ICN AGENCY EFFECTIVENESS PROJECT ON INVESTIGATIVE PROCESS

Competition Agency Confidentiality Practices

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Table of Contents

1. Investigative Process Project: Introduction

In 2012, the ICN's Agency Effectiveness Working Group (AEWG) began a multiyear project (Project) on competition agency investigative process. The Project seeks to provide a forum for competition agencies to discuss how they conduct investigations, with a view to improving the effectiveness of their processes. The Project addresses both the enforcement tools and procedures available to and used by competition agencies within their legal framework. The Project pursued the topic of confidentiality protections this year. Additional aspects of the mandate on internal agency checks and balances to decision making will be pursued in 2014-15. This report addresses only the confidentiality-related work.

To inform its work, the Project began with a stocktaking exercise intended both to identify existing work related to confidentiality and to survey member agencies' confidentiality practices. Recognizing that competition agencies are organized in various ways both internally and within their governments and that they operate under different legal systems, competition agencies may benefit from sharing information and experience on confidentiality practices during investigations.

It is hoped that the stocktaking exercise provides a basis for members to discuss their confidentiality practices. The AEWG may develop the work further in view of providing guidance to ICN members looking to enhance the effectiveness and efficiency of providing confidentiality protections during their investigative process.

Existing Work on Agency Confidentiality

As an initial step, the Project examined existing work on the topic of competition agency confidentiality accomplished in similar international venues and at the domestic level. The OECD, ICN, and ICC, among others, have addressed competition agency confidentiality practices in international settings. Additionally, various member agencies have articulated the importance of protecting confidential information and how to ensure confidentiality in their own domestic enforcement settings. As such, there are notable existing work products that address competition agency confidentiality practices that inform the Project.

Notable examples of existing work:

- OECD Procedural Fairness and Transparency - Key Points, recounting the results of roundtables held in 2010 and 2011 and drawing on 82 written submissions, several portions of the OECD Report discuss confidentiality;
- ICN Recommended Practices for Merger Notification and Review Procedures, RP IX. Confidentiality;
- International Chamber of Commerce, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings, including topic of confidentiality;
- ASEAN Regional Guidelines on Competition Policy, chapters on Enforcement Powers, and Due Process, including recommendations on confidentiality.

OECD

The OECD Procedural Fairness and Transparency report (OECD Report)was published in February 2012. The OECD Report summarizes three roundtable discussions on transparency and procedural fairness held in 2010 and 2011 and draws from 82 written submissions. The OECD Report recognized that "jurisdictions are continuing to refine their rules regarding confidentiality, both in relation to the rights of the parties of investigation and to third parties and the public to access information in the agencies' files."

Several portions of the OECD report examine how jurisdictions provide proper protection for confidential business information. Its key findings that correspond to aspects of this exercise are:

- business secrets, trade secrets, and personal information are commonly classified as confidential by competition agencies;
- many competition agencies that offer the parties under investigation an opportunity to examine the case file and the evidence contained within it, do so subject to confidentiality concerns;
- competition agencies need to balance the confidentiality protection against the rights of defence of parties under investigation;
- competition agencies protect confidential information by adopting methods such as redaction, summaries, confidentiality rings, and data rooms.

ICN

In 2004, ICN members approved a Recommended Practice on Confidentiality as part of the Recommended Practices for Merger Notification and Review Procedures (ICN Merger RPs). Several aspects of the ICN Merger RPs correspond to aspects of confidentiality examined by this exercise. They include recommendations to provide:

- transparency of the confidentiality laws, policies, and possibility of public disclosure;
- confidentiality protection to business secrets and other confidential information received during the merger review process to encourage parties to submit all relevant information;
- appropriate balance between protecting commercial interests and confidentiality of third-party submissions, while assuring procedural fairness.

ICC

The International Chamber of Commerce developed a "Recommended Framework for Best Practices in International Competition Law Enforcement Proceedings". Several aspects of the ICC framework are relevant here. The ICC's framework recommends:

- protecting non-public information, as clearly defined by competition agencies' guidelines and/or applicable law, to effectively investigate potentially unlawful conduct;
- addressing confidentiality concerns *vis a vis* transparency concerns in order to encourage parties to collaborate during investigations, and safeguard parties' right to defense;

- issuing decisions based only on information that has been disclosed to the defendants;
- strong rules to protect confidential information.

ASEAN

The ASEAN Guidelines on Competition Policy contain a chapter on procedural fairness. Its guidance includes recommendations such as:

- legislation should provide confidentiality protection of commercially sensitive information, as well as information related to the identity of persons furnishing information;
- adequate sanctions should be imposed on any personnel of the competition agency for a violation of the disclosure of confidential information provided by parties under investigation, complainants, and third parties;
- the submitter should identify and explain the reasons why the information should be treated as confidential;
- confidential information may be protected by privilege, such as attorney client or legal professional privilege.

Member Survey of Confidentiality Practices: Overview

In October 2013, AEWG member agencies were invited to participate in a survey of their available confidentiality practices. This Report, which is based on that survey, aims to give a representative overview of the most common confidentiality practices and provide insight into how different jurisdictions have developed their practices to contribute to effective and efficient investigations. Thirty-nine ICN members from the following jurisdictions submitted responses on their confidentiality practices: Australia, Barbados, Brazil, Bulgaria, Canada, CARICOM, Chile, Cyprus, Czech Republic, Denmark, El Salvador, EU (European Commission), Finland, Germany, Hungary, Israel, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Mexico, Pakistan, Panama, Poland, Russia, Singapore, Spain, Sweden, Taiwan, Turkey, Ukraine, United Kingdom (Competition Commission and Office of Fair Trading), United States (Federal Trade Commission and Department of Justice, Antitrust Division), Vietnam, and Zambia.

The survey was divided into four portions. These were: 1) an overview, including a competition agency's legal framework for confidentiality and its policies, guidelines and practices; 2) the submission and review of confidential information; 3) the disclosure of confidential information, divided into the following categories (i) general rules, (ii) disclosure to parties under investigation and third parties, (iii) disclosure to competition agencies in other jurisdictions in parallel investigations, (iv) disclosure to other government agencies in the competition agency's jurisdiction, and (v) disclosure in agency orders, statement of objections, court proceedings or public statements; and 4) legal privileges. Agencies were given the option to answer "Yes," "No", "Varies", or "N/A" in response to whether they follow a specific practice, with the opportunity to provide additional information and explanation.

Each investigation-specific question was crafted to address a single potential competition agency practice that may provide protection or disclosure of confidential information. Many of the potential practices used in the survey were drawn or inspired from the existing work cited above, e.g., OECD Report and ICN Merger RPs. The survey also offered the option of two open-ended, narrative responses to identify the "major issues" and challenges related to competition agency confidentiality practices.

2. General themes from the Member Survey of Confidentiality Practices

Confidentiality rules are universal. The protection of confidential information is a common component of competition enforcement frameworks. All responding competition agencies indicated that their legal frameworks provide for the protection of confidential information obtained during investigations. The majority of responding agencies supplement statutory provisions on confidentiality with agency rules, regulations, guidelines, or practices. Many of the responses recognized that the protection of confidential information is essential to creating an environment in which competition agencies can obtain the information needed to evaluate business conduct and to prevent competitively sensitive information from being shared among competitors while carrying out this evaluation.

The submission of confidential information is common in competition investigations. This is no surprise, as key investigative facts and theories about competitive harm often turn on competitively sensitive information. The responses revealed two general approaches to the submission of confidential information during an investigation.

1) All information submitted during the course of an investigation (or all information obtained pursuant to compulsory requests) is afforded confidential treatment upon submission without further requirements.
2) Confidential treatment is afforded only to the information that is designated as confidential, often with the requirement of some degree of substantiation or explanation beyond mere assertion as confidential.

Whatever the approach, often the ultimate legal designation of the information as confidential is not determined by its initial submission and receipt by the competition agency, nor by the claims of the submitter (though confidential treatment may be applied to the information).

Competition agencies have the central role in analyzing confidentiality claims and determining their merit. The responses reveal that often it is the investigative staff that reviews confidentiality claims, with the assistance of agency counsel or 'legal services,' particularly when there are questions or disputes involving the confidentiality claims. The responses reveal that information obtained during an investigation is generally kept "confidential" in view of the confidentiality or "professional secrecy" rules by which most competition agencies are bound. It is only where the information may be disclosed that such issues come into play and the need arises for analysing the claims for protecting legitimate business secrets and other confidential information so as to avoid harm to companies. This underscores the importance for the competition agency to be in a position to properly identify

the confidential nature of the information. In this respect, many of the responses stressed the specific role of parties in appropriately substantiating their claims for confidentiality while not making excessive claims.

Disclosure generally: confidential information is kept confidential, and disclosed only under specific circumstances. Most competition agencies describe a system whereby confidential information obtained during an investigation is protected from disclosure except in specific and limited circumstances. Even competition agencies with rules that provide access to investigative files to parties under investigation (and for some, third parties) start with the premise that access is limited to non-confidential information, with limited exceptions to respect the rights of defense. While competition agencies have the authority and ability to disclose confidential information in certain circumstances, as a whole, the responses reveal that this ability is used with care.

The responses reveal four common scenarios for the disclosure of confidential information:

- as necessary to advance an investigation (such disclosure can be to parties, and third parties)
- to parties as necessary for their defense
- to other governmental agencies, domestic or foreign, in a coordination or cooperation context
- to courts in the course of adjudication or appeal of competition matters

The first two scenarios are linked though have different objectives. In the first scenario, competition agencies have an 'affirmative' ability to disclose confidential information when it is in the interests of an investigation (e.g., to confront a witness; as affirmative proof of a violation). The responses that described this ability also noted that such "affirmative" ability to disclose confidential information is used carefully and sparingly. In the second scenario, competition agencies disclose confidential information to parties so that they have the ability to defend themselves by being informed of the evidence against them (i.e., via "access to the file" or via discovery as part of litigation). The third and fourth scenarios involve disclosure of confidential information to others outside the investigation context, to other law enforcers (e.g., competition and otherwise), and to the courts that decide and/or review competition matters.

