

[Slide 1 - Introduction]

PAUL O'BRIEN: Welcome to the ICN's training on-demand collection of online videos covering competition law and policy. This module is focused on competition agency investigative practices, the tools, principles, rules and policies used to guide investigations. Specifically, this module uses the ICN's work on investigative process to introduce ideas and considerations for agencies that are looking to benchmark and possibly improve their own investigation. This module focuses on two pieces of ICN consensus work: The ICN guiding principles for procedural fairness in competition agency enforcement and the ICN guidance on investigative process.

[Slide 2 - ICN's Guidance on Investigative Process]

PAUL O'BRIEN: How an agency investigates can be as important as what an agency decides. One of the main reasons that agencies pay attention to their investigative process is simply that they must.

[Slide 3 - Why Agency Care About Good Investigative Process]

PAUL O'BRIEN: Investigative tools and procedures are often set by statutes, regulations or other rules. Fairness to parties and third parties involved in investigations is a good government principle, a responsibility for enforcement agencies. This alone justifies attention. But, increasingly, the discussion of procedural fairness principles has recognized the benefits that good process has for agencies and that effective competition enforcement depends on investigative procedures that promote fair and informed investigations. These benefits include better informed and higher-quality decisions, investigative efficiency through engagement with and cooperation from parties, and increased legitimacy and credibility with

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parties, other stakeholders, the government and the public for agency decisions, as well as the overall mission of competition enforcement.

Procedural fairness principles, a mix of set rules and agency discretion of how to use them during investigations, these guide how agencies use their institutional tools in the enforcement setting, a bridge between tools and techniques, and thus they have a direct link to outcomes. A spotlight on these principles that underpin enforcement is warranted. We will explore these benefits in more detail as they are the foundation for many of the ICN guiding principles and the ICN guidance on investigative process.

[Slide 4 - ICN Guiding Principles for Procedure Fairness]

PAUL O'BRIEN: Let's begin with a look at the ICN guiding principles for procedural fairness in competition agency enforcement. This short document, just over a page, articulates nine broad principles for fair and informed enforcement and are meant to guide agency approaches to their investigations and enforcement decision-making.

They are, number one, impartiality. Competition agencies should conduct enforcement matters in a consistent impartial manner.

Number two, effective enforcement. Competition agency enforcement should be effective and capable of identifying, prioritizing, and addressing competition law violations. Agencies should have sufficient investigative powers and their use should be adapted to the needs of the matter.

Number three, transparency. Competition agencies should conduct enforcement matters under transparent rules and practices.

Number four, meaningful engagement. Competition agencies should seek and

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take into account relevant information and views from parties and third parties to inform their consideration of enforcement matters.

Number five, objectivity. Competition agencies should review and examine their conclusions and theories of harm, applying sound economic and legal analysis to support informed decision-making. Decisions should be based solely on the facts and evidence.

Number six, the opportunity to respond. Competition agency enforcement proceedings should include opportunities for parties to review evidence, respond to the allegations and present evidence and their views.

Number seven, judicial review and appeals. Competition enforcement proceedings should include the right to seek impartial review by an independent judicial body.

Number eight, confidentiality. Competition agency enforcement proceedings should include a process for appropriate identification and protection of confidential business information and recognition of privileged information.

Number nine, efficiency. Competition agencies should conduct enforcement within a reasonable time appropriate to the circumstances of the matter and avoid unreasonable costs and burdens.

[Slide 5 - International Perspectives]

PAUL O'BRIEN: The specifics of any competition agency's investigative process are often unique to that agency and its legal context. The ICN guidance focuses on the identification of shared principles and of common approaches that can form the foundation for common commitments and inspire agency improvements to process. Many other principles and key practices of procedural fairness do not depend on the legal regime. They are generally

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adaptable and can be implemented in any system.

The ICN's work recognizes different legal traditions and customs and allows for flexibility in achieving a shared objective of providing procedural fairness. The ICN guidance itself states 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.

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 setup of each jurisdiction.

[Slide 6 - Good Process Considerations]

PAUL O'BRIEN: There are many building blocks to fair and effective process embedded in the guidance and other ICN work. They include strong investigative tools and powers, system transparency to the outside, investigative transparency to parties, the opportunity to be heard, the opportunity to respond, internal safeguards that help ensure sound decision-making, the protection of confidential information, representation, reasoned decisions, and appropriate investigative timing and review by independent tribunals. We will cover each of these building blocks.

