ICN AGENCY EFFECTIVENESS PROJECT ON INVESTIGATIVE PROCESS

Competition Agency Transparency Practices

April 2013

I. 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 members 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 two aspects of its mandate this year: agency enforcement tools and agency transparency practices. Additional aspects of the mandate will be pursued in 2013-14 and beyond. This report addresses only the transparency-related work.

To inform its work, the Project began with a stocktaking process intended both to identify existing work related to transparency and to survey member agencies' transparency practices. Recognizing that ICN members 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 transparency practices during investigations.

It is hoped that the stocktaking exercise provides a basis for members to discuss their transparency practices. Members may consider whether to develop the work further in view of providing guidance to ICN members looking to enhance the effectiveness and efficiency of providing transparency with respect to their investigative process.

II. Existing Work on Agency Transparency

As an initial step, the Project examined existing work on the topic of agency transparency accomplished in similar international venues and at the domestic level. The OECD, ICN and other groups have addressed agency transparency practices in international settings. Additionally, various member agencies have articulated the importance of transparency and how they provide transparency in their own domestic enforcement settings. As such, there are notable existing work products that address agency transparency 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
- ICN Recommended Practices for Merger Notification and Review Procedures, RP VIII. Transparency
- International Chamber of Commerce, Recommended Framework for International Best Practices in Competition Law Enforcement Proceedings, including topic of Transparency
- ASEAN Regional Guidelines on Competition Policy, chapter on Transparency

OECD

The OECD Procedural Fairness and Transparency Report was published in February 2012. The Report summarizes three roundtable discussions on transparency and procedural fairness held in 2010 and 2011 and draws from 82 written submissions. The 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." Several portions of the report examine how jurisdictions provide transparency into their competition laws, policies, and processes encountered by parties under investigation. Its key findings that correspond to aspects of this exercise are:

- agencies promote transparency with respect to the competition laws they enforce and the policies they implement
- agencies promote transparency of their investigative process
- agencies inform parties about, and provide opportunities for, engagement with agency decision-making during an investigation

ICN

In 2003 and 2004, ICN members approved three Recommended Practices on Conduct of Merger Investigations, Procedural Fairness, and Transparency as part of the Recommended Practices for Merger Notification and Review Procedures. Several aspects of these three Recommended Practices correspond to aspects of transparency and predictability examined by this exercise. They include recommendations to provide:

- opportunities for meetings or discussions between the competition agency and the merging parties
- parties with an explanation of the competitive concerns that give rise to the need for an in-depth review
- parties with sufficient and timely information on the facts and competitive concerns
- parties with meaningful opportunity to respond to competitive concerns
- opportunities for third parties to express their views during an investigation
- transparency with respect to merger laws, procedures, and review standards, subject to appropriate protection of confidential information

ICC

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

- transparency with respect to competition laws and enforcement procedures and practices
- informing parties of the existence of an investigation, the allegations, and the evidence supporting the claims
- regular meetings with the parties to discuss the competition agency's concerns and working theories
- parties have the opportunity to submit written responses to competition agency provisional findings

ASEAN

The ASEAN Guidelines on Competition Policy contain a chapter on procedural fairness. Its guidance includes statements that:

- transparency is fundamental in order to support the credibility of the competition regulatory body
- the competition agency should provide transparency with respect to the application of policies, procedures and practices

- alleged infringing undertakings should have access to the investigation evidence gathered by the competition agency
- where feasible, the competition agency may also grant third parties interested in the proceedings access to specific information

III. Member Survey of Transparency Practices: Overview

In October 2012, AEWG member agencies were invited to participate in a survey of their available enforcement tools and transparency practices. This report aims to give a representative overview of the most common transparency practices and provide insight into how different jurisdictions have developed their practices to contribute to effective and efficient investigations. Thirty six ICN members from the following jurisdictions submitted responses on their transparency practices: Australia, Barbados, Botswana, Brazil, Bulgaria, Canada, Caricom, Chile, Columbia, Croatia, Czech Republic, European Commission, France, Germany, Hungary, Israel, Italy, Jamaica, Japan, Jersey, Kenya, Mexico, New Zealand, Norway, Poland, Russia, Slovakia, Spain, Sweden, Switzerland, Taiwan, United Kingdom (Competition Commission & Office of Fair Trading), United States (Federal Trade Commission & Department of Justice), and Vietnam.

The transparency survey identified two broad categories of transparency: general transparency of an agency's policies (general transparency portion) and standards across all enforcement areas and transparency provided to parties under investigation, third parties, and the general public within the context of specific investigations (investigation-specific portion).

The general transparency portion presented nine categories of information and asked whether the agency made such information publicly available. The categories were: 1) competition laws and guidelines; 2) agency investigative processes and practices; 3) investigation time lines; 4) agency decisions and orders; 5) agency decisions to close investigations; 6) speeches and policy statements; 7) advocacy submissions; 8) confidentiality provisions; and 9) available sanctions for competition law violations. Agencies were given the option to answer "Yes," "No", or "Varies" with respect to whether each category of information is publicly available in their jurisdiction, with the opportunity to provide further explanation.

Within the investigation-specific portion, the survey asked a series of questions related to an agency's transparency to three groups: parties under investigation, third parties, and the general public. Each question was further divided into responses for four enforcement areas: mergers, dominance/monopolization, cartels, and "other."[1] Again, agencies were asked to answer "Yes,"

[1] The "other" enforcement category was left to respondents' interpretations, generally indicating enforcement actions not covered in the three named categories (mergers, dominance, and cartels). Twenty four of the thirty six responding agencies provided answers for the "other" category. When answered, the results for the other enforcement area frequently tracked one or more of the three named categories. Overall, the results from the "other" category do not differ appreciably from the three more defined enforcement areas, and therefore, this report does not make an attempt to distinguish "other" enforcement areas in any meaningful way.

"No," or "Varies"[2] with respect to whether they follow a specific practice, with the opportunity to provide additional information and explanation about each practice.

Each investigation-specific question was crafted to address a single potential agency practice that may provide transparency. 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 Recommended Practices. There were twelve questions related to parties, ten questions related to third parties, and seven questions related to the general public. Six of the questions were common across all three groups (parties under investigation, third parties, and the general public); nine questions were the same for parties and third parties, and seven questions as between third parties and the general public. In presenting the specific results below, similar questions across different groups are reported together for comparison.

The survey also offered the option of an open, narrative response to identify the "most important" aspects of and limitations on agency transparency practices.

IV. General themes from the Member Survey of Transparency Practices

This section draws broad conclusions from the survey results. These themes are grouped into two categories: 1) those that evidence consistent practices across agencies and 2) those that evidence different means to pursue the common goal of transparency.

1. Indicators that transparency is pursued in similar ways by competition agencies

Agencies value transparency. Many of the responses recognize the benefits of transparency for parties and fairness across agency enforcement, but many respondents[3] also described reasons why transparency benefits the competition agencies that provide it. Several responses asserted that transparency during the investigative process is a key element to improving both the quality of evidence presented and the reasoning on which competition agencies base enforcement actions. By disclosing the information necessary for parties to understand the nature of the allegations, agencies ultimately promote more efficient investigations. Transparency to parties and others can assist competition agencies' own decision making by enabling them to hone better counter-arguments and identifying relevant evidence that might support facts or theories inconsistent with its working theories or ultimately with an enforcement action.

