

Investigative Process Project Issues Paper and Mandate

This paper outlines the principal issues surrounding competition agencies' investigative processes, and proposes a mandate and a scope of work for the Agency Effectiveness Working Group to begin following the 2012 annual conference.

The quality of a competition agency's enforcement depends heavily on its ability to conduct effective investigations. At its meeting in June 2011, the ICN Steering Group agreed to explore a project addressing competition agencies' investigative processes, in particular those that ensure that all relevant information and views are obtained and the mechanisms that ensure that they are given adequate consideration. The project is envisioned to address both the enforcement *tools* and *procedures* available to and used by competition agencies within their legal framework.

Regarding *enforcement tools*, competition agencies need sufficient powers to obtain information that will enable them to effectively enforce competition rules. Agencies derive their powers from legislative and/or executive bodies. They are provided with different types of enforcement powers and tools, based on the jurisdiction's legal system, the nature of its economy, cultural traditions, and other factors. For example, some agencies but not others have the power to conduct "dawn raids," and some agencies can compel testimony or conduct interviews while others rely exclusively on documentary evidence. The project will explore how investigative powers and tools available in different legal systems can enable competition agencies to obtain the information necessary to effectively enforce competition rules.

Regarding *procedures*, agencies' investigation processes should enable them to obtain information that allows them to determine whether a law violation has been committed. This information may come from various sources including subjects of the investigation, customers, suppliers, and competitors. For example, ensuring that agency procedures provide for input from the parties and third parties at appropriate stages of an investigation can help to focus the investigation on key areas of dispute and ensure that the agency is made aware of facts and legal and economic arguments that could either support or cast doubt on an agency's theory of the case or the evidence to support it. In addition, the credibility of competition agencies and of the general mission of competition enforcement is linked to the integrity of the process of conducting competition investigations and how this is perceived. Investigative procedures that provide for transparency, predictability, adequate notice and opportunity to be heard, and internal checks and balances strengthen agencies' decision-making and increase public confidence in agencies' decisions. Similarly, effective confidentiality rules encourage participants in the investigation to be forthcoming in the information they provide to the agency, and also balance the protection of confidential information with fair notice to targets of enforcement proceedings of the evidence on which the agency bases its charges.

The ICN has addressed investigative tools and procedures in each of its four substantive working groups. Recognizing the importance of these issues and the benefits of examining them across areas of substantive law, the ICN Steering Group has endorsed this discussion paper, prepared by the European Commission's DG Competition and the US Federal Trade Commission, in anticipation of a new ICN project on investigative process.

Proposed Mandate

The proposed mandate of the project on investigative process 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.

Project Proposal

The investigative process project seeks to provide a forum for members to discuss how they conduct investigations, with a view to improving the effectiveness of their processes. The two main prongs of the project will focus on (i) the *tools* agencies have and those they need to conduct effective investigations, and (ii) agencies' *procedures* for conducting investigations that provide the desired quantity and quality of information while protecting parties' legitimate interests and avoiding unnecessary burdens. Recognizing that ICN members are organized in various ways both internally and within their governments and operate under different legal systems, the project will explore how different investigative processes and practices contribute to enhancing the effectiveness of agency investigations and ensuring effective protection of procedural rights.

A. Legal Authority and Tools to Obtain Evidence

This subject covers the powers of investigation that agencies need to obtain the information to establish whether or not an infringement has been committed. This includes, for example, the power to require production of specified documents and other information, and to enter and search business and other premises. Through a survey or discussions, the project will identify the various tools members have and the costs and benefits of using them in different circumstances, and share agencies' experiences in using these tools to obtain the information necessary to evaluate the issues in the case. The project will consider previous relevant ICN work, such as on effective institutions for the Building Blocks for Effective Anti-cartel Regimes Report and information from the survey conducted for the Merger Investigative Techniques Handbook. Based on this background, the project will develop a checklist of powers and tools agencies need to conduct effective and efficient investigations, and members can consider whether to develop the work further.

B. Investigative Procedures

- Transparency and Predictability

Agencies should ensure that the laws and procedures that govern their investigations are accessible and understandable. Transparency promotes an effective, efficient, and predictable process, and promotes public confidence in competition policy and enforcement.