[Slide 7 - ICN Guidance on Investigative Process]

PAUL O'BRIEN: The ICN's guidance on investigative process was the

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culmination of a multi-year project to study effective competition agency process. The ICN conducted network-wide surveys of member agency investigative tools and practices across all types of investigative frameworks and enforcement areas. The results of these surveys were compiled in the comprehensive reports on investigative tools, transparency, engagement and confidentiality during investigations. The best practices themselves were distilled into common themes and later used as the basis for the development of ICN's consensus work on investigative process.

The project's mandate was to increase understanding among ICN member agencies of how investigative practices contribute to enhancing the effectiveness of agency's decision-making and ensuring the protection of procedural rights. The guidance is based on a broad consensus among ICN members regarding the importance of good practices and procedural fairness during competition investigations.

The guidance is offered in six sections. Number one, competition agency investigative tools; number two, transparency about agency policies and standards; number three, transparency during an investigation; number four, engagement during an investigation; number five, internal agency safeguards; and number six, confidentiality protections and legal privileges.

[Slide 8 - I. Investigative Tools and Powers]

PAUL O'BRIEN: The first section of the guidance covers effective investigative tools and powers. The guidance begins with the framework and purpose of investigative tools. Number one, that they should be sufficient and appropriate to all relevant -- appropriate to obtain all relevant information necessary for enforcement; number two, that they are granted and used within a legal framework; and number three, that investigative tools be supported by sound

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agency procedures and policies.

[Slide 9 - I. Investigative Tools and Powers]

PAUL O'BRIEN: The sufficiency aspect of investigative tools in the guidance includes the ability to compel information and ability to accept submissions. The recommended parameters of a legal framework include respect for confidentiality and applicable legal privileges, a respondent's ability to contest the misuse of tools, and an agency's ability to enforce compliance with its requests.

[Slide 10 - I. Investigative Tools and Power]

PAUL O'BRIEN: Agency procedures to support the effective use of investigative tools include internal review of compulsory requests before they are issued; focused use of tools and requests on the needs of specific investigations; the discretion to discuss requests with respondents and possibly to resolve disputes over the requests; and the need to ensure that all information receives appropriate consideration or avoiding selective review consideration and presentation of evidence.

[Slide 11 - II. Transparent Policies and Standards]

PAUL O'BRIEN: The second major topic of the guidance is transparency. Transparency is divided into two aspects. First, system-wide transparency and, second, transparency during an investigation. Enforcement system transparency addresses the transparency of laws, rules, regulations, policies and standards. The public and potential parties should be able to find out information about a jurisdiction's competition law and the competition agency's practices. This includes transparency of legislation, rules and regulations, as well as agency procedures, policies, guidelines and, importantly, agency decisions or summaries that

offer an explanation of the rationale for particular case decisions.

Of course, the extent of agency transparency should never undermine the effectiveness of its investigations. There are strong benefits providing enforcement system transparency. Clear and transparent standards promote enforcement consistency and improve compliance with the law as companies can better conform their conduct to them.

[Slide 12 - II. Transparency During an Investigation]

PAUL O'BRIEN: Transparency during an investigation addresses the transparency given to parties and third parties involved in specific competition law investigations. The extent of investigative transparency is subject to agency discretion which would 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.

The guidance suggests three key concepts to investigative transparency. First, notifying parties of an investigation; second, informing parties about the investigation, and third, updating parties throughout an investigation.

Notification of an investigation generally occurs as soon feasible and includes: one, a basic confirmation of the investigation, its legal basis, and finally, where possible, its expected timing. The guidance recognizes that such notification will differ in terms of timing and form depending not only on the type of investigation, for example, a cartel versus a merger, but also on the specific needs of each investigation.

The second aspect of transparency during an investigation covered in the guidance is the suggestion to inform parties about the substance of the investigation, the facts

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and nature of evidence gathered, and the agency's theories of competitive harm within appropriate confidentiality rules.

Third, the guidance urges agencies to provide parties with updates of the investigation scope status and any significant developments, such as changes to the competition concerns notified to the parties at key points during investigation.

[Slide 13 - II. Transparency During An Investigation]

PAUL O'BRIEN: As a capstone or culmination of investigative transparency, the guidance advises that party should have adequate notice of charges, access to evidence relied upon by the agency, and, third, the opportunity to respond to the evidence, provide evidence, oral or written, rebut opposing claims and arguments, for example. All of this is urged before a final decision or a finding of liability.

