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JOHN PECMAN: Hello, my name is John Pecman, Commissioner of Competition for the Competition Bureau of Canada.

Previous models of the International Competition Network's curricula project have focused primarily on the key substantive disciplines of competition law, namely market power, market definition, competitive effects, cartels, abuse of dominance and mergers. This module, and a series of modules that will be developed later, will turn to the process of conducting investigations.

It's not enough, of course, to have a command of the substantive law and economics of competition law, although that's important. We need to understand how to plan an investigation, how to identify the information we'll need to actually gather and organize the information.

The ICN has already compiled a wealth of material on this, especially the Anti-cartel Enforcement Manual compiled by the Cartel Working Group, the Investigative Techniques Handbook compiled by the Mergers Working Group and the Recommended Practices on Assessing Dominance in Unilateral Conduct. You'll hear more about these as we go along.

This module will concentrate on planning and conducting investigations. Our guide today will be Markus Meier, an experienced case handler and manager with the United States Federal Trade Commission. He will be assisted by colleagues from the Competition Commission of Singapore who will demonstrate some of the approaches he discusses.

Let's hear what he has to say.

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MARKUS MEIER: Hi, my name is Markus Meier and I'm an Assistant Director at the U.S. Federal Trade Commission in Washington, D.C. I head up an office of about 38 lawyers and other professionals, investigating alleged violations of competition law in the health care field. So, some of the industries we look at include the pharmaceuticals industry, doctors and hospitals, health plans and other health care professionals.

What I'm going to do today is talk to you about how to plan and conduct investigations. But before I get started, I wanted to give you a couple disclaimers.

I'm not going to be talking about how to conduct criminal investigations. So, we're not going to be talking about using undercover agents or how to do wiretaps or dawn raids.

I also want to make sure that you understand that anything I talk about today, you have to tailor it to the laws and policies and procedures of your country and your agency.

Now, I think most of what I'm going to be talking about today is generally applicable to different countries around the world. But if there is something that I'm telling you that isn't consistent with what you're permitted to do, you obviously need to follow the laws and policies and procedures of your country.

And before I really get going, I want to tell you about information that's available on the International Competition Network's website. There's a lot of really useful information, relevant to the topic of how to plan and conduct investigations. The ICN has working groups. There's a Cartel Working Group, it has the Merger Working Group, and it has the Unilateral Conduct Working Group. And each of these working groups has prepared a number of different types of materials that will be useful to you.

So, for example, the Cartel Working Group has a manual on anti-cartel enforcement. The Merger Working Group has an investigative techniques handbook. And the Unilateral Conduct Working Group has a workbook on recommended practices on how to assess dominance and unilateral conduct. And I highly commend these sources and other information available on the ICN website to you.

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MARKUS MEIER: So, let's go ahead and get started. Here's the set-up. A complaint arrives on your desk and the question is what do you do next? Now, this complaint could come in the form of a merger filing, a pre-merger notification filing if your country's laws require that. It could be just that your boss comes down to you and says, hey, I got an email today from a competitor complaining about another competitor or it could be some kind of a formal referral that's made to your agency. Or, for many agencies where you can bring cases on your own -- on your own initiative, it may be something that's just in the minds of some of the commissioners or bosses or other people at your agency that have come up with the idea and they said, hey, let's go ahead and take a look at this.

So, here's the situation. You got a complaint. What do I do now?

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MARKUS MEIER: The basic steps in conducting an investigation consist of the following: Step number one, you want to develop a theory or theories of the case. It's often the case that a given complaint or possible violation may actually raise a number of antitrust theories. So, you want to think about that right at the outset.

Second, you want to identify possible sources of information, because anti-trust analysis is very heavily fact-based and fact-driven and you've got to go out there and find the facts that help you do the analysis necessary to determine whether there has, in fact, been a violation of the law. This includes going out potentially and interviewing witnesses, again, depending on what the nature of your procedures and policies of your agency are, requesting documents and data. And then, at some point, you've got to sit back and organize that information and assess the evidence that you've been collecting to try to determine whether it's sufficient and adequate to determine whether there's been a violation of the law.

