

ADHERENCE TO ICN GUIDANCE ON INVESTIGATIVE PROCESS

A Practitioner Survey



U.S. CHAMBER OF COMMERCE

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Executive Summary

For the fourth consecutive year a practitioner survey has been conducted to solicit feedback intended to better inform competition authorities and the International Competition Network (ICN) of the views and experiences practitioners have when working with their respective competition authority. Earlier surveys supported work of the ICN's Investigative Process Project as part of the Agency Effectiveness Working Group as well as the ICN's Recommended Practices for Merger Notification and Review Procedures.

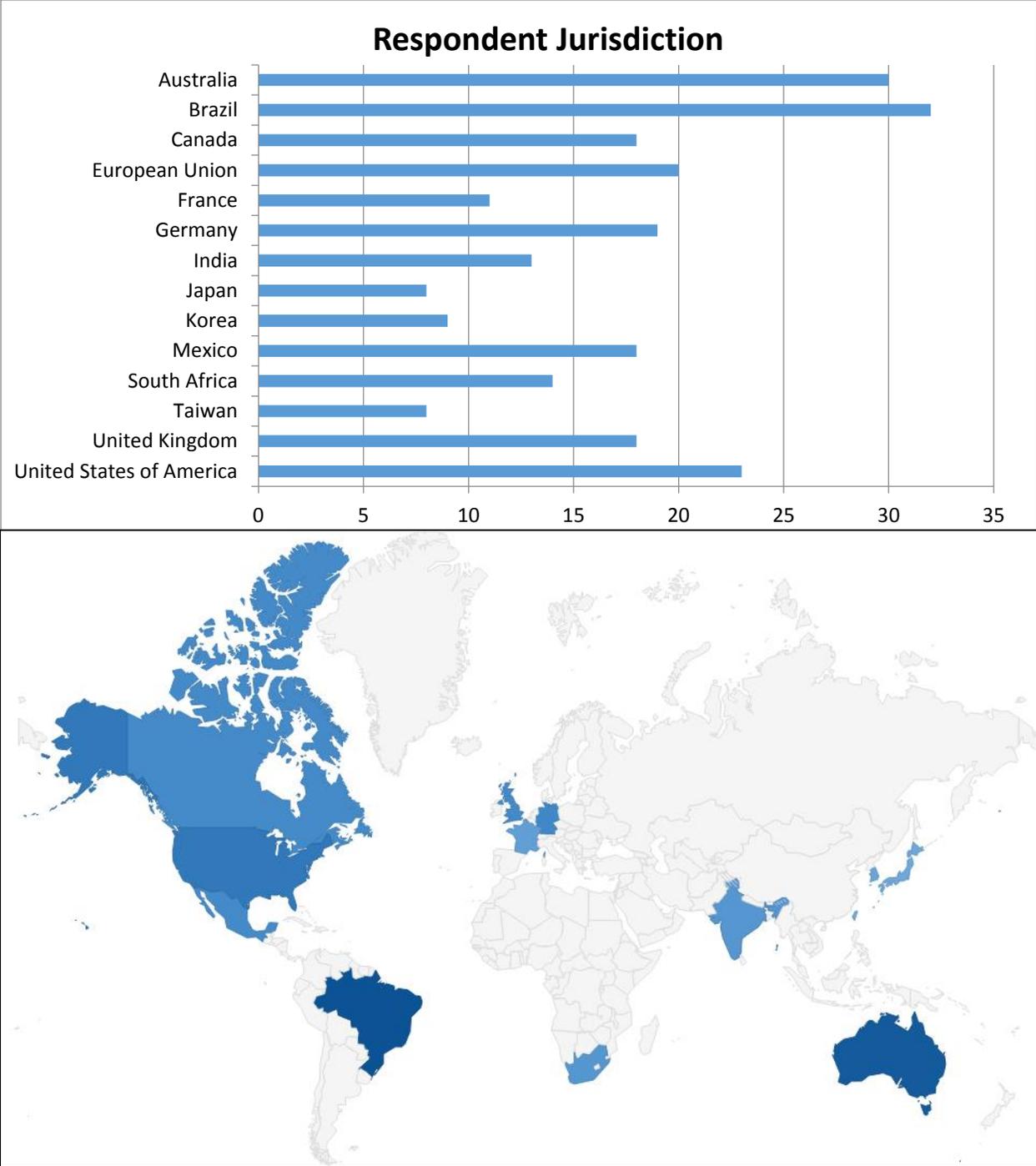
This survey is on the ICN Guidance on the Investigative Process issued in 2015. That guidance addressed an agency's investigative tools, transparency about policies and standards, transparency during investigations, engagement during investigations, and confidentiality and legal privileges. In addition to questions about adherence to the guidance, questions also solicited suggestions on important next steps the ICN might consider taking and what, if anything, specific jurisdictions should do to improve adherence.

Survey respondents were invited to submit their responses through a confidential, on-line interface. The survey was conducted between August and December of 2016. More than 1,500 practitioners were invited to respond across 14 jurisdictions. More than 240 practitioners took part from the following jurisdictions: Australia, Brazil, Canada, the European Union, France, Germany, India, Japan, Korea, Mexico, South Africa, Taiwan, the United Kingdom, and the United States of America.

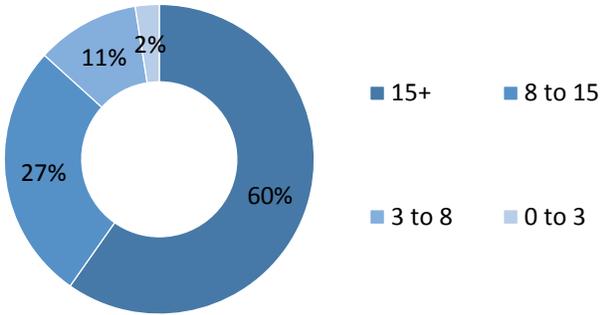
Interestingly analysis of responses across the entire data set did not indicate any statistically significant differences based on the practitioners' years of experience or prior work in a competition agency.

We thank the practitioners who participated in this survey and hope the results highlight areas for discussion between the practitioner community and enforcement authorities.

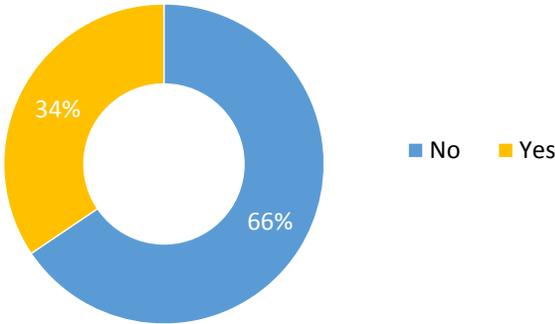
Survey Respondents



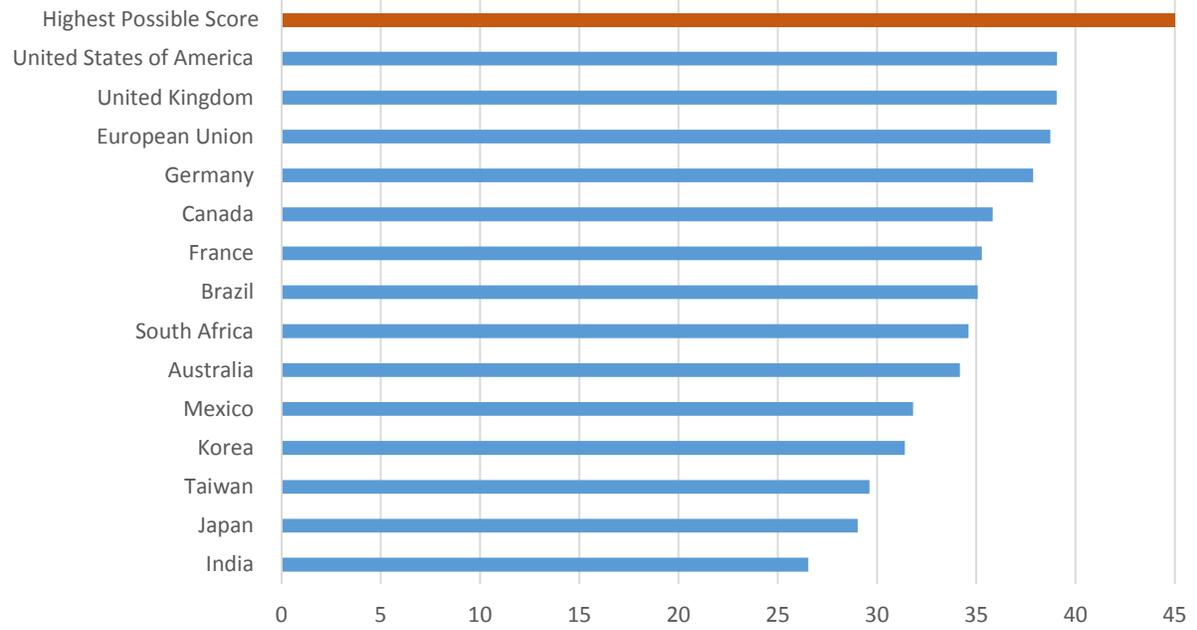
For how many years have you practiced competition law?



Have you ever worked within a competition agency?

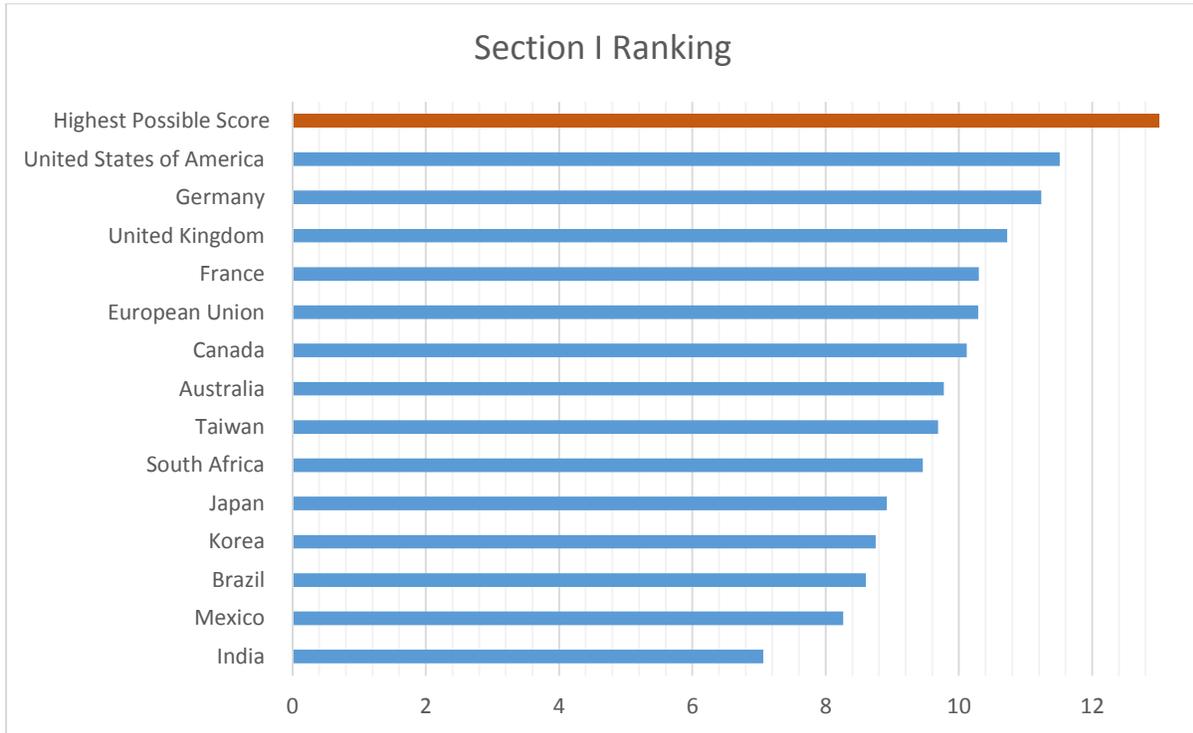


Overall Ranking



Analysis

Section I: Competition Agency Investigative Tools (Q4-Q16)

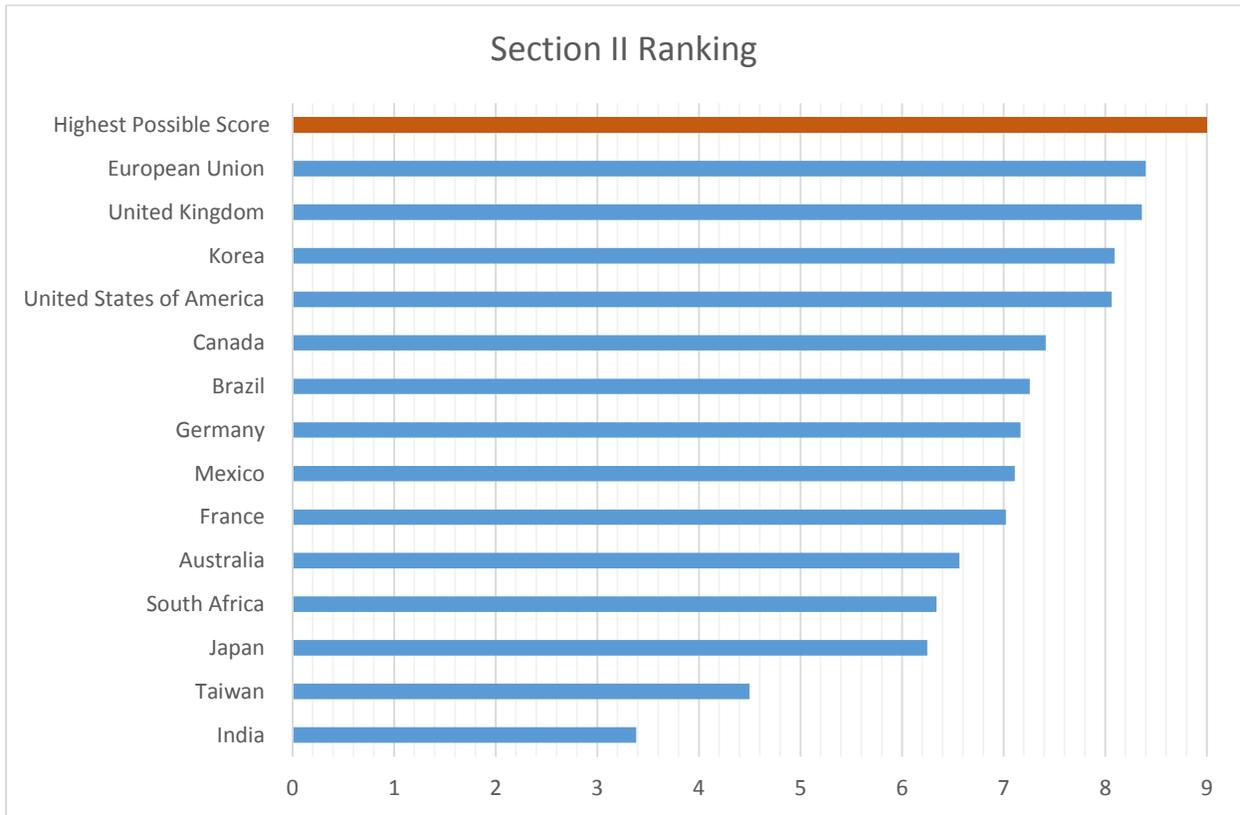


Most practitioners (69%) believe that their competition agency has sufficient resources and investigative tools to obtain all relevant information to enforce competition laws (Q4).

Despite the general satisfaction with the capabilities of their agencies, practitioners had less favorable impressions of how they use these tools during the investigative process (Q9-Q16). Respondents reported that they were, on average, only occasionally afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10). Less than half (47%) stated that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), while only half stated that the rules governing the agency's investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

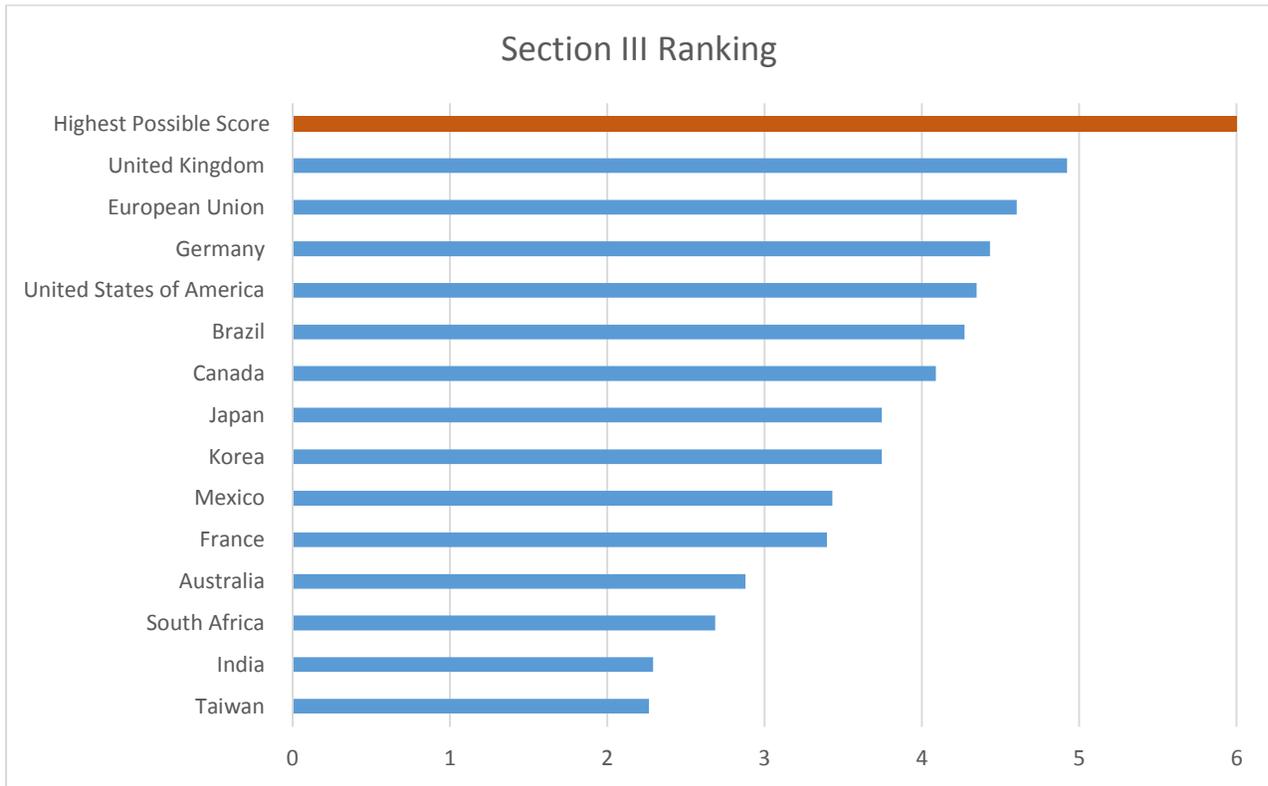
Though 76% believed that their agency's requests for information (RFIs) were relevant to the assessment of competition issues (Q12), some respondents complained of the overly broad scope and lack of transparency of these requests. Only half of respondents reported that the rules governing their agency's investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

Section II: Transparency About Agency Policies And Standards (Q17-Q19)



Most respondents (69%) consider their competition authorities transparent about their policies and standards and the framework of its investigations (Q17). A similar proportion (67%) reported that their agency makes publicly available a useful full version or summary explaining the agency’s findings (Q18). India and Taiwan are prominent outliers, with a majority of their respondents answering in the negative.

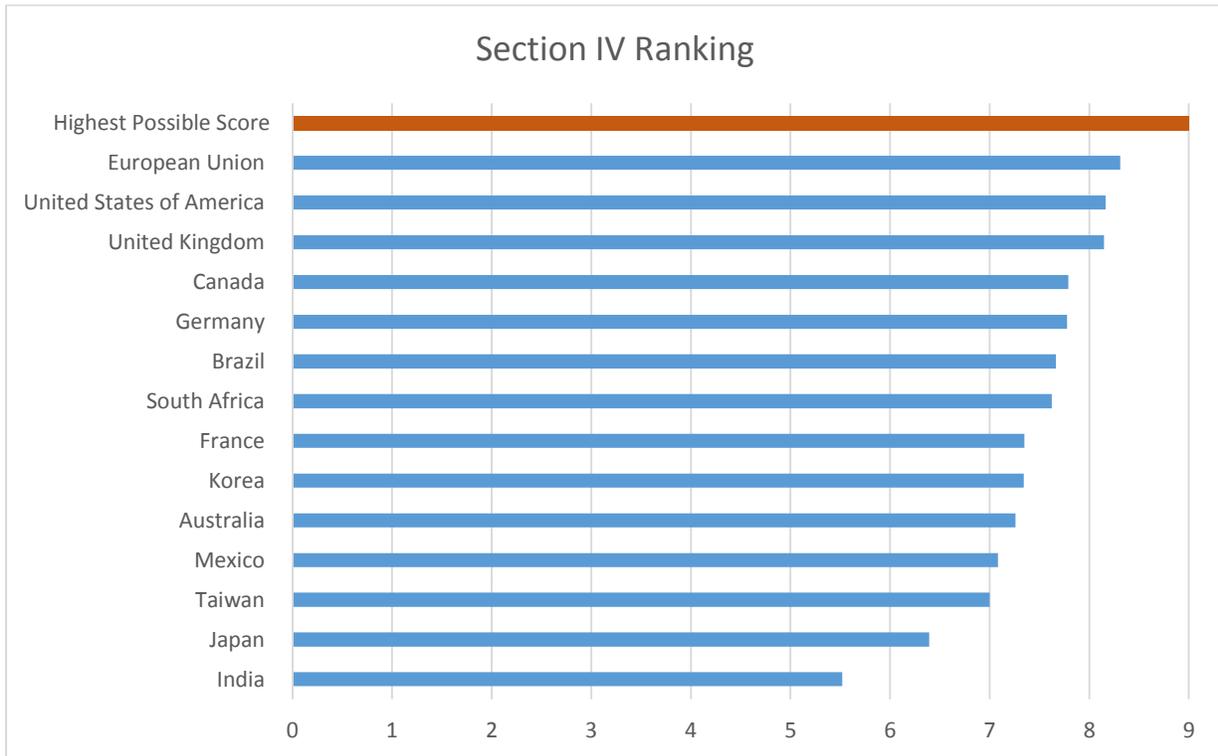
Section III: Transparency During An Investigation



The competition agencies' transparency received less positive feedback from practitioners once an investigation has been opened. On average, respondents stated that their agency "occasionally" informs parties under investigation of significant information related to the investigation as soon as it is practical, with less than half (45%) reporting that it did so "consistently" or "often" (Q20). With the exception of the United Kingdom, most respondents reported that the competition agency does not notify the parties of the expected timing of the investigation (Q22). Similarly, only 17% of respondents stated that their agency "consistently" or "often" informed the parties of the basic facts and nature of evidence gathered, as well as the agency's theories of competitive harm (Q23).

Most respondents (62%) stated that, after the formal allegations of competition violations and the presentation of legal arguments, the parties receive access to evidence and an effective opportunity to respond (Q25). The majority of respondents in Australia, India, Japan, and Taiwan, however, stated that they received partial access or none at all.

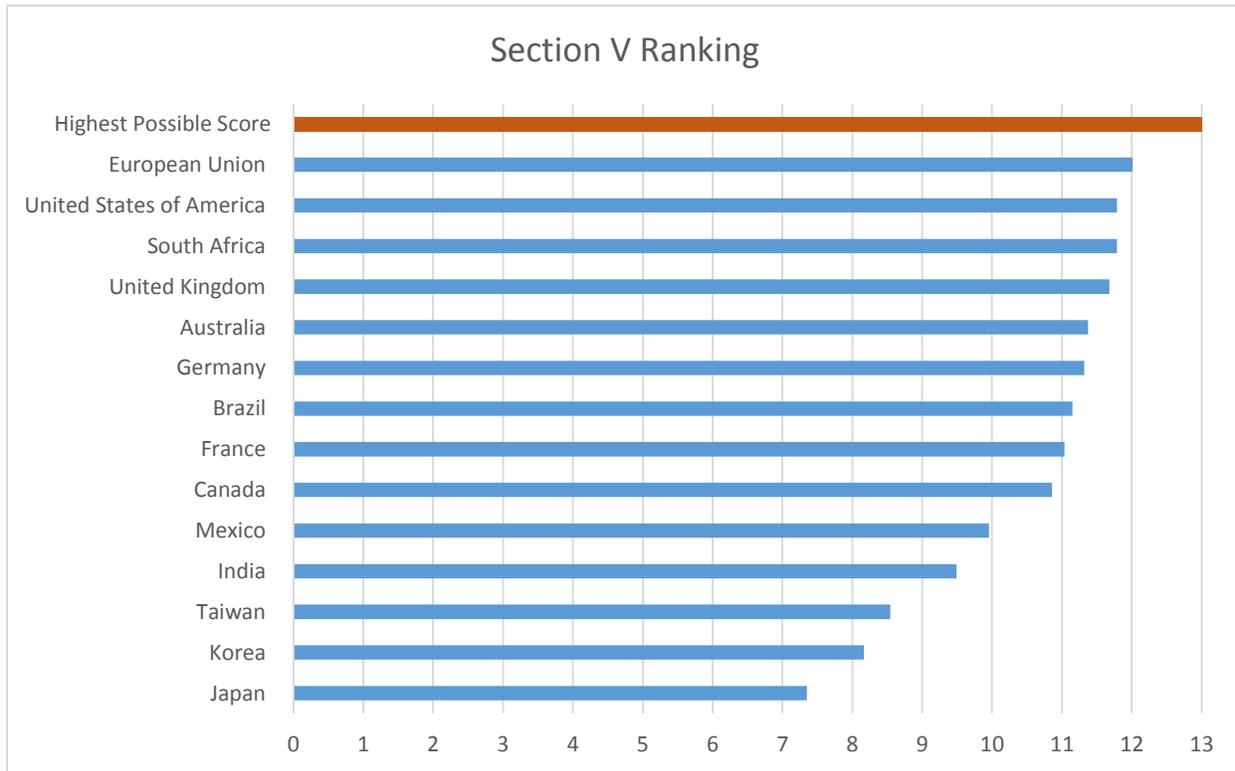
Section IV: Engagement During An Investigation (Q26-Q34)



Most respondents (86%) stated that their agency provides meaningful opportunities for the party under investigation to present evidence and defense arguments (Q26). Respondents strongly affirmed (99%) that parties under investigation are permitted to present their views through their counsel, employees, and outside experts (Q29), and 92% could make substantive submissions during the investigation (Q32).

A significant percentage of respondents in India (30%) and Japan (50%), however, stated that parties could not be represented by counsel of their choosing during all aspects of the investigation (Q28). Overall, 68% of respondents do not receive adequate information when the agency develops new theories of harm, particularly in Taiwan, India, and Japan (Q27).

Section V: Confidentiality Protections And Legal Privileges (Q35-Q47)



Respondents gave generally high marks for their agency’s confidentiality protections and legal privileges. 91% reported that their agencies “often” to “consistently” classify business secrets, trade secrets, and sensitive personal information as confidential (Q37), and 86% believe that their agency has a clear policy regarding the handling of confidential information by staff (Q38). A strong majority (93%) also reported that their agency typically avoids unnecessary public disclosure of confidential information (Q43). Nevertheless, about half of respondents in the jurisdictions of India, Japan, Korea, Mexico, and Taiwan stated their agency does not use limitations when disclosing confidential information or disclosure subject to a protective order (Q45).

In general, Japan received the lowest scores for this section and was the outlier on several questions. The majority of its respondents reported that parties and third parties are not required to identify confidential information in their submissions and to substantiate their confidentiality claims (Q40). Along with Taiwan, Japan’s agency does not have clear and public criteria for what information is entitled to confidentiality protections and how to submit and designate confidential information (Q36).

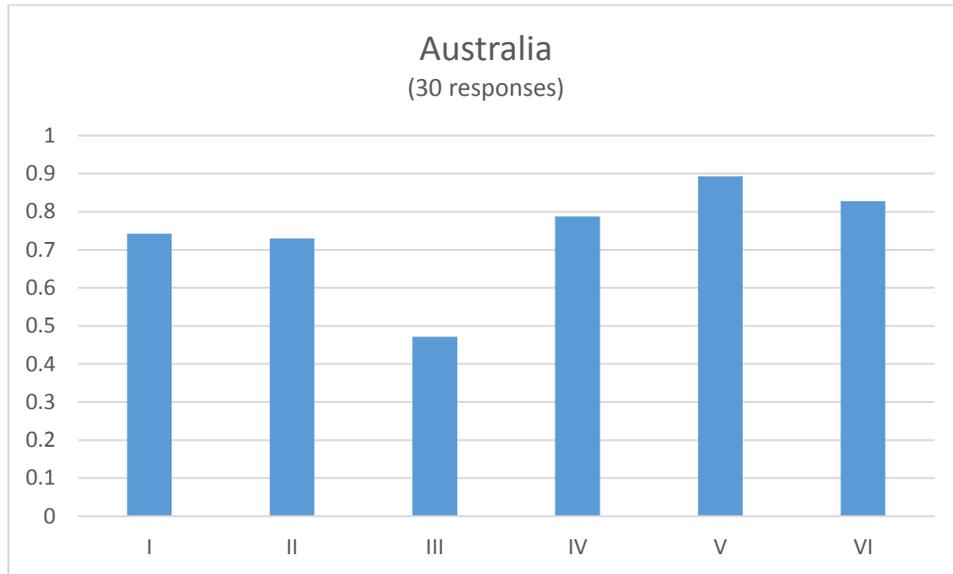
A majority of respondents in Japan, Korea, and Mexico stated that their agencies do not respect applicable legal privileges in its jurisdiction (Q46) and do not require parties and third parties to identify and describe materials withheld on the basis of legal privilege in order to assess the claims (Q47).

Section VI: General Questions

Overall, a majority of respondents (80%) – including a majority in each jurisdiction – believes that the ICN Guidance on Investigative Practice is sufficiently detailed to be meaningful and useful to ensure an appropriate balance between the agency and its powers and those under investigation (Q48). A majority of respondents in each jurisdiction believe that transparency and due process has either improved (Brazil, Canada, the European Union, France, Korea, Mexico, and the United Kingdom) or been maintained (Australia, Germany, Japan, South Africa, Taiwan, United States of America) in the last five years (Q53).

To the degree that respondents believed there is a procedural fairness or transparency problem in your jurisdiction (Q50), 30% attributed it to the statutory/regulatory framework itself; whereas the remaining 70% stated there is too much variation between case handlers.

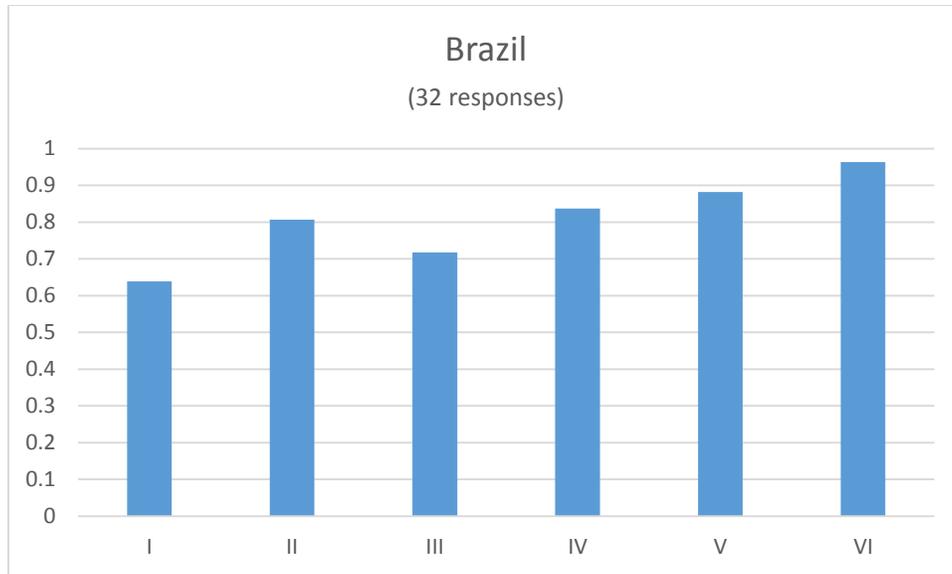
Jurisdiction Profiles



Australia received its lowest scores for Section III on transparency during an investigation. For those questions, practitioners reported that the competition authority inconsistently keeps parties updated of significant developments and generally does a poor job of providing access to evidence and an effective opportunity to respond.

The majority of respondents (63%) disagreed with the statement that the Australian Competition and Consumer Commission avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13). They highlighted extensive information and document requests and unrealistic timeframes. Similarly, a majority (66%) responded that the agency's investigations did not allow for external appeal procedures to resolve disputes relating to information requests (Q15).

Respondents identified the biggest shortcoming related to transparency or procedural fairness as the failure to disclose evidence held by the agency and its detailed theory of harm in order to enable parties to appropriately respond; lack of information about the status of an investigation; views of the agency and third parties; and access to opposing submissions in complex and contentious mergers (Q51). On the other hand, some mentioned the court system as a strength that offsets this shortcoming (Q52).

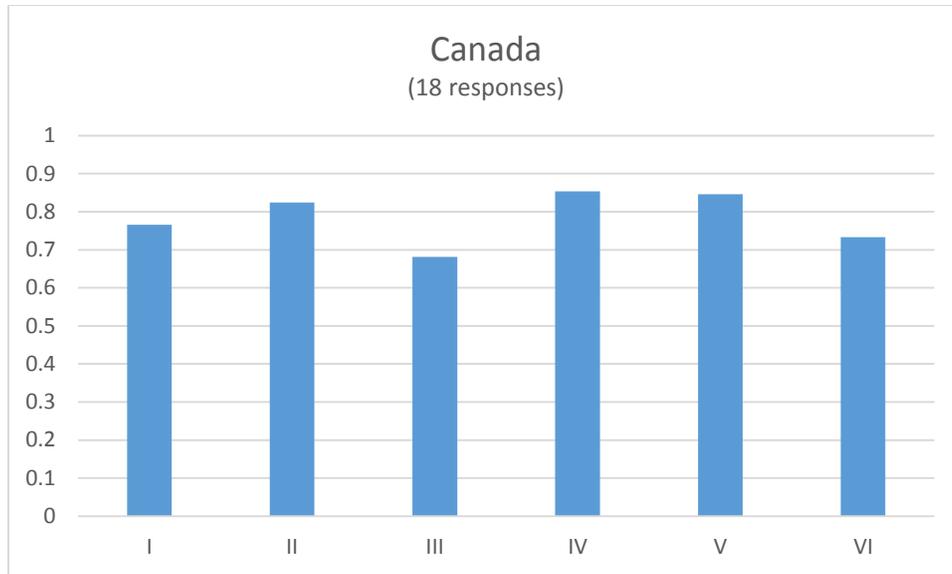


Though it received overall positive responses, Brazil’s competition agency received low marks on several questions in Section I on investigative tools.

Respondents in Brazil gave its agency the second lowest score for possessing sufficient resources and investigative tools to obtain all relevant information to enforce competition laws within statutory or agency-set deadlines (Q4), with a majority (63%) responding in the negative. They frequently reported that CADE, the Brazilian Competition Agency, is understaffed and lacks the appropriate financial resources to conduct investigations and dawn raids. Similarly, 59% responded that the agency lacked the resources necessary to evaluate the information it receives, again attributing this to a shortage in personnel (Q8).

Also in Section I, only 53% agreed that compulsory requests for information were subject to sufficient internal review before being issued (Q11), reporting that requests were often made without any internal review and were therefore overly broad and given short deadlines. Those problems were cited as the main reason why only 41% agreed that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13). Finally, only 39% responded that the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

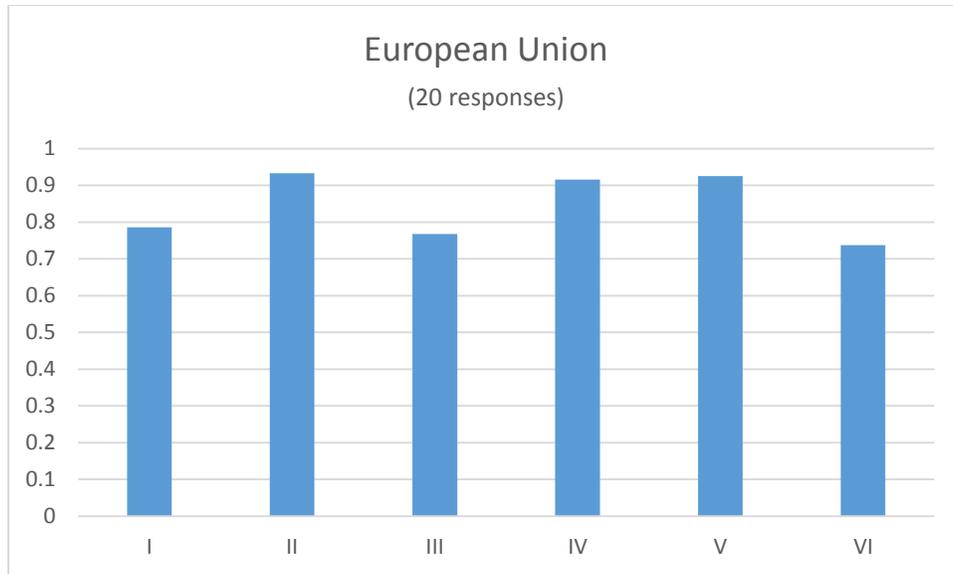
Respondents identified the biggest shortcoming related to transparency or procedural fairness as a lack of consistency in approach; little concern for properly substantiating economic theories of harm; lack of transparency about negotiation terms and requirements; and uncertainty about the calculation and criteria of penalties (Q51). As for its strengths, practitioners generally remarked that its procedures and decision-making were transparent, including access to records (Q52).



Although 71% of respondents in Canada agreed that their agency has the resources necessary to evaluate the information it receives (Q8), several indicated that these resources were not used efficiently and officers needed more experience. Only 50% agreed that the agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13).

In Section II on transparency on policies and standards, 58% responded that their agency informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20).

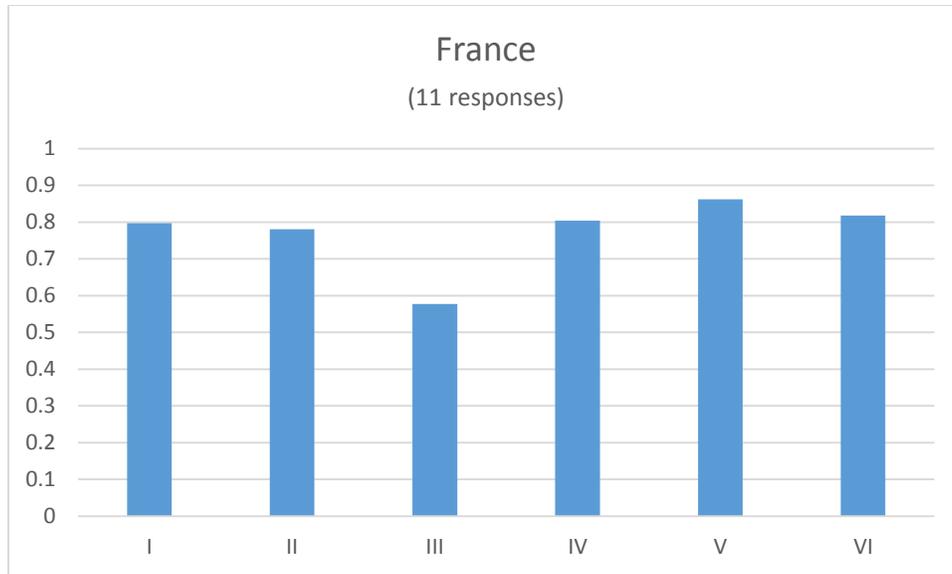
Practitioners identified the biggest shortcoming related to transparency or procedural fairness as inconsistency among officers; not following guidelines; and a general lack of transparency at the investigative stage with limited opportunities to resolve issues before litigation has commenced (Q51). Among the strengths, respondents noted the opportunity to engage the Bureau in dialogue and the robust and comprehensive procedural rules governing proceedings (Q52).