[Slide 14 - Benefits of Transparency]

PAUL O'BRIEN: There are several benefits to providing transparency during competition law enforcement. Among them, transparency promotes compliance more broadly as companies understand enforcement principles and practices. It promotes more efficient investigations as sharing agency concerns about conduct and the nature of evidence helps to focus investigations. Third, it promotes cooperation from parties. It can be more responsive to the issues that they know about.

[Slide 15 - Benefits of Transparency]

PAUL O'BRIEN: In comparison, the drawbacks to providing transparency are modest or can be limited. First, the guidance recognizes that the provision of transparency is investigative-specific. There are different considerations when the conduct is covert; for

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example, a cartel investigation versus overt, non-cartel agreements, dominance, and merger investigations.

The choice to provide transparency is subject to agency discretion and the specific needs of an investigation. Agencies remain free to modify or add to theories of harm that are shared. Agencies can keep the frequency of engagement reasonable and consistent with staff constraints and, finally, agencies need not and should not provide confidential information when not required.

[Slide 16 - IV. Engagement During an Investigation]

PAUL O'BRIEN: The third major theme in the guidance is engagement during an investigation. The guidance explains that agencies should provide opportunities for meaningful engagement between parties and agency, encouraging the open discussion of investigative theories and explanation of competition concerns, as appropriate. There are two key aspects of engagement explained in the guidance; first, the opportunity to be heard and, secondly, the opportunity to respond. First, the opportunity to be heard simply means the ability for parties to discuss the investigation with the agency, for example, via meetings or discussions with staff and decision-makers. The related opportunity to respond is the ability to respond to agency concerns and presentation of evidence.

[Slide 17 - Benefits of Engagement]

PAUL O'BRIEN: As with the provision of transparency, an agency's choice to engage with parties and third parties during an investigation can reap benefits. The benefits to active engagement include: Allows the agency to test its theories of harms. It could focus investigations by helping to identify real issues of importance and dispute and eliminate

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nonissues, improving the quality of the evidence. It can prevent surprises for an agency. If a party knows what the issues are, they can address the concerns, focus document production and propose remedies, for example.

The agency knows what the defense looks like in advance. It can promote better mutual understanding of the facts and issues. It can lead to settlements by consent, which, of course, save resources. Also, remedies are more effective when informed by understanding of business considerations.

[Slide 18 - V. Internal Agency Safeguards]

PAUL O'BRIEN: Internal safeguards. In addition to sections on transparency and engagement with parties and third parties, the guidance offers recommendations for internal agency process in a section on agency safeguards. The first half of this section explores internal procedures and practices to ensure that investigative process is consistent and impartial. This starts with protections against agency officials having conflicts of interest relating to their investigations, the ones they participate in or oversee.

The internal safeguards also emphasize consistency and accountability with internal agency rules or practices for conducting investigations in Section 8.2 and an agency management oversight of matters in Section 8.3. Section 8.4 addresses timing of investigations and avoiding unnecessary delay. While timelines can vary across jurisdictions and no single set of deadlines are appropriate for all, the general recognized goal for agencies is to comply with statutory deadlines and avoid undue delays in its investigations.

In the absence of deadlines, ICN work encourages agencies to consider the use of internal procedures and planning, such as timeline projections.

[Slide 19 - V. Internal Agency Safeguards]

PAUL O'BRIEN: The second half of the section on internal safeguards urges agencies to evaluate their investigative recommendations and findings to support informed and effective outcomes. The guidance instructs that agencies should objectively apply appropriate legal and economic analysis to the facts and evidence gathered and “thoroughly review, test and confirm their conclusions to strengthen confidence in their decision-making.”

Finally, the section identifies some basic contours for formal enforcement hearings with transparent rules and the ability of parties to respond to agency allegations.

Written enforcement decisions are also described in broad terms with the need to explain the facts, law, evidence and sanctions that determine the outcome. Agencies should keep in mind that the audience for the decisions is beyond the parties before them in specific investigations. Transparency is reinforced when agencies explain the rationale for their decisions, including findings of fact and analysis, subject, of course, to appropriate protection for confidential information.

This may be further enhanced when agencies explain, when appropriate, decisions not to bring a case. Such transparency bolsters compliance efforts as companies better understand the agency's reasoning and likely future enforcement perspectives.

[Slide 20 - VI. Protecting Confidential Information]

PAUL O'BRIEN: The last major theme of the guidance is protecting confidential information. Providing protections for confidential information submitted during investigations is an essential part of effective enforcement. Confidence that their business information and submissions are appropriately protected, promotes candor and engagement from parties and third

parties during investigations.

