

For Official Use**English - Or. English****1 September 2021****COUNCIL****Council****DRAFT RECOMMENDATION OF THE COUNCIL ON TRANSPARENCY
AND PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT****(Note by the Secretary-General)****JT03480373**

1. This document presents, in its Annex, the draft Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement (hereafter, the “draft Recommendation”) on the proposal of the Competition Committee for adoption by the Council. The draft Recommendation sets forth principles that should govern competition law enforcement, to ensure that it is transparent and fair. On 22 July 2021, the Competition Committee approved, by written procedure, the draft Recommendation for transmission to Council for adoption [[DAF/COMP/WD\(2021\)45/FINAL](#)].

1. Rationale for developing the draft Recommendation

2. **Transparency** involves making publicly available laws, guidelines, policies, procedures and practices, as well as competition authority decisions and court judgments. **Procedural fairness** involves establishing and following procedures that are fair and clear on the rights and obligations of affected and interested parties, and that provide opportunities for parties to take part in investigative process. Procedural fairness includes the right to request the independent and impartial judicial review of competition law enforcement decisions.

3. A transparent and fair (“due”) competition law enforcement process ensures the impartial and reasonable treatment of subjects of competition investigations and the exercise of their rights of defence, and improves the accuracy and comprehensiveness of decisions by making sure that all arguments are heard and assessed. Observing due process builds the credibility, and reinforces the quality and legitimacy of competition law enforcement. The benefits of due process extend to the competition authorities themselves: following consistent procedures for investigations and decisions and ensuring checks and balances foster internal clarity and self-discipline. However, transparency and engagement must not undermine the effectiveness of the investigation.

4. Competition agencies have different institutional structures to handle cases and take decisions, which depend on their jurisdiction’s legal history and culture, including whether it is a civil or common law jurisdiction and whether the enforcement system is administrative (where the first-instance decision is taken by the competition authority) or judicial (where the decision is taken by the court).

5. Regardless of a jurisdiction’s legal and institutional framework, there are minimum transparency and procedural fairness standards of universal application. Competition law enforcement should be fair, predictable and transparent, combine effective rules, impartial and independent institutions and sound practice, and perceived to be so by affected and interested parties, as well as citizens, maintaining public confidence. Procedural defects can taint investigations, harm the rights of parties, have a negative impact on the effective enforcement of competition law and undermine public confidence.

6. The OECD has developed extensive work on [transparency and procedural fairness standards](#) and recognised their importance in OECD legal instruments concerning competition law enforcement. Namely, the Recommendation of the Council on International Co-operation in Competition Investigations and Proceedings [[OECD/LEGAL/0408](#)] recognises that transparent and fair processes are essential to achieving effective and efficient co-operation in competition law enforcement. The Recommendation of the Council on Merger Review [[OECD/LEGAL/0333](#)] provides that merger laws should ensure procedural fairness for merging parties. The Recommendation of the Council concerning Effective Action against Hard Core Cartels

[[OECD/LEGAL/0452](#)] regulates important aspects of enforcement powers and investigation and decision-making against hard core cartels.

7. The importance of this topic is confirmed by developments in different fora. In 2019, the International Competition Network (ICN) issued [Recommended Practices for Investigative Process](#), and the ICN Steering Group members approved the ICN [Framework for Competition Agency Procedures](#). This is an opt-in framework promoting transparency and dialogue between competition authorities with regard to the implementation of fundamental principles of fair and effective procedures which are based on previous OECD and ICN work.

8. In addition, the International Chamber of Commerce's ("ICC") Commission on Competition had developed a [Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings in 2010](#), and issued [Effective Procedural Safeguards in Competition Law Enforcement Proceedings in 2017](#) that propose measures to protect the rights of the parties and promote effective competition law enforcement.

9. Discussions on transparency and procedural fairness pointed to the need for common principles of competition law enforcement notwithstanding legal, cultural and institutional differences among jurisdictions. This led the Competition Committee to select transparency and procedural fairness as one of the long-term themes for its Programme of Work and Budget for the 2019-2020 biennium. The chief result of this work is the draft Recommendation.

2. Scope of the draft Recommendation

10. The draft Recommendation establishes common principles based on which Members and non-Members having adhered to it (together, "Adherents") can design and evaluate their competition law enforcement system and, if appropriate, undertake policy reforms. The principles include transparency and predictability; independence, impartiality and professionalism; non-discrimination and proportionality; timeliness; meaningful engagement; protection of confidential information; and judicial review.

11. The draft Recommendation builds on good practices developed by the OECD, and considers guidance issued by the ICN and the ICC. It consolidates common principles and reinforces other international standards, which are addressed to competition agencies, by turning them into higher-level policy recommendations to governments and enlisting government support for their implementation.

12. The draft Recommendation is intended to be applied in accordance with Adherents' legal and institutional frameworks.

3. Process for developing the draft Recommendation

13. At its 129th meeting of 8 June 2018, the Competition Committee decided on transparency and procedural fairness as a long-term theme for 2019-20 [\[DAF/COMP/WD\(2018\)6\]](#), and requested that the Secretariat prepare a note on the options for OECD outputs.

14. The Secretariat's note on the principles that could be included in an OECD legal instrument on transparency and procedural fairness [\[DAF/COMP/WP3\(2018\)7\]](#) was

discussed at the 128th meeting of WP3 on 26 November 2018. During the meeting, WP3 requested that the Secretariat prepare a draft Recommendation on Transparency and Procedural Fairness for discussion in 2019.

