



SUMMARY RESPONSES:

The Treatment of Confidential Information in
Competition/Antitrust Administrative Proceedings

A Practitioner's Survey

April 2014

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Executive Summary

In 2012, the International Competition Network (ICN) launched the Investigative Process Project (the "Project"), with the mandate to increase understanding among ICN members of how different investigative processes and practices can contribute to enhancing the effectiveness of agencies' decision-making and ensuring effective protection of procedural rights. A major area of the Project's focus is the extent to which antitrust and competition law enforcement agencies' policies and procedures are transparent and protect due process during investigations and other administrative proceedings. The Project is chaired jointly by the U.S. Federal Trade Commission and the Directorate-General for Competition of the European Commission. The Project's published mandate states that "[b]ased on this work and building on the work of the ICN and other relevant work product, members may find it useful to develop ICN guidance of recommendations" concerning matters such as due process and transparency.

To aid the discussion and support the work on the Project, in 2013 three ICN NGAs (two of whom are former heads of ICN member agencies) launched a survey of private practitioners capturing their views on transparency and due process procedures used in competition proceedings¹. This year the Project pursued the topic of confidentiality practices and protections. Again, the same three NGAs conducted a survey of practitioners examining the experience from the private bar in dealing with an agency's treatment of confidential information during the administrative investigative and enforcement process.

The survey was conducted between February 18, 2014 and March 21, 2014. It was broadly distributed through various networks of potentially interested parties, including competition law and antitrust practitioners in many different countries. Survey respondents were invited to submit their responses through a confidential, on-line interface. The survey produced 94 individual responses. These responses concerned the practices with regard to the handling, treatment, and use of confidential information at least 34 different agencies. A full list of the agencies included in the survey's responses can be found in the answers provided to question Q1.

We were pleased at the broad response to the survey. However, in undertaking the survey, we became aware of a strong sensitivity to discuss issues concerning transparency and due process during competition law proceedings felt by some practitioners. It is clear that anonymity was important to those who took part in the survey. Therefore, the survey results where practitioner's narrative responses are shared may have been edited or redacted for the sole purpose of maintaining anonymity or to reduce redundancy.

The remainder of this report contains (1) a summary of the key takeaways from the survey's results, and (2) the detailed data and information provided in response to the survey's questions.

¹ <https://www.uschamber.com/competition-policy-antitrust-0>

Key Takeaways:

1. The aggregate survey results reflect experiences from a robust sample size covering a diverse number of jurisdictions. The overwhelming proportion of responses concerned an agency's confidentiality practices and protections as applied in non-cartel proceedings. (See question 1-2)
2. Overall, a little more than half of the practitioners felt that its competition agency's attitude, in general, was to balance the need for confidentiality with the need to review confidentiality designations as to avoid overly broad confidentiality determinations. When responses are split between investigation targets and complainants or third parties, however, there was a greater diversity of views on whether agencies get the balance correct. Over 60% of responses from a target's point of view felt that an agency's checks and balances used to examine/review confidential information were either insufficient, or varied on a case-by-case basis (Question 5). Further, roughly 75% of responses from a target's point indicated that confidential determinations made by an agency had been a problem in mounting an adequate defense (Question 7). On the other hand, over 50% of responses from the point of view of a complainant or third party responded that an agency's checks and balances used to examine/review confidential information were sufficient (Question 6). Finally, over 60% of responses stated that they have great confidence that information designated as confidential and submitted voluntarily will not be shared inappropriately without notice (Question 8). These results indicate that submitters of information designated as confidential – including complainants and third parties – have much greater confidence in the agency striking the correct balance between confidentiality and disclosure, compared to investigation targets.
3. In response to Question 9 over 85% of responses stated that an agency routinely uses confidential information in its claims of competition violations, which can often be difficult to access in order to mount a defense (36%) or agency practices varied on a case-by-case basis (50%).
4. Over half of the responses to Question 10 stated the agency has published policies and procedures concerning its treatment of confidential information and follows such procedures, although responses to Question 4 indicate a plurality of views regarding whether the fact that an agency has such procedures contributes to the agency striking the right balance between confidentiality and disclosure.
5. While over 70% of responses stated that a submitter is required to substantiate claims of confidentiality (Question 12) and over 80% respond that the agency reviews confidentiality claims (Question 13), nearly half of the practitioners surveyed believed agencies require very little justification for why information should be designated confidential (Question 11). These responses indicate that while an agency may review confidentiality claims, such reviews may be superficial or that confidentiality claims, while supported, are not supported in detail. Moreover, roughly two-thirds of practitioners felt that a review of confidentiality designations was not done as a matter of routine, but only upon request or at the agency's discretion. (Question 14)
6. A little more than half of the responses indicated that the criteria used by agencies to review

confidentiality claims were transparent. However, in the comments section of the survey several responses expressed concerns with regard to consistency as well as the degree to which the review was both meaningful and timely. (Questions 15-16)

7. A strong majority of practitioners believed its agency can override or reverse confidentiality assertions made by submitting parties. However, over three-fourths responded that the explanation for doing so was either not expressed or vague. (Questions 17-19)
8. With regard to timing, disturbingly, two-thirds of practitioners indicated that its agency does not provide confidential information to a target prior to deciding to charge a target with an alleged violation. (Question 20). This view was supported by several of the comments submitted in response to Question 21.
9. When the agency does provide confidential information to a target prior to deciding to charge a target with an alleged violation, there was a plurality of whether exceptions or exclusions still applied to such disclosure (Question 22), and many narrative responses stated that disclosure was incomplete, which affects the target's due process considerations (Question 23).
10. Even after an agency has decided to charge a target with an alleged violation, over 60% of practitioners responded that the agency still does not provide confidential information obtained from the complainant or third parties to the target.
11. Most responses indicate that an agency's procedures do allow for a target to seek to compel an agency to disclose information withheld on confidentiality grounds (69% in response to Question 25), while an even greater number of practitioners state that a submitting party is most often informed of an agency's intention to disclose information designated as confidential (76% in response to Question 26) and can seek a judicial or administrative protective order over the same (83% in response to Question 27).
12. Responses to Question 28 indicate that agencies attempt to use a wide variety of alternative methods to try to disclose all relevant information to targets, while concurrently limiting the exposure of confidential information. The most often employed method was providing non-confidential summaries (54%). However, many of the comments to Question 29 questioned whether the disclosure provided in such summaries was meaningful and/or timely. Further, setting aside those who solely selected "other procedures" (18 responses), only 34 of the remaining 76 responses indicated that the agency deployed more than one method to disclose relevant information to targets. The vast majority of these responses indicated that an agency used two of the methods named in the survey. This suggests that more methods could be routinely developed or deployed.
13. A majority of responses indicate that an agency is able to disclose confidential information obtained during an investigation to authorities in other jurisdictions (Questions 30-31). There were a wide variety of views expressed on whether doing so requires the submitting party's consent, where practices appeared to vary by jurisdiction and depending on the type of investigation (Question 32).

Where consent is necessary, a majority of responses indicate that providing consent is within the submitting party's discretion (Question 33), and helpfully 70% of responses state that the agency provides a model waiver of confidentiality (Question 34). Wide arrays of views were expressed on whether an agency's practices on sharing confidential information with other jurisdictions causes concern (Question 36).

14. With regard to issues regarding public disclosure of confidential information, practitioners were generally in agreement about the procedures and practices in place. (See questions 37-41)
15. Overall two-thirds of practitioners felt that its agency needed to either work on being more consistent or had some procedural deficiencies with regard to confidential information in investigations that needed improvement. (See question 42)

Survey Questions/Responses:

It is important to note that no single jurisdiction received more than nine responses. Therefore it is impossible to draw statistically significant conclusions on the practices in any particular jurisdiction. However, the survey is best interpreted as general perception from practitioners based on their experience. Also the percentages used are based on the number of responses received to any specific question

Q1: Please share with us, to the degree you are comfortable, which agency you will be referring to as you take this survey. If you wish not to share the exact country, please provide the region of the world (ex. Europe, Asia, Africa, Latin America, etc).

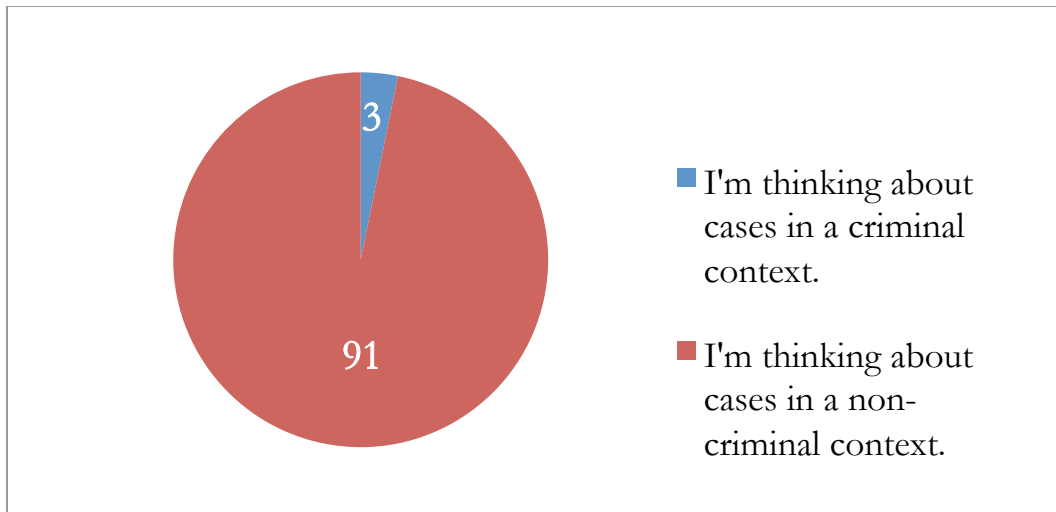
Argentina (4)
Australia (6)
Brazil (11)
Canada (5)
China (2)
Colombia (3)
Czech Republic
European Union (9)
France
Germany (5)
Greece (2)
Italy
India (3)
Japan (2)
Korea (3)
Mexico (2)
Namibia
Peru
Portugal
Poland
Romania

Spain
Singapore
South Africa
Swaziland
Switzerland
Turkey (3)
Ukraine
UK (4)
US (3) - DOJ (2) FTC (3) - (8 Total)
Venezuela
Zambia (3)

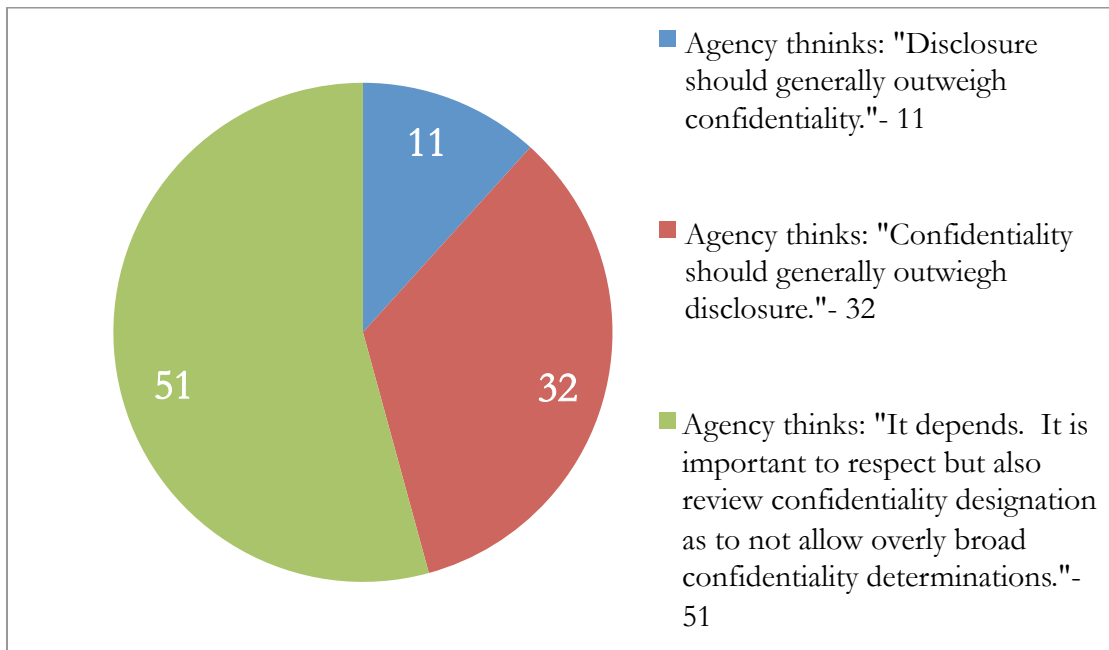
Responses where only geographic regions
where provided:

