

Report and recommendations on
the effective and efficient
use of Requests for
Information in competition
investigation and studies



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Executive summary

A material increase in the use of Requests for Information (RFIs) has resulted from increased merger enforcement, coupled with an expansion in the use of market studies and investigations by competition authorities. In response to this trend, ICC has developed enhanced guidance for competition authorities and parties regarding the issuance and response to RFIs, particularly “non-target” RFIs (*i.e.* where the recipient of the RFI is not the subject of the investigation).

Feedback from task force members – based on their own extensive experience responding to RFIs – was combined with the results of a survey circulated to the broader ICC membership to develop the following **recommendations** for more effective and efficient RFIs:

1. Agencies should engage in substantial discussions with industry participants to understand the market before issuing RFIs.
2. Agencies should clearly convey the purpose of the inquiry in the initial RFI request.
3. Agencies and Respondents should have the opportunity to discuss the RFI with the agency after issuance to ensure effective and efficient responses.
4. Respondents should respond to reasonable RFI requests in good faith.
5. Agencies should be flexible on format and structure of responses to the greatest extent possible.
6. Agencies should seek to cooperate with other competition authorities where objectives for market studies may align, and Respondents should be willing to provide waivers (where reasonably requested) to facilitate such cooperation.
7. Agencies should ensure that the scope and burden of RFI requests is proportionate to the role of the recipient in the investigation.
8. Agencies should, where feasible, provide feedback to RFI recipients on the status and outcome of the investigations or market study.
9. Agencies should provide adequate confidentiality protections for information submitted by RFI recipients, as well as clear and transparent information about the treatment of confidential information.
10. Respondents should provide supplemental responses if material and relevant new information comes to light within a reasonable timeframe after their initial response.

Introduction

These recommendations have two objectives: (i) to assist competition authorities in more effectively obtaining information through RFIs used to conduct investigations or market studies; and (ii) to make the process of information collection through RFIs more efficient and transparent for both competition authorities and the recipients (typically companies) of those RFIs. The recommendations are supported by a report and analysis of past practices and procedures used by various competition authorities and by an assessment of those practices that worked well and those that worked poorly.

ICC recognises the legitimate interest of competition authorities to gather relevant information necessary to ensure that they can prevent and remedy competition violations through appropriate enforcement action, but equally encourages competition authorities to undertake that effort in a responsible way so as to eliminate unnecessary burdens imposed upon RFI recipients, and in particular third party (*i.e.* non-target) RFI recipients, which can unnecessarily increase costs to companies and consumers.

ICC members have witnessed a significant increase in the use of RFIs in recent years, stemming not only from a robust merger and acquisition environment, but also from an expansion in the use of market studies and investigation by competition authorities, driven by a host of developments including the COVID-19 pandemic, energy supply constraints, sustainability initiatives, and the digital economy, among others.

In particular, RFIs are increasingly being used as a means to gather information from non-target companies (*i.e.* third parties in investigations or recipients to a broad market study). Recent broad market studies, which saw RFIs issued to numerous companies not directly under investigation, include the UK Competition and Market Authority's mobile ecosystems market study,¹ the US Federal Trade Commission's inquiry into supply chain disruptions,² and the French Competition Authority's study of the online advertising sector.³ The rash of merger activity likewise resulted in a large number of broad-scope RFIs being issued to customers, competitors, and suppliers of merging parties (and even in some cases companies in adjacent segments).

RFIs are often issued with a broad, standardised set of queries that reflect little concern for the burden placed on recipients, who in many instances receive numerous RFIs from multiple competition authorities sometimes conducting similar or parallel investigations. The result is that even well-intentioned recipients may find themselves overwhelmed and unable to offer a complete response within the (often short) deadline.

This can lead to inadequate information being supplied to competition authorities, risking sub-optimal competition outcomes. It can require follow-up efforts or subsequent rounds of RFIs, wasting valuable agency resources. It can also lead to significant expenses for companies. Overly broad RFIs may also undermine the credibility of issuing authorities by creating the impression that unnecessary information is being requested or that resources spent on these efforts mean that broader enforcement objectives are being left unfulfilled.