Transparency is universal. All respondents answered "Yes" to a significant number of the questions posed. At the aggregated level, for 21 of the 38 individual questions, the majority of respondents answered "Yes." Only 7 questions received majority "No" responses, with 5 of these 7 questions related to transparency for the general public. The responses to other questions are split, often with significant numbers of "Varies" responses that explain situational differences.

[2] For the few instances when a response to a specific question indicated multiple different answers within a specific enforcement area (e.g., depending on whether the investigation was pursued through administrative procedures or prosecutorial procedures) the answer was counted only once, as "Varies."

[3] All respondents to the survey were ICN member competition agencies. The terms "respondents" and "competition agencies" are used interchangeably throughout this report when referring to the competition agencies that submitted a survey response.

The percentages of majority "Yes" responses for general transparency (7 of 9) and transparency with parties in investigations (10 of 12) were even higher. The overall results are consistent with competition agencies sharing a common understanding of basic principles of transparency and using similar tools to provide transparency.

Consistency across enforcement approaches. The survey attempted to articulate practices that are broadly applicable across all enforcement systems, accommodating responses from competition agencies within both prosecutorial and administrative systems. Nearly a third of the respondents indicated that they have a prosecutorial approach to enforcement, i.e., to block or stop anti-competitive conduct, they must initiate a challenge in court. The aggregated results of the survey do not evidence a bright line split between the transparency practices of agencies that operate within administrative systems and those that operate in prosecutorial systems. The differences identified in narrative explanations do not go to *whether* transparency is provided, but rather *how and when* it is provided.

Consistency across enforcement areas (mergers, dominance/monopolization, cartels, and other). Most respondents provided the same answer across each enforcement area for nearly all questions, though a minority of responses did vary across enforcement areas for a number of the questions. The aggregated numbers evidence this consistency. The most striking exception to consistency across different enforcement areas is found in the responses to the questions on whether an agency is transparent about the timing of its investigations. Respondents indicated significantly more transparency with respect to the timing of merger investigations (often determined by statute or set rules) than other types of enforcement (often without prescribed timing). A second, though milder exception is the disclosure of the existence of an investigation to third parties and the general public. Again, the answers suggest higher transparency with respect to mergers than other areas of enforcement. No other practices evidence such notable differences across enforcement areas as timing and existence of investigations.

Methods for providing transparency are often linked. The survey posed questions focused on individual practices or methods for providing transparency and engaging with parties under investigation, third parties, and the general public. These practices are listed in Section V A, and include, for example, disclosures of facts, evidence, theories of and competitive harm; and opportunities to meet with the agency, submit materials, and respond to concerns. Severl of these practices evidence similar high lievesl of use among respondents. Moreover, many of the narrative responses explicitly linked practices, e.g., the opportunities to submit materials and respond to agency concerns often occur at or around meetings with the agencies; facts, evidence, and theories of harm are disclosed to parties under investigation to facilitate an informed response to agency concerns. The provision of transparency and agency engagement may often be made through a package of interrelated and complementary practices that reinforces an exchange of information between an agency and parties, third parties, and the general public.

For investigation-specific transparency, responses consistently indicate more transparency with respect to parties than third parties, and more transparency with respect to third parties than the general public. Ten of the 12 questions related to parties received a majority "Yes" rating; 3 of 10 questions for third parties; and only 1 of the 7 related to the general public. The practice that

rated a majority "Yes" across all three groups was the opportunity to present materials in support of one's views to the agency during an investigation. For example, the

Confidentiality is the biggest limit or counterbalance to agency transparency. Not only was confidentiality the most cited limitation in the responses to the optional narrative question, but it was also frequently cited within responses to many of the specific practices, including as a framing principle for many "Yes" responses about agency disclosures of information and access to evidence to parties under investigation third parties, and the general public. For example, a respondent might indicate agreement with a specific transparency practice, noting that the disclosure of the information is subject to confidentiality rules. Several responses observed that confidentiality protections are absolutely necessary for the protection of the legitimate interests of parties and to ensure the cooperation of parties and others with the agency during investigations. Many responses underscored the importance of confidentiality protections, noting that the disclosure of business secrets to rivals during the investigative process is inimical to broader competition agency goals of fostering legitimate competition on the merits. So pervasive are confidentiality protections that they should be considered an ever-present check on all types of transparency discussed in this report, even when not explicitly mentioned.

Agency discretion in providing transparency. A common theme across many responses, even those that described more formal, rules-based frameworks, is that agencies have discretion in providing many aspects of transparency. The scope and form of transparency provided is often a choice made by an agency, after evaluating whether the transparency advances its investigation and determining what is possible within the confines of confidentiality protections. Several responses described an informal balancing of the needs of a particular investigation and benefits of transparency with the risks to parties or others of being unreasonably prejudiced by the transparency. The number of "Yes" responses to this survey suggests that agencies value providing transparency and often make choices to do so.

2. Indicators of different means to pursue the common goal of transparency

Transparency can be provided either informally or formally. Some agencies explained that their transparency practices are set by statute or regulation, whereas others explained that transparency primarily is provided based on informal policies or practices. Often agencies that answered "Yes" to the same question described varying degrees of formality in providing the same basic aspect of transparency.

Models for a transparency framework. The responses described two basic starting points for providing transparency during an investigation: a "situational approach" versus a "systematic approach." These generalizations were drawn from agency descriptions of their procedures and practices in the reports. Given the flexibility and discretion that agencies have in providing transparency, many respondents described aspects of both in their actual practices, and thus the approaches are not intended as mutually exclusive.

> Situational approach. For many respondents, their investigations are generally considered non-public. Therefore, the question of whether to disclose information to non-parties (i.e., third parties or the general public) such as the existence of an investigation, the parties or

sectors involved, the factual basis and nature of evidence, and the progress towards resolution is situational. Such disclosure is often driven by consideration of whether the disclosure is needed to advance the investigation.

Systematic approach.[4] For other respondents, the starting point is a more systematic provision of basic information about all investigations. These agencies publish basic information about the existence of each investigation that may include: the parties or sector involved, the violations under consideration, a timetable of the investigation, and remedies under consideration. For details beyond the baseline of transparency provided in the public notice, these agencies face similar situational questions as any other agency about what, when, and to whom to disclose.

A third group of respondents exhibits aspects of both: they systematically publish information about their merger investigations, often according to a detailed statutory framework to do so, but do not generally disclose similar details with respect to other types of investigations.

Timing of transparency practices. While the responses to many of the basic concepts of transparency evidence high levels of consistency across different agencies, the explanations provided by respondents describe two basic approaches to when transparency is provided. In the first general approach, agencies view transparency as part of an ongoing interaction or dialogue with the parties. In a sense, transparency begins at the first contact and continues throughout with regular updates, as appropriate. The second general approach ties transparency to key milestones in the investigation. As many responses emphasized, agency interaction and its accompanying transparency occurs at or around specific events in an investigation. For instance, at the opening of an investigation, at or around a decision to proceed to a second phase or substantial investigation, in response to the issuance of a provisional statement of agency views, and at meetings with the parties or more formal hearings. While the ongoing dialogue approach generally is less structured and the milestone approach generally is more formulaic, they are not mutually exclusive. Several responses describe their agency's approach as having aspects of both.

