



ICN Roundtable on Competition Agency Investigative Process

Roundtable Report

Agency Effectiveness Working Group
2014



Report: ICN Roundtable on Competition Agency Investigative Process Agency Effectiveness Working Group

On March 25, the International Competition Network (ICN) held a one-day Roundtable on Investigative Process in Washington, DC. The U.S. antitrust agencies – the Federal Trade Commission and Antitrust Division of the Department of Justice – hosted the event. The roundtable focused on deepening the discussion of how different investigative practices can enhance the effectiveness of agencies’ decision-making and ensure the protection of procedural rights. 115 agency and private sector representatives from over 35 jurisdictions participated in the Roundtable.

The Roundtable featured sessions that used a sample investigative timeline to frame the discussion of investigative practices that promote fair and informed enforcement actions by facilitating effective engagement and interaction between agencies, parties, and third parties. The Roundtable covered the transparency of agencies’ investigations, opportunities for parties to engage with the agency, and protection of confidential information.

The ICN’s Investigative Process Project

The Roundtable was a part of the ICN’s Investigative Process Project, co-led by the U.S. FTC and the European Commission’s Directorate General for Competition. The Project’s premise is that effective competition enforcement depends on investigative procedures that provide appropriate transparency, predictability, confidentiality protections, notice, and an opportunity to be heard. The Project was the ICN’s first effort to address investigative process across competition enforcement areas (horizontal agreements, merger, and unilateral conduct).

The Project provides a forum for competition agencies to discuss how they conduct investigations, addressing both the enforcement tools and procedures available to and used by competition agencies within their legal frameworks. The Project’s mandate calls for the group to gather information and share experiences regarding agencies’ investigative procedures, and based on this work, consider developing ICN guidance or recommendations. The March 2014 Roundtable was a part of the Project’s stocktaking and learning process to promote the exchange of experiences related to competition agencies’ investigations.

Roundtable Format

The format of the day-long Roundtable consisted of several sessions beginning with a panel discussion, followed by a “table talk” time that addressed issues raised by the panel in small group discussions. Following these sessions, the groups reported on their discussions, offering individual perspectives, suggestions for improvements to procedural fairness practices, and questions to the larger group. The Roundtable provided all participants with an interactive forum in which they could share experience in small groups with both agency and non-governmental advisor participants.

The Roundtable presented five panels covering points or stages along a notional investigative timeline. At each point, the discussion emphasized various principles that guide investigative practices, such as transparency, engagement, and confidentiality, as well as the investigative tools and practices agencies use to implement these principles. The discussions explored agencies’ practices and interactions with parties at key points that facilitate effective engagement and interaction.

The discussions were roughly split along the timeline to address investigative practices during early stages of an investigation (“phase one” or preliminary investigations) and investigative practices during more advanced investigations (“phase two” or in-depth investigations). The first two panels covered investigative notice and phase one transparency and engagement. The final three panels covered evidence gathering, confidentiality, phase two engagement, and final agency decision making.

This report summarizes key points raised at the roundtable. The complete agenda for the roundtable is attached as Annex I.

Initial Phase Investigative Process

The discussions on initial phase process focused on investigative practices related to pre-investigation interaction, notice of the investigation, initial information gathering, and the decision whether to conduct further investigation.

Discussion Questions for the Panels and Table Talk:

- *What are the fundamentals of a fair and transparent investigative process? What does that mean during phase 1 and the beginning of an investigation? What makes for fair investigative notice? (scope and timing)*
- *What is your typical approach to engagement and sharing information at the outset of an investigation? Is the default open engagement, or is it a pure*

strategy choice to selectively share, or is it somewhere in between, depending on the situation?

- *Scrutiny of phase 1 practices often focuses on efficiency – the focused analysis of the many filings, complaints or tips that agencies receive in order to identify those matters that require in-depth evaluation. What kind of party-agency engagement facilitates efficiency in phase 1?*
- *What constitutes meaningful phase 1 engagement? What information is considered, and what information sources should be consulted, beyond the parties themselves? Will the parties get a window into those details at this stage?*
- *What do you see as the benefits of or efficiencies from meaningful engagement with the parties at this stage? What do you see as potential downsides or problems?*

The Roundtable discussions about investigative process during the early stages of investigations identified reasons for fair and transparent procedures, as well as the benefits they provide to both agencies and parties. These include:

