PROCEDURAL FAIRNESS IN ANTITRUST ENFORCEMENT: A COMPARATIVE ANALYSIS

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This article examines procedural fairness as the architecture of antitrust enforcement and compares how major jurisdictions address it across the lifecycle of investigations and sanctions. It argues that formal rights alone are insufficient and emphasizes the usability of rights at critical moments, highlighting recurring weaknesses in notice, access to evidence, timing, and review in the various jurisdictions. Key themes include the need for meaningful pre- and post-search controls, early and clear articulation of theories of harm, timely and practical file access, the power to obtain exculpatory and third-party evidence as well as evidence from other parties, and genuine equality of arms despite structural enforcement asymmetries. The article advocates for stronger confrontation and discovery rights, greater institutional independence, robust attorney-client privilege protection, proportionate and challengeable remedies, and appellate review that reaches facts and economics, contending that such reforms would enhance legitimacy without undermining effective antitrust enforcement.

I. INTRODUCTION

Procedural fairness is the hidden architecture of antitrust enforcement. The substantive law tells us what conduct is prohibited, but procedure determines whether the state can make and prove its case in a way that is legitimate, accurate, and worthy of confidence. That distinction matters more in antitrust than in many other fields because antitrust disputes are often fact-intensive, economically complex, and expensive to investigate and defend. They also carry unusually high stakes. A company may face a multi-billion-dollar fine, injunctive relief that changes the structure of a business, or years of reputational damage. An individual executive may face personal liability, professional ruin, and in some jurisdictions, such as the United States even prison. In that setting, procedural rules are not mere housekeeping. They are the difference between a system that is disciplined by fairness and one that is driven mostly by institutional momentum.[2]

The comparative experience shows that no major jurisdiction has solved these problems completely. The United States gives strong formal protection in some respects, especially through the Fourth Amendment for protections against searches, the Fifth Amendment (e.g., right against self-incrimination), the Sixth Amendment (e.g., right to a fair trial, right to confront witnesses), judicial review, and adversarial litigation (cross-examination at trial, access to the evidence and to confront witnesses at trial, ability to obtain evidence).[3] Yet it also tolerates very broad grand jury powers[4], little or no pre-indictment discovery, and, in criminal matters, extremely constrained defense tools. The European Union often offers more elaborate written procedures and more developed file access at certain stages, but it also relies heavily on administrative enforcement, compressed deadlines, and investigative structures that blend fact gathering with decision making (judge and prosecutor combined).[5] Asian jurisdictions, especially Japan, sit somewhere else on the spectrum and can resemble the European model in dawn raids and early opacity. The result is a patchwork of systems that all claim to be fair, but that provide fairness in very different ways, at different times, and with very different degrees of practical effectiveness.[6]

What emerges from the discussion is a recurring theme: fairness is not only a matter of formal rights on paper, but of whether those rights are usable when they matter most. A right to respond is weaker if the response period is unrealistically short. A right to obtain evidence from your adversary is weaker if critical material is in the hands of third parties (which is often the case in factually complex antitrust cases), and there is no mechanism to compel production of documents or other evidence. A right to appeal is weaker if review is deferential, if the reviewing party is not independent from the government, if the scope of review is narrow, or if review comes too late to matter. This article examines those recurring problems. The goal is to identify where procedural design enhances trust and where it leaves parties vulnerable to overreach or error.

II. NOTICE, TRANSPARENCY, AND THE INITIAL SEARCH STAGE

The first procedural question is whether the state can search, raid, or seize evidence without adequate advance justification. In the United States, the answer is shaped by the Fourth Amendment to the U.S. Constitution's Bill of Rights and the doctrine of judicial warrants. That is not a trivial protection. A warrant requires the government to articulate a basis for intrusion and to persuade a neutral magistrate judge that the intrusion is justified. Even if the standard can sometimes be met easily, the requirement itself matters because it inserts an independent actor between the investigator and the target. The search is therefore not just a function of agency will. It must be legitimated through a review mechanism that sits outside the enforcement team.

The European Union historically took a different path. Dawn raids by the European Commission have long been a hallmark of competition enforcement. They are effective from the agency's point of view because they preserve surprise and reduce the risk of document destruction. But surprise also creates vulnerability. Enforcement teams arrive at a company's premises early in the morning, often without the same prior

2 D. Daniel Sokol & Andrew T. Guzman, *Antitrust and Procedural Fairness* (2019).

3 U.S. Const. amends. IV, V, VI.

4 In the United States, after the *R. Enterprises* decision, relevancy is often considered by many as no objection to a broad U.S. grand jury subpoena; many observers view the attorney-client privilege as the only objection to such a subpoena. 298 U.S. 292 (1991). In European Union case law, unlike the United States, there is no in-house counsel privilege at all, compounding the procedural defects of EC dawn raids.

5 Ian S. Forrester, *Due Process in EC Competition Cases: A Distinguished Institution with Flawed Procedures*, 34 European Law Review 817, 821 (2009) ("I submit that the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR" referring to the European Convention on Human Right and Fundamental Freedoms).