Despite its high overall ranking, the European Union received the lowest score for whether the agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), with only 22% responding in the affirmative. Respondents reported that requests for information were unnecessarily broad and deadlines were too short. Several remarked that the Commission sometimes seems to be fishing for rather than requesting information.

Beyond that undue burden, respondents on average gave positive reviews to the EU competition authority across the other questions. The next lowest score was 60% affirmation on whether the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15). Regarding transparency during an investigation, 69% reported that the agency informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20), and 68% responded that the agency notifies parties of the legal basis, conduct under investigation, and if known, the expected timing of the investigation (Q22).

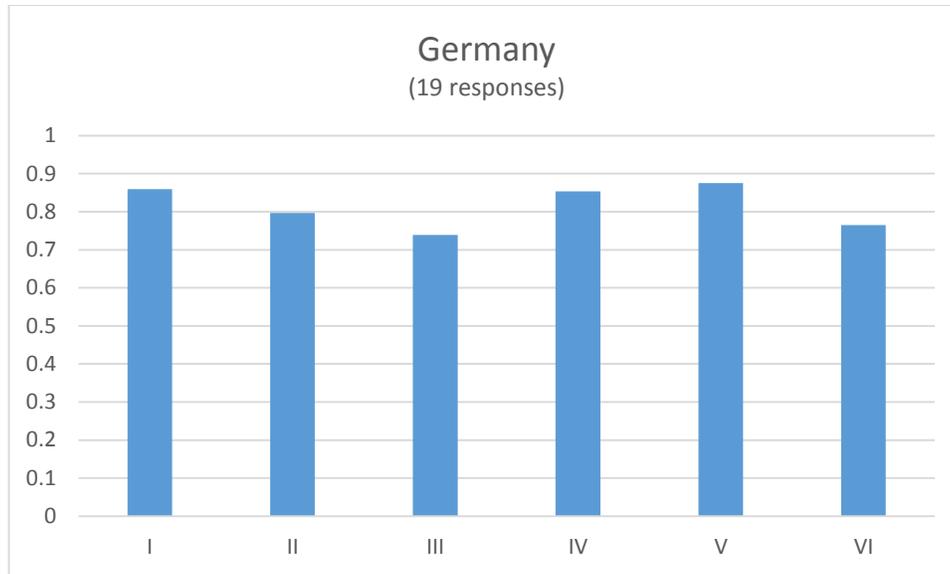
Practitioners reported that the biggest shortcomings related to transparency or procedural fairness were variation between case teams; lack of access to the non-confidential files until the statement of objections; and limited access to the decision-makers (Q51). They identified as strengths the EU’s ombudsman oversight; its strong legal framework and procedures; and its professional knowledge (Q52).



In France, only 55% of respondents agreed that the agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), and 45% responded that the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

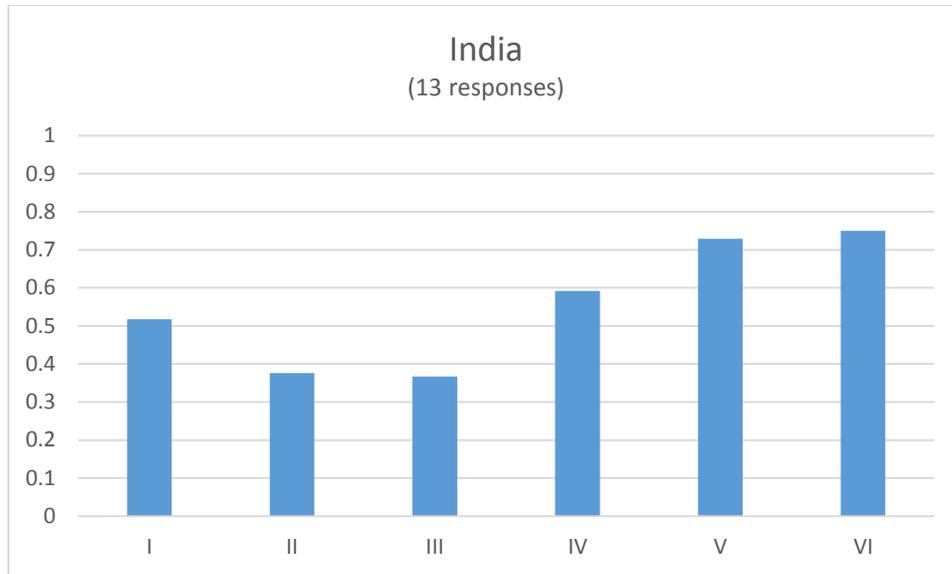
The lowest scoring section for France was Section III on transparency during an investigation. On average, respondents reported that their agency only occasionally informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20), with only 41% affirming that the agency keeps parties updated of significant developments (Q24). Similarly, they responded that the agency only occasionally informs parties of the basic facts and nature of evidence gathered, as well as the agency’s theories of competitive harm (Q23).

Practitioners responded that the biggest shortcomings related to transparency or procedural fairness were lack of sufficient notice; excessive information requests; and absence of separation between investigative teams and the decision-making body (Q51). They identified as strengths the effective appeal rights; well-defined procedures; and independence of the Paris court of appeal (Q52).



Respondents in Germany gave their competition authority consistently high marks. The lowest score it received (and the third lowest for that question) was for Question 31, where 69% of practitioners reported that parties under investigation are given the opportunity to meet with the relevant agency.

Practitioners identified the biggest shortcomings related to transparency or procedural fairness as legal privilege (which only starts when the investigation has been initiated); the lack of transparency on how fines are determined; and leeway for authority as regards treatment of leniency applications and settlement discussions (Q51). They identified as strengths its legal review; right of defense to respond to statement of objections and access to file; and communication with the authority (Q52).



Respondents in India gave their agency the lowest overall ranking compared to the other jurisdictions. Of particular note, only 1 out of 13 respondents (8%) believed that the competition agency has sufficient resources and investigative tools to obtain all relevant information to enforce competition laws within statutory or agency-set deadlines (Q4). The practitioners reported that the Competition Commission of India is understaffed, with some employees apparently untrained in competition law. For those and other reasons, only 31% of practitioners stated that their agency has the resources necessary to evaluate the information it receives (Q8).

On average, respondents reported that they were only occasionally afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10). 42% affirmed that compulsory requests for information were subject to sufficient internal review before being issued (Q11), commenting that requests for information are often unnecessarily broad and unrelated to the competition assessment.

Only 46% agreed that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), pointing to broad RFIs and short deadlines.

27% responded that their agency makes sure legal standards, agency guidelines for analysis, investigative tools that the agency can use, the framework for judicial review, and the sanctions and remedies available for competition law violations are transparent to respondents (Q17). They commented that Competition Commission of India has yet to issue guidelines on most contentious issues. Respondents added that they almost never know the tools or internal guidelines the Commission may employ during investigations.

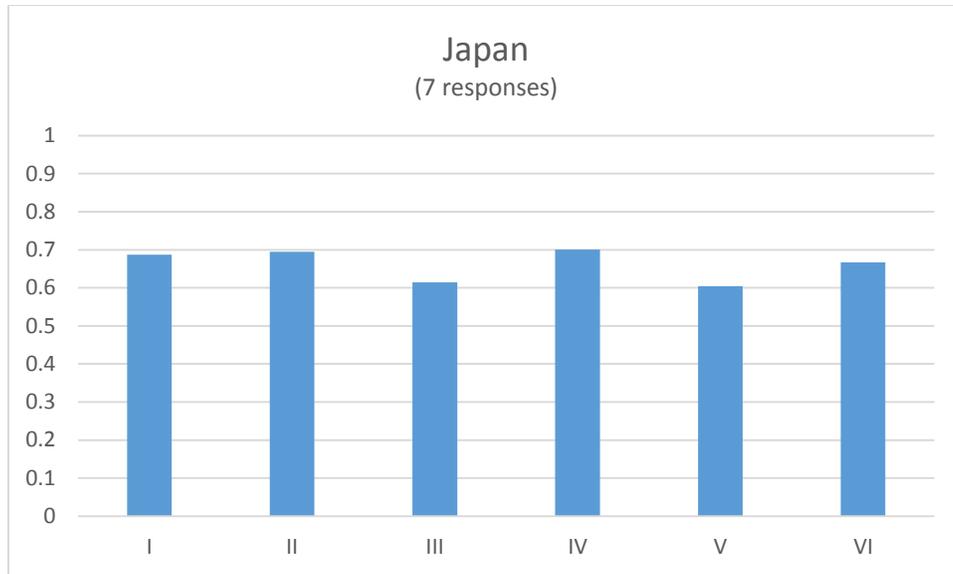
They also described the CCI's conduct as generally arbitrary and opaque. Accordingly, only 23% responded that their agency is fully transparent with respect to the framework of its investigations (Q19), remarking that there is no certainty or clarity in the absence of any guidelines or consistency in the approach of the agency.

On average, practitioners responded that their agency rarely informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20).

None of the practitioners responded that their agency keeps parties updated of significant developments, such as changes in status, scope or competition concerns throughout the investigation (Q24). Only 1 out of 13 (8%) responded that, when the agency develops new theories of harm, parties are fully brought into the process and receive adequate information about the new theories of harm (Q27), and 31% agreed that the agency provides parties under investigation opportunities to discuss the investigation with the agency (Q30).

On average, practitioners responded that their agency's communications of competitive concerns were only occasionally made in time for the parties under investigation to have an opportunity to respond to the concerns (Q33).

Respondents identified the biggest shortcoming related to transparency or procedural fairness as the absence of clear guidelines; disregard for procedural fairness; and the lack of access to actual case officers (Q51). For its greatest strengths, they cited the role of the High Courts and the opportunity to present oral arguments (Q52).

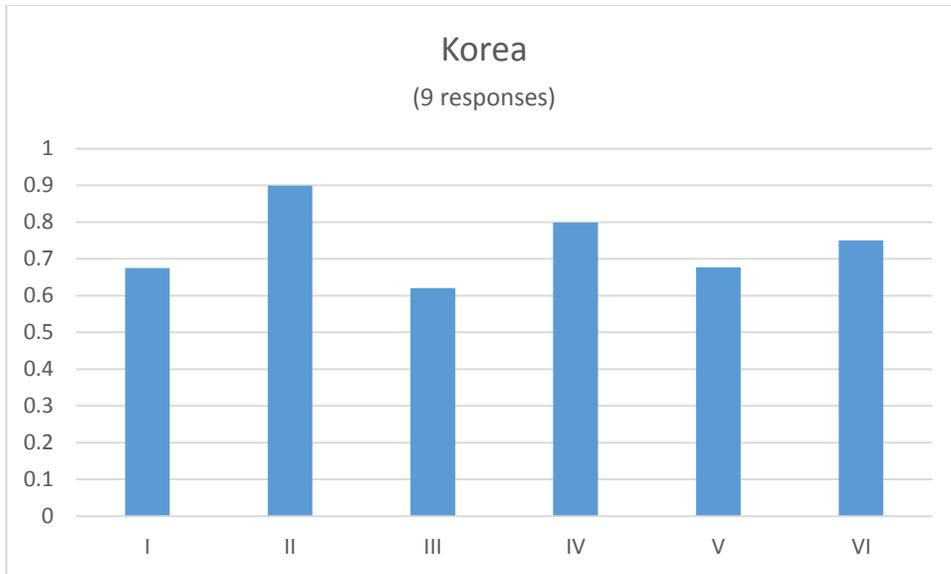


Japan received the second lowest overall score and received unfavorable reviews particularly in Sections III and IV on transparency and engagement during an investigation.

On average, respondents stated that they were rarely afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10), and only 1 out of 7 (14%) believed that the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15). Similarly, only 1 out of 7 agreed that, when the agency develops new theories of harm during an investigation, parties are brought into the process and do they receive adequate information about the new theories of harm (Q27).

2 out of 9 (33%) believed that, when the agency denies a request for confidential disclosure, it provides the submitter with timely notice and an opportunity to object prior to the disclosure (Q42). Practitioners also reported that their agency never or rarely respects applicable legal privileges in its jurisdiction (Q46).

Practitioners stated that the biggest shortcomings related to transparency or procedural fairness were its lack of recognition of legal professional privilege; limited access to evidence; lack of consideration of due process; and insufficient procedures to hear opinions and distinguish between background facts and violations of law (Q51).

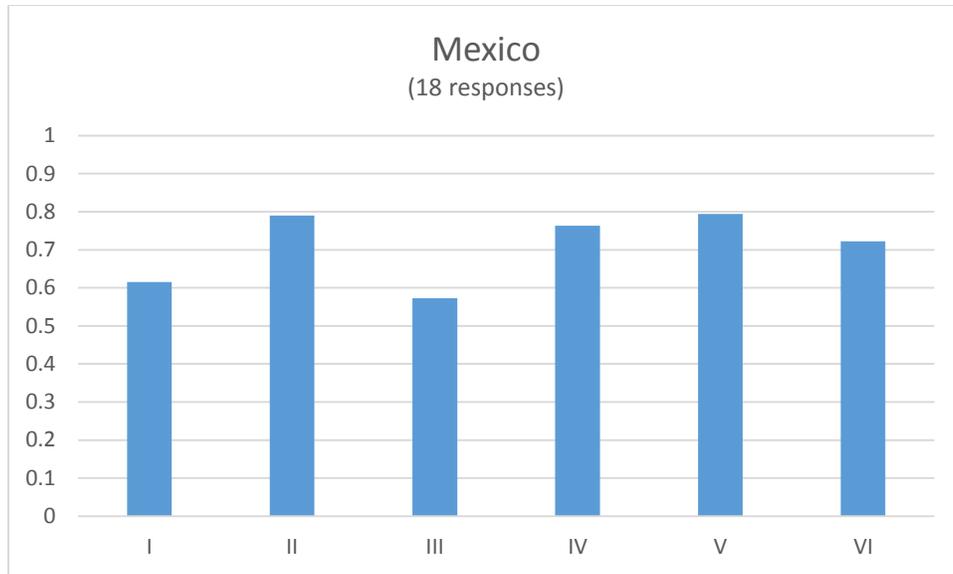


Korea ranked fourth from the bottom in the overall rankings, receiving its lowest marks for investigative tools and transparency during investigations. In Section I, respondents on average stated that they were only occasionally afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10), and 4 out of 9 (44%) affirmed that compulsory requests for information are subject to sufficient internal review before being issued (Q11). Only 1 respondent out of 9 (11%) believed that the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

Only 1 out of 9 (11%) agreed that, when the agency develops new theories of harm during an investigation, parties are fully brought into the process and receive adequate information about the new theories of harm (Q27).

33% believe that the agency uses appropriate limitations when disclosing confidential information, such as using data rooms with limited access, disclosure to counsel or outside counsel only, or disclosure subject to a protective order (Q45). Respondents on average stated the agency rarely to occasionally respects applicable legal privileges in its jurisdiction (Q46).

Respondents identified the biggest shortcoming related to transparency or procedural fairness as the absence of an obligation on the part of the investigator to share information; lack of fully guaranteed attorney-client privilege; and difficulty predicting penalties (Q51). For its greatest strengths, they cited the availability of decisions and other information on the agency’s website (Q52).

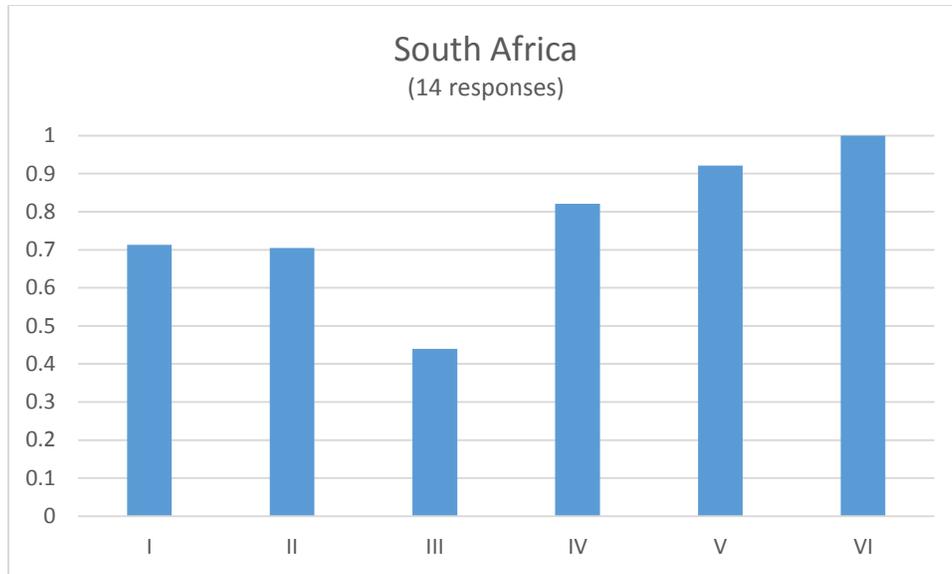


Mexico received its lowest marks in Section I on investigative tools and Section III on transparency during an investigation. Respondents reported on average that they were only occasionally afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10), and only half (50%) affirmed that compulsory requests for information are subject to sufficient internal review before being issued (Q11).

Only 39% responded that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), and 17% responded that the rules governing their agency's investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

Only 2 out of 18 (11%) agreed that, when the agency develops new theories of harm during an investigation, parties are brought into the process and receive adequate information about the new theories of harm (Q27). A little more than half (56%) reported that the agency uses appropriate limitations when disclosing confidential information (Q45).

Respondents identified the biggest shortcoming related to transparency or procedural fairness as the lack of legal privilege, expertise by staff, and transparency (Q51). For its greatest strengths, they cited the clear rules to classify confidential information and constitutional protections (Q52).

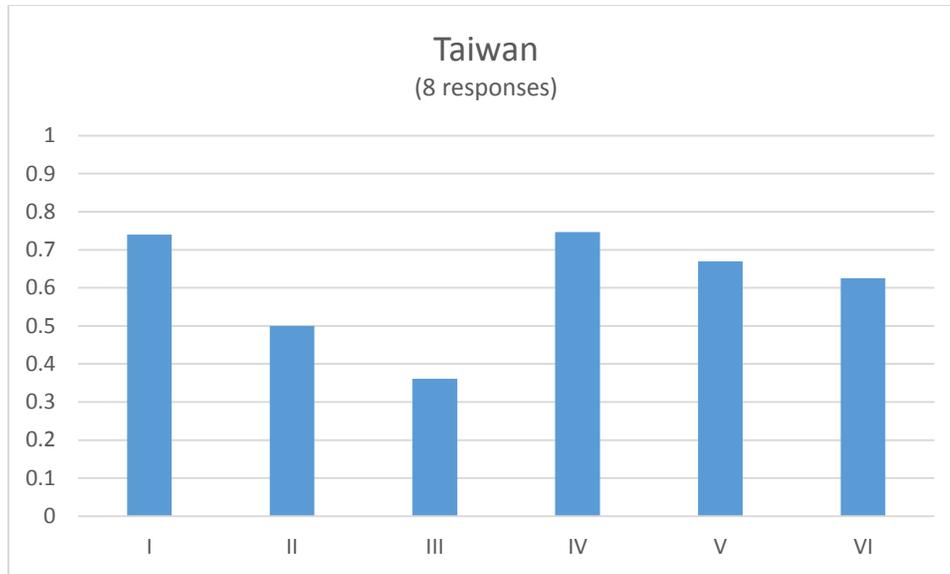


South Africa ranked in the middle of the jurisdictions in the survey, though it performed one of the lowest for Section III on transparency during an investigation.

Only half (50%) agreed that their agency has the resources necessary to evaluate the information it receives (Q8), while only 31% affirmed that compulsory requests for information subject to sufficient internal review before being issued (Q10). 38% stated that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13).

In Section III, respondents reported on average that their agency only occasionally informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20), and 21% stated that their agency keeps parties updated of significant developments throughout the investigation (Q24). None of the practitioners agreed with the statement that, when the agency develops new theories of harm during the investigation, parties are both brought into the process and receive adequate information about the new theories of harm (Q27).

Practitioners responded that the biggest shortcomings related to transparency or procedural fairness were inexperienced officials and lack of institutional knowledge; inconsistency; and the agency's objection to disclosing evidence relied upon in formulating theories of harm (Q51). They identified as strengths the independent oversight of the Competition and the regulator's openness to engagement with parties (Q52).



As the third lowest-ranked country in the survey, Taiwan performed the lowest for Section III on transparency during an investigation.

Although a majority (63%) agreed that the agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13), only 3 out of 8 agreed that the rules governing the agency’s investigations allow for external appeal procedures to resolve disputes relating to information requests (Q15).

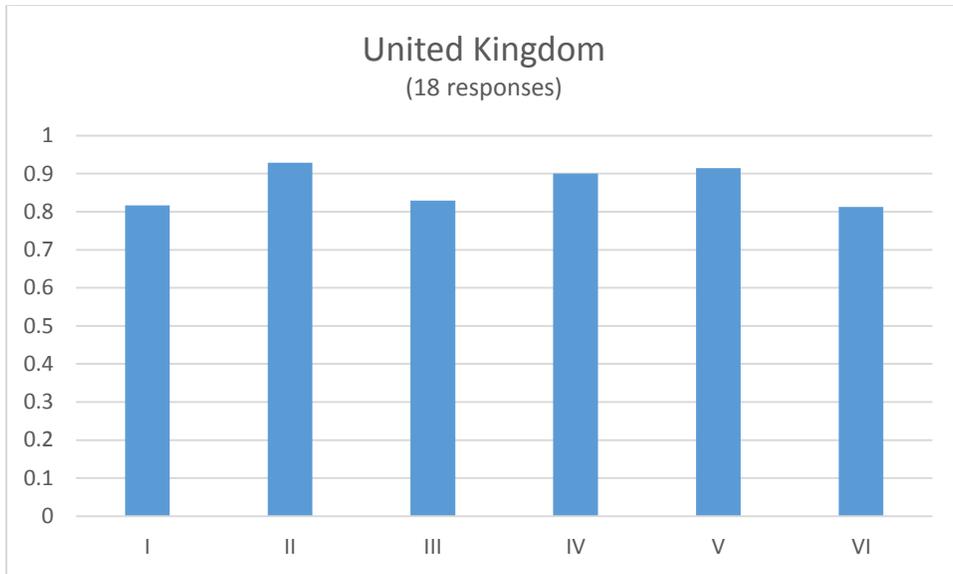
In Section III, respondents reported on average that the agency rarely to occasionally informs parties under investigation of significant information related to the investigation as soon as it is practical (Q20) and occasionally notifies parties as soon as it is feasible that an investigation has been opened (Q21) informs parties of the basic facts and nature of evidence gathered, as well as the agency’s theories of competitive harm (Q23). None of the practitioners believed their agency fully keeps parties updated of significant developments, such as changes in status, scope or competition concerns (Q24) and only 1 (13%) agreed that, after formal allegations of competition violations and the presentation of legal arguments, parties receive access to evidence and an effective opportunity to respond (Q25).

Similarly, only 1 out of 8 (13%) agreed that, when the agency develops new theories of harm, parties are both brought into the process and receive adequate information about the new theories of harm (Q27).

On average, practitioners responded that their agency’s communications of competitive concerns are occasionally made in time for the parties under investigation to have an opportunity to respond to the concerns (Q33). Only 38% stated that their agency has clear and public criteria for what information is entitled to confidentiality protections and how to submit and designate confidential information (Q36). Half (50%) reported that their agency has a clear policy regarding the handling of confidential information by staff (Q38).

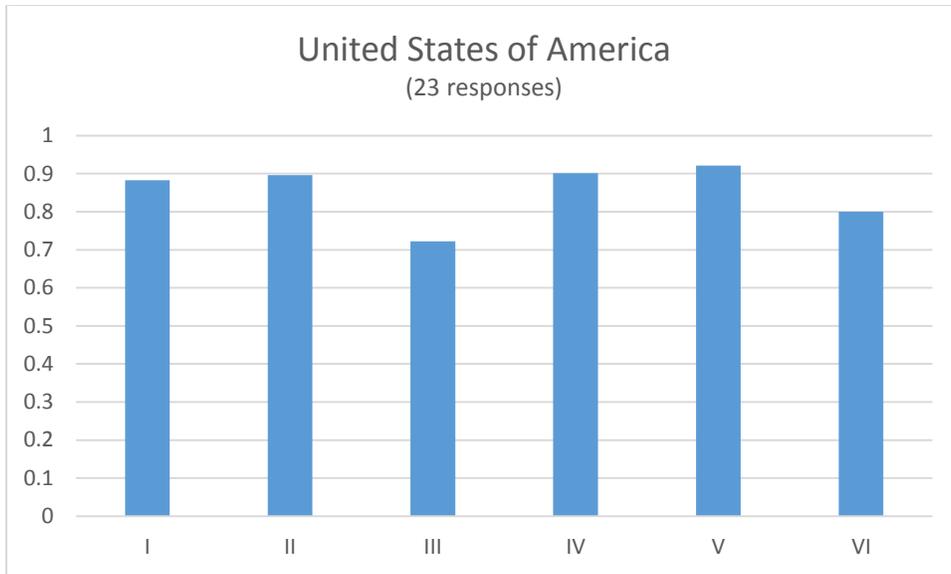
Practitioners identified the biggest shortcomings related to transparency or procedural fairness as the variation between case handlers; the lack of transparency or clear guideline for procedural fairness; insufficient protections for the parties’ procedural rights; and that the Taiwan Fair Trade Commission does not stipulate specific and clear rules regarding the investigation procedure (Q51). They identified as

strengths its protections of confidential information; opportunity to discuss with the agency; and its tendency not to make overbearing requests for information (Q52).



The United Kingdom received the second-highest ranking overall in the survey, performing solidly across each section. Its competition agency, however, received the second lowest marks for question 13, where only 28% of respondents agreed that the agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13).

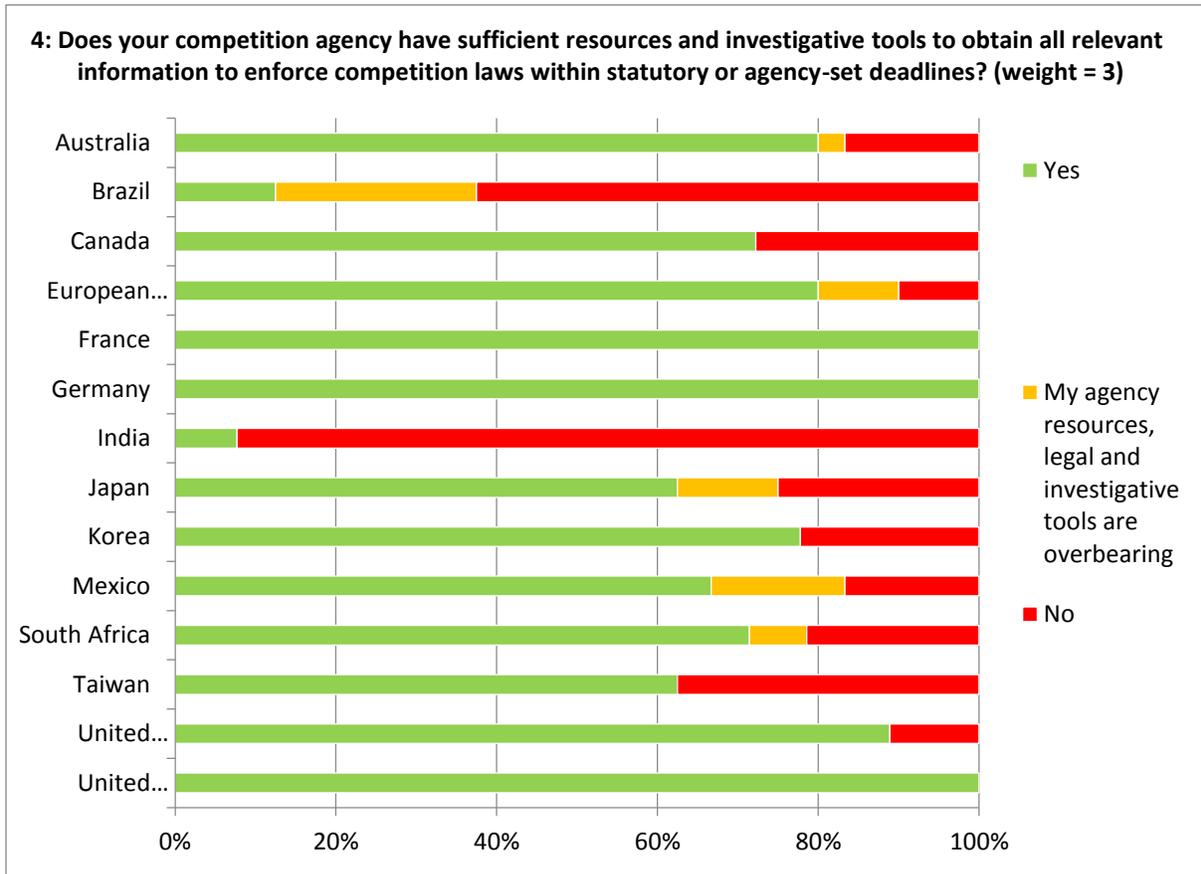
Practitioners identified the biggest shortcomings related to transparency or procedural fairness as the length of some investigations; a lack of commercial understanding on the part of case handlers; and unclear and restrictive practice on data rooms (Q51). They identified as strengths the publication of reasoned decisions; robust legislation and clear guidelines; protection for legal privilege; and transparency in reasoning for decisions (Q52).



The United States was evaluated as the highest-ranked jurisdiction. The questions for which it received the lowest scores pertain to investigative tools. 65% of respondents reported that they were afforded sufficient opportunity to contest the unlawful use of investigative tools (Q10). Similarly, 61% reported that their agency avoids imposing unnecessary burdens on parties and third parties in their use of investigative tools (Q13).

Practitioners identified the biggest shortcomings related to transparency or procedural fairness as the lack of consistency among the staff in allowing the parties to respond; access to third party submissions; and overly burdensome document requests and the timeliness of investigations (Q51). For strengths, they cited the agencies' bearing the burden of proof in court; strong legal protections and a general tradition of due process; the availability of effective independent judicial review; statutory protections; and transparency about the overall enforcement framework and priorities of the agency (Q52).

Survey Results



Explanations (Q4):

AUSTRALIA

- I do not believe that the ACCC has sufficient expertise in running criminal investigations.
- There is a growing trend for investigations to take longer, with lengthy intervals between questions from the regulator or engagement with the regulator.
- The agency has a number of resources available to it which it uses and has established transparent guidelines as to how they will be used.
- Insufficient funding materially hampers the ACCC's ability to rigorously and quickly investigate.
- Does not have appropriate training in relation to criminal cartels, needs international experience
- The ACCC has sufficient investigative tools but insufficient resources (staffing etc...)
- The ACCC's resources are not sufficient to undertake the level of economic analysis that is necessary for appropriate administration of our competition laws.

BRAZIL

- Staffing is necessary for the agency to become more efficient
- CADE, the Brazilian Competition Agency, is clearly understaffed. In spite of that, the agency has been doing a remarkable job in clearing merger cases in a very fast pace and also in conduct investigations. Some conducts investigations, particularly, unilateral conducts, have been moving very slowly. Although the agency has been doing a very good work in competition enforcement, it needs more financial and human resources to effectively enforce competition in Brazil.
- CADE is understaffed. Although the New Brazilian Competition Law (2011) have provided for 200 new positions to the authority, only a small number of new employees was duly supplied.
- The agency has developed a lot, but still lacks the appropriate human and financial resources. They need more money to conduct the investigations and dawn raids.
- CADE does not have enough staff to handle the current investigations and does not have resources, for example, to carry out dawn raids.
- Agency needs more people and financial resources
- Short staff, low budget
- CADE has improved but is clearly understaff and still lack resources and investigative tools.
- My agency is understaffed which makes them - despite their efforts - not to well respect the procedural rights and to take longer to reach a decision.
- Brazil's competition authority lacks human resources to carry out all necessary investigations.
- It apparently lacks human resources.
- Unfortunately, the agency lacks personnel and budget, despite of the efforts of its heads to increase bit of them before the legislative power.
- The agency lacks personnel and investments in it.
- The agency lacks enough human and financial resources for its activities. The legal framework is adequate.
- Sometimes the agency seems short on people who are able to assist in the investigations, but they seem to do their best with the resources they have.
- Although the Brazilian antitrust authority has been doing a very good job, they continue to be understaffed and this sometimes creates problems for them to obtain all relevant information and proceed with more complex investigations within a proper timetable.
- My competition agency has limited staff and funds.
- Investigations take years to be concluded due to the lack of personnel to request and analyze the relevant information; mergers consistently get priority over cartel and other conduct cases, given they are subject to stricter deadlines in cases of mergers; the situation has been aggravated due to the recent cut in CADE's budget.
- It has been well announced that if CADE had a larger staff, it could lead to much more fines as they expect to exist several wrongdoings that are not under the authority's scrutiny.

- Brazilian antitrust agency, especially in leniency negotiations, overbears the applicants with investigative measures and other obligations, such as translation of documents/evidence or production of documents that should be the authority prerogative to do so
- More staff needed for better enforcement
- CADE does not have enough staff to deal with the high and complex number of cases.
- My agency requires additional staff due to lack of resources/budget.
- Maybe due to limited resources, the agency focuses on cartels and merger reviews
- CADE clearly does not have enough resources or staff. In addition, the agency has clearly prioritized numbers over quality. The decisions are extremely poor and the staff is not well qualified to handle complex matters.
- My agency has clearly less resources than necessary to tackle with all the important matters that are under its analysis.

CANADA

- The Canadian Competition Bureau does not have enough resources and staff to adequately enforce the criminal cartel and bid-rigging provisions.
- While the Competition Bureau has sufficient legal investigative tools, it appears to be significantly resource constrained.
- The agency often says it needs more resources but a close examination of and specific file experience reveals that significant resources are expended through inefficiencies and lack of focus. Hands-on practical management oversight is missing.
- Need more people and resources.
- The CCB is somewhat under-resourced because of budgetary constraints. It has sufficient legal and investigative tools. Formal investigative tools like search warrants and production orders require a court order, but these are readily obtainable by the CCD.
- My agency is well staffed, but does not have sufficient resources to properly perform its mandate.

EUROPEAN UNION

- There is a need for more senior case handlers with sufficient experience to exercise discretion (for example in granting waivers in respect of information requests in merger filings and investigations).
- Staffing and resources are fine, but legal framework inadequate (inability to reach individuals for behavioral conduct, no ability to conduct meaningful interviews of investigations into conduct of individuals as no sanctions for untruthful statements or falsification of or hiding evidence, no sanctions against individuals for breach of confidentiality). This prevents meaningful ex officio investigations in cartels and reduces the ability to prosecute cases where rights of defense require disclosure of commercially sensitive third party data to investigation subjects (companies under investigation).
- Information requirements during pre-notification and, recently, in Phase II investigations have gotten completely out of control, with no oversight on the Commission. It's a case-by-case

problem but in some instances a critical one that is undermining confidence in and respect for the Commission.

FRANCE

- But the resources could be further improved in order to speed up the proceedings in particular during summer time.

INDIA

- There are very few officers and staff in the investigative arm of the agency in relation to the cases assigned to them. Secondly, most of such officers are not really trained in competition law. Thirdly, the agency (CCI) seems to place more weightage to completion of investigation within the assigned time frame than on quality and depth of investigation. Monitoring of timelines observed by the investigating officers results in them concluding the investigation as such officials do not want their career growth to be adversely impacted by any adverse comment from CCI. Fourthly, the investigative arm has no real autonomy as their budget and expenses are not under their control but that of the agency. Fifthly, the fact that these officials are appointed by the government rather than by the agency also leads to certain difficulties in their proper functioning.
- The Competition Commission of India is short by at least 50% of its sanctioned staff strength. They lack in both expertise and experience.
- The agency has shortage of its own staff. Most of officials are on deputation basis (mostly 3-5 years) as a result of which agency suffers from institutional memory loss. (2) They have tools and adequate training resources but staff continuity is still an issue to be resolved."
- The Director General's Office of the Competition Commission of India (CCI) appears to be understaffed. (2) In a number of cases, the CCI is reluctant to take cognizance of contravention of its orders despite having the statutory power to do so."
- The CCI is understaffed and those that are there are unqualified and overzealous.
- The agency is often short of resources, both human as well as technological and takes elongated periods of time to complete a basic investigation.
- Limited number of professional staff and frequent changes in the staff.
- The agency is understaffed and does not have the requisite expertise to address complex questions of law
- The agency is short staffed for carrying out detailed investigation. Moreover, the rollover of staff in the agency is high since a lot of them are on deputation, or move out for private practice.
- There are constant and unnecessary delays for no-issues transactions and increasingly scant regard for the 30 working day deadline for prima facie orders, which one would expect in such cases. One interacts with the same case officer / team across transactions, and they appear stressed. A detailed investigation of each case that is notified may be unnecessary and the Commission is well placed to judge this.

- The agency is short staffed which has caused substantial delays in arriving at final outcomes. Further short staffing in the merger control division has led to substantial delay in clearance even for simple transactions.

JAPAN

- My agency runs short of staffs, and its review tends to take longer than expected.

KOREA

- My agency has no mechanism by which investigation targets/respondents can access information or evidence that would make it possible for the agency to make fully-informed decisions.
- The KFTC is armed with certain human resource and investigative tools but I often think that it is not sufficient yet.

MEXICO

- My agency is well equipped with robust legal tools but lacks the qualified staff necessary to apply and enforce such legal framework.
- Since the Law changed two years ago, in terms of merger control the Commission has consistently changed criteria, thus there is lack of predictability and consequently they tend to issue burdensome requests for information.
- Indeed, considering Mexico's budget restrictions and other impediments.
- I believe it still needs more resources to complete investigations in a shorter time.
- My agency has highly professional and capable staff, good investigative and legal resources and tools. Area of opportunity: to have the support of specialized criminal prosecutors to enforce criminal sanctions.
- Cofece has opened so many investigation and is being so (unnecessarily) cautious in merger review that staff is always stretched too thin.

SOUTH AFRICA

- My agency lacks the sufficiently experienced staff to enforce the competition laws.
- While our agency has room for improvement in this regard, the agency is well resourced to obtain information within deadlines.
- Agency has stated that it is understaffed and often cannot deal with the workload.
- Sometimes a shortage of resources results in delays in approving mergers and in litigation proceedings (the latter can take many years to finalize).
- This answer is qualified on the basis that there are no statutory deadlines for large mergers and Commission-initiated prohibited practice investigations. Complex large mergers and enforcement litigation are often significantly protracted, often largely due to shortages in skills and capacity.