And then, ultimately, the ultimate question of any investigation is whether there has, in fact, been a violation of the law. These are the basic steps in conducting an investigation and I'm going to go through each one of these in more detail with you in in the time that we have remaining.

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MARKUS MEIER: So, step number one is to develop a theory of the case. This consists of a number of sub-actions. So, first of all, you want to review the complaint that you got. If it's a merger filing, you want to read it carefully and look for all the information that you can get out of it. If it's a complaint that came through a formal process through your

agency, you want to read it very carefully and also just try to figure out what might be going on here. So, you want to read the complaint, read the materials that you've been given and check them out very carefully.

But you also want to look for other publicly available information. Nowadays, with the Internet, there's an amazing amount of information available about different companies, different industries and how they compete in the marketplace. And I think that should always be part of an investigation, to simply go onto the Internet and see what you might find using services like Google and Bing or the services that are available in your particular country.

Once you've reviewed the complaint thoroughly and looked at other public information, you want to begin to identify possible theories of a violation. Now, when I talk about that, I'm not saying that you've already determined that there is a violation of law or that you've pre-judged the case, but rather, I'm suggesting to you that by developing a working theory or theories, you will better focus your investigation and be able to better conduct that investigation.

In fact, here I like to cite to a quote from Albert Einstein in which he once said: "Whether you can observe a thing depends on the theory you use. It is theory which decides that which can be observed." In other words, the facts that you learn and the information you gather only become relevant in light of your working theory of your investigation.

Now, every theory of violation -- and I'm going to show you a little bit more about this in a couple minutes. Every theory of a violation has certain elements of proof, that is to say, certain things that you would have to show in order to show that there's actually been a violation of the law. So, you want to begin to start listing those elements of proof because these are the kinds of things you want to go out and look for. And, again,

I'm going to show you how to do that in a few minutes.

You also, at this point, want to start thinking about possible economic harm to competition. Ultimately, competition laws are concerned with harm to competition and to promoting competition and, therefore, you want to start thinking about how -- if this conduct is really occurring the way the complaint reads or the way the information that came into you has been suggested, you want to think about what are the possible harms to the economy as a result of this, what's the harm to consumers as a result of this behavior?

Here's where your economists on your team can really help you out.

You also, early on in your investigation and I think right at the outset, you want to start considering possible justifications and defenses for the behavior. One of the things that you find in your agency and we certainly found in my office back at the FTC is we have limited resources. We don't have the ability to investigate every possible violation of the law and, therefore, we want to use those resources very carefully. We don't want to spend six months investigating a case only to find out that we don't have jurisdiction to do so or to find out that this behavior is occurring in a regulated industry that's subject to a different regulation within your system, or that the parties have some other justification embedded in your law.

So, you want to think about those early on in your investigation, incorporate the thinking about that.

Another reason you want to do that is because you want to investigate those justifications and defenses even before they've been raised by the target of the investigation. This makes a much more efficient investigation so that you don't spend six months investigating and then suddenly are presented with information that might have changed whether you should even

have spent the time conducting the investigation to begin with.

And, lastly, as part of developing the theory, I think it's important to think about possible remedies. Again, it's not because we pre-judge the case. It's not because we've decided that there is a violation of law. But it's useful, as part of your investigation, to think about, okay, what if there is a violation of law? What if we do conclude that the agency should take some action? What action are we going to take? What are we going to do about the conduct?

And that's why you want to think about the remedies, too, because it is sometimes the case that might spend an awful lot of time investigating and suddenly figure out that you actually don't have a remedy to fix the situation. And, again, given limited resources, time and money you have to do these investigations, you may want to try to figure that out before you spend six months investigating the case.

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MARKUS MEIER: So, where can you find these theories? Where do you find the possible theories and violations of the law?