6 The authors are optimistic that over time, the spread internationally of antitrust laws has in turn led to court challenges that have expanded due process rights. But that takes time. And judicial action. J. Mark Gidley and Maxwell Hyman, "The Emergence of Due Process following the Growth of International Antitrust Enforcement," in Eleanor M. Fox et al. (eds.), *Antitrust in Emerging and Developing Countries* (New York: Concurrences Review 2016).

judicial screening that would be required for a warrant in the United States. That is why the General Court's decision in *Nexans* mattered.[7] After 30 years of EC dawn raids, a post-facto challenge to the dawn raid on the basis of that raid having exceeding the probable cause was heard and prevailed. The decision in *Nexans* did not eliminate dawn raids, but it did clarify that raids cannot be left entirely to administrative instinct. And it signaled that the EC staff will be held accountable – albeit via post-facto judicial review rather than through the pre-search procedures of the United States and other countries. There must be proper, substantiated cause, and there must be meaningful review.

The existence of review is not the same as the effectiveness of review. A purely post hoc remedy may correct obvious abuses, but it does not prevent the privacy invasion, disruption, and strategic disadvantage that flow from an overbroad or unwarranted raid itself. That is especially significant in antitrust investigations, where a search may uncover documents, internal communications, in-house communications that would receive protection in many non-EU countries, and data structures that shape the case for years. Once that material is collected, the practical balance of power changes. Thus, a system that depends only on after-the-fact correction may be too little, too late. A fairer model would treat pre-search scrutiny as an essential part of enforcement legitimacy, while still preserving the ability of agencies to act quickly when there is a genuine need.

III. NOTICE OF THE INVESTIGATION AND THE SCOPE OF THE INQUIRY

Even when a search is lawful, the parties still need to understand what they are being investigated for. That is where notice becomes central. In the United States, the most common notice mechanism in complex antitrust matters is the grand jury subpoena. On paper, a subpoena tells the recipient what to produce. In practice, it often says less than the recipient needs to know. The subpoena may identify broad categories of documents, but because grand jury power is expansive and relevance limitations are weak, the request can feel less like a defined charge and more like a wide-ranging search for something incriminating. In practice, the grand jury subpoena is simply the subpoena rolling out of the prosecuting attorney's computer. The government's ability to ask for information can be functionally unlimited. That is why some lawyers describe grand jury investigations as virtually limitless.

In Europe, the same problem appears in a different form. The early phases of a competition investigation may be highly opaque, and the target may not know whether the agency is focused on a cartel, an information exchange, a hub-and-spoke theory, unilateral conduct, or some combination of all of the above. That uncertainty can be costly. Companies may spend months or years trying to infer the theory of the case from fragments of correspondence, raids, and meetings with investigators. Meanwhile, the investigation team may already have settled on a narrative.

Asia does not present one uniform model. Notice practices vary widely and can remain opaque. Across systems, the initial stage often lacks the kind of clarity that would allow a target to prepare a focused response. The party may know that it is under investigation, but not exactly for what. That ambiguity can serve legitimate law-enforcement goals, yet it also creates a structural imbalance. The government sees the case from the inside; the target sees it from the outside. Procedural fairness requires narrowing that gap as early as possible, not just at the moment of formal accusation.

IV. THEORIES OF HARM, MARKET DEFINITION, AND THE HIDDEN CASE AGAINST THE TARGET

A recurring concern is whether the legal theory of harm is clearly articulated. This is one of the most important fairness issues in antitrust because the theory of harm tells the defendant what conduct is actually alleged to be unlawful. Without that articulation, the party cannot decide whether to settle, whether to challenge the case, or even what facts matter most. The difficulty is that antitrust agencies often do not like to reveal the theory too early. They may still be investigating, but they may also be hedging strategically. Either way, the defense is left to guess.

That problem is intensified by the importance of market definition. In antitrust, the market is not a mere background detail. It often determines the context for market power, competitive effects, dominance, and the plausibility of procompetitive justifications. Yet market definition may be only loosely disclosed in the earliest phases. In some cases the target learns the market theory only when the formal complaint

7 *Nexans France SAS, et al. v. European Commission*, Case T-135/09, Judgment of the General Court (Eighth Chamber), 14 November 2012, ECLI:EU:T:2012:596, at Paras. 40, 60, 91 (Para. 40: "it must be observed that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of EU law. That principle was laid down in Article 7 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000, under which '[e]veryone has a right to respect for his or her private and family life, home and communications." (citations omitted); Para. 91: "Accordingly, it must be found that the Commission has not demonstrated that it had reasonable grounds for ordering an inspection covering all electric cables and the materials associated with those cables.").

or indictment is filed. At that point, the agency has had the advantage of months or years of shaping the record.[8] The defendant is forced into a compressed period of reaction.

