Confidentiality During Competition Investigations: Comparing the Perspective of Agencies and Practitioners

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In 2012, the International Competition Network's (ICN) Agency Effectiveness Working Group (AEWG) began a multiyear project on competition agency investigative process. The project's mandate 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."[2] In its first year, the project addressed investigative tools[3] and the agency transparency practices.[4] In 2014, the project examined the topic of agency confidentiality practices during investigations.

Confidentiality plays a pivotal role in competition investigations. The protection of confidential information submitted during an investigation protects the legitimate interests of companies, and indeed competition, by preventing competitors from receiving access to competitively sensitive information such as business secrets. Confidentiality protections also support the credibility of competition enforcement agencies and their ability to compel and obtain necessary information from companies that they investigate.

A key challenge faced by agencies in applying confidentiality rules is balancing the need to protect confidential information and the need for transparent enforcement. Addressing the competing objectives of transparency (to the parties under investigation about the evidence against them and more broadly in promoting public understanding of competition enforcement) and confidentiality protections (to information obtained by competition agencies during their investigations) is central to promoting fair, informed, and predictable enforcement.

To examine this and many other issues related to confidentiality during investigations, the ICN published a report[5] in 2014 based on survey responses from competition agencies in 37 jurisdictions. To contribute to the discussion and complement the ICN Report, a parallel practitioner's survey was conducted by three non-governmental advisors to the ICN.[6] The Practitioner's Report was based on 94 individual responses from 32 jurisdictions. Together, these reports represent the most comprehensive attempt to identity and advance

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[2] ICN Investigative Process Project Issues Paper and Mandate, *available at*: http://www.internationalcompetitionnetwork.org/uploads/library/doc799.pdf.
[3] ICN Investigative Tools Report (2013), *available at*: http://internationalcompetitionnetwork.org/uploads/library/doc901.pdf.
[4] ICN Report on Competition Agency Transparency Practices (2013), *available at*: http://internationalcompetitionnetwork.org/uploads/library/doc902.pdf.
[5] ICN Report on Competition Agency Confidentiality Practices (2014), *available at*: http://internationalcompetitionnetwork.org/uploads/library/doc1014.pdf.
[6] Sean Heather, James Rill, Charles Webb, Summary Responses: The Treatment of Confidential Information in Competition/Antitrust Administrative Proceedings (April 2014) *available at*: https://www.uschamber.com/sites/default/files/A%20Practitioner%E2%80%99s%20Survey%20on%20the%20Use%20of%20Confidential%20Information%20in%20Competition%20Proceedings%20-%20April%202014_1.pdf.

the understanding of competition agency practices and approaches to the protection of confidential information obtained during investigations.

As the reports represent two different perspectives on the same subject, this article is an attempt to identify some of the notable similarities, differences, and perception gaps in the surveys' results by comparing five of the takeaways from the reports. Given their common aim to examine agency confidentiality practices, the reports' insights combine to offer a useful basis for comparison. At the same time, it is important to recognize that the surveys differ in several respects. First, they did not use the same questions. Second, while combined the two reports contain results from 51 jurisdictions total, only 18 overlap.[7] Third, the scope of requested responses differed: while practitioners were asked to answer through the context of *their own specific enforcement experiences*, agencies were asked about *their policies and general practices*. Despite these differences, given the shared aim of the surveys, a comparison provides potentially useful observations about the state and perceptions of confidentiality practices, as well as potential areas for continued examination.

For a more complete comparison of the results of each survey, see the ICN Report, *General Themes*, at 8-16 and the Practitioner's Report, *Key Takeaways* at 3-5.

The importance of confidentiality rules

The results of the two surveys evidence shared views of the importance of confidentiality rules applied to competition investigations. The ICN Report begins with recognition that "the protection of confidential information is essential to creating an environment in which competition agencies can obtain the information needed" for evaluation. Rules to protect confidential information obtained during investigations is a common facet of competition enforcement frameworks – indeed 100 percent of the responding agencies said their competition law provides for the protection of confidential information and 92 percent said they have established policies and procedures to protect such information. Further, both surveys confirm that the submission of confidential information is routine in competition investigations and that confidential information is often critical to the competition analysis. Over 85 percent of the responses in the Practitioner's Report agreed that agencies use confidential information to support their findings.

Balancing confidentiality and transparency

The two reports share recognition of the challenge of balancing confidentiality rules and transparency practices. In the ICN Report, the responses identified the challenges posed by the competing objectives of transparent enforcement and confidentiality protections during specific competition investigations. Agencies recognize the need to be transparent

[7] The overlapping jurisdictions are: Australia, Brazil, Canada, Czech Republic, European Union, Germany, Italy, Japan, Korea, Mexico, Poland, Spain, Singapore, Turkey, Ukraine, the United Kingdom, the United States, and Zambia.

with parties under investigation about the nature of the evidence against them, but also have confidentiality rules that limit access to such information.