Disclosure of confidential information can occur based on legal rules, either as requirements (e.g., discovery rules in litigation) or as discretionary decisions of the competition agency, or they can occur with the consent of the submitter. While consent-based disclosure can occur in any context, it is most often found in the international merger cooperation context, as the basis for sharing information via waiver.

Disclosure during the course of an investigation. The responses reveal that the disclosure of confidential information – though it is overall rare – is related to the timing and advancement of an investigation. Early in investigations, competition agencies tend keep information confidential unless a party consents to its disclosure. At later stages, as an investigation

advances, disclosure of confidential information becomes relatively more likely. Generally, for competition agencies that are able to disclose confidential information, as an investigation advances, there is likely to be more review of confidential information, more use and consideration of disclosure of confidential information in the investigation, as well as more requests for access to confidential information and corresponding challenges to its disclosure. Some competition agencies reported that confidential information is rarely disclosed during the course of their investigation, but that they are subject to broader disclosure requirements during the course of their enforcement proceedings following an investigation.

Methods to limit the extent and impact of disclosures. According to the responses, when information obtained during investigations is disclosed, competition agencies (and where applicable courts) have and use a variety of methods to limit the extent of the disclosure of confidential information. Techniques and tools such as redaction, non-confidential summaries, aggregation and anonymisation of information are commonly used to limit the disclosure of confidential information. In litigation or investigative hearings, courts and competition agencies may use tools such as protective orders, closed hearings, sealed filings, and other restrictions on access to confidential information, often via "confidentiality rings." In contexts such as coordination and cooperation with domestic and foreign counterparts, competition agencies may condition the disclosure of confidential information on use restrictions and assurances of similar safeguards to protect the information.

Role of competition agency discretion. As many responses explained, the decision to disclose confidential information in many circumstances involves a mix of legal requirements, agency practices, and, at times, agency discretion. Competition agencies have the responsibility to determine if the statutory or agency justifications are met and often the discretion of whether to disclose once disclosure is determined to be appropriate. However, there are interests and incentives for agencies to be cautious with disclosures. Overzealous disclosure to advance investigations can result in challenges from the submitters of the information and ultimately erode the confidence companies have in providing information in future investigations. Withholding appropriate disclosures to parties at advanced stages of decision making or in litigation can carry serious consequences in court review, even leading to the possible invalidation of all or a portion of a competition agency decision or challenge.

Notice and ability to appeal. As a general principle, when the disclosure of confidential information, or information designated as confidential by the submitter, is contemplated, competition agency notice to the submitter and the ability to appeal a competition agency's decision to disclose are common rights or practices. However, many responses indicate that these basic principles are not absolute, as they are not always legal requirements and are usually subject to exceptions.

Generally, the first step that many competition agencies take when contemplating disclosure of confidential information or information designated as confidential, is to talk to the submitter. Most responses described a general willingness to engage with parties in informal consultations regarding questions of confidential treatment for specific information.

Submitters may be asked for further explanation or justification for their confidentiality claims. Some responses described formal aspects of notice with set timelines for response and internal agency evaluation outside of the case team (e.g., legal services, an internal arbiter such as a hearing officer or general counsel offices). Some responses indicated that disclosure takes place only after a final, legally binding order or decision is made on appeal. Requirements vary, as described below, but the general concept of prior notice before disclosure, particularly in contexts when third party information is shared with parties for investigative and defense purposes, appears in many of the responses.

A notable alternative to prior notice of disclosure is found in the coordination and cooperation contexts. For many responses, information disclosed to other government investigators and regulators (e.g., criminal prosecutors) for their own enforcement is not subject to notice requirements or part of common agency practices. Many responses explained that such notice is not appropriate for disclosure to law enforcement where a potential investigation into alleged wrongdoing may be compromised. Notice is less of an issue in the international competition cooperation context, since such cooperation is often facilitated by party consent via party waivers, and thus involves full notice of the competition agency's intent to share information. For jurisdictions with more integrated legal authority to share confidential information with foreign counterparts (e.g., within the ECN or some cooperation agreements or statutory authorization), notice to submitters is not often a requirement.

Across many responses, the ability for the submitter of confidential information to appeal a competition agency's decision to disclose confidential information (or information claimed as confidential) is a common facet in several contexts. It is generally linked to providing notice of a decision to disclose. For some responding jurisdictions, an appeal is an internal process within the competition agency, for others an appeal is before an external body, often a court.

The role of courts. Throughout the responses, for competition agencies from administrative and prosecutorial systems alike, courts have a unique and important role in terms of confidentiality. Not unexpectedly, the responses reveal that confidential information is routinely disclosed to courts in the course of litigation and appeals of competition cases. Courts often have the authority to decide the parameters of the sharing and presentation of confidential information during litigation and hearings. In many jurisdictions, courts also have the ability to act as an adjudicator of disputes involving questions regarding confidentiality and disclosure of information during investigations that is claimed to be confidential. However, many responses indicated that submitters rarely appeal confidentiality disputes to courts and therefore the judicial review of confidentiality disputes during an investigation does not occur frequently.

Resources required to implement confidentiality rules. Competition agencies and parties often go to great lengths to protect confidential information. The requirements for submission, review and disclosure can impose a significant workload. As a whole, the set of responses identify a myriad of ways in which competition agencies protect specific confidential information while still trying to disclose sufficient information to meet the transparency

requirements of their investigations. Competition agencies develop internal procedures for the handling of confidential information and provide routine training to investigative staff. Many responses describe practices whereby competition agencies keep two sets of investigative files, one public and one confidential; produce two versions of decisions, one with confidential information, one without; provide different versions of statements or reports to parties and third parties, each only revealing confidential information specific to the recipient; and produce aggregated information, summaries, and redactions before disclosing confidential information obtained. Additionally, in some jurisdictions, parties are required to produce materials with confidential information and also to produce redacted non-confidential versions or summaries of the same materials. This relieves the competition agency staff from having to produce such versions or summaries themselves. Often competition agencies and submitters engage in informal consultations to determine the proper contours of confidential information contained in submissions. The cumulative impact of these practices is a collective increase in workload for competition agencies and submitters, with the potential to impact and delay investigations. This also suggests that if submitters are "over-designating" information as confidential, it may unnecessarily increase the resource costs of implementing confidentiality rules. This resource impact of confidentiality rules was one of the primary challenges identified in the narrative responses to the survey.

The responses recognized the value of providing protection to confidential information obtained during investigations. The extent and variety of the practices implementing confidentiality rules are evidence of the seriousness with which competition agencies approach protecting confidential information. They are part of the task of balancing the need to protect confidential information and the need for transparent enforcement and decision making.

Different enforcement systems. The survey results include responses from both administrative and prosecutorial systems. The responses generally do not evidence a significant split in the overall approach to, or perception of, confidentiality rules. Prosecutorial systems appear more likely to limit disclosure of confidential information to the parties during an investigation. In such systems, the ability of parties to defend themselves and respond to charges are ensured at the litigation stage prior to a final decision in court, whereas similar disclosures may occur via "access to the file" in an administrative system. Given the nature of prosecutorial systems, courts and court rules play a larger role in determining the appropriate disclosure of confidential information prior to a final decision on the merits of the conduct investigated. Likewise, the responses suggest that administrative systems are more likely to have the ability to make final determinations on whether information is confidential.

Privileges impact information requests. The survey included a section on legal privileges and their impact on information gathering during investigations. Most responding agencies noted that a variety of legal privileges may apply that protect information from disclosure. Most responding agencies provide for procedures allowing submitters of information to protect privileged information (e.g., privilege logs). Generally, these responses described rules that

place the burden of establishing whether a privilege applies on the party asserting the privilege (e.g., by describing the nature of the information not produced in a manner that enables an assessment of the privilege claim without revealing privileged information).

Emerging experience with confidentiality issues. At various points throughout the survey responses, several jurisdictions indicated that specific confidentiality issues had not been raised or addressed in their jurisdictions. It is worth noting that some responding competition agencies have little or no experience with some of the practices addressed in this report and that confidentiality issues are a topic of attention for competition agencies that carefully consider new and revised procedures when faced with new issues.

Narrative Responses

Two survey questions asked for narrative responses. A compilation of the results are as follows, as both evidenced significant common themes.

First narrative request: Please describe the types of information obtained during investigations that your agency generally considers to be confidential.

There were a variety of responses with respect to official definitions of confidential information. Some jurisdictions lack a statutory definition of confidential information in their competition laws, others have competition laws that define confidential treatment in several contexts, and still others import the definition of confidentiality from other legal frameworks. Despite a variety of the types of sources for a working definition of confidential information, the responses exhibit remarkable consistency with respect to what information competition agencies generally consider worthy of confidential treatment. The most frequently cited phrase in response to this question was "business secrets" followed by similar formulations of "trade secrets," "commercial secrets," and "commercially sensitive information." The concept of secrecy appears in all responses as central to the determination of what is confidential, some even describing actions taken by submitters to keep their information secret or restrict access, or an objective rationale for secrecy, as important indicia of confidentiality.

Many responses gave examples of the types of information that are often determined to be confidential, generally information which reveals profits, prices, costs, and commercial strategies. A non-exhaustive list from the responses includes:

- names of customers
- invoices; prices paid by individual customers
- information about costs components
- sales data
- productions statistics
- internal business strategies
- financial data
- terms of contracts and current contract negotiations
- information about new products or projects

- personal information
- proprietary information

Many responses stressed that it is the nature of the information that is controlling, not simply a type, category, or title of a document or information that makes it confidential. The most cited factor in determining whether information is confidential is an element (often significant) of competitive harm that would accompany any disclosure of the information. Various responses used phrases such as "disclosure of which affects the competitive position," "significant damage if made public," "requirement of harm if disclosed," "significant harm if disclosed," and "may severely harm commercial interests."

