

## Best Practices for Antitrust Procedure: The Section of Antitrust Law Offers Its Model

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Antitrust law seeks to benefit consumers by prohibiting anticompetitive agreements, acts of monopolization/abuse of dominance, and anticompetitive mergers and other structural transactions. Undertaking the quest, however, does not guarantee reaching the goal. Antitrust rules and remedies may be inadequate (allowing harmful market conduct) or excessive (chilling desirable conduct). Members of the antitrust community (practitioners, enforcement officials, scholars, economists, policymakers, and business leaders) continuously debate how enforcement should be adjusted to find the “Goldilocks Zone,” where legal tools are “just right” when judged by their effectiveness in serving antitrust law’s ultimate objectives.

Recent years have witnessed an increasing recognition that antitrust procedure—like substantive rules and remedies—constitutes another dimension of the quest for appropriate balance. Enforcement aspires to be accurate, efficient, and impartial—both in reality and perception. Procedure can have a profound influence on the ability of antitrust enforcement to fulfill those aspirations. Recognizing this reality, a number of public international organizations have launched projects to improve antitrust procedure, with encouragement and support from the antitrust community. For example, shortly after its formation, the International Competition Network launched a major project that ultimately led to consensus adoption of “Recommended Practices for Merger Notification and Review Procedures.”<sup>1</sup> More recently, the ICN adopted “Guidance on Investigative Process” (ICN Guidance) at its 2015 annual conference.<sup>2</sup> The ICN Guidance contains good practice standards applicable to agencies that operate within all types of legal and enforcement systems regarding transparency to the public, transparency to and engagement with parties to investigations, and protection of confidential information.

Enforcers have also launched procedural initiatives, recognizing that procedures that are accurate, efficient, and impartial bring multiple benefits to their agencies. These initiatives include ensuring that the agency hears the parties’ view of the facts, the evidence, and how the law applies, resulting in better informed agency decisions and conferring legitimacy on the agency’s enforcement activities as perceived by affected parties and by the domestic and international antitrust communities. Similar initiatives have been pursued in the OECD<sup>3</sup> and in negotiations of

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<sup>1</sup> International Competition Network, Recommended Practices for Merger Notification and Review Procedures, <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

<sup>2</sup> International Competition Network, ICN Guidance on Procedural Fairness, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf>.

<sup>3</sup> ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRANSPARENCY AND PROCEDURAL FAIRNESS (2012), <http://www.oecd.org/competition/mergers/proceduralfairnessandtransparency-2012.htm>. See also Asia Pacific Economic Cooperation (APEC), [http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999\\_aelm/attachment\\_apec.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx); APEC Principles to Enhance Competition and Regulatory Reform (Sept. 13, 1999), [http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999\\_aelm/attachment\\_apec.aspx](http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx).

bilateral (U.S.-Chile,<sup>4</sup> U.S.-Korea<sup>5</sup>) and multilateral (Trans-Pacific Partnership<sup>6</sup>) trade agreements. There has also been a private sector initiative in this area by the International Chamber of Commerce's Competition Commission.<sup>7</sup>

The increasing intensity of discussion and initiatives regarding procedure was duly noted by the ABA Section of Antitrust Law and its International Task Force (ITF). In its role as the main vehicle for Antitrust Section and ABA input on antitrust issues at enforcement agencies worldwide, the ITF coordinates the submission of Section comments involving antitrust procedure to numerous foreign agencies (often jointly with the ABA Section of International Law). Although other bodies had addressed antitrust procedures, the ITF concluded, based on the long U.S. experience in implementing antitrust law and the Section's strong expertise and reputation, that the Section could make a valuable contribution to the international dialogue on these issues. Ultimately the ITF proposed a thematic approach to this topic, as distinct from only responding to individual consultations by agencies (by far the most common mode of ITF activity).

Following discussion of this change in approach, in 2013 then-incoming Section Chair Christopher Hockett launched a variety of Section initiatives focused on procedure, including (among others) a request to the ITF for a report that would survey scholarship concerning antitrust procedure and suggest whether, and if so how, the Section could contribute to the international dialogue on procedural aspects of antitrust enforcement. The ITF initiative continued under Chris Hockett's successors, Howard Feller and Roxann Henry.