Transparency practices can be subject to limited restrictions. Setting aside the larger issue of confidentiality protections and how they impact an agency's interaction about its investigations with others, responding agencies noted several types of limitations that they may place on their transparency practices. For instance, the ability to respond to agency concerns or present materials can be confined to a specific timeframe during an investigation (i.e., no submissions 10 days prior to a hearing) or requests for modifications to information requests can be required in writing.

Status of third parties. A section of the investigation specific transparency portion of the survey was devoted to third parties. The survey defined third parties as "competitors, customers, or other non-parties that the agency may contact during an investigation," but did not attempt define "qualified" or "interested" third parties. Many respondents explained that the extent of their

[4] Several respondents explained that this approach is often part of an overarching, government-wide policy that favors public access to government information and sets specific, broadly applicable rules to promote transparency.

interaction with third parties may depend on the procedural status of third parties considered or authorized as having an interest in the investigation or proceeding. For some agencies, there is a formal decision or certification for the participation of third parties; for others, there is an ad hoc determination made by the agency about who to contact to advance its investigation. The survey was not designed to differentiate responses for agencies that define interested third parties more narrowly versus others that consider a larger universe.

V. Results of Member Survey on Transparency Practices

A. How the results are presented

All the survey questions are presented as asked, with the percentage results for the "Yes," "No," and "Varies" categories, across all enforcement areas (mergers, dominance/monopolization, cartels, and other), and with a representative summary of the accompanying explanations.

For the questions on general transparency, the results of each question are presented separately. For the questions related to investigation specific transparency, the results are split across two general aspects of transparency representing the two-way interaction between an agency and parties, third parties, or the general public: 1) practices that are agency ***disclosures*** of information to parties or others and 2) practices that are ***opportunities*** to be heard by or present information to the agency. Within each category, similar questions that were asked of different groups (i.e., parties, third parties, and the general public) are presented together for ease of comparison.

Agency disclosures	**Opportunities to be heard**
• legal basis and legal standards of investigation • existence of an investigation and allegations against a party • economic theories under consideration • expected timing of investigation • factual basis and nature of evidence • staff recommendations • access to evidence	• meetings with staff • meetings with agency leadership • submit materials • consult on information requests • respond to concerns • react to proposed remedies

B. Survey Results

These results are presented in three broad categories: first, results related to general transparency about policies and standards; second, results related to transparency practices that involve agency disclosures within the context of specific investigations; and third, results related to transparency practices that involve opportunities to be heard within the context of specific investigations.

<u>Category 1: Transparency in General about Policies and Standards</u> (Not Specific to Individual Matters)

Does your agency make the following information public?

1. **Competition laws and agency enforcement guidelines**

Yes	No	Varies
100%	0%	0%

All respondents to the survey indicated that their competition laws and agency enforcement guidelines are generally available to the public. Often competition laws are made widely available in the same way all laws are made public, via an official journal, gazette, or other compilation of laws and linked to the competition agency website. Agency guidelines are frequently published by the agency on their own websites. Some respondents also provide explanations of their laws and guidelines in short forms summaries, via fact sheets or other general advice about the application of competition laws.

2. **Agency investigative process, procedures, and practices (such as an agency operating manual or agency rules of practice)**

Yes	No	Varies
72%	17%	11%

Most respondents are transparent with respect to their investigative process, procedures and practices. The responses revealed a range of formats for the presentation of such information, from the more formal incorporation in the jurisdiction's competition law or adopted agency rules of practice or procedural guidelines to the less formal, but no less public, agency manuals for procedures, staff working papers, fact sheets, FAQs, explanatory notes, best practices, or other guides to investigative procedures. For those respondents that do not publish their procedures, some indicated that they explain their procedures on an informal basis to any party or third party involved in an investigation.

3. **Typical timing or time lines for different types of investigations**

Yes	No	Varies
58%	25%	17%

A majority of respondents replied that they are transparent with respect to the typical timing or time lines of their investigations. Many responses emphasized that timing of investigations (especially outside the merger context) is case specific and thus difficult to predetermine or articulate with certainty. About half indicated that this transparency comes from their law, most often with respect to set timetables for merger investigations. Several respondents described their transparency with respect to typical timelines in more informal ways, as part of common agency practice to communicate with parties and others about how an investigation is proceeding, its

general schedule, and key milestones. Some agencies issue a tentative timetable or statement of intent on timing during their investigations.

4. **Agency decisions, opinions, and orders**

Yes	No	Varies
81%	**0%**	**19%**

All respondents indicated that at least most of their agency decisions, opinions, and orders are made public. For those that answered "varies" the exceptions that are not already published or made public included orders on procedural issues, some decisions to close investigations with no action, initial phase decisions that are only summarized for publication, and actions that involved a leniency applicant in which the agency took no action.

Several respondents noted that the content to their published decisions or orders are subject to the confidentiality of specific evidence that is cited (or not). Some indicated that their agency drafts public and non-public versions of its decisions, and only publish the non-confidential versions. Many respondents recognized a public interest and value in publishing specific agency decisions (especially those involving substantive analysis) as a central tool to provide transparency about the agency's likely enforcement approach to similar facts and more generally.

5. **Reasons for not taking an enforcement action after investigation or decisions to close investigations**

Yes	No	Varies
40%	**29%**	**31%**

Only a plurality of the competition agencies responded that they routinely publish reasoned decisions for not taking an enforcement action, though a significant majority indicated that they do so at least occasionally. Several noted that they are obligated by statute to publish a decision for every investigation, or in set circumstances, such as for investigations initiated by a complaint or in response to a request to re-examine a decision to close an investigation. Some agencies are only required to provide a reasoned decision to complainants and/or the parties involved.

A majority of respondents have no obligation to publish decisions in cases that are not pursued or are not in the public domain. Many respondents noted that their agency has discretion to consider publishing such decisions. Of the respondents that exercise that discretion on occasion, they described such instances as involving "exceptional" cases, cases with the "most significant impact," cases that raise "important or novel" issues, and cases when it is in the public interest to do so. Several respondents explained that they choose to publish non-enforcement decisions to increase understanding of their enforcement approaches and decision-making.

6. **Agency officials' speeches and agency policy statements**

Yes	No	Varies
81%	6%	14%

The vast majority of responding agencies routinely publish speeches and agency policy statements. Many of the responses indicated a general practice to publish "relevant" or "important" speeches and statements or those considered "of public interest." The intent behind transparency of speeches and policies is to foster greater understanding of how the agency approaches its enforcement mission generally, and often its investigative steps more specifically.

7. **Agency advocacy submissions to other entities (other government agencies, courts, private organizations)**

Yes	No	Varies
46%	29%	26%

Nearly all respondents described competition advocacy initiatives that their agency undertakes to educate or inform others to promote the coherent application of competition principles. As prompted by the breadth of this question, a wide range of activities were mentioned, from formal submissions of competition agency opinions or recommendations that are authorized by statute to less formal consultations with, or non-public advice to, other entities. Many respondents indicated that they have discretion with how and if they make known their advocacy work.