Asia
Europe
Latin America
North America

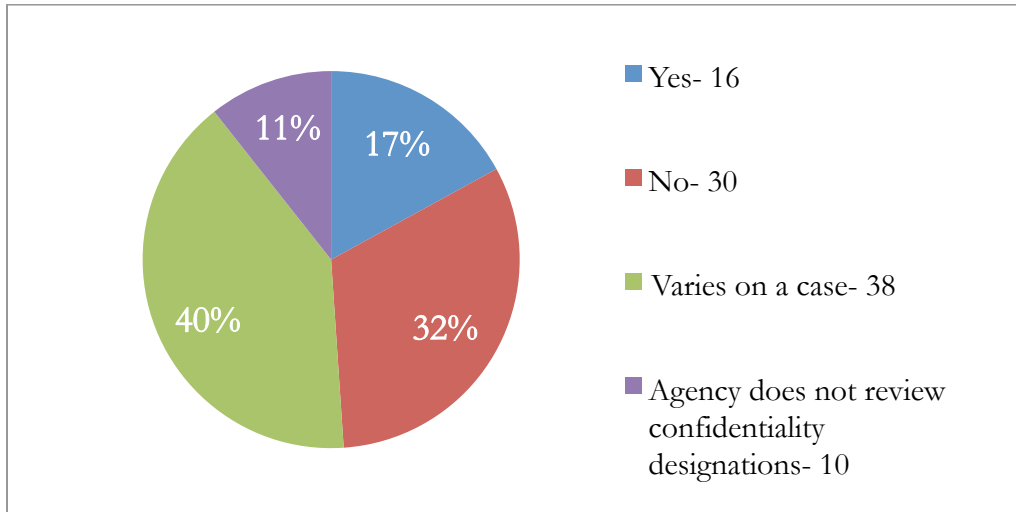
Q2: As you proceed to answer this survey will your answers be in the context of criminal or non-criminal competition proceedings?



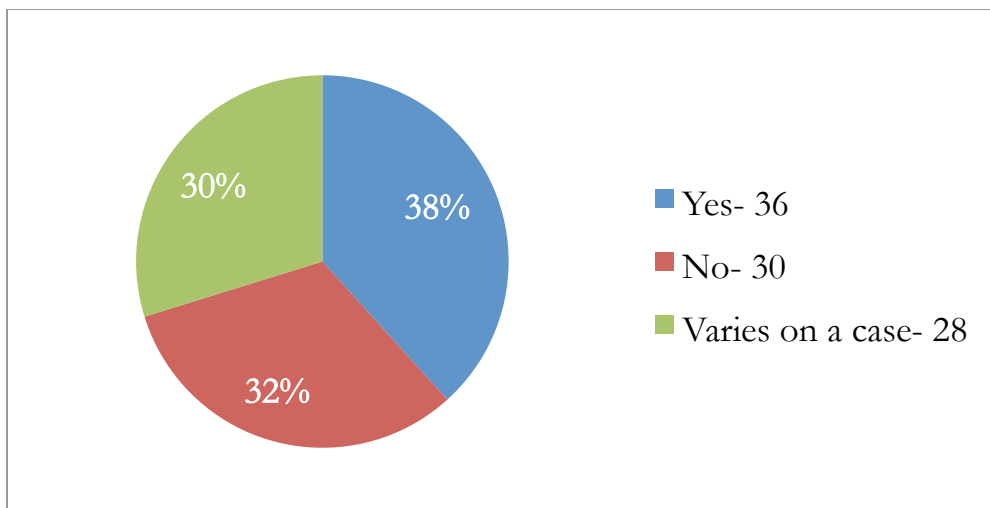
Q3: Thinking about the agency, what do you believe is its view on the balance between confidentiality and disclosure to the party under investigation?



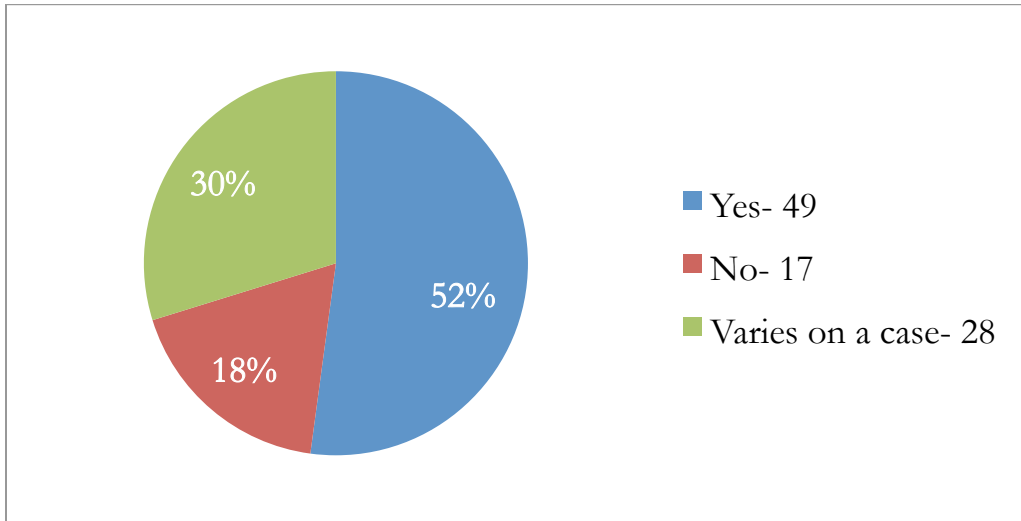
Q4: To the extent to which the agency has procedures to review confidentiality claims, in your experience has the agency tended to place an overly broad classification of what information is confidential?



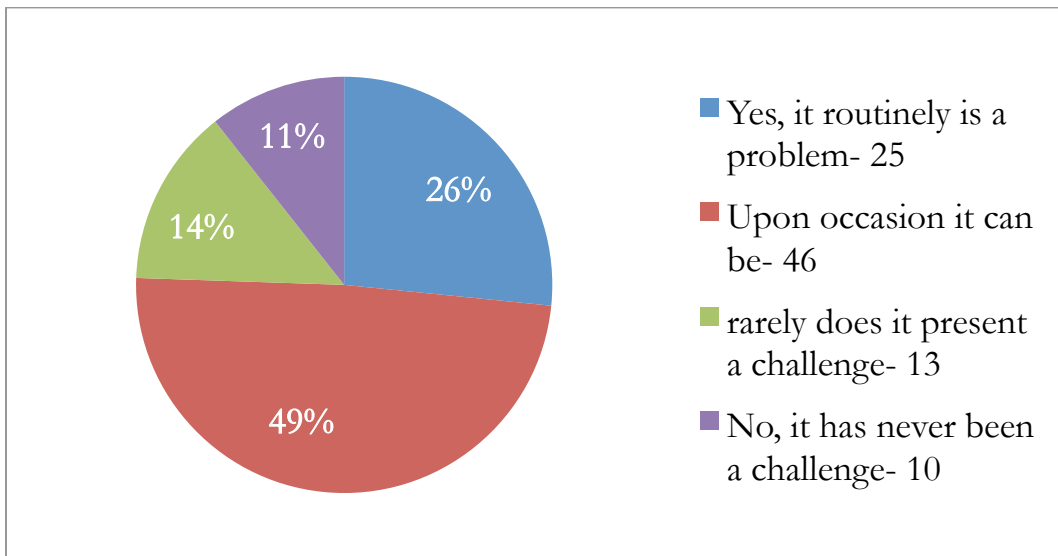
Q5: From the point of mounting a defense, are checks and balances used by the agency to examine/review confidential determination sufficient?



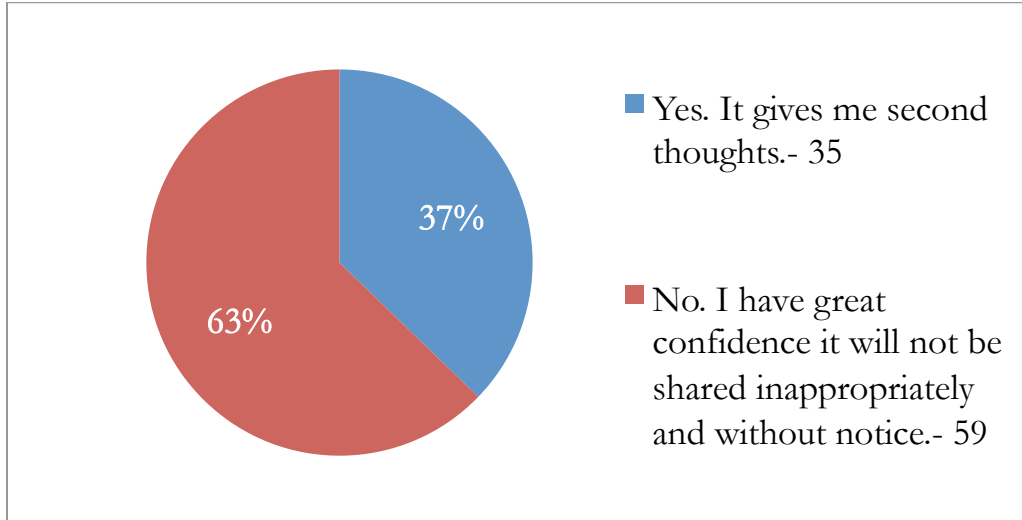
Q6: From the point of a third party/complainant who may supply confidential information, are checks and balances used by the agency to examine/review confidential determination sufficient?



