of facts and evidence, and the merits of competition law enforcement decisions;
 - b) require that all decisions are in writing, are based only on matters of record, and, as appropriate, contain details about the findings of fact, conclusions of law and related sanctions; and
 - c) strive for the review to be completed in a reasonable time, taking into account the nature and complexity of the case.
8. **Periodically review** their legal framework, public policies and competition authority rules, procedures, and guidelines to ensure alignment with this Recommendation, improve their enforcement systems and seek convergence towards best practices.
- III. INVITES** the Secretary-General and Adherents to disseminate this Recommendation.
- IV. INVITES** non-Adherents to take due account of, and adhere to, this Recommendation.
- V. INSTRUCTS** the Competition Committee to:
- a) serve as a forum to exchange information and experiences with respect to the implementation of this Recommendation and conduct voluntary peer reviews;
 - b) consider developing a toolkit to support Adherents' implementation of this Recommendation; and
 - c) report to the Council on the implementation, dissemination and continued relevance of this Recommendation no later than five years following its adoption and at least every ten years thereafter.