Delineating all information which merits confidential treatment is difficult to accomplish merely by naming categories or types of information, but two practical indicia of confidentiality appeared in many of the responses: the information in question is not public and the disclosure of the information would significantly harm the commercial interests or competitive advantage of the owner of the information.

The responses are consistent with the findings of the OECD's Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation:

> Responses to the Survey indicate that there is no commonly agreed definition at the international level concerning what information is "confidential" in competition matters. Some responses also indicate that there may be different definitions within the same jurisdiction, depending on the statutory provisions that the agency is applying (e.g. merger control law or provisions on behavioural conduct). These definitions of "confidential information" are not necessarily included in legal statutes, but may instead be developed by practices of the enforcement agencies and of the courts.[1]

In addition to different statutes applying to different types of investigations, the way subjects have themselves treated information with respect to confidentiality may vary in the merger versus cartel context. For example, participants in cartel activity routinely share price and customer information with their conspirators in order to reach agreement on prices or customer allocations, and such sharing negates claims that the information is confidential or competitively sensitive just because it contains price or customer information. In cartel investigations, information about prices and customers is more likely to be confidential on the grounds it reveals the scope of the investigation or is information provided by a confidential source.

[1] OECD Competition Committee, Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation at 122, available at www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf.

Second narrative request: Please identify the challenges and major issues related to the protection of confidential information obtained during investigations.

Several responses to this request (and others throughout the survey) stressed the need to protect confidential information obtained during investigations. Confidentiality of business secrets is an essential principle recognized by many competition agencies during the course of their investigations. Without strong confidentiality protections, in rules and in agency practices, parties and third parties may lose confidence in agency enforcement. The ability to obtain necessary information might be jeopardized as companies rethink what they provide to competition agencies. Several responses also identified confidentiality protections – preventing competitors from obtaining competitively sensitive information about their rivals – as consistent with their overall mission to protect competition.

There were three commonly cited challenges to the implementation of confidentiality rules. The first two are related, and result from the competing objectives of transparent enforcement and confidentiality protections.

The first challenge identified across many responses is the systemic tension between broader public access or "freedom of information" government-wide rules based on the objective of informing the public about government activities and the confidentiality rules that apply to information obtained by competition agencies during their investigations. Such transparency laws usually provide exceptions that protect confidential information obtained in law enforcement contexts from disclosure to varying degrees, but the overarching objective of government transparency is at odds with such restrictions that are generally to be narrowly construed. This tension is compounded by the central role that confidential information can have in competition analysis, where the determinative facts and evidence in a case may be confidential. Several responses expressed concern about restrictive confidentiality rules inhibiting what information can be presented to the public in competition agency decisions, and ultimately the public's understanding of the bases for the competition agency's decision making.

While the above systemic challenge is based on interaction with government-wide transparency laws, a second similar challenge also was identified within the context of specific competition investigations. The need to be transparent with parties under investigation about the nature of the evidence against them (and to a degree interested third parties) sometimes may be in tension with confidentiality rules that limit access to such information. When evaluating the question whether disclosure of confidential information is appropriate in the investigative context, some competition agencies reported that they consider factors such as the competitive sensitivity of the information (the extent to which the disclosure of this information might harm the interests of the parties concerned); the significance of the information for establishing the violation; the evidential value of the information (does it significantly advance the investigation); and whether non-disclosure deprives targets of the ability to defend themselves with knowledge of key evidence used against them. Other competition agencies reported that even though they generally do not

disclose confidential information in the investigative stage, they generally find that they can provide significant transparency to the parties under investigation regarding their primary competitive issues and concerns. Confidentiality as a "counterbalance" or limitation to competition agency transparency during investigations was a common theme identified by member agencies that responded to the 2013 Project survey on transparency.[2]

The third commonly cited challenge is resource based. The volume of confidential information that is submitted, identified, reviewed, and protected during competition investigations in a variety of manners imposes resource costs on competition agencies and the parties that submit such information to competition agencies. This concern about the resource costs of confidentiality rules is exacerbated by the perception in some jurisdictions that submitters are "over claiming" information as confidential in order to prevent otherwise appropriate disclosures or to delay investigations.

3. Results of Member Survey on Confidentiality Practices

How the results are presented

All the survey questions are presented as asked, with the percentage results of the "Yes," "No," "Varies," and occasionally "Not applicable" responses, and with a representative summary of the accompanying explanations. The results are presented according to the categories of the survey: an overview section, a section on submission and review of confidential information, a section on disclosure in five subparts focused on the audiences for disclosure, and a final section on legal privileges. Some of the questions have been reordered and presented below alongside related questions within their section.

For the portion of the survey results on disclosures, it is important to note that high percentages of "Yes" answers reflect the ***ability*** to disclose confidential information under certain circumstances. These numbers are not indicators of the ***frequency*** with which confidential information is disclosed or ***volume*** of confidential information disclosed.

[2] ICN Investigative Process Project, Report on Competition Agency Transparency Practices, available at http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf.

I. Overview

1. How to ensure confidentiality protection

a) Does your agency's legal framework provide for the protection of confidential information obtained during investigations?

Yes	No
100%	**0%**

b) If so, is this protection based on a statute?

Yes	No
100%	**0%**

c) Does your agency have established policies and procedures to protect confidential information obtained during investigations?

Yes	No
92%	**8%**

All responding agencies have specific statutory provisions to protect confidential information obtained during investigations. Confidentiality provisions protect business secrets, information about natural persons, or other kind of confidential information, and apply during the entire course of proceedings before a competition agency.

In addition, nearly every responding agency has articulated its own operating procedures to protect non-public information obtained during an investigation. Those procedures typically cover issues related to submission of, access to and handling of confidential information, as well as disciplinary measures to address unlawful disclosure or improper handling of confidential information.

2. Transparency

a) Does your agency ensure transparency of the confidentiality laws, policies and practices applicable to its investigations?

Yes	No
100%	**0%**

b) Does your agency publish the criteria governing its handling and treatment of confidential information?

Yes	No
70%	**30%**

Every competition agency that responded indicated that it is transparent with respect to the confidentiality laws, policies and practices, often by noting that it publishes its own guidance on the confidentiality rules applicable to its investigations. Across the set of responses, competition agencies identify such guidance in forms such as: agency operating manuals, information polices, confidentiality notices, codes of conduct, FAQs, guidelines or other rules. Such materials are generally available to the public, often accessible on competition agency websites. In addition, many responses noted the availability of informal consultations, meetings, and other exchanges between the agency and parties that submit information in order to explain confidentiality rules during an investigation. Most responding agencies also publish the specific criteria governing their handling and treatment of confidential information, as well as circumstances for the disclosure of confidential information. Several competition agencies that do not publish guidance noted that such criteria are embedded in their statutory framework of confidentiality protections.

3. Violation of confidential information

a) Does your agency have procedures to internally investigate the unauthorized disclosure of confidential information?

Yes	No
58%	**42%**

b) Does your law contain penalties for unauthorized disclosure of confidential information by an agency or agency staff?

Yes	No
92%	**8%**

In order to minimize the risk of inadvertent or improper disclosure of confidential information, competition agencies typically develop internal rules for handling confidential information. Many responses stressed the importance of internal instructions on the protection of confidential information, including, for example, during initial orientation for all new employees and periodic required training. When a violation of confidentiality rules occurs, a little more than half of the responding agencies have set internal procedures to investigate unauthorized disclosure. For some competition agencies without internal procedures, investigations can be handled by outside entities, such as a prosecutor, or parties may have the ability to file a damage action against the competition agency.

Statutory frameworks for nearly all of the responding agencies contain penalties for individuals for the unauthorized disclosure of confidential information (without prior consent of the relevant party or a legal justification). The most common potential penalties are criminal fines, the possibility of imprisonment (examples included up to 1 year and up to 5 years), disciplinary proceedings and even dismissal. Practice varies as to whether the competition agency is able to impose the penalties themselves or whether penalties are imposed by an outside entity, such as a court.

4. Different standards for confidentiality protection

a) Generally, does your agency's handling and treatment of confidential information vary:

i. depending on which party submits the information (i.e. complainant, third party, target)?

Yes	No	Varies
16%	**84%**	**0%**

ii. depending on which party requests access to the information (i.e. complainant, third party, target)?

Yes	No	Varies
37%	**61%**	**3%**

iii. depending on the type of investigation: cartel, merger, unilateral conduct?

Yes	No	Varies
34%	**66%**	**0%**

At the end of the overview section, the survey asked three questions about the potential difference in treatment of confidential information in different contexts: depending on which party submits the information, depending on which party requests access to the information, and depending on the type of investigation. At these broad levels of abstraction, the majority of responses to each question replied that there is generally no difference in the treatment of confidential information. This is consistent with general themes throughout many of the responses: confidential information is important across all investigations and enforcement contexts and the legal frameworks and agency rules generally are based on similar principles.

It is instructive to present the reasoning for the responses that did note differences. In terms of differences driven by the party that submits the information, only a small number of responses responded "Yes." All responses revealed that information submitted by both parties and third parties during investigations is generally subject to confidential treatment.

The responding agencies were more divided with respect to the confidentiality treatment depending on the party requiring access to the information, as nearly 40% recognized some differences for the treatment of confidential information. Across all responses, it is important to keep in mind that generally parties have broader access to confidential information obtained during an investigation or used against them in litigation. Many responding agencies only grant access to the file for parties or targets under the investigation, while complainants and other third parties involved in the proceedings will only have very limited access to specific documents, excluding other parties' confidential information. Similarly, many responding agencies in prosecutorial or judicial systems are required to provide discovery to parties (but not third parties) in enforcement proceedings. Generally, the "Yes" responses

identified the direct interests of parties under investigation (or targets) as the factor causing different treatment, particularly in access to confidential information used against them as a basis for a finding of a violation. Several responses noted that the process to determine access to confidential information for third parties is similar to that of parties, with similar opportunity to request access, but that the outcome of balancing whether to provide access and the evaluation of the interests involved is more likely to result in access to confidential information for parties than third parties.