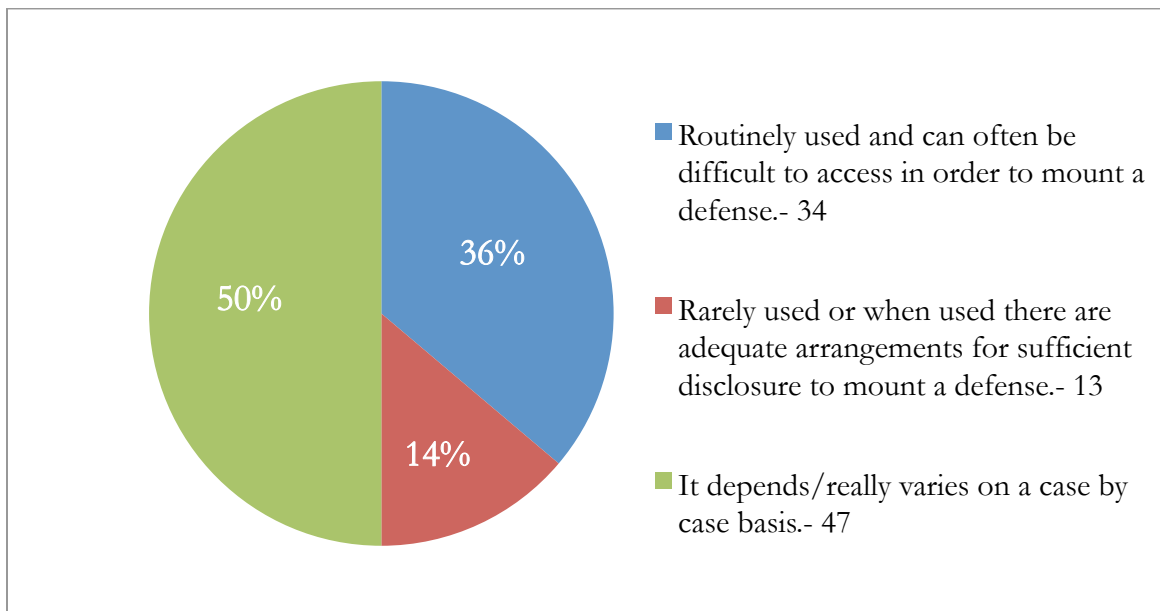
Q7: Has access to information the Agency has deemed confidential been a challenge to mounting an adequate defense?



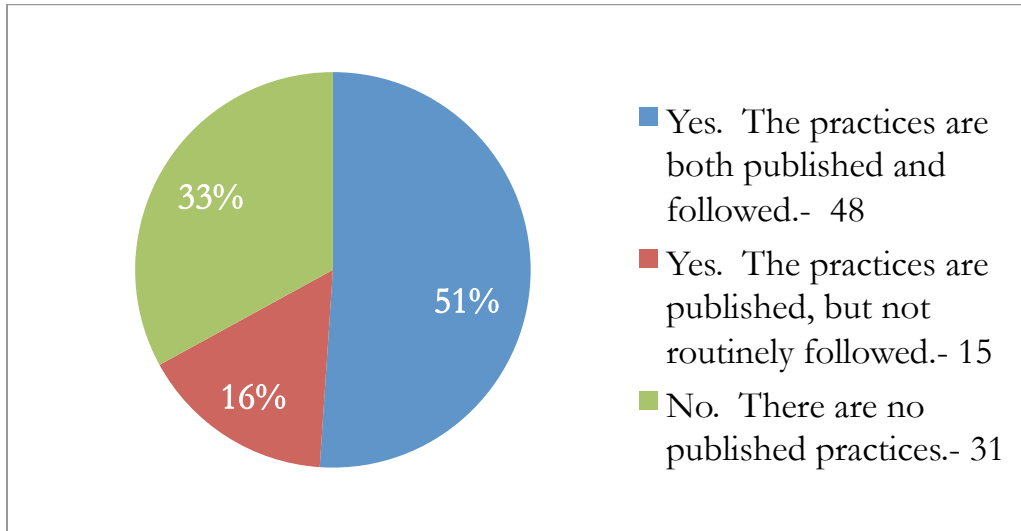
Q8: Does the agency's handling of confidential information cause you concern about voluntarily sharing information that may be pertinent to an investigation?



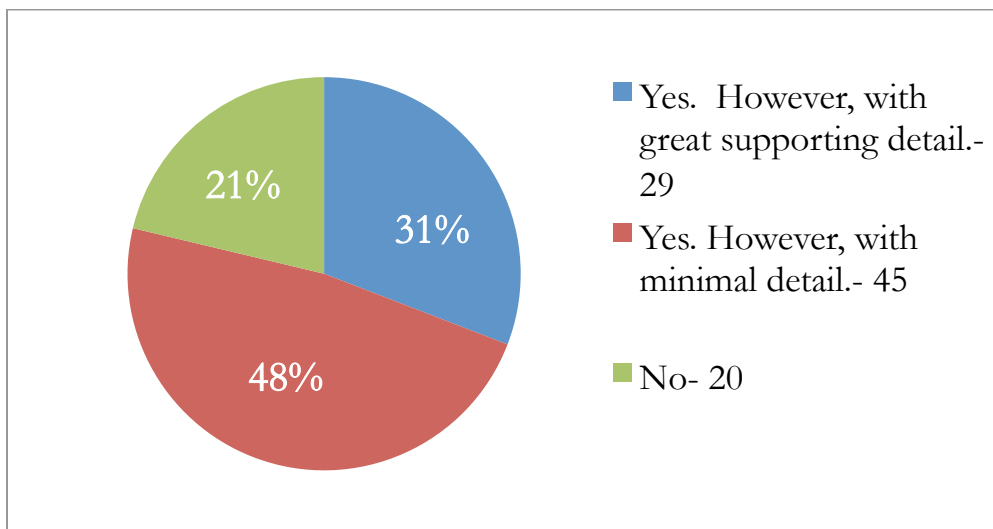
Q9: From your experience, how often does the agency rely on confidential information in its claims of competition violations?



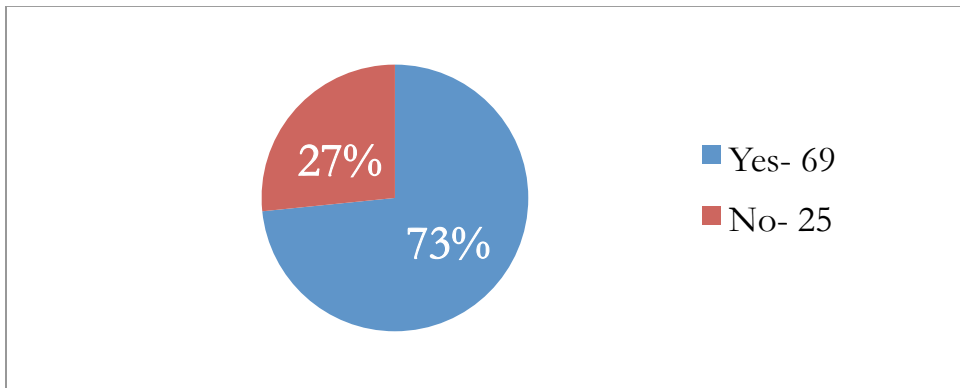
Q10: Does the agency have published policies and procedures concerning its treatment of confidential information during antitrust investigations and are they followed?



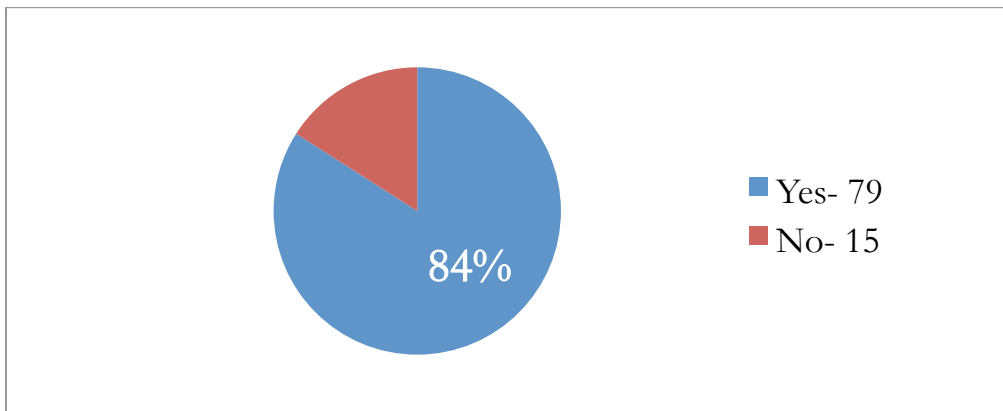
Q11: Is the submitter of information required to substantiate or explain confidentiality claims?



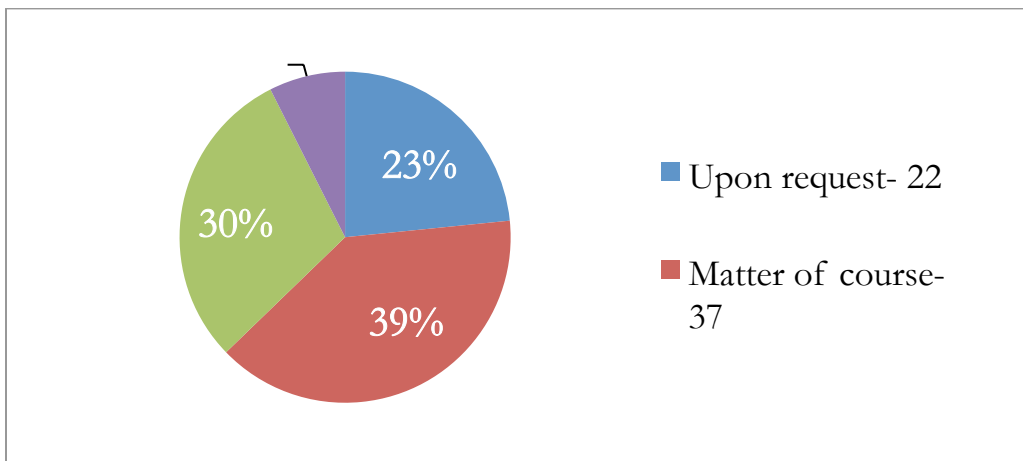
Q12: Is the submitter of information required to substantiate or explain confidentiality claims?



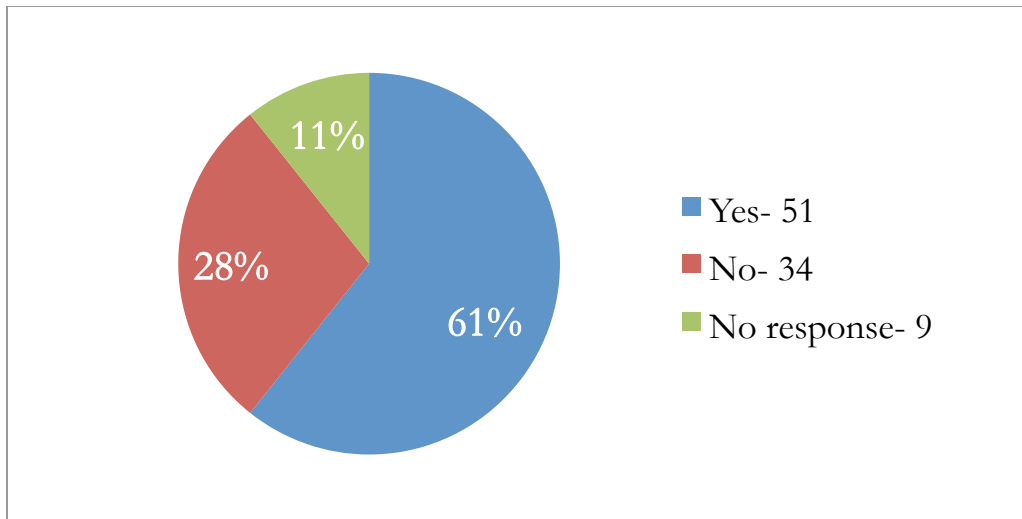
Q13: Does the Agency review claims of confidentiality to determine if the information warrants protection?



Q14: If so, is the review done as a matter of course, at the agency's discretion, or at the request of a party?



Q15: If so, are the criteria the agency uses to review confidentiality claims transparent?



Q16: If so, is the review both meaningful and timely? Please explain, including what improvements, if any, are desirable. (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

Sometimes it is meaningful and timely, but parties should be able to appeal against the determination to another body.

