



DUE PROCESS IN COMPETITION PROCEEDINGS IN THE EUROPEAN UNION AND UZBEKISTAN

Sarvinoz Sunnatillaeva,
Tashkent State University of Law,
Lecturer of Constitutional Law Department

Article history:	Abstract:
Received: December 24 th 2023 Accepted: January 20 th 2024 Published: February 26 th 2024	The article examines the critical importance of procedural fairness and the preservation of defendants' rights in competition law enforcement, based on examples from both the European Union (EU) and Uzbekistan. It refers to the recent OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement, as well as Article 47 of the EU Charter of Fundamental Rights, which emphasises the concepts of openness, independence, and the right to defence. Administrative processes in Uzbekistan describe procedural fairness principles, with a particular emphasis on the ability to be heard and participate in proceedings. The study finishes with a comparative analysis, emphasising the similar dedication to due process and protecting rights in competition procedures in both nations, but also highlighting contrasts in approaches to confidentiality and business secrecy.

Keywords: Due process, Competition rules, Transparency, Procedural fairness, European Union (EU), Charter of Fundamental Rights, Right to defense, Antitrust investigations, Rights of defendants, Statement of Objections, Administrative procedure, Confidentiality, Business secrecy, Anonymity, Whistle-blowing practice

INTRODUCTION. Most jurisdictions prohibit a company with market dominance from engaging in unilateral anti-competitive behaviour. The jurisdictions take different approaches, although there are several examples of conduct, such as the use of predatory or exclusionary pricing, bundling/tying other products, charging unfair or discriminatory prices or trading conditions, limiting access to necessary infrastructure or inputs owned or controlled by the dominant player that may be deemed anti-competitive¹.

The European Union (EU) has significantly improved competition legislation, and several countries have adopted mainly its model as the cornerstone for developing their own competition policies. Uzbekistan has been working to transform its economy towards a market-oriented framework since achieving independence in 1991. Uzbekistan has used the EU's experiences as a helpful point of comparison in adopting competition legislation, using lessons and insights from the development of the EU's competition law to guide the creation of its own legislative measures.

However, the way these compared legal systems operate differs in specific ways. For instance, in the EU law, the role of the jurisprudence of the CJEU is crucial and influences other future cases. Meanwhile, Uzbek law does not include case law as a source of legislation and has no impact on other future cases. The only sources of competition law are the legislative acts adopted by Parliament, the government and the competent authority.

Due Process in competition proceedings. On October 6, 2021, OECD Ministers adopted the Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement. This document serves as the model for developing national legislations and establishes duties of transparency and predictability; independence, impartiality, and professionalism; non-discrimination, proportionality and consistency; timeliness; meaningful engagement of the parties in the enforcement process; protection of confidential and privileged information; and judicial review².

¹Competition Policy & Competitive Neutrality, Note by the Secretariat, OECD, DAF/COMP(2015)13/FINAL, p.5 [pdf \(oecd.org\)](https://www.oecd.org)

² Pachnou D. (2022). *Due Process in Competition Law Enforcement. The New OECD Recommendation on Transparency and Procedural Fairness in Competition Law Enforcement.* OECD

https://www.pymnts.com/cpi_posts/due-process-in-competition-law-enforcement-the-new-oecd-recommendation-on-transparency-and-procedural-fairness-in-competition-law-enforcement/#:~:text=The%20Recommendation%20establishes%20duties%20of,and%20privileged%20information%3B%20and%20judicial (accessed on 03.07.2023)



In the EU, Art 47 of the Charter of Fundamental Rights states that every person enjoys a right to good administration, which includes a fair and public hearing by an independent tribunal and access to his or her file³. As was already mentioned in Chapter 1, the European Commission both investigates potential infringements of the competition rules and adopts binding decisions under judicial control exercised by the CJEU. This is the main ground on which the EU system is criticised, as some argue that the system cannot ensure independent and impartial investigation and decision⁴. However, the EU system is based on the principles of law that safeguard from unfair investigation of competition cases⁵.