In January 2015, the Section's Council accepted the ITF's Report and approved its three principal recommendations—that the Section: (1) attempt to formulate best practices for antitrust procedure; (2) identify mechanisms to enhance the effectiveness of Section outreach and contributions to policy dialogue on antitrust procedure (such as that occurring in the international antitrust organizations); and (3) identify specific research topics (legal, empirical, economic, or otherwise) that might deserve Section encouragement or support in pursuit of better information to enhance the quality of policy dialogue about antitrust procedure. The Council approved the ITF's consensus proposal for Best Practices for Antitrust Procedure in June 2015. The approved text of the Report on Best Practices for Antitrust Procedure (Report) is reproduced below.

A few brief framing remarks are in order. First, the Report is targeted at a fundamental type of proceeding common to all systems of antitrust or competition law enforcement—specifically, proceedings conducted by a government agency seeking to determine whether an infringement of competition rules has occurred and, if so, to formulate and apply a remedy. This excludes a variety of other enforcement agency activities, such as conducting industry studies, participating in proceedings between private parties (e.g., as an *amicus curiae*), participating in proceedings under other regulatory systems, public advocacy for competition and antitrust policy, and formulating or reacting to proposals for legislative change in antitrust law, to name just a few. These other activities can be vital to the success of an enforcement program, but government proceedings to assess and remedy possible infringements form the canonical tool of antitrust

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<sup>4</sup> United States-Chile Free Trade Agreement, art. 16, June 6, 2003, [https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset\\_upload\\_file616\\_4010.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/chile/asset_upload_file616_4010.pdf).

<sup>5</sup> Free Trade Agreement Between the United States of America and the Republic of Korea, ch. 16 (June 30, 2007), [https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset\\_upload\\_file193\\_12715.pdf](https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file193_12715.pdf).

<sup>6</sup> Trans-Pacific Partnership, Oct. 5, 2015, ch. 16, <https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf>.

<sup>7</sup> International Chamber of Commerce Commission on Competition, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings (Aug. 30, 2010), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2010/Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings/>.

enforcement, and they are a—if not *the* leading source—of questions about the quality of procedure in antitrust enforcement.

Second, the Report proposes best practices for each distinct phase of government infringement proceedings from inception of an investigation through first level review of the first-instance determination regarding an infringement. The process is analyzed in five distinct phases: Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review. (The Report concludes with a short list of key practices relevant to all phases of the process.) Thus, at least within the specific sphere of government infringement proceedings, the Report attempts to be comprehensive.

Third, in suggesting best practices, no presumptions are made regarding the superiority or inferiority of any particular system—common law versus civil law, adversarial versus inquisitorial, or administrative versus prosecutorial/judicial. Best practices are selected only on the basis of their capacity to help assure accurate, efficient, and impartial antitrust enforcement. The ITF's initial Report to the Section Council had included, at the Chair's request, a stock-taking of existing scholarship on antitrust procedure. The ITF's experience in compiling that very extensive list demonstrated (1) that procedure has been a frequent topic of study and commentary in numerous antitrust enforcement systems around the world, and (2) the scope and variety of antitrust procedures in use across the more than 100 jurisdictions that actively enforce antitrust laws are so profound as to almost defy characterization. Accordingly, identifying best practices that are relevant only in the context of a specific system of procedure would severely limit the utility of the Report. Thus, the selection was heavily influenced by a desire to focus on practices that could be understood and applied to a broad variety of specific systems and jurisdictions. In addition, the recommendations are based on the premise that basic principles of accurate, efficient, and impartial procedure should apply across all types of enforcement systems.

