

ICN Guidance on Investigative Process

Introduction

Fair and effective investigative process is essential to sound competition law enforcement; this includes availability and use of effective agency investigative tools, transparency and engagement with the parties during an investigation, and protection of confidential information. Effective enforcement tools, procedural safeguards, and consistency of process and procedures within an agency contribute to efficient, effective, accurate and predictable enforcement by competition agencies. Cooperation and engagement from parties and third parties are key contributing factors to an agency's ability to pursue fair and effective investigations. The credibility of a competition agency and, more broadly, of the overall mission of competition enforcement are closely tied to the integrity of the agency's investigative process and public understanding of such process.

The mandate of the ICN's investigative process project is to increase understanding among ICN members of how different investigative processes and practices can contribute to enhancing the effectiveness of agencies' decision-making and ensuring effective protection of procedural rights. The project has examined competition agencies' ability to conduct effective investigations through both enforcement tools and investigative procedures. The aim of the project is to gather together accumulated experience of how competition agencies implement and improve fair and effective investigative process across all institutional frameworks. The project conducted surveys of agency investigative practices and issued reports on Investigative Tools, Transparency and Confidentiality. This project is the first time that the ICN has examined the investigative process across all competition enforcement areas.

There is a broad consensus among ICN members regarding the importance of transparency, engagement and protection of confidential information during competition investigations. Competition agencies operate within different legal and institutional frameworks that impact the choice of investigative process and how these fundamental procedural fairness principles are implemented. Consequently, there can be different approaches to achieving fairness during investigations. Agencies may do so via formal, structured legal rules as well as through the use of informal agency practices; they may use a set framework of procedures for key points during an investigation and engage in an ongoing, open dialogue with parties. Specific investigative principles and practices may differ in timing, frequency, implementation, and level of participation within the agency, depending on the legal context or institutional set-up of each jurisdiction. Furthermore, agencies' approaches to implementing fair and effective investigative processes evolve in light of developments in the applicable law and agency practice.

This compilation, while not exhaustive, reflects key investigative principles and practices important to effective and fair investigative process that were identified in the investigative process reports and are common to many of the competition agencies responding to the surveys.

I. Competition Agency Investigative Tools

1. A set of effective investigative tools is a basic attribute of sound and effective competition enforcement.

Competition agencies should have sufficient resources and the appropriate investigative tools to conduct investigations and obtain all relevant information to enforce competition laws within any statutory or agency-set deadlines.

1.1 The most common investigative tools used by competition agencies include voluntary and compulsory requests for information (documents and written responses), voluntary and compulsory on-site searches or inspections, voluntary and compulsory interviews or testimony, other voluntary submissions of information, and searching publicly available information.

1.2 Competition agencies should have the ability to compel the submission of relevant information at appropriate stages of an investigation from various sources, including parties under investigation and relevant third parties. Agencies should also have the ability to accept and consider submissions of relevant views made voluntarily by parties and third parties.

1.3 Agencies should have sufficient resources to evaluate the relevant information received, to assess the competitive impact of the conduct under investigation, to determine whether a violation may have occurred, to consider, and where appropriate, to challenge, prohibit or remedy the misconduct.

2. Investigative tools for competition law investigations should be based on an appropriate legal framework setting out clear criteria and procedural requirements for their use.

2.1 There should be appropriate limitations on the use of investigative tools, e.g., appropriate internal agency review and external review by courts, evidence gathering subject to applicable legal privileges, confidentiality protections, due consideration of relevance, proportionality, and the ability for respondents to contest unlawful use of investigative tools. Such limitations should be commensurate with the need to ensure effective enforcement of competition law.

2.2 Compulsory investigative tools should be backed by the ability to enforce compliance, including appropriate and effective sanctions for non-compliance and obstruction.

3. Competition agencies' internal procedures should address the use of their investigative tools and the information gathered during an investigation.

3.1 Compulsory agency requests for information should be subject to internal review prior to being issued.

3.2 Tailoring the use and content of tools to the specific investigative situation benefits agency enforcement. Agencies should focus their requests on information potentially relevant to the assessment of competition issues or concerns raised by the

investigation. Agencies should avoid imposing unnecessary burdens on parties and third parties in their use of investigative tools.