The Commission responded to the criticism of the Commission's lack of independence and freedom from political influence by pointing out that critics *"miss the fundamental point that its unique institutional set-up derives from the Treaties establishing the EU. The Commission as a whole is established as an institution independent of outside influence"*⁶.

The discussion on this topic proves the demand for improving standards of protection constantly.

In Uzbekistan, 2 059 antitrust investigations were conducted by the Committee between 2019 and 2021, and 1 878 of them were on abuses of dominance⁷. This high number may be connected with the register of dominant undertakings, as the Committee monitors the activity of these entities⁸.

Procedural principles are crucial due to the competent authority's significant powers in enforcing competition rules, and they should be respected during all investigation procedures. The number of investigations demonstrates the significance of due process in competition proceedings.

RIGHTS OF DEFENDANTS IN COMPETITION PROCEEDINGS. The competent authorities shall respect all persons' rights during all investigation procedures.

There are the rights of defendants, which are guaranteed during the investigation under EU Law:

- "the right to receive a Statement of Objections – i.e. a written and formal document setting out the Commission's objections to their conduct, the reasons for these objections and the evidence on which these objections are founded;
- a right of access to the Commission's investigation file;
- the right to submit comments in writing on the Commission's objections, including any expert opinion they like to produce;
- the right to a formal oral hearing – chaired by the Hearing Officers, who report directly to the Commissioner for Competition - and which are attended by senior officials;
- the right to receive a fully reasoned decision, so as to be able to exercise their right of appeal to the European Courts"⁹.

Art 48 of the Charter of Fundamental Rights provides that "Respect for the rights of the defence of anyone who has been charged shall be guaranteed"¹⁰. The idea of "due process" and the right to defence are frequently compared in the literature. The latter is a more comprehensive idea that covers the procedural safeguards upheld by the competition authorities during inspections, the confidentiality of the business secrets collected by the competition authorities, as well as the right of third parties to be involved in the proceedings¹¹. The right of defence includes procedural guarantees that safeguard the defendant during the proceedings. The right is implemented in Article 27 of Regulation

³ Charter Of Fundamental Rights Of The European Union (18.12.2000). OJ 2000/C 364/01 https://www.europarl.europa.eu/charter/pdf/text_en.pdf

⁴ I. S. Forrester (2009), Due Process in EC Competition Cases; a Distinguished Institution with Flawed Procedures, 34 E.L. Rev. 817. p.p. 821-823

⁵ Philip Lowe (DG Competition). (2009). *Due process in antitrust*. CRA Conference on Economic Developments in Competition Law. Brussels. p. 2 [Due process and fines \(europa.eu\)](#) (accessed on 10.02.2024)

⁶ Ibid.

⁷ OECD (2022), An Introduction to Competition Law and Policy in Uzbekistan, OECD Publishing, Paris, www.oecd.org/daf/competition/an-introduction-to-competition-law-and-policy-inuzbekistan.pdf p. 41

⁸ Register of dominant undertakings [Tovar yoki moliya bozorida ustun mavqeni egallab turgan xo'jalik yurituvchi](#)

[subyektlarning davlat reyestri - O'zbekiston Respublikasi Raqobatni rivojlantirish va Iste'molchilar huquqlarini himoya qilish qo'mitasi \(gov.uz\)](#) (accessed on 10.02.2024)

⁹ Philip Lowe (DG Competition). (2009). *Due process in antitrust*. CRA Conference on Economic Developments in Competition Law. Brussels. p. 6-7 [Due process and fines \(europa.eu\)](#) (accessed on 03.07.2023)

¹⁰ Charter Of Fundamental Rights Of The European Union (18.12.2000). OJ 2000/C 364/01 https://www.europarl.europa.eu/charter/pdf/text_en.pdf

¹¹ Bernatt, Maciej and Botta, Marco and Svetlicinii, Alexandr, The Right of Defense in the Decentralized System of EU Competition Law Enforcement: A Call for Harmonization from Central and Eastern Europe (July 1, 2018). World Competition: Law and Economics Review, Vol. 41, No. 3, 2018, p.4



1/2003¹², which guarantees that the parties are given access to the file and that the Commission may only base its decisions on objections on which the parties have had a chance to react¹³.