¹ *Mobile Ecosystems Market Study*, Competition & Mkts. Auth. (June 2022), <https://www.gov.uk/cma-cases/mobile-ecosystems-market-study>.

² Press Release, Fed. Trade Comm'n, FTC Launches Inquiry into Supply Chain Disruptions (Nov. 29, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/11/ftc-launches-inquiry-supply-chain-disruptions>.

³ Press Release, Autorité de la concurrence, Sector-Specific Investigation Into Online Advertising (Mar. 6, 2018), <https://www.autoritedelaconcurrence.fr/en/press-release/6-march-2018-sector-specific-investigation-online-advertising>.

Creation of the ICC Task Force

In an effort to bridge the gap between issuing agencies and recipients – between the goals of a competition authority’s inquiry and the reality of a company’s documentary practices, capabilities, and expertise – ICC created a task force to establish clear, practical guidance for authorities considering the issuance of RFIs and companies responding to the same.

In creating these recommendations, the task force notes that certain RFI issues (notably compliance costs and burden) have been recognised by competition authorities around the world. RFI issues have also been addressed by the International Competition Network and Organisation for Economic Cooperation and Development, which have both proposed guidance for agencies conducting market studies.⁴ This undertaking is not intended to replace those efforts, but rather to complement them with practical guidance derived from recent real-world experience from RFI recipients.

The goal of this project is not to prescribe a uniform process or bright line limit on the use of RFIs, or to make any comment on the propriety of their use. Instead, this effort aims to identify workable principles for all parties engaged in the RFI process, with the hope that this effort will (i) improve the quality of responses, (ii) increase efficiency of all parties, (iii) reduce costs – both by promoting proportionality and reducing time spent drafting and responding to overbroad or overlapping requests that require further refinement – and (iv) encourage continued dialogue and trust between companies and competition authorities.

Methodology

The task force is comprised of in-house counsel and private practitioners across a diverse array of industries who have extensive experience receiving, responding to, and engaging with competition authorities about RFIs. Members provided salient examples from their own experiences with RFIs. The project also solicited input from the broader legal community via a survey that aimed to identify common experiences and concerns from both in-house and outside counsel. The survey also provided respondents with the opportunity to propose changes to the RFI process and relay specific experiences (similar to the input solicited from task force members).

Results from this survey, along with the thoughtful insights provided by task force members, were examined alongside guidance from international organizations and competition authorities to create a set of “best practices.”⁵

⁴ See Int’l Competition Network, Market Studies Good Practice Handbook (2016), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_MktStudiesHandbook.pdf; OECD, Market Studies Guide for Competition Authorities (2018), <https://www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-Competition-Authorities-2018.pdf>; OECD, Methodologies for Market Studies – Background Paper by the Secretariat, DAF/COMP/WP3 (June 7, 2017), [https://one.oecd.org/document/DAF/COMP/WP3\(2017\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2017)1/en/pdf).

⁵ For ease of reference, this report refers collectively to survey respondents and task force members as “contributors.”

Report on ICC member challenges with RFIs

The majority of survey respondents reported an increase in the frequency of non-target RFIs in the past five years.⁶ Both task force members and survey respondents reported challenges – and in many instances, helpful practices – in five primary areas: scope, cost, timing, objectives, and coordination.

In order to encourage contributors to speak openly about their experiences, all examples have been anonymised.

Scope of RFIs

When asked about the challenges faced in responding to non-target RFIs, more than 80% of survey respondents cited scope as a significant concern. Both survey respondents and task force members reported receiving lengthy, broad questionnaires that did not always line up with a company's structure or the way it keeps its records.

“A relatively recent example had us receive three questionnaires on the same deal, with over 200 pages of questions containing 400+ questions (often divided into various sub-questions) and requiring a detailed breakdown of spend in various niche segments for various years. Another questionnaire had 110 questions (but more like 250 in sub-questions). [These questionnaires failed to consider that] our group is a multinational with hundreds of legal entities with corporate separateness – this information is not held centrally.”