The practical effect of the asymmetry is that parties can be left trying to determine not merely what happened, but what the government thinks happened. That difference matters because antitrust violations are often not self-evident. Unlike a traditional property crime or physical assault, an antitrust case may turn on economic context, counterfactual reasoning, and inferences about incentives. The same conduct can look lawful or unlawful depending on the market framework and the theory of competitive harm. That makes the need for early clarity even more acute. If the state wants to impose severe sanctions, it should explain the theory sufficiently early that the respondent can engage with it meaningfully.

V. ACCESS TO EVIDENCE, TIMING, AND THE PRACTICAL MEANING OF DISCLOSURE

Access to evidence is often described as if it were a simple binary question: either the evidence is disclosed or it is not. This framing is too narrow. Timing is just as important as access. In the United States, defendants in criminal antitrust matters often will not receive meaningful evidence until after indictment. At the point, the damage is done: the target of the indictment faces nationwide if not global adverse publicity (and potential stock impact and reputational loss), often in a press conference orchestrated by prosecutors. That means the government may spend a long period building a record, interviewing witnesses, and collecting digital material before the defense can even see what the government has. And unfortunately, even given criminal discovery tools, and the existence of the Brady obligation to turn over exculpatory evidence, often the government will drag its feet and produce the evidence only after protracted efforts at disclosure near the eve of trial.

In Europe, by contrast, the problem is often not the absence of a file entirely, but the size of the file combined with the speed of the response period. A party may receive hundreds or even thousands of paragraphs of allegations and still be asked to answer within 30, 60, or 90 days.

Those deadlines matter because antitrust cases are not simple. They involve long email chains, chat records, pricing data, internal strategy documents, market studies, and economic models. A meaningful response requires not just reading documents but understanding them in context, interviewing employees, checking third-party information, and presenting the facts in a manner defensible both factually and legally. Context matters: Was there a legitimate joint venture? Were the communications "horizontal" or "vertical" communications among buyers and sellers.[9] Were the sellers working to combat buyer fraud? There is a tremendous amount of "gray" in the decisional doctrine that has grown in U.S. antitrust law, and as well, in Europe. A short response window may appear to technically satisfy due process in form, yet still be deeply unfair in substance. Fairness is not measured by whether a clock exists. It is measured by whether the clock makes a real response possible. Too often a case team develops a narrative all its own and goes blind towards the exculpatory evidence.[10]

The role of file access in enabling defense work is important. Jurisdictions that provide pre-indictment or pre-sanction file access generally do better because they allow the defense to begin organizing its response before positions harden. But file access alone is not enough if it comes too late. Many if not most U.S. guilty pleas occur before any indictment or full-blown sharing of the government's evidence. By the time a defendant receives a formal complaint, the agency's theory may already have been fixed, the press may already have portrayed the target as culpable, and the party's ability to shape the narrative may have been lost. Procedural fairness therefore requires a combination of early notice, timely file access, and enough breathing room to make use of what has been disclosed.

VI. EXCULPATORY EVIDENCE AND THE DANGERS OF CONFIRMATION BIAS

One of the most serious concerns is the disclosure of exculpatory evidence. In the abstract, the point is straightforward: if the government possesses material that cuts against its theory, the defense should have it. In practice, however, things are rarely so tidy. We refuse to assume bad

8 A frequently mentioned shortcoming is the extremely short periods of time for responses in European proceedings to a Statement of Objections, itself another due process infirmity. The investigating staff may have interviewed witnesses and obtained documents, drafting an SO running for hundreds of pages, written over a period of years, and then insist on response in a matter of a few months, often as short as 60 days.

9 The foreign exchange cases were an egregious example of confusion in the role between banks acting as competing sellers (horizontal), as the government wanted to portray them, or traders constantly in a state of actual or potential buyer-seller relationship (vertical). Strikingly, the jury took only four hours to acquit foreign exchange traders at the heart of the government's sprawling forex antitrust cases; approximately $10 billion in fines and penalties were assessed against organizations, but the jury acquitted the members of a key chatroom quickly after a three-week trial. *United States v. Usher*, October 2018 (S.D.N.Y.).

10 *Intel Corp. v. European Comm'n*, Case C413/14 P, ECLI:EU:C:2017:632, Judgment of the Court (Grand Chamber) of 6 Sept. 2017 (addressing how the Commission withheld exculpatory evidence).

faith as the default explanation. Government lawyers and investigators may honestly believe they are doing the right thing. The problem is that they may not appreciate the exculpatory character of evidence because they are reading it through the lens of a developing theory. That is where confirmation bias enters. Once a case team has formed a view, information that supports the view is noticed more easily than information that undermines it.