Those interested in comparing the Report with the ICN Guidance will see numerous similarities, but one major contrast: while the Report identifies best practices for each of the five previously noted distinct phases of government proceedings (Investigation, Asserting Contentions of Infringement, Assessing Contentions of Infringement, First-Instance Decision, and Review), the ICN Guidance is limited to the investigation phase. Within the ambit of the investigation phase there are numerous similarities between the good practices identified in the Report and the ICN Guidance. Some notable common principles include that (1) agencies should seek evidence broadly rather than limiting their inquiry to complainants and/or targets, (2) applicable substantive rules and procedures should be adequately disclosed so that parties are able to know in advance the legal framework that applies to their conduct, and (3) parties should be permitted to present all aspects of a defense, including expert economic analysis among others.

The ITF is currently working on implementing the other two ITF recommendations the Council approved in 2014—enhanced outreach and identification of worthy research topics relevant to antitrust procedure. We hope that through discussion of the Report and the other supporting efforts, the Section will reaffirm its best traditions and also contribute to progress in assuring that antitrust proceedings are accurate, efficient, and impartial, both in reality and as perceived by the antitrust community and the broader public.<sup>8</sup> ●

*(T)he Report proposes  
best practices for  
each distinct phase  
of government  
infringement  
proceedings from  
inception of an  
investigation through  
first level review of  
the first-instance  
determination  
regarding an  
infringement.*

<sup>8</sup> The authors of this article express their great appreciation for the hard work and many contributions of all who brought the Report to fruition. The Report was a collaborative effort undertaken primarily by a subgroup of the International Task Force, including (in alphabetical order) William Blumenthal, Rachel Brandenburger, Terry Calvani, Neil Campbell, Jennifer Driscoll, Damien Geradin, Elizabeth Kraus, and James Rill. The various drafts were reviewed, edited, and commented upon by the other members of the International Task Force, by Deborah Garza (the Section's International Officer at the relevant times) and, finally, by other Council members. The project benefited greatly from the continuous support of Section Chairs Christopher Hockett, Howard Feller, and Roxann Henry.

## **BEST PRACTICES FOR ANTITRUST PROCEDURE**

### **REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE**

**May 22, 2015**

#### **INTRODUCTION**

Among numerous policy studies and reform efforts underway throughout the global antitrust and competition-law community (enforcement officials, private antitrust-law practitioners, antitrust economists and academics, among others), significant recent interest has focused on improving antitrust procedures. Merger review procedures were among the first areas targeted for study and for proposals regarding best or recommended practices, but more recently interest in reform of procedures has broadened to include all the main areas of antitrust enforcement.

As new antitrust laws and agencies continue to expand globally, an increasing variety of legal methods and institutions has been applied to competition matters. This offers both opportunities and challenges: on one hand this increased diversity allows comparison of different procedures, which may help identify those rules, institutions and other mechanisms that are most conducive to impartial, efficient and accurate enforcement. On the other hand, the increasing variety of the systems encountered in antitrust enforcement creates new challenges in developing principles and approaches likely to be widely accepted and implemented.

Adopting procedures that promote the impartiality, efficiency and accuracy of antitrust decisions can help achieve basic competition goals. Procedures that allow agencies to obtain and test relevant evidence, as well as the legal and economic approaches and analyses that inform their decisions regarding infringement and remedy, can enhance significantly the overall quality of enforcement decisions. This facilitates vigorous competition within established legal constraints and ultimately enhances productivity and consumer welfare. Moreover, procedures that are—and are rightly perceived to be—accurate, efficient and impartial will enhance respect for competition law and its enforcement institutions and processes among counterpart agencies, within the business community, among consumers and by the general public.

As the latest development in a process that began several years ago, the ABA Section of Antitrust Law's International Task Force has developed this proposal for best practices for antitrust procedure. This proposal is intended to stimulate and contribute to ongoing global dialogue on this fundamental subject, adding the perspective of the world's oldest and largest association of antitrust professionals to current efforts to improve antitrust procedures. This proposal has been formulated based only on the anticipated ability of these practices to contribute to the impartiality, efficiency and accuracy of antitrust decisions. No specific system of enforcement—adversarial or inquisitorial, common-law or civil-law, judicial or administrative—has been assumed superior in its relevant capabilities.