And so, what I have here is the pyramid. And at the top of the pyramid is the law itself. This is the law in your country, the statutory law, the law that was passed by a legislature, the competition law that you're charged with enforcing. And what you'll find, inevitably, as you read it and parse it very carefully is that every possible violation of competition law has various elements of proof. Different kinds of things that you would have to establish in order to establish that there's been a violation of law. Again, I'm going to show you that in even more detail in a few minutes.

And once you understand what those elements of proof are, it helps you

begin to identify the kind of facts you're looking for, because antitrust, again, is a very fact-intensive, fact-driven investigation and analysis.

And so, what I'm going to talk about today re the techniques that you can use to find the facts, to drive the analysis, to prove the elements of proof in order to determine whether there's been a violation of the law.

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MARKUS MEIER: So, let's take a quick look at the major theories of violation. Here, the good news is, at its highest level, there aren't that many. In most competition regimes, there may be about three at its highest level. Those would be agreements, number one, agreements that restrain competition; number two, abuse of dominant position; and number three, mergers and acquisitions that lessen competition.

Now, of course, within each of these major categories, there are potentially numerous additional sub-theories. So, for example, in the area of agreement, there could be price-fixing, concerted refusals to deal, market division, bid rigging, joint ventures and actions by cooperatives and trade associations, and in the vertical agreements and restraint of trade, there could be tying, exclusive dealing, resale price maintenance and the like.

Each of those discrete types of potential violations have different elements of proof. But one of the things that unifies them all is it requires at least more than one actor agreeing with another actor to do something which the law forbids.

With respect to the major category of abuse of dominant positions, there are a lot of, again, sub-theories, violations within that category, including exclusive dealing, refusals to deal, tying, bundled pricing, most favored nations clauses, predatory pricing and any other provisions that

your law may have. And, again, each of those sub-violations has different elements of proof, different things you need to look for in order to establish that there is a violation.

But what brings that category together is it's typically conduct that's done by one actor, as opposed to a group of actors agreeing.

And, lastly, there are the merger theories and, typically, there are about two major categories there within the merger theories category. It's the unilateral effects theories and the coordinated interaction theories.

Now, if you have questions, concerns, doubts about how to understand some of these different theories I'd like to refer you to the website of the International Competition Network. Because in the International Competition Network, there are working groups that work on these topics. There's a cartel working group. There's a merger working group. There's a unilateral conduct working group. And each of these working groups has prepared different materials that can help you understand what the basic elements of proof are for each of these categories of violation.

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MARKUS MEIER: So, let's just take a closer look at one of these categories of violation, the abuse of dominant position.

Some of the sub-elements of proof in an abuse of dominant position case is, one, you have to show that a company has a dominant position. Two, you have to show that there is some conduct that that company engaged in that may harm competition. Three, you have to ensure that there's no legitimate business justification for that conduct. And four, all things being equal, you'd like to find evidence of actual anti-competitive effects or at least the potential for anti-competitive effects.

Now, consider, even within those categories I just gave you, there are

sub-elements. So, for example in order to prove that a company has a dominant position, the law typically requires that you prove a relevant market and that you prove some level of market power or even monopoly power within that market. So, that might involve the exercise of market definition, determining market shares, doing a calculus of the market shares, determining entry conditions. Those may all be sub-elements of proof that your law requires that you establish in order to establish that a company has a dominant position.

With respect to the conduct, I've already talked a little bit about that. I've mentioned things like exclusive dealing, most favored nations clauses, refuses to deal, predatory pricing. That's the kind of conduct that you'd want to be looking for.

And, again, if you look back at your law -- you start with the statute and you look at your law, you may find that it describes the kinds of things that you would have to establish to show that a company is engaged in predatory pricing or that a company has engaged in exclusive dealing.

And as I said earlier today, you want to make sure that there's actually some reason to think that this conduct might have an anti-competitive effect, that it either has had such an effect on the marketplace or that it could have such an effect on the marketplace.

So, now, before we move on, I'd like to go ahead and take a look to our colleagues in Singapore and see how they prepare to start an investigation, how they develop a theory of a case and how they develop an investigative plan.