- Agency practices are influenced by “good government obligations” to conduct investigations in a fair manner.
- Procedural fairness provides credibility for an agency’s decisions, and ultimately its overall mission. It creates confidence on the part of both parties and the public.
- Transparency provides parties with the information necessary to understand the investigation and the ability to respond effectively to agency requests.
- Procedural fairness can increase efficiency of investigations through better use of time and resources. Early interaction is particularly useful in that it helps determine the existence and scope of any competitive concerns and can lead to a quicker resolution. Engagement with parties helps focus an investigation on the relevant issues.
- Transparency and engagement can provide a stronger foundation for cooperation between agencies investigating the same matter. A lack of engagement or transparency from one agency can create “cooperation gaps” or asymmetries of information available to the agencies. This can put the non-transparent agency at a disadvantage and increase the risk of incompatible outcomes.

The discussions also explored the nature of effective investigative process during the early stages of an investigation. There was widespread agreement that transparency and engagement with parties are key components of effective early stage process (and throughout an investigation). The debate focused on the appropriate parameters for providing transparency and engagement at the beginning of investigations.

A core principle that emerged from the discussions is that agencies have a strong interest in the “integrity” of their investigations. This core concern of ensuring that investigations are appropriate, pragmatic, focused, and not compromised is especially sensitive in early investigative stages when the scope of the investigation is developing and the agency does not yet know many key facts. Because of this overarching interest, several participants noted that the integrity of an investigation may be “more important” than transparency and engagement in the early stages because it is vital for the effectiveness of the investigation. This may result in a more limited interaction, though this likely changes over the course of the investigation. Participants also agreed that the degree of transparency may depend on the type of conduct under investigation, and other related factors such as the likelihood of finding a violation and the exposure to sanctions, especially fines.

A key aspect of early stage process is notice of the nature of the investigation. As early as feasible, agencies should identify the conduct under investigation, communicate their initial theories of harm, and explain the nature of the evidence on which they rely open an investigation. The appropriate timing and specificity of investigative notice was a topic of debate, and determined often to be case specific. For example, investigative notice and early transparency in a cartel investigation may be precluded until after a covert investigative stage, e.g., until after raids or searches are completed. In the merger context, for comparison, there are often extensive agency-party exchanges from the very announcement of a transaction and filing of a notification.

The discussions went beyond the mere recognition that transparency and engagement are useful to explore what constitutes “meaningful engagement” early in an investigation, prior to a phase two decision. Exchanges on the following types of issues contribute to “meaningful” interaction between parties and agencies:

- early and sufficient notice to parties of an investigation;
- discussion of the facts uncovered about the products, market, and conduct under investigation; sharing of preliminary theories of harm;
- the identification of “threshold” issues that may determine or narrow the investigation (e.g., ease of entry); and
- the expected timing of the investigation and significant milestones within the process.

Such interaction can come via informal meetings or discussions between the parties and investigative staff. There was broad agreement that the more advanced the investigation, the greater the importance that agencies share or explain their analysis, culminating in a final agency decision or court challenge where an agency is obligated to explain its legal theories and reasoning.

The discussions also identified a challenge to fair and informed investigative process during early stages: “fear” of divulging investigative strategy. This barrier applies to both agencies – evidenced by a reluctance to be transparent about their own thinking or to “protect” working theories, and parties – evidenced by a reluctance to engage or cooperate with the agency or not to make its case in full for strategic reasons. To the extent that agencies are wary of sharing their analysis for fear of critical feedback, the participants agreed that the benefits of informing the agency via engagement outweigh the risk of being criticized. Agency reluctance stemming from a lack of confidence or insecurity should decrease over time as agencies (and parties) become more experienced and comfortable with investigative transparency and engagement.

The discussions recognized a natural inclination for agencies to delay engagement until after they obtain and review information and arrive at an initial assessment. Similarly, parties that have been informed of an agency’s thinking naturally may see less benefit to further engagement. But both agency and non-governmental advisor participants spoke of a need to overcome this reluctance on both sides in order to take advantage of the benefits of engagement. Agencies can use early interaction to learn more, and more quickly, about the products, markets, and market participants. Parties that forgo late stage engagement may pass up an opportunity to shape or limit the scope of final agency decisions. While there is a potential downside of parties trying to use engagement against an agency (e.g., challenging the scope of information requests that go beyond theories that have been shared with the parties), the discussions concluded that the benefits of being more informed through open engagement with the parties outweigh the risks. Engagement during an investigation helps ensure that the evidence, facts, and theories are exposed to the best arguments both in favor and against.