As the underlying intent and value of advocacy is to inform others, the responses indicate a high degree of transparency with respect to general agency advocacy efforts. However, given the variety of ways advocacy occurs, the publication of specific advocacy submissions and arguments appears to be situational. The transparency with respect to advocacy initiatives depends on the circumstances in which the advice is requested and provided. Generally, the more formal and more significant the advocacy provided, the more likely it is to be published, and in particular if it responds to a formal, transparent call for comments. Several respondents qualified their answers that the transparency or publication of the advocacy effort may be at the discretion or permission of the recipients of the advocacy. Other caveats on the transparency of advocacy work included: publication depends on relevance; only those formerly adopted are published; only if non-confidential in nature; and only those documents that reflect "important policy statements."

8. **Explanation of confidentiality protections and treatment of legal privileges during investigations**

Yes	No	Varies
69%	14%	17%

Most respondents indicated that they are transparent with respect to their confidentiality rules. Several noted that the source of specific rules comes from their competition act or other applicable laws. Responses also cited a variety of other formats that make known confidentiality

rules, from operation manuals, explanatory notes, guidelines, agency decisions, best practices, FAQs, and specific agency-issued rules on access and use of documents.

9. **Explanation of available sanctions for violations of competition laws and how they are determined**

Yes	No	Varies
94%	0%	6%

All respondents asserted that the sanctions for violations of competition laws are publicly known as they are set out in the competition act. Many respondents also cited specific agency-issued guidance in the form of manuals, guidelines, methodologies, and notices that describe the available sanctions and the factors considered in determining appropriate sanctions. Respondents from prosecutorial systems also noted that sanctions determined by courts in competition systems are also transparent via court decisions, guidelines, or other guidance. Those that responded "varies" noted that while sanctions are enumerated in their laws, the agency has not produced specific guidance on determining sanctions in investigations.

Category 2: Transparency within the Context of Specific Investigations: Disclosures

1. **Legal basis and applicable legal standards**

Does your agency disclose the legal basis of the possible violation under investigation and applicable legal standards for the investigation to the parties?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
100%	0%	0%	100%	0%	0%	97%	0%	3%	96%	0%	4%

All respondents reported that they disclose the legal basis and standards for the investigation to the parties. All comments that described how such notice is given mentioned that it is done in writing, and several noted that it is reinforced, as appropriate, in oral communications with the parties.

The responses revealed that there are different ways to inform parties, but the vast majority of responses described the same basic approach: agencies inform parties about investigations in writing early in an investigation. Many respondents explained that parties are given notice promptly at the initiation of an investigation, or after a short preliminary investigation to determine whether a complaint has merit. The responses explained that it is common for parties to be informed by the first action or contact an agency makes. Basic disclosures to the parties about the investigation were described as "the first procedural step of the investigation" or accompanying the first investigative measure addressed to the parties, whether in a request for information, authorization for an inspection or raid, or acknowledgement of a merger review via notification. Several responses added that the agency informs parties if there are any changes as necessary throughout the investigation, for instance when an agency adds an additional potential violation to its investigation.

Communication with the parties at the beginning of an investigation includes such information as: the scope of the investigation, the alleged infringement and details of the conduct under investigation, the sector or subject matter, and applicable provisions of the law. Some competition agencies also inform the parties of their rights and obligations while under investigation, identify materials to be provided to the agency, and set out a notional investigative timetable, or even potential theories of competitive harm under consideration.

Several competition agencies indicated that the timing of this disclosure may vary as to the type of proceedings. In merger investigations, for example, this can happen from the earliest contact. Due to sensitivity of leniency applications and the possibility of covert investigations, parties under investigation in the cartel context may not be informed of investigations at the earliest onset of agency investigative activities. Consistent with the discretion agencies have in providing transparency, a common refrain repeated in the responses is that transparency will be limited or not given in situations where it might "prejudice the investigation."

2. Existence of investigation and allegations against parties

Does your agency disclose to a party under investigation the allegations against it?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
94%	6%	0%	97%	0%	3%	94%	0%	6%	100%	0%	0%

Does your agency disclose to third parties: The existence of an investigation and allegations against the parties under investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
67%	9%	24%	43%	14%	43%	42%	12%	45%	42%	13%	46%

Does your agency disclose the existence of an investigation, and the identify of, and allegations against, the parties under investigation to the general public?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
61%	18%	21%	44%	29%	26%	41%	32%	26%	33%	29%	38%

Parties under investigation

The responses reveal that the disclosure of the allegations to the parties under investigation is a fundamental and nearly universal practice. Many responses revealed two points of emphasis for when this disclosure is made: early in an investigation and, more fully, at or about the timing of an agencies' provisional finding or statement of objections. "Early" in an investigation can mean the expression of basic allegations at the first contact with or first investigative measure to the parties, at a meeting with the parties during a preliminary or initial phase, or in some cases, after preliminary investigation of the conduct at issue. Several responses emphasized that the responding agencies strive to update the parties as to possible competitive concerns, working theories, and new allegations as they arise during the course of an investigation. Several

competition agencies also noted that the timing of these disclosures may vary across enforcement areas according to the risk that they might prejudice the investigation (i.e., informing targets of a cartel investigation prior to planned searches).

Third parties and the general public

The responses indicate that it is fairly common for agencies to disclose the existence of an investigation and the allegations against the parties to third parties and the general public, though not to the same frequency or degree as the parties themselves. There is little difference in the results for third parties compared to the general public.

Many responses indicated that third party information is often necessary in order to have a full understanding of the market. For third parties to provide informed input, it is often necessary to provide a basic context for their input, including acknowledging the existence of an investigation and the broad terms of the conduct under investigation.

The responses revealed two models for disclosing information to third parties and the general public. First, a significant contingent of respondents provides transparency about their investigations by publishing basic information once an investigation is opened. Beyond the public announcement of the investigation, this basic information usually includes a summary of suspected infringements and a call for comments. This approach is more commonly used in merger investigations that have set statutory frameworks for timing and procedures, as evidence by the variation in "Yes" replies across the enforcement areas.

Having automatically published basic information about the allegations, for agencies that follow the first model, there is no issue about disclosing the information to select third parties. However, when they consider disclosing details beyond the basic information that is published, these agencies consider the value, necessity, and extent of additional disclosures as they interact with third parties.

For the responding agencies that do not automatically publish basic information about their investigations, the context for potential disclosure of the existence of an investigation and the allegations arises from the agency's decision to contact third party it believes has relevant information, a frequent occurrence in many investigations. These respondents described the disclosure of the existence of an investigation and allegations as situational specific, often tempered by an "as necessary" standard. Some of the phrases used to describe when such disclosures are made are: "when pertinent," "when necessary to get relevant information," "when appropriate," "if deemed necessary," or "to the extent appropriate to assist the investigation." When disclosed, the responses spoke of the content as "broad terms" and only the information necessary to advance the investigation. In this respect, the disclosures are akin to the "basic" information routinely published by other agencies. Several respondents mentioned that they acknowledge an investigation if the parties themselves have disclosed it or as necessary to their investigation.

For the general public, several responses mentioned that the disclosure of detailed allegations is provided via the final decision in the investigation, once a public version is made available.

