

Agency-Party Engagement During Competition Investigations: Perspectives from the ICN's Investigative Process Project

*Paul O'Brien (US Federal Trade
Commission)**



Copyright © 2013

Competition Policy International, Inc. | For more information visit CompetitionPolicyInternational.com

The International Competition Network has an ongoing, multi-year project on competition agencies' investigative processes. The project's aim is "to increase understanding among ICN members of how different investigative processes and practices can contribute to enhancing the effectiveness of agencies' decision-making and ensuring effective protection of procedural rights."¹

The ICN is not alone in its work in this area. Indeed, procedural issues such as transparency, predictability, and engagement have received increased attention of late in various international bodies, reflecting the spread of competition law to many countries with different legal systems and cultures. Notably, the OECD published a Procedural Fairness and Transparency Report in February 2012, the culmination of three roundtable discussions on transparency and procedural fairness held in 2010 and 2011.² Several portions of the report examine how competition agencies provide transparency into their laws, policies, and processes encountered by parties under investigation. The OECD Report recognized "a broad consensus on the need for, and importance of, transparency and procedural fairness in competition enforcement, notwithstanding differences between prosecutorial and administrative systems, and other legal, cultural, historical, and economic differences among members."

In April 2013, the ICN published a report on the results of a member survey of competition agency transparency practices.³ The ICN Report provides an overview of the most common transparency practices and insight into how different jurisdictions have developed their practices to contribute to effective and efficient investigations. Thirty-six ICN member agencies submitted responses for the ICN Report. In parallel, several non-governmental advisors active in the ICN project organized a separate, standalone practitioner's survey on transparency in competition proceedings and published the results in April 2013.⁴ The Practitioner's Report is based on 92 responses from individuals in thirty-five jurisdictions. Both surveys addressed transparency during the course of competition investigations and engagement between agencies and parties. Both identified common issues, approaches, and perspectives within their response groups. These surveys represent two of the most comprehensive attempts to identify and compare engagement between parties and agencies during competition investigations. As such, both are worthwhile resources that advance the understanding of competition investigative processes.

Given the two reports from two different perspectives, one might ask whether they reveal a perception gap with respect to agency-party engagement. In order to do so, this note will

* Paul O'Brien is counsel in the Office of International Affairs at the US Federal Trade Commission. The views expressed here are his alone.

¹ ICN Investigative Process Project Issues Paper and Mandate (April 2012) *available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf>.

² Procedural Fairness and Transparency, Key Points, OECD Competition Committee (2012), *available at* <http://www.oecd.org/daf/competition/mergers/50235955.pdf>.

³ ICN Report, Competition Agency Transparency Practices (April 2013) *available at* <http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf>

⁴ "Summary Responses: A Practitioner's Survey on Transparency & Due Process in Competition Proceedings" (April 2013) (co-authored by Sean Heather, James Rill & Charles Webb).

introduce four aspects of engagement covered in both surveys: 1) meetings with investigative staff, 2) transparency of theories of harm, 3) transparency of timing of an investigation, and 4) meetings with decision makers and the parties' ability to submit information in support of their views.

Despite their common subject matter, it is important to caution that there is no direct comparison point for the two surveys. First, they did not use the same questions, though there is considerably overlap in the topics explored. Second, only 19 jurisdictions were covered by responses in both surveys, representing a little over half of each survey set. Third, the scope for responses was different. Practitioners were asked to answer their survey through the context of their own *specific enforcement experiences*. Agencies, on the other hand, answered a survey about their *general practices* across enforcement areas. Whereas the agency responses separated questions by enforcement areas and by type of interaction (with parties, third parties, and the general public), the practitioners survey did not make such distinctions. Despite these differences, given the shared aim of the surveys to examine the same commonly used investigative practices from different perspectives, a comparison provides important observations for continued work in the area.

With the above caution in mind, here are the respective results on four common practices, and an attempt to characterize the perceived differences.⁵

1. Meetings with investigative staff.

- In the agency survey, *all* responding agencies indicated that they offer the opportunity for parties to meet with investigative staff. The responses described both formal and informal opportunities to meet.
- Nearly 60% of the practitioner responses said that they had regular meetings with agency staffs during the course of the investigation.

2. Transparency of theories of harm.

- In the ICN Report, a majority of responses (70-76% across different enforcement areas) indicated that the disclosure of economic theories of harm is part of common agency practice to ensure the parties understand the investigation and are informed enough to respond to agency concerns.
- The Practitioner Report states that “in most cases, a theory of economic harm is not presented to the parties during the investigation stage.” Sixty-eight percent of the responses answered “no” to the question of whether an economic theory was disclosed.