Advanced Phase Investigative Process

The discussion focused on investigative practices related to evidence gathering and confidentiality rules, exchange of evidence and theories, and agency decision making processes.

Discussion Questions for the Panels and Table Talk:

- *What are some of the most effective tools agencies can use during investigations to obtain the information needed for evaluation? What makes specific investigative tools effective and what are some of the challenges with respect to investigative tools and procedural fairness?*
- *The great counterweight to investigative transparency and disclosure of information is the need for confidentiality protections. How should the two be balanced during an investigation and interaction with parties?*
- *What makes for meaningful party-agency engagement during phase 2? What information should be shared, and what sources and resources used?*

- *How should agencies use meetings and other opportunities for parties to present their views?*
- *What can parties do to be most effective in meetings with the agency and other opportunities to submit views?*
- *What agency practices promote legitimacy of agency decisions?*
- *What, if any, agency practices are useful internal checks and balances to effective decision making? How do investigative staff and top officials interact to reach an agency decision? How do you ensure that the decision addresses and accounts for all party arguments and all relevant facts from the market in question?*
- *Have you ever looked back at an investigation and regretted engagement and transparency? How and why?*

The Roundtable discussions on advanced stage investigative process reinforced many of the main points on transparency and engagement articulated above, and also discussion of effective investigative tools and the importance of confidentiality protections on evidence gathered during an investigation.

The discussion reiterated the need for transparency and procedural safeguards during evidence gathering. Basic safeguards include the need for staff to seek higher level agency approval for compulsory requests to help ensure appropriateness and consistency, the value of engagement with recipients of requests for information to inform the scope and relevance of such requests, and ultimately, a mechanism to challenge or question requests for information. The discussion emphasized the efficiency value of “focused” evidence gathering. Agencies should, to the extent possible, focus their request on information that is potentially relevant to the investigative theories, consider their requests against less intrusive alternatives, and be willing to engage with parties on the theories of harm and requests for information that are used to test those theories. Legal privileges, confidentiality protections, and even the increasingly digital nature of evidence gathering were identified as complications that raise important procedural fairness questions in the context of evidence gathering that can benefit from party-agency engagement. Here, as with many other points discussed during the Roundtable, participants underscored the value of agency guidance or guidelines that set forth the process of all aspects of an investigation, including the use of investigative tools, confidentiality rules, and other investigative practices.

Once again, the participants were asked to explore the nature of “meaningful” engagement between agencies and parties, this time in the context of advanced investigations. Meaningful engagement in advanced investigative stages can include: an open discussion and exchange on the theories of harm; regular updates on the progress of the investigation and expected timing of any decisions; discussion of the meaning and evaluation of evidence on which staff relied to support their theories of harm and

recommendations; discussion of potential remedies; and discussion and perhaps facilitation of cooperation between agencies, especially with respect to contemplated remedies. A key characteristic of useful interaction is “specificity” with respect to what is shared – for instance, a clear identification of the theory of harm and discussion of specific evidence that allows the parties to address the agency’s concerns. Agencies should strive to disclose as much as possible with respect to the underlying facts, nature of evidence, and its analysis, subject to confidentiality protections. Agencies should have procedures to assess confidentiality claims and balance them, where appropriate, with any need to disclose such information, such as for the parties’ rights of defense.

Many of the discussions centered on investigative processes that are designed to promote interaction. Many spoke of the value of an “ongoing dialogue” approach to engagement during an investigation whereby parties are encouraged to contact the agency at any time during the investigation. Agencies can also schedule opportunities for interaction right into their investigations by offering set dates for agency-party meetings. An open dialogue also provides opportunities for parties to respond to the staff’s working case theories and preliminary findings, and to make additional arguments and provide evidence and insights, for example, via “white papers” to the agency. Most often, these opportunities come via regular meetings and discussions between the investigative staff and parties under investigation, and where appropriate also include agency decision makers at more advanced stages. The discussions recognized that difficulties arise when the officials involved in the meetings and interaction with the parties are not those taking the final agency decision.

One identified challenge to advanced stage engagement is the concern that parties may “close the doors” to cooperation and engagement once they have a sense of the agency’s case and a belief that the investigation is advancing towards a decision or order against them. To the extent that parties disengage during advanced investigative stages, they may miss important opportunities to inform ongoing decision making and perhaps impact or limit the agency’s decision. The discussions recognized that mutual engagement will help enhance the understanding of the markets, facts, and theories, lead to more informed interaction, shape the case team’s thinking, and ultimately impact the agency’s decision making.