From a global, Fortune 50 company: “We once received a scattergun 58-page RFI that wanted every long-term contract [company-wide], which was defined broadly as ‘every contract over one year.’”

Broad RFIs are likely to encounter even more friction as companies keep information in a variety of formats and locations. For example, geographic borders are becoming less relevant to companies that keep their data and documents on servers in one country but can quickly call up information from thousands of miles away. But at the same time, companies (especially conglomerates) may have numerous data systems that makes it extremely difficult to collect or centralise the collection of data. And the definition of a “document” – once a physical item, then updated to include emails and text messages – must now consider whether to further expand to include algorithms, computer code, apps, etc.

Survey respondents and task force members were nearly unanimous in their suggestions of how to address potential RFI scope issues at an early stage: an initial discussion with the issuing agency, which was widely viewed as an efficient way to bridge any gaps between an authority's requests and a company's reality.

“An initial phone interview is a more efficient process in terms of using our internal resource. I would venture to say it is also more useful for the agencies as we can provide more substantive answers to their questions. The phone interview permits

⁶ 27% of survey respondents reported that the use of non-target RFIs has become “much more” frequent, while 58% reported it is “somewhat more” frequent.

our side to understand the agency’s concerns, and to provide some color/context on what type of information we have and what our role in the market is. Both of these items would permit any follow-up requests from an agency to be narrowly tailored to limit our burden in responding – but also narrowly-tailored for their benefit, to confirm they are getting information that is truly relevant.”

“If authorities reached out to have calls to gain more insight into (1) what actually matters and (2) what companies can actually produce, this would allow them to send far more targeted follow-on RFIs, reducing workload on all sides.”

Discussions about scope are not a novel concept. Most survey respondents have participated in these types of exchanges.⁷

By making these discussions standard practice, all recipients would be afforded the opportunity to understand the intended goals of the overall inquiry and share insight into the factors that may impact their response. The potential benefit for the recipient is a more narrowly tailored RFI, or at least one that better accommodates the reality of the company’s structure and document retention practices. As one task force member expressed it succinctly, *“It’s not a lot of work to help an agency prepare a well-drafted questionnaire.”*

For competition authorities, the benefits can be twofold: a narrowly tailored RFI increases the possibility that information received in response will be relevant and useful to its overall investigation. Moreover, particularly for competition authorities conducting market studies in new or rapidly developing markets, initial discussions also offer an opportunity to learn more about the industry under study.

“These initial meetings allow our business to talk through the agency’s questions and seek clarification where needed, or even provide guidance on how we or the industry look at an issue that their question might imply they don’t understand.”

In addition, it is useful for competition authorities to exchange with multiple businesses within an industry. Companies noted that enforcers often base RFIs on one company’s perspective or approach to the market that does not apply to others.

Contributors cautioned that the goal of these initial calls should be to appropriately tailor the scope of an RFI and that authorities should act on the information they learn.

“[It would be beneficial to have] an informal call but only if this replaces the RFI. Unfortunately, we have experienced increasingly that we first receive an RFI, then have a call, then receive a follow-on RFI.”

“The concept of having a call is good practice and could enable competition authorities to improve their non-target RFI processes, however, it requires that authorities use the output of these conversations to tailor the RFIs to the issues, areas, products/services, or geographic markets that are relevant to the recipient. For example, [in a merger investigation] if an organization has flagged that it is not a customer of the merging parties with respect to specific products, services, or geographies, then the RFI it receives should not include questions which relate to such products, services, or geographies.”

⁷ Note that “never” was a possible choice; no survey respondents selected this option.