TAIWAN

- Taiwan Fair Trade Commission does not have the power to conduct "dawn-raid," which may be seen insufficiency in terms of enforcement power.
- Its budget is limit to have sufficient resources and investigative tool.
- In terms of backgrounds, the agency staff does not appear to have sufficient legal and economic background to adjudicate complex antitrust issues, and does not appear to have adequate support in these areas.

UNITED KINGDOM

- They have the tools. The staff is of mixed quality. Hence cases are taking longer than they should and they are bringing too few cases. They are trying to turn this around at present.
- Generally, the UK's Competition and Market Authority (CMA) has the necessary resources and tools to meet deadlines, although slightly less so in relation to anti-trust investigations.
- The CMA seems woefully understaffed to deal with the increase in workload expected post Brexit. And recruitment - particularly while the civil service pay scale remains applicable to the CMA - appears very challenging.

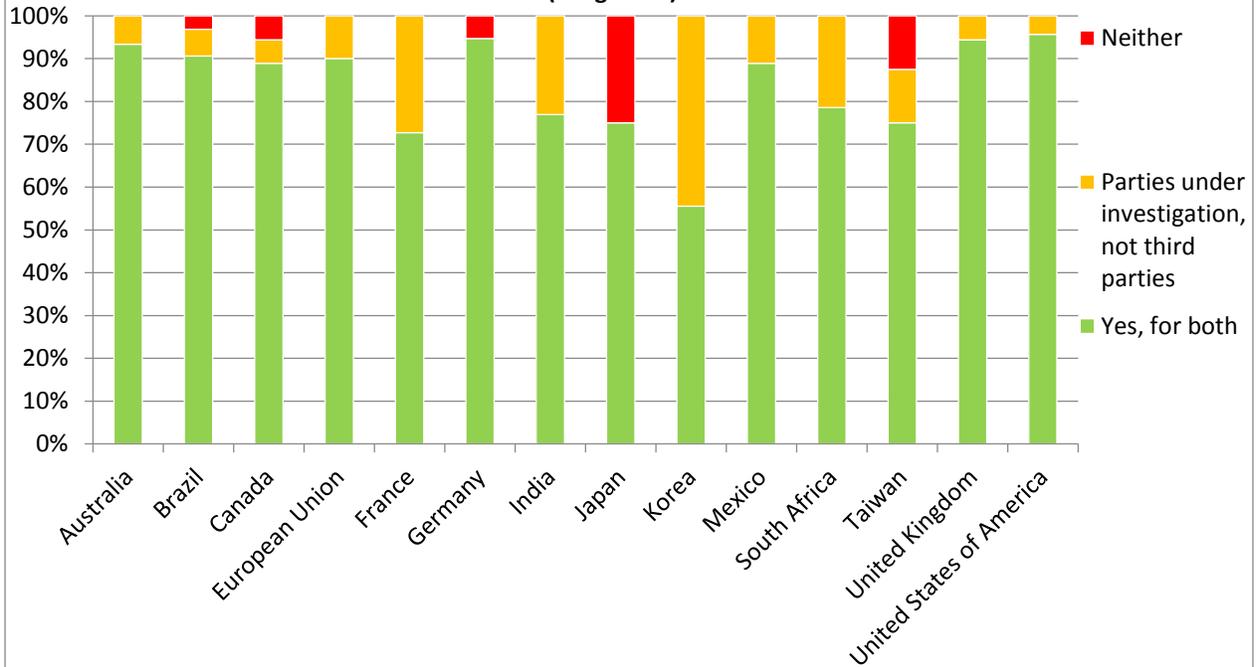
USA

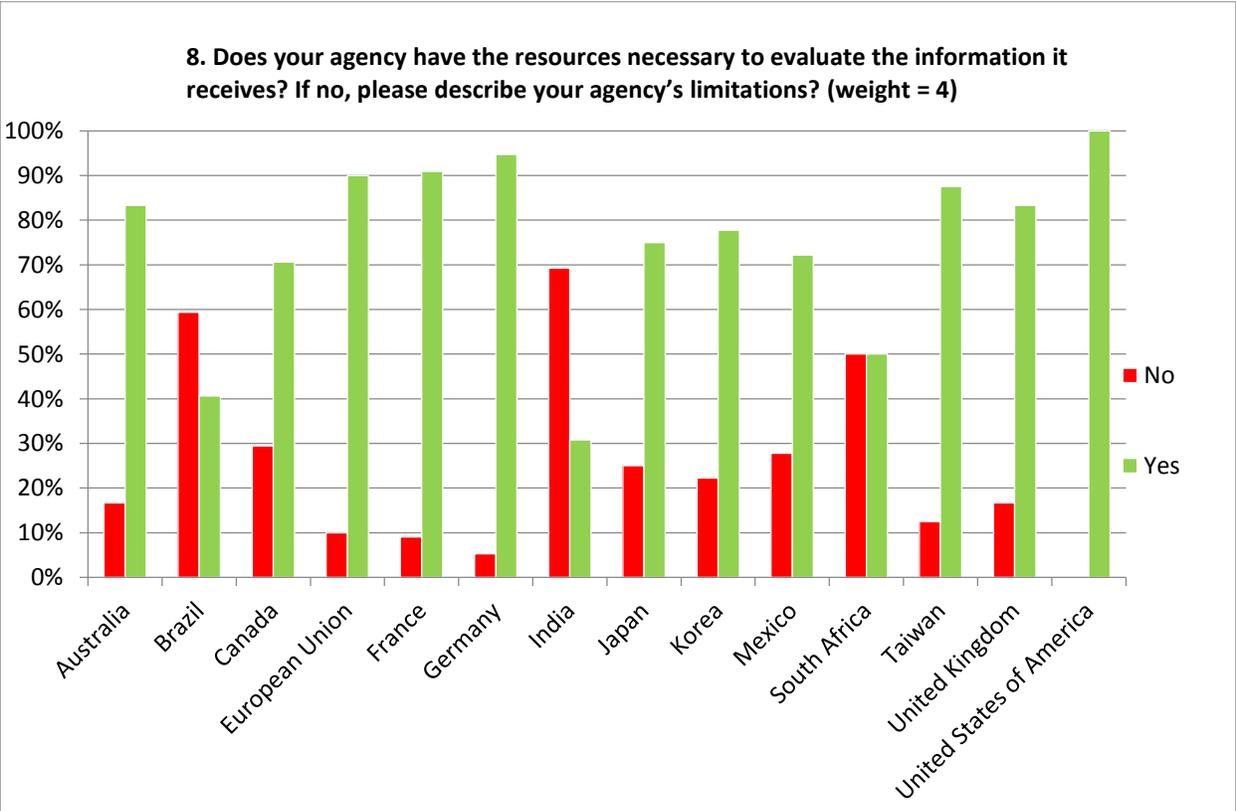
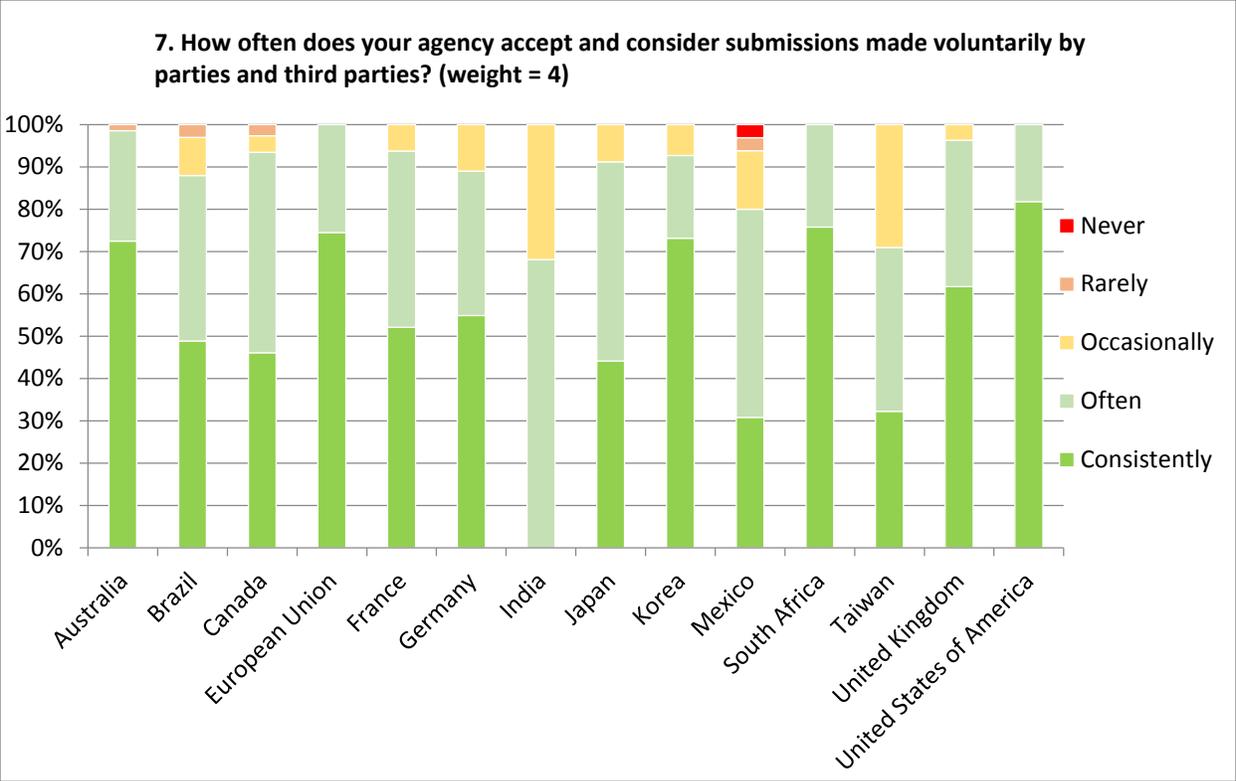
- The US DOJ has extraordinary resources and experience in enforcing competition laws.
- FTC and DOJ generally have sufficient resources and skills, although resources become strained at times of high demand, such as now.

5. Does your agency have the ability to compel the submission of relevant information from parties under investigation and relevant third parties? (weight = 2)



6. Does your agency have the ability to enforce sanctions for non-compliance with information requests from parties under investigation and relevant third parties? (weight = 2)





Explanations (Q8)

AUSTRALIA

- Often requests for information are much too broad resulting in the production of large volumes of irrelevant material. I suspect that much of this information is not properly analyzed.
- Many complaints are not pursued due to resource limitations. Such judgments are of course necessary, but genuine competition concerns can go unanswered if complaints are not widespread.
- It has the resources but the level of rigor applied to the analysis is not always as high as is desirable.
- The ACCC has insufficient resources. While there are no statutory timeframes for the ACCC to complete an investigation, investigations can and do take a long time.
- The ACCC needs more senior legal and economic resources.

BRAZIL

- Again, CADE is clearly understaffed. Nevertheless, the agency does a good work with its limited resources.
- No, the agency is short staffed and in doubt it will have a negative bias.
- The agency is understaffed and has limited resources.
- It apparently lacks human resources.
- Sometimes lack or delay in proceedings developments review lack of resources.
- The agency lacks personnel.
- As explained above, the agency lacks personnel to analyze all information provided.
- Sometimes the agency seems to not have enough people to examine in detail all relevant information related to cartel investigations.
- See response to question 4 above.
- CADE is frequently understaffed.
- We have been dealing with several cases in which CADE.
- Given the short number of staff the authority does not have the necessary means to evaluate the information. This is also because there are many investigations in course and they sometimes have to choose between a more in depth analysis and fewer cases ongoing or having more cases with perfunctory analysis.
- CADE does not have enough staff to deal with the high volume of information received.
- The agency is cleared understaffed.
- Please refer to answer 4.
- Staff is not well qualified and is extremely busy. This makes the analysis in complex matters too simplistic.
- The agency lacks human resources to tackle with the volume of information obtained in a timely fashion.

CANADA

- Not enough staff and IT resources to review records, mostly electronic records, seized as a result of the execution of search warrants within a reasonable timeline.
- The agency often says it needs more resources but a close examination of and specific file experience reveals that significant resources are expended through inefficiencies and lack of focus. Hands-on practical management oversight is missing.
- If the information is extensive, the agency may well not have the human resources necessary to evaluate that information in a reasonable time period.
- My agency requires more resources to review the increasing amounts of data and documents it receives.
- All agencies have resource constraints, so prioritizing cases is important.
- It has the resources, but often not the mindset - there is a lot of getting "dug in" and being unwilling to listen.
- Many of the officers are inexperienced and easily influenced by third parties complaining about mergers for reasons unrelated to competition law.

EUROPEAN UNION

- As mentioned above, the response depends on the particular circumstances of the case, including the language in which it is conducted. Sometimes matters move swiftly, sometimes they take a very long time because staffing is limited. That said, the limitation is more in terms of capacity than capability.
- Generally, yes but again more officials with seniority and experience would improve procedures and timing for review of information.

FRANCE

- In certain cases, an overwhelming amount of responses make it very difficult for the small case team (often composed of 1 person) to review thoroughly.

GERMANY

- Sometimes information processing slow due to lack of time or capacity. Hence, there are instances where agency is not well equipped to fully evaluate the information on file and draw the right conclusions.

INDIA

- The Competition Commission of India's staff suffers from both expertise and experience handicap.
- Agency's limitations include:
 1. Lack of well-trained/professional manpower or human resources.
 2. Time pressure on existing staff to handle work.

- Limitations:
 1. The CCI does not have competition law experts (in the sense that the CCI's members do not have any training in Competition Law).
 2. CCI is highly understaffed.
 3. There is a general reluctance to carry out market surveys.
 4. Short duration of the members of the CCI.
- The CCI is understaffed and those that are at the CCI are unqualified.
- 1) Lack of filtering actual information from random online information.
- 2) Over reliance on temporary interns for research.
- 3) Misunderstanding of various sectors.
- The agency is understaffed.
- Shortage of staff having relevant expertise.

JAPAN

- Japan FTC has very limited number of economists who have Ph.D. in Economics , which restricts their ability to conduct extensive economic analysis in its investigations.
- Legal education and understanding of due process is insufficient.

KOREA

- My agency lacks technical and/or economic expertise and often relies upon the biased experts of interested third parties.
- So far as I know, the KFTC does not have any systemic process to evaluate the information and just relies upon the discretion of the case team on this issue. Since there is no procedure to evaluate or test the evidence by third parties other than the person who submitted it, "evaluation of the information" would sound rather unfamiliar in Korea.

MEXICO

- My agency lacks the qualified staff necessary to understand, evaluate and take action from the complex information that it receives in the course of its proceedings.
- As previously mentioned, in merger control they issue burdensome requests for information and the staff reviewing the case is not sufficient to review the substantial amount of information they request.
- See comment on section 4 above.
- Sometimes it does not follow up and assess information.
- Not all staff members are duly qualified to understand and assess information provided. Deep mistrust of economic agents and too rigid rules of contact with decision makers result in limited understanding of dynamic, complex markets.
- I think the agency has limited human resources so it is difficult for them to process considerable amount of information.

SOUTH AFRICA

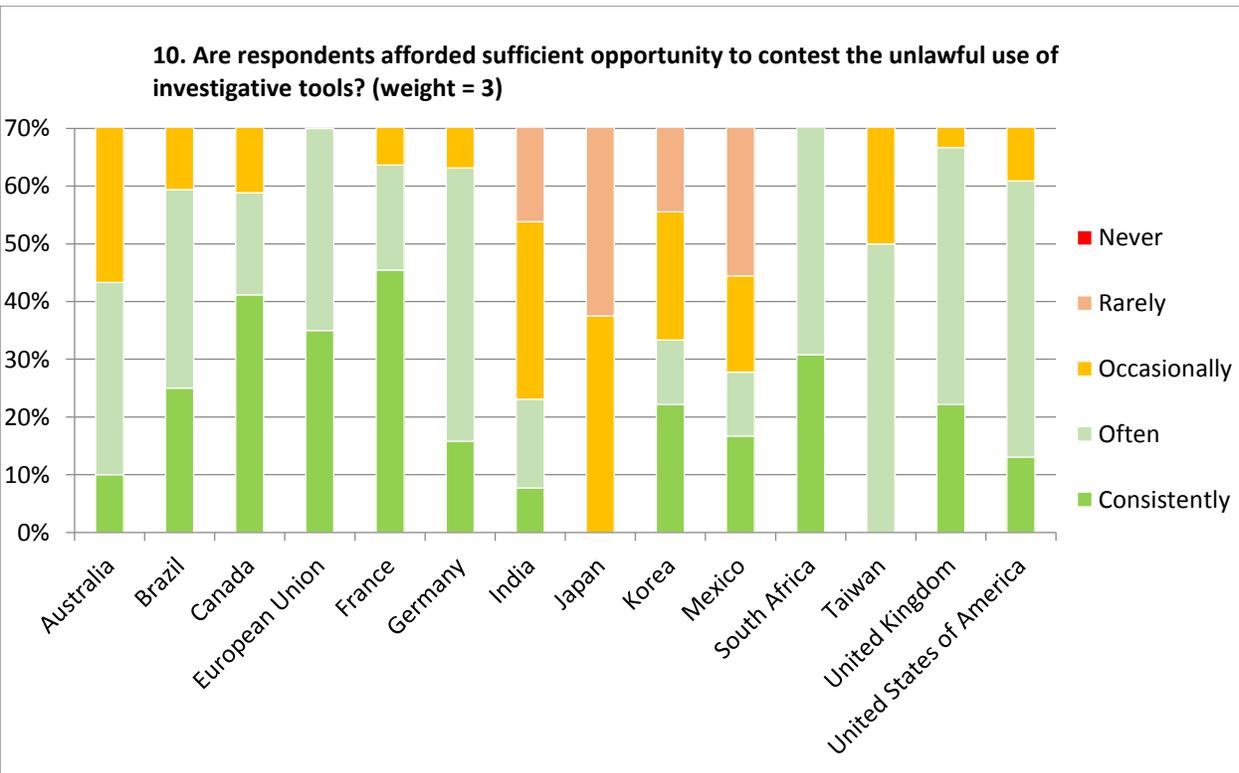
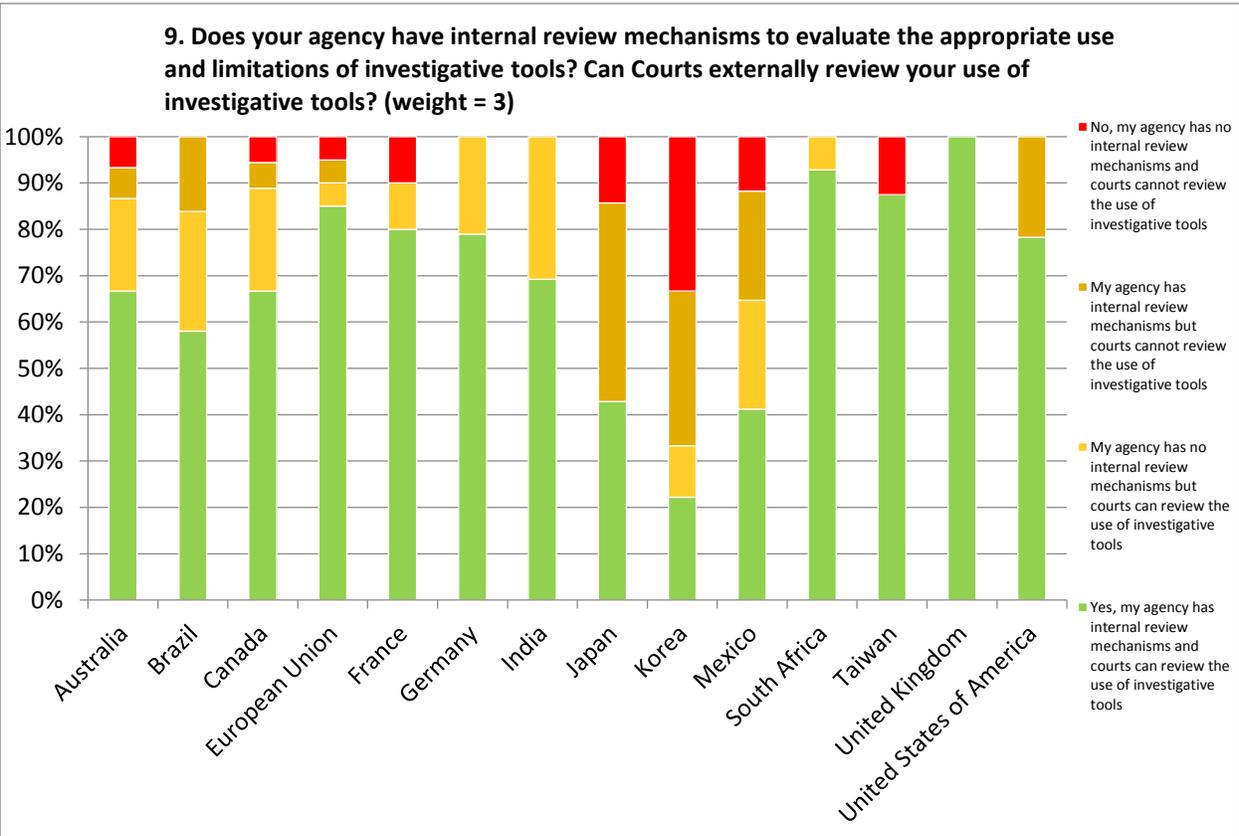
- The majority of the staff is inexperienced and will not always have the necessary expertise to consider the information which it receives.
- The agency's skills in this regard could be better. High staff turnover and lack of appropriately skilled and experienced officials does, however, set back the evaluation process to a degree.
- Not enough senior investigators.
- Mostly yes, but often lacks the ability to analysis complicated sets of data received from clients and economists. Agency uses external experts to assist complicated matters.
- Sometimes shortages of personnel result in unwanted delays.
- Very often information is required which would require a substantial amount of time in order to gather (and to prepare in the format required by the Commission) and which would be of very limited value to the Commission. The Commission more often than not does not consider the inconvenience occasioned by third parties in procuring information, nor does it ascribes a weighting of the value of the information. Even if information is required on a whim, it is sought and parties are threatened with sanctions if it is not provided. In addition, the Commission will also seek information in a merger investigation to advance a cartel investigation, which is ultra vires.
- The agency has significant resources but high staff turnover and inexperienced personnel often leads to a lacks sufficient expertise internally to critically assess and verify information and, in particular, get to the bottom of competing allegations (e.g. respondent vs third party views/allegations; merging party vs third party views/allegations) in an objective manner. In most instances, the agency seems to arrive at relatively balanced outcomes but, in my experience, assessment is often not robust/analytic and in some instances poor.

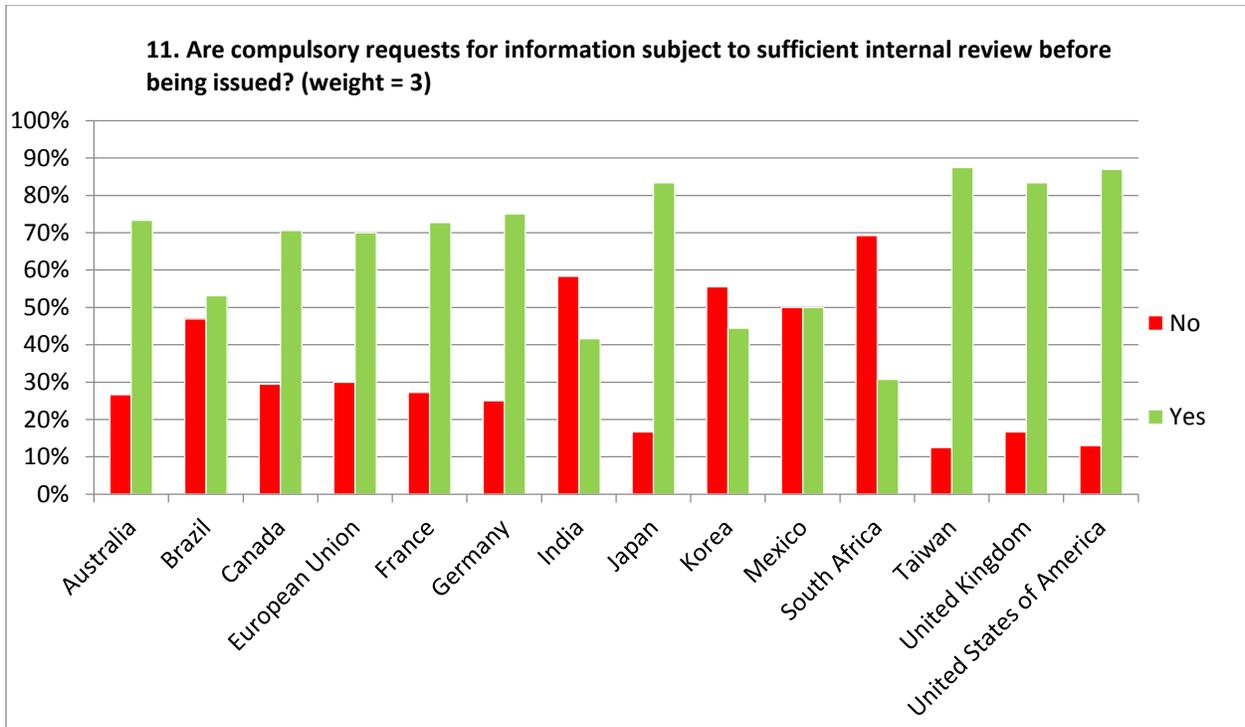
TAIWAN

- TFTC appears to have little to no economic staff or training. Case teams are comprised of non-lawyers, and they appear to lack understanding of basic competition law principles. They often do not appear interested in reviewing the information it receives, while at the same time, seem disinterested in letting investigated parties explain it to them.

UNITED KINGDOM

- Yes because the agency is able to choose whether to prioritize cases/complaints for investigation or not.
- Sometimes staff too junior to assess effectively. Somewhat addressed by involvement of senior people and or independent panel members in certain key decisions.
- The CMA understaffed to deal with the increase in workload expected post Brexit. Already can be very slow to deal with even "own initiative" investigations.
- The staff are insufficiently experienced to correctly weight evidence. Staff retention is a major issue driven mainly by poor salaries vs alternatives.





Explanations (Q11):

AUSTRALIA

- The investigatory team recommends the use of coercive powers to the Commissioners who invariably issue the notices.
- The quality and scope of many requests often leaves one to question the effectiveness of internal controls.
- At times the review process appears to be simple rubberstamping and is not transparent.
- Whilst senior sign off is required, there is limited rigor applied to the need for and scope of the notices issued by senior personnel. The delegated model of responsibility gives rise to some gaps in review.
- Information disclosure notices are often badly and expansively drafted
- I believe that requests for large amounts of information are sent indiscriminately without sufficient internal consideration on the need for them and the imposition on business.
- On a number of occasions the requests are unnecessarily onerous because they are too broad and not well targeted. There could be more discussion and negotiation about the information and documents sought without loss of effectiveness.

BRAZIL

- Excessively broad requests for information are often issued even before key issues are internally discussed.
- It seems that they have to work on such internal reviews.
- The case handler has full discretion over which information to request.

- RFI issued directly by investigators without internal review.
- Often, requests for information are issued without review from relevant authorities.
- In some cases, we have the impression that the requests for information covers a much broader issue than necessary to the case; and in some cases may relate to information that would restrict the ability of the defendant to defend themselves (and, according to our law, the defendant has the right not to provide any information/evidence that may jeopardize its defense).
- I am not sure. Sometimes RFI is answered with no further development or feedback, which challenges the need of such RFI.
- Sometimes a request is sent by a junior person in the agency without proper review.
- Compulsory requests for information comes with limited deadline and with no negotiation to extend it.
- Requests for information is usually discretionary to the case handler.
- We have been facing cases when CADE asks for so many information and grants a short time table to address them. Then it seems that, sometimes, the agency does not carry out a sufficient internal review.
- Sometimes the request of information are made by junior people from CADE staff without the review of the senior staff and sometimes the requested information don't have connection with the investigation.
- My experience indicates that case handlers have a significant degree of autonomy.

CANADA

- There is a complete failure to limit requests to what is relevant to the matter at issue. No judgement is brought to bear on request -- staff simply follow process, checklists etc. without regard to relevance or the burden imposed on the businesses involved.
- On some occasions overly broad demands for information are issued, despite clear information to the contrary.
- There is an internal review process but it is the blind/stubborn leading the blind/stubborn.
- In my experience, the Competition Bureau consistently overreaches on its document and information requests. The controls are largely external and depend on the compelled party challenging the request in Court.

EUROPEAN UNION

- Some of the RFIs are excessive when looking at the information required for the authority's investigation. Not surprisingly, this often means that the case handler who prepared the RFI is still quite inexperienced and wants to be certain that no question goes unasked. That said, often it is possible to "discuss" the scope of the RFI with the hierarchy and achieve significant reductions in scope.
- See the Cement cases. Overly burdensome RFLs are the rule rather than the exception.
- Requests are often too broad and standard form, rather than being rigorously reviewed for relevance and the narrowest range of demands necessary.

- This question is hard to answer if one has not worked within the agency but, in my experience, on occasion junior investigators may send out information requests which do not appear warranted or thought through. That these information requests have not been properly reviewed internally becomes evident when more senior investigators are contacted regarding the scope or content of the information request. As indicated, this only happens occasionally and could well be the normal consequence of delegation. As far as I'm aware, the decision on whether to issue an information request and what it contains is largely taken by the investigation team and other EC bodies (such as the legal service or the hearing officer) do not play a role in this, but to require them to do so would probably stifle the investigative process.
- The answer here goes to the jurisdictional limitations (EU only) and also the subject of information requests (in essence companies as no sanctions for untruthful and misleading statements of individuals). Because of these limitations in EU law, the EU commission often "tries" to get information it has no powers to seek, which is unsatisfactory. A system that is "trying on for size" when enforcing is inherently weak.
- This is a part of the Commission's practice that is not sufficiently transparent. I assume so because the mechanisms exist but do not know if every such request for information is sufficiently vetted.
- Lack of sufficient senior supervision.

FRANCE

- No internal process.
- In particular questionnaires sent out in merger control processes include unnecessary questions that have been reviewed by junior case team members and not reviewed carefully by more senior personnel.

GERMANY

- Sometimes the questions asked are excessive and demonstrate prosecutorial bias, but this differs from case to case.
- I suppose - I do not know, as this is not transparent. But generally I suppose that within the unit the FCO will discuss this.
- In antitrust matters, there are only very limited compulsory requests for information (relating to financial information only).
- Internal review is limited to respective decision making panel within the German FCO, which appears to be insufficient
- Often too wide and of a fishing expedition type.

INDIA

- There is very limited internal review of the type of information / documents sought.
- Information requests are almost always made by case handlers. Not sure about the review of such requests by senior staff.

- Information requests are often fishing and roving expeditions and no materiality threshold is applied.
- For merger control, requests for information are often unnecessarily broad and unrelated to the competition assessment. For anti-competitive agreements and abuse of dominance cases, requests are usually overarching and general. Both sets of requests are issued by the case officer/investigating officer without any supervisory checks.
- There is a tendency to use evidence selectively to support a conclusion - rather than first look at the evidence and then take a view on the conclusion.
- We are not sure what internal procedures are followed before issuing requests for information. Given the mundane nature of the requests, sometimes, it is clearly visible that the request has been issued with a view to buy more time or harass.

JAPAN

- Whether a sufficient internal review has been conducted is not possible to confirm from outside.

KOREA

- Usually the officer in charge and his/her boss decide whether to issue the requests without thorough internal review process.
- Often the requests are made in rush, and we seldom experience sufficient time for internal review before submission.
- The KFTC does not have power to issue compulsory requests for information. So this question is not relevant.

MEXICO

- RFIs are issued by staff and there is no chance to question the same before an internal superior officer or body. There is also very limited, if any, opportunity to call for judicial review of the proportionality and reasonability of the RFIs.
- In some cases it appears that the request for information are not carefully reviewed and consequently in 50% of the cases they are repetitive and burdensome.
- These decisions are not reviewed by superiors (i.e., Commissioners), therefore, private parties are subject to middle-staff decisions.
- If so, the terms of internal review are not disclosed.
- The Mexican authority does not even honor or accept the "attorney-client privilege". There are no internal review mechanisms.
- Many requests are too burdensome, formalistic and poorly drafted. It is extremely frequent to receive RFIs with questions that are not properly limited from a material, geographic, personal and temporal perspective.
- It is common to see the commission sending requests for information which scope is clearly too broad and usually the information requested exceeds the scope of the investigation leading us to believe that there is no prior review of the information.

- Sometime officers of the agency issue request for information that are not applicable to the transaction either because the information was already provided or because the information it is not relevant for the case.

SOUTH AFRICA

- At times it is apparent that the information being sought is not related to the inquiry which would need to be undertaken and in many instances it is apparent that had an internal review been undertaken then the requests for information would be more focused.
- Internally there seems to be a lack of appropriately skilled officials, with the result that unnecessarily cumbersome requests are issued. There is staff turnover that seems to lead to duplication and a lack of institutional knowledge.
- Depends on the seniority of the investigators involved.
- The Commission often ignores jurisdictional pre-requisites, such as establishing dominance in an abuse investigation, before going on to request detailed information over long periods of time.
- Requests are often sent without being vetted.
- Sometimes unnecessary and overly voluminous requests in context of mergers.
- Requests often require further clarification, but are generally effective in achieving their objective.
- There is no transparency in this regard and we have had an experience this year of, in our view, poor judgment in the use of drastic sanctions being used to compel information in circumstances where, in our view, this was unnecessary and unfounded on the facts and circumstances.

TAIWAN

- I answered no because I don't understand the question. It is totally unclear to me what internal review, if any, is applied to compulsory requests.

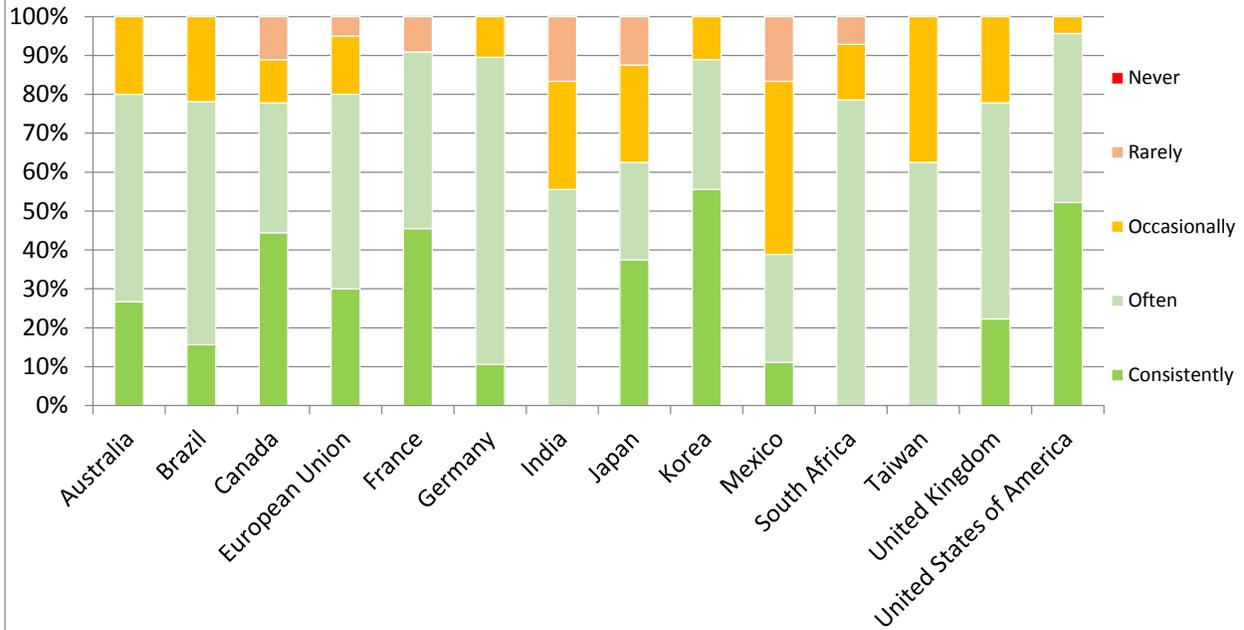
UNITED KINGDOM

- Too often information requests are clearly drafted at a very junior level and are not sufficiently well thought through or targeted.
- Questionnaires can be un-focused / inaccurate in their descriptions of markets.
- Needs to be more consistent internal review.

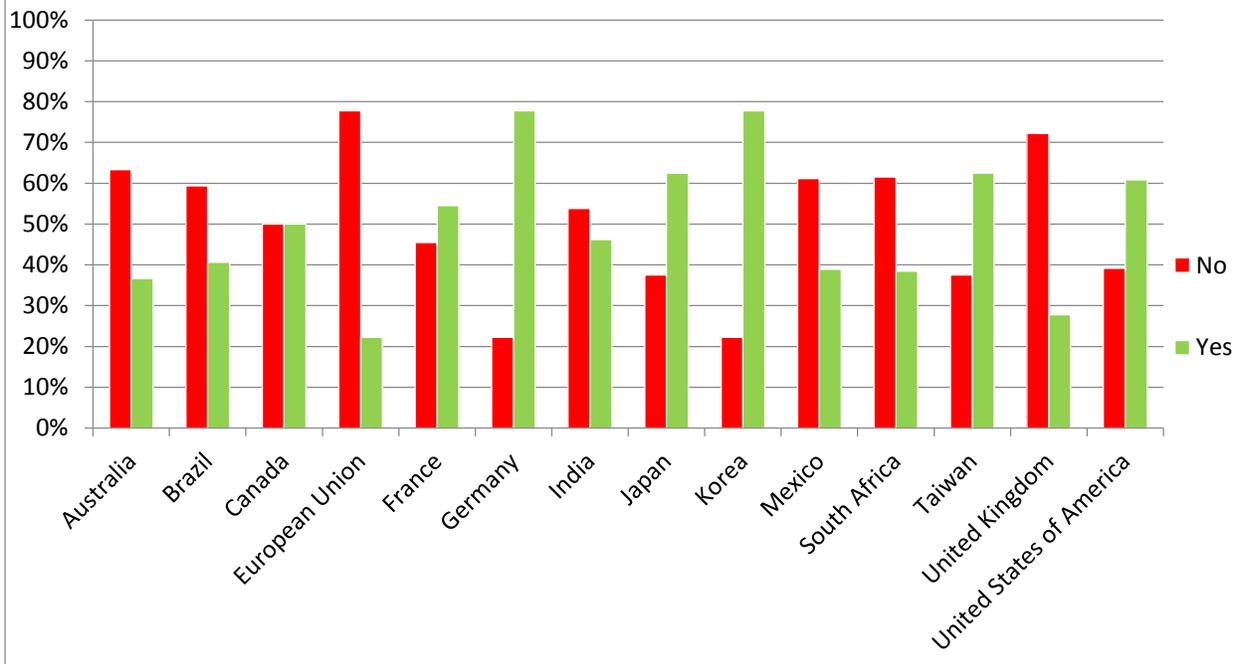
USA

- Overly burdensome; often redundant.
- Lots of authority is given to staff attorneys and internal procedures tend to be weighted in favor of the staff.
- There is regular internal review of compulsory process at the FTC and DOJ, but there are instances where more thorough internal review could have better focused the investigation and limited the scope of the compulsory process.