Themes from the Roundtable Discussions

In the wrap-up session, participants discussed their observations and conclusions on investigative practices that promote fair, informed, and effective enforcement in order to inform the ICN’s Investigative Process Project.

- There is a consensus that procedural fairness principles of transparency, engagement, and confidentiality are essential components of fair and informed competition investigations.
- Procedural fairness protections do not depend on the type of system or the country. The design of a system does not dictate whether procedural fairness is possible.
- The level of transparency can depend on the type of case (merger, conduct, civil, criminal)
- There is a need for transparency regarding the use of investigative tools, confidentiality rules, and other investigative practices. Agency guidelines and guidance about the investigative process contributes to ensuring procedural fairness.
- There is tension between transparency, confidentiality, and preserving the integrity of the investigation. All should factor into an agency's consideration of its investigative processes.
- Benefits from fair investigative process include:
 - Credibility and legitimacy to the agency's mission as well as specific investigations and decisions
 - Potential for investigative efficiency, better use of resources and lower costs
 - Quality control: better and more informed decisions via opportunities to vet theories of harm and test evidence more thoroughly
 - Better-informed decisions and more accurate choices regarding interventions
 - Improved cooperation and coordination with other agencies
- While there is a range of ways to achieve fairness through specific practices, key components of fair and informed investigative process include:
 - Transparent rules, procedures, investigative practices, and decisions
 - Notice that an investigation has been opened
 - Informing parties of the nature of evidence gathered and relied upon, and expected timing of the investigation
 - Informing the parties of the legal and economic theories of harm under consideration
 - Informing the parties of agency concerns and providing the opportunity to respond to those concerns
 - Opportunity to meet with the agency and provide additional arguments and insights
 - Appropriate protection for confidential information gathered during an investigation
- Challenges to providing procedural fairness include:
 - Differences in process, and differences in parties' incentives across investigations into different enforcement areas

- Fears of revealing investigative strategy and compromising the integrity of the investigation; the amount of caution appropriate to protect the interests of the investigation and the parties and third parties involved
- Needed confidentiality protections
- Maturity of the agency; need for experience and confidence of agency staff
- Willingness of parties to actively engage with the agency
- Tension between incentives of agencies and parties:
 - From the agency perspective, in the early stages, integrity of the investigation can be more important than transparency. Concern that agencies may be reluctant to engage early, without knowing key facts .
 - From the parties' perspective, likely to be more forthcoming in early stages than in advanced stages. Concern that parties may be reluctant to engage once an investigation advances and a decision against them becomes more likely.
- Multilateral and bilateral dialogues between agencies and with the bar can help achieve a better understanding of necessary procedural safeguards and ways to achieve them during investigations. Individual agency and international guidance on what constitutes fair and informed investigative process is a welcome development to serve as benchmarking for procedural fairness standards.

Annex 1 – Roundtable Agenda

ICN Roundtable Discussion Competition Agencies' Investigative Process Tuesday, March 25, 2014 Washington, DC

The roundtable sessions will use a generic investigative timeline to frame the discussion of investigative practices that promote fair and informed enforcement actions. The discussion will focus on key investigative points to explore agency practices that facilitate effective engagement and interaction between agencies and parties (and third parties). Discussions will alternate between presentation of key issues and small “table talk” discussion groups.

10:00-10:15 Opening Remarks

- **Edith Ramirez**, Chairwoman, U.S. Federal Trade Commission
- **Andreas Mundt**, ICN Chair and President, Bundeskartellamt

10:15-12:30 Morning Session: Initial Phase Investigative Process

During the morning session, the discussion will focus on investigative practices related to pre-investigation considerations, investigative notice, initial information gathering, and the decision whether to conduct an advanced investigation.

10:15-10:40 Investigative Notice and Phase 1 Transparency
Panel 1 Speakers:

- **John Pecman**, Commissioner, Canadian Competition Bureau
- **Andreas Mundt**, President, Bundeskartellamt
- **Jim Rill**, Baker Botts LLP
- **Mariana Tavares de Araujo**, Levy & Salomão Advogados

Discussion Questions for the Speakers:

- What are the fundamentals of a fair and transparent investigative process? What does that mean during phase 1 and the beginning of an investigation? What makes for fair investigative notice? (scope and timing)
- What is your typical approach to engagement and sharing information at the outset of an investigation? Is the default open engagement, or is it a pure strategy choice to selectively share, or is it somewhere in between, depending on the situation?