Antitrust cases are especially vulnerable to this problem because they are often gray rather than black and white. This contrasts with a simple theft or physical harm case; antitrust is not a chalk-outline crime. In an antitrust matter, there may be no obvious smoking gun. There may be an ambiguous pricing memo, a set of phone calls, an industry meeting, a pre-existing joint venture, or parallel conduct that can be read in multiple ways. Different accounts of the meeting may exist. In that environment, what counts as exculpatory may not be obvious to the investigator. The adversarial system matters – with the ability to confront the government's witnesses with cross-examination and the further ability to call and present witnesses for the defense -- precisely because it allows someone outside the case team to say, this evidence cuts the other way.[11]

The discussion of the foreign exchange investigation underscores the stakes. In that case, an internal interview conducted nearly two years before indictment about the construction of a benchmark with the manager of that benchmark suggested the benchmark could not be rigged, yet that information apparently did not stop charges from being pursued.[12] Whether or not every detail of that episode is framed exactly the same way by all commentators, the larger lesson is unmistakable: if evidence that could materially affect charging decisions is not surfaced in time, the system risks punishing people before it fully understands what the evidence means. And even where the truth eventually emerges, the damage to the accused may already have become irreparable. That is why exculpatory evidence disclosure is not a technicality. It is a structural safeguard against wrongful or overstated enforcement – it is a constitutional right in the United States.[13]

VII. DISCOVERY RIGHTS AND THE PROBLEM OF THIRD-PARTY EVIDENCE

Discovery is one of the most important procedural differentiators across jurisdictions. In U.S. civil cases, broad discovery gives the defense tools to ask for documents, depose witnesses, and test assertions through compulsory process. That is not just a convenience. It is often the only way to reconstruct what happened in a complex commercial dispute. Criminal cases, however, are much more constrained. The proposed five-deposition amendment reform in U.S. criminal cases reflects a recognition that current tools may be inadequate for complex antitrust prosecutions. In a case involving millions of emails and chat messages, even a small number of depositions can materially change the defense's ability to test the government's case.

Europe remains even more limited. The EU's 2014 Damages Directive has pushed some systems toward greater disclosure, but the development is embryonic. Many continental systems remain inquisitorial in design, with informal procedures at best, and that design affects the defense's practical access to evidence. The problem is not simply procedural tradition; it is that antitrust evidence often lives in third-party hands. Customers may know whether a price increase was competitive or collusive. Competitors may know whether a meeting was innocuous or coordinated. Suppliers may have correspondence that either corroborates or undermines the agency's theory. If there is no realistic mechanism to reach that evidence via discovery, the defense may be forced to argue in the dark. By the same token, letting claimants assert claims in European courts for damages without having to produce the context documents for the conduct or its consequences is a violation of due process per se.

There is specific difficulty of a lack of subpoena power in defendants. Without a subpoena or comparable compulsory tool, parties may be unable to obtain key emails, WhatsApp messages, text messages, and internal records from non-cooperating sources. That is a major problem because antitrust cases increasingly turn on digital traces. A single message thread can matter as much as a long economic report. Yet those records may not be voluntarily produced, especially where third parties fear retaliation or regulatory pressure. The result is that the side with coercive power has more of the truth available to it. A fairer system would at least provide a realistic path to accessing third-party evidence when the stakes justify it. And this infirmity may be again compounded by European procedures may insist on a rapid Statement of Defense before even internal evidence of the client can be fully processed.

11 For this very reason, many observers believe that antitrust prosecutors should practice "open files" and produce *all evidence* to the defense that the government has obtained – precisely because the view of its "exculpatory" nature may be lost on a prosecution case team in antitrust that is too tied in to its own view of the facts to appreciate the evidence's exculpatory effect.

12 DX-0819, interview of Shirley Barrow, supervisor of the WMR index, 12 March 2015. Ms. Barrow informed the Antitrust Division that the WMR fix calculations had protections against manipulation including making prices unweighted. The Forex traders were indicted nearly 2 years later on the theory that large trades could move the WMR index. The traders were acquitted quickly by the New York jury after NYC in Oct. 2018.

13 *Brady v. Maryland,* 373 U.S. 83 (1963) (prosecution's suppression of evidence favorable to an accused upon request violates the due process clause, where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution in suppressing the evidence).

VIII. EQUALITY OF ARMS AND THE WEIGHT OF GOVERNMENT POWER

Equality of arms is a foundational idea in both common-law and human-rights traditions, but it has been elusive in practice in many jurisdictions in antitrust case.[14] In criminal matters, prosecutors in the United States possess enormous leverage and asymmetric access to evidence: The grand jury is ex parte – the defense usually does not have access to the proceedings until after indictment; the public is barred from grand jury witness examinations and no defense lawyer is present to ask the questions that would tell "the rest of the story." Grand juries can interview witnesses, collect large volumes of evidence, and shape the case narrative long before the defense can effectively respond. In Europe and other administrative systems, the imbalance may be even stronger because the state controls both the investigative and prosecutorial machinery and may also influence the adjudicative process.