Notably, there was no expectation from contributors that a competition authority would fully map out its overall investigation plan, or the parameters of its investigation, in such discussions. Rather, there was an understanding that the scope of an investigation can and does change in response to market developments and other factors, including information received in RFI responses. But contributors reported that *any* guidance on scope can be helpful – including, in some cases, by simply identifying the types of information that are *not* relevant to an investigation. This permits the companies to share feedback that can optimise the efficiency of the RFI inquiry for all parties. Initiating a dialogue early in the process can also pay dividends down the road. Many of the experiences shared by survey respondents and Task Force members reflect the benefits of engagement between competition authorities and companies. Cooperation in this respect can yield benefits when dealing with confidentiality concerns, the identification of new relevant information, and other issues that may arise during an investigation.

Cost

The focus on scope as a primary concern is perhaps no surprise given its correlation to cost: broader RFIs require a greater expenditure of both funds and manpower. The majority of survey respondents reported an increase in the cost to respond to RFIs.

Many survey respondents also engage outside resources (most commonly law firms, but also economic consultants and e-discovery vendors) to assist with RFI responses, which can also add to the financial cost required to respond.

The most substantial source of potential cost savings identified by respondents is narrowly tailoring RFIs. Competition authorities should consider whether the questions in RFIs are feasible for the recipients to answer. This can be as simple as ensuring that questions are designed to extract only the relevant information without imposing additional unnecessary burdens. For example, one survey respondent reported receiving an RFI that “*asked for detailed information on ‘all customers’ of the company where we had more than one million customers.*” There may well be less costly, but equally effective questions that could be posed. For example, in the instance reported above, a few less burdensome iterations may be possible, including:

- An open-ended narrative question: “What categories of customers does your company serve?”
- A specific, targeted request: “Please list your top 10 customers for the past three years,” or “please list the top three end uses for your products and the top 10 customers for each end use.”
- A multiple-choice option: “What types of customers does your company serve? Please check all that apply.”

Multiple survey respondents also proposed another straightforward way to reduce costs: to provide RFIs in a more “user-friendly” format that can be easily edited.

“We lose a lot of time reformatting or copy/pasting the document to be able to split tasks between various teams.”

“One authority’s new digital form does not allow the questions to be downloaded in

an editable form. This results in significant time spent manually re-creating the RFI so we can work on it internally.”

While seemingly minor, these types of changes can significantly reduce the time and financial impact for companies facing multiple RFIs.

Timing of RFI response

The time allotted to respond to RFIs was cited as a concern by 85% of survey respondents. Similarly, task force members from larger companies shared that even RFI deadlines that were “reasonable” at first glance, often failed to account for the considerable time needed to identify the relevant sources of information and experts within a large organisation. Larger companies also often have more layers of review before a response can be finalised and submitted to an authority.

“In our experience, the RFIs we receive are often sent to a number of different companies and associations – but the related deadlines do not consider the different positions these organizations may be in.”

Task force members reported a number of different strategies that were useful in alleviating timing burdens. In many cases, competition authorities were willing to identify a subset of “priority” questions or agreed to a “rolling” production of responsive materials, which allowed better allocation of internal resources.

“In one recent market study, the agency sent us the entire RFI but highlighted a subset of ‘priority’ response with an earlier deadline. This helped us manage our response plan by focusing our initial efforts on the priority questions but letting us preview to the business team what subsequent questions would be coming down the pipe and which individuals would be needed to provide input.”

As discussed in more detail in the “Coordination and deference among agencies” section below, in some instances competition authorities were receptive to first receiving and reviewing materials prepared for a similar RFI in another jurisdiction or for a similar matter, and then providing a narrower set of follow-up questions if additional information was required. Similarly, an agency’s willingness to “defer” the response to certain sections of the RFI until they determine whether such information is really needed can be tremendously helpful.

One task force member shared that it was useful when a competition authority issuing an RFI for a market study also published its planned timeline for the study.

“It is helpful to see an authority’s timeline for a market study beyond just the deadline on our RFI – as an initial matter, it can help us determine whether it might be appropriate to seek an extension or propose a rolling response. And it can be helpful to ‘motivate’ business teams that may need convincing that their efforts to respond will bear fruit.”