- 3.3 Agencies should have the discretion to discuss requests for information issued with recipients to ensure mutual understanding of the requests.
- 3.4 Agencies should allow for case teams to discuss and seek to resolve disputes regarding information requests with recipients as a first step. Rules governing agency investigations may also provide for internal review or external appeal procedures to resolve disputes related to information requests.
- 3.5 Investigations often benefit from seeking information from a variety of sources and perspectives, including the subjects of the investigation, customers, suppliers, and competitors, in order to ensure a thorough understanding of market conditions and impact. Agencies should ensure that the evidence and information obtained during an investigation receive appropriate consideration.

II. Transparency About Agency Policies And Standards

4. Transparency about legal standards and agency policies is a basic attribute of sound and effective competition enforcement.

Competition laws and policies that govern agency enforcement should be transparent.

Transparency to the public about an agency's process and procedures can help to reinforce the values of accountability, predictability and fairness in the application of competition enforcement.

- 4.1 Enforcement system transparency should include the substantive legal standards used for enforcement, any agency guidelines for analysis, the processes and investigative tools that agencies use to conduct their investigations, the framework for judicial review, and the sanctions and remedies available for competition law violations and how they are determined.
- 4.2 Competition agency decisions to challenge or prohibit conduct should be transparent and the agency should, subject to appropriate protection for confidential information, provide a publicly available version or summary which explains the agency's findings of fact and legal and economic analysis.
- 4.3 Agencies should be transparent with respect to the framework for their investigative process, to the extent it does not undermine the effectiveness of its investigations. This includes making public relevant agency investigative rules, guidelines, practices, procedures, applicable timeframes, and confidentiality rules. Competition agencies use many formats for the public presentation of such information. They can be presented formally, including through incorporation in relevant competition law or agency rules of practice or procedural guidelines, or in less formal ways, such as agency speeches, closing statements, manuals, staff working papers, fact sheets, Frequently Asked Questions (FAQs), explanatory notes, best practices, or other general advice or information materials related to investigative procedures.

III. Transparency During An Investigation

5. Transparency to parties during an investigation is a basic attribute of sound and effective competition enforcement.

Competition agencies should provide a high level of transparency to parties under investigation, informing the parties as soon as practical of significant information related to the investigation, including an explanation of competitive concerns, subject to appropriate protections for confidential information and the specific needs of the investigation.

Similarly, party candor and completeness in responding to agency requests and concerns, including during presentation of legal and economic arguments and defenses are necessary to ensure efficient and effective enforcement.

- 5.1 The extent of investigative transparency is subject to agency discretion and should take into account the specific needs of the investigation and obligations to protect confidential information. Different types of investigations, and investigations at different stages, may require varying levels of transparency (e.g., the initial nonpublic or covert stage of a cartel investigation typically calls for less transparency than the interaction with parties during the early stages of a merger review).
- 5.2 To the extent that it does not undermine the effectiveness of an investigation, agencies should notify parties as soon as feasible that an investigation has been opened, and identify its legal basis, the conduct under investigation, and where possible, the expected timing of the investigation.
- 5.3 During an investigation, agencies should inform parties of the basic facts and nature of evidence gathered, as well as the agency's theories of competitive harm. At key points in the investigation, agencies should provide the parties with updates of the investigation's scope, status, and any significant developments, such as changes to the competition concerns notified to the parties.
- 5.4 After formal allegations of competition violations and presentation of legal arguments are made, parties should be provided with access to the evidence relied upon as the basis for the agency's allegations and an effective opportunity to respond.

IV. Engagement During An Investigation

6. Engagement with the parties under investigation is a basic attribute of sound and effective competition enforcement, promoting more informed and robust enforcement.

Competition agencies should provide opportunities for meaningful engagement during an investigation, including the opportunity for parties under investigation to present evidence and arguments/defenses.

Investigations benefit from the open discussion of investigative theories with the parties and the explanation of competition concerns at key stages.

6.1 Engagement and dialogue between parties and agencies on relevant legal, economic and factual bases for competitive concerns support fair and informed enforcement. Engagement during an investigation does not limit an agency's discretion to pursue new or additional theories that may arise, though new theories and concerns should also be incorporated into any ongoing engagement.