For those that recognize differences across enforcement contexts, the responses explained that different statutory provisions and confidentiality rules may prescribe disclosure in different ways, depending on the type of investigation or type of sanction available (i.e., whether the conduct is subject to fines and/or imprisonment). Some of those that identified differences in treatment of confidential information noted that greater confidentiality safeguards accompany more intrusive investigation processes; for instance, cartel investigations, with the use of a grand jury or searches and raids, are more likely to have some distinct rules to guard the confidentiality of the information seized. Cartel investigations can also lead to the unique, often more strict treatment of confidential information in the context of leniency and the identity of a leniency applicant.

II. Submission and Review of Confidential Information

1. Treatment of information received during investigations

a) Is *all* information provided to your agency in response to a *compulsory* request during an investigation subject to rules that prohibit or restrict its disclosure (subject to specified exceptions)?

Yes	No
76%	**24%**

Most responding agencies treat as confidential all the information received pursuant to *compulsory* process in an investigation. Even non-confidential information received during the course of an investigation may be protected as confidential by rule or statute, or otherwise classified as "agency internal information" and not released unless an exception applies (e.g. the material is required to be produced in court proceedings or become subject to "access to file" requirements). However, in some jurisdictions, if publicly available information is provided in response to a compulsory request, the underlying information is still considered public and disclosable, although in some situations the specific document submitted may be considered confidential, for example, if it was submitted to the grand jury or pursuant to a statute providing confidentiality for all submitted documents.

b) Is information provided to your agency voluntarily during an investigation subject to rules that prohibit or restrict its disclosure?

Yes	No	Varies
71%	**11%**	**18%**

With respect to information received *voluntarily* (as opposed to through a compulsory request) during an investigation, most responding agencies have rules that provide for confidential treatment. Most responses indicated that submitters need to designate the information as confidential in order to be granted the protection, even where the rules that would not require such designations for information provided via compulsory request.

Though these two questions are not intended for direct comparison, the responses to both indicate that information provided via a compulsory request and information provided voluntarily, can be, and often is, subject to confidential treatment. In both cases, most competition agencies subject the information received to any rules that prohibit or restrict its disclosure.

2. Role of the submitter

a) In order to receive confidential protection, are companies or persons that produce information required to identify any material that they consider to be confidential or contain confidential information?

Yes	No	Varies
66%	**18%**	**16%**

b) Is the submitter of information required to substantiate or explain claims of confidentiality?

Yes	No	Varies
58%	**18%**	**24%**

Most responding agencies require parties that submit information during an investigation to clearly and concisely identify any documents, portions of documents, materials, or data that they consider to be confidential. In such a context, it is the submitter of the information that makes the initial assessment of and claim to confidentiality. Though not determinative, it establishes an initial posture for the information.

Several "Yes" responses stated that the general instruction is that confidentiality claims should be kept to the minimum extent necessary to protect confidentiality, and that blanket or unsubstantiated claims will not be accepted. Several of the "Varies" responses came from systems that do not require specific claims of confidentiality for information provided via compulsory requests, but do have requirements for voluntarily produced information. Also, several of the "No" answers indicated that submitters are invited or encouraged to mark appropriate submissions, or portions of submissions, as "confidential" as this may assist with subsequent review and challenges. Note that several of the "No" replies represent systems that provide blanket confidential treatment for all information submitted during an investigation.

As a result, parties are often required by many of the responding agencies to identify the specific information to be treated as confidential, explain claims of confidentiality and make a clear statement about it. Sufficient explanations may include factors such as the nature of the information, the harm that could be caused to undertakings or employees, and the likelihood and magnitude of the harm if such information is disclosed. Submitting parties might also refer to a legal provision, or fill out a form. Some jurisdictions also require the parties to provide a concise description of each piece of confidential information. This description must allow any party with access to the file to determine whether the information deleted is likely to be relevant for its defence and if there is a basis for a claim of confidentiality. For some competition agencies, it is sufficient to merely mark the information with the word "confidential" or a similar assertion. In many of the responding jurisdictions, parties are required to provide information in two versions: a public version, excluding the confidential information; and a confidential version, including the confidential information. Several responses stated that agencies may also identify confidential information *ex officio*, independent of the submitter's claims.

Importantly, several responses emphasized that there is no general presumption that information claimed as confidential information is in fact confidential. Mere designation is not enough, as the competition agency or court may determine after review that the information is not entitled to confidential protection.

A few responses raised practical concerns or perceptions that submitters simply label entire documents or submissions as confidential information, assuming it is a difficult task to check, review, and eventually challenge such assertions. Several responses stressed the importance of following rules that limit designations to actual confidential information.

3. Competition agencies' role in offering guidance and in reviewing claims

a) Does your agency provide formal or informal guidance for recipients of requests for information on how to claim confidentiality for information in their submission or how the agency assesses confidentiality?

Yes	No	Varies
82%	**18%**	**0%**

b) Does your agency review claims of confidentiality to determine if the information warrants protection and the form of that protection?

Yes	No	Varies
86%	**5%**	**8%**

c) Can your agency deny a request for confidential treatment for information if it decides that its disclosure would not cause competitive harm to the disclosing party?

Yes	No	Varies
84%	**14%**	**3%**

d) Is your agency required to (or if not, is it your agency's practice to) explain its conclusions to the submitting party with respect to the party's confidentiality designations if the agency determines that the information is not entitled to confidential treatment?

Yes	No	Varies
68%	**22%**	**11%**

The majority of responding agencies provide guidance regarding what constitutes confidential information. Most competition agencies provide *formal* guidance based on criteria established by law, guidelines, internal regulation, and/or explanations in the request for information itself. Several responding agencies stated that their guidance includes specific examples of business secrets and confidential information in order to give more practical guidance on confidentiality claims.

Virtually every responding agency has the ability or authority to review claims of confidentiality to determine if the information warrants protection, at least in some circumstances. In this regard, the competition agencies will assess whether the claim is justified, if it follows the legal requirements, and whether the information is publicly available. As a whole, the responses indicate that competition agencies provide careful, rigorous review of confidentiality claims, consistent with statutory responsibility to protect confidential information.

Broadly drawing from across the responses, typically a competition agency will either provide a preliminary denial of confidentiality claims at the outset if claims are clearly erroneous, or more likely provisionally accept claims if the requirements for submission are met. The responding agencies typically have the ability to deny claims at later stages, consistent with the practices for reviewing claims in light of requests for access.

According to many of the responses, reviews for confidentiality are made when a third party requests access to information, or when the information is to be disclosed, or used in a decision or litigation. Several responses noted specific time limitations placed on reviews, e.g., that review takes place within 10 business days. Who decides confidentiality claims varies from competition agency to competition agency, and generally includes both internal review and determination, and ultimately the possibility for external review (i.e., a court) if challenged. At some competition agency, the review can be made by the head of the competition agency, by a designated commissioner of the case, or by the case team. At other competition agencies, the review is made by a specialized body within the competition agency (e.g., legal services or a general counsel's office), or by a mixed body (e.g., case handlers, specialized offices, and managing officials). For others, a court makes the final review and determination.

If the competition agency does not agree with the confidentiality claim made by a submitter, as an initial step, most responding agencies explain their determination to the submitter and

grant additional, often limited time to further justify or correct the confidentiality claims made. Several responding agencies noted that they give the reasoning for their decisions in writing.

If the disagreement persists, most responding agencies can deny a request for confidential treatment for information they determine not to be confidential (often including a conclusion that the information is unable to cause competitive harm if disclosed). In some responding jurisdictions the competition agency has the ultimate discretion as to whether certain information warrants confidential protection according to the law or not. In others, however, the competition agency can only disclose information claimed to be confidential by the submitters after a favorable final decision by a court.

III.A. Disclosure of confidential information

1. Generally

a) Is your agency able to disclose confidential information obtained during an investigation under certain circumstances?

Yes	No	Varies
97%	**3%**	**0%**

Nearly all of the responding agencies can disclose confidential information under certain, limited circumstances. In the majority of responses, these circumstances are spelled out by law. In others, some additional criteria of permissible disclosure are also contained in internal regulations. In some jurisdictions disclosure can be granted on a case-by-case basis, depending on the discretion of the competition agency.

In some jurisdictions, the legal criteria for disclosing confidential information are very strict and detailed. Other responses explain that disclosure is possible after applying a balancing test. Such a balancing test might be applied in different contexts of disclosure, e.g., disclosure to other government agencies, disclosure to foreign competition agencies, and disclosure of inculpatory information. Some responding agencies also underlined the role of their constitutional principles on access to public information or the parties' right of defence. Some jurisdictions also mentioned the role the competition agency may have in seeking waivers when disclosure is sought.

2. Different contexts of disclosure

a) Is your agency able to disclose confidential information obtained during the course of an investigation:

i. to the parties under investigation?

Yes	No	Varies
42%	39%	19%

ii. to third parties involved in the investigation?

Yes	No	Varies
22%	59%	19%

iii. to competition agencies in other jurisdictions?

Yes	No	Varies
53%	26%	21%

iv. to other government agencies in your jurisdiction?

Yes	No	Varies
63%	5%	32%

v. in an agency order, statement of objections, or in court proceedings (e.g. a complaint)?

Yes	No	Varies
65%	5%	30%

vi. in press releases or similar public statements (e.g. speeches; this does not include statements in court or agency decisions or orders)?