The Commission should set out in the statement of objections all material facts, descriptions, and supporting evidence. Parties are given access to the case file so they can review the material and express their opinions about the Commission's findings.

As was mentioned above, Commission was often criticised for not being able to ensure fair and impartial case handling. However, involved parties have the right to appeal the decision of the Commission in the CJEU¹⁴. Judgement of the CJEU on *Qualcomm* is one of the recent cases in which the contested decision was annulled because of the infringement of the right of defence by the Commission.

Case study (Qualcomm v Commission).

Background. Through exclusive payment arrangements with Apple from 2011 to 2016, Qualcomm abused its strong market position, according to the inquiry by the European Commission. These contracts required Apple to only employ Qualcomm chipsets in its iPhones and iPads, and Qualcomm would be entitled to compensation if Apple switched manufacturers. This had a tremendous market impact by effectively preventing rivals like Intel from competing for Apple's chipset contracts. By the contested decision of the Commission, Qualcomm was given a heavy punishment of EUR 997,439,000¹⁵.

As a result, Qualcomm challenged the ruling, claiming that it had violated its right to a defence, that important material had not been disclosed, and that the decision was insufficient.

Findings of the Court. As a preliminary observation, the Court noted that in terms of competition law, upholding the rights of defence includes making sure that every party accused of breaking the law has the opportunity to view their opinions about the claimed facts and supporting evidence during the administrative procedure. These rights are breached if the Commission made mistakes that may have had an impact on the procedure's conclusion. In order to prove such a breach,

the accused party must demonstrate that, without procedural blunders, their errors would have been better¹⁶.

On the applicant's claims that the Commission failed to provide the applicant with adequate access to the case file, it was discovered that the Commission had failed to notify Qualcomm about a series of meetings with third parties, and the lack of sufficient written records for some of these interviews raised concerns.

In keeping with the precedent set by the Intel case¹⁷, "Commission must be in a position to provide an indication of the content of the discussions which took place during the interview, in particular, the nature of the information provided during the interview on the subjects addressed"¹⁸.

The notes given to the applicant by the Commission after the disputed decision lack important indications. They mainly include the date and names of participants, with only a short summary of about two to three lines. These brief notes touch on topics like the chipsets market, the applicant's position, and its business practices. However, they do not provide any content about the actual discussions that took place in the interviews. This is a problem because previous case law (Intel) requires these discussions' content and nature to be explained.

It was found that the applicant did not know about three interviews conducted during the administrative process leading to the disputed decision. Interestingly, these interviews were not mentioned in the contested decision's description of the process. This shows that the Commission did not fulfil its duty to keep records according to Article 19 of Regulation No 1/2003, as these interviews were missing from the official case file. After identifying the Commission's procedural mistakes, the Court looked into whether the applicant was able to show that it could have defended itself better without these procedural errors.

In this regard, the court accepted that the Commission's and third-party interviews might have included information directly relevant to the inquiry. This might include competitors' ability to supply Apple, their willingness to fight Qualcomm's deal, and Qualcomm's

¹² Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1*, 4.1.2003, p. 1–25 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R0001>

¹³ Andersson H. (2022). *Hear Me Out! Failing to Respect the Parties' Right to be Heard May Come at a High Price.* <https://competitionlawblog.kluwercompetitionlaw.com/2022/08/18/hear-me-out-failing-to-respect-the-parties-right-to->

[be-heard-may-come-at-a-high-price/](#) (Accessed on 04.08.2023)

¹⁴ See for more Chapter 1.

¹⁵ Case T-235/18, *Qualcomm v Commission*, ECLI:EU:T:2022:358

¹⁶ Ibid. para 159

¹⁷ C-413/14 P, Judgment of 6 September 2017, Intel v Commission, EU:C:2017:632, paragraphs 91 and 92

¹⁸ Case T-235/18, *Qualcomm v Commission*, ECLI:EU:T:2022:358, paras 189-190



chipsets' competitive benefits. The court also acknowledged that if this evidence had been supplied swiftly and diligently, it might have had a major influence on Qualcomm's defensive strategy¹⁹.