3. Expected timing of the investigation

Does your agency disclose the expected timing of the investigation to the parties under investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
85%	15%	0%	38%	41%	21%	32%	41%	26%	38%	42%	21%

Does your agency disclose the expected timing of an investigation to third parties?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
58%	42%	0%	29%	65%	6%	26%	65%	9%	30%	61%	9%

Does your agency disclose the expected timing of specific investigations to the general public?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
45%	52%	3%	24%	71%	6%	21%	71%	9%	21%	71%	8%

The survey responses on competition agency transparency about the timing of investigations are among the most varied. The results show more transparency given to parties than to third parties, and likewise more transparency given to third parties than the general public. Even more striking, transparency about timing in merger investigations appears to be much more common than for other areas of enforcement.

Respondents described two situations that impact transparency about timing: investigations that follow set statutory frameworks and those that do not, and therefore are difficult to predict. As apparent from the results, merger investigations are more common in the first category, although a subset of respondents explained that they have similar frameworks for other types of investigations. For those with determinable timetables, many respondents explained that they publish notice of basic information about the investigations, including the timing.

For investigations not subject to set timetables, the responses explained that is it often difficult to estimate the scope, extent, and expected timing of investigations that can vary significantly depending on their complexity. In this context, two general approaches were described in the responses. Some respondents reported that they routinely publish estimates that are subject to revision. Many other respondents described a case by case approach to discussing and disclosing expected timing. This ad hoc approach views timing as a topic relevant for discussion with parties (or others) as needed, covering general timing and/or focused on upcoming key points in the investigation (i.e., meetings with parties or release of preliminary findings). The results suggest that the disclosure of timing occurs with more frequency with respect to parties than third parties, and the narratives emphasized that disclosures to third parties are more narrowly tailored to points of relevance for the third party (i.e., timetable for the submission of its views).

4. Factual basis and nature of evidence

Does your agency disclose the factual basis and nature of evidence for the allegations under investigation to the parties?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
88%	6%	6%	82%	6%	12%	79%	9%	12%	83%	8%	8%

Does your agency disclose the factual basis and nature of evidence for the allegations in an investigation to third parties?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
34%	44%	22%	36%	39%	24%	33%	36%	30%	30%	43%	26%

Does your agency disclose the factual basis and nature of evidence for the allegations in an investigation to the general public?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
18%	58%	24%	21%	65%	15%	21%	65%	15%	17%	58%	25%

The results on the disclosure of the factual basis for an investigation and the nature of evidence gathered show a clear delineation in frequency with respect to parties, third parties, and the general public. With respect to different enforcement areas, there is not much variation as to whether this type of information is disclosed, however, several respondents did cite sensitivities in the cartel context (in particular criminal prosecution) that may result in such information being provided later than is common in other enforcement contexts. The facts and evidence gathered are the foundation for a competition agency's analysis and thus are crucial to any investigation. Their disclosure, and as many responses emphasized, always is subject to confidentiality considerations.

Information about the facts and evidence supporting the agency's decision that many respondents are required to provide to parties at some point prior to a final enforcement decision or when initiating a challenge in court. Yet the vast majority of responses describe a process where the agency uses its discretion to provide such information earlier, at appropriate investigative steps (and subject to appropriate confidentiality protections) to ensure that parties are informed about objections raised against them.

Generally, disclosure of this information occurs at an advanced point of an investigation, informed by evidence gathering, but many responses described it as a fluid process. The most cited tool or event for providing this transparency was an agency's provisional statement of findings, statement of objections, or issues statement provided after evidence is gathered and before the ultimate enforcement decision. This written statement sets outs the initial agency objections and findings based on the evidence gathered. Many also stated that this type of information can be discussed earlier, even included in a notice to initiate an investigation, if available. Such discussion often occurs in initial meetings with the parties and at points prior to

initiating a second phase investigation. Several responses mentioned that this type of information is addressed throughout the interaction between the agency and parties, informed by feedback from market contacts and evidence uncovered during the investigation. Several respondents described an on-going dialogue with parties during an investigation that aims to ensure they are informed about the general nature of evidence in enough detail to meaningfully respond to the agency's concerns.

The results suggest that disclosure of the facts and evidence is made less often to third parties and the general public, and the narrative responses also indicate more limited disclosures when made. In the course of investigations, agencies routinely engage third parties and seek relevant information and views from them. When they do, respondents said they disclose basic information about the subject matter, facts, and evidence that is necessary to advance the investigation. Several respondents state that they discuss facts and evidence with third parties "in broad terms" not only acknowledging confidentiality rules, but also suggesting a more limited detail of disclosure than might occur with parties.

For a certain subset of respondents, these disclosures are made via their practice of public notices at the initiation of an investigation, often explaining the subject matter of the investigation and calling for comments. Others explained that non-confidential versions of their provisional findings or statement of objections are given to third parties or made public. Other respondents explained that they make disclosures during the course of their ad hoc communications with third parties, often in the context of issuing requests for information or meetings, always to the extent necessary, subject to confidentiality protections and their judgment that such disclosures would not prejudice the investigation.

Facts and evidence appear to be disclosed to the general public to an even lesser extent. The respondents that answered "Yes" generally do so as part of automatic public notices about their ongoing investigations or indicted that this disclosure occurs via pleadings made in court proceedings or non-confidential version of final agency decisions.

5. Disclosure of the theories of harm

Does your agency disclose the economic theories of harm under consideration to the parties under investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
76%	12%	12%	73%	18%	9%	70%	27%	3%	71%	25%	4%

A majority of responses indicted that the disclosure of economic theories of harm is not required during an investigation, but is done so as part of common agency practice to ensure the parties understand the investigation against them and are informed enough to respond to agency concerns. Several respondents explained that the working theories of competitive harm are integral to how staff evaluates the conduct under investigation and are closely tied to other factors that are commonly discussed with and disclosed to the parties, namely key facts about the market and the nature of evidence developed during the investigation.

Many respondents explained that the disclosure of their theories of harm are critical pieces of their formal findings, detailed at the latest in written provisional findings or statements of objections and ultimately in the agency's final decision or pleadings in court, as appropriate. Most also described this topic as part of their informal interaction with parties during an investigation. Many respondents discuss their competitive concerns and staff analysis with the parties orally before key decision points. In terms of timing, discussion of theories of harm can start early in an investigation and be subject to regular updates as agency thinking about the potential competitive harm evolves. Generally, it is more likely to take place in greater detail and frequency in advanced stages of investigations as evidence is gathered and evaluated.

6. Staff recommendations to agency decision makers

Are staff recommendations to agency decision makers disclosed to the parties under investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
16%	69%	16%	15%	70%	15%	15%	70%	15%	18%	64%	18%

Are staff recommendations to agency decision makers disclosed to third parties?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
9%	84%	6%	9%	82%	9%	9%	82%	9%	13%	78%	9%

The survey results show that the disclosure to parties of the formal, internal staff recommendation is not a common practice. Referencing why these written recommendations are not given to parties, most respondents emphasized that staff recommendations are considered agency confidential information and that agency decision makers can adopt decisions that differ from staff recommendations. However, many responses explained that parties learn of the competitive concerns identified by staff via interaction and discussion and know the working theories of harm – all with the explicit understanding that agency leadership makes the ultimate determination in the matter. Several responses also explained that the thinking and recommendations of the investigative staff are often embodied in the provisional findings or statements of objections.

As with parties, the vast majority of respondents do not share staff recommendations with third parties, for similar reasons. With respect to staff sharing their working theories or analysis with third parties via informal discussions, the narrative responses indicate that this is more limited than with respect to parties. Several responses explained that staff may share its working theories or analysis with select third parties (subject to confidentiality rules) if the third parties' perspective or expertise can improve staff's understanding and analysis.