Yes	No	Varies
8%	84%	8%

This question set out six potential categories for the disclosure of confidential information, by the recipient of the information or by the vehicle of disclosure. For two categories, other government agencies and agency orders/court proceedings, large majorities of responding agencies have the ability to make such disclosures, at least in certain circumstances ("Yes" plus "Varies"). For two categories – third parties and public statements – the responses indicate that disclosures are not common practices. Finally, in two categories – the parties under investigation and foreign competition agencies – the responses were split, with majorities of the responding agencies able to make such disclosures in some circumstances.
The most commonly available types of disclosure of confidential information obtained during an investigation that were identified in the responses relate to disclosing confidential information to other governmental agencies and in court proceedings.

The responses were split as to whether competition agencies disclose confidential information to parties during an investigation (recognizing that several responding agencies from prosecutorial systems make significant disclosures after investigations and during litigation). Amongst those which can disclose confidential information, such a disclosure is subject to a balancing test where the right of defence is weighed against the right to preserve confidentiality. Even fewer responding agencies disclose confidential information to third parties during investigations. And those that answered "Yes" explained that such disclosure occurs rarely. One example from a response explained that even if a third party is "materially affected by the alleged infringement or is likely to materially assist the case, the necessity of … disclosure would still be very carefully considered". For those that replied "Varies", some responses noted that the agencies typically provide the parties with the core competitive concerns and theories of harm without disclosing confidential information.

A majority of responding agencies can disclose information to competition agencies in other jurisdictions. Others, in the above context, share only non-confidential information. Some responding agencies will share confidential information with other competition agencies only pursuant to a waiver or a bilateral international agreement whereas some respondents explicitly identified an international agreement under which they can share confidential information with their counterparts. In general, responses described waivers as a vital tool to allow more complete communication and cooperation, both between competition agencies and with the providing party, enabling competition agencies to better coordinate on timing, make more informed decisions, and avoid conflicting outcomes, while preserving the providing party's right to confidentiality protections with respect to third parties.

Most responding agencies can share confidential information with other government agencies. For these responding agencies, generally information can be shared with law enforcement authorities such as tax authorities or criminal prosecutors. Some competition agencies explained that they can pass confidential information to another governmental agency if they come across evidence suggesting a law violation, and in such cases, some competition agencies have the discretion to share confidential information whereas others are required by law to do so.

Most competition agencies disclose confidential information to courts during the course of their litigation or the appellate review of their decisions. In many responding jurisdictions, courts can independently decide whether the disclosed information is indeed confidential (for the purposes of further restricting disclosure of such information in the court proceedings).

A majority of responding agencies do not provide for the possibility of disclosing confidential information in press releases or other public statements. Only a few competition agencies responded that they can disclose confidential information in the above context, yet they did not specify the exact circumstances in which such a disclosure can occur and all noted that such possibility is rare.

3. Ability of the submitters to prevent or limit disclosure

a) Does your agency provide notice to the party or third party claiming confidentiality of your intention to disclose information designated as confidential?

Yes	No	Varies
49%	**22%**	**30%**

As a general principle, a majority of responding agencies provide notice to the submitter whose confidential information is disclosed, at least in some circumstances. The provision of such a notice stems either from requirements imposed by law or standards developed by the judiciary, from the competition agency's practice or elsewhere (e.g. broader government-wide policy).

In some responding jurisdictions, notice is not a legal requirement, but rather the competition agency has the discretion to provide notice or not, at times based on balancing tests or principles borrowed from broader jurisprudence such as the "requirements of natural justice." In some jurisdictions, the notice seems to be given *ex post*, whilst in other jurisdictions the notice is given before the disclosure and after hearing the parties (e.g. via consultations between the competition agency and submitter or written comments from the submitter after being notified about the competition agency's intention to disclose confidential information). Some respondents answered that the notice is given by way of a formal, reasoned decision.

Many responding agencies noted that they provide notice only with regard to certain types of disclosure or in certain contexts, e.g., notice requirements may contain exceptions for cases of disclosure to other governmental bodies.

b) Do parties and third parties have the ability to object to, or appeal within the agency, prior to the disclosure of their information on confidentiality grounds?

Yes	No	Varies
70%	**22%**	**8%**

c) Do parties and third parties have the ability to appeal to or seek an order from a court and/or administrative agency to prevent or limit disclosure of their information?

Yes	No	Varies
76%	**19%**	**5%**

Two thirds of responding agencies allow a submitter of information to challenge its disclosure. In some jurisdictions such challenges are only possible within the competition agency, in other jurisdictions only before courts, and lastly, some jurisdictions allow both types of challenges, i.e. internal and judicial. Whether or not considered an ability to object or appeal, many responses described a practice of informal consultations with submitters as a first step if the confidentiality of specific information is in question.

For several responding agencies that allow the submitter to object internally within the competition agency prior to disclosure, the ability to object is not part of a formalized procedure. For other competition agencies, the procedure of filing internal objections is formalised and hence accessible only after certain legal criteria are met. Some competition agencies established a special adjudicative body within their structure which reviews confidentiality disputes (e.g. a hearing officer or procedural adjudicator).

In the majority of responding jurisdictions, submitters can appeal the disclosure decision to a court in order to prevent or limit the disclosure. The responses reveal that an appeal can be lodged to judicial or semi-judicial bodies depending on how the competition review system is shaped in a given jurisdiction. Sometimes the appeal is filed *via* the competition agency, which can change its decision before the appeal reaches the court.

4. Ability of parties and non-parties to challenge or access confidential information

a) Does your agency have a process for a party (e.g. a target) or third party (e.g. a complainant) who is given access to information obtained during an investigation to challenge the agency's conclusions on confidentiality for a document or materials submitted by another party?

Yes	No	Varies	N/A
38%	**38%**	**11%**	**14%**

Practices across the responding agencies are split as to whether to allow parties or non-parties access to confidential information or to challenge the confidentiality status of the information submitted by another party. Several responding agencies that provide for such a challenge mentioned the broader context of access to public information. Some competition agencies reported limiting the availability of a challenge procedure to certain non-parties (e.g. third parties whose legal interest was violated).

Some competition agencies which allow for a challenge procedure follow a two-prong procedure: first a party or non-party can question the confidentiality status of the information (this is done by objecting verbally or in a written form within the competition agency), second, if the competition agency still considers the disputed information confidential, a party or non-party can file an appeal to the court. Others allow a direct challenge in court.

5. Disclosure of confidential information during investigative hearings

a) Does your agency have procedures to prevent the disclosure of confidential information during investigative hearings?

All responses

Yes	No	Varies	N/A
45%	**18%**	**0%**	**37%**

Results for only those respondents with investigative hearings (N/A responses removed)

Yes	No	Varies
71%	**29%**	**0%**

Many of the responding agencies that have investigative hearings identified several practices intended to prevent the disclosure of confidential information during the hearings. These include: closing the hearing to the public, restricting the category of persons who can attend the hearing only to certain authorized officials working on a case, using special rooms, or hearing parties separately. In some jurisdictions, a party must file a request for a closed hearing in advance and demonstrate a potential harm that might occur absent such hearing.

6. Disclosure of confidential information during informal discussions

a) Is your agency able informally to discuss with parties under investigation and third parties the nature of evidence that contains confidential information without revealing specific confidential information? (e.g. by aggregating or anonymizing specific views, data or information)?

Yes	No	Varies
76%	**16%**	**8%**

As identified above, the common starting point for confidential information obtained during investigations is non-disclosure, except in limited circumstances. Competition agencies also recognize the value of exchanges with parties and third parties to learn more about the conduct and markets at issue and test what they have learned from others. The large majority of "Yes" responses to this question suggest that competition agencies are able to find ways to engage parties and third parties with what they have learned during an investigation while still respecting confidentiality protections. As identified in the responses, even without disclosing confidential information, agencies can inform the parties about the general theories of competitive harm underlying the proposed case, the general nature of the evidence that supports those theories, the staff's economic analysis, and the possible scope of relief.

The practices identified by the responding agencies that answered "Yes" include the use of non-confidential versions of documents, discussion of ranges of numbers rather than specific figures or summaries of information rather than specific data, and description of aggregated summaries rather than individual views all in order to preserve confidentiality. The responses stressed that such practices are not an end run around confidentiality rules, but rather they allow for useful discussion of the conduct at issue.

III.B. Disclosure to parties under investigation and to third parties

1. Disclosure to parties under investigation

a) During the course of an investigation, is your agency able or required to provide confidential information to a party under investigation that was obtained from other targets or third parties?

Yes	No	Varies
37%	61%	3%

Most responding agencies answered that they do not disclose confidential information to parties under investigation during the investigation. The reasons for non-disclosure in the above context often relate to a broader interest of not disclosing any confidential information before the end of the investigation, in order to ensure the effectiveness of the investigation.

These responding agencies who do disclose information to parties during an investigation usually allow for a limited disclosure that relates to a party's right to defence (e.g. only inculpatory or exculpatory information, or information vital to providing due process). Responding agencies that disclose confidential information to parties under investigation described more discretionary approaches based on "the needs of an investigation."

2. Disclosure to third parties

a) During the course of an investigation, is your agency able to or required to provide confidential information to third parties that was obtained from targets or other third parties?

Yes	No	Varies
24%	76%	0%

An even higher percentage of responding agencies answered that they do not disclose confidential information during an investigation to third parties. Among those that allow for such disclosure, they explained that such instances are rare, usually limited to critical information (e.g. information that proves the violation) and/or limited in access (e.g. access is given only to attorneys of third parties).

3. Restrictions on access to file on confidentiality grounds

a) If your jurisdiction provides "access to the file" (i.e. access to documents contained in the agencies' case investigation file) during an investigation, is your agency able to partially or totally restrict access to information that is deemed confidential?

All responses

Yes	No	Varies	No access to file
61%	0%	0%	39%

Reponses on only those with access to file (others removed)

Yes	No	Varies
100%	**0%**	**0%**

Most responding agencies that provide "access to file" are able to totally or partially restrict access to confidential information in the file. Some maintain a special file with non-confidential or disclosable information (e.g. public file). Other competition agencies seem to take measures on case-by-case basis (e.g. by "taking out pages," or "omitting" trade secrets every time a request to access to file is lodged). Some competition agencies also provide appropriate annotations on the non-confidential documents to help identify what type of information was removed.