The guidance urges agencies to offer clear publicly available criteria for confidentiality protections, policies for handling confidential information, and its procedures for evaluation. The guidance further endorses the common practice of providing appropriate notice and opportunity to object before the disclosure of confidential information. The guidance instructs agencies to avoid unnecessary public disclosure and consider appropriate limitations on access when confidential information must be disclosed; for example, redactions, data rooms or protective orders. Finally, the guidance recognizes the importance of respecting applicable legal privileges.

[Slide 21 - Confidentiality]

PAUL O'BRIEN: Maintaining the confidentiality of information is critical to effective competition enforcement. Not only will parties reconsider cooperation if confidentiality is not ensured, but the disclosure of confidential information can harm competition. The guidance recognizes the interaction, perhaps tensions of transparency engagement and confidentiality within its simple framework, urging competition agencies to consider the interplay of the commitments to protect business confidential information, as well as provide parties with the information they need to be able to respond to agency concerns and defend themselves. Both are critical to effective process.

[Slide 22 - Other considerations for good process]

PAUL O'BRIEN: There are other specific aspects of good process found in the guidance and other ICN recommendations that reinforce the six main themes of tools, transparency, engagement, internal safeguards and confidentiality. Let's take a look at some of

these additional principles that agencies may consider.

[Slide 23 - Representation]

PAUL O'BRIEN: Representation. The guidance states that parties should be allowed to express views via counsel, their employees and outside experts. This reinforces fairness and can facilitate engagement and informed communication between agency investigators and companies under investigation. Parties use counsel and experts as effective advocates for their views.

[Slide 24 - Internal practices Examples]

PAUL O'BRIEN: Practices that help ensure the agency is fully informed during an investigation include multiple meetings or discussions between the parties and the agency at key points during an investigation; the ability to accept submissions from parties and third parties explaining their views and arguments; seeking information from a variety of sources and perspectives to ensure a thorough understanding of the facts by the agency; ensuring that all evidence and information obtained during an investigation receives appropriate consideration, including both legal and economic analysis as appropriate. For example, that could include internal review by management, advisory panels or committees or the use of independent advisers.

[Slide 25 - Judicial Review]

PAUL O'BRIEN: Judicial review. Recourse to an independent, impartial and meaningful judicial review on both substance and process is essential to procedural fairness and a common feature of legal systems, including competition law regimes around the world.

[Slide 26 - Conclusions]

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PAUL O'BRIEN: One of the challenges to talking about common practices for good process is the reality that each competition agency's process was created uniquely for that agency and its legal context. The ICN's work was developed with this reality in mind and its approval by ICN members is evidence that there can be meaningful international experience sharing and convergence on investigative process.

Another common challenge to the value of the guidance comes from the fact that many agencies' investigative processes are set or framed by statute. Some view legislative reform as the only path to convergence, and given the consensus building and political attention needed for such reforms, an unlikely or time-consuming one.

The international efforts to promote convergence on procedural fairness and many of the good practices identified in the ICN's work focus actually on agency choices and the discretion agencies have in implementing their own process rules.

[Slide 27 - ICN's Guidance on Investigative Process]

PAUL O'BRIEN: The principles and recommendation that ICN's work can often be implemented without legislative change through an agency's commitment to improve fairness and investigative rigor. For example, better engagement with parties can begin with a commitment by management and staff to have discussions and meetings with parties at key points during an investigation.

The ICN urges all members to consider the guiding principles in light of their own processes and benchmark their investigative practices with the guidance to help identify internal choices that might promote improved process and convergence towards the ICN principles.

[Slide 28 - Closing]

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PAUL O'BRIEN: In conclusion, the ICN's guiding principles for procedural fairness and guidance on investigative process stand for the idea that attention to fair and informed process benefits agencies, parties and ultimately markets and consumers. Appropriate use of investigative tools and transparency to parties are key parts of effective and efficient case management. Substantive engagement with parties and third parties means agencies are more likely to get to the right decision. Internal practices that test and reinforced informed decision-making lead to better outcomes.

More broadly, shortcomings and shortcuts in the provision of procedural fairness during investigations can cast doubts on substantive outcomes in an agency's enforcement mission. A commitment to fair and informed investigative process bolsters agency credibility.

We hope that you will find the ICN's guiding principles for procedural fairness and guidance on investigative process useful tools in your own agency's consideration of what makes for good process.

Thank you for your attention.