The agency adopts a casuistic approach, as a rule in benefit of the agency file interests. The internal review process tends to confirm the case-handlers approach.

The agency reviews the claims and approaches the matter, broadly, in a common sensible way.

Mostly meaningful, careful and timely.

Review is not timely - it can take several months in cartel cases.

The review is taken in a very formalistic way.

Frequently, the assessment of whether or not information submitted by defendants or third parties takes longer than it should, creating difficulties in either preparing the defense or submitting arguments against a defendant.

The substantive provision of the law is very simple but the procedural regulations drafted by the Agency is complicated and substantially distinguished the substantive provision. This may be challenged in Writ jurisdiction for a judicial review at any point of time in future. The procedural regulations must be brought at par with the substantive law so as not to defeat the intent of the basic law.

There is a complete ad hoc process regarding confidentiality designation. There are also a number of leaks that need to be investigated regarding the source.

The process is perhaps not given as much importance on a consistent basis as it should be. Sometimes it seems that the authorities will accept unduly broad confidentiality claims which makes their published decisions difficult to interpret in places

Usually timely, often meaningful, but not always.

The law specifies that all inquiries are conducted in private and that all information submitted in the course of an inquiry is entitled to confidential treatment. The agency will sometimes reveal to the target of an inquiry a summary of its conclusions, but seldom the specific facts upon which these conclusions are based (apart from vague statements about having received complaints and very general descriptions of the allegations in the complaints). This sometimes inhibits the ability of merging parties to deal with the agency concerns at the pre-application stage.

Varies depending on case and case team.

The review could be more meaningful as assessed on the specific facts. Often broad categorizations are used to exclude confidentiality protection regardless of the specifics of the facts or the industry.

Disclosures are generally limited to litigation and FOIA responses, which are subject to either judicial review and timetables or statutory rules.

Generally speaking, one will have to differentiate between various types of proceedings. In case of merger control, confidential information of the merging parties on one hand will be kept confidential and third-party interveners will generally not granted access to confidential information. Information provided by third-party interveners has to be disclosed to the merging parties in general, but confidential

information will be protected. However, the agency may not base its decision, e.g. prohibition of merger, (solely) on confidential information.

The case in antitrust/cartel proceedings is quite similar. However, the party under investigation has generally the right of *full* access to the case file. In case of confidential information of third parties, such information must not be used against the party under investigation. In order to ensure confidentiality for third parties (e.g. complainants), the agency accepts anonymous complaints. In addition, the agency set up an online "whistleblower tool" through which anonymous complaints can be made which ensures that not even the agency gains knowledge of the complainant's identity.

Tends to be slow, and over-cautious in favor of upholding confidentiality claims.

I think the review of the confidentiality claim is meaningful and timely. It would be desirable that the authority may provide thorough explanation regarding the grounds for granting confidentiality (or not) to a given document.

Guidelines are needed, in particular in relation to confidentiality issues regarding merger proceedings.

Yes, the agency analyzes the introduced documents and in the term of five business days, decides if the information adjusts to the requirements.

The process, if there is one, is not transparent. An agency should advise the target that it has reviewed the confidentiality designations, the results of that review, and provide the target an opportunity to challenge and ask for reconsideration to the extent that agency has found the confidentiality designations to be warranted. The agency should also explain why measures (e.g., disclosure to counsel only, or outside counsel only) do not adequately balance the interest in confidentiality with due process to the target.

The agency tends to favor confidentiality so as to encourage cooperation. Reviews are not common. There should be more weight given to the effect on the target before relying on confidential information.

The review is rather meaningful. In some instances it takes too long

Sometimes the review is neither meaningful nor timely. Although there are rules established by the regulations, the application of such rules needs to be more transparent.

Review is impacted by the agency's own priorities - if it wants to reveal the information or prefers not to - that appears to drive the decision in some cases.

Confidentiality review depends on the potential recipient of the information. In cartel cases, defense lawyers for other individuals/undertakings under investigation get full access to the file, but may only share with their clients what is really needed for the defense (thus, the review is shifted to the lawyers with no real means of checking what is passed on).

Nobody can control if third parties have access.

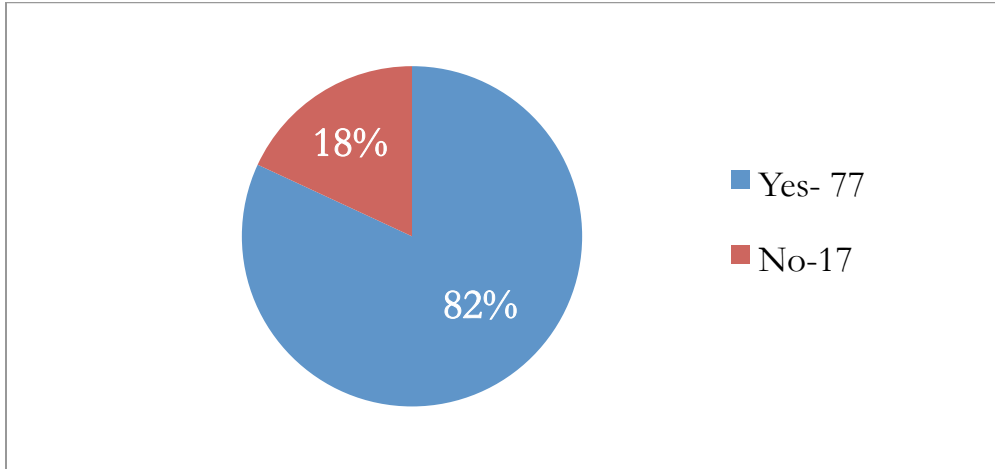
It is very meaningful although not very well tested and there is need to set up more formal guidelines and procedures as currently the framework is not very established.

Much depends on the parties to a procedure and while there is some pressure during a cartel procedure discussions about confidentiality AFTER the procedure can slow down the publication of an agency decision for a very long time (we are talking many months or even more than 1 year). That needs to change given that published decisions are necessary for private actions and serve as precedents for the defense in other cases.

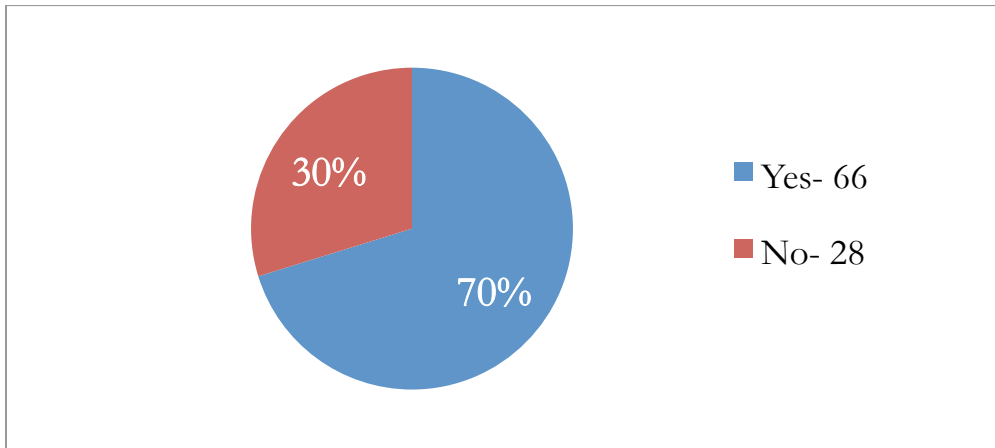
Confidentiality is governed by federal statutes. The criteria are generally transparent, but the decisions are less so. In my view it is better for the agency to err on the side of protecting confidentiality while the case is still in front of the agency. If the matter is litigated there will be an opportunity for greater disclosure of confidential information.

The agency has absolutely no regard for disclosure to the respondent of theories, allegations or evidence, confidential or non-confidential, prior to the Examiner's Report. It discloses in the Examiner's Report only its findings and conclusions, typically without citation to evidence underlying evidence.

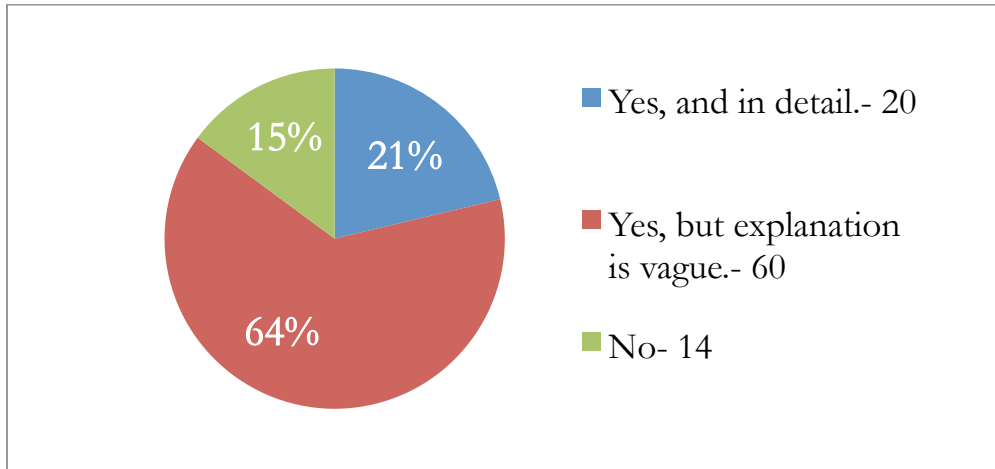
Q17: Can the agency deny a request for confidential treatment if it decides that the disclosure would not cause competitive harm to the submitting party?



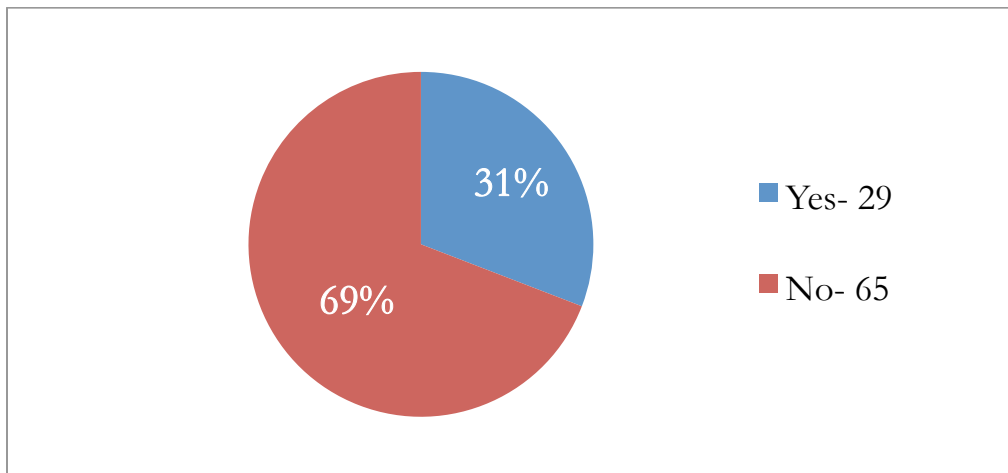
Q18: Can the agency deny a request for confidential treatment if it decides that in fairness to the target confidential information can and should be disclosed, including subjecting such information to a protection order that places appropriate limitations on use and access?



Q19: Does the agency explain its conclusions to the submitting party with respect to the confidential designations it made if the agency determines that the information is not entitled to confidential treatment?



Q20: During the course of an investigation prior to issuing tentative conclusions or recommendations or deciding to charge the target with a violation subject to a hearing, does the agency provide confidential information to the parties under investigation that was obtained from complainant or third parties?