4. Seeking disclosure of information withheld on confidentiality grounds

a) Are parties under investigation able to object to, or seek to compel disclosure of, information withheld from disclosure in the file on confidentiality grounds?

All responses

Yes	No	Varies	No access to file
51%	**16%**	**0%**	**32%**

Reponses on only those with access to file (others removed)

Yes	No	Varies
76%	**24%**	**0%**

Generally, of the responding agencies that provide access to file, parties under investigation can seek to compel disclosure of information withheld on confidentiality grounds. This can be done by challenging the confidential status of the information, by relying on the right of defence, or by referring to general procedural fairness (e.g. seeking to compel disclosure on grounds of "natural justice"). Some respondents described this process as an internal agency procedure, whereas others described special independent bodies within their agency with competence to decide issues regarding disclosure of confidential information (e.g. a hearing officer or procedural officer). In some jurisdictions, parties can seek disclosure before judicial or quasi-judicial institutions. Some responses indicated that a competition agency's failure to disclose information to parties under investigation might be used as the parties' argument in their request to annul the decision, due to a breach of the right of defence.

5. Procedures regarding the disclosure of information

a) When your agency intends to disclose information designated as confidential to the parties under investigation, is the entity that submitted the information given:

i. notice of the intended disclosure?

Yes	No	Varies	N/A
57%	19%	5%	19%

ii. the ability to object or appeal within the agency to request that the disclosure not be made?

Yes	No	Varies	N/A
58%	22%	0%	19%

b) Does the submitter have the ability to appeal to, or seek a protective order from, a court or administrative agency to prevent or limit disclosure?

Yes	No	Varies	N/A
47%	33%	3%	17%

As a general matter, a majority of responding agencies provide advance notice to the submitter of confidential information before they disclose the information. The advance notice might take different forms. The competition agency may offer to meet with the submitter or may more formally require a response from the submitter on the planned disclosure. About half of the responding agencies allow the submitters to object or appeal within the competition agency against the planned disclosure.

Again, about half of the responding agencies give the submitter the ability to appeal against the disclosure or seek a protective order from a court or the agency itself. Sometimes the appeal, although available in practice, is not labelled as an "appeal against the decision to disclose information," but rather relates to a particular framework that competition agencies have in place regarding access to file (for example, an appeal against a competition agency's decision to "refuse to limit the access to evidence"). Some respondents indicated that the submitter has a right to damages or competition agency officials may be administratively liable if disclosure occurs before the appeal is reviewed by the court.

Some competition agencies reported having no experience with confidentiality challenges to the disclosure of information to parties under investigation.

6. Methods limiting exposure to confidential information

a) Does your agency use any of the following methods to disclose information to parties during investigations while limiting the exposure of confidential information:

i. remove or redact confidential information before providing third party information to parties under investigation?

Yes	No	Varies
97%	3%	0%

ii. provide non-confidential summaries?

Yes	No	Varies
76%	18%	5%

iii. use "confidentiality rings" allowing full disclosure of the information to a limited set of persons (e.g. legal and economic advisers)?

Yes	No	Varies
29%	71%	0%

iv. use "data rooms" allowing disclosure of a specific set of documents or information but with prescribed, supervised access?

Yes	No	Varies
34%	66%	0%

As a whole, the responses reveal that competition agencies use a variety of practices to limit the exposure of confidential information when making disclosures. These questions identified four types of limiting practices. There is widespread use of redaction and non-confidential summaries, whereas the more resource and monitoring intensive, often technologically focused methods of confidentiality rings and data rooms are far less used by the responding agencies during investigations.

Removing or redacting confidential information is the most commonly used method of limiting exposure to confidential information. Usually, the submitters must do the redacting work themselves and provide the competition agency with two versions (confidential and non-confidential) of documents. A few competition agencies stated that they will delete confidential information (such as customers' names, pricing strategies, etc.) from the documents themselves.

For some responding agencies, the possibility of using non-confidential summaries is provided explicitly by law whilst in other jurisdictions it stems from the practice of a competition agency. In some jurisdictions which use non-confidential summaries, the summaries have to be prepared by the submitters of information.

Relatively few responding agencies use confidentiality rings or special data room procedures during investigations. Several responses noted that confidentiality ring procedures are more common in matters that go to judicial proceedings. The data room procedure is described as typically used for the disclosure of quantitative data relevant for econometric analysis (access to such rooms is normally given to external legal counsel and economic advisers, equipped with several PC workstations and the necessary software, and there is no network connection). In some instances, persons (e.g., lawyers, accountants, economists) who are given access to confidential information under a confidentiality ring procedure sign a special commitment that they will not disclose the information.

III.C. Disclosure of confidential information to competition agencies in other jurisdictions

1. Disclosure to competition agencies in other jurisdiction in parallel investigations

a) Does your agency have authority to disclose confidential information obtained during an investigation to competition agencies in other jurisdictions that have a parallel investigation of the same conduct or transaction?

Yes	No	Varies
71%	26%	3%

As seen in previous sections, as a general rule competition agencies cannot disclose information obtained during their investigations. However, under certain circumstances, the majority of responding agencies have the ability to disclose confidential information to competition agencies in other jurisdictions, enhancing the ability to cooperate during parallel investigations.

Although parallel investigations is the most common context in which a competition agency might disclose confidential information to another competition agency, there are few jurisdictions that may also disclose confidential information purely for the benefit of an investigation in another jurisdiction, without a corresponding investigation.

2. Circumstances of disclosure

a) If so, under what circumstances? Please identify the most common circumstance for disclosure:

i. pursuant to the applicable legal framework?

Yes	No	Varies	N/A
59%	14%	0%	27%

ii. pursuant to international agreements?

Yes	No	Varies	N/A
47%	25%	0%	28%

iii. in response to requests for judicial assistance?

Yes	No	Varies	N/A
38%	32%	0%	29%

iv. with the submitting party's consent, i.e. pursuant to a waiver?

Yes	No	Varies	N/A
67%	6%	0%	28%

The two most common circumstances identified in the responses in which competition agencies might disclose confidential information to foreign competition agencies are with a submitting party's consent and under specific authority of a legal framework that allows for the exchange of confidential information. While the ability to use the two appears equally common, the responses reveal that for many responding agencies in practice, waivers are more prevalent in terms of the instances of such exchanges.

The submitting party's consent, usually pursuant to a waiver, is a condition for the information disclosure for many responding agencies, and its content and scope typically is discussed with the submitters concerned on a case-by-case basis. The responses indicated that several competition agencies encourage parties to use the ICN model waiver,[3] and many follow the OECD Recommendations on cooperation.

Disclosure of confidential information pursuant to a legal framework without the need for a waiver is the second most common circumstance for disclosure to a foreign counterpart. For many responding jurisdictions, the ability to use a governing legal framework is jurisdiction specific; competition agencies may have the ability to share confidential information with a limited number of counterparts (often via a bilateral agreement) but not with many others. For example, countries which are members of the European Union, as well as the European Commission itself, can share and use in evidence confidential information with the other member states under the European Competition Network framework (ECN), pursuant to Article 12 of Regulation 1/2003. However, outside the ECN, the ECN member cannot transmit the information exchanged to other national or foreign authorities, even if national law or an international agreement (unless the latter is concluded on basis of Article 218 of the Treaty on the Functioning of the European Union) would allow or oblige it to do so.

Several responses explained that international agreements are becoming increasingly relevant for sharing confidential information, but noted that many existing bilateral agreements do not provide rules for the exchange of confidential information. Several responses noted that the agreements do not override domestic laws of either country, including confidentiality laws that may restrict the agencies' ability to share certain types of information.

With respect to judicial assistance, for those that are able to use such avenue for the exchange of confidential information, the responses described an environment in which competition agencies typically transmit information asked for by other national courts, often with accompanying limitations. These include assurances that the information will be protected by confidentiality rules. Some noted that without such assurance non-confidential versions of the information are transmitted.

It is also notable that about one fourth of the responding agencies have no ability to disclose confidential information to foreign counterparts. Several more responses explained that their competition agency had no experience with doing so.

[3] http://www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf

3. Ability of the submitters to discuss, limit, and appeal disclosure

a) In circumstances where disclosure is permitted, does your agency have any process or discussion with the party(ies) that submitted confidential information in order to determine the scope and content of any disclosure?

Yes	No	Varies	N/A
32%	32%	16%	19%

b) If sharing confidential information with competition agencies in other jurisdictions is authorized in circumstances without consent, does your agency provide notice to the party that submitted the confidential information, and an opportunity to object prior to disclosing that information to a competition agency in another jurisdiction?

Yes	No	Varies	N/A
9%	29%	17%	46%

c) If the Agency overrules a submitting party's objection to disclosure of its confidential information, does the submitting party have the ability to seek review of the agency's decision from a court or an independent administrative body?

Yes	No	Varies	N/A
14%	26%	11%	49%

A little less than half of the responding agencies have some ability, or offer opportunities in some circumstances, to discuss the scope and content of disclosures to foreign counterparts. It is important to note that exchanges via waivers are limited to the terms of the waiver, and therefore submitting parties have the opportunity to limit the scope of the information when they set the terms they grant via waiver.

Most responding agencies answered that they are not authorized to share confidential information with foreign competition agencies without a waiver or have no practice of doing so. For those competition agencies that might disclose without the submitting party's consent under applicable legal frameworks, most do not offer the submitter an opportunity to object or to seek review of the competition agency's decision to disclose the confidential information. Common justification in these responses is that such notice and review may jeopardize the investigation in one or both of the cooperating jurisdictions. Several noted, that if, in their discretion, they determine that there likely is no harm to the investigations, the submitting party might be informed of the information exchange and final decisions of the competition agencies might be open to court review.