7. Access to the evidence obtained in the investigation

Are parties provided with access to the evidence obtained in the investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
73%	15%	12%	74%	12%	15%	71%	15%	15%	67%	17%	17%

Are third parties provided with access to the evidence obtained during the investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
24%	48%	27%	21%	41%	38%	21%	38%	41%	17%	42%	42%

Is the general public provided with access to the evidence obtained during an investigation?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
12%	76%	12%	12%	76%	12%	12%	79%	9%	13%	71%	17%

The high level of "Yes" and "Varies" responses indicates that providing parties with access to the evidence used against them is a fundamental agency practice. Several responses described providing access to evidence to the parties under investigation as a "critical factor" in their system to ensuring the meaningful participation of the parties in the investigation and as an important "right" of defense.

The responses describe both formal requirements to provide access governed by law or rules (administrative and/or court imposed), as well as informal practices used by agencies to inform parties. Many respondents are required to provide access to case files to parties when the agency presents its preliminary conclusions or upon a court challenge, when the parties get extensive review of the evidence gathered that forms the basis for the agency's assertions. Parties have the ability to review and respond to the assertions. Not all of the "Yes" responses, however, were based only on formal access to case files or court discovery rules. Some responses also described using informal, often earlier, opportunities of interaction with the parties to discuss the nature of market contacts and give a sense of the scope and type of evidence being gathered, even when such disclosure is not required until a later point in the investigation.

The results suggest that access to evidence is not commonly given to third parties and the general public, though the "Yes" plus "Varies" answers add to a small majority across each of the enforcement areas. The narrative responses reveal that a minority of respondents are required to provide such access, often limited to complainants or authorized third parties determined to have legal interest in the investigation. For those that can use their discretion to provide such access to third parties, it is described in cautious terms, for instance, only when "necessary to assist assessment of the case" or limited to "specific information or documents" to determine facts or "assess credibility of different interpretations of the same facts." Some respondents stated that the ability to have access to the case file or to evidence gathered (subject to confidentiality protections) is a distinguishing feature of third parties given to third parties that have a heightened interest in the investigation, for example, complainants.

For the general public, there appears to be very little access to evidence during an investigation. For those competition agencies that responded "Yes," they cited government-wide transparency rules that enable public access to government information (subject to confidentiality protections and other limitations) all investigations and the access provided by public versions of provisional findings and final agency enforcement decisions.

Confidentiality protections limit the extent and content of access to evidence that contains business secrets or confidential business information. Some responses also cited concerns about prejudicing an investigation or revealing the identity of a source that may also limit the access provided.

Category 3: Transparency within the Context of Specific Investigations: Opportunities to be Heard by the Agency

1. **Opportunity to meet with the investigative staff**

Does your agency provide the parties with the opportunity to meet with the investigative staff?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
100%	0%	0%	97%	0%	3%	94%	0%	6%	96%	0%	4%

Does your agency provide third parties with the opportunity to meet with the investigative staff?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
88%	3%	9%	82%	3%	15%	79%	6%	15%	75%	4%	21%

Does your agency provide the general public with the opportunity to meet with the investigative staff?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
27%	64%	9%	21%	70%	9%	21%	67%	12%	17%	74%	9%

For parties under investigation, all responding agencies offer the opportunity to meet with investigative staff. The responses described both formal and informal opportunities to meet. Several responses described rule-based, predetermined meetings and/or investigative hearings recognized by law set for specific points in an investigation. Others described their approach as offering parties regular, informal opportunities to meet, usually multiple times over the course of an investigation, including prior to key decision points. Of those that have formal, predetermined meetings, many also explained that they offer additional informal opportunities for meetings or discussions by phone. By rule or by practice, party-staff meetings and other communications are prevalent.

On timing, the responses reveal that party-staff meetings can occur throughout the course of an investigation but tend to be more likely and more detailed in the advanced stages of an

investigation. Key investigative points for such meetings that were identified in the responses include: after notification or the initiation of an investigation; prior to or just after a decision to proceed to a second phase; before and after the agency issues or shares its provisional findings; during remedy phases or consideration; prior to an agency decision; and at any point the parties can offer information that will materially advance the investigation.

The responses emphasized a dual purpose for party-staff meetings: as an opportunity for the parties to present their points of view as well as an opportunity for the staff to inform the parties about the progress of the investigation and their analysis. This interactive, two-way nature of party-staff meetings involving the identification and discussion of competitive concerns enables more efficient management of investigations. Most responses explained that there are no established procedures for meetings with staff. Several respondents mentioned that their practice is to take formal minutes and/or record such meetings.

Nearly all respondents offer third parties the opportunity to meet with investigative staff. Indeed, many respondents emphasized the importance of engaging third parties during investigations, noting that they commonly seek information from and consultations with third parties. For most respondents, the ordinary interaction with third parties includes the opportunity to meet the investigative staff. The responses identified at least two ways in which the nature of third party meetings differs from party meetings. First, there were less reported instances of predetermined or 'required by law' meetings with third parties. A few responses indicated that formal complainants or certain "interested parties" are entitled to some information or response from the competition agency, but for the most part, third party meetings are at the discretion of the agency, which can be selective about with whom they choose to meet. According to the responses, competition agencies generally are selective based upon the perceived relevance of a third party; seeking to meet with third parties that have "relevant" or "valuable" information or "evidence material to the inquiry." This suggests that the high number of "Yes" responses does not mean that competition agencies seek or commit to meetings with all possible third parties. Secondly, consistent with this discretion, the responses as a whole describe a less interactive dialogue with third parties, with the consultations often occurring and tailored around requests for information from the competition agency. This more narrow focus of interaction with third parties is consistent both with their smaller roles in the investigation and confidentiality protections.

Meetings for the general public are not common practices. The "Yes" responses tended to reflect openness, in principle, to meeting with those who have relevant information, as opposed to regular experience with such meetings. While several responses indicted that the agency is open to receiving relevant information from anyone, no respondent said that it offers a formal opportunity to meet to the general public. One response noted that if an investigation attracts significant interest, the agency may hold a public hearing as part of its investigation.

2. Opportunity to meet with agency leadership or decision makers

Does your agency provide parties with the opportunity to meet with agency leadership or decision makers to discuss agency concerns prior to an enforcement decision?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
56%	22%	22%	64%	21%	15%	63%	22%	16%	54%	29%	17%

Does your agency provide third parties with the opportunity to meet with agency leadership or decision makers?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
47%	28%	25%	50%	22%	28%	47%	22%	31%	52%	22%	26%

While the responses related to parties provide a majority across all enforcement areas, meetings with agency leadership do not appear to be universal practices among the respondents – a notable difference with the nearly universal practice of providing parties with the opportunity to meet with investigative staff.

For the most part, the responses stated that meetings with agency leadership are not granted by law, but many respondents do grant such meetings in their discretion as part of their normal practice. A few respondents noted that this opportunity is given at the formal investigative hearing. The responses revealed that meetings with agency leadership are given at a later stage than meetings with staff. These meetings generally take place at more advanced stages of an investigation after an agency's preliminary position statement has been issued and closer in time to an agency's final enforcement decision. The responses generally did not identify established rules for meeting with agency leadership. One response noted a precondition to meetings with agency leadership: parties should present any arguments it plans to make to staff first.