12. Does your agency focus their requests on information relevant to the assessment of competition issues concerns raised by the investigation? (weight = 3)



13. Does your agency avoid imposing unnecessary burdens on parties and third parties in their use of investigative tools? (weight = 3)



Explanations (Q13):

AUSTRALIA

- The agency will issue extensive information and document requests that can be burdensome for the recipient.
- Time frames can be unrealistic.
- Having dealt with a few different regulators I can say that the ACCC requests are the widest in scope by some degree and they often request information which is of marginal relevance.
- Sometimes ask for too much information.
- Agency is inconsistent in this regard. Some investigations are very well focused others less so.
- 3rd parties yes; parties, often not.
- Use of investigative tools can place a high burden on parties and agency does not always do everything it could to minimize this burden.
- The agency is unprepared or unwilling to receive information on this issue. better planning by the agency in the use of these tools could assist reduce the burden. For example providing advance notice on an informal basis as the decision making process to issue the instrument. Such a process may give the recipient a full two or more weeks in which to comply.
- Document requests can be too burdensome having regarding to the probative value of the documents sought.
- Not always but usually.
- I do not believe the agency sufficiently weighs up the burden on parties with the need for the documents. While there is a right of appeal to the court on the scope of the notice the burden on the parties is not relevant and notices are very difficult, costly and time-consuming to challenge.
- Commonly contacts one of my clients for information (for industry opinions) and does not appreciate that information is being requested by various divisions with the ACCC
- Statutory notices issued by the ACCC are usually significantly broader than they need to be
- They are willing to discuss burdens and over wide capture but the scope of documents being captured is significant and growing and the cost to companies is extensive.
- Requests are frequently very broad in scope and need to be confined through discussions with the agency.
- The requests can be unnecessarily onerous because they are too broad.
- Generally -- on occasions notices can be too burdensome but a practice is now developing to consult prior to issue.

BRAZIL

- Sometimes the agency issues extensive RFIs with very short deadlines for third parties to provide information.
- Not rarely CADE issues very broad and excessive requests for information and usually takes the opportunity of a request in a merger filing to dig out information for other purposes.

- Frequently our agency issues extensive requests for information without careful consideration of the burden over parties and third parties.
- They have definitely to work on that. Most of the time they impose unnecessary burdens on the parties.
- The requests are made on the interests of the investigation.
- Mostly. Sometimes requests of questionable utility are issued.
- CADE's understaffing normally results in parties and third parties having the burden to deal with unnecessary or unreasonable information requests.
- Sometimes the authority does not understand that the amount of information requested does not come in a click of a button.
- CADE does not seem to take this into consideration, when using investigative tools.
- Often the agency request information of the parties, even when they have the tools to obtaining them by themselves.
- In some cases, for instance, the agency request the defendants to provide sworn translation of documents that were not disclosed by them, but by the request of the agency (for instance, copies and sworn translation of decisions issued by all other antitrust authorities in the world related to the same subject matter of the investigation).
- Usually, the agency impose the parties all costs, including what it would be of its responsibility, such as translation of official letters to the language where it would be sent.
- Sometimes agency does not adapt the templates for the industry and does to seem to care about the burden on private parties, or the fact that the industry/company may not have certain data available.
- Sometimes more information than necessary is requested, which require significant investment in time and resources from private parties.
- On the contrary. The agency frequently imposes burdensome questionnaires and frequently resorts to "fishing" actions.
- I don't think they avoid because of the reasons already explained before (short staff).
- CADE tends to pull part of its job to the parties - for lack of staff.
- Sometimes CADE request unnecessary information without connection with the investigation.
- In several cases, the agency does not measure the burden over third parties when making requests or using investigative tools.
- Sometimes information requests are unreasonable, but I understand they are open to discuss this issue to reduce unnecessary burden.

CANADA

- While the Bureau tries to avoid such burdens on third parties, in practice significant burdens are placed on such third parties.
- With some frequency demands are overbroad-due to a concern that the agency does not know enough to tailor a request.
- The CCB tries to avoid imposing disproportionate burdens, but the parties on whom these burdens are placed do not always agree that they are disproportionate. The CCB is willing to

discuss with third parties what information should be provided in response to production orders.

- Courts have imposed an obligation to do so but they reluctantly do so to a minimum that is not acceptable.
- The agency tries to do so but has often not appreciated the extent of its requests.
- Undue burdens are sometimes imposed on third parties.
- Mostly, although there have been exceptions.
- They say they do but often the requests are much more extensive than required and the Bureau is resistant to narrowing.
- In my experience the Competition Bureau has little up front regard or understanding of the burden placed on responding parties by their requests. They will only consider these issues if there is push back from the party responding to the request.

EUROPEAN UNION

- The answer is really: "usually yes but not always". I have experienced circumstances where I had the impression that data was collected simply to fit into a "new" tool although the outcome of its use was not decisive for the case. Also, sometimes RFI's are too burdensome for the parties to the case and the case handlers seem to have little idea of how much time and effort is required to respond to the questions.
- See above re unnecessarily broad RFTs.
- Especially in the area of merger control, the European Commission at times is quite excessive in the information it requests, also from third parties.
- The burdens imposed by RFIs can be excessive. There is scope to make RFIs more focused, and/or to use telephone interviews to facilitate a dialogue rather than sending excessively long and potentially largely irrelevant RFIs.
- Requests often too burdensome and short deadlines.
- Request can be too broad and standard form.
- The question is of course what is "unnecessary" but the information requests issued by the Commission to third parties in mergers are very burdensome and, given that other agencies around the world do not all issue such information requests, it is hard to see why this process is necessary. Also in antitrust cases, the Commission sometimes seems to be fishing for rather than requesting information, despite the limits imposed by the European courts on such practices.
- The agency asks for whatever it wants regardless of the burden. Data and document requests are increasingly voluminous.
- Because of the heavy reliance on documentary materials, the EU in enforcement cases has a tendency to have overly broad fishing expeditions. In merger control it has been a recent criticism that the information demands (data) have increased exponentially in recent years.
- This is an area that can be improved. The agency's questionnaires to third parties in both behavioral and merger cases can often be a) very onerous b) with extremely short deadlines and c) expensive to comply with in terms of management and in-house counsel time and external

counsel fees. Although this is changing gradually for the better, the agency is not always willing to have calls/meetings in lieu of responding to voluminous questionnaires.

- Lack of sufficient senior supervision.
- It depends on the case team. Sometimes the answer is yes, sometimes no.
- The European Commission tends to exceed significantly in its request for information.
- Again the problems arise case-by-case, not always, but when they arise parties are totally at the mercy of the case team, with no viable means of recourse.

FRANCE

- Extensive requests are not unusual and the link to the investigation is not always obvious.
- Not always; questionnaires can often be extremely burdensome.

GERMANY

- In most cases yes, but there are exceptions where questions are out of proportion or useless.
- Typically yes - of course there may be divergent opinions, but you can usually try to discuss and reduce the burden if you provide good reasons. Sometimes, however, information requests may seem too burdensome.
- Confiscation of computers and hard drives.
- Extensive E-searches.
- Mostly, but not always.
- Not always. The FCO sometimes is "fishing in the dark" from my perception.

INDIA

- There is hardly any mechanism to evaluate this burden and it seems that the burden imposed on parties is seldom a factor in asking for information / documents.
- Unnecessary burdens imposed by the agency include:
 1. Demands for excessive information pertaining to long time periods and sometimes plain historic.
 2. Insistence on market information from parties, sometimes available with third parties, when there is none present.
 3. Short time frames provided to furnish the information asked for.
- Again, as the RFI are extremely broad and sometime unrelated to the anticompetitive conduct under review, they are extremely burdensome.
- Information and data can usually be procured by the Commission from departments of the Government - this is rarely done. The Commission prefers burdening the parties (often with information that is difficult for private parties to access). When the Commission does approach third parties, it is usually a late action and well into the timeline for closure of the case.
- Quite significant number of times - large data requests are sent without realizing the administrative burden these request impose on the parties; the data requests are also issued for time period for beyond the time period of investigation.

JAPAN

- Case handlers sometimes issue overly burdensome request for information, partly due to insufficient understanding of the case especially in early stage of their investigation.
- The determination of whether or not relevant is wholly up to the discretion of the agency.
- Scope of information request is always overbroad, due dates are so tight, and no consideration on costs, time and burden for businesses are given.

KOREA

- The agency does not much care about burdens on parties.
- The KFTC tries hard to avoid at agency level, but in the fields, we see several cases where unnecessary burdens are imposed on the parties.

MEXICO

- Very formalistic.
- There are some instances where Cofece request unnecessary information for the competition analysis and often request document production, instead of relying on the available information
- While the agency exercises restraint and reasonability, internal rules create excessive burdens, such as the need for sworn translations.
- Please refer to responses above.
- It is not uncommon to receive unjustified requests with no basis other than the authority's investigative powers.
- No, the extent that the agency fails to disclose the specific purpose of an investigation.
- Sometimes the agency request information in excess.
- Their requests for information to third parties are frequently overreaching.
- Many staffers have expressly stated their (incorrect) belief that companies have deep pockets and show complete disregard for the burdens imposed by their RFIs from a formal and substantive perspective.
- Not always, but often.
- The information requested is too broad and it is common to see that the information requested is not used in the investigation.

SOUTH AFRICA

- Our agency's officials are often inexperienced from a commercial perspective, with many officials having never worked in a law firm or other corporate environment. Frequently they do not see the burdensome nature of their requests.
- Our agency does not like to limit itself at the outset of an investigation. It may do that much later in the investigation.
- Information requests are often extensive and unrelated to the transaction being assessed.
- The Commission has little to no regard for any trouble it may put private firms to even in circumstances where there is no prima facie case.

- Agency generally pursues its interests without due regard for the administrative burden placed on the parties.
- Sometimes overly voluminous/repetitive requests.
- The agency has little comprehension of the cost and other burdensome implications of investigative tools on respondents, merging parties and third parties.
- It does not consider the burden imposed on respondents.

TAIWAN

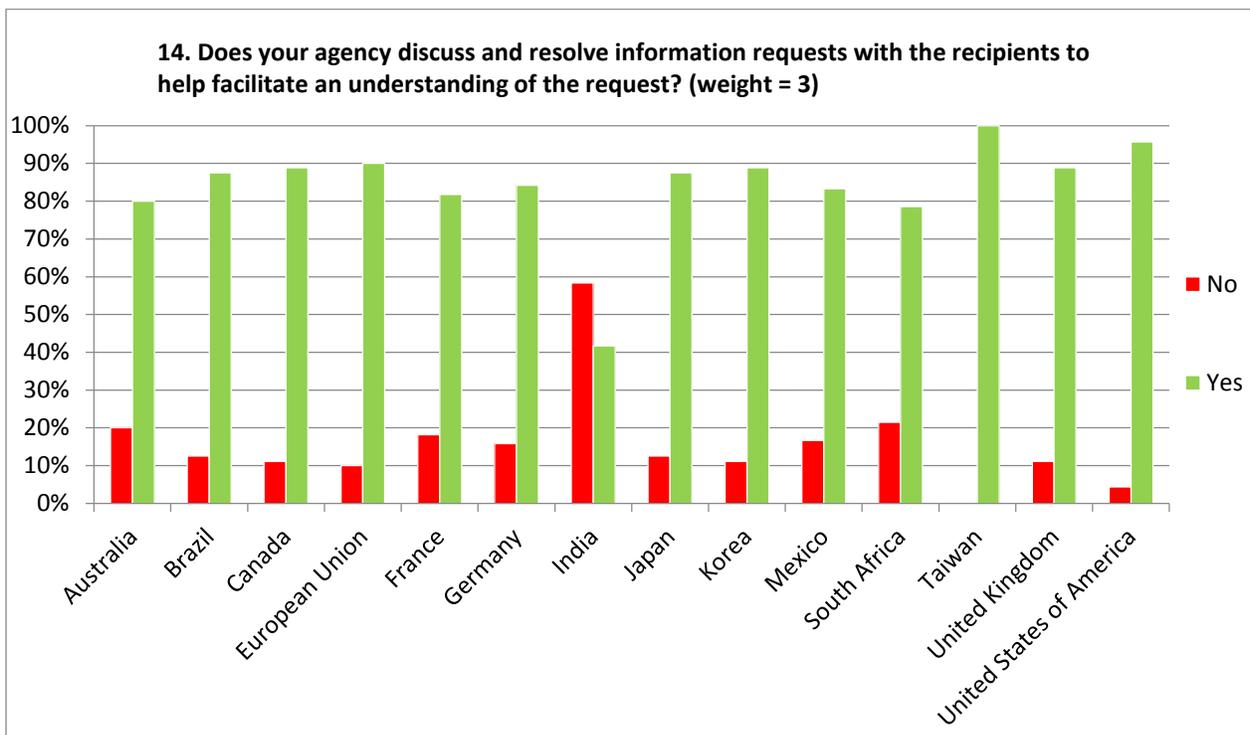
- Sometimes asking for unrelated information.
- Sometimes, the parties/third parties have to negotiate with the TFTC so as to limit the scope of investigation (i.e., exclusion of items not necessary for the subject case).
- The agency sometimes requests information that might not be relevant to the case.

UNITED KINGDOM

- Sometimes - despite comments to the contrary - the CMA does not fully appreciate the burden (especially on smaller firms) and is not willing to consider alternative procedures when using their investigative tools.
- While on the CMA the CMA does try to consider what information it asks for, its requests are still sometimes (not always) too expensive and not necessary well thought through. One gets the impression that the requests have been prepared by junior staff without much experience or understanding of the business world or focus as to what they actually need for their assessment.
- There is a tendency for unfocussed and poorly informed requests.
- While some improvements have been made recently, requests for information are too often very wide ranging and insufficiently targeted at the key issues.
- The agency attempts to avoid imposing unnecessary burdens on (third) parties (e.g. by using draft informal requests) but the agency's requests are still relatively burdensome, e.g. the agency often requests a substantial amount of internal documents from the parties.
- Sometimes the info requests are excessive.
- Parties may be asked to redesign surveys and are then berated when the results are not helpful, although the original design did not have the flaws introduced by the agency. Some unwillingness to accept that methods used to obtain survey information for a business are likely to be appropriate for investigative surveys - e.g. asking a business with substantial on-line sales to consumers to use a fixed line telephone survey to interrogate consumer views.
- Generally, yes. Occasionally (often staff dependent) can ask for burdensome - and unnecessary - information, and be slow to deliver feedback / status updates.
- Over-expansive information requests.
- Information requirements are frequently wildly excessive - again lack of staff experience is a big driver.
- Sometimes ask for excessive data, particularly the case with more junior case officers.

USA

- The US DOJ tries to avoid excessive burden but given the volumes of data at issue in these cases, significant burden is unavoidable.
- FTC and DOJ requests for information from the parties and 3d parties are regularly over-broad and burdensome. While there is some willingness to negotiate, the burdens are nonetheless very substantial.
- Deadlines are too short; overly broad requests for fear of missing something.
- Lack of sensitivity to costs of compliance by third parties.
- The US DOJ and FTC have an uneven track record. Nominally, they seek to avoid undue burden, but actual performance varies on a case by case basis.
- The staff over investigates.
- While there are both formal and informal processes for resolving disputes, there are still too many instances where the scope of information requests, including merger investigations, is still too broad.
- Staff lacks sufficient experience/understanding with burdens and costs imposed by information requests.
- Agencies try to reduce burdens on third parties, but the parties themselves have tremendous burden.
- Subpoenas and CIDs are intentionally drafted broadly, which gives the agencies leverage in negotiations on unrelated issues, particularly in unconsummated merger reviews.
- Third parties and individuals subjects sometimes bear great expense in providing information.



Explanations (Q14):

AUSTRALIA

- The agency is unprepared to engage in this.
- Sometimes it does this and it has indicated a willingness to consider it going forward but it has been the exception rather than the rule in the past. The request for discussion and reconsideration is often viewed with suspicion.
- Dialogue is minimal.
- The ACCC can and does discuss with recipients the breadth of the information request. Occasionally, the agency does revise its request (where it appears to be unduly onerous or burdensome). However, the ACCC has a broad discretion and is not always willing to accommodate concerns.
- It often does discuss but not always.

BRAZIL

- The officials rarely discuss information requests prior to issuance.
- Rarely the authority talks with the parties prior to issuing the requests for information. In any case, however, we are allowed to talk with the agency to ask clarification on the request.
- No assistance or clarifications are a frequent approach.
- They just send a letter with the requests.

CANADA

- Usually discusses, but frequently ignores the information.
- They will but after the Court order has been granted which will lead to further resources being devoted to amendments of the order.
- They have "pre-issuance dialogue" but issues are sometimes not resolved to the satisfaction of the recipient.
- They discuss, but usually do not resolve.
- Certainly the Bureau is open to discussion but this rarely leads to resolution of the party's concern.

EUROPEAN UNION

- But more careful preparation of RFLs (wording, scope, necessity of the information) before they are sent out would be welcome.
- While the RFLs generally do invite contacts, in my experience respondents don't feel able to resolve issues that way.
- Not consistently.
- In most instances, the Commission is very good at engaging with the recipients of information requests to ensure a focused approach.
- Not always, but they are open to discuss if a request can be shown to be impose a unreasonable burden or it is overly broad.

- See also response to 13. Not always willing to waive parts of the questionnaire that the respondent deems irrelevant or burdensome.
- But not always - case specific.

GERMANY

- This possibility very much depends on the case team leader.

INDIA

- It does but rather very occasionally.
- No discussion is entertained on the scope of the information requests.
- There is no mechanism for responses to any queries the third parties or parties under investigation may have regarding the specific information request.
- This practice is not adopted.
- In merger control cases only.
- There is a lack of adequate consultative process by the agency during investigations.
- Generally these are non-negotiable.

KOREA

- Yes, but not always.

MEXICO

- This only happens in some cases; however, they are usually reluctant to limit the scope of RFI's.
- See comment on section 13 above.
- Because the lack of expertise in some markets.
- Although they do explain, they typically insist on getting everything they requested just as they requested it.
- But they do not have legal tools to reformulate a poorly drafted or overreaching question, so even if the staff informally agrees to a more limited response, the recipient bears the legal risk.

SOUTH AFRICA

- Sometimes yes, other times no. A client once asked the relevance of a very detailed info request in a third party merger, and the Commission would not disclose the relevance. As it transpired the Commission was fishing for cartel conduct under the pretext that it was for the merger investigation.

TAIWAN

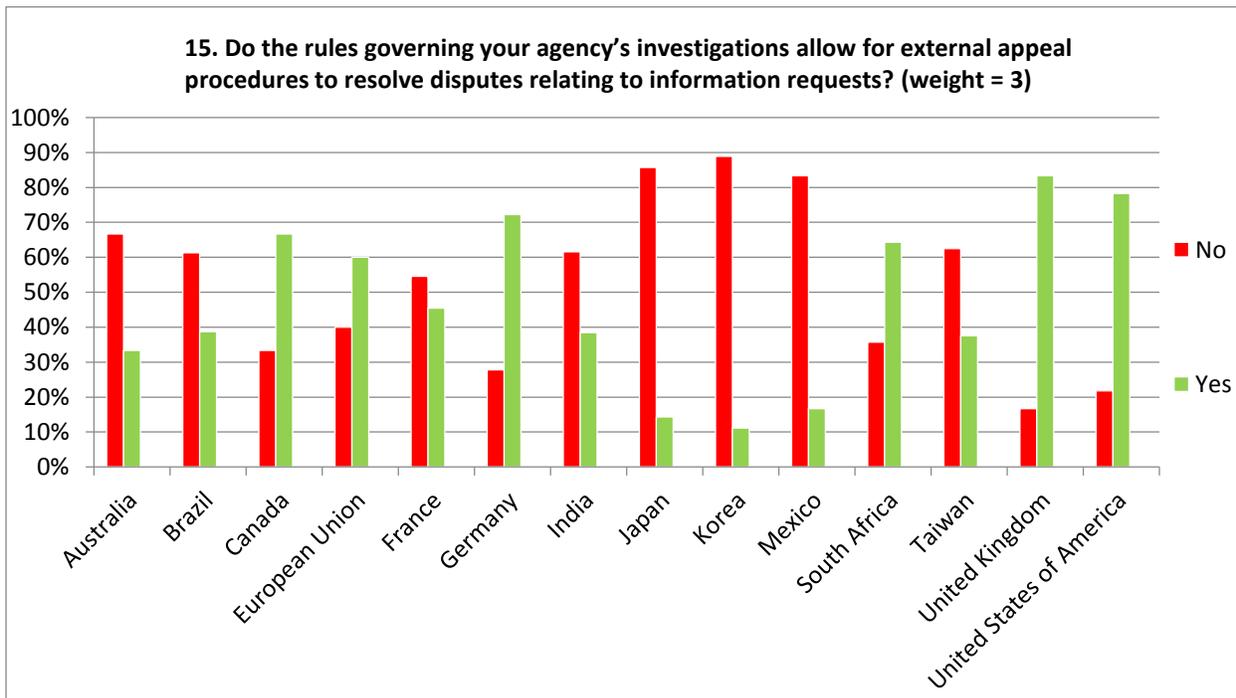
- If we have questions, they will typically engage on the issues.

UNITED KINGDOM

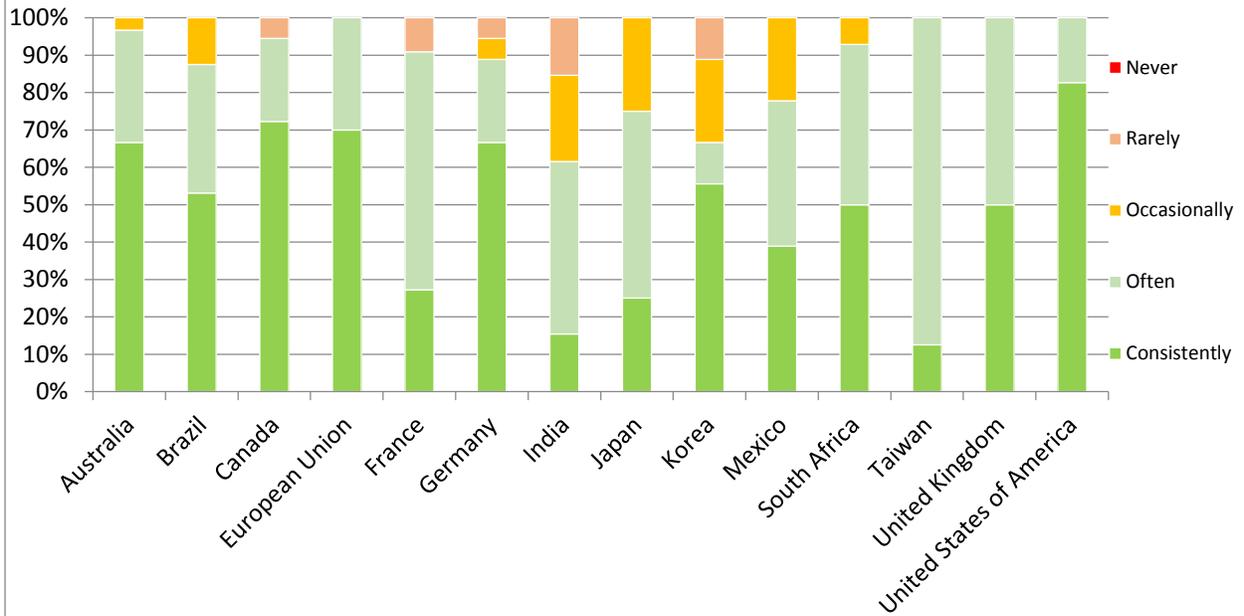
- Sometimes they will be willing to engage in a discussion and you can try to explain what you can provide, rather than what they have asked for.
- This does happen although whether or not it is effective is often dependent on the approach and skills of individual case handlers.
- Sometimes.
- Does not always listen.
- The CMA does show willingness to do this.

USA

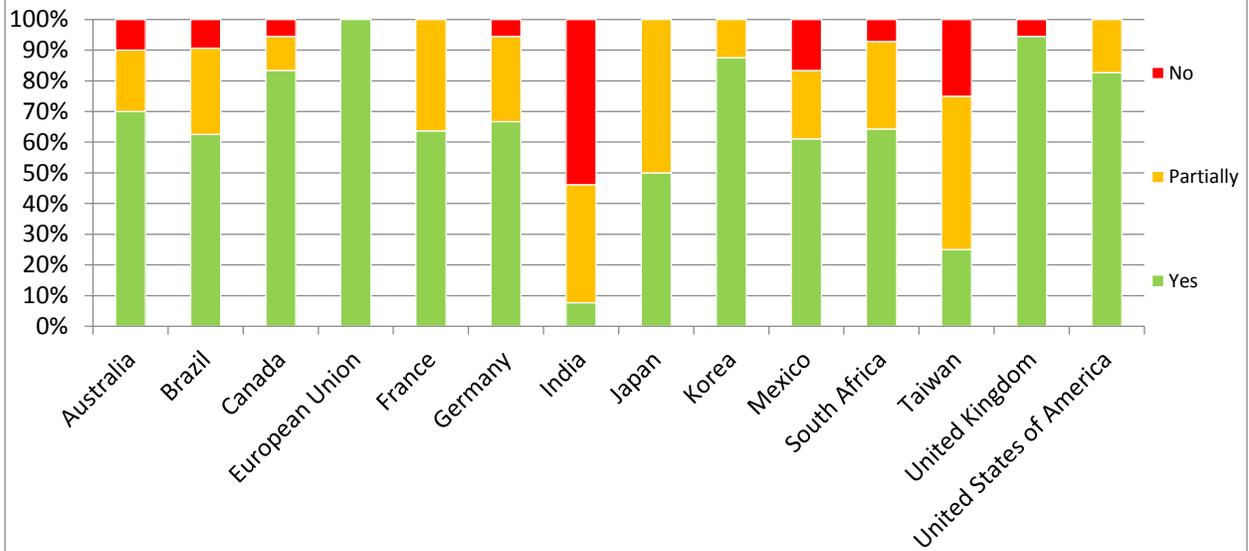
- Sometimes, depending on the staff and matter. In most instances, sophisticated counsel will understand the basis for a request. But in recent years, staff at both the FTC and DOJ have become increasingly less transparent and unwilling to discuss theories of harm, particularly on matters that are likely to be challenged.



16. Does your agency seek information from a variety of sources, including the subjects of the investigation, customers, suppliers, and competitors in order to ensure a thorough understanding of market conditions and impact? (weight = 2)



17. Does your agency make sure legal standards, agency guidelines for analysis, investigative tools that the agency can use, the framework for judicial review, and the sanctions and remedies available for competition law violations are transparent to resp



Explanations (Q17):

AUSTRALIA

- Internal procedures are often opaque, and the ACCC generally does not highlight options for external review.
- Guidance is available but is unhelpfully high-level.
- The standards and processes are made transparent but their application and the decision making process is not transparent. Access to decision makers is limited and the way in which staff brief up to decision makers lacks transparency.
- Does not follow the model litigant policy all time. In fact, mediation with parties is not followed through.
- The extent to which the ACCC is transparent varies from matter to matter. This is because there are no statutory requirements for the ACCC to be transparent.
- Good transparency about investigative tools, framework, sanctions, remedies (i.e. statutory processes); somewhat lesser transparency about approach to analysis; fewer analytical guidelines than some other regulators in other jurisdictions.

BRAZIL

- Even though the agency is cautious in the majority of times, it still attempts to make use of doubtful tools to get the information needed.
- There are some decisions and negotiations before the agency that do not follow the guidelines issued by the agency. Sometimes they follow, sometimes they do not, without cause and lack of information why they are proceeding in such way.
- The respondents have no access to agency guidelines for analysis, for instance; and the framework for judicial review is not an issue presented by the agency.
- The agency often ignores or act in conflict with prior standards, resort to investigative tools on a discretionary basis, claims that no judicial review is admissible and is often aggressive in the imposition of sanctions and remedies.
- There are not many opportunities for third parties to contribute to the design of antitrust remedies.

CANADA

- Practice is not always reflected in the published guidance -- media reaction outweighs substance in weighting.
- Sometimes yes, sometimes no.
- Agency guidelines are a black hole. There is little to no predictability in outcomes or in cases they choose not to or to pursue.

EUROPEAN UNION

- All of these things are transparent to respondents and published. What is somewhat lacking is information/benchmarking on the agencies performance against these standards.

GERMANY

- No access to files at an early stage, very secretive investigation.
- Partially the German FCO issues guidelines on certain issues, but this does not cover the entire spectrum (e.g. there is not an overview on the use of investigative tools).
- Evaluation of quality of submissions under leniency/amnesty rules unclear; very difficult to understand drivers behind fines imposed on members of a cartel.
- Proceedings often lack a thorough and robust investigation. Case handlers often rely on informal, poorly recorded oral communications with market participants with limited minutes/records. The standards of investigation have consistently and increasingly fallen behind the standards of other leading competition authorities over the recent years.
- Normally they do. Sometimes you get the feeling that they look only for how to win the case.

INDIA

- There are no given compendium of legal standards not has the agency come up with any guidelines in any area. The judicial appellate forum has been extremely critical that the agency does not adhere to the principles of natural justice or proper evidentiary standard. Parties find it difficult to understand the purpose of investigator's queries as well as the ratio of agency's findings.
- Competition Commission of India is yet to issue guidelines on most contentious issues. some guidelines, including by way of consultations are available in merger control. Respondents, almost never know the tools or internal guidelines the Commission may employ during investigations.
- Transparency issues relate to:
 1. Lack of transparency in terms of information requests made by the agency.
 2. Lack of transparency in penalty imposing standards.
 3. Lack of transparency in terms of analysis/evaluation of cases and abject lack of economic analysis.
- Most of the orders of the CCI have been overruled by the Appellate Tribunal on the grounds of natural justice.
- The CCI's conduct in generally adhoc and arbitrary.
- Our agency is as opaque as it can get.
- Disagreements on procedures often arise and are settled in court/ appellate tribunal.
- For merger control, there has been a recent increase in guidance notes. For anti-competitive agreements and abuse of dominance, there is no guidance material.
- There are lapses on the procedural side on collecting and dealing with information. The investigative and decision making process often proceed on assumptions drawn on selective evidence.
- The Commission is erratic in its application of standards and it is unlikely that there exist guidelines for analysis. Investigative tools are not used consistently.

- Agency has been reprimanded on number of occasions for failing to adhere to the principle of stare decisis; the agency has lacked consistency in application of the legal standards.

JAPAN

- Basis of the Japan FTC's orders is usually disclosed to the recipients only in the final stage of its investigation i.e. after the Japan FTC delivers a draft order to the recipient. State of play meeting is very rare to date.
- Just recently the agency has (at last) adopted a new policy to this effect, so we have yet to see.
- Last year JFTC published a investigation procedure guidelines, but contents is not enough to meet the needs of transparency

KOREA

- There is no statutory or formal procedure for such presentation of evidence or argument. It has been done only voluntary basis in practice. However, companies are often hesitating to do this because they have concern that such efforts would not do good for them and the KFTC will use that defense argument or evidence to make the case - for example, if they find the evidence presented by the party contradicts to what they already have, they will try hard to find more to support they allegation, etc.

MEXICO

- The negotiation of remedies is not transparent and consequently it provides great uncertainty to the parties.
- The agency simply states the legal consequences for non-compliance (i.e., fines).
- No, to the extent that communications from the agency focus on sanctions, in lieu of preventive measures.
- Legal standards have been interpreted by the agency and then applied. Their interpretations are unclear and change frequently, without any control or publicity. No guidelines on use of investigate tools.
- It is a moving goal post. They keep making more stringent standards in practice based on unfortunate cases of violations to the law. Lack of administrative or judicial review of RFIs and poor technique used in statutory provisions leave respondents quite defenseless.

SOUTH AFRICA

- Officials talk about the agency's "current practice" but such practices are seldom articulated in an official document or publicized appropriately.
- The legal standards are set out in the legislation but the agency's approach is evolving and no clear guidelines are in place.
- Sanctions are clear and transparent. However, internal assessments of information and development of theories of harm are often opaque, particularly in complex matters.

- There is little to no transparency. Procedures to challenge are subject to quasi-judicial review, and accordingly these matters are only resolved by adversarial litigation. The agency does not pro-actively adopt transparent approaches with respondents, merging parties or third parties.

TAIWAN

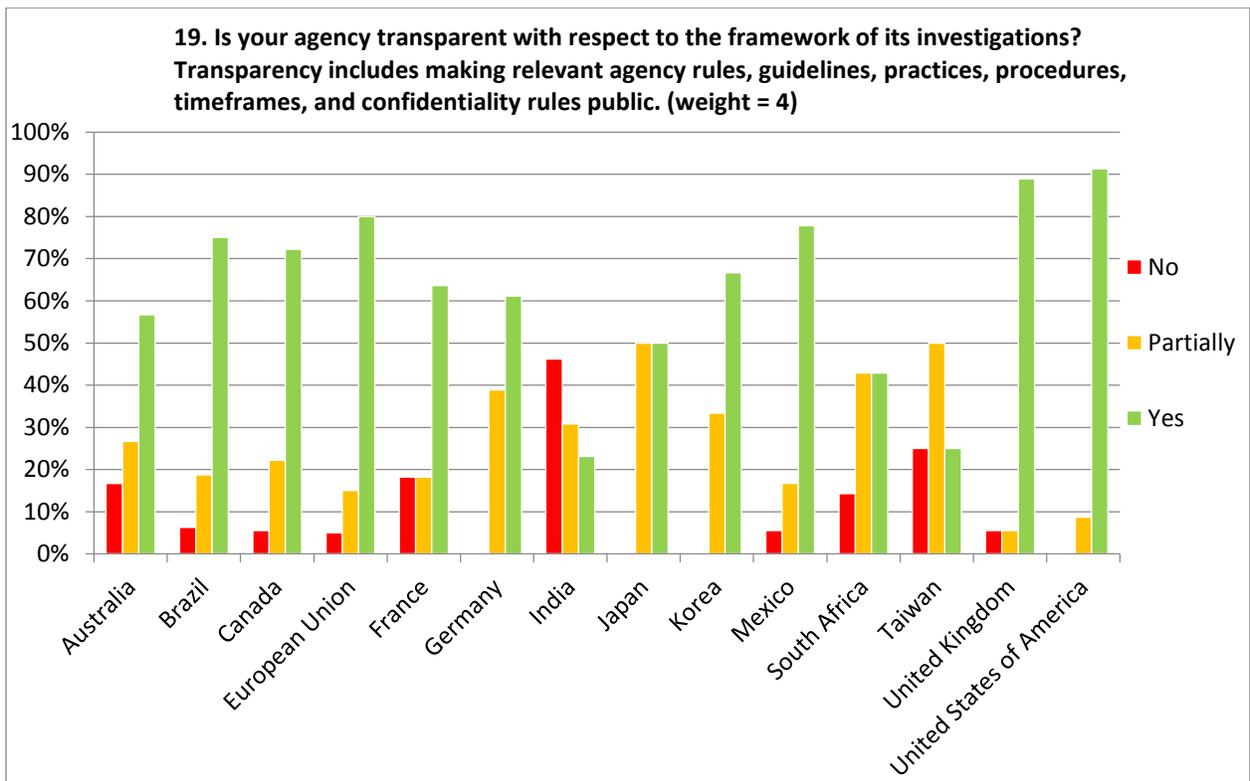
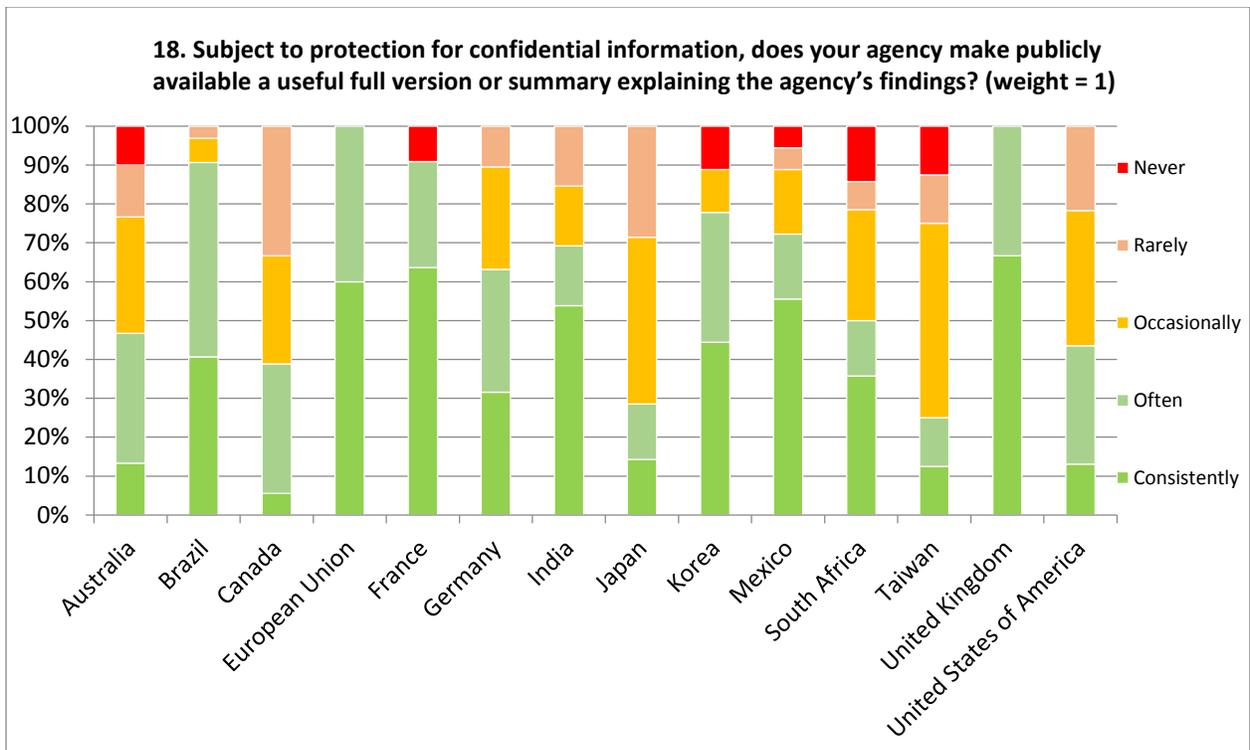
- Not fully transparent for files review or interrogation
- Due to the constraint under the administrative laws and legal system and the internal policy of the antitrust authority, the investigation process somehow is not transparent to respondents as almost all of the information obtained by the authority during the investigation process is deemed confidential and cannot be revealed to respondents, including the legal ground of allegation and authority's investigation report. Thus, it is difficult for respondents to know the investigation process, evidence obtained by the authority and the possible result of the investigation.
- Taiwan Fair Trade Commission mostly will not specifically mention these issues with the parties under investigation. If any doubt, the parties have to proactively check with the TFTC or their own legal counsels to understand their rights.
- According to local practices, some standards and guidelines are confidential and some of them are not in written but followed by the agency.
- TFTC has no procedure, such as an SO or complaint, to inform the investigated party of the alleged competition law violations, and which give the investigated party adequate and fair process for responding to such allegations in a meaningful way. Under existing TFTC rules, there is no requirement for TFTC to fully inform you of the alleged violations until the Commission issues an order.
- Some agency internal guidelines are not publicly available.