The best practices listed below are considered relevant to the conduct of any antitrust proceeding, defined as a process for determining whether one or more specific individuals or business organizations have infringed applicable competition-law standards, and to prescribe and enforce a remedy for such infringement. Antitrust enforcement involves many activities that do not fall into this category: competition advocacy, general market or industry studies (other than those that can lead to the imposition of remedies for identified anticompetitive practices), or amicus par-

ticipation in judicial proceedings between private parties, just to name some of the most obvious. Such activities were not considered as part of the subject matter of this report, although they can each be vital to the broader success of a competition-law enforcement system.

The Report also does not address any but the most fundamental principles that govern the conduct of public officials and private parties engaged in the antitrust enforcement process. Thus, for example, aside from the most elementary protections against corrupt influence of the decision making process, rules of conduct for public officials or private parties are not included although they are obviously essential to sound antitrust enforcement. This report presupposes that such individuals and entities are subject to their own professional, legal, and other disciplines that assure orderly engagement with antitrust enforcement processes. Such practices may facilitate dialogue and compliance with applicable procedural rules, and are also likely to enhance efficient and accurate enforcement.

The proposed best practices have been divided into six specific categories, five of which correspond to conceptually distinct stages of an antitrust proceeding as it is defined in this proposal: (1) Investigation, (2) Asserting Contentions of Infringement, (3) Assessing Contentions of Infringement, (4) First-Instance Decision and (5) Review. We conclude with a brief list of best practices applicable at all stages of an antitrust proceeding.

## **ANTITRUST PROCEDURES—BEST PRACTICES**

### **I. INVESTIGATION**

- A. In conducting investigations and seeking evidence, officials should make every reasonable effort to define clearly the specific potential legal, factual and economic contentions being considered.
- B. Officials should adopt management practices designed to help ensure that the expected costs and other burdens of investigation—including those imposed upon targets and others who provide information or otherwise cooperate with the investigation—are proportionate to the expected value of the evidence sought. The expected significance of the potential competitive harm also should be considered in making this assessment.
- C. At key points in a pending investigation (or periodically) officials should specifically reassess the potential contentions and tailor the investigation accordingly.
- D. Officials should strive for balance, pursuing and considering both exculpatory and inculpatory evidence and analysis.
  1. Officials should not limit pursuit or consideration of exculpatory evidence to that provided by targets' counsel. Officials should pursue and consider potentially exculpatory evidence from third parties, especially when such evidence may not otherwise be available to targets or their counsel.
- E. At key points in a pending investigation (or periodically) officials should disclose (subject to limitations reasonably reflecting and tailored to any legitimate concerns such as the preservation of evidence of covert criminal behavior or maintaining confidentiality of business secrets) all potential contentions of infringement and (in reasonable detail)

the underlying evidence, analysis and argumentation relevant to the defense, to targets and their counsel, and provide reasonable opportunities for and carefully consider all responses to such disclosures (including submissions as to facts, economic analysis, legal analysis, policy, and other forms of argumentation). Targets and counsel for targets should have reasonable opportunities to present such responses in face-to-face meetings with officials conducting the investigation and with officials managing the investigation. Subject to the foregoing, officials should maintain the confidentiality of evidence and all other aspects of the investigation (including its existence).

- F. Officials should apply credible objective checks and balances to the process of investigation to ensure adherence to the foregoing practices.
  - 1. It is important for officials to establish management practices that limit susceptibility of their processes to confirmation bias and other institutional characteristics that may allow or even encourage officials to broaden or persist with investigations beyond the point that disinterested analysis would consider well supported. Periodic review of investigations by retained experts with the ability and incentives to provide objective independent views may be one such practice; others might include the development of specialized offices or other units (a staff including experts in competition economics, law, and/or the particular sector involved) internal to the investigating institution or to another institution, subject to safeguards for their objectivity, independence and candor.
- G. Prior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials and upon which they intend to rely in support of such contention. Each target should be provided with the opportunity to present a full response, including as to all matters of fact, economic and other expert analysis, legal, policy and other argumentation. Protections for material reasonably regarded as confidential should be afforded by such mechanisms as restricting access to counsel or outside counsel only, use of data rooms (physical or virtual), or disclosure pursuant to protective order. A target should be permitted to present its response through documentary submissions and through face-to-face presentation to the official(s) responsible for making any contention of infringement.
- H. The disclosure of an investigation, or the possibility of a future investigation, should ensure that targets and/or potential targets are not prejudiced or otherwise unnecessarily disadvantaged. Such disclosure should be accompanied by a clear statement that there has been no contention of infringement, and that any future such contention would be subject to assessment on the merits.

