

Annotated ICN Guidance on Investigative Process

This annotated version of the ICN Guidance on Investigative Process replicates the Guidance along with accompanying ‘good practice’ examples for agencies on how they might implement in practice certain aspects of the principles and practices presented. Good practices are practices which work well in jurisdictions where they are applied but which may or may not work well in the legal context of other jurisdictions or specific investigations. The scope, timing, availability, and appropriateness of these considerations will vary from jurisdiction to jurisdiction and from investigation to investigation. Agencies often have discretion in shaping their practices and choice of how process is provided, driven by the needs and interests of an investigation.

The purpose of this annotated version is to provide inspiration for competition agencies that choose to evaluate their investigative and decision-making practices, with examples of practices that some agencies have used to support fair and informed enforcement. The text of the Guidance appears in *italics*, the Good Practice Examples are enclosed in text boxes.

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, internal checks and balances on enforcement process, 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.

There is a broad consensus among ICN members regarding the importance of transparency, engagement, internal checks and balances on enforcement process, 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 competition agency investigative process.

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.

Good Practice Examples

If offered, accept voluntary written or oral information from parties and third parties on their views during an investigation, as appropriate. The arguments and perspective from parties and third parties in their own words (in addition to responses to compulsory requests) may help to inform an investigation. Be attentive to potential biases and confidentiality protection implications for information received outside of compulsory requests.

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.

Good Practice Examples

Consider procedures that allow for consultations with market participants to seek perspectives on proposed commitments or remedies, as appropriate and within confidentiality rules.

Good Practice Examples

Establish procedures that allow for agreed upon resolution in enforcement cases, e.g., settlement, remedies, or commitments. This can facilitate prompt resolution and help reduce costs and burdens on parties, agencies, and markets. Consider whether to set time limits for discussions for agreed upon resolution proposals or to allow ongoing, open discussion, as appropriate.

Good Practice Examples

Engage with parties on timely proposals they make for commitments, settlements, or remedies, as appropriate. Allow parties to respond to agency concerns and offer amended proposals. This can help to improve and better understand the likely impact of the proposed resolution. Explaining preliminary findings or concerns can help prompt resolution.

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.

Good Practice Examples

Allow recipients to comply with Requests For Information (RFIs) within a reasonable period of time to ensure that the overall investigation stays within its required or projected timing. Consider reasonable requests for time extensions for responses.

Good Practice Examples

Provide the ability to challenge alleged improper use of investigative powers, e.g., via internal review as an initial step; through recourse to internal administrative appeal; or via an independent court, tribunal, or administrative entity for review.

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

Good Practice Examples

Establish a process for the agency to enforce compliance with compulsory RFIs, internally and, if necessary, through recourse to an independent court, tribunal or administrative entity. Make this process transparent, with established procedures and known penalties.

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.

Good Practice Examples

Consider establishing internal processes to promote consistency, efficiency, and best practices in RFIs across similar investigations. This may include a specialized office or official that drafts or evaluates RFIs; or having compulsory RFIs reviewed and approved by management or a central office; or sharing RFIs across different enforcement units; or the use of templates or models as a starting point for common RFIs.

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.

Good Practice Examples

Consider the relevance and burdens of every RFI issued. Focus RFIs on the facts at issue, theories, and potential violation or harm to competition involved in each investigation. Avoid requests that are unrelated to specific agency concerns, working theories, or facts at issue to avoid unreasonable burdens on recipients and the agency. Consider the necessity of a search or inspection during an investigation within the limits of applicable law and whether gathered information is relevant to the investigation.

Good Practice Examples

Consider appropriate limits to scope, time period, persons impacted, issues addressed, and the format of responses required. However, no limit should jeopardize an informed investigation.

3.3 Agencies should have the discretion to discuss requests for information issued with recipients to ensure mutual understanding of the requests.

Good Practice Examples

Include an agency contact point and necessary instructions in every RFI. Consider including information on every RFI providing appropriate notice of the investigation, including its legal basis and the required timing for response.

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.*

Good Practice Examples

Consider timely requests from RFI recipients to explain or modify the response requirements. Allow case handlers to interact with RFI recipients and, where appropriate, make good faith modifications to avoid unnecessary or unreasonable costs and burdens.