UNITED KINGDOM

- Over the last decade or more the CMA (and its predecessor the OFT) have been very good at issuing guidelines covering an array of subjects and procedures which are very helpful.

USA

- US enforcers are better than most jurisdictions but could issue more guidance on Section 5 FTC Act, Section 8 Clayton Act, disgorgement remedy, etc.
- The US agencies generally provide useful guidance on policies and investigative processes, but there are areas where the guidance could be improved, particularly for single firm conduct.
- There are guidelines published, but much of the day to day practice is governed by standards that are not addressed in the guidelines.



Explanations (Q19):

AUSTRALIA

- There is transparency with respect to some aspects of agency practice, such as handling of information, enforcement policies, etc. but little transparency as to timeframes and internal processes.
- The ACCC does not say much about the way it conducts investigations. It has some guidelines on its coercive powers, except the use of search warrants.
- It is improving. It is consulting on draft guidelines for some aspects now. It is still only partial.
- There is no transparency for timeframes in conduct investigations.
- Keeps party in the dark about enforcement matters. However, mergers are transparent.
- Good transparency about statutory processes; somewhat less transparency about analytical framework/analysis.
- Timeframes in Australia are usually not transparent.

BRAZIL

- The agency has still to evolve with regards to procedural procedures.
- The agency often does not follow its own guidelines. Moreover, confidentiality preserved, the rules and methodologies applied to the case analysis are not disclosed, even if it does not harm parties or third parties.
- The agency frequently acts on a confidential or informal basis.
- There is a lot of information that is not shared with interested third parties and with society in general.

CANADA

- Makes them public but do not always adhere to them.
- The CCB has published guidance on much of the above. There are internal processes that it does not publish guidance on.
- Sometimes "yes".
- Sometimes internal processes (practices and procedures) at the agency are not transparent.
- as above. The Bureau often invokes the confidentiality obligations of the statute as a false excuse for their unwillingness to engage in a discussion or to explain where they are coming from.
- They could be more transparent in some merger investigations.

EUROPEAN UNION

- Yes, except when it comes to time frames. Time frames are clear when it comes to indicating by when the Commission wants information, but often completely opaque when it comes to timing of next steps to be taken by the Commission.
- See response to 17 also. The framework is transparent. The conduct of investigations is not always transparent to merger parties or subjects of the investigation.

GERMANY

- A set of guidelines is published, however a lot depends in practice on the individual division, often the divisions have different approaches.
- There is no full transparency, since the FCO only issues guidelines on certain aspects of its work (generally merger control is much better covered than unilateral conduct or cartels).
- In investigations, practices and procedures often remain vague and are not explained. Often very informal (which may also be positive).
- While guidelines are available, the actual investigations and records of such investigations are in most cases very limited.

INDIA

- There is no certainty or clarity on above issues in the absence of any guidelines or consistency in the approach of the agency.
- The regulations are in place but no practice guidelines/ case studies/ handouts/ quick reference publications are available for guidance/reference.
- Procedure laid out in the implementing regulations but issues on many issues yet to be settled.
- There are some rules framed regarding timelines, filing process and other procedural issues. However, there are no clear guidelines / rules on investigative techniques to be followed, economic parameters to be considered.
- Procedures adopted by the agency are not known except the broad principles set out in the legislation.

JAPAN

- Just recently the agency has (at last) adopted a new policy to this effect, so we have yet to see.
- The JFTC's procedures are becoming more transparent but there isn't such a thing as the Manual of Procedures published by the EC for example.
- Last year JFTC published a investigation procedure guidelines, but contents is not enough to meet the needs of transparency.
- Procedural rules are somewhat transparent. But too much relying on voluntary cooperation which is not practically challengeable. No attendance of counsel is admitted. Those factors make the JFTC's investigation invisible from the practical view point.

KOREA

- Korean competitive agency provides relevant agency rules, guidelines, practices, procedures, however, it does not provide applicable time frames and confidentiality rules.
- The answer is more likely "yes" but not always.
- I believe most of the relevant rules are made in public but I heard that there are certainly other internal rules which are not publicly available but could still be influential.

MEXICO

- There are a set of rules apparently clear, but in practice there are cases where those are not entirely followed by Cofece.
- It is extremely difficult to engage in meaningful discussions with respect to the purpose of an investigation, the theories of harm and the concerns of the agency. Officers usually claim legal reserve (confidentiality) requirements. Usually these issues are only clearly stated when a statement of objections is entered.

SOUTH AFRICA

- Other than individuals who may at one stage worked for the agency many practitioners are not very aware of the agency's framework for its investigations etc.
- Our agency is non-committal when asked about timing. It is not transparent in relation to the framework of its investigation.

TAIWAN

- Some internal procedure is not disclosed.
- TFTC publishes its rules at a high level. But it largely shields its practices and timelines.
- Some agency internal guidelines are not publicly available.
- The agency does not disclose the investigation timeframe and may make a decision without any prior notice to the parties.

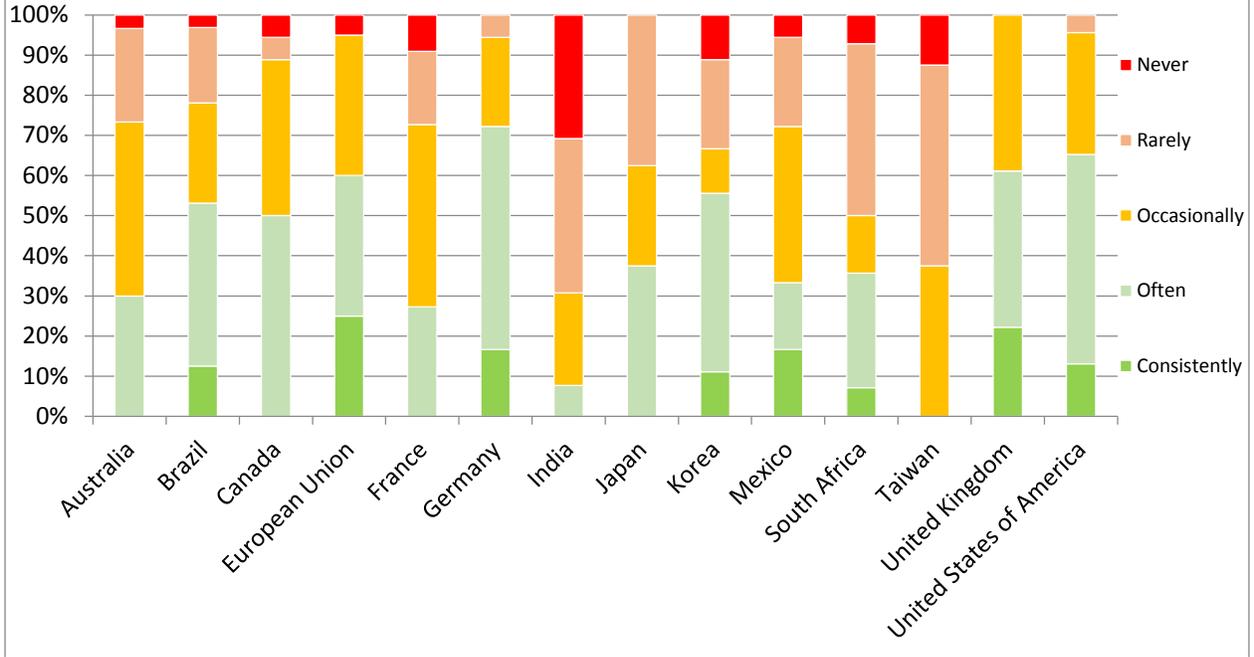
UNITED KINGDOM

- It has prioritization criteria. In reality, they select the cases they want to do but with no clear pattern.

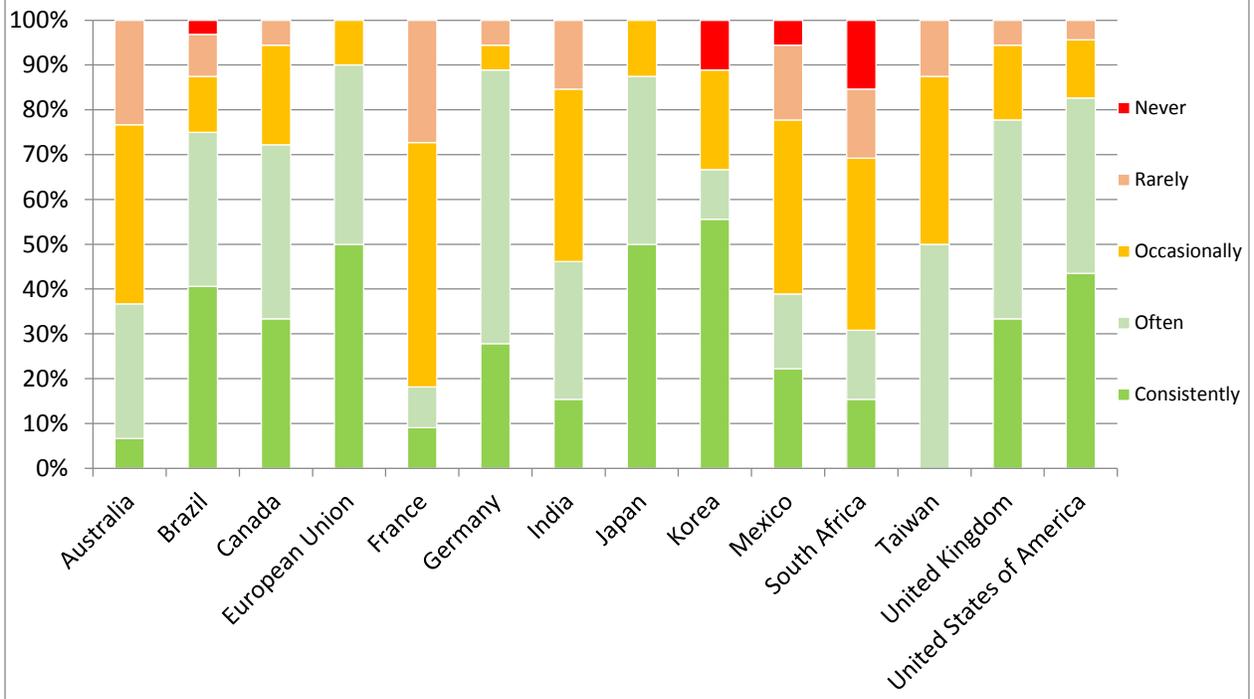
USA

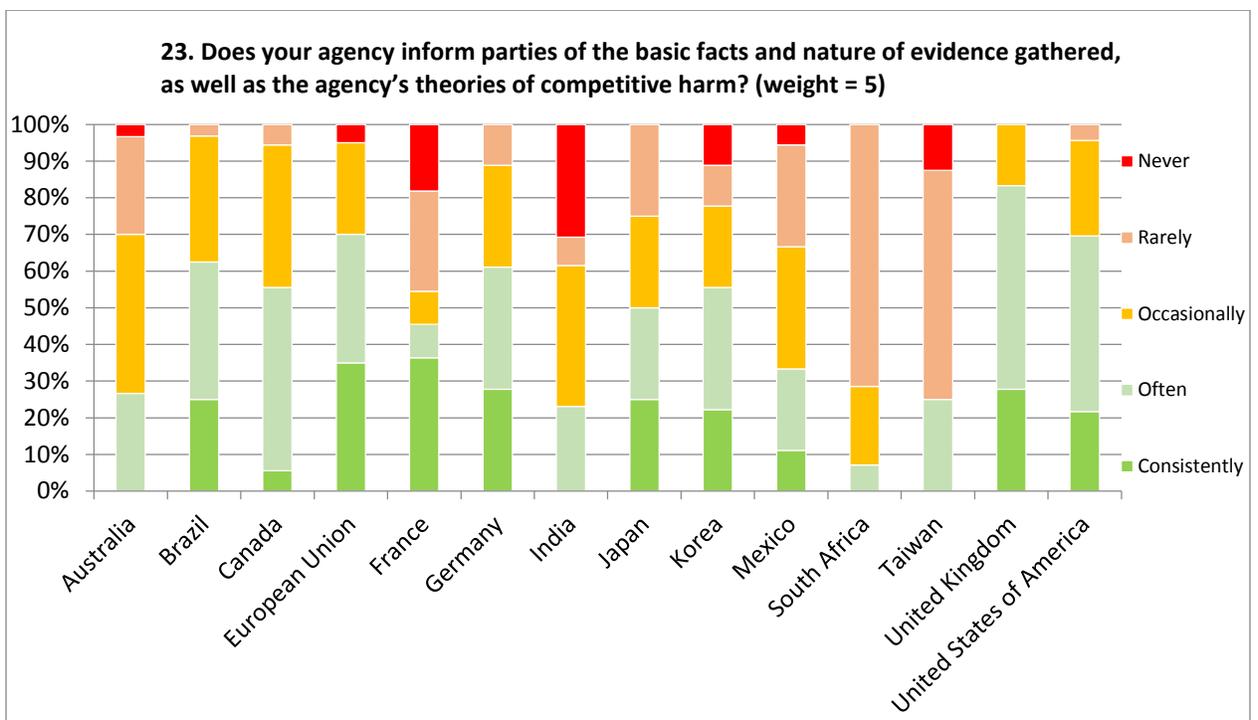
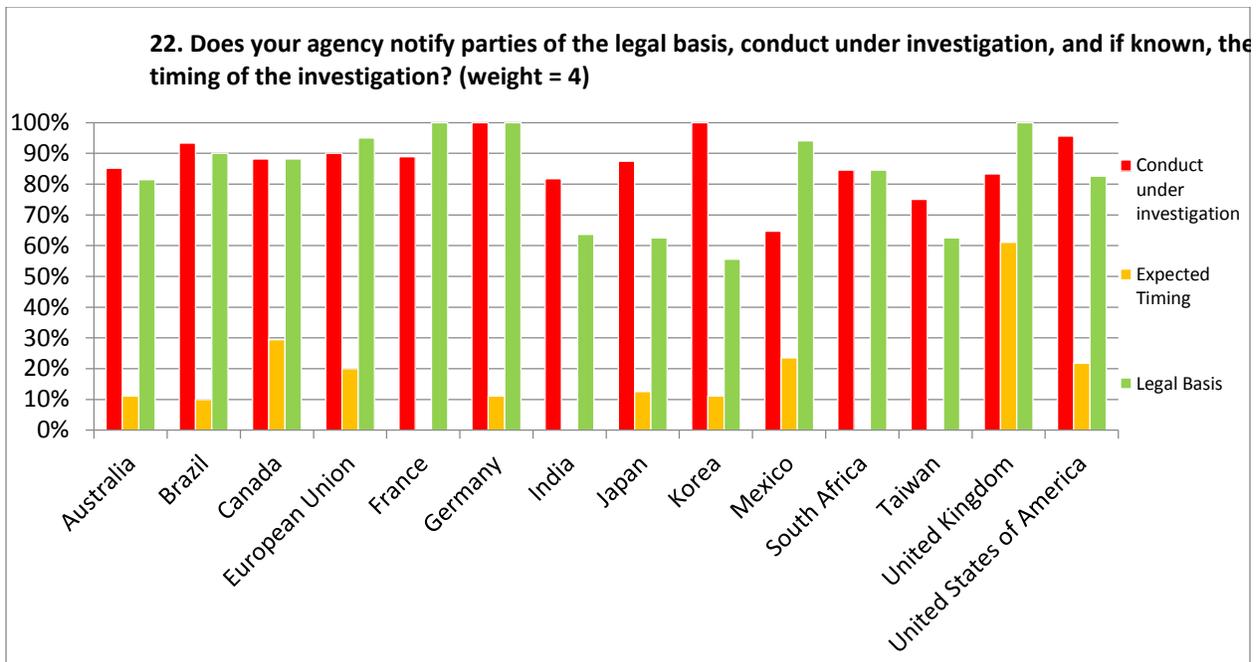
- US agencies are more opaque under Obama administration; interferes with coming to the right decision with false perception that opaqueness enhances litigation posture.
- You need to be a practitioner in the area to understand the agencies processes.

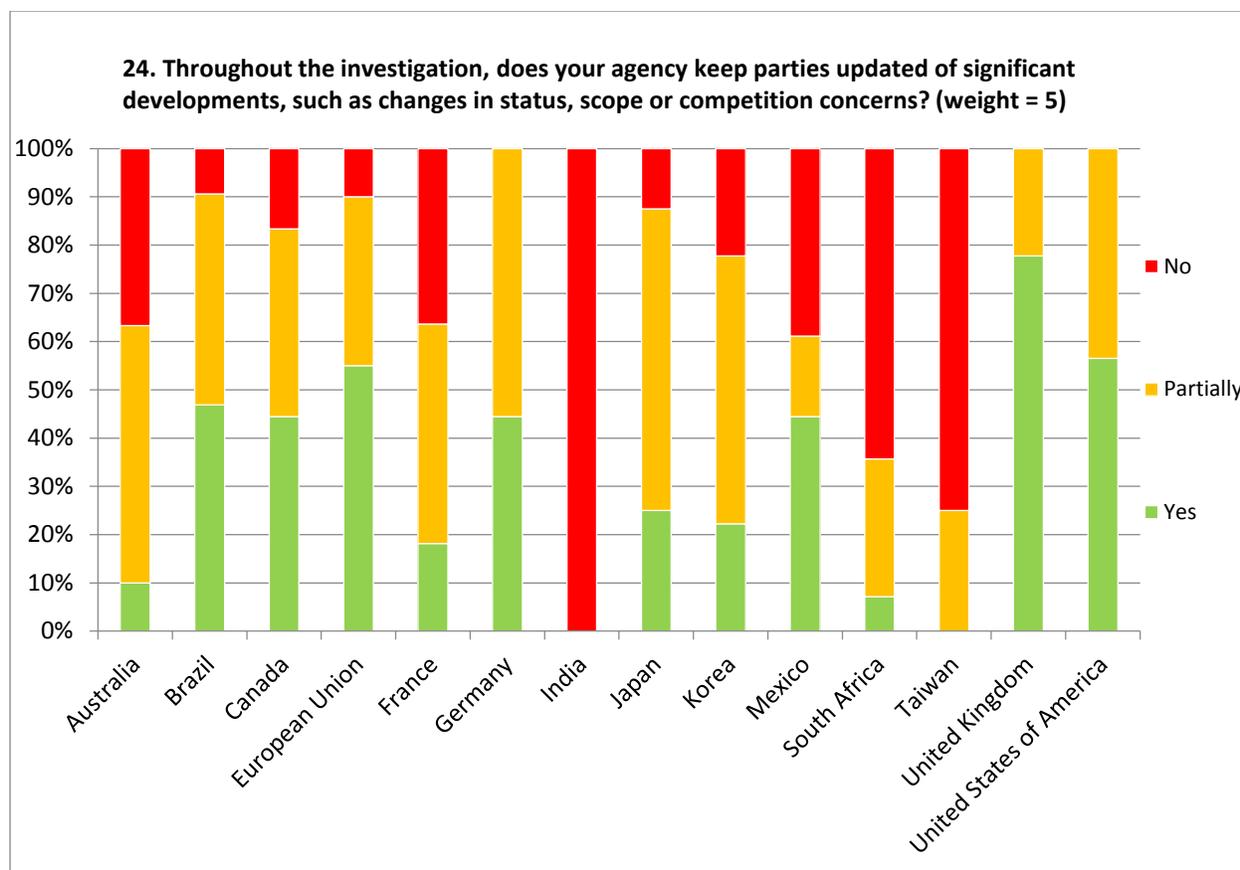
20. Does your agency inform parties under investigation of significant information related to the investigation as soon as it is practical (i.e., an explanation of the agency's competitive concerns)? (weight = 4)



21. Does your agency notify parties as soon as it is feasible that an investigation has been opened? (weight = 3)







Explanations (Q24):

AUSTRALIA

- Where the agency is using its compulsory powers it must provide an outline of the conduct and legal basis for the alleged breaches. Outside this requirement the agency provides little transparency.
- Depends on the investigation. For merger clearances, yes. For other investigations, no.
- The ACCC's investigations are quite secretive. Often they do not tell the complainant anything about the progress of the investigation.
- No regular updates.
- This is not always done.
- If the agency is intent on court proceedings, it is usual for there to be little in the way of updating communication.
- This is very patchy. I have had a number of investigations that the ACCC refuses ever to confirm are closed leaving the targets on tender hooks until the statute of limitations expires.
- The agency always hides behind confidentiality when questions are raised including where third party interests are adversely affected.
- Sometimes it does and sometimes it does not.
- Sometimes there is a long lag between developments in ACCC thinking and the parties' being aware of that change.

- The agency does not keep parties sufficiently informed - there can be long periods where parties are in the dark as to what is happening or what the agencies thinking is.
- Does not adequately explain to parties about developments.
- The ACCC does not generally keep parties informed of the progress of the investigation. Following an information request, it is not uncommon for parties to only hear from the ACCC many months (or years) later when the ACCC is about to institute proceedings.
- The level of transparency varies between investigations and might depend somewhat on the case team.
- Generally it does, but on some occasions the ACCC is not proactive in informing about developments.
- It will do so from time to time if there is ongoing dialogue with the relevant party.

BRAZIL

- Changes in concerns during the investigation are not shared.
- Extremely transparent procedure, parties have access to all the files all the time after launching of the investigation (very few redactions are allowed against parties and must be thoroughly justified).
- Defendants are often surprised by a change in CADE's understanding of the evidence during investigations.
- If the investigation, in this question, relates to the precedent period to the opening of the case, formally, the answer is that rarely the authority initiates an investigation and notifies the party of it (and of its significant developments).
- Some developments sometimes are note communicated. However, all data is available in the authority website.
- Changes in status, yes; but competition concerns, no.
- Usually, the parties do not precisely know the facts that are charged on them. The conclusions on the competition concerns are customarily disclosed only at the end of the investigation.
- It could be better explained in the website the exact status of each proceeding.
- I understand that the agency significantly keep defendants in the dark to drive them to apply for settlement.
- CADE does not make state of play meetings and only rarely gives any guidance on how concerns evolved throughout an investigation.

CANADA

- Change of concerns not communicated in a timely manner and with sufficient details,
- Sometimes only.
- The agency is slow to advise on changes in developments.
- Varies depending on the investigation.
- This is closer to a no than a partially.
- They could be more transparent in some merger reviews.

- After documents and information have been collected, there is typically little or no communication from the Competition Bureau through the balance of the investigation. Normally, little or no notice is given before court proceedings are filed. Communications through the investigation are typically limited to discussions aimed at resolving the dispute, which are almost always initiated by the party under investigation.

EUROPEAN UNION

- The European Commission would normally issue a letter of facts or supplementary statement of objections if something basic has changed.
- Officials are often unwilling to discuss developments, seemingly afraid to prejudice their position, meaning parties can be unaware of progress in cases for months, even years. More experienced, senior officials would be able to exercise discretion to deliver more effectively on this objective,
- The Commission effectively sets out its case at the time of the Statement of Objections (when it limits the scope of its investigation) and in a state of play meeting shortly before a decision. It may however be years between opening of an investigation and the Statement of Objections during which the parties have little or no idea of the case being pursued.
- I have had both good and less good experiences in this regard. State of play meetings are infrequent in behavioral cases and not always transparent. This is less of an issue in merger cases due to the time constraints involved.
- The European Commission explains everything in the statement of objections.

FRANCE

- Information is not systematic before the statement of objections.
- Often parties are left in the dark for years until suddenly an SO is adopted. There is no transparency as to the progress of the investigation.

GERMANY

- There has been some frustration with the handling of summary applications in cartel cases.
- Not necessarily in settlement processes.
- There is no full transparency or information flow (the level of information often depends on the decision making panel and case officers dealing with the investigation).
- Often, there is nearly no communication before entering into settlement talks.
- Depends on case team, more likely if a party cooperates.
- Depending from division to division within the FCO.
- Depending on the case, it may require active requests from the parties subject to the investigations to get an update/state-of-play.

INDIA

- Investigation is not a collaborative process. The agency calls for information and documents as they deem appropriate and enforce the same in terms of powers vested in the agency. There is hardly any discussion regarding the scope, status or competition law concerns with any party.
- Commission's investigation process is opaque and the only way to learn about the status is to engage with the case handlers. The formal system only provides information on whether the investigators have been afforded additional time to complete their review.
- The agency's shortcomings include:
 1. No information conveyed to parties to the case about addition of third parties.
 2. No communication with regard to extending scope of investigation with regards to theories of harm/allegations. (One instance can be seen from the case: Grasim Industries v. CCI, W.P 4159 of 2013 which was pronounced by High Court of Delhi against the agency extending its scope of investigation)
 3. Lack of communication regarding inclusion of office bearers in the investigation already initiated.
- The CCI only collects the information required during the investigation without giving any updates to the parties under investigation.
- This does not happen. The CCI is extremely secretive.
- There have been situations where the investigative wing has broadened or narrowed the scope of investigation without any notice to the concerned parties.
- There is no status update.
- There is a lack of consultative process between the agency and the parties.
- The officers of the Commission are often cryptic and expect practitioners to 'read between the lines'. This is an unnecessary hurdle in merger control and does not facilitate dialogue. One has to probe deeper or seek appointments with senior officials to understand what exactly one is up against.
- The agency is like a black hole. The information is absorbed without any update on where the matter is progression and when is it likely to complete.

JAPAN

- Unless specifically requested by the parties, the Japan FTC will almost never update these things. Even in case where the parties request to do so, case handlers often refuse to explain.
- It is very rare for the agency to have meaningful dialogue with the parties about the items listed above during the investigation.
- Partially, through new information requests, interviews, etc.
- The agency would not disclose clearly but through the communication it give us what we can infer from.
- Only when a attorney asked and investigators accept to do so.
- No information is provided to the parties in the case of investigation of violation; information is relatively clearly provided in the case of merger review.

KOREA

- Under case handler's discretion. No special rule for this.
- Korean competitive agency tends to update significant developments of investigation only when they need additional information.
- The agency rarely informs parties of such updates.
- We become aware of that information only at the almost end of the stage. Often we do not know that information before the closing of investigation.
- The KFTC tends to not proactively inform the parties of the significant development of case.

MEXICO

- During the investigation, Cofece is hermetic and does not share relevant information with the parties.
- As noted above, it is extremely difficult to engage in this discussions as information gathered in the investigation is confidential. This is at odds with due process principles.
- During the investigation, all information related thereto is confidential.
- The agency does not provide any information during the investigation stage.
- It is not so easy to obtain the information.
- Very limited. As it focuses on protecting the evidence gathered.
- Agency's interpretation is that no one but the Commissioners has the authority to inform private parties. So, concerns are not informed until they have gone to the Governing Body for a decision to be made.
- The investigation phase is confidential and the Mexican Agency does not disclose any information.

SOUTH AFRICA

- Only if parties request and are entitled to the information.
- It is seldom that our agency updates parties of any such developments unless it is about to refer a matter for prosecution.
- The Commission never feels that it owes this duty to respondents.
- This is normally done on request by the parties, if at all.
- They are slow to advise their theories of harm.
- The agency plays its cards very close to its chest. More transparency would facilitate speedier resolution.
- Theories of harm are often communicated at a very high level, usually with insufficient detail about the evidence relied upon.
- Not really - you know where you stand once a referral to the Tribunal is made. In made instances I have never received a notice of referral or non-referral in matters.
- The agency adopts a guarded and suspicious approach. Very little details are provided and when reasons or explanations are requested, these are often insubstantial.

TAIWAN

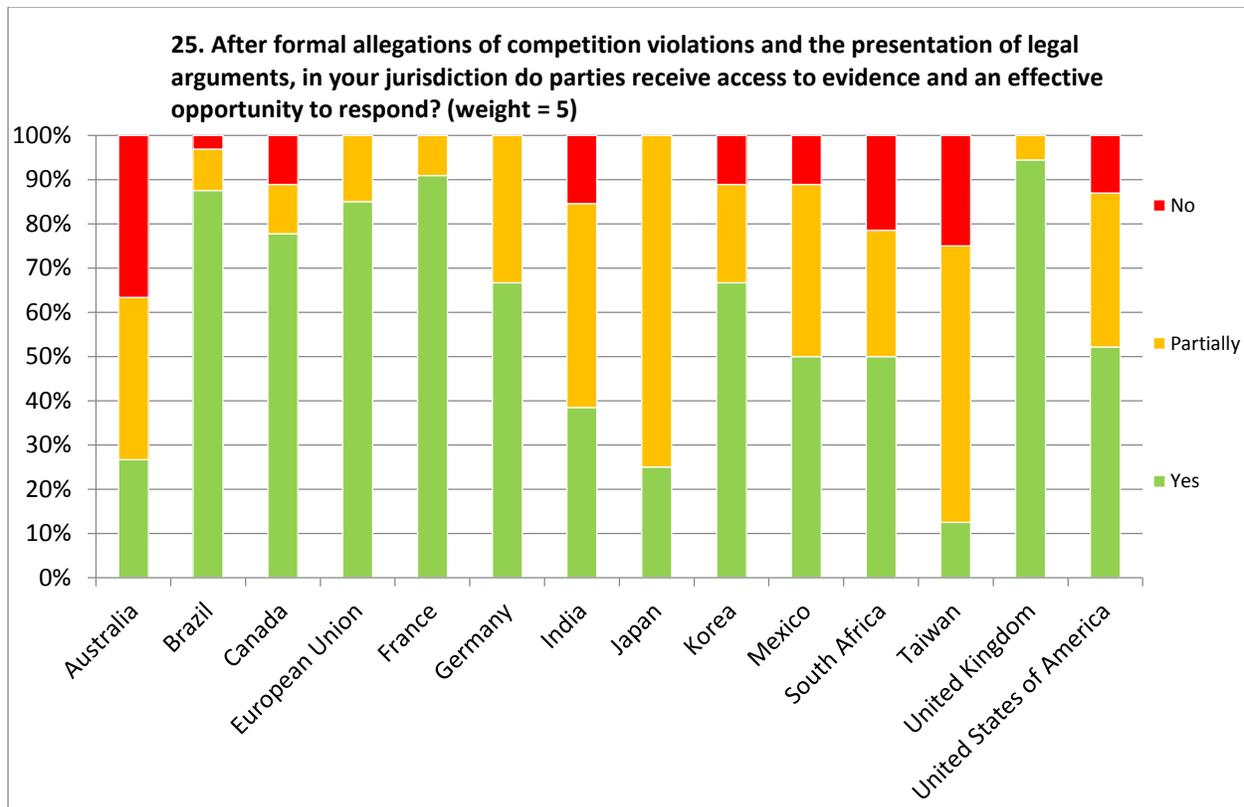
- Never disclose during the investigation
- Authority does not inform the parties about the investigation status at all.
- The parties have to proactively call the case handler to check the status but the case handler sometimes will not give a clear answer. There is no formal mechanism under the law providing the parties' with the right to know the status.
- It really depends on its attitude to that case. The agency will do if that case is high-profile.
- Usually before the result is out, the agency does not disclose any development and updates on the status.
- No investigation status will be disclosed.

UNITED KINGDOM

- I have had recent experience where it has come very late.
- It attempts to but there have been lapses.
- Very random timelines for investigations.
- By the time of opening proceedings full information will be given and access to file, before that what information is given is hit and miss and varies from case to case. this applies also to questions 22 and 23.

USA

- The extent to which DOJ/FTC so do depends on the staff. Most staff are willing to do so, but not always.
- Obama administration encourages less transparency, especially at DOJ.
- Sometimes yes, sometimes no.
- There is typically very little communication in criminal investigations. In civil, merger and non-merger, investigations, it depends on the staff and the matter. There is typically less communication when the agency thinks it may litigate and the lack of communication is directly related to the agency's desire to prevail in the litigation.
- The decision to inform subjects depends on the staff's view of the effect on the investigation.
- In a conduct investigation, not always transparent.
- The agencies generally inform the parties of significant new issues, but the process is uneven.
- It depends on the staff on the case.
- This varies depending on the particular case team involved on a matter. Lack of information (or incorrect information) regarding the status of a particular investigation occurs most often when there is intervention from agency leadership prior to the conclusion of the staff's investigation.
- In criminal investigations, the agency does not always advise of the status.



Explanations (Q25):

AUSTRALIA

- Parties only have the opportunity to access evidence and respond to that evidence if the matter goes to court proceedings (which are required before penalties can be imposed). The agency never discloses evidence outside court processes.
- Only if Court proceedings are commenced.
- The ACCC may provide some evidence to the party under investigation, but usually the source of the evidence is anonymous.
- But only where the matter has been ventilated in court.
- Not with the agency. Access only happens in Court or Tribunal proceedings.
- Nothing like in Europe/ Singapore.
- Subject to confidentiality restrictions.
- Often the agency will merely restate concerned expressed without having undertaken analysis themselves. They do not put complainants to proof and do not provide parties with concrete evidence.
- Mergers no with informal process. Investigation of conduct breaches if it leads to litigation yes, through the court process.
- Only fully at civil or criminal trial stage.
- The agency does not give parties sufficient evidence and only states broad theories of harm.
- Access to the evidence is generally only available once the ACCC institutes proceedings.

- The parties don't get access to evidence but an overview and opportunities to respond generally.
- Australian is a prosecutorial system.
- A summary of the ACCC's case will be provided by letter or in conference. Access to evidence gathered is not available until court proceedings are commenced to prosecute the conduct.

BRAZIL

- Yes, but some information is not made available, when it refers to confidential information of third parties. The problem is that sometimes the agency relies on this information to ground its accusation. There is a conflict between making information available to investigated parties and keeping treatment of third parties as confidential.
- Allegations of competition violations are frequently made collectively and parties must "guess" what applies to each. Access to evidence is not always available, as the agency frequently holds some information confidential until the end of the investigation.
- There is a significant delay in disclosing evidence available.

CANADA

- Once a case is launched before the courts or Competition Tribunal there is better disclosure but never comprehensive disclosure.
- A considerable amount of evidence is protected by confidentiality and public interest privilege.

EUROPEAN UNION

- Access to evidence is necessarily limited by the protection of business secrets. These may be protected to an extent that it is worthless looking at the documents in question because the entire page is blackened. Also, the period of time to digest the evidence and respond tends to be extremely short given the amounts of evidence that may have to be examined.
- There is an oral hearing but this could be a lot improved. More and more this is just a sequence of presentations. There is no cross-examination of parties. The hearing is not before a neutral body.
- Note that access to file rules in the EU are in need of substantial revision as there is no mechanism for disclosure under protective orders or confidentiality rings (because of the absence of sanctions for breaches by individuals). This leads to sometimes inadequate disclosure and cases being dragged out for years (and sometimes failing where rights of defense are asserted aggressively).
- Largely yes, and the agency compares well to other competition agencies.

FRANCE

- But over than 96 % of the agency's "statement of objection" are followed by a fine...
- Parties are always requested to respond within weeks to a document it took years for the authority to draft.

GERMANY

- The deadlines to respond to an SO are often too short in particular in complex merger proceedings.
- Depends on type of procedure. Where there is a Settlement, there is only limited Review. During proceedings access is by Standard answer denied, even if it cannot be foreseen how partial access would hamper the investigation.
- Depends on division and to the evidence the agency concludes is the most important evidence.
- In normal procedure yes; in settlements (apparently nowadays the majority of the cases) no.
- While access to the file is granted, the records on file are often poor as regards actual investigations.

INDIA

- The agency does not issue any formal statement of charge. The parties merely get an opportunity to respond to the report of the investigator. A party's ability to defend itself is impacted if it is not given distinct article of charge along with evidences that are relied upon for such charges. There have been cases where the agency has imposed penalties on charges which were not even made by the investigator.
- Access to investigation reports and documents is given but not to internal files/comments.
- CCI merely forwards the investigation report to the parties without informing its viewpoints and points of concurrence/disagreement with the recommendations in the report. The parties under investigation are left in the theory of competitive harm proposed by CCI.
- Typically only inculpatory evidence is provided and not exculpatory. Also, the fees for obtaining photocopies of the documents is extremely high.
- The access to evidence is an extremely cumbersome process. The non-maintenance of records in proper categories makes it even tougher for the respondents to access all the data relied on, especially in cartel investigations.
- In some cases, the time provided is not sufficient, but in most cases an effective opportunity to respond is provided.
- Though the report of the DG Investigation is made available to parties, there is hardly any opportunity to cross-check with the DG on the rationale or approach adopted by them for coming to the conclusion, there is no occasions to cross examine persons providing evidence to the agency.

JAPAN

- Disclosure is limited to the information provided by the subject parties and the information which my agency considers to support the violations. In other words, my agency may not disclose the information which can rebut the allegations of my agency.
- Only supporting evidence is disclosed. Copy of evidence is not permitted, except for evidence seized from the party.
- Access to evidence is limited (usually there is no access to exculpatory evidence).

- Although the parties may view some evidence, the access method is very limited and is not effective. The timeline to respond is also very tight.
- Only incriminating evidence.
- Access to information from third parties are limited, JFTC does not disclose any evidence which may undermine JFTC's allegation.

KOREA

- Only evidence cited by the examiner in support of his examiner's report (SO) is available to respondents. Such exhibits may be withheld from respondents on the basis of 3rd party confidentiality, with no provisions for outside-attorney review. Evidence collected by the examiner that he does not wish to rely upon (i.e., exculpatory evidence) is not available to respondents.
- The agency allows access to some material evidences but not all.
- The evidence which the case examiner selected to attach to the examiner's report is only available upon request, and sometimes the preparation period of response is not sufficiently given.

MEXICO

- After the statement of objections (DPR), the targets of an investigation get access to the file, except for the confidential information. However, third parties are not formally considered parties of the investigation process and therefore their access to the file is precluded.
- Yes, except that the parties do not have access to information classified as confidential by the agency, even if the same is material to the defense of the charged parties.
- There are legal limitations.
- But only under legal basis.
- Yes, except for confidential information or protected by immunity.
- The time to review the evidence is limited and the access to the file is difficult.

SOUTH AFRICA

- To the extent that such information is not confidential or in instances where NDAs have been signed by the parties legal and economic experts. At times, even after NDAs have been signed, the agency may still withhold certain information.
- Our agency prefers to play its cards close to its chest, keeping the respondents guessing for as long as possible and (possibly) hoping that the respondents will either ask for settlement or incriminate themselves.
- Some information, particularly in cartel matters where there has been a leniency application is regarded as restricted and not disclosed.
- Eventually.
- Parties are very seldom provided access to evidence, in some instances even after litigation proceedings are underway.
- Only to certain evidence.

- The rules and application of the rules around access to records and evidence are in flux, with conflicting approaches being adopted. The underlying evidence is very hard to come by.

TAIWAN

- Files review and access to evidence are subject to restrictions.
- Although the evidence obtained by the authority may be made available to the party under investigation, but it is quite often that most of evidence are heavily redacted that the party under investigation cannot have a full picture of those evidence. Thus, lack of opportunity to respond.
- The parties can apply for file review but sometimes the scope of documents permitted for review is very limited.
- This is a complicated issue. TFTC does provide the right to file review, but it can happen before formal allegations. Once formal allegations are made, they are made in a Commission Order because TFTC does not have a procedure for providing formal allegations of competition violations prior to issuing a final Order.
- It will be subject to the TFTC's decision on the scope of the review.
- No access to the evidence usually before the court's review.
- The agency may still claim that some information confidential and does not disclose to the parties.