10:40-11:10 Table Talk (small group discussion)

11:10-11:20 Break

11:20-11:45 Phase 1 Engagement and Decision Making

Panel 2 Speakers:

- **Kristina Geiger**, Deputy Director General, Swedish Competition Authority
- **Patty Brink**, Director of Civil Enforcement, U.S. Department of Justice, Antitrust Division
- **Marvin Price**, Director of Criminal Enforcement, U.S. Department of Justice, Antitrust Division
- **Bill Blumenthal**, Sidley Austin LLP
- **Paul Lugard**, Baker Botts LLP

Discussion Questions for the Speakers:

- Scrutiny of phase 1 practices often focuses on efficiency – the focused analysis of the many filings, complaints or tips that agencies receive in order to identify those matters that require in-depth evaluation. What kind of party-agency engagement facilitates efficiency in phase 1?
- What constitutes meaningful phase 1 engagement? What information is considered, and what information sources should be consulted, beyond the parties themselves? Will the parties get a window into those details at this stage?
- What do you see as the benefits of or efficiencies from meaningful engagement with the parties at this stage? What do you see as potential downsides or problems?

11:45-12:15 Table Talk (small group discussion)

12:15-12:30 Table Talk Report Back

12:30-1:45 Featured Speaker

- The Honorable **Douglas H. Ginsburg**, United States Court of Appeals for the District of Columbia Circuit

1:45-4:00 Afternoon Session: Advanced Phase Investigative Process

During the afternoon session, the discussion will focus on investigative practices related to evidence gathering and confidentiality rules, exchange of evidence and theories, and the agency's decision making process.

1:45-2:10 Evidence Gathering and Confidentiality

Panel 3 Speakers:

- **Salvatore Rebecchini**, Commissioner, Italian Competition Authority

- **Dae-Young Kim**, Director, International Cartel Division, Korea Fair Trade Commission
- **Ali Nikpay**, Gibson Dunn LLP
- **Chuck Webb**, Walmart International

Discussion Questions for the Speakers:

- What are some of the most effective tools agencies can use during investigations to obtain the information needed for evaluation? What makes specific investigative tools effective and what are some of the challenges with respect to investigative tools and procedural fairness?
- The great counterweight to investigative transparency and disclosure of information is the need for confidentiality protections. How should the two be balanced during an investigation and interaction with parties?

2:10-2:40 Table Talk (small group discussion)

2:40-3:05 Phase 2 Engagement: Meeting the Decision Makers and Other Opportunities to be Heard

Panel 4 Speakers:

- **Tembinkosi Bonakele**, Acting Commissioner, Competition Commission of South Africa
- **Carlos Mena Labarthe**, Head of Planning, Institutional Relations and International Affairs Unit, Mexican Federal Economic Competition Commission
- **Dorothe Dalheimer**, Deputy Head of Unit, EU DG-Competition
- **Sheridan Scott**, Bennett Jones LLP

Discussion Questions for the Speakers:

- What makes for meaningful party-agency engagement during phase 2? What information should be shared, and what sources and resources used?
- How should agencies use meetings and other opportunities for parties to present their views?
- What can parties do to be most effective in meetings with the agency and other opportunities to submit views?

3:05-3:35 Table Talk (small group discussion)

3:35-4:00 Final Agency Decision Making

Panel 5 Speakers:

- **Deborah Feinstein**, Director, Bureau of Competition, U.S. Federal Trade Commission

- **Mark Berry**, Chairman, New Zealand Commerce Commission
- **Caní Fernandez**, Cuatrecasas, Gonçalves Pereira
- **Tom Barnett**, Covington & Burling LLP

Discussion Questions for the Speakers:

- What agency practices promote legitimacy of agency decisions?
- What, if any, agency practices are useful internal checks and balances to effective decision making? How do investigative staff and top officials interact to reach an agency decision? How do you ensure that the decision addresses and accounts for all party arguments and all relevant facts from the market in question?
- Have you ever looked back at an investigation and regretted engagement and transparency? How and why?

4:00-4:30 Roundtable Wrap Up

Participants will discuss key take-aways that will inform the ICN's work on investigative process.

Facilitator: **Stanley Wong**, StanleyWongGlobal

4:30-4:45 Closing Remarks

- **William Baer**, Assistant Attorney General, U.S. Department of Justice, Antitrust Division