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INVESTIGATOR 1: It seems like this complaint is about an exclusive arrangement between a vending operator and a ticketing service provider. It

doesn't look like a horizontal agreement, it looks more like a unilateral conduct case.

INVESTIGATOR 2: I think so.

INVESTIGATOR 1: Yes.

INVESTIGATOR 3: So, under the law, what do we need to prove for an unilateral conduct case?

INVESTIGATOR 1: Well, for an unilateral conduct case, you would have to show that this is an entity with significant market power, that the entity is actually dominant in the market. Then, after you have shown that this entity is dominant in the market, then you have to work in some evidence to show that this entity has engaged in some form of exclusionary conduct.

I think the first step would be to identify the relevant markets perhaps and then we can see whether this entity is dominant in the relevant market.

INVESTIGATOR 2: Just to add, although the complaint is against Pandam Theaters, we cannot rule out the possibility that it might be Tickets Link who is forcing the Pandam Theater to impose such restrictions on its customers. In developing our theory of harm, we have to be very careful who is the dominant player and who is abusing its market power.

So, just to be clear, our working theory of harm is as follows: Tickets Link is dominant in the ticketing service market in Peronica and it is abusing its dominant position via a series of exclusivity restrictions imposed upon venue operators and show promoters requiring them to sell tickets only via Tickets Link and, thereby, foreclosing competition from other ticketing service providers.

INVESTIGATOR 1: Yeah, I think that's about right.

INVESTIGATOR 3: Now, we have to come up with an investigation plan

and see what are the factors that we need to consider and then, from there, decide what evidence we need to gather.

INVESTIGATOR 2: Typically, to prove dominance, we need to look at market share, entry barriers, countervailing buyer power and to prove abuse, we need to ascertain the nature of the conduct in question and effects and also assess the effect of the conduct on the market.

INVESTIGATOR 3: I suggest we begin the investigations by interviewing the show promoters who held shows, you know, recently in Peronica, and through these show promoters, you know, we will be able to find out if it is only Pandam Theaters, Peronica Stadium and Show Entertainment, you know, that insist on selling tickets exclusively through Tickets Link.

INVESTIGATOR 2: The show promoters can also provide us with useful data for economic analysis. From their submissions, we can work out the market shares for various venue operators and also the market shares for various ticketing service providers.

INVESTIGATOR 3: We can also find out the names of the international and local show promoters who have been active here, and then I think now such information can be easily gathered from the Internet. And once we have the name of all these show promoters, we can send them a list of questions in advance and also that they can prepare the necessary data for the interview.

INVESTIGATOR 2: So, once we have consolidated the information from the show promoters, we should have a better idea of whether our theory of harm is born out. Then we can meet again to discuss what information we will need from Tickets Link, from Pandam Theater, Peronica Stadium and Show Entertainment.

INVESTIGATOR 1: Right, right. I think in the meantime I will also check in with the (inaudible) Competition Bureau as well as the Competition

Commission of (inaudible). I understand they have some recent cases and investigations into this same market. I think they may be able to share some experiences with us.

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MARKUS MEIER: So, let's move on to step two of the investigation. Step two is where you begin to identify the various sources of information, the places where you're going to get the facts that help drive the analysis. And, basically, those sources of information fall into a number of categories. One category is witnesses. And by witnesses, I mean people who have information that might be useful to your investigation. I mean people that might know about how the industry works or customers who buy within the industry or others that have studied the industry.

I'm going to give you a list of those kind of people in a few minutes, the kind of people that you really want to talk to. But one broad category of sources of information are witnesses.

Another really important source of information in an investigation are documents and data. Economists love to get their hands on data. They love numbers and they love to work those numbers and there's a lot of interesting things they can do when they get the right kinds of numbers and they can apply the right kind of statistical testing to it and, often, help -- really help you figure out what's going on in a given case. So, when you can get data, it's a great thing to get.

You also want to get documents, documents from the parties, the merging parties if it's a merger, the cartel members if it's a cartel, things that will help you prove the possible violation of the law.

Another important source can be government sources. There's a lot of other government agencies out there that regulate these different industries, that have oversight over the different industries, and they may

have an incredible amount of information that can help you.