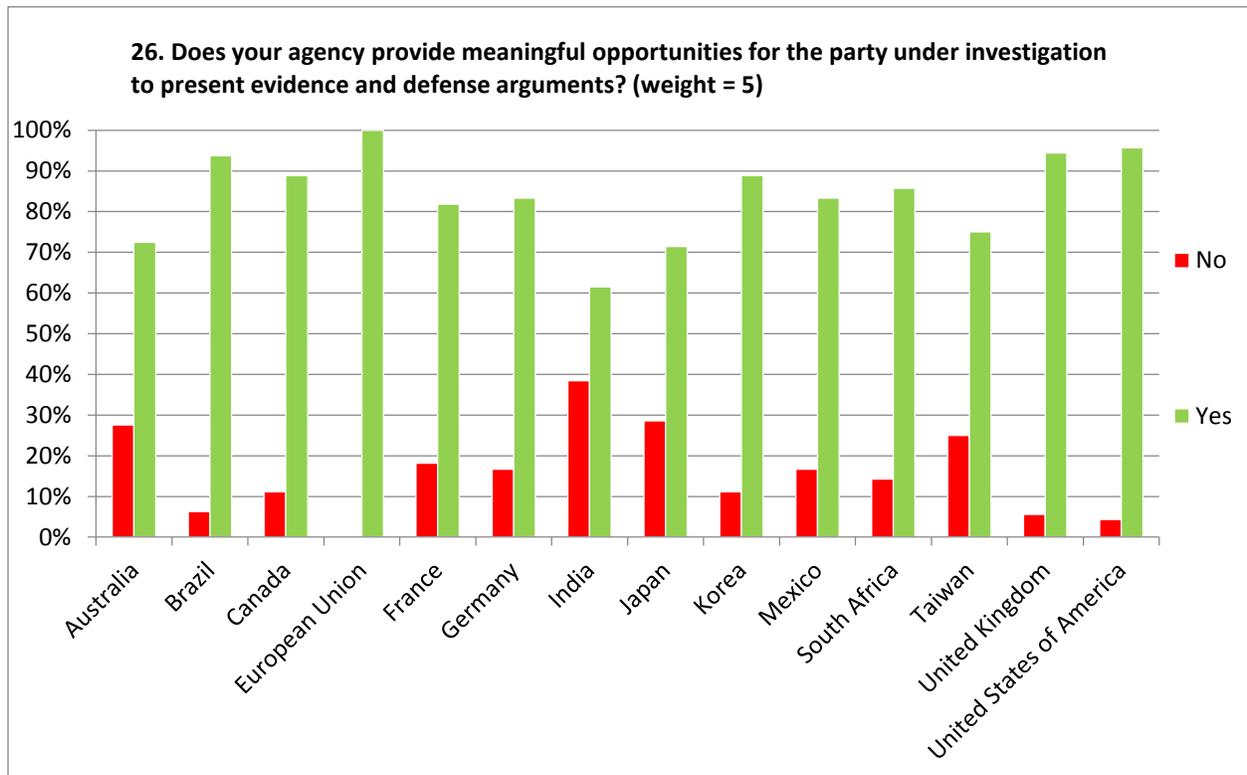
UNITED KINGDOM

- Limited access may be granted to a leniency applicant or a settling party.

USA

- The parties may not receive access to all of the evidence submitted because of confidentiality restrictions on third party information. However, if the charge is disputed there is such access.
- The parties do not get any access to the file unless/until litigation is filed. At best we get an oral explanation of the agency's concerns.
- Confidentiality restrictions and litigation gamesmanship can prevent sharing.
- Depends on court rulings.
- In sufficient access by parties to third party information.
- The FTC and DOJ do not directly disclose information from any third party during the investigation in order to protect the confidentiality of third party information and preserve grand jury secrecy and also to encourage people to complain and to provide information by removing the possibility of retribution. Agency economists sometimes share the nature and results of their analyses, but they have become increasingly non-transparent in the last several year, particularly where the agency might litigate.
- Often the only way to learn what evidence the agencies are relying on is to engage in formal litigation with the agency.
- Only after legal proceedings have commenced is access provided.
- Not at the agency level, but parties can contest in court.

- Parties have a right to discovery of the agencies' evidence as part of a legal proceeding challenging the conduct/transaction. Parties do not have a right to evidence during the investigation stage due to confidentiality restrictions.
- Access to some information is provided during the investigation phase, but only at the discretion of the enforcers. Access to full information is provided after court proceedings are instituted.



Explanations (Q26):

AUSTRALIA

- Usually it does provide adequate opportunities. However, sometimes the ACCC will commence proceedings without providing those opportunities.
- Again it is patchy. Sometimes that opportunity is there; often the ACCC adopts a very opaque approach to its enforcement investigation.
- Only the courts permit this.
- Opportunities to engage are resisted, calls are not returned and they are redirected to other persons to avoid interactions.
- There is no formal process for this to occur and the manner and nature of such opportunities are heavily dependent on the particular staff involved.
- Meeting can be scheduled with the regulator.

- While parties are free to present evidence and arguments during the course of an investigation, it is incumbent on the party to take the initiative to do so; the ACCC does not typically seek out that information.
- It is an informal process. Often, the agency is committed to its view and not open to consider changing the view, despite listening to you.

BRAZIL

- The agency only allows the parties to request production of evidence with the defense petition. After that, and despite of the right of the agency to produce evidence (at any time, any type of evidence), the parties can only disclose documental evidence.

CANADA

- Not meaningful as rarely will they modify their initial preliminary findings.
- Yes, but if by meaningful you means they will keep an open mind, then no.

GERMANY

- In principle yes, but in merger cases the parties learn late in the process what the concerns are and the risk is that the case team will not change its mind.
- They do, however, generally speaking at a point in time when their minds are made up.
- In settlement proceedings there is no such opportunity. Since many cases are settled there are in principle no rights of defense.
- In that respect they are fair. Does not mean, however, that they really consider it.

INDIA

- Limited time for a written response and extremely limited time for oral arguments is allowed.
- Eventually, this does happen after the parties insist upon transparency and dialogue. Delay in mergers and acquisitions have high economic costs, which the Commission appears oblivious to.

JAPAN

- These opportunities are not fully provided in the Japanese antitrust law. The parties can present defense arguments only after they receive draft orders, which should be too late. Case handlers, however, often accept defense arguments from the parties in any stage of its investigation, although this is not expressly provided as a right of defense under the Japanese antitrust act.
- We have not experienced that the opportunities provided are indeed meaningful.
- But almost never take into consideration.

KOREA

- There is no statutory or formal procedure for such presentation of evidence or argument. It has been done only voluntary basis in practice. However, companies are often hesitating to do this because they have concern that such efforts would not do good for them and the KFTC will use

that defense argument or evidence to make the case - for example, if they find the evidence presented by the party contradicts to what they already have, they will try hard to find more to support they allegation, etc.

MEXICO

- Only after the investigation has concluded a party under investigation is able to submit evidence and defense arguments by answering the statement of objections.
- Legal basis.
- Parties are denied access to evidence on the agency's interpretation of confidentiality. Agency has the right to accept or reject expert witnesses. Defendants are frequently left without information and without the possibility of appointing an expert witness. Agency also denies the defendant's expert witness, when they are accepted, of the information that they used to prepare their own models.
- Since the investigation phase is confidential, it is not possible to provide evidence.

SOUTH AFRICA

- This is usually as a formality.
- Yes, although the investigators are often unreceptive to defense evidence once a theory of harm has been formulated.

TAIWAN

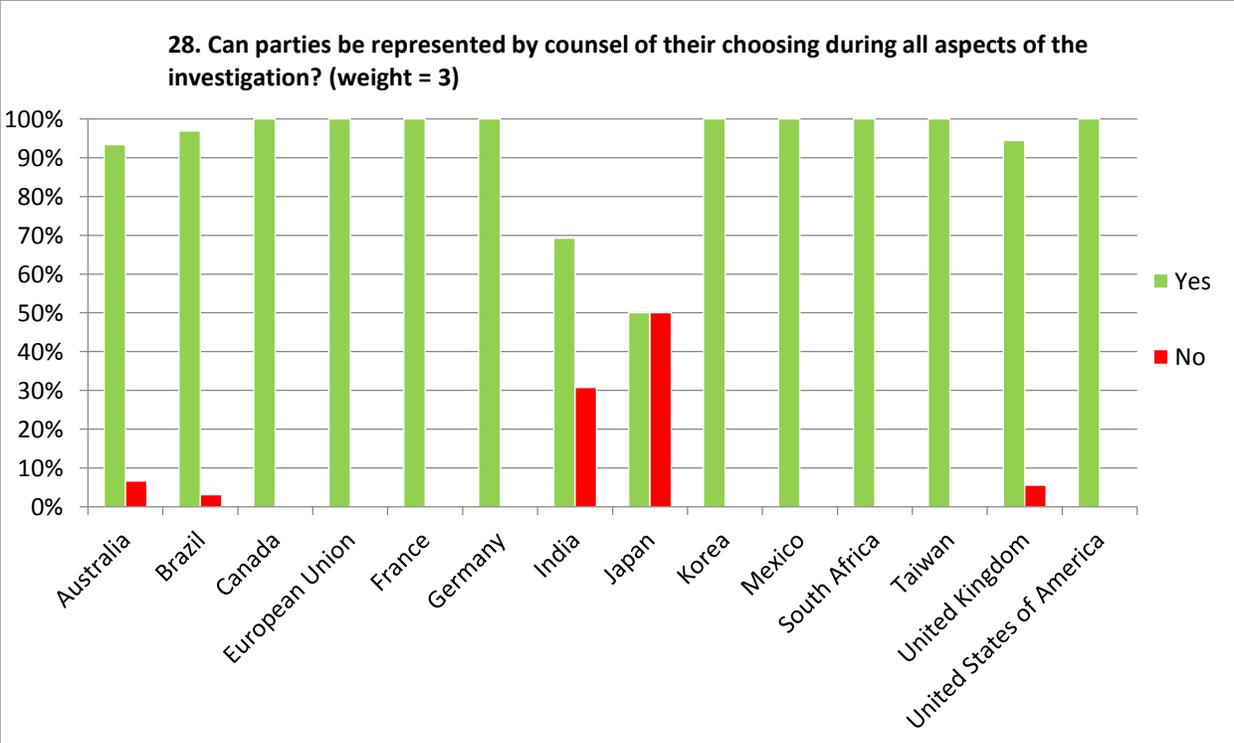
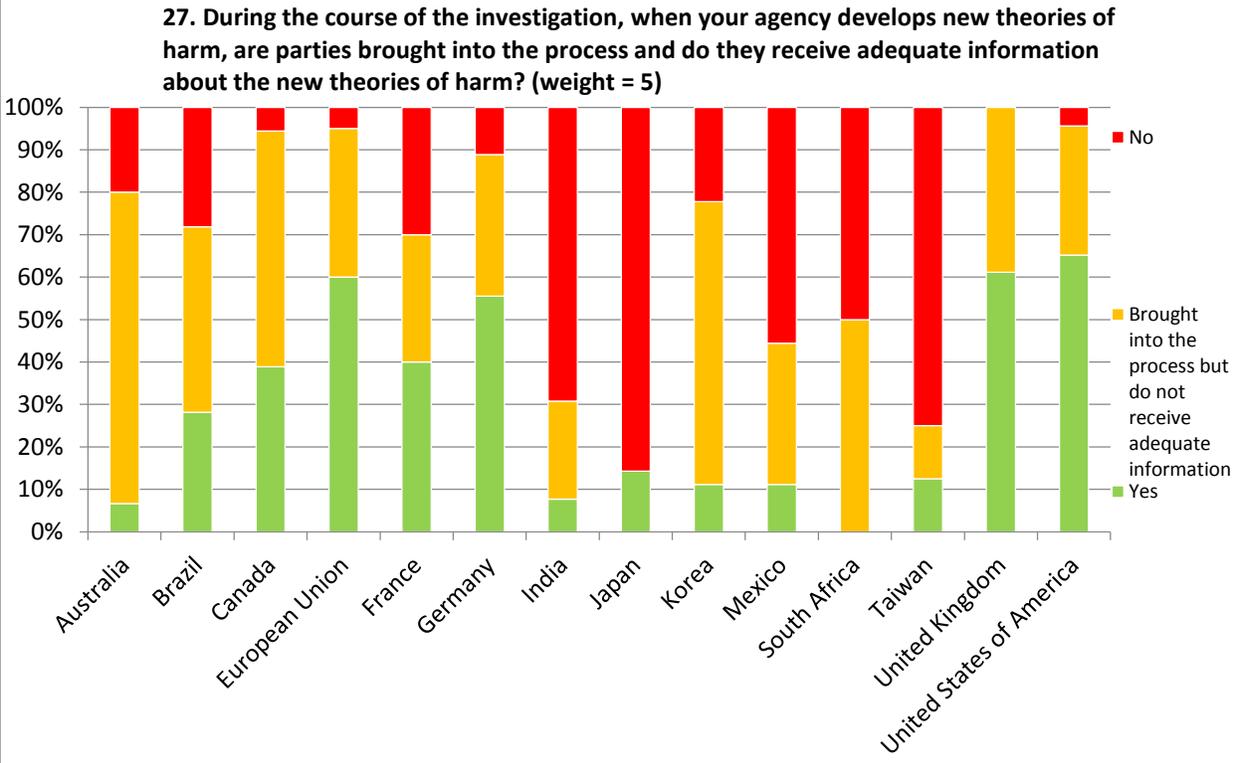
- As the authority does not send its investigation report to the party under investigation before the decision is made, the party under investigation has no opportunity to defend its position.
- TFTC does not issue a formal document like an SO which crystallizes their evidence, theories, and thinking, and gives a party a chance to provide a meaningful response to their concerns. TFTC does allow for meetings with the case team, but these are typically more of a method for responding to the case team's questions.

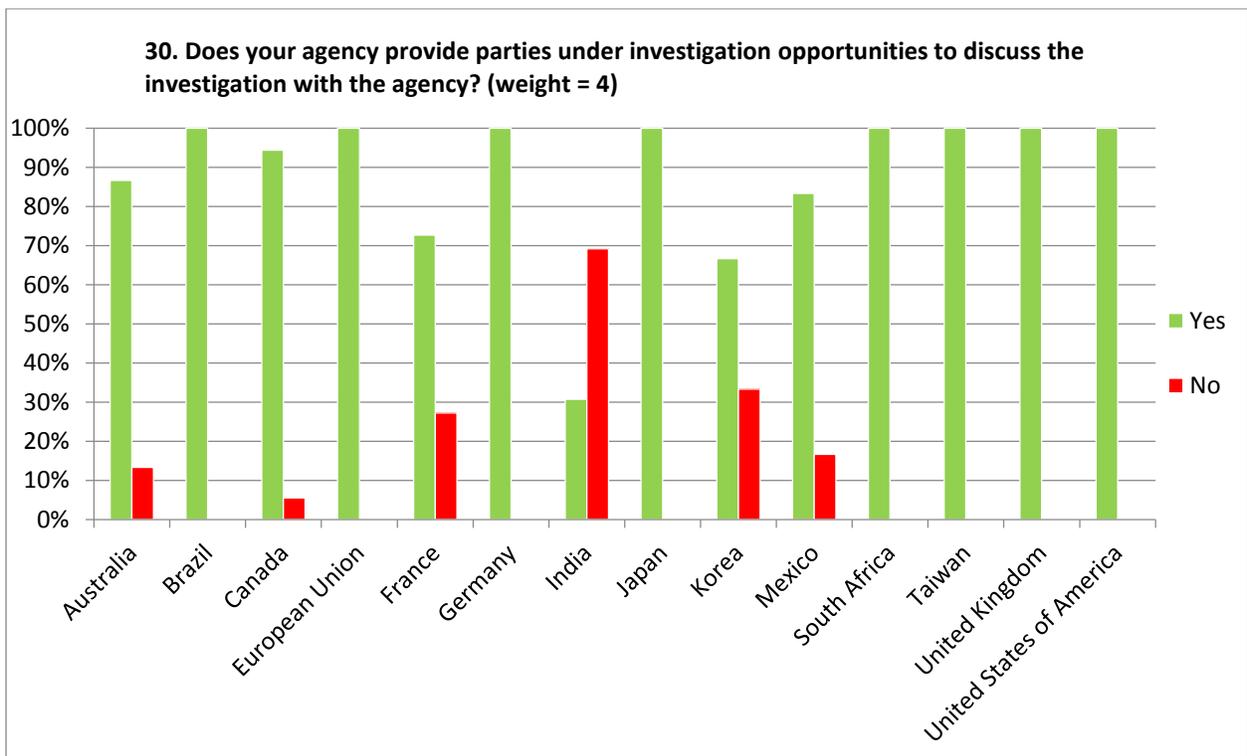
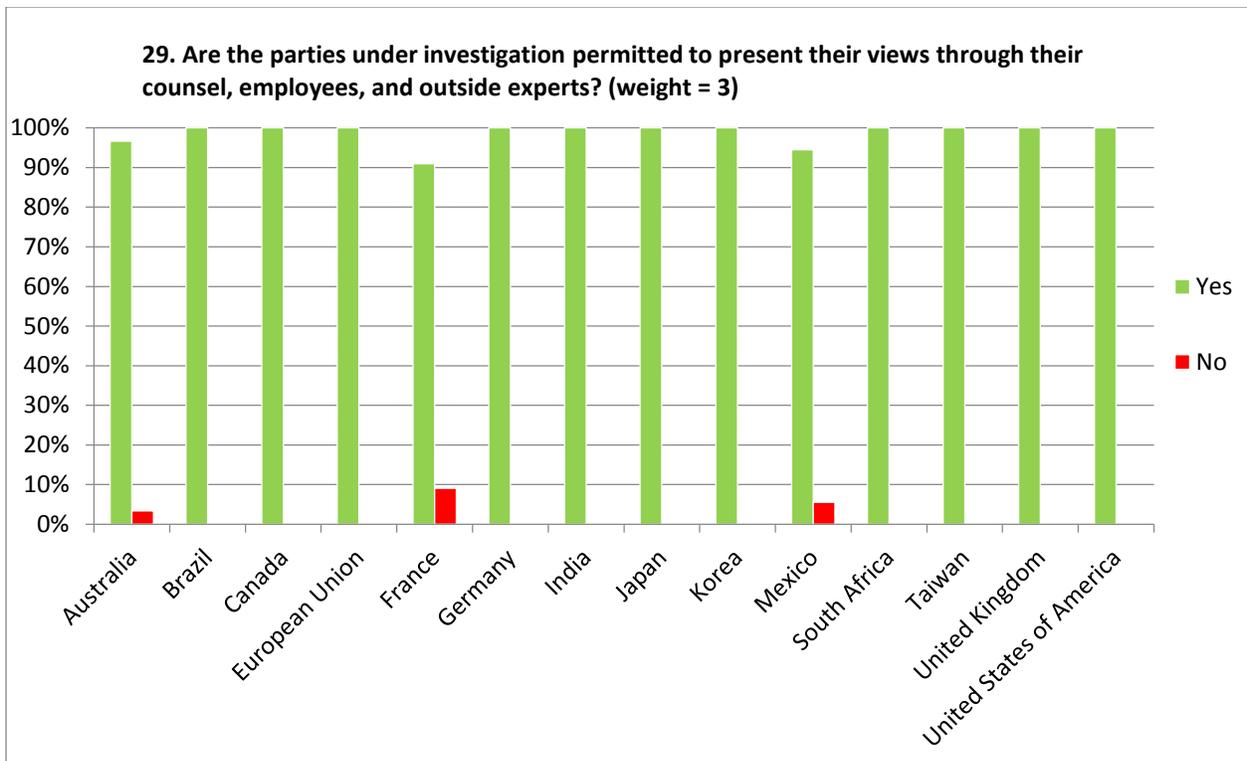
UNITED KINGDOM

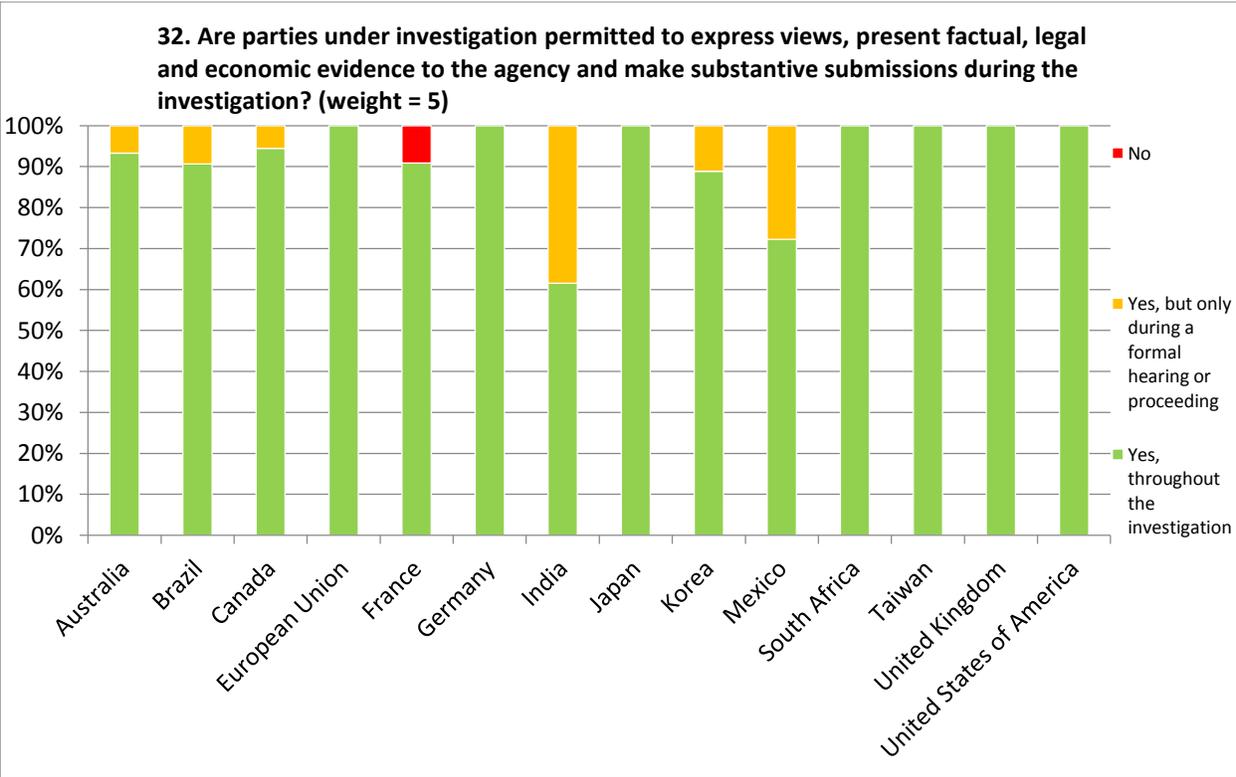
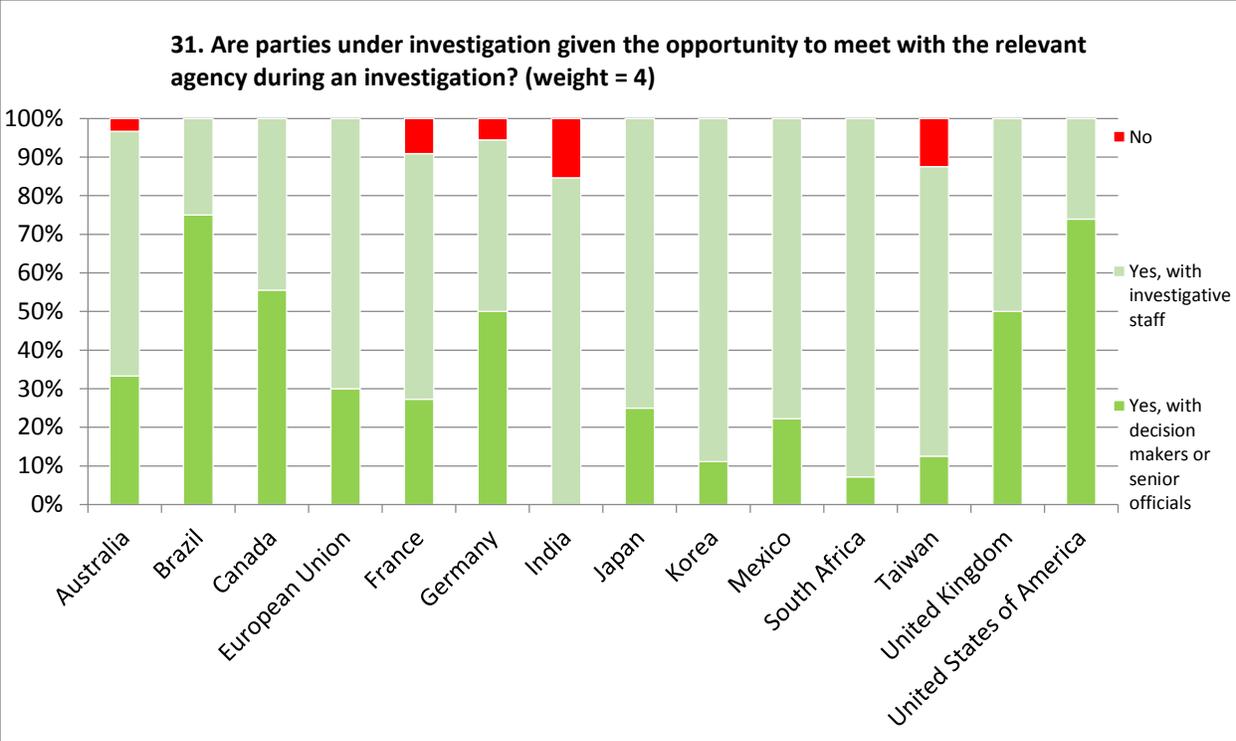
- They are an opportunity to provide both written evidence and oral hearings.
- There is a formal opportunity to respond in writing and orally although some practitioners question the effectiveness of oral hearings and whether responses are reviewed impartially and objectively once formal charges have been set out in a Statement of Objections.
- In CA98 cases yes. In EA02 cases while there are hearings they are not a "meaningful opportunity" for defense they are more focused on answering agency questions.

USA

- The FTC in particular frequently leaks confidential information, including the status of ongoing confidential investigations, to the press.







Explanations (Q32):

AUSTRALIA

- There is no formal hearing by the agency. If the matter proceeds to Court proceedings, opportunities are provided at that stage.

BRAZIL

- Regarding question 31, answer should be yes with investigative staff AND yes, with decision makers and senior officials (but I could not click both simultaneously).
- The right of the respondents to request production of evidence (testimony, hearing of experts, expert proof) is only allowed up to the delivery of the defense petition (the discovery phase follows to the delivery of defense petitions).

GERMANY

- They always hear what you have to say.

INDIA

- This is not stated in the Japanese antitrust law, although practically case handlers accept this.

JAPAN

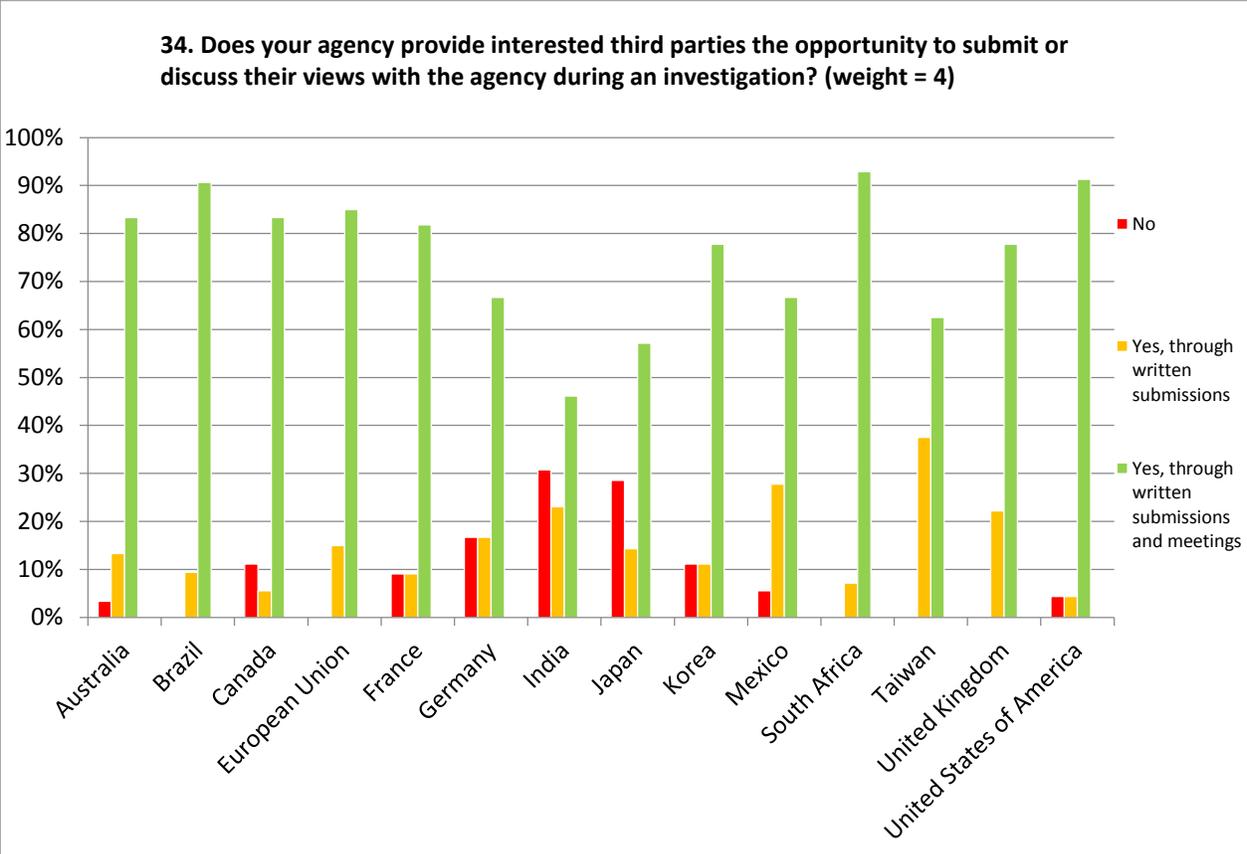
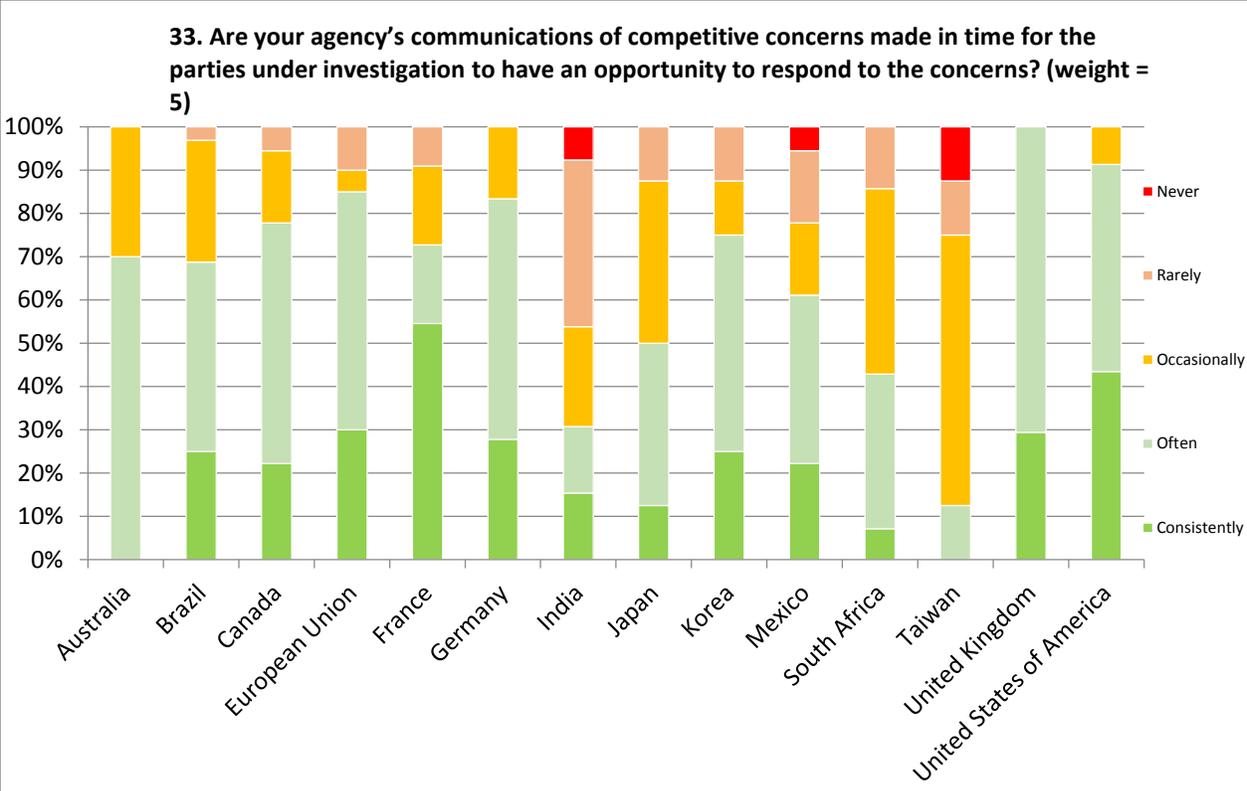
- Yes, the agency will not refuse such opportunities but given a lack of transparency regarding the investigations, parties would need to pursue this pro-actively without underlying information or an indication of the agencies views/preliminary views.

SOUTH AFRICA

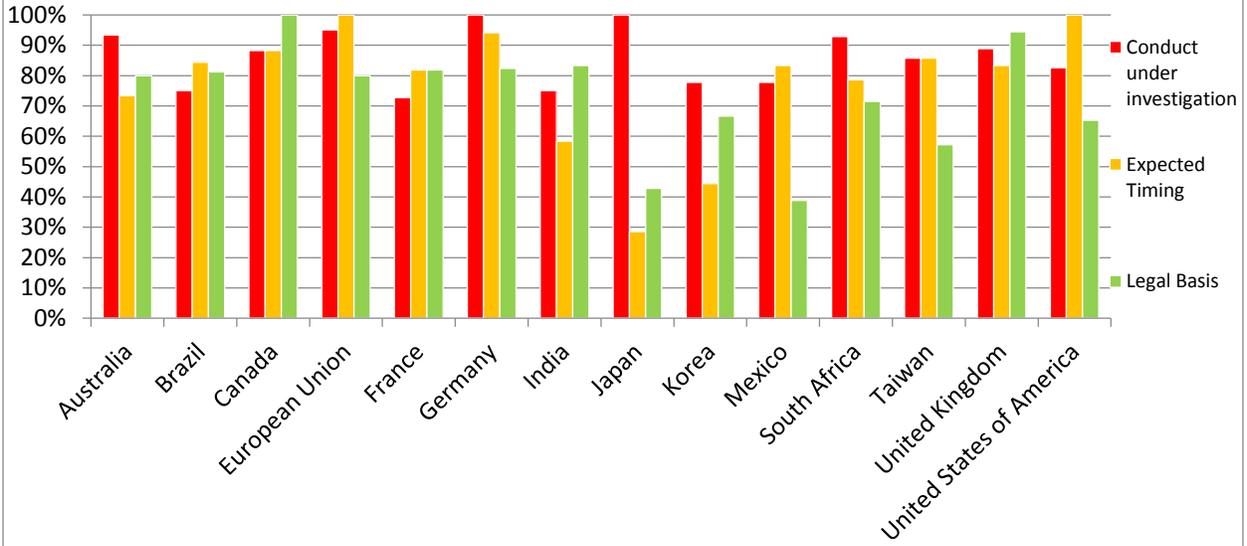
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UNITED KINGDOM

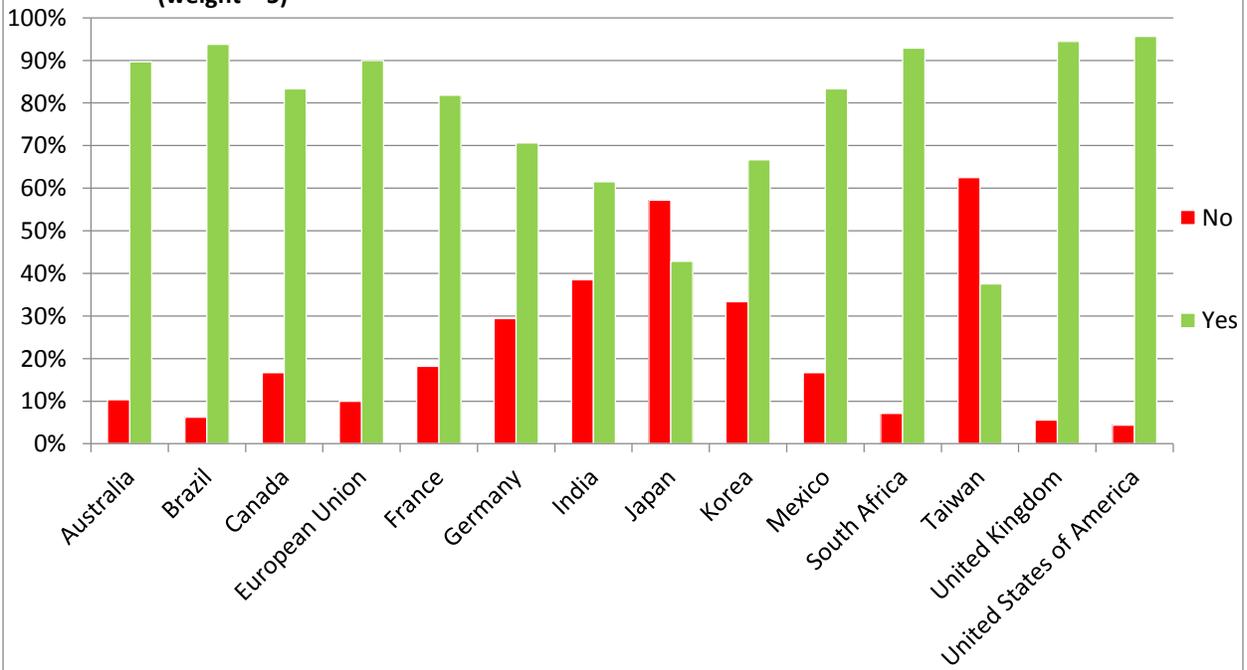
- Practice before the opening of formal proceedings may be variable and the parties may, at that stage, not have enough information to present arguments against the opening of proceedings.



35. When making determinations of confidentiality, does your agency take into account The commercial interests of the party, the procedural rights of the party under investigation and the overall public interest in the efficiency and transparency of enforcement efforts? (weight = 4)



36. Does your agency have clear and public criteria for what information is entitled to confidentiality protections and how to submit and designate confidential information? (weight = 5)



Explanations (Q36):

AUSTRALIA

- In some areas it is clearer than others. For example, in the cartel area the issue is quite clear but less so in other antitrust / competition law investigations.
- The agency considers all third party information provided in an investigation to be confidential.

BRAZIL

- No, it does not have a clear criterion, we need to present what information is considered confidential and the agency must determine whether it may or may not be confidential, each case may be defined differently.

CANADA

- The criteria are not clear and public.