Good Practice Examples

Consider internal review or approval of modifications to ensure consistent application. Consider documenting any modifications to RFIs for common understanding between agency and recipient.

Good Practice Examples

If case handlers are unable to resolve disputes concerning RFIs, consider providing an internal review option for recipients of RFIs, led by an official or office not involved in conducting the investigation. Ensure that any such process is not used to jeopardize investigative timing.

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.*

Good Practice Examples

Invite or contact relevant third parties for views during an investigation, where appropriate. Be aware of potential bias in arguments from parties and complainants.

Good Practice Examples

Cooperation with other public agencies at the national level and counterparts abroad can be critical for effective investigation. Cooperation tools may range from formal ones (agreements or MOUs, etc.) to informal (exchange of experience, cooperation with investigators of different agencies). Ensure that such cooperation is done according to applicable law and confidentiality protections and avoids unnecessary burdens.

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, procedures, and investigative priorities 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.*

Good Practice Examples

Publish guidelines or other statements on agency analysis and enforcement interpretations. Consider topic-specific guidance on issues related to analysis and outcomes such as access to evidence (e.g., access to file, discovery), any settlement or commitment process, and sanctioning methodology.

- 4.2 *Competition agency decisions to challenge or prohibit conduct, or to accept a mutually agreed upon resolution, 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, legal and economic analysis, and any commitments or sanctions. Written reasoned decisions promote transparency to counsel and companies seeking to comply with the law.*

- 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, confidentiality rules, and any priority setting principles. 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.*

Good Practice Examples

Publish statements or explanations, if available, of how the agency sets investigative priorities, conducts investigations, and its procedures in support of informed and robust decision making.

Good Practice Examples

Be prepared to explain investigative processes to parties and third parties, such as the procedural rules on RFIs, the confidentiality rules that apply to submissions and statements to the agency and access to such information, instructions for digital submissions during investigations, the framework for cooperation with foreign counterparts, the role of third parties, and the submission and use of economic analyses.

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 subject matter of the investigation, and where possible, the expected timing of the investigation.*

Good Practice Examples

Carefully consider factors that might impact the appropriate timing of notice of an investigation e.g., covert investigation or potential for destruction of evidence.

Good Practice Examples

If appropriate and possible, explain the likely timing of an investigation.

- If the timing is set by statute, clearly communicate the timetable, including the dates for significant milestones (e.g., change of phase, required meetings or hearings, decision deadlines).
- If there are no deadlines or phases for an investigation, consider providing time projections or estimates, even if in general terms or only for the next investigative step.
- Be clear that any such projections are non-binding and could be subject to change, specifying any factors that the party's choices impact, e.g., response time for RFIs or remedy proposals.

- 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.*

Good Practice Examples

At a sufficiently advanced stage of the investigation, share the agency's views, working theories or competitive concerns, and significant legal, factual, and economic issues being considered, as appropriate.

Good Practice Examples

Where relevant, communicate significant changes in scope and status of the investigation to the parties under investigation, e.g., a change in potential allegations that the agency is pursuing or a change in the expected timing of the investigation.

Good Practice Examples

If a significant departure from established rules or practices occurs during an investigation, consider explaining the circumstances to the parties and third parties affected, in a timely manner.

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.*

Good Practice Examples

Prior to a final finding of a violation, provide the party with a written statement of the charges; *e.g.*, a complaint, statement of objections, case officer report. In the statement, specify in detail the nature of the alleged offense and supporting facts,

Good Practice Examples

As appropriate to procedural rules and confidentiality requirements, provide the party with access to, or discovery of, all relevant evidence obtained in the investigation, both exculpatory and inculpatory.

IV. Engagement During An Investigation

6. *Engagement between the agency and the parties under investigation on significant factual, legal, economic, and procedural issues 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 significant procedural issues 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.*

Good Practice Examples

Explain that as an investigation develops new evidence and facts are uncovered, certain issues might not emerge until later, and staff views and working theories may change. Early discussion of issues and concerns with parties need not limit an agency's discretion to pursue new or additional theories of harm that may emerge during the investigation. Along with such caveats, consider updating parties on significant changes, as appropriate.