Objectives of RFI

The value of understanding a competition authority's basic objectives in issuing an RFI was by far the most agreed-upon topic in the task force's discussions.

"We receive a lot of questions from business teams when we receive an RFI: why is the competition authority sending this questionnaire? What is the purpose? What is the theory of harm they are considering? [One agency] often puts its theory of harm in the cover email when they send us an RFI – this is helpful in answering these questions and framing our response."

"We can often guess what the basic objective might be in a market study, as agencies sometimes issue press releases or other announcements before they are launched. But hearing it directly from the competition authority helps to frame our thinking and suggests that our input is valuable to helping them achieve their objectives."

By contrast, a number of task force members expressed frustration when the issuing authority's objectives were muddled – or an RFI was being used as a procedural cudgel rather than a means to an investigative end.

"RFIs often do not highlight the perimeter of the investigation. In some cases, for the company, it is impossible to understand the facts based on which the [agency] is acting. In a specific case, the legal counsel could not understand the basis of the RFIs and [whether the agency was seeking information based on its] competition or consumer law jurisdiction."

One authority "regularly issues RFIs to buy more time since RFIs stop their review clock, which only starts again once the response has been submitted."

While no task force members reported any expectation of follow-up after submitting a response, several noted that they appreciated when an authority was willing to provide detail on next steps or the progress of a market study after their submission was made, or expressed frustration when their response efforts seemed to go nowhere.

"In a recent case of alleged abuse, before launching the investigation, [we received] a very detailed RFI, which required [us] to dedicate a lot of time to managing it (about 45 days). The RFI basically requested [us] to investigate on [the agency's] behalf. [The agency] then decided to archive its claim without specific arguments despite this significant work."

"In one market study, we received a follow-up question from the agency related to confidentiality designations before the information we provided was published in a market study. This was fairly standard procedure for the agency, but it was useful to get this tidbit that the market study did have a publication date, so we could follow up internally and let our executives know that it was forthcoming."

When asked about follow-up reports from issuing authorities following submission of an RFI response, half of the survey respondents reported that they "never" receive updates.

One response noted that feedback from competition authorities can be a useful "carrot."

"[Non-target RFIs] are often complex and time consuming. It is sometimes difficult

to motivate the business to invest the significant time it takes to respond to these questionnaires, considering the lack of feedback of competition authorities after the submission of the response.”

Finally, there was some discussion about whether a company should be expected to bear the burden of responding to an RFI when the company has a limited role as relates to the overall inquiry.

“Burdensome RFIs are not limited to third-party mergers. We have also been approached with burdensome requests in cases where alleged anticompetitive behavior of others was being investigated. Here the burden does not necessarily lie [only] in the sheer number of questions, but mostly in requests for ‘any documents/communications related to x.’ Such requests often require us to employ specific eDiscovery expertise at significant expense. A recent example required us to review in excess of 40,000 documents. [All this and] we were not suspected of committing any infringement in that case.”

“We once received an RFI as a ‘major customer of paper clips’.[!] We just couldn’t find anyone to answer the questions.”

Contributors suggested that in these situations, companies should be afforded the opportunity to indicate why an RFI or investigation is not relevant to them, or request further explanation on their nexus to the overall investigation.

“[Authorities should consider] the possibility for RFI recipients to provide high-level feedback or only answer key questions of an RFI rather than having to answer every single question, in cases where the RFI recipient has identified that a proposed transaction is likely to have a neutral and/or negligible effect on them and/or competition in the market, or that the alleged conduct being investigated has not impacted them to a material extent or is not expected to have a significant anti-competitive effect on them in the future.”

As an example, agencies could effectively use an “If yes, then” approach, which only requires additional information from a respondent if the respondent meets the foundational criterion, e.g. of purchasing more than certain volume of product. Several contributors also reported raising these topics at the initial post-RFI discussions noted above.

“What works well is when you get to choose to answer or not. What works poorly is if the [authority] pressures you to answer everything at a short deadline and doesn’t want to listen to initial feedback on the lack of relevance of questions.”