EUROPEAN UNION

- However the problem is more that certain confidential information that is needed for rights of defense are disclosed without confidentiality ring/protective order restrictions, effectively forcing the EU to make a choice between rights of defense, rights of confidentiality, and dropping the case.
- Yes, however my feeling is that while some of the criteria are consistently applied and a common practice has developed (e.g. presenting ranges for market shares) in other areas the determination is not always consistent and depends more on the appetite of the respondent to make extensive confidentiality claims and/or the time pressures the agency is under.

FRANCE

- Criteria of what can or cannot be protected is not clear and arbitrary, depending on what the needs of the investigative teams are.

GERMANY

- There are not guidelines on what constitutes confidential information, but an ongoing (unpublished) practice of the FCO which is fairly transparent for practitioners.
- Standards are very different depending on which division is handling a case.
- You have to argue why information is "business secret"

INDIA

- The Regulations describe confidentiality provisions. However, the agency has not come out with any explanatory notes or provided much clarity on it in terms of its experience in this area.
- Ad hoc.
- There is no clear cut guidelines. More often than not counsels seek confidentiality on certain sensitive issues based on practice experience.

JAPAN

- Confidentiality is judged by my agency on a case-by-case basis.
- This depends on case-by-case discussions with case handlers.
- There is a public criterion, but it is not necessarily clear to provide sufficient guidance for the parties.
- No general rules are published.

KOREA

- I've never heard of criteria for confidentiality protection.
- The agency considers various factors including trade secrets, but does not have clear guidance.
- Personal information, business secret are categorized as confidential information but there is no detailed rules or guidelines, at least publicly available, on handling the confidential information by the officials at the KFTC.

MEXICO

- These criteria are set forth in transparency statutes.
- Yes on how. There is also a legal definition of confidential information. However this is not fully clear on scope and exclusions, specially relating to immunity concerns or other particular situations.
- There are no guidelines. The Agency's determination on confidentiality are made based on its own litigation strategy. If the Agency believes it would need information to support its case, then the info is included in its brief regardless of of the commercial interests of the party. If the Agency believes allowing a defendant access to information would complicate its case, then the information is deemed confidential and the defendant is denied access.
- Many decisions are so heavily redacted that it is impossible to understand the Commission's reasoning. No clear guidelines as to what is considered confidential and no consistent practice to afford or deny protection.

SOUTH AFRICA

- No criteria of what constitutes confidential information but the confidentiality regime works.

TAIWAN

- Generally subject to discretion
- The Taiwan Fair Trade Commission has sole discretion to determine confidentiality on a case-by-case basis. There is no clear guideline/criteria for this issue.
- In terms of submitting and designating, yes. In terms of criteria for showing investigated parties third party information, TFTC allows parties to over designate, and thereby withhold information from disclosure to the investigated party.
- No publish available information.

- It is unclear how the agency determines any information confidential and verify whether the undisclosed information is truly confidential.

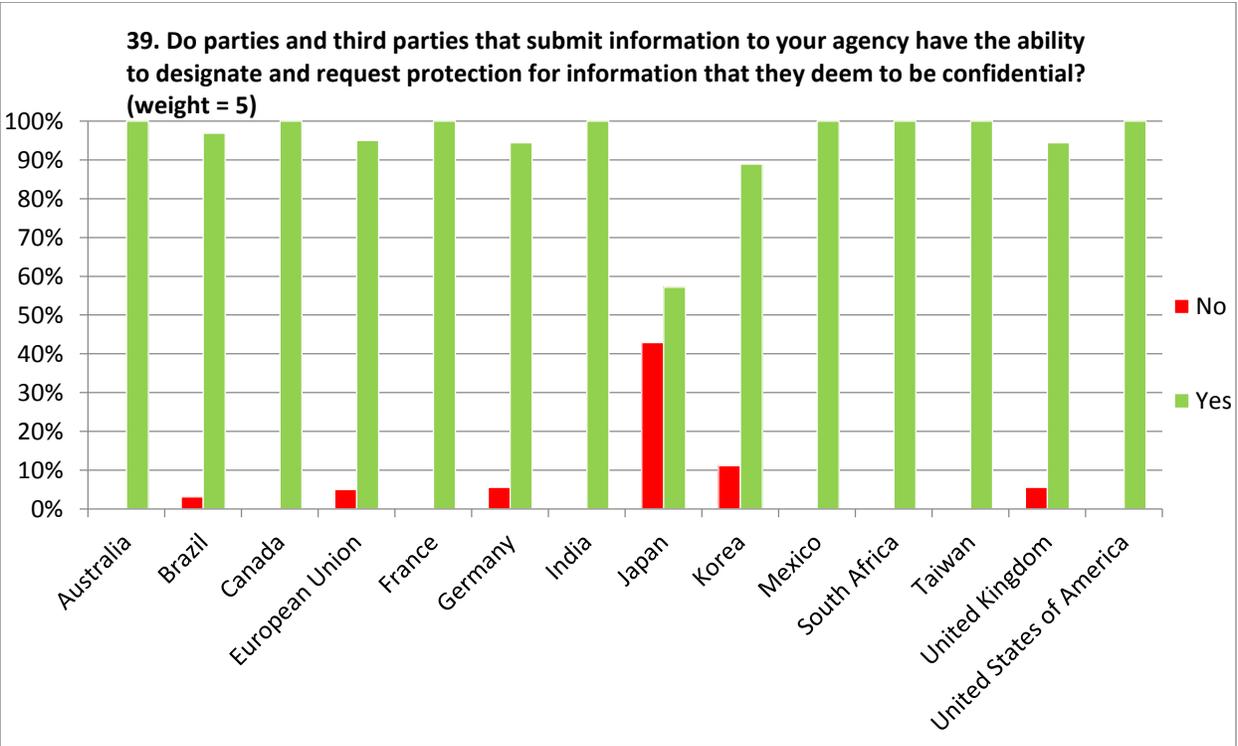
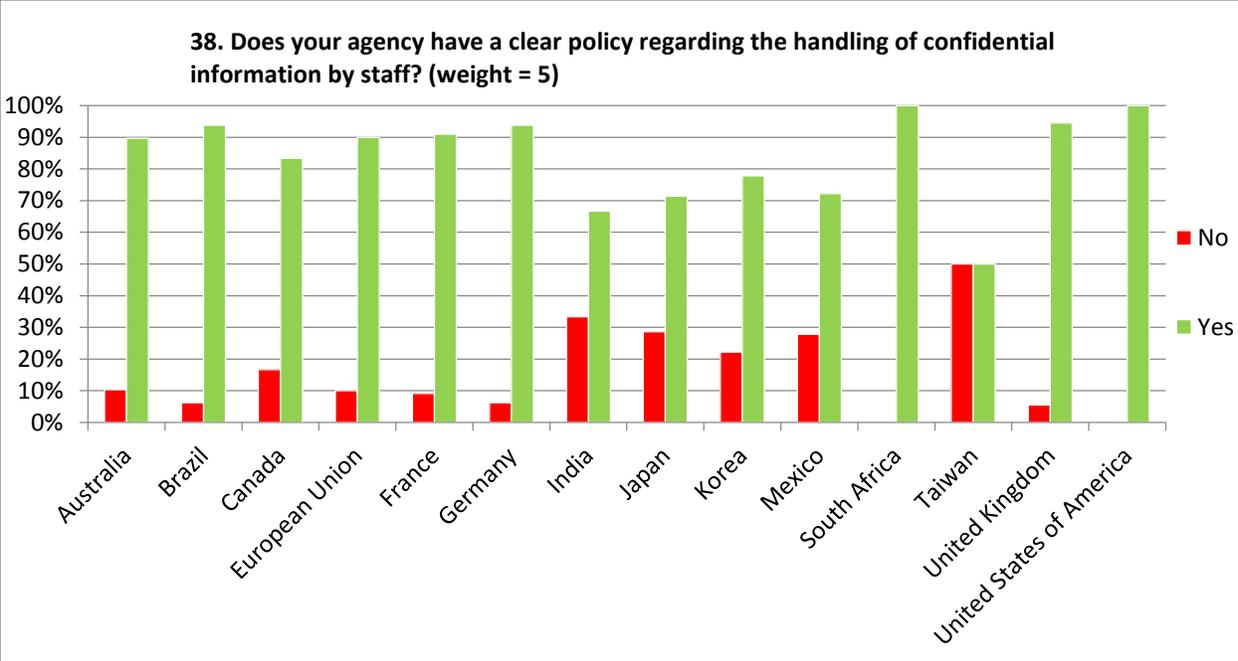
UNITED KINGDOM

- This is a "yes, but" answer. There is a concern that the agency fails to properly take on-board some valid confidentiality and substantiated concerns.

USA

- Parties designate material confidential, but the agency does not always indicate if has accepted the request for confidentiality.





Explanations (Q39):

CANADA

- The CCB must keep such information confidential, subject to exceptions, including the CCB's right to use that information to enforce the Act, during, for example, Competition Tribunal

proceedings. Once proceedings have commenced, the CCB has certain disclosure obligations that override confidentiality. However, protocols are put in place to protect confidentiality.

EUROPEAN UNION

- See above re absence of confidentiality rings and the implications.
- The can request, but the European Commission can conclude differently and reject.

GERMANY

- In practice, in investigations other than merger cases the FCO does not provide a non-confidential version of submissions to third parties' lawyers in access to file, but the actual confidential ones and leaves it to the lawyers of such parties to determine which information is confidential; only if a decision is finally published the FCO amends it to meet confidentiality claims.
- However, the Authority does not necessarily follow the assessment as "confidential."

INDIA

- However, the confidentiality treatment is afforded only at the discretion of the agency.

JAPAN

- Not all requests for protection of confidential information is taken by my agency.
- This is not provided in the Japanese antitrust law. This depends on case-by-case negotiation with case handlers.
- We may designate and request protection, but it is not necessarily clear to what extent it would be considered.

KOREA

- The agency considers parties' request but has its own discretion.

MEXICO

- The Agency does not need to agree with the party making the submission. The Agency's decision is made based on its own strategic interests.

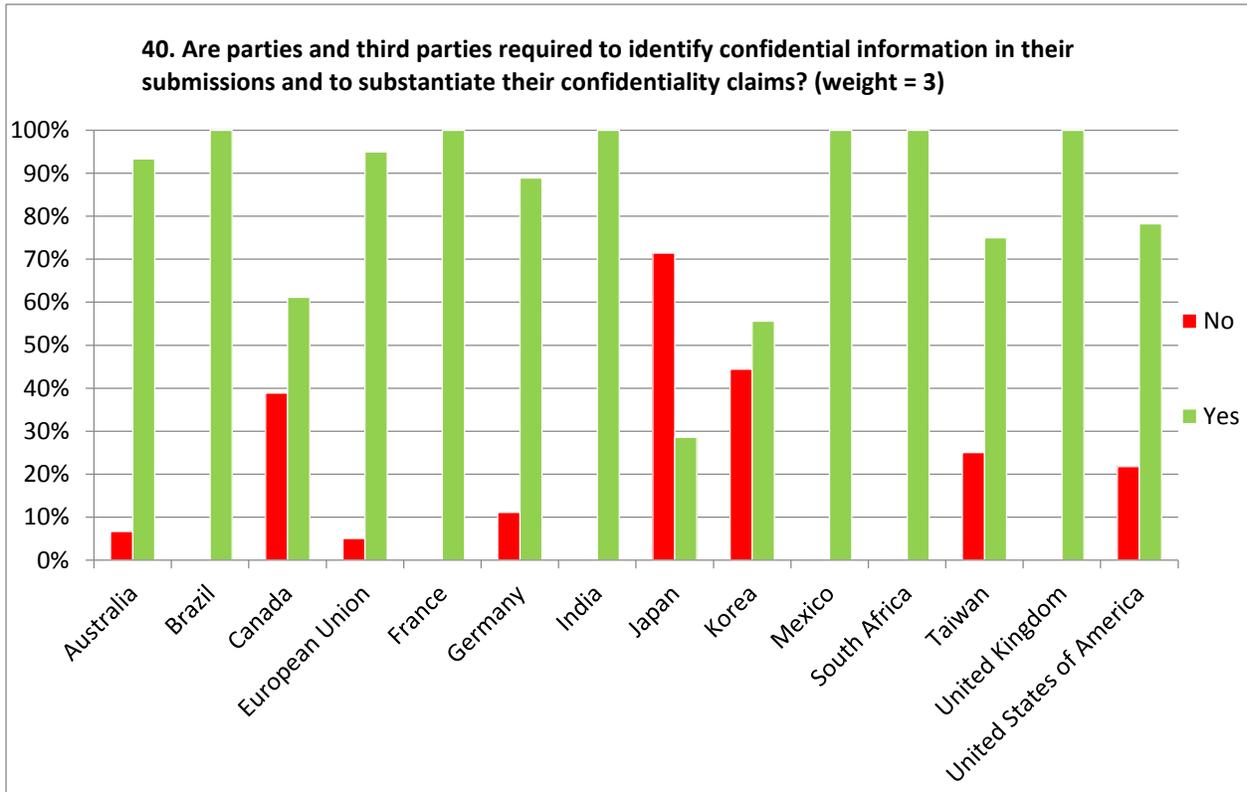
TAIWAN

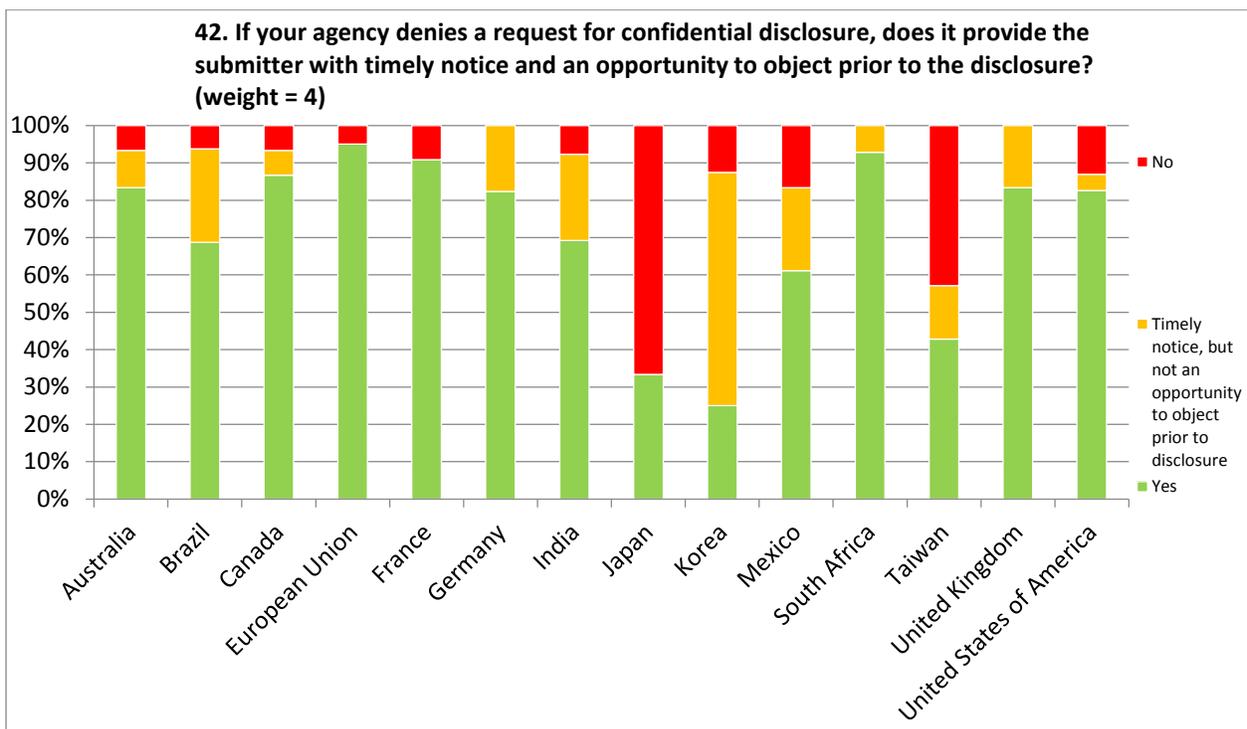
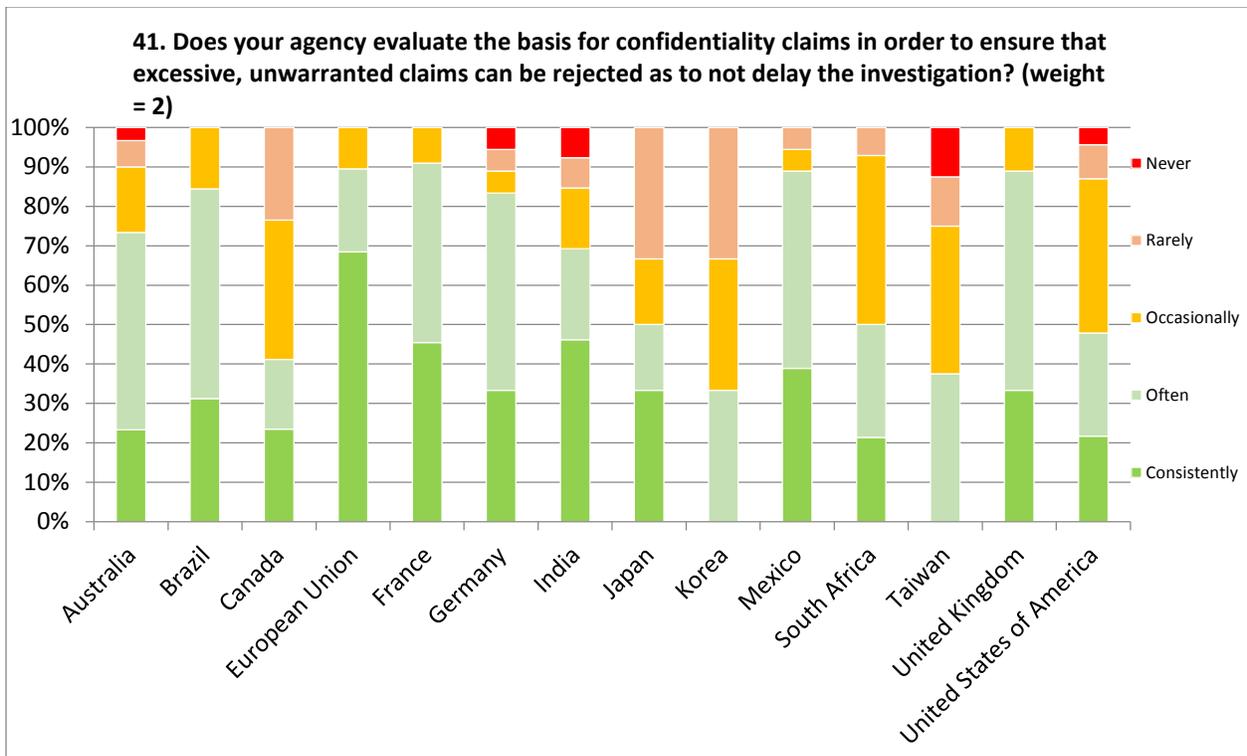
- The process exists, but it allows third parties to over-designate confidential information, and there is no ability to appeal or have an independent party evaluates improper designations.

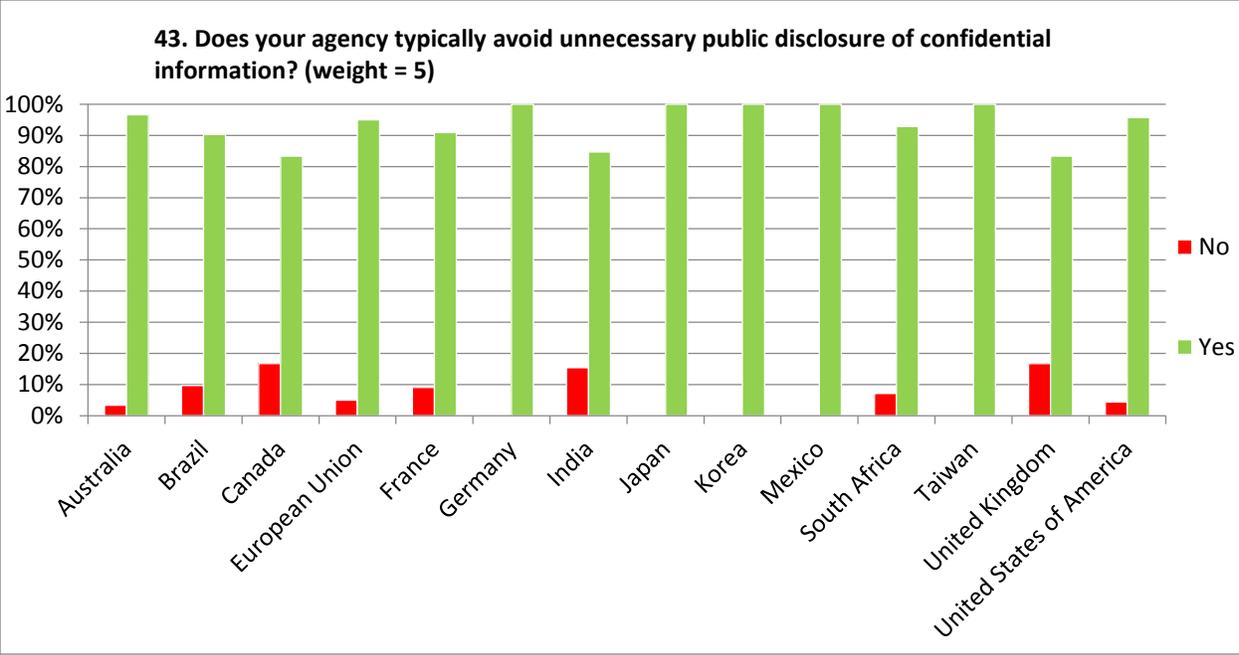
UNITED KINGDOM

- This is a "yes, but" answer as there is a concern that the agency fails to properly take on-board some valid confidentiality and substantiated concerns.

- With regard to question 38 the agency may well have a clear policy but it is not transparent, particularly as regards the responsibilities of staff members. The agency is accorded by law extensive sharing rights with other agencies which would be beyond reasonable if universally applied.







Explanations (Q43):

BRAZIL

- The agency often adopts a passive role. If a request for confidential treatment is made, the agency frequently grants without much substantiation.

EUROPEAN UNION

- The agency occasionally makes prejudicial public statements about pending cases
- See however above re absence of confidentiality rings and the implications

GERMANY

- Not always though.
- They truly protect leniency applicants.

INDIA

- In the erstwhile cement cartel order, the then Chairman of the CCI proceeded to disclose the order in public domain with a clear prejudice, before the actual order even came out.

MEXICO

- But errs on the side of too generous with confidential request. Impossible to understand half of their reasoning.

SOUTH AFRICA

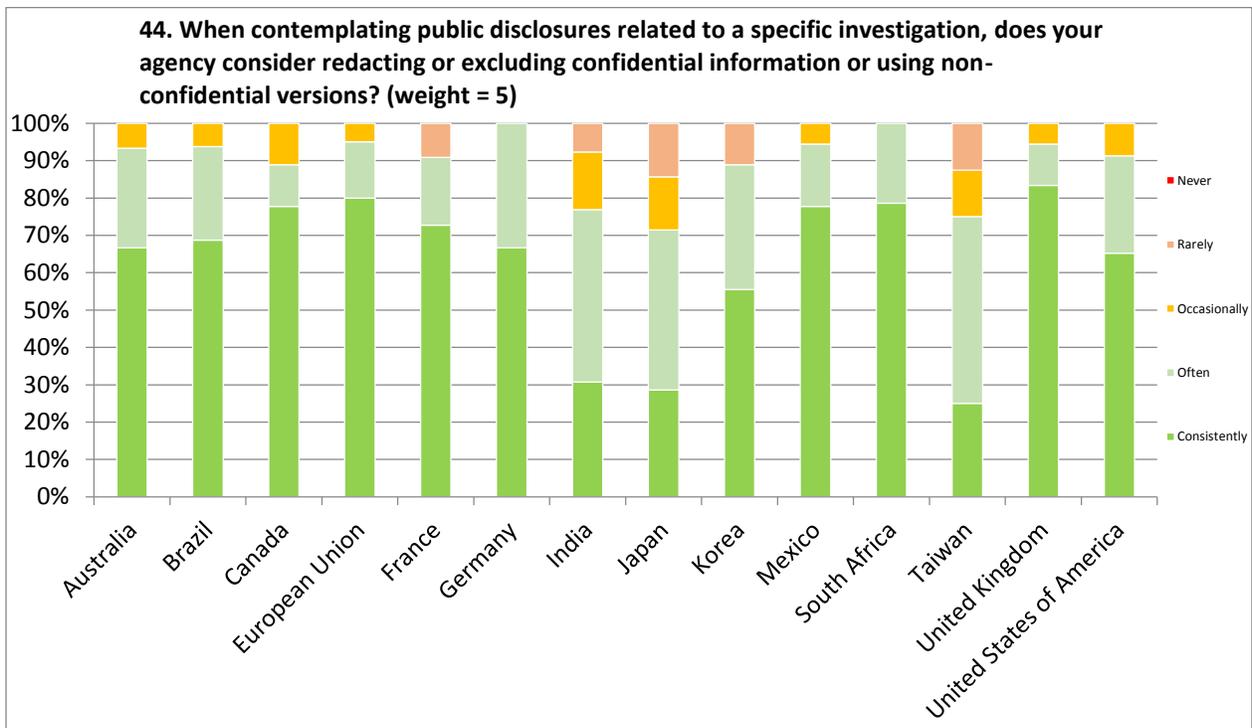
- We have had two relatively recent experiences of confidential information being provided to third parties due to the agency failing to inform the parties of the anticipated disclosure and verify the agency's approach to confidentiality. However, in the majority cases, the agency protects confidentiality.

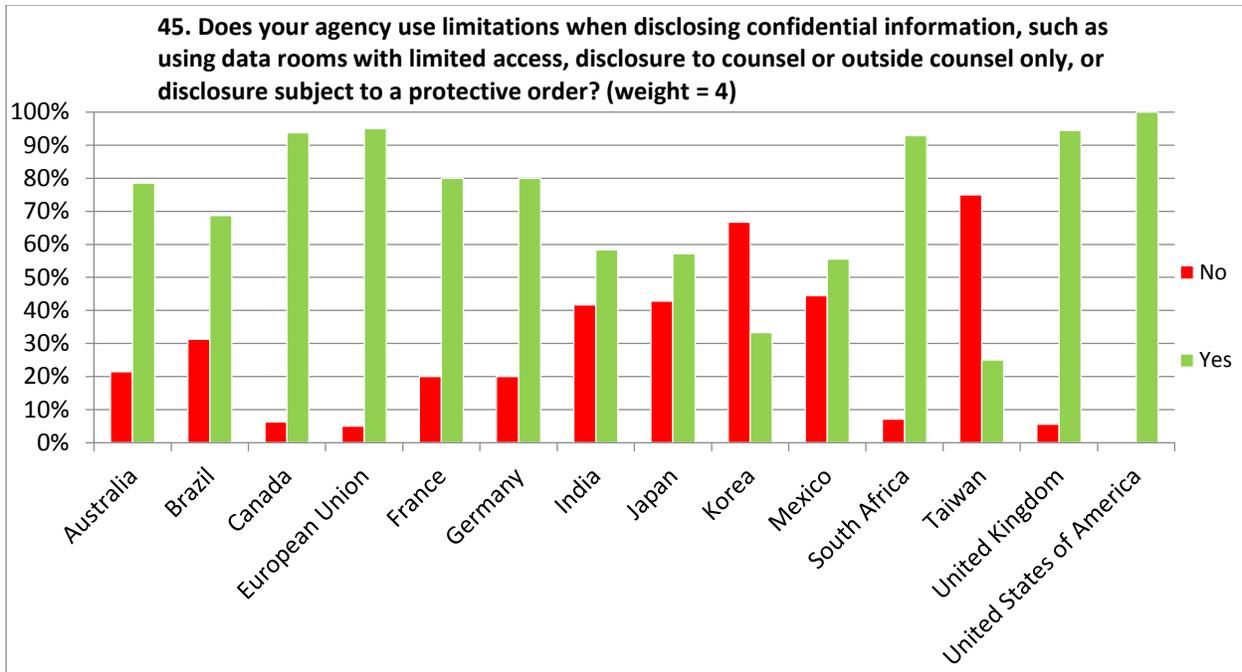
UNITED KINGDOM

- It generally does but there have been occasions where information can be deduced by market participants.
- Depends on "typically". There have been a number of lapses.

USA

- The FTC in particular frequently leaks confidential information, including the status of ongoing confidential investigations, to the press.





Explanations (Q45):

AUSTRALIA

- Disclosure of confidential information only arises in the context of court proceedings. As part of those proceedings, confidentiality regimes with appropriate confidentiality undertakings and limitations on disclosure (such as to external counsel only) are put in place.
- Disclosure to counsel is common.
- Limiting confidential information to lawyers only - ie protective orders.
- Disclosure to outside counsel and experts.
- In the court process, limit to outside counsel.
- These are not available to the agency.
- All of those listed depending on the circumstances.
- This doesn't really arise in ACCC investigations. Once enforcement action is in court then court orders can provide for these things.
- Rarely discloses confidential matter or if it is usually provided to external counsel.
- Data rooms with limited access only in relation to criminal matters, not civil.
- While there are limitations, the ACCC generally has a broad remit to use the information it receives including to disclose it to a variety of people, agencies etc...
- Limited exposure to outside counsel, and in court on the same basis, under a protective order.

BRAZIL

- Electronic procedural mechanisms to isolate access only to authorized counsel.

- CADE usually does not disclose confidential information. If only disclose confidential information in conduct investigation to the investigated parties to extent necessary for their defenses, but with the commitment that they will not disclose or use the information for any other purpose.
- Disclosure to counsel or outside counsel only" is a frequent method employed by our agency.
- Disclosure with a warning that confidential information is to be used for purposes of exercise of defense on the case only.
- Not those methods; use redactions and selective access.
- It prepares the confidential version of the files with limited access to the defendants only in respect to their right of defense in the files.
- CADE has its own online system where it discloses confidential case files to the parties under investigation.
- The parties must submit a public and a confidential version of documents. The public information are disclosed to everyone. The confidential will be accessed only by CADE and eventually respondents.
- Disclosure to selected people.
- It discloses information to counsel and outside counsel, as well as data room with limited access.
- The agency use separate confidential records with parties' attorneys access only.
- Separate electronic files that are available only to the parties allowed to have access to the relevant confidential documents/information.
- Disclosure to counsel or outside counsel only.
- Electronic system that requires login and password and limit access to confidential information of each investigated party.
- CADE has restricted data rooms and it makes documents available only to those entitled to receive them.
- CADE has a specific online system that allows the disclosure of confidential/public info according to the designated public (all investigated parties, public in general, counsel etc.)
- Often parties have to prepare two versions: public and confidential ones.
- The abovementioned measures are not used by my agency.

CANADA

- Protective orders, including counsel-only disclosure of certain information.
- Disclosure to counsel only.
- Case summaries / technical backgrounders; redaction of confidential information, e.g., in public version of consent agreements.
- Disclosure to counsel or outside counsel, protective orders.
- Outside counsel, protective orders.
- I have no specific experience with this.

EUROPEAN UNION

- Disclosure subject to a protective order

- Data rooms
- Data rooms with limited access and limited disclosures are common features of the process in Brussels.
- Data rooms and limited disclosure rings.
- Disclosures are often subject to confidentiality requirements. The EC also uses data rooms with limited access. The EC regularly relies on the confidentiality obligations of outside counsel (e.g. when sending documents relating to JVs) rather than explicitly subjecting such disclosures to confidentiality obligations.
- Data rooms.
- See above; the absence of sanctions on individuals for breach of confidentiality obligations make such processes impractical for the EU.
- Data rooms (often), counsel or economic expert only (occasionally), confidentiality agreements (occasionally).
- Disclosure to counsel.
- Data room open to outside counsels.

FRANCE

- Non confidential versions.
- Sending relevant documents to relevant parties.
- Data room accessible to external counsels only etc.

GERMANY

- Disclosure to counsel only who are under an obligation not to pass on business secrets to their client.
- The FCO discloses confidential information to outside counsel only, but leaves it for them to determine what they can pass on to their clients (subject to ethical rules).
- Limited outside counsel access
- Disclosure to outside counsel-only; to counsel
- Disclosure to counsel or outside counsel
- Data Rooms, disclosure to counsel
- Outside counsel only and protective order to limit communication with clients to what is necessary for defense reasons.
- Disclosure to outside counsel only

INDIA

- Data rooms with limited access or disclosure to counsels or disclosure subject to a protective order is nonexistent.
- Only public versions of other party submissions are made available to authorized representatives.

- The agency either classifies the order as confidential or not. No such above-mentioned protections given.
- The data or redacted portion of the confidential documents are blacked out from the public version which is only provided to the parties concerned.
- In rare instances, access to data room has been arranged.
- Redaction is the only method used by the agency.
- Ranges are used instead of absolute figures.
- Investigative material and reports are generally provided only to relevant parties. Confidential information is redacted.
- Data rooms with limited access, disclosure to counsel.
- No mechanism to deal with data rooms etc.

JAPAN

- My agency sometimes limits the disclosure of confidential information only to outside counsel.
- Not at all.
- The limitations are not necessarily meaningful as those listed above.
- Omit such information.
- Data room methods.

KOREA

- Disclosure to outside counsel only.
- No particular rules.
- My agency has no procedure under which information submitted by 3rd parties and claimed to be confidential can be reviewed or challenged by respondents.
- I've never seen the limitations used. However, Korean competitive agency might protect the confidential information by disclosing the information to designated counsel only.
- The agency does not have such guidelines for disclosure.
- We do not know such detailed limitation in handling the confidential information at the KFTC.
- Disclosure to outside counsel only.

MEXICO

- Cofece does not disclose confidential information.
- Files with limited access.
- It is a black or white question. The information is either confidential, and treated as such under applicable transparency laws, or not and then can be subject to public disclosure.
- Disclosure subject to a protective order.
- The only mechanism is to issue a confidential version to each party disclosing the corresponding party's related information.
- Yes, although the communication of such limitations is scant.
- Data rooms for authorized outside or in-house counsel.

- Not sure how.
- The Agency in Mexico makes no distinction. If they decide to make the information public, then it is made public to everyone, or denied to everyone if the opposite decision is made.
- Use of limited data rooms' access; limited disclosure subject to protective order; protection orders.
- If the information is classified as confidential, the information is not disclosed.

SOUTH AFRICA

- Disclosure to counsel or outside counsel and independent experts only and subject to signed NDA.
- Disclosures subject to a protective order can be arranged.
- External counsel only basis.
- External counsel.
- Information provided to outside counsel under confidentiality undertakings.
- Disclosure limited to counsel.
- Disclosure to outside counsel and experts' subject to confidentiality undertakings.
- Usually information provided on a counsel to counsel basis and confidentiality undertakings signed.
- As set out in 45.
- None of these limitations are applied. Redacted versions are circulated electronically to interested parties.
- Disclosure to counsel or outside counsel only is standard practice, together with non-disclosure undertakings.

TAIWAN

- No such alternatives available.
- The authority normally will just refuse to disclose information if it deems that such information is confidential. There is no mechanism of disclosure to counsel or outside counsel only or protection order in the anti-trust investigation process.
- The Taiwan Fair Trade Commission will redact confidential information when disclosing the documents to third party.
- It will not disclose any confidential information.
- I am aware of parties suggesting such procedures, but those suggestions were denied.
- There is no general practice and clear rule.
- No confidential information will be disclosed.