4. Conditions on disclosure

a) When your agency receives confidential information from another jurisdiction, is your agency obligated to maintain the confidentiality of the information received?

Yes	No	Varies	N/A
76%	0%	11%	14%

b) Are your agency's disclosures to competition agencies in other jurisdictions subject to conditions on further disclosure use?

Yes	No	Varies	N/A
61%	8%	8%	22%

Responding agencies indicated that they typically have discretion as to whether to share information with foreign counterparts that includes consideration of investigative interests and available safeguards for the information. While not universally recognized across the responses, most responding agencies identified two common prerequisites for sharing confidential information: a commitment to safeguard and restrictions on use. First, most responding agencies said that they seek assurances that the receiving agency will protect confidential information in accordance with its own confidentiality rules and laws. Many responding agencies must ensure that the receiving competition agency offer the same or similar level of protection for confidential information. Several responses noted that the originating agency also may require prior consent before information is transmitted by the receiving competition agency to any other agency or third party. The second common prerequisite is a use limitation: the information may only be used for the subject matter for which it was collected or appropriate law enforcement (i.e. to investigate and prove a violation). A few responses tied the limitation on use to similar liability for the conduct at issue. Others also mentioned a requirement of reciprocity in that the receiving competition agency has similar authority to share information upon request of the originating competition agency.

Prior to disclosing, other factors for consideration identified in a few responses include whether the matter in which disclosure is sought is sufficiently serious to justify making the disclosure; whether the law of the receiving country provides appropriate protection against self-incrimination in criminal proceedings; whether the law of that country provides appropriate protection for the storage and disclosure of personal data; and whether any mutual assistance arrangements apply.

III.D. Disclosure to other government agencies in your jurisdiction (e.g. criminal prosecutors, tax authorities, legislature)

1. Disclosure for the facilitation of the competition agency's own investigative function

a) Is your agency able to disclose confidential information obtained during an investigation to other government agencies for the purpose of facilitating the exercise of your agency's own investigative functions?

Yes	No	Varies
51%	32%	16%

A majority of responding agencies can disclose confidential information to other governmental agencies for the purpose of facilitating the competition agency's own investigative functions. In this context, disclosure can occur to: police, prosecutors and law enforcement agencies assisting the competition agency in its investigations or generally to another government agency.

The ability to share confidential information in the context of the competition agency's own investigative function can stem from either statute or from inter-agency agreements. Several explained this ability as part of their broader authority to facilitate their investigative functions, and is done so only when necessary to advance an investigation. Some indicated that while such disclosure is permissible, it is rare in practice. As with other contexts for disclosure, competition agencies generally do so carefully, even in the context of sharing with other governmental agencies.

b) Does your agency have discretion as to whether to make such a disclosure?

Yes	No	Varies	N/A
54%	3%	11%	32%

Most responding agencies for which this question is applicable responded that they have discretion as to whether or not to make the disclosure. A cited reason for declining a request to disclose to another government agency is that it may be more effective for the other agency to obtain the information itself. Usually the disclosure to another government agency assisting the competition agency in carrying out its investigatory functions can be made pursuant to legal standards which stress the interests of the investigation (e.g. disclosure can be made "without compromising investigation" or where "objectively necessary for the investigation"). Some responses noted that their ability to share confidential information with other government agencies is generally discretionary except with respect to agencies that are specifically empowered to request confidential information from the competition agency.

c) Is notice and ability to object provided to the party that submitted the confidential information prior to its disclosure to other government agencies?

Yes	No	Varies	N/A
14%	35%	16%	35%

Only a small minority of responding agencies are required to provide notice whenever they make a disclosure to another governmental agency. Some noted a practice of "usually" giving notice although they are not obligated by law to do so. Several competition agencies that do

not provide a notice stressed that providing such a notice could hamper the effectiveness of the investigation. One response noted general *ex ante* notice that informs the parties that the submitted information can be shared with other governmental agencies.

d) If the agency overrules a submitting party's objections to disclosure of its confidential information, does the submitting party have the ability to seek review of the agency's decision from a court or an independent administrative body?

Yes	No	Varies	N/A
36%	**17%**	**6%**	**42%**

Even amongst competition agencies that provide an ability for a submitting party to seek review of the disclosure of its confidential information to another governmental agency, most competition agencies limit this review to exceptional circumstances. Several competition agencies, which provide for a right to review the discussed disclosure, observed that such a review has not happened in the competition agency's practice.

2. Disclosure to assist other authorities in carrying out their own statutory functions

a) Is your agency able to disclose confidential information obtained during an investigation to other government agencies to assist the other authority in carrying out its own statutory functions?

Yes	No	Varies
68%	**21%**	**11%**

The "Yes" responses to this question regarding the ability to disclose confidential information to assist in another agency's investigation are notably higher than the previous question related to the competition agency's own investigation. Amongst responding agencies which can share confidential information with other government agencies for the purposes of carrying out these authorities' own statutory functions, most respondents underlined the crime prevention aspect as a justification for the above sharing. In some jurisdictions, officials working for a competition agency have an explicit duty to report crimes. Most responding agencies indicated that they can disclose confidential information only to criminal prosecutors (though several stated that such a disclosure is seldom used) and other law enforcement bodies such as tax authorities. Several competition agencies also explicitly identified sectorial regulators, such as telecommunication, energy and financial regulatory agencies, as governmental bodies with whom confidential information can be shared.

A group of agencies responded that disclosure to other governmental agencies (including prosecutors and law enforcement agencies) is possible only if the competition agency is asked to do so by the court. Some responses cited requirements that the information disclosed only be used by receiving agencies for the purpose for which it was acquired. One competition agency stated that confidential information might be shared with other law enforcement

agencies if such agencies "certify that the information will be maintained in confidence and used only for law enforcement purposes."

Some competition agencies seem to allow almost unlimited sharing of confidential information with almost every other government agency, citing principles whereby all government agencies render assistance to one another. One response stressed that the "government as a whole is responsible for keeping the information confidential."

b) Does your agency have discretion as to whether to make such a disclosure?

Yes	No	Varies	N/A
43%	30%	14%	14%

In some responding jurisdictions, the sharing of confidential information with another government agency for the purposes of carrying out the other agency's functions is in certain circumstances a legal obligation of a competition agency; hence the competition agency has no discretion. In other jurisdictions, competition agencies possess a certain degree of discretion. Some competition agencies have discretion with respect to some other government agencies, but not others (usually those specifically empowered by statute to request information from the competition agency). Others have discretion with regard to disclosure to other government agencies except when the information relates to the commission of a crime. One responding agency noted that it can decline to produce the information if it is more efficient for another government agency to request information itself.

c) Is notice and ability to object provided to the party that submitted the confidential information prior to its disclosure to other government agencies?

Yes	No	Varies	N/A
8%	47%	25%	19%

Most responding agencies do not provide a notice before they share confidential information with other government agencies. As mentioned earlier, several agencies stressed that providing notice could impact the effectiveness of any potential investigation pursued by the other government agency receiving the information.

d) If the agency overrules a submitting party's objections to disclosure of its confidential information, does the submitting party have the ability to seek review of the agency's decision from a court or an independent administrative body?

Yes	No	Varies	N/A
32%	30%	14%	24%

In a minority of responding jurisdictions, the submitter has a right to seek a judicial review in the discussed circumstances. However, several responses indicated that this is rare. Given that notice is rarely required, this is not surprising.

e) Does your agency have any formal arrangements with respect to sharing investigative information with other government agencies in your jurisdiction?

Yes	No
46%	54%

A little less than half of the responding agencies have formal arrangements with respect to sharing investigative information with other government agencies. Among jurisdictions in which there exist formal agreements between a competition agency and other government agencies regarding sharing of confidential information, most such agreements are concluded between the competition agency and various prosecutorial bodies. For some, such agreements have been concluded with sector regulators. Such agreements can be formal agency-to-agency MOUs that set out how confidential information is to be treated or just general principles to follow. One response noted a domestic network of sectoral regulators with competition competences within which confidential information might be shared.

Among competition agencies which did not enter into special agreements with other government agencies but which nevertheless allow the disclosure of confidential information to them, the procedure of such a disclosure can be governed by general provisions of law, internal regulations, or according to an administrative practice.

III.E. Disclosure of confidential information in competition agency orders, complaints or public statements

1. Ability to disclose in competition agency decision or court filings

a) Does your agency have authority to disclose confidential information in an agency decision or order, or complaint or other court filings?

Yes	No	Varies
66%	26%	8%

Most responding agencies have the authority to disclose confidential information obtained during an investigation and use it either in litigation that occurs as the result of the investigation or in the decision or order of the competition agency. However, there is a difference between disclosing confidential information for court proceedings and for publications of the competition agency. In practice, many responding agencies state that they do not publish confidential information in their orders, or in the final decision published on their website, or in any document available to third parties or in the public domain.

In court proceedings, responding agencies commonly disclose confidential information that proves their cases or supports their decisions, described in typical responses as “information of substantive importance to prove the alleged infringement of law,” or “information needed for the effectiveness of the right of defence.” Competition agencies might also be required to disclose confidential information to courts when a decision is appealed or when they seek authorisation to execute a search warrant or dawn raid. In litigation and on appeal, courts are

described as typically well equipped to evaluate confidentiality claims and keep business secrets confidential. Disclosures in court are often subject to an opportunity for submitters to seek a protective or confidentiality order.

It is worth noting that a significant number of responding agencies do not have authority to disclose confidential information in their published documents or complaints, and even among the jurisdictions that have the authority, some of them have never disclosed confidential information in those circumstances.

b) Does your agency publish separate public and non-public or redacted version of its decisions or orders, or file separate versions of complaints or other filings in court proceedings, to protect confidentiality?