It is not merely that the defense has fewer resources. The deeper problem is that the government's tools are structurally different. The state can compel, search, interview, and preserve evidence.[15] The defense often cannot, at least not during the investigation phase. Even where corporate defendants have substantial internal resources, those resources are no substitute for formal access powers. Companies may know their own files, but they do not know what the agency has, what a leniency applicant said, what other witnesses said, or which third-party communications the state considers pivotal. That is why equality of arms cannot be achieved by saying that a large company can hire many lawyers. What matters is whether the procedural framework gives both sides a comparable ability to access the evidence in the hands of accusers and third parties and to develop and test the case through means such as cross-examination – a constitutional right in the United States.[16]

This imbalance can lead to real substantive error. Innocent people are charged every year, and that is lamentable. In antitrust cases, innocent people (and companies) plead guilty. In antitrust, the risk is heightened because investigators may bring charges in cases that are ambiguous, novel, or economically complex. A theory that sounds plausible internally may not survive real adversarial testing. Equality of arms is important not because it guarantees that the defense will win, but because it ensures that the charge has been exposed to meaningful challenge before the state acts as though its theory were truth.

IX. THE RIGHT TO BE HEARD, WRITTEN SUBMISSIONS, AND ORAL HEARINGS

A fundamental principle of due process is the right to be heard, the right to secure evidence in the hands of others, and the ability to test the evidence through confrontation and cross-examination. The European Convention on Human Rights in Article 6 recognizes the importance of a "fair and public hearing" conducted "by an independent and impartial tribunal established by law." Article 6 also recognizes the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf." But to date these principles have not been given full force by current European competition proceedings.

The right to be heard is one of the most visible procedural guarantees, but its practical value depends on the forum. In the European Union, the statement of objections has been the formal mechanism for response to competition charges. It is often detailed (an "SO" can run hundreds or even a thousand paragraphs) and allows for lengthy written submissions – albeit often under potentially unreasonable deadlines calculated to reduce the defense's ability to present the truth. Written submissions of the defense can be effective when they are paired with enough time and access to evidence – both in the hands of accusers and third parties – but that takes having discovery powers. Written advocacy allows for careful explanation of economics, fact patterns, and legal distinctions. It can be particularly useful in antitrust because the issues are often technical and the record is large.[17]

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14 Renato Nazzini, *Competition Enforcement and Procedure* (2d ed. 2015).

15 And regrettably, sometimes government antitrust authorities have destroyed evidence, such as the interview tapes of a government witness in the ACCC's case against Prysmian and Nexans.

16 The Sixth Amendment to the U.S. Constitution provides a number of critical rights including the right to confront witnesses against the accused. In *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009), the US Supreme Court considered whether the State could merely submit a lab report concerning blood type or blood-alcohol-content (BAC). The Supreme Court overturned the procedures in more than 30 U.S. states by ruling that the Sixth Amendment fair trial and confrontation rights meant that the State must produce at trial the laboratory expert who produced that report, not merely put the report into evidence. "The Sixth Amendment guarantees a defendant the right 'to be confronted with the witnesses *against him*." The majority opinion for the court noted the long-decried as infamous prosecution of Sir Walter Raleigh, convicted on the basis of an out of court hearsay statement with no ability to confront his accuser with questioning.

17 Amnesty programs amplify the risk. These programs encourage the "gray" conduct to be sinisterized. So too do government prosecutors overreaching in amnesty cases. In United States v. Stolt-Nielsen, the district court ruled that the prosecution violated the amnesty agreement the Antitrust Division had entered into with Stolt-Nielsen. 524 F. Supp. 2d 586 (E.D. Pa. 2007). Critically, witnesses presented by the government were rejected by the court as incredible.

At the same time, we are skeptical about the adequacy of oral hearings that are too short or too constrained. A hearing lasting two or three days, despite the pendency of penalties running into the tens of millions, hundreds of millions, or even billions of euros (or dollars), especially after a voluminous statement of objections, may not offer enough opportunity to test the evidence. The comparison with U.S. criminal trials, which may last several weeks, drives home the point.[18] A hearing that does not permit confrontation violates notions of due process.[19]

A hearing is meaningful not merely because it exists, but because it allows a party to confront accusations, question assumptions, and, cross-examine witnesses. The U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) put it this way:

> "To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that the evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. . . . .Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes."

Cross-examination is one of the most powerful devices in adversarial law because it can reveal gaps, distortions, bias, fraud, and overconfidence in the presenting side's case.

Some jurisdictions remain strongly inquisitorial and may not welcome this adversarial style. Yet in complex antitrust matters, a system that deprives the defense of meaningful oral testing will struggle to surface the truth. Written submissions are important, but they are not always enough – particularly where the exonerating evidence in the hands of accusers or third parties and yet there is no process for obtaining it. A mere written presentation cannot capture the dynamics of a witness's recollection, the pressure of a pointed question, or the weaknesses in a government's narrative. A fair process should therefore preserve both written and oral channels, with enough scope to make each of them real rather than ceremonial.