Q21: If yes, is the disclosure both timely and meaningful? (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

Sometimes, sometimes not and parties have to try constitutional defenses based on the due process clause

But not always or entirely.

Not always.

No. Reiterate the ad hoc actions of the agency.

Depends on the circumstances. During the investigative stage, information is generally kept confidential. However, once the matter is proceeding to trial there are disclosure requirements.

The disclosure is to the legal representative of the parties and not the parties and is generally made timely and meaningfully, however, there are instances where the parties seeking disclosure are required to approach the agency for relief in order to obtain disclosure.

In relation to merger proceedings, the disclosure is ultimately made prior to the agency considering the matter. However, this is not timely in the sense that it doesn't allow the party, who requires the disclosure of the confidential information adequate time to consider information, which is being made available under the cover of confidentiality in a timely and meaningful manner.

Can be slow. In a merger case that can make the disclosure useless due to speed of procedure.

In infringement cases disclosure will not be given prior to tentative conclusions.

The agency makes no such disclosures.

Disclosure is often late and subject to excessively restrictive conditions.

Time for a response may be relatively short, but extensions often granted. One curious case recently saw a second access to file (including new leniency applications) being granted at a stage while the authority had already concluded its investigation and was in the process of drafting the final orders.

No, it should be done before filing the claim.

Yes, during informal investigations, in particular unilateral conduct complaints, the authority can choose that briefs are exchanged between the parties. However, these would be non-confidential briefs.

It is disclosed only after SO is issued - sometimes it may not be timely.

The parties may have just read the confidential information - not to make copies or even transcript it.

As a general rule, disclosure is timely and meaningful. When an investigation is initiated, as soon as practicable, the agency is required to give written notice of the investigation to the person who is the subject of the investigation or to an enterprise which is suspected to be a party to the matter to be investigated. The notice must indicate the subject matter and the purpose of the investigation. There is no requirement to disclose the precise terms of the complaint. However, where the agency considers that written notice will materially prejudice the investigation, it may defer the giving of such notice to the conclusion of the investigation. In certain instances, this discretion may conceivably prevent a party from preparing an adequate defense to a claim.

Defendants have access basically to the whole file at any and every stage of the investigation - guaranteed by the courts, who are very protective of rights of defense. This happens from day one of the investigation - including, for instance, leniency documents and all the evidence presented - and continues throughout the whole proceeding, with a right to see and copy the files. Only confidential information (such as business secrets) from the leniency applicant and/or other defendants or third parties is not accessed, but then such material cannot be used at all for the accusations. It is so used, then it needs to be disclosed the other defendants as well.

Sometimes a little broad. Normally timely.

Most times it is.

The timing varies a lot.

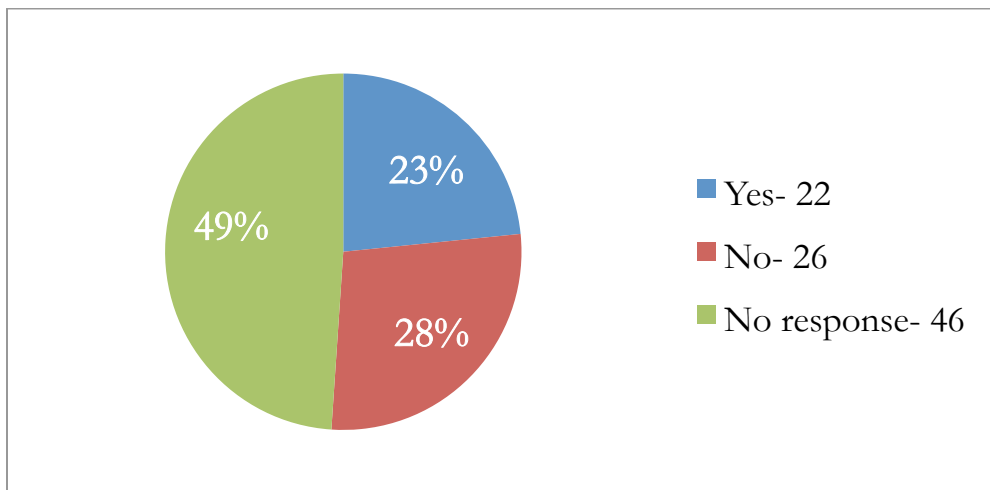
The agency may grant access to the complaint itself even before the SO, but it routinely asks the complainant to provide a non-confidential version where business secrets and other confidential information are redacted.

During cartel procedures disclosure at the time of issuing a statement of objections is comprehensive. The only issue tends to be that there is often little time to fully digest the information and use it in the defense.

The agency does not disclose any evidence to the Respondent. It may after the Examiner's Report disclose what it thinks the evidence is, but not the evidence itself.

The agency discloses nothing, confidential or otherwise, to the Respondent up to a week or two before it issues its tentative conclusions or recommendations. It allows during that brief period inspection and copying of at least some written statements it obtains from complainants and third parties.

Q22: If yes, is the access to the file complete, or are there still exceptions or exclusions (including, but not necessarily limited to, exceptions or exclusions based on confidentiality)?



Q23: If there are exceptions or exclusions, do they affect the due process considerations of the party under investigation? Please explain. (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

They may affect the due process considerations of the party under investigation.

Injury to ample defence.

It depends, but sometimes yes.

Yes, a company may be charged without have accessed to all materials used by the authorities.

There are exceptions but it has always been a challenge to convince the authority as to why the claim will not fall within the ambit of the exception. Appellant Tribunal may not always agree with the non-disclosure of the confidential information. In this hearing before the appellate tribunal the confidential information granted by the Commission was overruled

That's clearly the case. The agency does not make clear what is the content of the claim(s).

At trial, parties generally expect full disclosure.

No. Only information that may (has been) disclosed to the party under investigation can be used against the latter. Accordingly, the agency may ask the submitting party to limit its confidentiality claim to the extent that is strictly necessary. If this is not possible and the facts cannot be corroborated by other non-confidential sources, the information must not be used.

Yes, they do.

The disclosure does not affect the due process considerations of the party under investigation.

The disclosure is made to legal representatives of the parties. This may at times present a challenge given that the information may not be disclosed in total to the respective client and accordingly may delay the matter.

As for the complainants, they are able to draft a new complaints following the access to file and thereby to issue new analysis or evidences in order to assist the Authority to grant an objective decision. As for the undertakings under investigation, they are able to review the complaints and/or the case handlers' allegations so as to effectively use their defence rights.

No, agency seeks to protect complainants.

Yes, the data room process used is excessively restrictive.

Depends on how well the file is maintained. Biggest problem may be that certain information takes some time to make its way into the file and thus is not available to the party under investigation when preparing its response to an SO.

The agency may reject the access to confidential information that will not be used as evidence in the decision. However, there is no possibility to review such approach, the party has no possibility to check, if the file does not contain additional information speaking in favor of it.

As explained above, exclusions from access are extremely limited, and cannot reach material used for the accusations (only business or commercial secrets or IP, and only when not relevant to the charges). So there are no due process concerns there.

Generally the exceptions and exclusions do not affect due process.

In those situations, the complainant argues that specific sections are confidential and the agency accepts such claims regardless of the effect on due process.

Yes, the exceptions affect due process rights.

Normally they do not affect the due process.

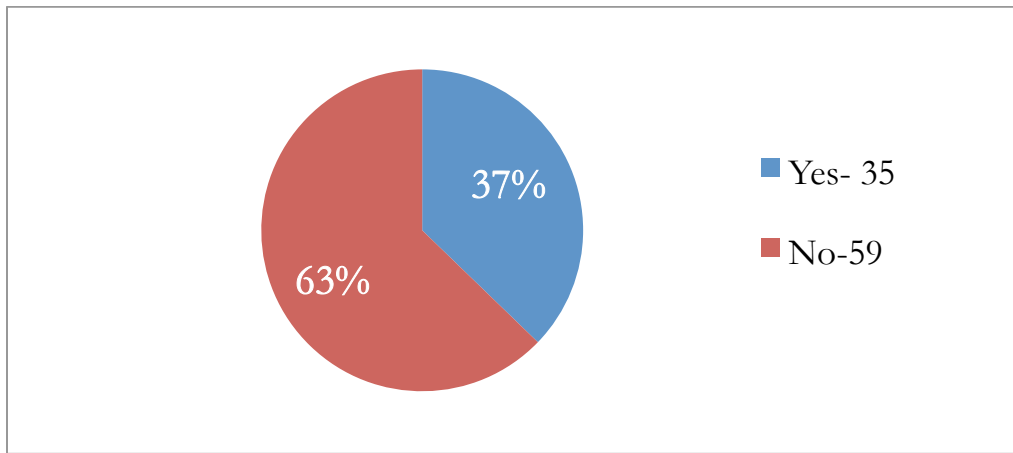
In this jurisdiction a cartel investigations may result in criminal indictments (up to a 10-year term). If the agency will use the evidence, then, the party must know the grounds. This is a difficult problem under the leniency program. An improvement could be to let legal counsel to have access under a non-disclosure agreement.

Q22 is badly written. Not clear what the answer means. No due process issues in my experience.

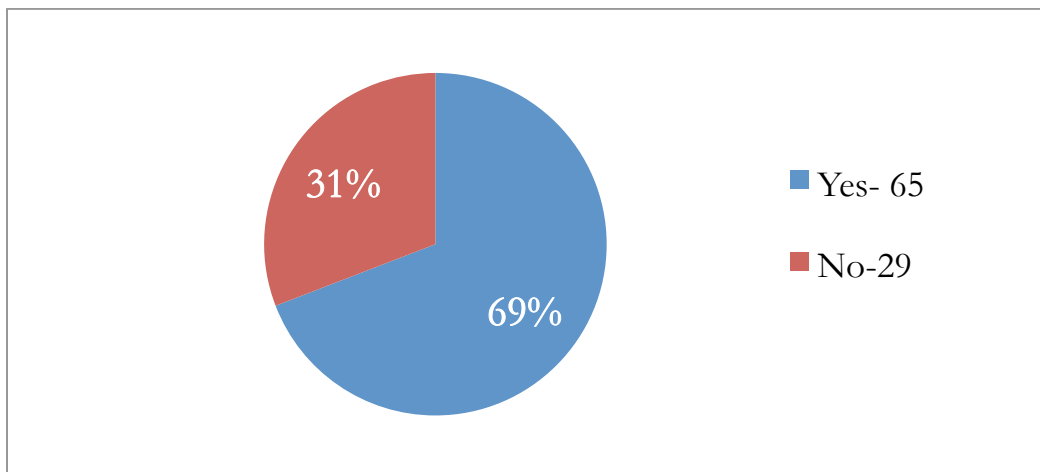
There are no "due process considerations" in this agencies proceedings.

What it chooses to disclose is subject to its complete discretion. Its selective disclosure is patently inconsistent with due process considerations.