Good Practice Examples

Effective engagement is not a one-way presentation from parties, but can be a two-way dialogue on the merits of an investigation, with agency staff explaining their evolving views of facts and potential allegations, where appropriate.

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.*

Good Practice Examples

If relevant, use opportunities to engage with party counsel and party business representatives to inform an investigation. Do not exclude counsel from investigative events, e.g., on-site inspections or interviews, to the extent that they are legally permitted to attend.

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.*

Good Practice Examples

In addition to interaction with parties via formal investigative tools (e.g., RFIs, formal statements or testimony, official hearings), consider using less formal ways, as appropriate, to solicit party responses, views, and perspectives on key issues via phone calls, letters, emails, and meetings.

Good Practice Examples

Consider whether it is useful to identify potentially dispositive issues with the parties to facilitate early resolution or focus party submissions and investigative resources (e.g., evidentiary production and review) on the most meaningful or problematic issues.

Good Practice Examples

Encourage case teams to consider requests for consultations with parties under investigation, as appropriate. During engagement with parties, where appropriate, consider discussing the nature of the evidence, facts learned, and staff working theories in order to solicit an informed and useful response. Respect confidentiality rules during such interactions.

Good Practice Examples

Where appropriate, have the case team offer to meet with the parties at key stages of an investigation, e.g., after initiation of a case, around the decision to pursue an advanced or second phase investigation or after a formal written charge has been issued, and prior to final agency decision making.

- Meetings after the initiation of a case can be used to identify significant or dispositive issues and where appropriate give an indication of expected timing.
- Meetings during advanced investigations can be used to explain any remaining investigative steps and to discuss the competitive concerns identified.
- Meetings near the end of the investigative process can be used to discuss agency views, the nature of evidence gathered, and how the agency intends to pursue the case further.

Good Practice Examples

Prior to meeting with the parties, identify the basic agenda or issues for the meeting, and if appropriate, request a ‘white paper’ or other substantive written materials addressing key questions in order to clarify important issues ahead of the meeting.

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.*

Good Practice Examples

Fulfill any legal requirements to provide formal opportunities to respond (e.g., hearings, opportunities to respond to statements of objections or complaints, and providing access to file or discovery obligations).

Good Practice Examples

Provide a formal opportunity for the party to respond in writing to the agency’s objections or allegations. Provide reasonable time for a party to provide a written response, considering the length, scope, and complexity of the investigation, the urgency of the case, and whether the party has had prior access to information.

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.

Good Practice Examples

In addition to interaction with third parties via formal investigative tools (e.g., RFIs, formal statements or testimony, official hearings), consider using less formal ways, as appropriate, to solicit third party responses, views, and perspectives on key issues via phone calls, letters, emails, and meetings.

Good Practice Examples

Encourage case teams to consider requests for consultations with third parties with legitimate interests, as appropriate.

V. *Internal Agency Safeguards*

8. *The use of internal agency safeguards to bolster investigative integrity and support informed and robust decision making is a basic attribute of sound and effective competition enforcement.*

Competition agencies should establish internal procedures and practices to ensure that their investigative processes are consistent and impartial.

- 8.1 *Agency officials should not have relational or financial conflicts of interest relating to the investigations and proceedings they participate in or oversee. To help ensure the impartiality of investigations and decision making, agencies should have ethics rules to prevent potential conflicts.*

Good Practice Examples

Consider a systematic (e.g., for every investigation) process to check for potential conflicts (e.g., financial or personal) for all personnel working on a specific investigation.

- 8.2 *Agencies should promote consistency of procedures across similar agency investigations through internal rules or practices for conducting investigations. Templates or models for routine investigative requests and recommendations can help promote consistency. A written agency practice manual or internal guidelines and regular training on investigative techniques can help ensure that staff is familiar with agency rules and agency practices are continuously improved.*

Good Practice Examples

Create internal operational rules or an agency practice manual for staff to promote investigative consistency. Consider publishing it to increase transparency and to set expectations for investigations.

Good Practice Examples

Consider using templates, guides, checklists, or models for approving common internal investigative steps such as: opening an investigation, issuing RFIs or entering an advanced phase of an investigation, and recommendations from staff for agency decision. Models can help establish consistency, ensure that the investigation is exploring all issues, and inspire confidence that the agency is following its own rules.