X. IMPARTIALITY, INDEPENDENCE, AND INSTITUTIONAL BIAS

One of the most important themes is the concern about separating investigative and decision-making functions. In the United States, criminal and many civil matters are decided by judges and juries who are institutionally separate from the enforcing agency – the constitutional separation of powers and the guarantees of constitutional fair trials. That separation of function of course does not guarantee correctness, but it does reduce the risk that the same institution will investigate, accuse, and judge all at once. The line between those roles is much less clear in some administrative systems – an issue that has also arisen in the United States with certain independent agencies which use Administrative Law Judges (ALJs) who are employees of the prosecuting agency. That concern is especially pointed in Europe.

The issue is not that administrators are inherently biased in a crude sense. People in enforcement agencies are human beings with incentives. They want to be rewarded for bringing cases. They may develop a sense of ownership over the investigation. They may identify with the enforcement narrative. Over time, that can create institutional momentum. When a person spends years building a case, it becomes psychologically harder to see weaknesses in it. That is one reason why independent scrutiny is so important. A decision maker outside the investigative chain can ask the uncomfortable questions the case team may no longer be asking.

Some systems do a better job of providing a meaningful "day in court". That phrase matters because it captures more than formal access. It suggests a setting in which the defense can appear before a genuinely neutral adjudicator and know that the facts it presents and its arguments are being assessed by someone who is not already invested in the investigation. For a field like antitrust, where the facts are complex and the law often ambiguous, independence is not a luxury. It is one of the main ways the system protects itself from self-confirming error.

18 The foreign exchange criminal antitrust trial ran to three weeks time: the government's cooperating and immunized accuser was subject to extensive cross-examination, the government's foreign exchange experts were forced to admit many of the key points of the foreign exchange traders' defense, the government's 2015 interview memo (DX-0819) in which the author of the forex index had described the index as not subject to manipulation due to the fact that trades were unweighted (large trades could have no undue effect) and the traders were able to put on their own fact and expert testimony. With the benefit of three weeks' of trial testimony, the swiftness of the jury's acquittal of all three traders speaks to the persuasiveness of the evidence presented by the defense at this trial. *United States v. Usher* (S.D.N.Y. Oct. 2018).

19 So too does a case where the government hides the identity of a key witness. This issue arose in the ACCC's case against Prysmian and Nexans, where the ACCC sought to hide the identity of its immunity witness, "Mr. A." Judge Bruce Lander in *ACCC v. Prysmian Cavi E Sistemi Energia S.R.L.* [2011] FCA 938 (22 Aug. 2011) ruled that Mr. A's identity must be revealed so that the respondents can search their records and "test the[] assertions" made by the witness.

XI. BURDEN OF PROOF, STANDARDS OF PROOF, AND THE REALITY OF CHARGING DECISIONS

The burden and standard of proof are often discussed as though they are fixed labels, but there is a more complicated reality. On paper, the law may clearly require proof beyond a reasonable doubt in criminal cases or a lower civil standard in administrative matters. But the real question is how those standards operate in practice, especially at the charging stage. In the United States, the standard needed to indict is much lower than the standard required to convict. That means people can be pulled into criminal litigation even when the evidence has not yet been tested to the courtroom standard.

Antitrust being treated more like a preponderance case in practice is important. The government may believe that because a theory is economically plausible, it is sufficient to move forward. But plausibility is not proof. When agencies or prosecutors move too quickly, they can create a mismatch between the evidentiary threshold used to start the case and the seriousness of the consequences imposed if the case proceeds. The result is a system that may be more comfortable with accusation than with restraint.

The discussion also notes that much depends on gatekeepers. If the formal burden is low at the charging stage, then the institutional responsibility to screen weak cases becomes greater, not smaller. That responsibility rests on prosecutors, agency heads, and political appointees who are supposed to exercise judgment before bringing the case. The quality of that judgment matters immensely. A system can have a high formal burden and still produce weak cases if the gatekeepers are too aggressive, but it can also have a low formal burden and still function reasonably if the decision makers are disciplined. We are skeptical that this discipline is always present.

XII. PRESUMPTIONS, ECONOMIC ANALYSIS, AND THE CHALLENGE OF REASONED DECISION MAKING

Antitrust is filled with presumptions—about market share, dominance, collusion, parallel conduct, and information exchange. Presumptions can help agencies, but they can also become shortcuts if they are applied too rigidly. A presumption may be useful as a starting point, yet a fair system must always leave room for rebuttal. The defense should be able to engage the presumption with factual evidence and argument, not merely by objecting to it in the abstract. And that includes the ability to gather the facts to respond to the allegations.

The role of economics makes this even more complicated. Antitrust economics is in a difficult period, perhaps the most difficult in decades. Economic analysis remains indispensable, yet currently there seems less consensus than in earlier eras about the proper use of models, market structure evidence, and econometric methods. Some judges and agencies have responded by appointing their own economists. That can be helpful, but it does not eliminate the deeper problem: economic arguments are often contestable, and contestability is not the same as proof. The more "economics-driven" the case, the more important it is that decision makers explain not only what they decided but why they found one economic story more persuasive than another. Sound economics can be presented with clear facts and articulation.