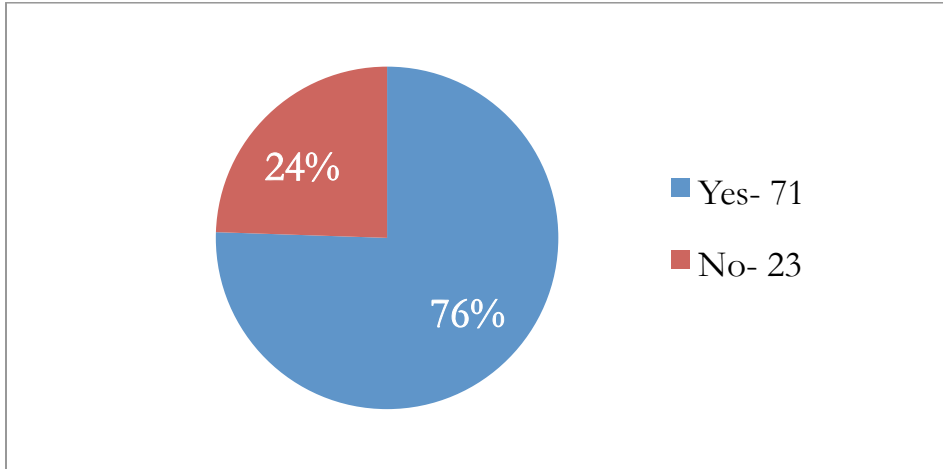
Q24: Following the issuance of tentative conclusions or recommendations or deciding to charge the target with a violation, does the agency provide confidential information to the parties under investigation that was obtained from complainant or third parties?



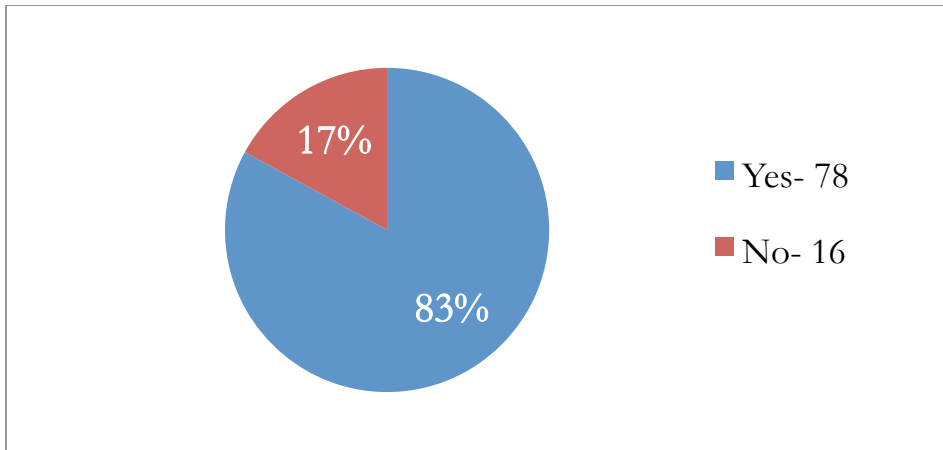
Q25: Are parties under investigation able to object to, or seek to compel disclosure of, information withheld from disclosure on confidentiality grounds, including subject to a protective order with appropriate restrictions on use (e.g., the instant proceeding) and access (e.g., counsel, or outside counsel)?



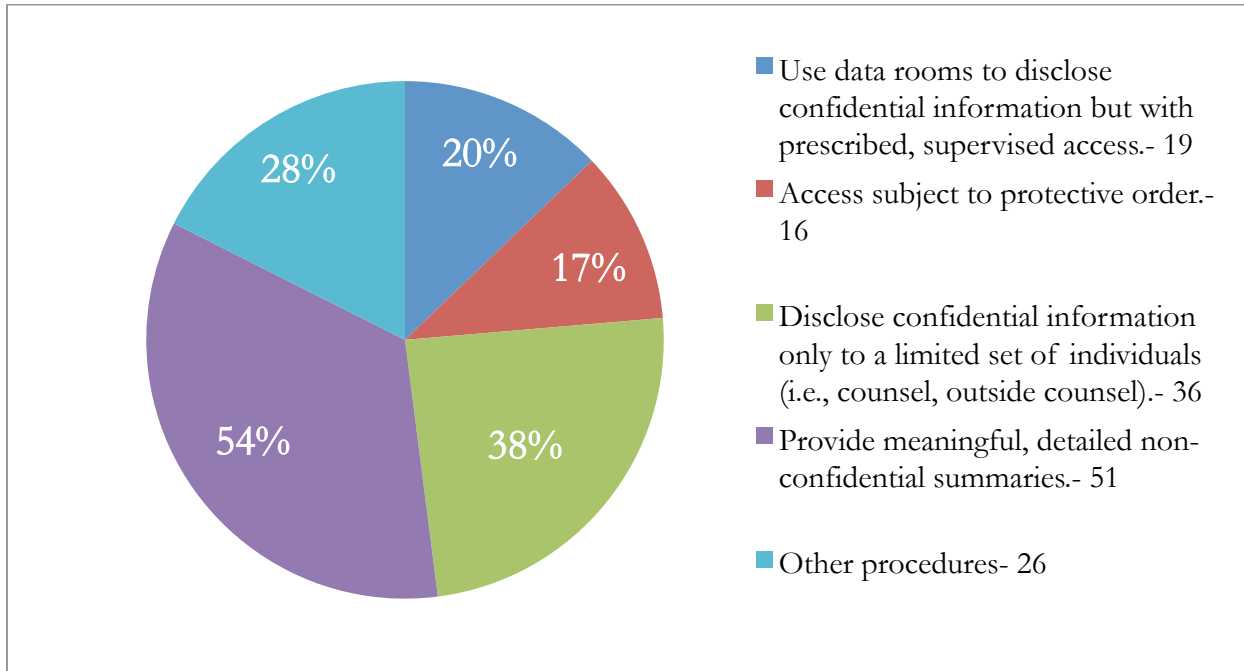
Q26: When the agency intends to disclose information designated as confidential to the parties under investigation, is the third party that submitted the information given notice of the intended disclosure and the ability to object or appeal the intended disclosure?



Q27: Does the third party have the ability to appeal to or seek a protective order from a court or other administrative agency to prevent or limit disclosure?



Q28: Does the agency use alternative methods to attempt to disclose all relevant information to the parties under investigation, while at the same time limiting the exposure of confidential information? (CHECK ALL THAT APPLY)



Q29: Are the methods that are employed both timely and meaningful? (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

Yes (28 responses gave this answer)

No (10 responses gave this answer)

Most of the time.

The agency approach and respective methods on disclosure are ambiguous. Usually it adopts a formal decision trying to dismiss the confidentiality claims. Such decision is subject to judicial review. In one specific case the agency decision was reversed by the court, which correctly upheld the confidentiality claim from other defendant in the same antitrust file.

No. The agency has to develop a more timely and meaningful manner to address confidentiality issues in investigations and merger cases.

Sometimes.

They are reasonable-but of course not perfect.

The approach taken by this agency is very hit and miss. I was representing an agency witness in an competition case, and the agency did nothing to protect the company's confidential information. Indeed, the agency was initially going to allow almost everything to be disclosed. We had to insist on much wider confidentiality orders.

Only partially.

Depends on the non-confidential summary either submitted by the party owning the confidential information or prepared by the agency

Sometimes yes. But leakages to Press and Media continue to remain a serious concern for parties and their lawyers.

No. Again, it varies on a case by case basis.

Hard to evaluate given the experience varies.

Data rooms / confidentiality rings take time to set up etc but can be effective so long as not subject to undue restrictions.

In the case of a complainant, the agency may seek consent to disclose confidential information and if consent is not forthcoming may decide not to proceed with the case if information is central.

The agency does not actually use any such methods, but "none of the above" was not an option. While it provides summaries, these are often neither meaningful nor detailed.

Not particularly. The national agency should adopt an approach similar to the European Commission.

The agency will provide the gist of the concerns but not disclose the confidential information. This can make it difficult to test the veracity of the claims but does give the party under investigation an understanding of the allegations in broad terms.

Yes, disclosures are made both before a matter is sent to the tribunal and if it is an agency decision, prior to that decision being made.

In theory, the agency may provide the respondent with a "summary" of the theories, allegations and evidence against it, but it rarely does so, and a summary falls well short of "all" information to the respondent. I have been unable to respond to Qs, 26-27 because I have not worked on cases in which a Statement of Objections was issued. I understand, however, that following the issuance of an SO the agency discloses "confidential" information "upon which it relies." Presumably, this means information that it cites to support a finding or conclusion. This is not adequate. It should disclose all information. If there is any exception, it should be limited to information relevant to issues that are only relevant to issues and claims excluded from the SO.

Meaningful yes; timely no. The process of getting a regime tends to be lengthy.

They are meaningful, their timely character depends on the case.

They are satisfactory.

No, they are not. Especially the third parties and complainants could not benefit from the right of access to file. The agency usually rejects those requests of access to file without granting a substantive explanation. In case of access to file, the methods used by the agency are narrowly interpreted.

Not really "meaningful". Disclosure is high level.

Excessively restrictive (including as to too late and too short a period of time to review and assess).

So so, sometimes yes and sometimes no.

Can be - cases vary. Depends on the experience of the case team.

It depends on the case.

Main focus is ensuring rights of defense so targets of an investigation basically see everything, and courts can be called to intervene. Balance in this case it totally tipped towards broader access by defendants. Confidentiality is a narrowly defined exception and can never impact material relevant to the investigation. However, defendants have an obligation for instance not to reveal certain materials (such as leniency documents) to anyone or it in any context other than their defense in the proceedings. These restrictions do work. Also, the authority releases non-confidential versions of document that is subjected to confidentiality.

The method result in a summary that in our experience is too vague to be useful. It tells us only what we have been able to assume from the agency's actions.

The procedures are completely ad hoc.

Yes. The agency will usually outline its case and key facts, while protecting confidentiality and witness information.

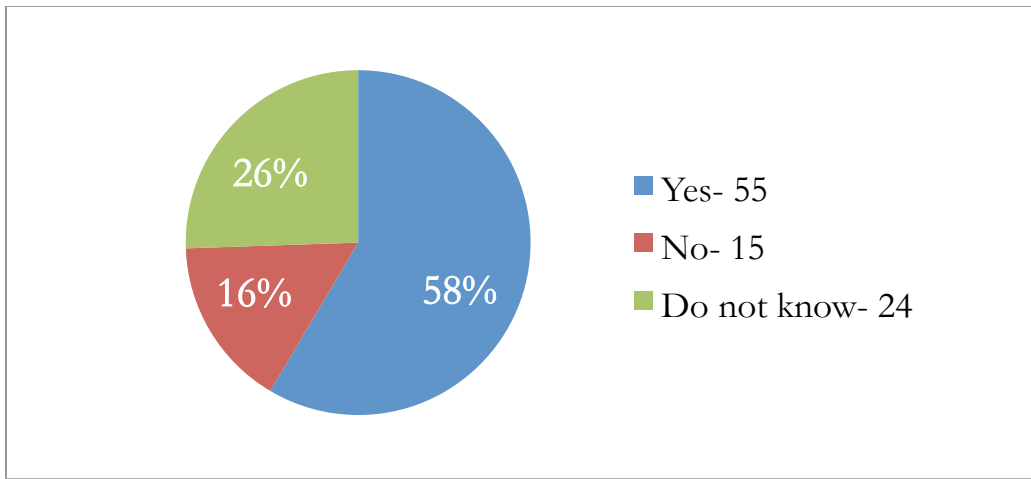
That depends, sometimes they are not.

Not really in certain cases. Likewise, in cartel cases there is no full-explanation as to how the authority gathered evidenced, and, therefore, sometimes such circumstance does not allow assessing due process violations.