## II. **ASSERTING CONTENTIONS OF INFRINGEMENT**

- A. The official decision to make a contention of infringement should be based on a well-considered assessment, including balanced and conscientious evaluation of both exculpatory and inculpatory evidence, that the completion of proceedings (including obtaining a final determination of infringement and defining, implementing and administering a remedy) is highly likely to serve the fundamental purposes of competition

law. A contention of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it.

- B. A contention of infringement, and the pursuit of remedies, should not be fashioned for any inappropriate purposes, including, for example: (1) primarily to prevail in infringement proceedings independent of any substantial competitive benefit; or (2) primarily to obtain any advantage over or concession from a target that is not directly justified by the competition law purposes of proceedings.
  - 1. Key competition-law concepts such as “restraint of trade,” “restriction of competition,” “abuse of dominance,” “exclusionary conduct,” “substantial adverse impact on competition,” “substantial lessening of competition” and the like are inherently broad and flexible. Accordingly, assessing contentions of infringement of these laws often involves complex factual, economic and policy assessments of numerous interacting factors. Some circumstances exist in which it is possible for officials to secure a determination of infringement even where it might be questionable whether this would serve fundamental purposes of competition law. Moreover, some accused targets that may ultimately be entitled to exoneration may have powerful private reasons to avoid contesting official assertions of infringement—to avoid the substantial expense, disruption, extended periods of legal, financial and commercial uncertainty, public opprobrium, and/or contentious relationships with a public institution associated with fully contested proceedings—leading such targets to settle quickly and/or by making concessions that exceed the relief that ultimately might be justified. This may create temptation for officials to press investigations—consciously or unconsciously—beyond the point that best serves fundamental purposes of competition law.
- C. No official contention of infringement should be made before providing respondents a genuine opportunity to settle the matter by consent without additional contested proceedings.
- D. The process of publicizing a contention of infringement should ensure that such publication does not prejudice or otherwise unnecessarily disadvantage respondents. Specifically, publication of any contention of infringement should be accompanied by a clear statement that such contention is subject to assessment on the merits and does not constitute a determination or finding of infringement.

### III. ASSESSING CONTENTIONS OF INFRINGEMENT

- A. Following a contention of infringement, officials should follow specific procedures for the assessment of such contention in accord with the following practices. No finding of infringement should be made absent compliance with such procedures.
- B. Any assessment (hereinafter “first-instance decision”) of a contention of infringement should be made by an independent official or officials, personally identified to the parties.
  - 1. “Independent” in this context means (1) having no prior role in the investigation or in formulating the contention of infringement (except as a neutral decision maker regarding interim or preliminary matters required for management of prior

proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to conduct the proceeding and to make the assessment in a disinterested, efficient and accurate manner.