15. The first draft [[DAF/COMP/WP3\(2019\)2](#)] was discussed at the 129th meeting of WP3 on 4 June 2019 [[DAF/COMP/WP3/M\(2019\)1](#)]. The second draft [[DAF/COMP/WD\(2019\)66](#)] was discussed at the 130th meeting of WP3 on 2 December 2019 [[DAF/COMP/WP3/M\(2019\)2](#)]. The third [[DAF/COMP/WP3/WD\(2020\)23](#)] was discussed in virtual sessions, and a fourth revised draft [[DAF/COMP/WP3/WD\(2021\)1](#)] was issued. The WP3 approved the fifth draft [[DAF/COMP/WP3/WD\(2021\)30](#)] on 2 July 2021 with minor corrections, and the Competition Committee approved the sixth draft (which is reproduced in the Annex) [[DAF/COMP/WD\(2021\)45/FINAL](#)] on 22 July 2021 and agreed to its transmission to Council for adoption.

16. Before the Committee's approval, a webinar was organised on 6 April 2021 with the ICN, Business at OECD (BIAC), the International Bar Association and the ICC's Commission on Competition, the United Nations Conference on Trade and Development, the World Bank and the World Trade Organisation (the last three being Observers to the Competition Committee). Participants discussed the key principles of the draft Recommendation and its future implementation.

17. In spring 2021, the Network of Economic Regulators, a subsidiary body of the Regulatory Policy Committee, was consulted and sent views on the fourth draft.

4. Implementation, dissemination and non-Member adherence

18. The draft Recommendation includes a provision instructing the Competition Committee to:

- “*consider developing an implementation toolkit based on Adherents' enforcement experiences*”. The implementation toolkit would provide detailed guidance and good practices on how to implement the different substantive policy recommendations contained in the draft Recommendation. The toolkit could be developed in an inclusive process, with all Adherents and relevant stakeholders contributing to its development;
- “*report to the Council on the implementation, dissemination and continued relevance of [the] Recommendation no later than five years following its adoption and at least every ten years thereafter*”. The report to Council would bring together good practices of Adherents identified through the monitoring of implementation activities as mentioned above. It would assess the relevance and impact of the draft Recommendation with a view to identify follow-up actions to improve implementation and dissemination, and consider whether the draft Recommendation requires revision.

19. Several tools will be made available to support the implementation by Adherents and the preparation of the report to Council. In particular, the draft Recommendation aims to provide a structured checklist, which could be used for:

- Peer Reviews: Adherents would be able to undertake peer reviews voluntarily whereby they would be assessed by fellow Adherents. It is proposed that the Secretariat would facilitate such peer reviews and that the review would be presented to WP3 or the Competition Committee for discussion. The modalities of

these peer reviews would be defined in co-operation with WP3 or the Competition Committee and all Adherents, following the adoption of the draft Recommendation.

- Self-assessments: Adherents would be able to voluntarily conduct a self-assessment against the draft Recommendation and present their findings to WP3 or the Competition Committee.
- Accession reviews: accession candidates are requested to position themselves vis-à-vis all legal instruments adopted within the OECD framework prior to joining the Organisation.

20. The draft Recommendation also invites the Secretary-General and Adherents to disseminate it. Once adopted, the draft Recommendation will be available on the [online Compendium of OECD Legal Instruments](#). A booklet with the draft Recommendation and background information will be accessible in PDF format to facilitate dissemination.

21. In addition, the Secretariat will share the draft Recommendation through its available communication tools, including at relevant national and international events in which it participates, as well as through the ICN. The Secretariat will develop work related to the draft Recommendation in relevant roundtables to be hosted by the Competition Committee and its subsidiary bodies. It will also promote the draft Recommendation in OECD outreach events and activities, including during regional meetings and seminars.

22. The draft Recommendation will be open to non-Member adherence. Non-Member Adherents will be involved in the efforts to support the implementation of the Recommendation, including in the report to Council. Associates in the Competition Committee (Romania and Brazil) participated in its development and will be considered as having adhered to it as of the date of its adoption, in line with the Revised Resolution of the Council on Partnerships in OECD Bodies [[C\(2012\)100/REV1/FINAL](#)].

23. Finally, it is proposed that the Participation Plan of the Competition Committee be updated by Council to include adherence to the Recommendation as a condition that any non-Member seeking Associate status would be required to meet, as is the case for the other Recommendations under the responsibility of the Committee.

5. Proposed action

24. In the light of the preceding, the Secretary-General invites the Council to adopt the following draft conclusions:

THE COUNCIL

- a) noted document [C\(2021\)98](#);
- b) adopted the draft Recommendation of the Council on Transparency and Procedural Fairness in Competition Law Enforcement set out in the Annex to document [C\(2021\)98](#) and agreed to its declassification;
- c) welcomed the adherence to this draft Recommendation at the time of its adoption by Brazil and Romania;
- d) agreed to add adherence to the legal instrument mentioned under b) as a condition for Associate Status in the Competition Committee and to amend its Participation Plan accordingly;

- e) recalled that the participation of non-Members in OECD bodies is governed by the Revised Resolution of the Council on Partnerships in OECD Bodies [[C\(2012\)100/REV1/FINAL](#)].

ANNEX. DRAFT RECOMMENDATION OF THE COUNCIL ON TRANSPARENCY AND PROCEDURAL FAIRNESS IN COMPETITION LAW ENFORCEMENT

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;

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- 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.