Moreover, Qualcomm claimed that its right of defence was breached during an economic study conducted by the Commission. Initially, the Commission looked into Qualcomm for antitrust violations in two markets: LTE and UMTS chipsets. Qualcomm provided an economic study that covered both. However, the Commission ultimately narrowed its emphasis to LTE chipsets, dismissing the UMTS claims. Qualcomm protested, alleging that it had not been told of the change and hence could not update its analysis. Similar to a prior UPS case, the General Court determined that the Commission erred by failing to tell Qualcomm of the changed emphasis, depriving it of a fair hearing. The developing allegations hampered Qualcomm's defence²⁰.

Commentary. The case study demonstrates that to prove the infringement of the right of defence, first procedural error and then the impact of this error on the right and the outcome of the contested decision should be shown.

The judgement differs from the Intel case, in which the Court found that the errors of law that vitiated the decision under appeal were not such as to invalidate the Court's conclusion that the administrative procedure was not vitiated by an irregularity capable of leading to the annulment of the decision at issue²¹. Thus, the meeting recording is thus no longer voluntary, and failing to take notes is considered a procedural fault and may lead to the infringement of the right of defence.

As the Court found that the procedural errors made by the Commission were capable of harming the right of defence of Qualcomm. The Commission's inability to keep accurate and detailed records of seven meetings involving six different third parties harmed Qualcomm's defence. The ruling of the court emphasises the need to protect due process and defence rights in competition law matters, ensuring that all parties have access to necessary material for a fair and informed defence.

Despite criticism of the EU institutional system for investigating competition cases, the case law demonstrates that properly set safeguards and guarantees can provide due process in these procedures.

In **Uzbekistan**, The Law on Administrative procedures includes the principle of opportunity to be heard, which states that the administrative body is obliged to provide the interested person with an opportunity to express his or her opinion on all the circumstances that are important for the adoption of the administrative act.

Moreover, Art 10 of this Law provides that administrative bodies are obliged to ensure free access to information about administrative procedures in the ways established by the legislation on the openness of the activities of public authorities and administration.

Uzbek legislation consists of all rights connected with the right of defence. According to Art 36 of Law on Competition, the persons involved in a case on violation of competition law, from the date of the ruling on initiation of the case, shall have the right to familiarise themselves with the case materials, except for information constituting state secrets and other secrets protected by law, make extracts from them, give oral and written explanations, provide evidence and participate in its examination, ask questions to other persons involved in the case, make motions and object to motions and arguments of other persons involved in the case²².

In the court case N 3-1003-2003/5458²³, the Supreme Court of Uzbekistan cancelled the decision of the Committee because it found that the administrative body did not involve all interested parties.

The Committee found that the company "Turakurgon" exceeded the prices and ordered to return gained profit to consumers. Turakurgon was the company created by the "Uzbekneftegaz", which has a dominant position in the oil and gas market of Uzbekistan to serve local needs for oil products in the city of Namangan.

The territorial division of the Committee considered the case without the involvement of Uzbekneftegaz. However, the prices for oil products of Turakurgon were

¹⁹ Ibid. paras 211-212

²⁰ Killick J. and et al. (2022) EU General Court quashes Qualcomm antitrust fine for "exclusivity payments", and censures the EU Commission for multiple due process and substantive errors. <https://competitionlawblog.kluwercompetitionlaw.com/2022/06/21/eu-general-court-quashes-qualcomm-antitrust-fine-for-exclusivity-payments-and-censures-the-eu-commission-for-multiple-due-process-and-substantive-errors/> (Accessed 10.02.2024)

²¹ C-413/14 P, Judgment of 6 September 2017, Intel v Commission, EU:C:2017:632, Paras 94-103

²² Law of the Republic of Uzbekistan On competition, <https://lex.uz/docs/6518383#6522124> (accessed on 10.02.2024)

²³ DECISION OF THE JUDICIAL COMMITTEE ON ADMINISTRATIVE CASES OF THE SUPREME COURT OF THE REPUBLIC OF UZBEKISTAN, case N 3-1003-2003/5458, 24.08.2022



set according to the order of its parent company Uzbekneftegaz.