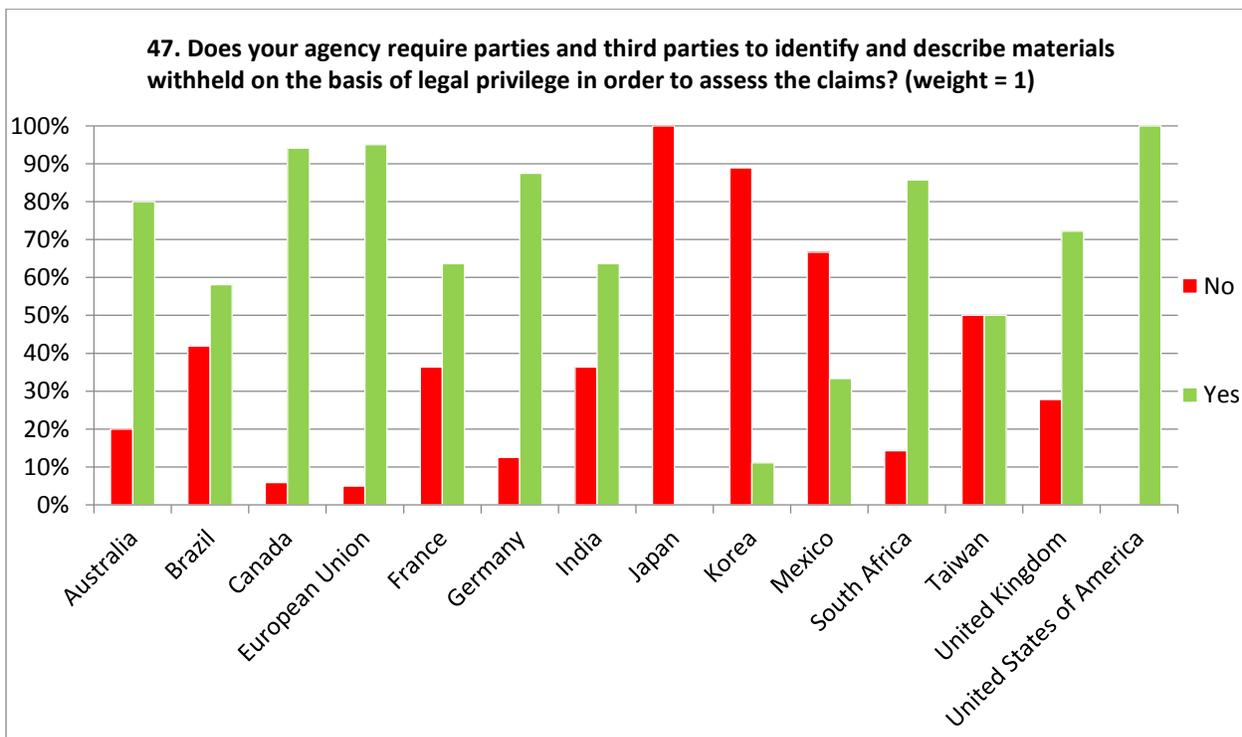
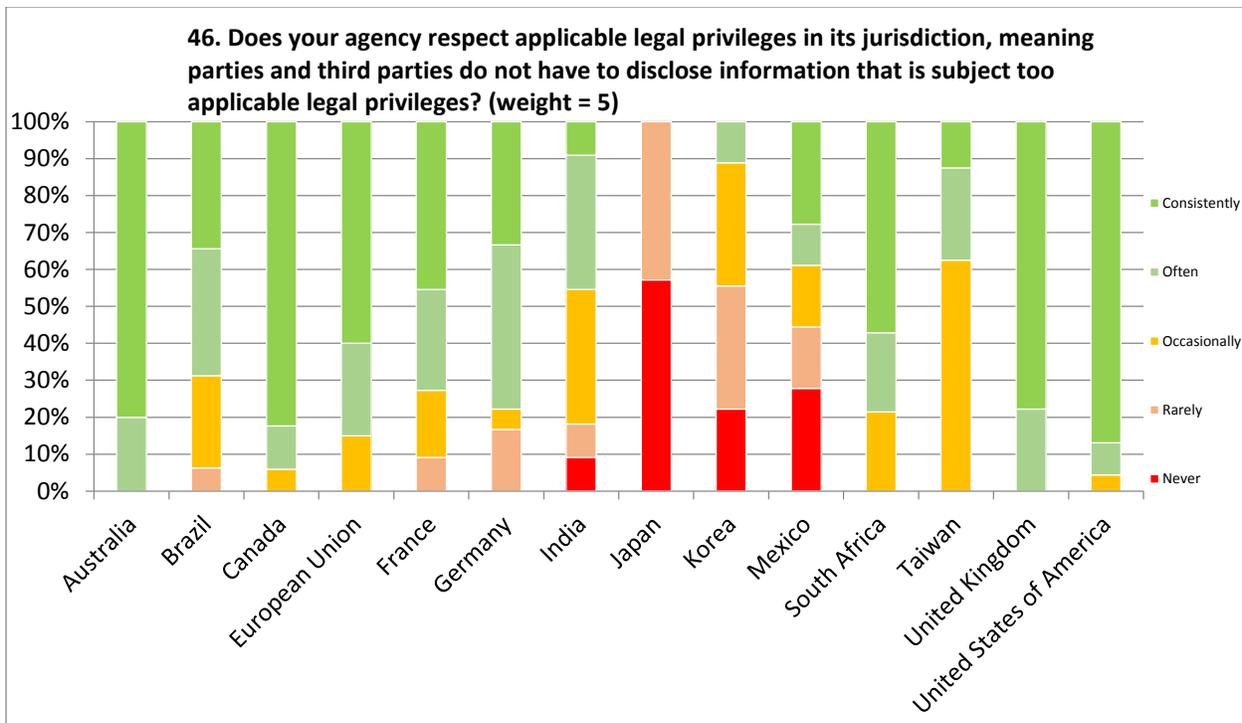
UNITED KINGDOM

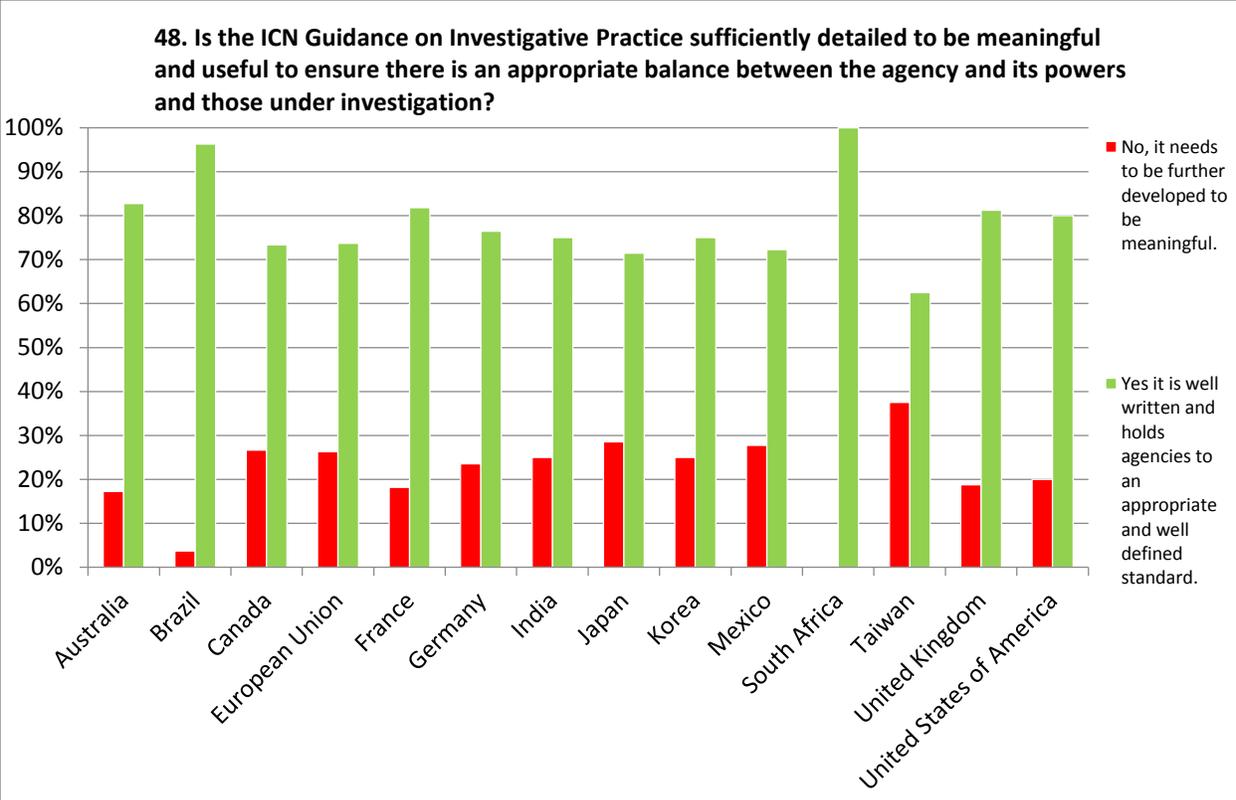
- Confidential rings and access to external advisers only in some circumstances.
- Data rooms with limited access; use of confidentiality rings.
- Confidentiality rings; limited access data rooms; external counsel/experts.

- Data room and ring fenced team's accessing certain confidential information.
- Yes data rooms are used. However the restrictive nature of the conditions of access insisted upon mean that this is sometimes a point of significant controversy. Parties under investigation have had to resort to litigation in recent years in order to obtain proper access.
- Data rooms, confidentiality rings ("plus" versions as well).
- Data rooms and disclosure to counsel or outside counsel only.
- Confidentiality rings, including advisers and, sometimes, "clean teams", data rooms.
- Data rooms and confidentiality rings are problematic and can be used excessively - insufficient onus on the procedural rights of the investigated company.
- Data rooms with limited access, disclosure to counsel only.
- Data rooms, confidentiality rings.

USA

- Disclosure typically happens only in litigation, where the process is supervised by the court.
- Protective orders; limitations to outside counsel only.
- Outside counsel only and protective orders.
- Often through third party data companies.
- Disclosure subject to a protective order, usually only to outside counsel.
- Protective order.
- Protective order in litigation; disclosure to counsel in investigations.
- Disclosure to counsel and protective orders in litigation.
- Mostly limiting access to outside counsel.
- Disclosure to outside counsel and protective orders.
- Disclosure to counsel or outside counsel only or disclosure subject to a protective order.
- In litigation, confidential information will be shared pursuant to a protective order. There is no mechanism for sharing confidential information prior to the issuance of a complaint.
- Protective orders and disclosure to counsel only.





49. Do you have suggestions for improving the ICN guidance going forward or have you identified missed opportunities the ICN guidance has failed to address?

AUSTRALIA

- No
- It is a very solid work but it has little day to day relevance.
- There could usefully be something about public ex-post review of past decisions, particularly on mergers, being desirable to improve quality of forward looking decision making.

BRAZIL

- There are some aspects in the interactions with Criminal Prosecutors that should have been addressed to. Follow up of the use of the ICN guidance (such as the present one) shall be used as material for discussions in future ICN meetings.

CANADA

- No.

EUROPEAN UNION

- No.

FRANCE

- Compelling RFI (which could give rise to heavy daily penalty payments for not answering) MUST be reasoned (give the PURPOSE of the RFI) and MUST be immediately subject to judicial control (the B-A BA of the rule of law).

GERMANY

- The substance of legal privilege may vary significantly, and should be tackled by the ICN - even though this is a question of substance, but may have vast implications on process. For example, in Germany there is no legal privilege for advice rendered prior to the initiation of proceedings/investigation, which means the FCO can and does take previous legal advice rendered on the specific subject matter of the investigation. Only once the investigation is initiated can legal advice of outside counsel be deemed as advice of a "defense attorney", which is the only advice subject to legal privilege protection.

INDIA

- Guidelines are alright. The challenge is to apply them to different legal settings and architecture.
- More guidance on usage of economic analysis in investigations should be an important part of the guidance.
- These need to be customized for different jurisdictions to the extent possible.
- For younger agencies, the efforts should be more focused on getting the agencies to rigorously adopt the rules.

JAPAN

- I think the guidance has covered various items with certain detail. However whether or not the actual enforcement practice actually/sufficiently meets the standard is not necessarily covered (In this survey there were quite amount of questions where technically the answer might be yes with respect to whether or not there is a certain procedure/protection, but in reality there remains lack of due process, and thus it is difficult to conclude that those procedure/protections are sufficient/meaningful/useful.)
- Not now. The priority should be on to comply the guidance as much as possible by as many jurisdictions.

KOREA

- Unfortunately, I did not have a chance to review in detail the ICN guidance yet.

MEXICO

- No.
- Eventually, subject to a thorough analysis.
- I need to review it more thoroughly.

- Agency do not have an obligation to observe the ICN guidance. It would help to let the public know which agencies are disregarding the ICN guidance.
- I think the ICN guidance might be improved by analysis of practical cases handle by different authorities.
- The topic of legal privileged should be expanded in order to provide a clearer understating to agencies on the importance of protecting this kind of information.

SOUTH AFRICA

- Greater advocacy initiatives.
- No.

TAIWAN

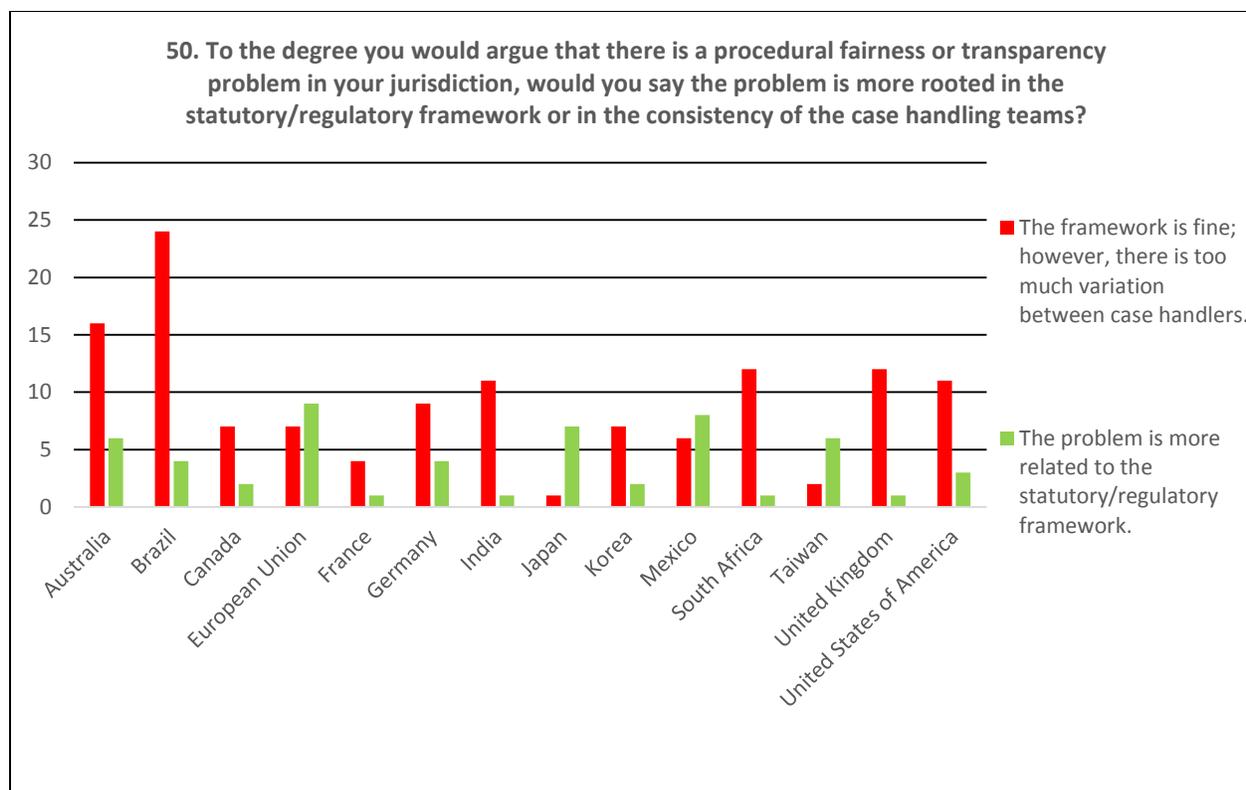
- No.
- For the previous question, the ICN guidance doesn't hold agencies to an appropriate, well-defined standard. To the extent that ICN can do this, it would be a welcome improvement.

UNITED KINGDOM

- Guidance to agencies referring to closed cases to use as examples, and for deterrence, should be considered. There is a risk that the use an agency may make of a case adversely impacts on leniency applicants and can deter leniency applications.
- None

USA

- The ICN itself should evaluate whether member authorities are adhering to ICN guidance (even if that is only done in a confidential way) and then the ICN should work with the authority to assist it in achieving compliance.
- More detailed guidance and the use of hypothetical circumstances to give content to guidance.
- No; except perhaps the length of time for an investigation, which sometimes can take years, for no reason.
- The guidance should go beyond the investigative phase and cover the decision and post-decisional phases to ensure that procedural fairness pertains throughout.
- As to the US agencies, the areas for improvement include reducing the burden of document requests and ensuring more consistent practices between the two antitrust agencies.
- Implementation across varied agencies is main hurdle.



51. What is the biggest shortcoming related to transparency or procedural fairness in your jurisdiction?

AUSTRALIA

- Failure to disclose evidence held by the agency and its detailed theory of harm in order to enable parties to appropriately respond. It would be better if there was disclosure of these matters before the ACCC commenced court proceedings. Parties under investigation have no real sense of the strength of the agency's case or what evidence they may have.
- Lack of information given about the status of an investigation (other than a merger clearance application).
- The ACCC is very secretive about its investigations.
- What third parties are saying and the genuinely held views of agency
- Access to opposing submissions in complex and contentious mergers.
- No right to silence when individuals face the risk of serious civil penalties.
- The regulator often weds itself too quickly to its case theory, and there is little opportunity to challenge the regulator while the investigation continues (potentially for years) at significant cost to the target.
- The officers of the agency are overconfident in their power and they are beyond review.
- Lack of frankness in engaging on the evidentiary materials relevant to a matter and lack of access to material.
- Culture of the agency is hostile to and suspicious of business.
- it would be helpful to be given a clearer sense of the nature of complainants evidence.

- Getting access to objections / objector material in merger clearance context.
- Early understanding of the precise detail of an allegation.
- The indiscriminate power of the agency to issue compulsory notices and difficulty challenging them; and the lack of disclosure by the agency of the evidence or theories of harm.
- There are no ex-post assessments.
- There are no statutory requirements relating to the conduct of an investigation; nor has the ACCC issued any guidance (including any broad guidelines) as to the process it would follow in an investigation (such as the guidelines which apply in an informal merger review). While investigations vary (due to the size and complexity), there should still be some guidelines providing for transparency or procedural fairness in the context of an investigation into anti-competitive conduct.
- Informality of merger reviews.
- Insufficient explanation of theories of harm.
- The inability to see the ACCC's evidence before proceedings are commenced - and having to rely on their explanations/ summaries of the evidence they have gathered.

BRAZIL

- CADE's Tribunal does not issue a statement of objections before rendering a final decision.
- Excessive rigor in maintaining leniency and settlement confidentiality even after an investigation is concluded.
- Consistency of approach in different cases is the biggest concern.
- Too much transparency.
- In complex cases fairness is limited to procedural aspects; materially there is little concern about detailing/properly substantiating economics rationale and theories of harm.
- The investigation is not clear for the defendants, i.e. it is made in a general way during the investigation and it is only specified in the decision.
- The agency could be more transparent about negotiations terms and requirement and penalties' calculation and criteria.
- Confidentiality of leniency agreements vs. rights of defense of parties investigated in the same proceedings. Judgement sessions are publicized through streaming live in the website.
- Due process of law clause is often disregarded. Defense arguments are often simply disregarded and not reviewed.
- The lack of state of play meetings in which authorities tell parties clearly what they think about the case and give them the opportunity to address their concerns.
- The electronic procedures before CADE, a new system that became effective in the past 2 years, have been changing what we had known about transparency and procedural fairness.
- Although the authority issues guidelines, they are non-binding documents and its application varies from case handler to case handler.
- Some of CADE's officials don't have the expertise to understand the real consequences of some sensitive information that is provided to public in general.... they could be more criterious.
- Training of the staff about the rules.

- Occasional political interference.
- Lack of clarity as to the approach towards an understanding of new theories or issues that are out of the table.

CANADA

- Lack of practical and informed management oversight and involvement in casework.
- Section 29 of Competition Act allows agency too much latitude for disclosure.
- No issues.
- The CCB sometimes makes over-broad claims of "public interest privilege" to avoid disclosure in administrative cases.
- The Bureau doesn't follow its guidelines.
- They do a pretty good job, but some inconsistency between officers.
- Some variation across cases and case teams.
- Individual officers have a lot of influence and there is not a lot of skepticism or pushback internally.
- There is a general lack of transparency at the investigative stage and limited opportunities to resolve issues before burdensome and expensive disclosure and production obligations have been imposed and litigation has commenced.

EUROPEAN UNION

- Variation between case teams.
- Enforcer bias, infringement cases (not acquittals) linked to career path of officials, lack of some due process guarantees.
- Some inconsistencies between case handlers and units and practice areas.
- Lack of access to the decision-makers, limited legal privilege (excluding in-house counsel).
- Commercial confidentiality.
- ECJ being willing to challenge the Commission.
- Court review does not occur in a meaningful time frame.
- The European Commission does not allow access to the non-confidential files until the statement of objections. This means that the European Commission can (and does) analyze the evidence for years, the parties have two months.

FRANCE

- Initial collection of IT data is made on a catch-all basis and until recently including in respect of privileged documents. The practice seems to have been somewhat improved with a procedure similar to the EU sealed-envelope approach.
- The way interim relief procedures are handled. The parties investigated are not given sufficient notice (i.e., sufficiently early) of the Authority's potential concerns, including in cases where giving notice would not affect the Authority's investigation.
- Legal privilege in electronic seizures – excessive information requests.

- NO CONTROL OF THE AGENTS (either internal or by Courts).
- The total absence of separation between investigative teams and the decisionary body. The Authority is both a judge and a party to the case. The existing separation is purely fictional and in practice both sides collaborate entirely freely.

GERMANY

- Legal privilege in Germany is unsatisfactory because it only starts with the inspection. There is no safeguard to rights of defense in the process, e.g. no hearing officer.
- Legal privilege (see above) and lack of transparency on how fines will actually be determined; the FCO fining guidelines only determine the framework of the possible maximum fine amount, but it is unclear how the mitigating and aggravating circumstances are weighed in practice, and this seems to differ quite a lot between different case handlers/units.
- No real legal privilege, only in cases where investigation has started.
- Variation in the divisions.
- Massive leeway for authority as regards treatment of leniency applications, settlement discussions and fine calculation.
- Lack of thorough investigations and records of investigations on file.
- Very limited scope of legal privilege.
- Settlement procedures are arbitrary.

INDIA

- Absence of clear guidelines.
- Arbitrariness and disregard for procedural fairness. The decision making is very discretionary and even the appellate tribunal, setting aside orders of CCI, has not been able to change the mindset of the agency significantly.
- There is no appeal prescribed against CCI orders of refusal of confidentiality claims under the statute.
- Lack of access to actual case officers.
- Absent clear internal guidelines, case handlers are not consistent.
- Lack of fair and balanced approach, backed by proper knowledge of investigative techniques and tools.
- The delayed manner in which transparency and procedural fairness play out.
- Agency does not understand due process and wrongly believes it does not apply to it.
- Lack of clear view on where the investigation is heading.

JAPAN

- Due process in interview with relevant personnel in the parties subject to investigation (e.g., attendance of counsel not allowed, copy of statement not provided).

- Lack of client-attorney privilege, insufficient care in handling confidential documents, and prohibition of attendance by attorneys in the Japan FTC's interviews with employees of the parties.
- The scope of right to counsel is very limited (including lack of legal privilege) compared to other jurisdictions.
- Lack of recognition of legal professional privilege.
- Access to evidences, access to interview records, representation by councils during interview among others.
- Lack of serious consideration of due process as well as costs, time and burden of business.

KOREA

- Attorney-client privilege is not fully guaranteed.
- Korean competitive agency has lots of discretion, and sometimes it is hard to predict the penalty level.
- Lack of applicable legal privileges such as attorney-client privilege and attorney work product privilege.
- KFTC case teams often complain that they are not provided with sufficient investigative tools and newly adopted investigation rules caused lots of hurdles to their legitimate and efficient fact finding efforts.

MEXICO

- It is difficult to obtain clear information on the facts under investigation.
- No legal privilege.
- The Mexican Federal Constitution provides strict prohibitions to avoid violations to the transparency during all kind of procedures carry on by official agency.
- No legal privilege available in Mexico and formalistic approach to all cases.
- Staff are uncomfortable with sharing theories of harm, evidence, etc., in the context of investigations as they see the statutory framework as requiring them to maintain confidentiality; they believe they can even be subject to liabilities if they share this information. The problem is that this significantly undermines due process rights of investigated parties.
- Negotiation of remedies.
- There are no clear guidelines on privilege. In some cases, redacted information prevents an adequate defense.
- Missing transparency actions by the agency.
- The legal inability to contact the investigating agency, except in a hearing.
- The lack of expertise of the new staff.
- The lack of expertise of the new Staff.
- Potential negative effects on agents that are not yet declared guilty under final unappeasable resolution.
- Breach of attorney-client privilege. Lack of judicial supervision.
- Inconsistent application, lack of publicity of many acts.

- Legal coordination amongst other applicable legislation.
- All decisions from the Agency cannot be reviewed by courts until the final decision is reached. This may cause abuses throughout the investigation phase.

SOUTH AFRICA

- The lack of understanding amongst certain agency staff as to what is required from a procedural process perspective. Often some staff are not aware of what is required of individuals in their positions
- Inexperienced officials, lack of institutional knowledge, lack of technically strong leadership
- Our agency needs to formulate ground and communicate its case early in the process rather than embark on a fishing expedition with no cogent theory of harm and an unwillingness to indicate the evidence at its disposal or whether it has any factual witnesses.
- Inexperience and potential meddling
- Consistency in application
- Access to information in the agencies possession which would allow parties to assess the agencies case and possibly settle matters expediently.
- Mishaps in relation to sharing of confidential information
- The agency's objection to disclosing evidence relied upon in formulating theories of harm
- Understanding of the implications of procedural fairness and the right to respond (audi alteram)

TAIWAN

- No similar statement of objections procedure.
- The authority is not required to provide its investigation report to the party under investigation for that party to defend its position.
- The Taiwan Fair Trade Commission does not stipulate specific and clear rules regarding the investigation procedure and hence the parties can barely evaluate the status of the case.
- The opportunity to review files has only one. This is not enough to protect the parties' procedural right.
- TFTC does not provide a document outlining their legal theories and evidence (like an SO) prior to the Commission issuing an Order. Thus, parties are largely kept in the dark about the nature and scope of the issues, and must guess as to how to meaningfully respond to the allegations. This is a fundamental shortcoming, because it deprives investigated parties of a meaningful right to defend themselves.
- There is no general rule; too much variation between case handlers; no transparency or clear guideline for procedural fairness.
- The agency has great discretion to determine whether to provide any investigation information.

UNITED KINGDOM

- See comment re Q49 - leniency applicants can be disadvantaged.
- The time some investigations take and in recent times the distraction caused by the change in structure and merger of the OFT and CC into one - which resulted in a lot of churn in staff.

- Lack of commercial understanding on the part of case handlers.
- Unclear and restrictive practice on data rooms.
- The biggest challenge in this jurisdiction is getting the balance right between respecting claims for confidential information to be kept confidential versus the rights of defense.
- Lack of merit appeal in EA02 cases.

USA

- From time to time, certain case handlers are less forthcoming and transparent than expected. Most are quite good about these issues.
- The biggest US problem is that not all staff share the concerns in sufficient detail to allow the parties to respond, or they do not do so in a timely way.
- Lack of transparency due to litigation posture.
- Party access to third party submissions.
- Inconsistent levels of transparency with respect to the government's theories of harm and strategic lack of transparency motivated by the desire to strengthen the government's litigating position.
- Inability to meaningfully contest scope of compulsory process within the agency.
- Timeliness of investigations by some staff.
- Reluctance of staff to share information on theories, evidence until the end of the investigation.
- Need for more coordinated substantive guidelines between the agencies in areas other than mergers.
- Lack of access to the file, especially third party submissions.
- Dependence on staff with different standards.
- Overly burdensome document requests and lack of consideration for respondents' legitimate timing concerns with investigations, which can sometimes drive the outcome.
- Inconsistent notice of case closing in larger cartel investigations.

52. What is the greatest strength related to transparency or procedural fairness in your jurisdiction?

AUSTRALIA

- The court system ultimately ensures procedural fairness and transparency.
- The merger clearance process.
- ACCC cannot impose fines for competition law breaches so the Court have to be satisfied of the breach.
- Ability to meet and discuss with agency.
- When Court or Tribunal processes are initiated procedural fairness applies.
- Rigorous court process before any conviction.
- The inflexibility can be effective as a means to engage, but it is inconsistent.
- The court process.

- ACCC is always prepared to listen.
- ACCC very strong on confidentiality.
- Ultimately, judicial oversight - we are a judicial enforcement model, and the agency use of formal investigatory powers is subject to review by the courts.
- The willingness of the agency to meet with and hear the evidence of the parties.
- Legal Professional Privilege.
- No strengths.
- Flexibility of the informal process in merger reviews.
- Very good due process and transparency.
- No corruption and political factors play no part.

BRAZIL

- CADE is one of the most transparent governmental agencies in Brazil.
- Guidelines and framework are in general available.
- There is a culture of transparency and access both to the records of the case and to the decision makers.
- Too much transparency.
- Procedures are extremely transparent; so is decision making.
- The confidential files are opened for all the defendants so that they can defend themselves considering all the evidence collected by the authority.
- Protection of confidential information and complete access of documents, evidence and decisions by the agency to respondents and their counsels.
- Judgment sessions are streamed alive and is kept recorded in the agency's website.
- There is general transparency on status of investigations and an attempt to make public to the extent possible all decisions by the authorities.
- Full access to records by parties and respective counsel or external counsel, and ample possibility of meetings with investigative staff and higher ranking officials.
- The high level of transparency in the access to information and petitions presented by third parties in the course of the investigations.
- CADE's Tribunal sessions of judgement are not only public, but also available online with live transmission.
- The existence of guidelines and internal regulations helps the understanding of the authority's point of view.
- Transparency is the rule in almost all cases, they push the lawyer to maintain the less confidential information as possible; moreover, the senior officials are very open to discuss.
- The on-line platform CADE/SEI.
- Public database with the records of all cases. Duty to submit redacted versions of all documents.

CANADA

- Willingness of the Bureau to engage in dialogue with businesses and the Canadian Bar Association.
- The process is clear.
- Canada has strong laws on procedural fairness, which the CCB generally respects.
- The opportunity to discuss and meet with the Bureau.
- Administrative approach of agency, expertise and reasonableness of staff.
- General commitment to transparency and procedural fairness.
- We have a first rate court system which can serve as a check, but it takes a lot to get to a stage where the court is engaged.
- The robust and comprehensive procedural rules governing proceedings brought by the Commissioner of Competition before the Courts and the Competition Tribunal have generally guaranteed procedural fairness to all parties once litigation is commenced.

EUROPEAN UNION

- Oversight by the hierarchy.
- Oversight of ombudsman.
- A recognition of the usefulness of common standards and best practices, bearing in mind the risk of appeals to the European Courts.
- Inability to appeal effectively.
- Publication of final decisions with reasoning (although often with great delay).
- Strong legal framework.
- Professional knowledge.
- Commission and its treatment of all Parties - consistently fair and broadly always follows its procedures.
- Generally very good procedures.
- Reasoning very well developed.

FRANCE

- Effective appeal rights.
- The functional separation of the investigation case team and the decision makers.
- Well-defined procedural frame.
- The independence of the review court (Paris court of appeal).

GERMANY

- There is full court review.
- Rights of defense in response to statement of objections, access to file, possibility to engage in meetings with the case handler.
- Well-established system; legal review.

- Depending on the case the biggest shortcoming may turn into the biggest strength: massive leeway for authority as regards treatment of leniency applications, settlement discussions and fine calculation.
- Communication with the authority is in fact great and fair.

INDIA

- You can complain and it's most likely that it will be looked in to but then you are often afraid to complain for the fear of being victimized.
- The presence of High Courts, especially in writ jurisdiction helps maintain procedural fairness when the agency crosses any line.
- The CCI has prescribed regulations which ensure procedural fairness and transparency to a large extent.
- Nothing at all as of now.
- Oral hearing is provided in all cases in addition to written reply.
- The appellate and writ courts are very well versed with principles of transparency and fairness.
- When the Commission does 'open up', the dialogue becomes meaningful and plays out positively and objectively.
- None. Very poor track record. This explains why so many cases are being reversed/remanded and why India fares poorly on the domestic and international stage.
- Opportunity to present arguments orally.

JAPAN

- Hearing of opinion procedure introduced in 2015, though still not sufficient.
- JFTC appears to be making efforts to identify in its formal opinion what are background facts and what are fact directly violating the law and what are facts substantiating the calculation of fines.

KOREA

- All decisions are publicly disclosed by web-site or press release.
- Inequality of arms. The examiner has extensive authority to compel production of documents and information from 3rd parties but has no obligation to share exculpatory/contextualizing information with respondents. Respondents have no equivalent ability to develop evidence.
- Korean competitive agency provides information of almost all of the cases handled, and such information can be easily found by website.
- The KFTC's efforts to meet a global standard at the agency level, reflected in the recently amended rules on investigation.

MEXICO

- As I mentioned before, the Constitutional prohibitions to violate the transparency.
- Clear rules to classify confidential information.

- Senior staff in charge of investigations apply the laws and regulations with common sense. The problem, however, is that this can all change with a change in staff and that is not ideal.
- The staff of the Investigative Authority.
- Confidential information is usually redacted.
- Regulatory progress.
- The law protects the confidential information adequately and public information is appropriately disclosed.
- The other related legislation, that avoid the abuse of power.
- The competition law and related legislation.
- My agency is very convinced on the benefits of transparency, and has published several guidelines, reports, bulletins, technical criteria, resolutions, etc. inspired by this.
- The main legal framework with recent reviews.
- All meetings with Commissioners have to be disclosed and this has allowed to review the content of such meetings. Additionally, the Plenum sessions are also public and this as provided a great degree of transparency.

SOUTH AFRICA

- The independent oversight of the Competition. In most cases (except small mergers) there is a separation between the investigative body and the adjudicating body.
- Our agency is subject to review by a higher body.
- The decisions and/or actions of our agency are reviewable.
- Judicial Review.
- Regulator open to engagement with parties.
- Opportunities for engagement during the investigative process.
- Mishaps in relation to sharing of confidential information happen infrequently.
- The Commission's openness to submissions from parties involved in the process and third parties. The fair and objective review available to the Competition Tribunal is also a critical check on procedural fairness.

TAIWAN

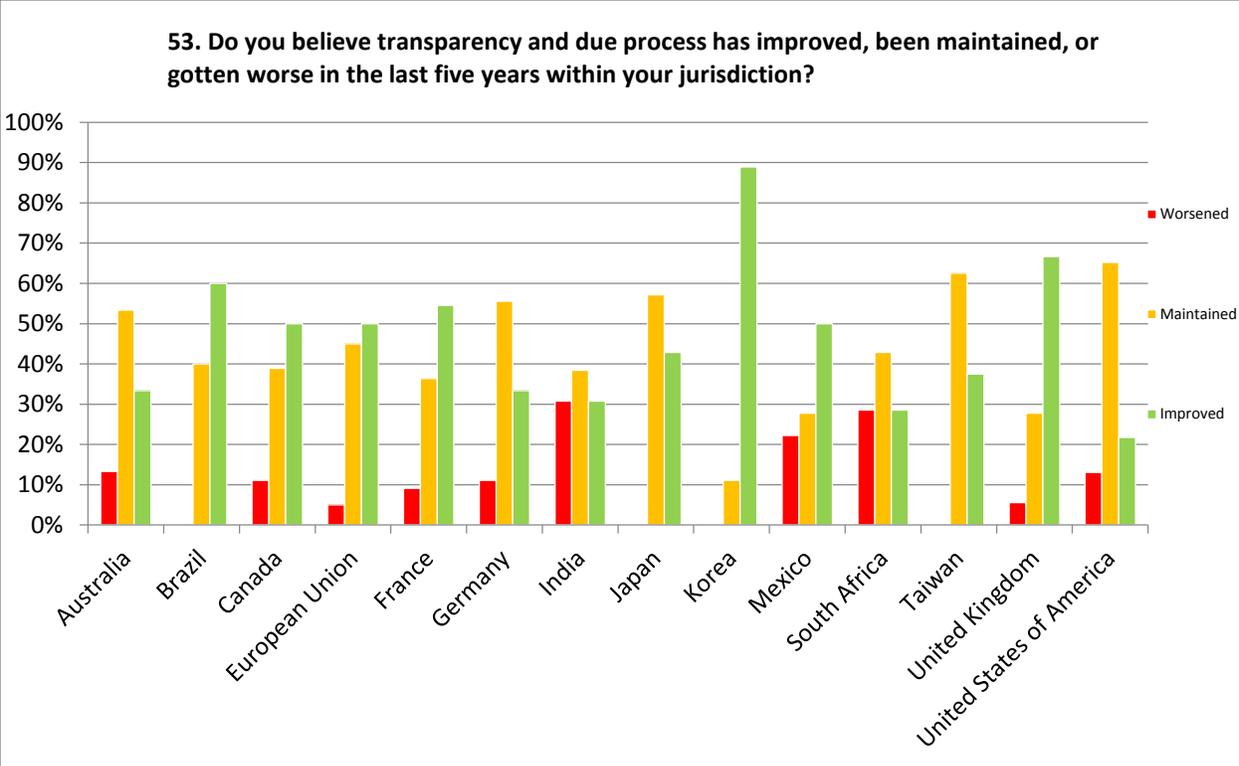
- Authorities are more liberal in offering informal discussion with parties under investigation, but what information will be disclosed to the parties under investigation during such discussion may still be subject to the relevant laws and regulations.
- Protecting the confidential information.
- Case teams are willing to meet with investigated parties; RFI's are not overbearing like in other jurisdictions.
- No transparency or clear guideline for procedural fairness.
- The parties have an opportunity to discuss with the agency.

UNITED KINGDOM

- Publication of reasoned decisions.
- Good robust legislation and clear guidelines with logical procedural steps.
- Ability to challenge.
- Protection for legal privilege.
- The Courts.
- Key strengths of the regime are (i) the procedural officer system for complaints, and (ii) the ability to apply a specialized court for review of decisions.
- A general respect for fairness and the rule of law.
- Transparency is very high in reasoning for decisions.
- implemented on day to day basis.

USA

- The vast majority of DOJ staff are quite transparent and fair with the parties.
- The agencies bear the burden of proof in court.
- Ability to litigate in court if necessary.
- Maintaining confidentiality of submissions.
- Strong legal protections and a general tradition of due process; the availability of effective independent judicial review, at least with respect to the DOJ.
- The law.
- Ability to discuss issues with staff and decision makers.
- Opportunity to meet with decision makers; ability to challenge decisions in court.
- Use of courts to ensure due process; APA.
- Prompt access to the court system to require the agencies to prove their case.
- A combination of statutory protections, long-standing agency practice and judicial review.
- Staff routinely are direct, cooperative and forthcoming re issues and competition concerns.
- The ability to contest the agencies' charges before a federal court judge.
- Transparency about the overall enforcement framework and priorities of the agency.



Explanations (Q53):

AUSTRALIA

- The agency is happy to use the media to bully.
- Anti-business culture has strengthened within the agency.
- ACCC more open about their internal process.
- There is appreciably better explanation of both the process and reasons for decisions.
- The ACCC engages well with the competition community.

BRAZIL

- The errors remain the same.
- There has been a lot of improvement within the last ten years; for the last five years not much has changed.
- The adoption of an efficient and comprehensive electronic system for the management of case files has significantly improved the transparency and due process throughout the investigation proceedings, allowing parties to timely identify new developments and quickly react whenever necessary.
- Considering pros and cons, maintained on average.

CANADA

- The guidelines are not followed.
- No worse and no better and it should be better.

EUROPEAN UNION

- Improvement thanks to ECJ case law.
- Ombudsman now is a credible check - Commission has published best practices and a manual of procedures.
- Publication of internal documents setting out process.

FRANCE

- Nothing is done to solve the issue of the collusion between investigation and decision bodies; in fact, the Authority denies such an issue exists.

GERMANY

- Cases have become more complex with more economic reasoning and the rights of defense are in danger, because the competition authorities constantly seek to enlarge their powers without also adjusting the rights of defense, see Commission initiative on harmonization of procedures in the Member States.

INDIA

- Transparency, due process etc. cannot become meaningful till such time the rules / guidelines are explicitly made. In fact in the absence of any guideline for any area, you are never sure how your conduct will likely be evaluated.
- COMPAT (the appellate tribunal) has overturned a significant number of CCI's decisions and thus there is uncertainty and stiffness in the regime of transparency in India.
- The investigative wing is a little more diligent and uses more advanced techniques for investigation. Due process has improved massively, courtesy the presence of an efficient appellate authority which has reprimanded the investigative agency multiple times.

JAPAN

- The agency has made some improvements, however they are extremely minor and far from sufficient.
- But needs much more improvements.

MEXICO

- There is no significant improvement in timeliness and openness of sharing of information with investigated parties and counsel, no legal privilege, no opportunity to question RFIs, etc. In all fairness, this is statutory and not a problem originated by the practice of the agency.
- With respect to merger control.

- It has improved due to partial regulatory progress.
- the new law of 2014 restricts contact with the agency.
- The other related legislation, that avoid the abuse of power.
- Statute was changed to deny the parties under investigation access to courts until the process has been completed. Procedural violations (including disregard of attorney-client privilege) is not subject to judicial review.
- 2013 reform eliminated all forms of administrative review and greatly limited judicial review. Case handlers are not familiar with the rule of law (many are not trained lawyers, and many who are, are not well versed in due process).
- Since 2013 there have been important legal reviews both in our Constitution and in the mail legal framework.

SOUTH AFRICA

- Recent developments related to the agency at times refusing to provide parties legal representatives access to the investigation record absent a ruling from the adjudicating body has undermined the high levels of transparency which otherwise exist.
- Businesses have taken the agency on review and appeal and have won. The agency has learnt from mistakes and improved.

TAIWAN

- It is at a generally low level compared to other jurisdictions, and has a lot of room for improvements.

UNITED KINGDOM

- The merger of the OFT and CC provided an opportunity to revisit some of the procedures and improve them.
- Please note that this response is submitted on behalf of Slaughter and May and reflects the experiences of its Competition Group members.

USA

- Obama administration has lowered transparency levels.
- The U.S. agencies have been a positive force for transparency and due process across the globe through efforts of individuals such as Randy Tritell, but current (2016) FTC leadership has occasionally not lived up to its own words. In addition, the ever-lengthening of investigations presents significant challenges for respondents, particularly for unconsummated transactions.



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