- C. The decision-making officials should compile a record whose contents are clearly ascertainable by respondents and any reviewing authorities (subject to proportional limitations to protect specific and reasonable confidentiality concerns). Officials should provide specific and enforceable means to exclude from the record all extraneous matter. Off-the-record communications with decision-making officials by the parties or their counsel or other agents or representatives should be prohibited throughout proceedings.
- D. Counsel for respondents should be permitted to introduce all relevant evidence, argument and expert analysis on all material issues (subject to reasonable administration of proceedings—*e.g.*, limits on merely cumulative evidence, reasonable requirements as to timeliness and/or sequence of submission).
- E. All evidence, arguments and expert analysis placed in the record should be subject to challenge on the basis of authenticity, relevance, materiality and/or other potentially significant aspects. All documentary and testimonial evidence, argument and analysis should be subject to challenge by means tailored to provide tests of credibility, completeness and weight.
  - 1. Allowing counsel for parties to challenge inculpatory or opposing testimony by live cross-examination should be permitted to the extent feasible. In legal systems that do not present this opportunity, as in some administrative, inquisitorial and/or civil-law systems, other equivalent means for testing the quality and credibility of such testimony should be made available, such as questioning of witnesses by the independent decision maker *sua sponte* or upon request of the parties.
- F. Presentation of or challenges to evidence, arguments and expert analysis should be made in the presence of the first-instance decision-making official(s).
  - 1. For reasons of efficiency, certain procedural stages may call for written submissions by counsel, such as briefing of a request for summary disposition, a request for narrowing of the issues, or upon final submission of the matter for decision. Where submissions are made in writing, counsel for respondents should have the opportunity for oral presentation of argument before the decision maker(s).

#### **IV. FIRST-INSTANCE DECISION**

- A. Any assessment of infringement should be based only on matters of record as to which targets and their counsel have had full opportunity to respond. The assessment should be in writing, explaining reasons for the assessment of evidence on each issue and the economic, factual and legal analysis relied upon.

- B. A finding of infringement should include a clear explanation of the evidence and the legal and economic theories and analyses that support it. The specification of remedy should be written and should explain why each element of the remedy is required by, and tailored to, the characteristics of the infringement.

## V. REVIEW

- A. First-instance decisions should be subject to review by an independent tribunal.
  - 1. “Independent” in this context means (1) having no prior role in the investigation, accusation, or first-instance proceeding (except as a neutral decision maker regarding interim or preliminary matters required for management of first-instance proceedings, as provided by law); (2) having no specific personal interest in the matter or material relationship to any party; and (3) having sufficient expertise in the law and economics of competition and/or other relevant disciplines to review the first-instance decision in a disinterested, efficient and accurate manner.
  - 2. “Tribunal” in this context means one or more named officials specifically designated to conduct the review and render decision and personally identified to counsel for the parties.
- B. Counsel for the parties should be permitted to address the tribunal directly in face-to-face proceedings and through written submissions.
  - 1. The opportunity for face-to-face proceedings should be subject to the discretion of the independent tribunal to forego such proceedings where they are highly unlikely to affect the outcome of or basis for the decision on review, in which case the tribunal should consider the parties’ written submissions.
- C. Review should be permitted on any issue unless sound policy suggests deference to the first-instance tribunal (*e.g.*, basic fact-finding, routine evidentiary and procedural rulings, assessments of witness credibility and the like).
  - 1. Many basic facts are usually not appropriate for review on the merits, such as whether particular individuals participated in particular communications (cartel cases) or whether particular distributors traded in specific goods (exclusionary conduct cases). By contrast, competition proceedings frequently involve the drawing of inferences (*e.g.*, the existence of conspiracy; whether a practice should be regarded as exclusionary) that implicate important economic and/or competition policy aspects (such as the probability and consequences of mistaken inferences) or otherwise intertwine fact, economic analysis, law and/or policy. Review should be permitted on such issues.
- D. The basis for decision should be confined to matters addressed in the record in the first-instance proceeding (subject to reasonable exceptions for post-decision changes in law or fact and incontestable public-record facts).
- E. The decision on review should be in writing and explain in detail the assessment of and conclusions upon all issues underlying the decision.

**VI. BEST PRACTICES APPLICABLE TO ALL PHASES OF ANTITRUST PROCEEDINGS**

- A. Officials involved in all steps of an antitrust proceeding should possess sufficient expertise in competition law, economics and/or other relevant disciplines to enable them to conduct their duties in a disinterested, efficient and accurate fashion.
- B. All rules and practices governing proceedings—procedure, evidence, review, *etc.*—should be clearly disclosed and made publicly accessible in advance of proceedings. Any exceptions should be proportional and based on specifically identified objective and legitimate reasons.
- C. Officials should provide for an effective system to prevent unnecessary delay at any stage in proceedings.