6.2 Parties should be allowed to be represented by counsel of their choosing during the investigation, and should be permitted to present their views via counsel, their employees, and outside experts.

6.3 Agencies should provide parties under investigation with opportunities to discuss the investigation with the agency. As an investigation advances, meetings or discussions between the agency and parties at key points of the investigation are a common and effective means for engagement. Early discussion of the evidence and working theories may enhance the efficiency and effectiveness of the investigation.

6.4 Parties under investigation should be given the opportunity to exercise their rights of defence and respond to agency concerns and evidence. Parties should be permitted to express views, present factual, legal, and economic evidence to the agency and make substantive submissions during the investigation. An agency's communication of competitive concerns should be made in time for the parties to have an opportunity to respond to the concerns.

7. Engagement with third parties (e.g., competitors, customers, sector regulators, or other non-parties that agencies may contact during an investigation) also promotes more informed and robust enforcement.

Agencies should provide interested third parties with the opportunity to submit views to the agency during an investigation, and where appropriate, the opportunity to meet or discuss their views with the agency.

V. Confidentiality Protections and Legal Privileges

8. Protection of confidential information is a basic attribute of sound and effective competition enforcement.

Respecting confidentiality is important to ensure continued cooperation and the submission of information from parties and third parties during investigations.

Any legal framework for competition law enforcement should include protections for confidential information submitted during investigations. That protection should cover not only disclosures to parties and third parties, but also to the public through agency decisions and other statements.

- 8.1 Confidentiality rules and determinations of confidentiality during an investigation should take into account the commercial interests of submitters, the procedural rights of parties under investigation, and the overall public interest in the efficiency and transparency of enforcement efforts.
- 8.2 Agencies should have clear, publicly available criteria for what information is entitled to confidentiality protections, how to submit and designate confidential information, and the circumstances under which confidential information may be disclosed. Business secrets, trade secrets and sensitive personal information should be classified as confidential during competition law investigations and protected from disclosure, except in explicitly stated circumstances.
- 8.3 Confidential information received from parties and third parties during competition investigations should be subject to appropriate confidentiality protections. Agencies should have clear policies regarding the handling of confidential information by staff as well as access by a party or third party to confidential materials obtained from other sources during an investigation. A confidentiality policy setting out how an agency will deal with information or evidence that it receives from a leniency applicant needs to be considered in an effective leniency policy.
- 8.4 Parties and third parties that submit information to an agency during an investigation should have the ability to designate and request protection for information that they deem confidential. Parties and third parties should be required to identify confidential information in their submissions and to substantiate their confidentiality claims.
- 8.5 Agencies should have procedures for evaluating the basis for confidentiality claims to ensure that excessive, unwarranted claims are rejected and do not delay or impair the investigation.
- 8.6 When an agency denies a party or third party request for confidential treatment during an investigation and contemplates disclosure, it should provide the submitter with timely notice of the agency determination and an opportunity to object prior to disclosure.

9. Competition agencies should have clear policies regarding the disclosure of confidential information obtained during investigations.

- 9.1 Agencies should avoid unnecessary public disclosure of confidential information in investigative hearings, public announcements, court or administrative proceedings, decisions and other communications. When contemplating public disclosures related to a specific investigation, an agency should consider redacting or excluding confidential information or using non-confidential versions.
- 9.2 When disclosing confidential information to parties during an investigation or litigation, agencies should consider appropriate limitations on the access to such materials, including using data rooms with restricted access, disclosure to counsel or outside counsel only, or disclosure subject to a protective order, as appropriate.
- 9.3 Agency policies regarding the disclosure of confidential information obtained during investigations should address the disclosure to parties of confidential information relied upon as the basis for an agency's formal allegations of competition violations.

10. Competition agencies should respect applicable legal privileges that are recognized in their jurisdiction during the course of their investigations and have policies regarding the handling of privileged information.

- 10.1 Parties and third parties should not be required to disclose information that is subject to applicable legal privileges in the agency's jurisdiction.
- 10.2 Parties and third parties should be required to identify and describe materials withheld on the basis of legal privilege to allow the agency to assess the claims.