Coordination and deference among agencies

Contributing to the burden noted by many task force members was the increasing frequency with which companies receive similar RFIs from different competition authorities.

“An added challenge is that post-Brexit, we can now sometimes expect extensive questionnaires from both the CMA and the European Commission – with similar questions (but not exactly the same, so cutting-and-pasting is largely ruled out).”

“At least when [a similar RFI comes from] the same agency you can remind them you already answered the questions, but when it’s coming from a different jurisdiction or agency it can be harder to get them to accept an already-prepared answer from a different RFI – even if the substance of the response is the same.”

“It’s really great when you can get different agencies to coordinate and work together rather than sending slightly different versions of the same RFI.”

In some cases, task force members reported sharing with an issuing agency that they had received a similar RFI from a different authority, often in the hopes that the agency would be receptive to using this prior response as a starting point or to modify their own RFI. However, this tactic was not often successful.

Recommendations for more effective and efficient RFIs

In light of the experience of ICC members as reflected, in part, in the report above, ICC has prepared the following recommendations to advance RFI practices and procedures and to allow for more effective and efficient use of RFIs by agencies.

1. Agencies should engage in substantial discussions with industry participants to understand the market before issuing RFIs.

Agencies should endeavor to understand the contours of a market before issuing RFIs. While market studies and sectoral inquiries are often issued because an agency needs to better understand a particular market, having an informed understanding of the basics of the market can pay significant dividends down the road. These efforts are well-spent and will lead to better RFI questions, which in turn will yield responses that are more relevant and useful to the agency’s overall objectives. Businesses can assist in this regard and are incentivised to assist the agency up-front to streamline the further process of the case. In addition to industry participants, other competition authorities (who may be considering similar issues or have recently completed their own studies in the same industry) also may be a useful source for these types of primers.

2. Agencies should clearly convey the purpose of the inquiry in the initial RFI request.

The RFI should begin with a short statement describing the general objective of the RFI request and the purpose to which it relates, as well as identifying the reason the company is receiving it. This recommendation is not intended to require that agencies fully establish the parameters of an investigation or reach some threshold of “definability” before issuing an RFI. Input from task force members demonstrates that companies understand that an agency may not have clearly defined all of its goals, and that both scope and objectives may shift as information is received. But task

force members noted that where agencies do provide input on the purpose of an inquiry – even just in a cover email, as one agency is reported to frequently do – it can be helpful in both responding to questions from business teams and framing a company’s overall response.

3. Agencies and Respondents should have the opportunity to discuss the RFI with the agency after issuance to ensure effective and efficient responses.

Once an RFI has been issued, a short discussion between the issuing agency and the Respondents is an efficient way to open a dialogue between the parties and come to an understanding on objectives and scope. Expanding the use of these discussion will yield benefits for both agencies and recipient companies.

Of course, both agencies and RFI recipients need to be willing to fully engage to leverage the benefits of such discussions. Issuing agencies should participate with an eye towards utilising the information learned to narrow or refine the required RFI response – and, if such information is learned, actually narrow or refine the RFI. At the same time, companies must be prepared to come to the table with useful factual information to help achieve this goal.

The types of discussions described by task force members do not need to be lengthy or formal to be productive. Agencies should include contact details for an individual staff member at the competition authority involved in the investigation or send an introductory email in advance of issuing the RFI, to facilitate future discussions.

4. Respondents should respond to reasonable RFI requests in good faith.

Just as competition authorities should accept responsibility to tailor RFI requests, Respondents should also accept their obligations in responding to reasonable RFIs. ICC recognises that members should respond to RFIs through good faith and reasonable efforts to provide responsive and accurate information as requested. This obligation should be consistent with applicable legal principles and appropriate practices.

This also implies that there are limitations to RFIs and situations where a company may not be obligated, to the extent that a particular set of RFIs is voluntary rather than compelled, the RFIs themselves are not within the authority of the requesting agency, or the RFIs are unduly harassing or otherwise excessive in a way that undermines their legitimacy. ICC members recognise, however, that investigations supported by RFIs play an important role in allowing competition officials to execute their duties which benefit competition, consumers and markets. These objectives are not possible unless companies are willing to respond in good faith to reasonable RFIs, and engage with competition authorities to share their knowledge.