While the percentage of respondents that do not provide opportunities for meetings with agency leadership to parties remains about the same for third parties, there is a noticeable shift from "Yes" replies to "Varies." This may suggest that agencies exercise their discretion to grant such meetings less with respect to third parties. The narratives responses support this conclusion. Generally, respondents explained that they have the discretion to hear any person or company whose evidence it considers to be material to the investigation. While the openness to such meetings with third parties is on par with that for parties, the responses indicate that third party meetings are not as common. The responses qualified third party meetings with the following types of phrases: "if considered useful," "when necessary," "depends on the agency's needs," "not impossible," and "if justified." Several indicated that third party meetings are generally limited to "key" third parties, whether that is according to status granted to interested third parties or by some perceived importance (i.e., primary or largest competitors or complaining customers). Despite the discretion to meet with third parties, and the relative rarity with which agencies may choose to do so, many responses emphasized that agencies carefully consider the view of third parties before making a decision and that the frequency of third party meetings with agency leadership should not be interpreted as diminishing the important role of third party input.

3. Opportunity to submit materials[5]

Does your agency provide parties with the opportunity to submit materials (e.g., "white papers," economic studies) in support of their views?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
100%	0%	0%	97%	0%	3%	97%	0%	3%	96%	0%	4%

Do third parties have the opportunity to submit information or materials (e.g., "white papers," economic studies) in support of their views?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
97%	0%	3%	94%	3%	3%	97%	3%	0%	96%	4%	0%

Is the general public provided with the opportunity to submit comments, materials, or information (e.g.,
"white papers," statements, complaints) in support of their views?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
71%	26%	3%	67%	33%	0%	66%	34%	0%	61%	39%	0%

The opportunity for parties and third parties to submit materials in support of their views during competition investigations is nearly universal among respondents, and according to the responses frequently used by parties. This opportunity can be provided by established rules, by agency practice, and even when set by rule, augmented by agency practice. Respondents noted that parties often are informed of the opportunity to submit views at the beginning of an investigation, and are invited and encouraged to do so throughout, in particular in response to preliminary findings. Several responses explained the value of encouraging discretionary party input, noting that it helps the agency to assess the strengths and weaknesses of its own theories before it makes an enforcement decision. Some respondents noted that they may identify key issues for the parties to address in their submissions or ask the parties for their views on issues that where there is a difference of opinion about the interpretation or meaning of facts or market conditions.

Most party-initiated submissions are tied to other aspects of engagement, for instance, they are often provided in response to the agency sharing its competitive concerns or issuing provisional findings or in anticipation of a meeting or hearing during the investigation. Respondents emphasized that the opportunity to submit materials in support of views is at the discretion of the parties, with many respondents noting that they welcome any materials of the parties choosing. Materials are most often submitted in writing (several responses gave the example of party "white papers"), but may also include oral presentations during meetings with the agency. For content, these party-initiated submissions typically present arguments, facts, theories, economic analysis, and any evidence in support of the party's views. While generally unrestricted in terms

[5]This question did not refer to compulsory requests for information in which the agency prescribes what a party or third party recipient must produce.

of content and form, several responses identified limited restrictions placed on such submissions, including prescribed time periods for submission (i.e., closing the window of opportunity within a few days of a final hearing) or requiring that arguments and evidence be articulated and identified prior to presentation during the final hearing.

Competition agencies routinely seek information and views from third parties. Several respondents noted that the bulk of information they receive from third parties is provided in response to agency interviews or compulsory requests for information, but on occasion third parties submit materials created on their own initiative in support of their views related to an investigation. Submissions from third parties often are encouraged via public notice of investigations and via ad hoc individual interaction with third parties. The responses indicate widespread openness to third party submissions, similar to that for parties. Third parties have the discretion to submit what they deem relevant in support of their views. The major difference identified in the responses is that third party submissions are much less common than similar submissions by parties.

For the general public, the "Yes" responses are the highest for any question asked. The bases for the high positive responses are agencies that publish notices for public comment in their investigations and a more general openness across many respondents to accepting submissions from anyone that has relevant views. Many respondents do not formally seek submission from the general public, but will accept and consider them in the rare instances they occur. The responses make clear that consideration of public comments largely is on the basis of their relevance and entirely at the discretion of the agency.

4. Opportunity to consult with the agency on compulsory requests for information

Does your agency provide parties with the opportunity to consult with the agency on compulsory requests for information, i.e., to negotiate or discuss the scope and timing of requests for information?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
72%	9%	19%	79%	0%	21%	76%	0%	24%	75%	0%	25%

Does your agency provide third parties with the opportunity to consult with the agency on compulsory requests for information, i.e., to negotiate or discuss the scope and timing of requests for information?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
70%	20%	10%	73%	12%	15%	67%	18%	15%	75%	4%	21%

The responses indicate that it is a common practice for agencies to offer the opportunity to consult on their requests for information. Respondents explained that when requests are drafted, the agency often can lack information about the manner in which information is organized. Therefore, recipients of agency requests for information often are encouraged to contact the investigative staff to discuss any clarifications or questions, including any desire for extensions

of time. Several respondents noted that their requests for information include staff contact details.

Respondents generally indicated that staff has the discretion to engage in consultations and to make decisions that modify the request. The most requested modifications relate to timing extensions for replies, thought the scope of requests are often questioned as well. A few responses described higher thresholds for agreeing to modifications, noting that there must be "compelling need" for the modifications, for instance, based upon the extraordinary scope of the request or legal restrictions on production. Several described internal agency appeal processes for requests that are denied by staff or the ability for recipients to challenge a request in court. Consultations are usually conducted in writing or via calls and meetings, with any agreements set in writing. Consultations usually occur after the request is issued, though some respondents described the possibility of sending drafts to expected recipients for discussion in certain circumstances (though not where such practice may threaten the ability to obtain the needed information, for instance, to protect against potential document destruction by targets). Several respondents noted that consultations are particularly useful for requests involving quantitative data.

The responses related to consultations with third party who receive requests for information were substantially similar to the points raised with respect to parties. The primary exception is a greater sensitivity to time constraints and the ability of third parties to delay an investigation in which they are only tangentially involved. Therefore, respondents indicted more reluctance to grant extensions of time to third parties, perhaps reflected in the higher "No" response rate.

5. Opportunity to respond to the competition agency's concerns

Do the parties have the opportunity to identify relevant evidence for consideration and respond to the agency's concerns (for instance, in response to a statement of objections, hearing, etc.) prior to an enforcement decision?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
94%	3%	3%	94%	3%	3%	94%	3%	3%	96%	4%	0%

Based upon respondents' answers, the ability to respond to agency concerns appears to be a basic, fundamental, and widely-practiced aspect of agency transparency. Several responses described the parties' ability to respond to agency concerns as key aspect of the rights of defense.

By its very nature, the opportunity to respond occurs at more advanced stages of investigations when parties know or have a sense of the preliminary findings or competitive concerns. The most commonly cited events that provide this information are the agency's provisional findings or statement of objections and informal exchanges with staff about their working theories. Several responses recognized that an effective response is "contingent on being informed of the relevant evidence and theories." This recognition of a degree of engagement and interactive dialogue links this opportunity to respond with man of the agency disclosures explored earlier. Several responses state that the sharing of the competition agency's preliminary views and concerns is a prerequisite to meaningful response.