3. Transparency of timing of an investigation.

⁵ Both surveys covered many more aspects of transparency practices and engagement with parties and third parties.

- The ICN Report’s results on transparency about the timing of investigations are among the most varied. Transparency on the timing of merger investigations appears to be much more common than for other areas of enforcement: 85% answered “yes” to disclosing expected timing in merger cases; only 32-38% for other enforcement areas. The responses explained that it is often difficult to estimate the expected timing of investigations outside the merger context that can vary significantly depending on scope and complexity.
- For the Practitioner’s Report, a little less than two-thirds of those that responded (63%) claimed that the agency staff did *not* keep the parties regularly informed of the expected timing of the investigation.

4. Meetings with decision makers and the ability to submit information.

- The ICN Report’s results indicate that a majority of respondents provide parties the opportunity to meet with agency leadership (54-64% range across enforcement areas). The opportunity for parties and third parties to submit materials in support of their views during investigations is nearly universal among respondents, with “yes” answers ranging from 94-100%. The responses explained that party submissions help the agency assess the strengths and weaknesses of its own theories before making an enforcement decision.
- The Practitioner’s Report summarized that agencies “most often allow parties to both meet with decision makers and submit written submissions prior to making a final decision.” Almost two-thirds responded that there was an opportunity to meet with agency leadership and decision makers prior to the agency making its final decision, and over three-fourths of respondents stated that there was a timely and meaningful opportunity to submit written responses to agency charges prior to the agency issuing a final decision.

The differences in these few sample results range from a striking gap in perceived transparency of theories of harm to the relatively comparable impressions about the opportunity for parties to meet with decision makers and submit materials in support of their views. On an initial glance, these differences may be consistent with a broader gap in the overall perception of the scope of agency-party engagement. A closer reading of the surveys reveals potential explanations, often subjective in nature, which are not readily apparent in the numbers.

Engagement is discretionary

A common theme in the ICN Report is that agencies have and use discretion in providing transparency. The scope and form of transparency is often a choice made after evaluating whether the transparency advances its investigation. While the responses to the ICN survey suggest that agencies value transparency, the ways they do so may vary from case to case depending on the needs of a particular investigation. Likewise, parties often have discretion with respect to their engagement with agencies, in what they choose to present. The inherent discretion on both sides raises questions such as whether agencies are

choosing to forgo potentially useful interaction with parties and whether parties are not taking advantage of opportunities to make their cases, for strategic reasons, lack of knowledge about the opportunities, or otherwise. Perceived differences in the scope of interaction between agencies and parties might be a result of unwisely exercised discretion.

Perceptions on the content and scope of engagement

It is apparent from the practitioner responses that the perception of engagement is influenced not just from its availability, but also its content, scope, and timing. For example, while the majority of practitioner responses noted the ability to meet with staff and agency decision makers, less than half of the respondents characterized those meetings as timely and meaningful. Indeed, differences about the value of specific aspects of engagement may account for a significant perception gap between parties and agencies. For example, among the majority of practitioners that stated there was no disclosure of the theories of harm during an investigation were comments that the theory of harm “was disclosed to us only in vague terms” or “only at the end of the first phase” or “was just a ‘mock theory.’” Perhaps not inconsistently, several of the “yes, we share theories of harm” responses by agencies in the ICN Report asserted that disclosure is more likely to take place in greater detail and frequency in advanced investigative stages and can be detailed at the latest in written provisional findings or statements. Perceived differences in the interaction between agencies and parties might be a result of different values placed on the content of the interaction. Answering whether an agency provides the opportunity to meet may not answer whether that meeting provides a meaningful exchange.

Foundation for Dialogue

The mandate for the ICN’s project on investigative process states that “the credibility of competition agencies and of the general mission of competition enforcement is linked to the integrity of the process of conducting competition investigations and how this is perceived. Investigative procedures that provide for transparency, predictability, adequate notice and opportunity to be heard, and internal checks and balances strengthen agencies’ decision-making and increase public confidence in agencies’ decisions.”

The ICN and Practitioner Reports share a belief in the value of transparency and agency-party engagement. They have advanced the dialogue on effective investigative processes and procedural fairness by providing real world perspectives on the underlying practices that promote these goals. It may come as no surprise that such interaction may be perceived differently from different perspectives. These different perceptions are useful because they provide focus for continued dialogue and the identification of principles and improved practices that can apply across systems and cultures that promote basic fairness, while ensuring effective competition investigations.