Antitrust is not always a "chalk-outline" crime. Unlike offenses with a visible victim or a clear physical event, antitrust harm is often inferential. It may depend on counterfactuals, competitive effects, and the significance of ambiguous communications. That makes transparent reasoning essential. A reasoned decision maker should show how the facts support the legal conclusion, how competing inferences were weighed, and if a decision is for the government authority, why the defense's account was rejected. Without that explanation, review becomes difficult and the losing party cannot know whether it lost because the evidence was weak or because the decision maker was simply unpersuaded by the theory. It also means that a government's antitrust case must be subjected to the test of competing factual evidence and cross-examination to confront the government's account.

XIII. TIMELINESS, LOSS OF EVIDENCE, AND THE COSTS OF DELAY

Timeliness in antitrust is complicated because antitrust investigations are inherently slow and complex. Restraint is appropriate. Complex cases may require time to collect data, interview witnesses, understand markets, and test economic models. But the fact that cases are complex does not mean that delay is harmless. A prolonged antitrust investigation can create reputational damage, uncertainty, and practical prejudice. For individuals, as then-Attorney General Robert H. Jackson noted in his famous 1940 address, *The Federal Prosecutor*, government attorneys and the grand juries they control have awesome powers.[20] The criminal accusation itself may become a life-altering event long before any verdict is reached, with devastating consequences for employment, health, and family, often with little or no recourse when the government's case fails.

The potential loss of evidence is also important. Statutes of limitations exist in part because evidence degrades over time. Even though digital records often can persist longer than paper records, access still becomes more difficult as employees move, memories fade, systems change, and context disappears. An email chain may survive, but the person who wrote it may no longer be available to explain what it meant. A chat message may be retained, but the surrounding business context may be lost. That is why procedural systems need to worry not only about whether evidence exists, but whether it can still be meaningfully understood.

The best answer may differ for companies and individuals. A company may prefer a slower but more careful process if the alternative is a rushed and potentially erroneous decision. An individual may care much more about prompt vindication because the harm to personal reputation is immediate and severe and often irreversible. Timeliness is not a one-size-fits-all concept. It must be evaluated against the nature of the defendant and the gravity of the consequences.

XIV. APPEALS AND THE SCOPE OF REVIEW

A right of appeal to an independent body is one of the system's most important structural safeguards of due process. It ensures that a single decision maker does not have the final word and that legal or factual errors can be corrected. The presence of a truly independent and impartial review of the decision below can deter abusive prosecutions. Thus, we emphasize the behavioral effect of appellate oversight: lower tribunals may act more carefully when they know their decisions will be examined. That is a realistic account of how institutions behave. The presence of a higher court can improve discipline even before a case is appealed.

But not all review is equally useful. If review cannot reach the facts, or if it is too deferential to agency findings, then the review may preserve error or even publicly legitimate it rather than correct it. In antitrust, that is especially dangerous because findings often depend on complex inferences, economic judgments, and assessments of credibility. A review process that cannot look meaningfully at those matters may do little more than confirm the original decision.

Apart from findings of liability, causation and remedies and penalties should be fully challengeable on appeal. That is essential because antitrust sanctions can be immense. A fine that seems justified on paper may still be disproportionate in light of the actual evidence or the defendant's role. Appellate review provides a check on excess. It also reinforces the idea that enforcement is not finished merely because the agency has spoken. The decision must survive independent scrutiny if it is to be trusted.

XV. PRIVILEGE, CONFIDENTIALITY, AND THE INTERNAL LIFE OF COMPLIANCE

We are concerned about privilege, especially the lack of in-house privilege in Europe.[21] The point is not simply that lawyers prefer confidentiality. It is that companies need candid legal advice in order to comply with competition rules – this is particularly true in antitrust where the law is complex and nuanced, and much conduct is "gray." In-house lawyers often are the people best positioned to advise business teams in real time. If those communications are not privileged, companies may hesitate to put advice in writing, may over-copy outside counsel, or may fail to create a clear record of compliance efforts. None of those outcomes supports competition law's professed aims. A robust attorney-client privilege encourages businesspersons to consult with lawyers in advance; the absence of protections of attorney-client privilege means that members of a company will be reluctant to seek out advice in the first place.

Most business people will follow legal advice if they receive it clearly and consistently. In-house lawyers are often the day-to-day interpreters of competition rules. Enforcement of the antitrust laws depends on the complexities of antitrust law being conveyed by those with expertise. If attorney communications can be exposed too easily, the compliance system itself is weakened. The effect is counterproductive. It does not make enforcement fairer; it simply makes legal advice less available, less candid, less robust, less clear, and less usable.

20 Attorney General Robert H. Jackson, Address at the Second Annual Conference of United States Attorneys, The Federal Prosecutor, Great Hall, U.S. Department of Justice Building, Washington DC, April 1, 1940 ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this down to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial.").