Respondents described both formal and informal ways for parties to respond to the competition agency's concerns. Formal mechanisms are often initiated by an agency's provisional findings or statement of objections or provided via an investigative hearing. Informal ways that were cited include ongoing discussion between the parties and staff and the openness to informal meetings and submissions from parties throughout the investigation. Several responses cited limited restrictions placed on the ability of parties to respond, such as prescribed time limits for the submission of materials prior to a hearing or meeting with the agency. Some respondents emphasized that it is not unusual for the agency to change its thinking in response to party arguments and submissions.

6. Opportunity to comment or provide views on proposed remedies

Are third parties provided with the opportunity to comment or provide views on proposed remedies or settlement commitments?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
48%	45%	6%	38%	50%	12%	32%	56%	12%	30%	57%	13%

Is the general public provided with the opportunity to comment or provide views on proposed remedies or settlement commitments?

Mergers			Dominance			Cartels			Other		
Yes	No	Varies	Yes	No	Varies	Yes	No	Varies	Yes	No	Varies
22%	72%	6%	18%	76%	6%	15%	82%	3%	22%	74%	4%

The response rates for the opportunity for third parties to provide views on proposed remedies are split: a slight plurality for "Yes" in mergers, and a plurality and slight majority for "No" in other enforcement areas. The differences are, at least in part, driven by the baseline of transparency provided by an agency. Those that publish notice of their investigations tend to also publish notice of proposed remedies.

Many respondents noted the value of market testing proposed remedies. The responses indicate that many agencies routinely seek the views of third parties before deciding whether to accept proposed remedies, often at the discretion of the agency. For some competition agencies, the views of specific third parties such as complainants or 'authorized' third parties are sought, for other competition agencies, it is entirely at their discretion, often implemented by contacting only those most likely to have critical information or substantially affected by the outcome. However, the responses from the agencies that described market tests for remedies varied among the "Yes," "No," and "Varies" categories depending on how the respondent interpreted its actions. While it is difficult to read into the results much more than that there is no consistent practice to provide third parties with the opportunity to comment on proposed remedies, there may be more consistency if a broader interpretation of 'input' via informal contacts from the agency is considered.

For the general public, there is no common practice among the respondents to provide opportunities for input into proposed remedies. Several respondents described rules that require

public notice of proposed remedies in some investigations, but the majority of respondents across each enforcement area are not required to do so and do not do so in their normal practices. Those that do seek public comment generally have discretion as to the consideration of the public input.

VI. Grouping of Results Based on Consistency with Practices

In this section, the results have been categorized and presented based on the percentage of agencies that responded that their transparency practices are consistent with the proposed practice.

- The first category represents points that were significantly consistent across the responses: at least 65% and often much more responded "Yes" to the question. These practices are labeled as indicating "significant consistency."
- The second category represents practices that are more split across the responses. For each, "Yes" was the most frequent response, generally, between 40-60%, and often accompanied by substantial rates of "Varies" responses. This category represents "moderate consistency," but evidences a wider variation of practices across the responding agencies.
- The third category includes practices that received a majority "No" response. Most of the responding agencies do not follow the practice as articulated in the question, and as such, these are labeled "no consistency."
- A fourth category identifies the few responses that show significant variation across enforcement areas – i.e., a significant majority "Yes" for mergers, but only a plurality "Yes" or even "No" for one or more other enforcement areas. This category most notably includes the questions related to the transparency of the timing of investigations. These are labeled "variation across enforcement areas."

Notably, the practices that scored highest for transparency to parties include a mix of both agency disclosures and opportunities to be heard. In contrast, the practices that scored highest for third parties and the general public are all opportunities to be heard by the competition agency; disclosures to third parties generally scored much lower. This is consistent with the greater interests and roles of parties under investigation and the overarching presence of confidentiality protections and their limitations on disclosures. This also is consistent with the characterization of party-agency interaction as involving an ongoing dialogue or two-way exchange of information, in contrast to a less interactive, more one-way flow of relevant information from third parties to an agency during an investigation.

<u>Transparency in General about Policies and Standards</u> (not specific to individual matters)

Significant consistency

- Competition laws and agency enforcement guidelines (100% Yes)
- Explanation of available sanctions (94% Yes)
- Agency decisions, opinions, and orders (81% Yes)
- Agency officials' speeches and agency policy statements (81% Yes)
- Agency investigative process, procedures, and practices (72% Yes)
- Explanation of confidentiality protections (69% Yes)

Moderate consistency

- Typical timing or time lines for different types of investigations (58% Yes)
- Agency advocacy submissions to other entities (46% Yes)
- Reasons for not taking an enforcement action (40% Yes)

<u>Transparency to Parties under Investigation</u> (matter specific)

Significant consistency

- opportunity to submit materials in support of views (96-100% Yes)
- disclose the legal basis and applicable legal standards (96-100% Yes)
- disclose the allegations against a party (94-100% Yes)
- opportunity to meet with the investigative staff (94-100% Yes)
- opportunity to respond to the agency's concerns (94-96% Yes)
- disclose the factual basis and nature of evidence (79-88% Yes)
- opportunity to consult with the agency on requests for information (72-79% Yes)
- disclose the economic theories of harm under consideration (70-76% Yes)
- access to the evidence obtained in the investigation (67-74% Yes)

Moderate consistency

- opportunity to meet with agency leadership (54-64% Yes)

No consistency

- disclose staff recommendations to agency decision makers (15-18% Yes; 64-70% No)

Variation across enforcement areas

- disclose expected timing of the investigation (85% Yes Mergers; 32-38% Yes All Others)

<u>Transparency to Third Parties</u> (complainants, competitors, customers, or vendors) (matter specific)

Significant consistency

- opportunity to submit information or materials in support of views (94-97% Yes)
- opportunity to meet with the investigative staff (75-88% Yes)
- opportunity to consult with the agency on requests for information (67-75% Yes)

Moderate consistency

- opportunity to meet with agency leadership or decision makers (47-52% Yes)

No consistency

- disclose staff recommendations to agency decision makers (9-13% Yes; 78-84% No)
- opportunity to provide views on proposed remedies (30-48% Yes; 45-57% No)
- third parties provided with access to the evidence (17-24% Yes; 38-48% No)
- disclose the factual basis and nature of evidence (30-36% Yes; 36-44% No)

Variation across enforcement areas

- disclose existence of an investigation and allegations against the parties (67% Yes Mergers; 42-43% Yes All Others)
- disclose expected timing of an investigation (58% Yes Mergers; 26-30% Yes All Others)

Transparency to the General Public (matter specific)

Significant consistency

- opportunity to submit information or materials in support of views (61-71% Yes)

Moderate consistency

- disclose the existence of an investigation (33-61% Yes)

No consistency

- opportunity to provide views on proposed remedies (15-22% Yes; 72-82% No)
- general public provided with access to the evidence (12-13% Yes; 71-79% No)
- opportunity to meet with the investigative staff (17-27% Yes; 64-74% No)
- disclose the expected timing of specific investigations (21-45% Yes; 52-71% No)
- disclose the factual basis and nature of evidence (17-21% Yes; 58-65% No)