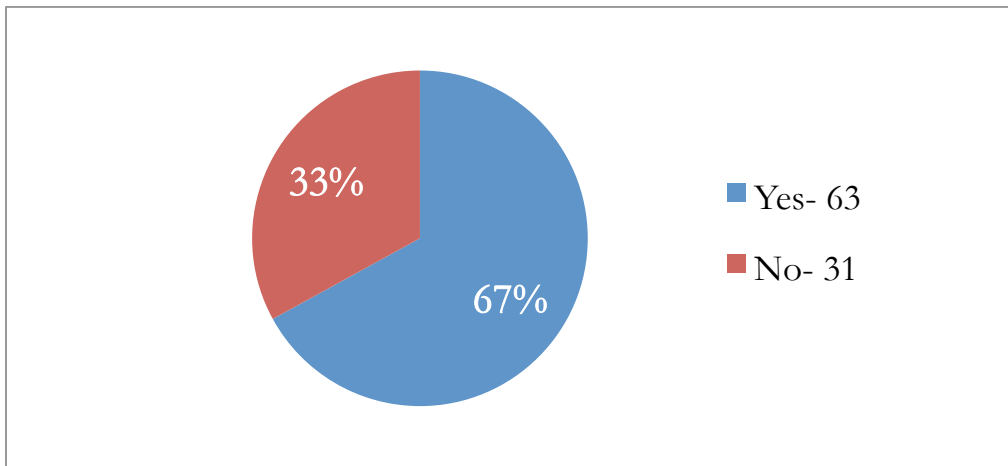
Process is governed by statute and agency has limited discretion.

It uses data rooms to make the limited and selective disclosures it chooses to make.

Q30: Is the agency able to disclose confidential information obtained during an investigation to competition agencies in other jurisdictions?



Q31: Is the agency able to disclose confidential information obtained during an investigation to competition agencies in other jurisdictions?



Q32: Does disclosure require the submitting party's consent? Are there instances where consent is not required? (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

Yes. (9 responses gave this answer)

No. (12 responses gave this answer)

There is no public information on the "facere" of the NCA on the exchange of confidential information with other EU NCA's in antitrust files when applying national competition law.

Generally yes.

Yes it requires a waiver of confidentiality.

Not in all cases.

Only within the boundaries of the Law and subject to bilateral agreements or protocols if there are any.

waiver/consent required.

YES, as a matter of practice, if not substantive law.

The agency may disclose confidential information to other agencies only after obtaining consent from the party that submitted the information.

In Leniency Application (Lesser Penalty Regulations) - confidential information as well as the identity of the party claiming confidentiality may be disclosed with the consent of the Applicant.

No clear. The agency has signed MOUs with competition regulators in several agencies, but the actual processes with respect to the MOUs and specifically on the disclosure of confidential information is not disclosed.

Confidential data could only be shared with consent.

No submitting party's consent if EU authorities only are involved.

Submitting party's consent necessary if the requesting authority does not belong to an established cross-jurisdiction agreement.

No consent required. However information can only be disclosed for purposes of the administration of the statute. It is assumed this test is met in the case of merger review in a multi-jurisdictional case.

There is an exception to the provision granting confidentiality to all information submitted during an inquiry, for the "administration and enforcement of the Act". The agency interprets this as permitting it to disclose to other Agencies if to do so would assist it in advancing its own investigation, without either notice or consent.

Yes, it requires consent.

Yes - sharing across jurisdictions that share an agreement may not require consent.
Unclear

Depends. Yes, consent required unless in litigation or in response to information requests, if applicable.

It depends on the circumstances of the disclosure.

Possibility and extent of information sharing depends on the provisions of the respective information-sharing agreement between the agency and the authority of the other jurisdiction.

It would require consent.

In principle, disclosure does not require the submitting party's consent.

Disclosure is in most, if not all occasions with the submitting party's consent.

Disclosure is in most occasions with consent from the submitting party. If the submitting party withholds consent disclosure could be made to counsel only. A waiver has to be obtained in order for the information to be disclosed to the other agency.

Consent not required in inter-EU disclosures.

It depends. Varies on a case by case basis. If the relevant party has requested for confidential treatment, then the Agency shall only be able to provide an executive

summary of the information (approved by the relevant party when applying for the confidential treatment).

Consent is not normally required.

Not necessarily, agency may disclose confidential information to other agencies that are part of a sharing agreement without the party's consent

Yes and yes.

No it does not.

Consent is in any case required.

The consent is not required, however, we are not aware of any cases where confidential information would have been disclosed.

Merger Control: yes. Antitrust Enforcement: no

Consent not required.

Yes, it should be obtained from the parties.

Varies in a case by case basis.

Yes, unless there are treaty based information exchange rules.

The agency believes it does not require consent. The bar believes it does require consent.

In practice, disclosure does not require the submitting party consent.

Discretion of agency.

There are some specific rules for sharing information/pieces of evidence.

No, the consent is always required to the best of my knowledge.

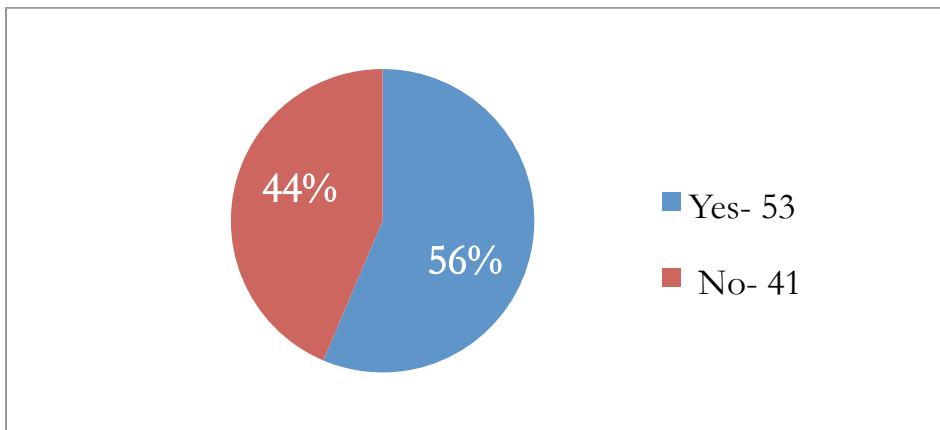
No, unless for leniency documents, where the consent of the leniency applicants is necessary.

In merger cases, the party's consent is required. Consent is not required in cartel cases.

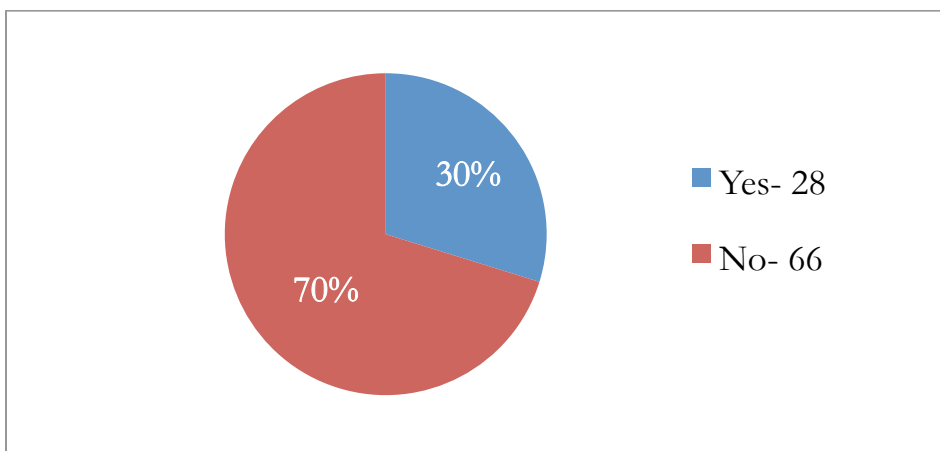
Waivers are required in pre-merger clearances and cartel cases. Notwithstanding, there are several cooperation treaties that allow exchange of non-strictly classified information.

The agency does not require anyone's consent for anything. It does whatever it wants.

Q33: Is providing consent a matter of free discretion of the submitting party?



Q34: Is there a model for waivers of confidentiality?



Q35: If circumstances exist where a competition agency can share confidential information to competition agencies in other jurisdictions absent consent, is notice provided to the submitting party, and is there a meaningful and timely opportunity to object and/or appeal? (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

Yes. (5 responses gave this answer)

No. (16 responses gave this answer)

Not necessarily.

No notice

No. I don't know. It depends on the bilateral agreements I suppose. There are no disclosed rules on the matter.

Occasion of this kind has not arisen yet.

Notice will be provided to the submitting party but there is not much meaningful and timely opportunity to object.

Formal notice is not provided. In merger review for multi jurisdictional cases it is understood that the information will be shared since this is allowed under the law.

No notice in case of information sharing between jurisdictions a part of an information sharing agreement. Opportunity to object/appeal exists only against final decision in the procedure, but not against the actual information exchange.

Such a case has not arisen but the agency would require consent of the party.

There is not much local experience in this regard.

When the agency discloses confidential information it is with consent of the submitting party, irrespective of intended recipient.

The agency does not disclose information under confidentiality to other agencies unless a waiver is obtained from the submitting party.

No. The submitting party has the opportunity to request for confidential treatment at the time of providing the confidential information.

Not for disclosure between the agencies that are a part of multi-jurisdiction agreement.

No - occurs pursuant to legislation.

Notice is not provided and there is no opportunity to object or appeal.

In case of sharing confidential information with competition agency in other jurisdictions the agency is not required to notify the submitting party, thus the latter does not have an opportunity to object and/or appeal. Even if the submitting party becomes aware of such transfer, the agency enjoys a high level of discretion regarding the conditions of sharing confidential information to competition agencies in other jurisdictions.

Probably not (I am not sure).

Not sure.

No notice provided.

No. agency should not disclose, absent consent.

Is not established.

Notice is not given in advance.

Q36: In general, does the agency's practices with regard to sharing of confidential information with other jurisdictions cause concern? If so why? (The responses below have been lightly edited to maintain confidentiality or duplication of similar responses have been removed)

No. (45 responses gave this answer)

3. If the NCA shares the confidential information with other NCA's, such action is a matter of concern, as the NCA does not have the legal competence or power to share confidential information with other NCA's when applying national competition law.

4. Yes, but it has not been a problem.

5. Yes, because they are not transparent and the rules are not clear.

6. Yes, for two main reasons:

1. Occasionally the agency uses confidential information to launch investigations and in the public documents such information is made available to the public.

2. There are also occasions whereby the agency launches a formal investigation based on confidential information that is not easily available to the investigated party violating her right to defense.

Yes-it appears not to comply with the requirements of the Act.

Yes, to the extent that it is not transparent.

I do not have sufficient data/info to reply.

Yes. Lack of transparency.

It is not clear how often this happens in actual practice.

Yes, because there are no rules for that, neither the parties are always previously informed.

Situation of this kind has not yet arisen till date.

It causes concern because the agency has not disclosed what it will or will not share.

As the process of the agency sharing confidential information with other agencies is not transparent. Difficult to answer this question.

Yes, because of leaks and the extent of data to be shared.

Within the context of an agreement between agencies, there is no information about information shared with other authorities, which infringes due process.

Not generally a problem. Might be an issue with respect if rules for reciprocal agency are problematic; agency generally shares under the terms of their international agreements with other agencies or, if there is no agreement, when the agency is assured that the receiving agency will protect confidentiality.

I would argue that the exception for "administration and enforcement of the Act" is not specific enough to permit information to be given to foreign law enforcement

agencies. At the time the Act was written, the agency did not cooperate with such agencies on a routine basis, let alone cooperate with over 80 jurisdictions. There is such a wide variety of experience and trust that could apply to those jurisdictions that it simply makes no sense to think that because someone trusted the agency with information, the same faith should be placed in all foreign jurisdictions. I believe that the agency should seek waivers before providing information to foreign jurisdictions in merger cases, if only to ensure that the receiving agency will provide confidential treatment to the same standard as applies under the law.