5. Agencies should be flexible on format and structure of responses to the greatest extent possible.

Companies often receive RFIs with very similar questions from multiple competition authorities. A willingness by agencies to be flexible on the exact requirements for response to an RFI can lead to significant benefits for both agency and Respondent. While overlapping RFIs may suggest an overall burden reduction – a company can gather information for multiple responses in one fell swoop – small differences in response requirements can easily eliminate any efficiencies and significantly delay response times. These differences can be as small as one RFI requiring a table and another requesting a narrative response or requiring database load files instead of PDFs. By offering flexibility on response format – in other words, making clear that the authority prioritises

prioritizes substance over form – companies can often leverage other RFI efforts and significantly reduce their response time.

At the same time, companies should be receptive to reasonable feedback from competition authorities that an existing response does not suffice, and be willing to provide additional information as needed. In some instances, specific requests may relate to the authority's planned use of the information (e.g. requiring data from a particular time period in order to aggregate with other like responses) or dictated by the authority's own legal or procedural requirements. This recommendation should be viewed as encouraging a dialogue on modifications, where modifications are possible.

6. Agencies should seek to cooperate with other competition authorities where objectives for market studies may align, and Respondents should be willing to provide waivers (where reasonably requested) to facilitate such cooperation.

Competition authorities can also benefit from interactions with counterpart agencies conducting similar investigations. Competition authorities have a long history of working with their counterparts in other jurisdictions on competition enforcement matters. The benefits of such cooperation can include significantly reduced enforcement costs. Authorities have acknowledged that cooperation on competition enforcement matters reflects the reality that companies (and their conduct) have increasingly international reach.⁸

Applying this same approach to market studies and sectoral inquiries can provide similar benefits. For example, a competition authority considering a market study may first review the fruit of similar efforts in another country and determine that certain types of information should be prioritised (or that certain questions are unlikely to yield useful responses). Moreover, information gathered directly from another agency may already be indexed or organised in a way that reduces time and costs.

Many competition authorities already have memoranda of understanding, agreements, and procedures in place to exchange information. These often include procedures for authorities to request waivers from companies that have submitted confidential information in another jurisdiction. Companies should be willing to grant reasonable waiver requests to facilitate this cooperation. Even without a waiver, competition authorities should seek to cooperate with other agencies on the content and structure of the RFI itself, utilising their counterparts' insights into the information that is truly necessary, the right questions to ask, and the most effective ways to ask them.

7. Agencies should ensure that the scope and burden of RFI requests is proportionate to the role of the recipient in the investigation.

Many competition authority statements on procedures already note that burden is a consideration. For example, the European Commission's *Antitrust Manual of Procedures* states that "the team needs to check whether such a measure is proportional, i.e. whether the measure is

⁸ For example, the Korea Fair Trade Commission has stated that "as the world economy becomes globalized and integrated . . . the enforcement of competitive laws only within South Korea is insufficient for effectively coping with threats to competition such as international cartels of multinational enterprises." *International Affairs*, Korea Fair Trade Comm'n, <https://www.ftc.go.kr/eng/contents.do?key=513>. Similarly, the European Competition Network was established as a forum for discussion and cooperation among European competition authorities "to counter companies that engage in cross-border practices" and allow "competition authorities to pool their experience and identify best practices." European Competition Network, https://competition-policy.ec.europa.eu/european-competition-network_en.

appropriate and necessary” and that “in principle, the less burdensome measure should be selected.”⁹

These recommendations do not seek to draw a bright line on what may be considered “overly burdensome.” But expecting all companies to assume the same level of burden in all cases – regardless of the RFI type or the company’s role in an investigation or relevant market – can lead to frustration and inefficiencies.