The Court cited the decision of the Plenum of the Supreme Court of the Republic of Uzbekistan on judicial practice on consideration of cases on appeal against decisions, actions of administrative bodies and their officials:

"When considering the case on the merits, the court should thoroughly investigate all relevant circumstances, in particular, to find out:

Whether the administrative body or official has the authority to make a decision or take an action;

Whether the administrative body or official has complied with the procedure for making a decision or taking action if such requirements are established by regulatory legal acts (form, terms, grounds, procedure, etc.). At the same time, it should be borne in mind that failure to comply with the procedure for making a decision and taking action may be grounds for the satisfaction of the application (complaint) only if this circumstance affected its legality"²⁴.

As a result of consideration of the facts and Law on the Administrative procedures, the Court found that the right to be heard of Uzbekneftegaz was breached as it had a legitimate interest in the case, and the price was set by its order, but it was not considered in the case.

Consequently, the Court concluded that not only the directly involved company but also other parties with legitimate interests should be granted the right to be heard and express their viewpoints. This decision emphasises the importance of involving all relevant stakeholders in administrative proceedings to ensure fairness and comprehensive decision-making.

Interestingly that the Court annulled not on the basis that the parent company was not properly investigated but on the basis that the parent company was not involved in the case and its absence caused harm to the right to be heard.

Comparative analysis of both jurisdictions on the right of defence shows that both regimes value the right to be heard (right of defence). The Law on Administrative Procedures in Uzbekistan emphasises the need to allow parties to voice their viewpoints, access case information, and participate in procedures. The Supreme Court's annulment of a judgement, because all interested parties were not included, emphasises the need for broad involvement.

²⁴ Decision of the Plenum of the Supreme Court of the Republic of Uzbekistan, from 24.12.2019 № 24 <https://lex.uz/docs/4711315> (Accessed on 10.02.2024)

²⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ L 1*, 4.1.2003, p. 1–25

Finally, both the EU and Uzbekistan emphasise the necessity of defending one's rights in administrative actions. The comparative study illustrates the same purpose of assuring justice, informed defence, and the participation of all key stakeholders in decision-making. The competent authorities in both jurisdictions shall respect **the right to confidentiality and professional (business) secrecy**.

In the EU, according to Art 30 (2) of Regulation 1/2003, the Commission must have regard to the protection of business secrets. However, in some cases, the Commission must disclose the information for the proper conduct of the investigation²⁵.

Moreover, regarding the confidentiality of complaints' information, in the *Adams v Commission* case, the Court stated the duty of confidentiality of the Commission owed to the complaint. Accordingly, an institution, which accepts information on infringement, is bound to comply with a request for anonymity²⁶.

Uzbekistan's legal acts on competition do not mention the guarantees of confidentiality and business secrecy. General rules on rights and guarantees of entrepreneurship activity regulate this area.

There are only general rules on the anonymity of the applicants; however no guarantees on the anonymity of the informants. Nevertheless, the author of this paper believes that the right of complaints and informants to anonymity should be indicated separately in the Law on Competition to ensure the safety and attractiveness of the whistle-blowing practice.

CONCLUSION. The article gives a complete review and comparative study of competition legislation and enforcement processes in the EU and Uzbekistan, with an emphasis on due process, defendant rights, and confidentiality. While both jurisdictions share concepts such as the right to a fair hearing and access to case information, they differ in terms of execution and institutional structures. The CJEU's jurisprudence has affected the EU's competition law system, which emphasises procedural fairness and openness, as well as comprehensive safeguards for defendants' rights. Notably, recent court judgements in Uzbekistan highlight the necessity of wide stakeholder participation and adherence to due process in administrative processes. Both countries recognise the importance of preserving corporate secrets and confidentiality; nevertheless, but Uzbekistan's competition legislation

<https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32003R0001>

²⁶ Case 145/83. Judgment of the Court of November 7 1985. Stanley George Adams v Commission of the European Communities.



may benefit from explicit clauses ensuring the anonymity of complainants and informants. Overall, harmonising procedural rules, increasing openness, and protecting defendants' rights are critical to supporting fair and effective competition law enforcement in the EU and Uzbekistan.

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