Good Practice Examples

Consider regular training, seminars, and discussions for investigative staff on agency process rules and best practices.

- 8.3 *Investigation by case officers should be guided by agency management oversight and coordination with other relevant parts of the agency, as appropriate to the nature and circumstances of each investigation and an agency's organizational structure. This promotes consistency and agency accountability. Key investigative actions that can benefit from oversight and/or coordination include: issuing compulsory requests for information, commencing in-depth investigations, evidence evaluation, and recommendations to agency decision makers. Regular internal meetings between case officers and agency management and/or other coordinating offices can help guide and reassess investigative progress, strategy, and theories. Case teams should maintain a thorough case file or record including relevant evidence, correspondence, and analysis to support informed decision making.*

Good Practice Examples

Consider establishing a process of oversight or internal consultations for investigations, appropriate to the nature and circumstances of the investigation. Consider internal coordination between the investigating unit and specialized units such as litigation offices, legal services, economist divisions, or policy offices, as appropriate. For instance:

- Require internal consultation, review, and/or approval for key milestones such as opening, expanding, closing, and concluding investigations and issuing compulsory RFIs or other significant compulsory investigative measures (e.g., inspections, recording statements or questioning).
- Hold regular or ad hoc internal meetings between the case team and agency management or other coordinating offices to reassess the progress, strategy, evidence, theories, timing, and plans at key points during an investigation, as appropriate to the circumstances of the case. It may be useful to have the case team identify and address in advance likely party arguments.
- Create a case file or other internal record in every investigation containing evidence relied upon, correspondence, analysis, RFIs, and other notes related to the investigation. This can be for both internal use as well as the basis for consideration of appropriate disclosures under confidentiality rules and legal privileges.

8.4 *Agencies should avoid unnecessary delay in enforcement. Agencies should meet all deadlines set by competition laws or agency rules and in the absence of such deadlines, set internal projections or working estimates to help avoid unnecessary delay, appropriate to the complexity and circumstances of the matter.*

Good Practice Examples

Strive to meet all enforcement deadlines imposed by competition laws and agency rules. Ensure that parties and third parties meet deadlines to ensure that the overall investigation stays within its required or projected timing.

Good Practice Examples

In the absence of statutory or agency mandated deadlines, consider internal options to promote the investigation being conducted within a reasonable time, appropriate to the circumstances and complexities of the case. As appropriate, consider internal timeline projections, regular discussions to consider the status of an investigation, and/or targets for the completion of the investigation, phases, and/or significant investigative tasks. Monitor and revise such projections as appropriate.

Good Practice Examples

Set reasonable deadlines for parties and third parties to respond or otherwise contribute to an investigation to avoid delay.

Good Practice Examples

Conclude investigations once it is determined that allegations of possible anti-competitive conduct lack merit.

- 8.5 *Competition agencies should periodically review internal rules, procedures, and practices to seek continual improvement in their enforcement processes. Agencies may also benefit from engaging with outside stakeholders when evaluating the effectiveness of their enforcement processes. Agencies should consider reforms to their internal procedural rules and practices that promote convergence towards recognized best practices.*

Good Practice Examples

Review and consider international best practices on agency process from organizations such as ICN and OECD.

Good Practice Examples

Consider evaluating the agency's investigative process, including via consultations with the private bar and companies familiar with agency process and practices, and consider ways to improve efficiency and efficacy.

- 9. Agencies should thoroughly evaluate their investigative recommendations and findings before they are implemented or acted upon. Internal safeguards and agency practices that support informed decision making improve the quality of enforcement actions, increase the likelihood of effective outcomes, and strengthen agency credibility.**

- 9.1 *Agencies should objectively apply appropriate legal and economic analysis to the facts and evidence gathered in a particular matter. No other consideration, e.g., personal bias, political interference, national protectionism, or interests of industry participants not related to competition should play a role in the enforcement process. Agencies should ensure that all of the evidence and information, whether exculpatory or inculpatory, obtained during an investigation receive appropriate consideration during the agency decision-making process.*
- 9.2 *Agencies should critically examine the facts and evidence gathered and how they apply to relevant legal and economic theories defined in an investigation before making a determination. When alleged violations are identified and agency action is recommended, agencies should thoroughly review, test, and confirm their conclusions to strengthen confidence in their decision making. Such strategies should include*

seeking party comment on agency concerns and may benefit from internal tools such as peer review or scrutiny by officials not involved in conducting the investigation (e.g., agency management and other investigative, economist, or legal services offices).