Competition authorities should consider the posture of the investigation (*i.e.* a market study or enforcement action) and the role of the recipient in determining whether the burden imposed by the RFI is proportionate. Adjustments to the RFI scope and expected timing of response, properly reflecting these factors, should be implemented. Adjustments may include making certain questions optional, or affording Respondents the opportunity to weigh in on whether their response is likely to be useful or relevant to the authority’s inquiry.

8. Agencies should, where feasible, provide feedback to RFI recipients on the status and outcome of the investigation or market study.

Keeping recipients timely updated about the status or outcome of an inquiry continues the dialogue between competition authority and company. It reinforces the legitimacy of the overall investigation by showing recipients that the authority is acting on the information it has received, which in turn strengthens the reputation of a competition authority and makes companies more likely to respond to future requests.

Providing periodic updates can provide a measure of accountability and stymie the use of RFIs for inappropriate purposes. Finally, providing such updates creates opportunities to engage on follow-up requests. For example, notifying a respondent that the scope of a market study has shifted after the initial RFI may present an opportunity to share that a follow-up RFI is forthcoming, giving the company time to begin marshalling its resources for a response.

9. Agencies should provide adequate confidentiality protections for information submitted by RFI recipients, as well clear and transparent information about the treatment of confidential information.

Clear information about confidential treatment and the ability to designate information as confidential will encourage Respondents to be more forthcoming in providing valuable information, particularly in cases where the RFI requires sensitive information or the Respondents may fear reputational risk or commercial retaliation from business partners.

Agencies should adopt confidentiality measures sufficient to protect confidential information submitted by Respondents. Such measures should provide clarity on both the types of information that can be considered confidential, and how such confidentiality designations may change during different stages of an investigation (*e.g.* a Phase II merger review vs. litigation).

There is often confusion about the use of confidential and non-confidential terms. In applying confidentiality protections, agencies should consider whether access to confidential information should be granted to relevant parties, only to external counsel in a data room, or only to external

⁹ Eur. Comm’n, Antitrust Manual of Procedures § 3.3 (Nov. 2019), https://competition-policy.ec.europa.eu/system/files/2023-02/antitrust_manproc_11_2019_en.pdf.

counsel if disclosed on an anonymised or aggregated basis when the information is of commercial sensitivity. To assist with the determination of the appropriate level of protection, Respondents should provide relevant detail on the reason(s) for the confidentiality request and to facilitate prompt resolution of confidentiality issues.

In cases where competition authorities believe it is important to use confidential information provided by a Respondent, Respondents should be given advance notice and the opportunity to discuss possible alternatives which are sufficient to protect the Respondent's confidential information, such as providing non-confidential versions of their responses or anonymising certain aspects of a response. In certain instances, it may be appropriate for a company to review a draft description of highly sensitive information before it is published. Agencies should inform Respondents in advance as to when, in what form, and to which parties, access to documents will be granted.

10. Respondents should provide supplemental responses if material and relevant new information comes to light within a reasonable timeframe after their initial response.

Agencies should endeavor to provide updates to Respondents, but Respondents should also provide follow-up responses under certain conditions. If the Respondent learns additional information that is relevant to the RFI, and such information is material – *i.e.* it alters the fundamentals of the Respondent's initial response – it should endeavor to provide that information as part of its good faith obligation to respond. Note that this should not be construed as placing Respondents under a perpetual obligation to provide information, but instead to cover new and relevant information that is learned within a reasonable timeframe after the initial RFI is received.

This recommendation echoes the importance of dialogue and engagement present in several of the other recommended practices, as well as that of the relationship between competition authorities and companies that should continue even after an RFI.

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The International Chamber of Commerce (ICC) is the institutional representative of more than 45 million companies in over 170 countries. ICC's core mission is to make business work for everyone, every day, everywhere. Through a unique mix of advocacy, solutions and standard setting, we promote international trade, responsible business conduct and a global approach to regulation, in addition to providing market-leading dispute resolution services. Our members include many of the world's leading companies, SMEs, business associations and local chambers of commerce.



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