To a limited degree. I have 3 concerns. 1. While the agency is generally reliable about the specifics, but I am concerned about the agencies sharing summary level information derived from confidential sources. 2. There is often pressure to consent to a waiver that is inappropriate to facilitate merger clearance, particularly in light of the different standards of confidentiality protection across jurisdictions. 3. There is little transparency to know whether disclosure limits are in fact observed, and I can imagine it varies in degree from staff person to staff person.

Not generally. There are some limits under legislation.

Practice of information sharing may (indirectly) lead to publication of confidential information due to potential disclosure obligations of receiving authorities in other jurisdictions (e.g. UK, US) which then may have adverse consequences for party concerned (e.g. risk of class actions).

In principle, they do not cause concern on local practitioners.

The agency does not share confidential information with other agencies, but if this were to occur it will be of concern since it may be costly and difficult to litigate any breaches of confidentiality.

Yes. By sharing with other jurisdictions but not the respondent information designated, legitimately or otherwise, "confidential," the prejudice to the respondent is multiplied. Specifically, it is worse when multiple jurisdictions get only one side of the story. Even if confidential information is shared with the respondent, the agency sharing the information with another jurisdiction should take measures to ensure that the receiving jurisdiction protects the information from disclosure.

Yes. Because they are outside the submitting party's control.

Yes - very broad powers and limited transparency.

Since the submitting party is not notified about sharing of confidential information with other jurisdictions and cannot control and protect confidentiality of its data in other jurisdictions, such sharing raises objective concerns.

While for example there would be less concerns in sharing confidential information referring to a past conduct (such as in the cartel) there are greater concerns in sharing current or future confidential information which is provided for example in mergers and unilateral conduct. Especially in mergers authorities are requiring a greater number of sensitive documents (see for example EU). It is also important that there is protection of the same information in both countries as there might be a risk that the definitions are different.

Not so far - but then again, relevant instances have been limited.

I guess the concern is that generally the party under investigation does not really have a great bargaining position, and can be "strong armed" into doing what the agencies want.

The agency practices with regard to sharing confidential information with other jurisdictions do not cause concern.

Unknown/did not encounter.

Very little is known about the practice in this jurisdiction -- whether and to what extent information is shared (in either direction).

Somewhat. It is too open ended, as it can share if in furtherance of the administration and enforcement of the Act, which the agency interprets broadly even including reciprocal assistance.

Please refer to other information provided herein.

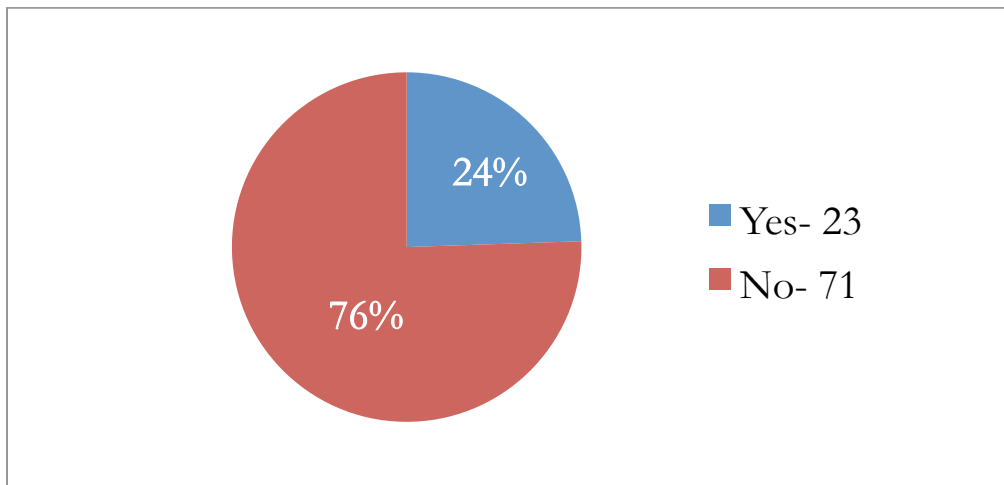
We have not had any complaints or concerns raised so far.

Yes, particularly if not certain upfront with which agencies information is shared as this may negatively impact leniency applications.

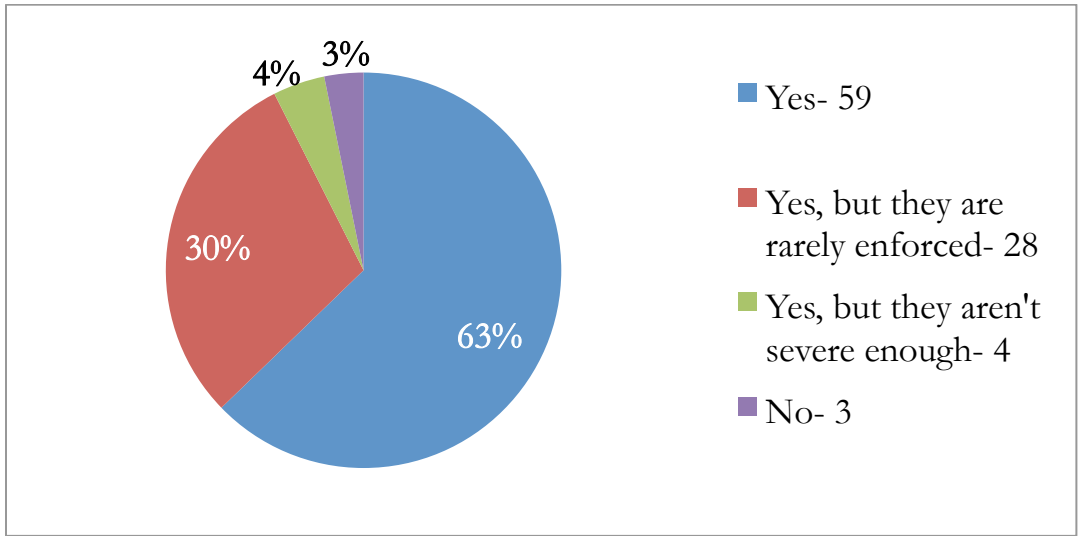
Due to the fact that many targets are public companies. Likewise, due process and presumed innocence principles require that there is symmetry of evidence between the parties.

Yes. May prove our client guilty in other geographic markets.

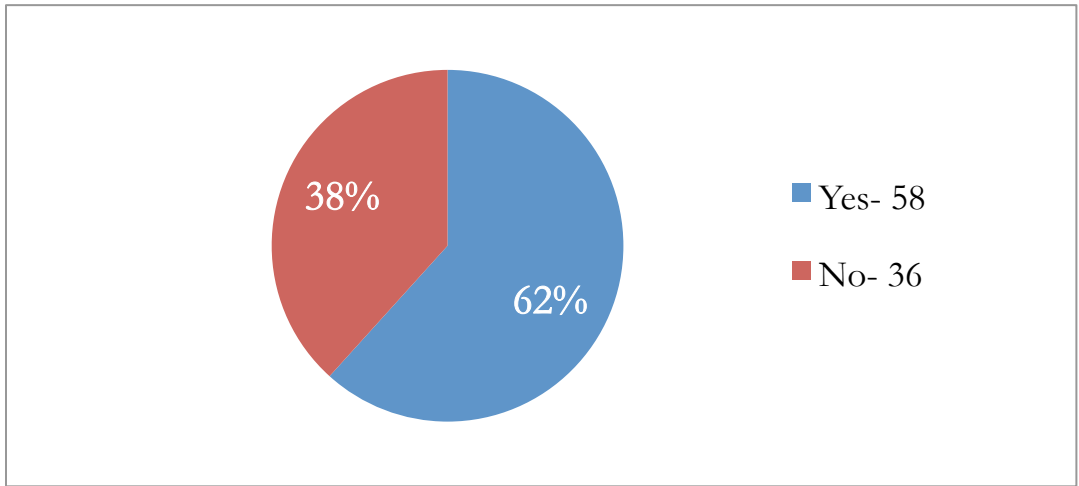
Q37: Can the agency disclose confidential information in agency decisions, orders, complaints, court filings, press releases, or other documents?



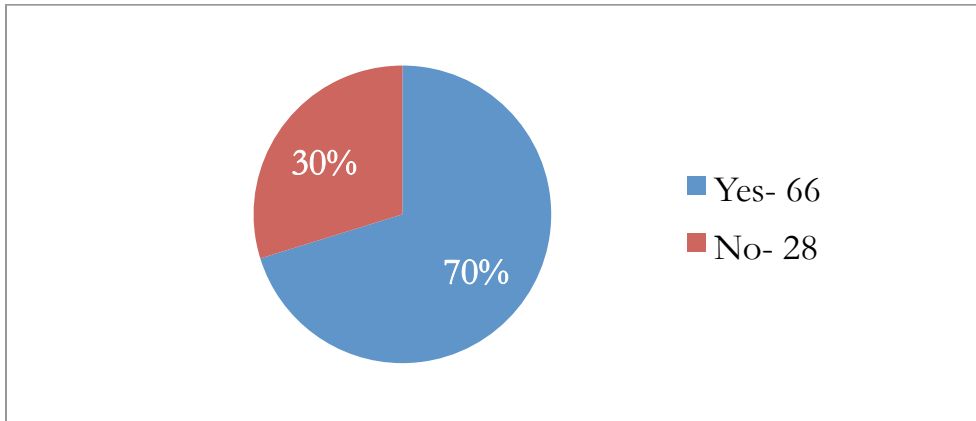
Q38: Are agency employees and consultants who receive access to confidential information subject to any sanctions for disclosing it outside the agency?



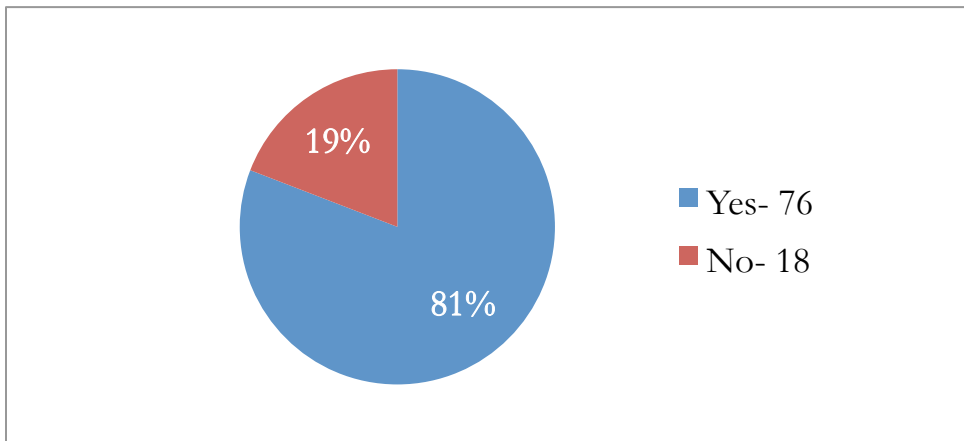
Q39: Does the agency provide notice to the affected party prior to disclosing confidential information in an agency order or decision, or a complaint or other court filing?



Q40: Does the affected party have the ability to object to, or appeal WITHIN THE AGENCY, prior to the disclosure of their information on confidentiality grounds?



Q41: Does the affected party have the ability to appeal to or seek an appropriate order FROM A COURT and/or OTHER ADMINSTRATIVE AGENCY to prevent or limit disclosure?



Q42: Having now completed the survey, how do you view the agency with respect to how it handles matters of confidentiality?