The Practitioner's Report also focused on agencies' view of the balance between confidentiality and transparency to parties under investigation. The responses indicate a perception that the general approach by agencies is to favor protecting confidentiality claims over providing transparency: 34 percent believed that agencies think confidentiality should outweigh disclosure, 12 percent said agencies favor disclosure, and 54 percent chose a middle ground: agencies respect confidentiality but also seek to prevent overly broad claims. In terms of whether agencies achieve the "right" balance between confidentiality and disclosure, the Practitioner's Report reflects the often divergent interests of parties under investigation seeking access to the evidence against them and third parties who have been compelled to supply confidential information. The responses reflecting the experiences of complainants and third parties had much greater confidence in the agency's approach to disclosure of confidential information than the responses that reflected investigation targets. Two questions asked about the "checks and balances" used by agencies to review confidentiality determinations: 38 percent responded that such practices are sufficient "from the point of mounting a defense" whereas 52 percent responded that the same practices are sufficient "from the point of a third party/complainant." This is consistent with a perception that agencies are more inclined to choose confidentiality over investigative transparency.

Due process considerations[8]

The general approach to the balancing of confidentiality and transparency during an investigation described above is linked to perceptions of due process for parties under investigation. The results of the Practitioner's Report indicate that many of the respondents believe that agency confidentiality practices prevent targets from mounting an adequate defense: 26 percent characterized it as a "routine problem" and another 49 percent stated that access to information deemed confidential "occasionally" presents a challenge to mounting a defense. In response to another question, more than 60 percent of the practitioners claimed that, in their experience, even after making tentative conclusions or deciding to charge a target, agencies still had not provided confidential information to the parties under investigation.

On this issue, perhaps to no surprise, the ICN Report projects a different perspective. Unlike the Practitioner's survey, the ICN survey did not seek to capture specific case experiences, so it is silent on the frequency with which (or volume of) confidential information is disclosed in specific cases. However, the ICN Report does address the due

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[8] As part of a project on investigative process, the ICN's examination of confidentiality practices focused on confidentiality *during an investigation*. Several agencies reported that they are subject to broader disclosure requirements during the course of enforcement proceedings following an investigation, though these requirements and how they impact due process were not explored in any detail in the ICN Report. For example, in might be the case that confidential information that is not disclosed to targets (either via an administrative 'access to file' process or via discovery in a litigation or prosecutorial context) may not be used to support the agency findings on appeal or prove allegations in court.

process issue from the perspective of agency practice and policies. In characterizing the general practice across agencies, the ICN Report states that "confidential information obtained during an investigation is protected from disclosure except in limited circumstances." Even systems that provide access to investigative files to the parties start with the limiting principle that access is restricted to non-confidential information. Yet the ICN Report identifies the disclosure of confidential information "to parties as necessary for their defense" as one of the four common scenarios for the disclosure of confidential information during investigations. Also, at 15, the ICN Report notes that agencies consider "whether non-disclosure deprives targets of the ability to defend themselves with knowledge of key evidence sued against them" when evaluating whether disclosure of confidential information is appropriate.

In perhaps the most direct example of a difference of opinion from the practitioners' views, the ICN Report states that even for agencies that "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."

Tools to address confidentiality

Together both surveys confirm that competition agencies have and use a variety of tools to limit the extent of the disclosure of confidential information while still providing transparency in their investigations. The ICN Report notes practices such as redaction, non-confidential summaries, aggregation, and anonymization during investigations; and protective orders, closed hearings, and sealed filings for litigation and investigative hearings. The Practitioners' Report agreed that many agencies provide meaningful non-confidential summaries and can limit disclosure to a defined set of individuals (*i.e.*, counsel). This practice of "confidentiality rings" – or the restriction of access to confidential information to specific individuals – was cited in both surveys. The ICN Report stresses that many agencies strive to explain their concerns without revealing confidential information: over 75 percent of the responding agencies have the ability to discuss the "nature of evidence that contains confidential information without revealing specific confidential information."

Notice and ability to object

The ICN Report indicates that notice of contemplated disclosure of information designated as confidential and the ability to object to or appeal an agency's decision to disclose are common across many jurisdictions, with notable exceptions such as information disclosed to other government investigators. The Practitioner's Survey support this conclusion: 69 percent answered that parties under investigation are able "to object to, or seek to compel disclosure of, information withheld form disclosure on confidentiality grounds;" 76 percent answered that third parties are given notice of the intended disclosure of information designated as confidential; and 83 percent answered that third parties have the ability to appeal to or seek a protective order to prevent or limit disclosure. More generally, the ICN Report notes that most responding agencies expressed "a general willingness to engage

parties regarding questions of confidential treatment for specific information" as an initial step when contemplating disclosure.

Conclusions

Differences in the results from these two surveys range from the striking gap in the perception of how confidentiality protections impact the ability for parties to mount an adequate defense to similar impressions about the methods agencies use to protect confidential information and availability of basic checks such as the ability to object to disclosure in certain circumstances. The differences related to due process perspectives may derive, in part, from an agency's choice in balancing confidentiality and investigative transparency, and the idea that agencies may be more attuned to protecting confidentiality. This issue is further complicated by the often divergent interests of confidentiality protections and disclosure of confidential information between parties and third parties. When viewed from the perspective of a party under investigation, non-disclosure of information can raise due process concerns, whereas viewed from the perspective of an agency (or third party that provided the information), the same non-disclosure is viewed as providing necessary confidentiality protections.

Both the ICN and Practitioner Reports underscore the seriousness with which competition agencies and companies approach protecting confidential information obtained during investigations. Together they advance the dialogue about effective confidentiality practices by identifying and presenting perspectives from both sides of an investigation. Dual exercises like this are useful in providing issues for continued dialogue, identifying common principles across different regimes, and ultimately, the development of better practices for competition investigations.