Yes	No	Varies
74%	**16%**	**11%**

In order to protect confidential information, many responding agencies typically issue both public and non-public version of its decisions or file both a public and non-public versions of its complaints.

When submitters request that specific information be kept confidential or when the competition agency identifies confidential information, there might be different versions of a competition agency's orders and/or decision, with and without the confidential information. Many responses stated that they usually produce a version containing all confidential information obtained during an investigation, which will be handed to courts; a public version, in which confidential information will be erased or redacted; and a version for each party or interested third party.

Several prosecutorial competition agencies responded that non-confidential filings in court proceedings may be required as a result of a court approved protective order, rather than as an obligation or standard practice of the competition agency.

c) Does your agency provide notice to the submitter prior to disclosing confidential information in an agency order or decision, or a complaint or other court filing?

Yes	No	Varies	N/A
35%	**43%**	**14%**	**8%**

The responses were split as to providing previous notice to the submitter prior to disclosing confidential information in a competition agency order or decision, a complaint or other court filing, although a majority of responses indicate the availability of procedures for submitters to challenge the disclosure of confidential information, as seen below.

Some responding agencies inform the submitter of their intention to disclose information that may constitute business secret or other confidential information. Other competition agencies,

if in doubt or in the regular course of action, will provide the submitter with previous notice in order to allow the submitter to verify the absence of confidential information in the final text prior to publication. Some responses explained that notice is given only if the submitter had previously identified such information to be treated as confidential. Responses from prosecutorial competition agencies generally were "No" to such notice, though some explained that court approved protective orders may protect against public disclosure of confidential information in complaints and other filings.

2. Public statements

a) Does your agency have the ability to publish confidential information in its press releases or other similar (non-adjudicatory) public statements (e.g. speeches)?

Yes	No	Varies	N/A
8%	**89%**	**0%**	**3%**

b) Does your agency provide the text of a press release or other similar public statement to the parties for review for confidential information prior to publication?

Yes	No	Varies	N/A
8%	**84%**	**8%**	

Virtually all responding agencies publish their press releases or other public statements without any confidential information. As such, most responding agencies do not provide the text of a public statement to the submitters prior to its publication.

A press release will be published after a competition agency decision typically describing the scope of the case, the nature of the violation, and the amount of any fines or remedies imposed. Several responses explained that confidential information is not necessary to convey this type of information to the public. Even responding agencies that have legal authority to publish confidential information in press releases or other public statements stated that in practice they are very unlikely to do so or have never done it before.

3. Possibility to challenge the disclosure

a) Is there a formal or informal procedure for parties to challenge the disclosure of confidential information in agency orders, decisions, press releases, or other public documents?

Yes	No	Varies
68%	**32%**	**0%**

b) Do the formal procedures for parties to challenge such disclosures include recourse to a court or an independent administrative body?

All responses

Yes	No	Varies	N/A
63%	13%	3%	21%

Responses of only those that have a procedure

Yes	No	Varies
80%	17%	3%

Generally, parties first go through a competition agency's internal procedure. If issues regarding confidentiality remain unresolved, typically the parties can apply to the court for judicial review. In addition, in order to restrict public dissemination of confidential information parties can often seek a protective order. An example described in a typical response: if a third party disagrees with the competition agency's intention to disclose confidential information, that party can object verbally or in writing to the competition agency, and if the agency does not change its view, the third party can commence an action in court seeking to prevent the disclosure. Such challenges are rare. In case disputes arise regarding the disclosure of business secrets, competition agencies may provide a provisional version of the decision excluding all information for which confidentiality has been requested.

4. Prosecutorial systems

a) If your jurisdiction provides for judicial adjudication of competition cases, is access to the parties of information that is deemed confidential able to be partially or totally restricted during discovery?

All responses

Yes	No	Varies	N/A
28%	6%	3%	63%

Responses of only those with for judicial adjudication of competition cases

Yes	No	Varies
75%	17%	8%

b) If your jurisdiction provides for judicial adjudication of competition cases, are the following methods used to disclose information in those adjudications, while limiting the exposure of confidential information?

i. Removal or redaction of confidential information before providing information

All responses

Yes	No	Varies	N/A
28%	3%	3%	66%

Responses of only those with for judicial adjudication of competition cases

Yes	No	Varies
75%	17%	8%

ii. Non-confidential summaries of confidential information

All responses

Yes	No	Varies	N/A
8%	14%	3%	75%

Responses of only those with for judicial adjudication of competition cases

Yes	No	Varies
82%	9%	9%

iii. In camera sessions or "confidentiality rings" that allow full disclosure of the information to a limited set of persons (e.g. legal and economic advisers)

All responses

Yes	No	Varies	N/A
25%	9%	0%	64%

Responses of only those with for judicial adjudication of competition cases

Yes	No	Varies
73%	27%	0%

iv. "data rooms" allowing disclosure of a specific set of documents or information, but with prescribed supervised access?

All responses

Yes	No	Varies	N/A
15%	21%	0%	64%

Responses of only thise with for judicial adjudication of competition cases

Yes	No	Varies
42%	58%	0%

The majority of responses from prosecutorial systems indicate some ability to partially or totally restrict access to information that is deemed confidential during discovery. Such disclosure can be limited to outside counsel and experts, and not allowing confidential third-party materials to be disclosed to in-house counsel or business employees of the party. This allows parties access to the information used against them while limiting the impact of disclosing confidential information. Given the role of courts in deciding competition cases in prosecutorial systems, they usually oversee the limitations put on the exchange of confidential information, for example, in the form of a court approved protective order governing

information used in the litigation. Court sessions may be conducted behind closed doors and even some parts of the final judgment may remain confidential. In some responding jurisdictions, information filed under seal will not be part of the public record. Competition agencies and parties might provide a redacted copy of a document that will be made public while providing the court with an unredacted copy containing confidential information. Data rooms that control access to information might be used to address the cost and feasibility of discovery of large amounts of data and some agencies also reported use of non-confidential summaries of confidential information at least in some circumstances.

5. Appeal to court

a) If your jurisdiction provides for judicial adjudication or appeal of competition cases, does the submitter of confidential information have the ability to seek a protective order from a court to prevent or limit disclosure of their confidential information in judicial proceedings?

Yes	No	Varies	N/A
59%	25%	9%	6%

Among the responding jurisdictions that provide for judicial adjudication, the majority allows the submitter of confidential information to appeal to a court to prevent confidential information from being made public or from being used beyond the court proceeding. Usually, courts (judicial and administrative) have extensive experience evaluating requests for protective orders and, in determining whether to issue such orders, will consider several factors, including the confidentiality interests at issue, the fairness and efficiency of limiting public access to information, and the importance of the litigation to the public. Finally, a few responses noted that courts may consider ordering a confidentiality ring (or other limitations on who gets access) as a means of protecting the confidential information in question by limiting its disclosure.

IV. Legal privileges and their impact on information gathering during investigations

1. Right of the submitter to decline to produce requested information

a) Are companies (and persons) that respond to a compulsory information request during an investigation able to decline to produce information that is privileged under your laws? (e.g., attorney-client or legal professional privilege or a privilege against self-incrimination)

Yes	No	Varies
74%	21%	5%

Most responding agencies recognise the importance of legal privileges (most notably, privilege against self-incrimination and attorney-client or legal professional privilege) and provide for procedures allowing submitters of information to protect privileged information. It should be noted that the privilege against self-incrimination generally only applies to

individuals and not collective entities such as corporations. Most responding agencies have the general power to compel information except information for which there is a valid objection to production due to a legal privilege. Some responses noted that parties declining to produce information on grounds of privilege have the burden of establishing that the privilege applies, as well as describe the nature of the documents or communications not disclosed in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege. A minority of respondents indicated that companies cannot refuse to provide requested information under any circumstances.

2. Limitation of the scope of the request

a) Does your agency limit the scope of its information requests so as not to solicit privileged materials?

Yes	No	Varies
49%	**51%**	**0%**

Half of the responding agencies limit the scope of requested information to exclude privileged materials. Some of the responding agencies explicitly exclude the production of privileged materials or remind submitters of privileges in their information requests, including by providing instructions regarding the preparation and submission of privilege logs covering documents withheld under a claim of privilege. Several responses described requirements to provide statements that support or explain any privilege claims and/or identify information that was withheld due to privilege.

3. Limitation of collecting privileged materials during inspections

a) Does your agency limit dawn raid or search procedures so as not to collect privileged materials?

Yes	No	Varies
49%	**51%**	**0%**

About half of the responding agencies do not collect privileged materials during raids or searches. There are different practices related to claims of privilege during a raid or search. Some competition agencies describe a “quick scan” or cursory look at the material to determine privilege, but do not inspect or make copies or abstracts. Others seal and submit materials that are claimed as privileged to the competition agency or senior staff for review. A filter team or designated filter employee who is not involved in the underlying investigation may review the materials for evaluation of the privilege claim. Sometimes the materials are sealed and brought before a court to decide whether they are privileged.

4. Procedure regarding privilege claims

a) When parties claim privilege in declining to produce certain information, does your agency review these claims?

Yes	No	Varies
78%	**22%**	**0%**

A majority of responding agencies review privilege claims. In some responding jurisdictions the review is only possible within the competition agency. Others allow both internal and judicial review. Finally there are jurisdictions where the review is only possible before courts.

5. Recognition of the attorney-client or legal professional privilege

a) Does your jurisdiction recognize the attorney-client or legal professional privilege?

Yes	No	Varies
79%	**21%**	**3%**

b) If so, does it cover communications from in-house (employed by the company) lawyers?

Responses that recognize attorney-client or legal professional privilege

Yes	No	Varies
37%	**63%**	**0%**

A majority of jurisdictions recognise attorney-client or “legal professional privilege,” which covers communications created for legal advice or use in litigation. Among the responding jurisdictions that recognise attorney-client or legal professional privilege, a minority apply the privilege to advice given by in-house lawyers.