21 E.g., *Akzo Nobel Chemicals Ltd. V. Commission*, Case C-550/07 P, Sept. 14, 2010.

Confidentiality rules also matter in litigation. Protective orders in the United States and confidentiality rings in the UK and continental Europe are attempts to balance the need for access against legitimate secrecy interests. In the United States the balance often works reasonably well – complex matters can be examined; often only a very tiny percentage of the factual material exchanged under a U.S. protective order ever needs to see the light of day, and U.S. court balances each day openness and public access to the court proceedings with legitimate needs for confidentiality. But confidentiality should not become an excuse for disabling the defense. Overly ring-fenced information with no timely recourse to the courts hobbles the defense, particularly in antitrust cases where prices, gross margins, and other data are essential to a fair antitrust hearing. A system that protects secrets at the expense of the ability to contest the case has solved the wrong problem.

XVI. DAWN RAIDS, REMEDIES, AND THE NEED FOR POST-FACTO AND PRE-FACTO CHECKS

Dawn raids are vivid symbol of enforcement power. In the United States, the warrant requirement creates a *pre-facto* check. In Europe, the *post-facto* judicial review established in cases like *Nexans* helps, but more could be done. The broader lesson is that enforcement power should be checked both before and after use whenever possible. Pre-facto review protects the target ex ante; post-facto review ensures that abuses can be corrected and that institutions remain accountable.

Remedies and sanctions raise similar questions. Fines, behavioral commitments, and structural remedies can all be appropriate in the right case. But they become problematic if they outstrip the clarity of the underlying legal rule or if they are imposed before the defense has been heard adequately. We are concerned of the asymmetry in sanctioning non-domestic firms. Whether or not one accepts every implication of that concern, the underlying principle is that penalties should be proportionate, reasoned, and subject to meaningful challenge.

There also needs to separation of the underlying violation from the remedy. That distinction is crucial. A party should first be given a fair chance to contest liability. Only then should a remedy be negotiated or imposed. In some systems, however, the remedy process becomes intertwined with the merits in a way that pressures settlement before the case is fully tested. That may be efficient, but efficiency is not the same as fairness. A fair system does not ask parties to accept severe relief before they have had a genuine opportunity to contest the accusation.

XVII. THIRD PARTIES, TRANSPARENCY, AND THE SEARCH FOR TRUTH

Antitrust cases often depend on third parties. Customers, suppliers, competitors, and intermediaries may possess the most relevant facts, especially about pricing, communications, and market behavior. This requires third-party access for the defense as central rather than peripheral. If the defense cannot obtain third-party evidence, it may never get a full picture of what occurred. That is especially true in coordinated conduct cases where the decisive evidence may lie outside the principal parties' own files. Equality of arms is meaningless without a level playing field in the acquisition of facts and evidence.

At the same time, third parties have legitimate rights. Confidentiality, commercial secrecy, and privacy all matter. These are balanced daily in U.S. courts – with secrets protected, but the defense given full access to the information needed in a case; in the case of disputes, U.S. courts strike the balance between protections and access on a daily basis. The challenge is to strike a workable balance. Protective orders and confidentiality rings are one attempt to do that. They allow information to be shared for litigation purposes while limiting public dissemination and preserving commercial sensitivity. The goal is not total disclosure for its own sake, but access sufficient to test the case without exposing sensitive business information unnecessarily. But the key is that an impartial judiciary is available to strike the balance and examine if information is truly confidential when the time comes for the defense to present its case.

This balance also implicates trust. Third parties are more likely to cooperate with investigations and defense efforts when they know the system has credible confidentiality protections. If they fear that producing information will expose them to retaliation or unwanted publicity, they may stay silent. That silence harms truth-seeking. A well-designed procedural system should therefore encourage truthful participation by protecting against unnecessary exposure while ensuring that relevant facts can still be reached.

XVIII. CONCLUSION

Our vision of procedural fairness is not anti-enforcement. It is pro-legitimacy. It recognizes that agencies need tools to investigate complex conduct, preserve evidence, and protect competition. But it also insists that those tools be tempered by notice, access, independence, and review. Otherwise, the system risks becoming too one-sided to command confidence.

Several lessons recur throughout the discussion. First, timing matters. A right delayed may not be a right at all. Second, access matters. Defendants cannot contest what they cannot see, and they cannot see what they cannot obtain. Access to the evidence held in the hands of accusers and third parties is essential to fair antitrust proceedings.

Third, independence matters. Investigators should not be their own judges. Fourth, hearings matter. The opportunity to present evidence before an impartial tribunal, with the right to subpoena evidence and cross-examine opposing testimony is critical. Fifth, explanation matters. A reasoned decision must show its work, particularly where the evidence is economic and the law is uncertain. Sixth, remedies matter. Severe sanctions require careful justification and meaningful challenge.

As antitrust enforcement continues to globalize and become more data-intensive, these concerns will only grow. The way forward is not to abandon enforcement, but to refine it. That means greater transparency where possible, far better discovery rights, stronger privilege protections, more meaningful hearings, and review that reaches substance rather than merely process. Government enforcers cannot be frightened of the discovery of the truth. A system that takes fairness seriously will not be less effective. It will be more credible, more durable, and ultimately more just.

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