Good Practice Examples

Ensure that the views of all relevant internal components (e.g., legal services, case handlers or investigators, economists) are included in the evaluation of enforcement matters, as appropriate. For example, relevant components could choose to submit their own memo, views, or recommendation for consideration, as appropriate.

Good Practice Examples

Establish a transparent process for thorough internal review of staff recommendations prior to a final agency decision by officials or an office outside of investigation team, e.g., as appropriate, a peer review panel of other investigators or management, a legal services entity, officials from different enforcement phases, an economist unit, or other experts.

- 9.3 *Any final, formal hearing on alleged violations during enforcement proceedings should be conducted before officials independent of the investigative process. The hearing should be held pursuant to transparent rules and procedures that include the opportunity for parties to make arguments, present and rebut evidence, and respond to agency allegations.*

Good Practice Examples

An agency hearing or court proceeding before an independent presiding officer or court might also include the presence of agency officials (e.g., case officers, senior management, decision makers); ; and an official record via a transcript.

- 9.4 *All final written enforcement decisions on violations should include detailed explanations of the findings of fact, conclusions of law, evidence relied upon, party arguments, and sanctions. Written mutually agreed upon resolutions (e.g., settlements or commitments) should identify the legal basis, relevant facts and evidence, and clearly explain any commitments and sanctions. Written reasoned decisions support accountability in decision making and provide a record for further review.*

Good Practice Examples

Written, reasoned decisions reinforce accountability and provide transparency for companies and individuals to understand the law and agency enforcement approaches.

Good Practice Examples

If an agency makes a significant departure from its procedures, process, rules, prior practice, guidelines, or past precedent, consider explaining such departure.

Good Practice Examples

If an agency decision to accept a remedy, commitment, or settlement, or to close an investigation without action, is novel or significant, consider, as appropriate, publishing a written explanation or closing statement (if a written decision is not already required).

VI. Confidentiality Protections and Legal Privileges

10. 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.

10.1 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.

10.2 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.

Good Practice Examples

Establish clear, transparent rules and practices for the protection of business secrets and other confidential information obtained during investigations. Issue guidance or explanations on how parties and third parties can designate information as confidential, how such designations are assessed, the process for determining whether to disclose confidential information, and how to challenge such disclosure.

Good Practice Examples

When issuing an RFI or otherwise interacting with parties or third parties (e.g., interviews), be prepared to explain the applicable confidentiality protection rules or policies. Consider creating a standard letter or statement for this purpose.

- 10.3 *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.*

Good Practice Examples

Require parties and third parties to identify confidential or privileged information in their submissions. Have them explain or substantiate such claims, as appropriate.

- 10.4 *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.*
- 10.5 *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.*
- 10.6 *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.*

Good Practice Examples

Consider providing parties and third parties an opportunity for consultation or other process with the agency to address confidentiality disputes. Consider which components of the agency are relevant for such discussions, possibly including officials not involved in the investigation.

Provide notice to the submitter of the agency's intent to disclose information designated as confidential with appropriate time for the submitter to consider challenging the decision to disclose.

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

- 11.1 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.
- 11.2 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.

Good Practice Examples

If applicable confidentiality protection rules and policies allow the disclosure of information designated as confidential, consider possible safeguards or limitations such as redactions, non-confidential summaries, confidentiality rings, protective orders, or data rooms.

- 11.3 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.

Good Practice Examples

When providing access to file or making required disclosures, consider appropriate safeguards to protect confidential information obtained during an investigation, e.g., protective orders, confidentiality rings. Reconcile such access with confidentiality or disclosure rules, establishing a clear procedure to respect party rights' of defense as well as confidentiality obligations.

12. 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.

- 12.1 Parties and third parties should not be required to disclose information that is subject to applicable legal privileges in the agency's jurisdiction.
- 12.2 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.

Good Practice Examples

Establish procedures on applicable legal privileges, e.g., how parties claim them and how the agency may respond to assess or challenge such claims. Consider written guidance for such procedures.