The ICN has addressed transparency in several discrete contexts. For example, the Recommended Practices on the assessment of dominance require transparency with respect to

the degree of substantiality required for a finding of dominance. The Practices offer various ways competition agencies can foster transparency, such as by publishing agency decisions or enforcement guidelines, providing other formal guidance to the business community, or through less formal means such as speeches. The Guiding Principle on transparency in merger review provides that the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits. The Recommended Practices for Merger Notification and Review Procedures offer similar guidance on transparency, and offer more detail on predictability, including on the need for investigation timetables. The Market Studies Handbook discusses making the market study process predictable and timely, and lists transparency with stakeholders as an essential component of an effective study. The project will review agencies' practices and ICN work with a view to identifying good practices.

- Ensuring that the Agency has the Full Benefit of Parties' Evidence and Views

Enabling parties to present evidence and their views of issues in the case is essential to conducting an effective investigation and to protecting parties' rights. Information the agency discloses to parties should allow them to ascertain the legal, economic, and factual bases for the agency's concerns, subject to appropriate confidentiality protections and any applicable legal privileges. The project will explore what steps agencies take to ensure that they benefit from parties' views, including notice to the parties of charges, theories of harm, and opportunities to provide views and present legal and economic evidence to relevant agency officials at key points during the investigation. This work could include when competition agencies inform the parties they are being investigated, and whether and how they make available complaints and supporting evidence. This will include the key formal rights of parties, including e.g., the right to be heard, access to file, and the ability to reply to the charging document, and offer illustrative examples of informal opportunities agencies use to engage with parties, such as state of play meetings.

- Internal Checks and Balances

Effective enforcement relies on appropriate internal reviews to improve the quality of enforcement actions. Some agencies hold scrutiny panels typically consisting of staff lawyers and economists other than the case team, who conduct a peer review or "devil's advocate" panel. The project will gather experience on how agencies provide internal checks and balances, with a view to identifying good practices; this may also lead to discovering creative, less well known instruments for review.

- Role of Third Parties

Third parties play an important role in helping agencies to conduct well-informed investigations; thus, their rights and obligations warrant careful attention. The project will examine the procedural safeguards applicable to third parties, including complainants, competitors, and other interested parties, particularly with respect to confidentiality protections and the parties' right to be informed. Other issues, such as minimizing the burden of information requests, can be more important with respect to third parties than to the parties themselves. The project will explore the

multifaceted role of third parties in an investigation, and the various roles and rights of third parties, in order to distill appropriate safeguards and obligations.

- Confidentiality and Legal Privileges

Ensuring the protection of confidential information improves the quality and public confidence in the investigation process and strengthens the credibility of enforcement actions. Protection of confidential information, however, must be balanced against the need to provide investigation targets with the evidence that provides the basis of the case. For example, although competition agencies often share their general understanding of the facts and the nature of their concerns with potential defendants, they do not share confidential information submitted by third parties. The project will examine members' practices and review confidentiality rules and agency policies pertaining to the determination and handling of confidential and privileged information. The project will also review existing ICN work. For example, the confidentiality provision of the Merger Notification and Review Procedures Recommended Practices discusses confidentiality rules and principles generally and details specific elements such as confidentiality with respect to third party submissions, and the Anti-Cartel Enforcement Manual compiles practices and procedures pertaining to the protection of confidential information and legal privilege.

The objective of the review of members' practices and ICN work is to identify practices that balance interests in the confidentiality of submitted information with parties' need for sufficient information.

Next Steps

The Steering Group has determined that the most logical forum for this project is the Agency Effectiveness Working Group, whose mandate is to examine factors that determine the ability of competition agencies to achieve their objectives in an efficient and effective way. At the same time, the US Federal Trade Commission and European Commission's Directorate General for Competition would remain involved as project leaders in developing the project. Both before and at the 2012 annual conference in April, members' input will be solicited on the scope of the topics in this issues paper, and on the issues the project can most usefully address in the first phase of its work. This feedback will be used to prepare a work plan for Steering Group consideration.

Following the conference, the AEWG will convene a series of teleconferences and possibly surveys to gather information and share experiences regarding agencies' powers and tools to conduct investigations, and their investigational procedures. Based on this work and building on the work of the ICN and other relevant work product, members may find it useful to develop ICN guidance or recommendations.

This Issues Paper and Mandate was approved at the 2012 ICN Annual Conference.