So, for example, when I introduced myself, I told you I do a lot of cases involving the pharmaceutical industry. In the United States, the U.S. Food and Drug Administration regulates the pharmaceutical industry. Their job is to make sure that the pharmaceutical supply in America is both safe and effective, that drugs work the way they're supposed to and that they make people feel better.

Now, as a result of their regulatory role, they know what products are being developed and what products are going to come out into the marketplace and they know because they regulate the industry. They know roughly when these products are going to be approved. It's a great source of information to find out about entry and possible entrants in the future.

So, we've developed a very close working relationship with the U.S. Food and Drug Administration so that we can get the kinds of information we need to help do our competition analysis. That's just one example of the many, many different agencies out there that may be helpful as you look for information to help drive your analysis.

There's also public sources, and I already talked about that a few minutes ago when I made a pitch for using the Internet. But in addition to Internet, there's libraries and there's all kinds of information that's being collected, again, sometimes by government agencies that are made available on public websites, such as, in the United States, the U.S. Securities and Exchange Commission. Any publicly traded company has to report all kinds of interesting information to the U.S. Securities and Exchange Commission and that information, a lot of it, is publicly available and has a lot of information in there about companies that are in the industry and the nature of competition in that industry and other things that might be helpful to you as you conduct your analysis.

Another source of information could be related investigations. It's often the case that one investigation brings information to you that may spur you to look at another case, to look at another geographic market, to look at another product market, or to look at other behavior by the companies that you're investigating. So, related investigations can often also be a very important source of information.

Then, of course, there's also international cooperation agreements. This is becoming more and more common between countries to have agreements, to work with each other and to assist each other in competition investigations and this can be an important source of information.

And, lastly, I put others because, quite frankly, sources of information can be as wide and varied as your imagination. You can think of it and if you can think of where there might be good information that might be helpful, that is a place that I would highly recommend that you go ahead and take a look and see what you can find from those other sources of information. But, again, here's sort of large categories of places where you might look to get information, to get facts that will help drive your analysis.

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MARKUS MEIER: So, now we're on to step three and this is interviewing witnesses. Now, I know from my experience, having traveled to a number of different countries and done this kind of training in a number of different countries, this is not a common practice everywhere in the world, although it's a practice that, if your laws allow it, if your procedures and policies allow it, I highly recommend it. It can be very useful to get out there and talk to people in the industry to try to learn more about what's going on.

When I say get out there, I mean sometimes get out of the office and

actually go visit them, but also using the telephone. The phone can be a very powerful tool for investigation. And learning from people who really are expert in their industries and really know what's going on can be an amazingly powerful tool to help drive your analysis. So, if your laws permit it, I highly encourage it.

Now, why do we interview witnesses? Well, it's the same reason we do the investigation. We're trying to learn facts that are needed to prove or disprove the elements of a legal theory under investigation. Remember when we started the investigation we set up those legal elements of proof. Now we want to go out and find the facts that allow us to establish, to prove or disprove a violation of the law.

And why do I say that? I say it because it turns out that our job isn't necessarily just to find violations. Our job is to figure out whether something's going on out in the marketplace that's wrong. But if it's not wrong, we should back off and move on to something else. We should take our resources and work on something that's more productive. So, if we learn facts that disprove our theory, that's useful too, because then you know you can close the investigation and you can move on and spend your time on something that's more promising.

A second reason we interview witnesses is to get information needed to understand the business practice under investigation or the industry. We need to understand the context in which the business practices or the conduct that's being complained of, we need to understand the context in which that's occurring. It is helpful to understand how the industry works and how the business works and how the business practice under investigation works and witnesses can be a great source of information to help us understand that.

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MARKUS MEIER: What kinds of witnesses do we want to interview?

Well, there's a variety. We certainly want to interview whoever came in and complained, if there is a complainant. If somebody came in and was motivated enough to reach out to your agency and complain about some business conduct by a competitor or by a supplier, that's a person who is motivated to come in and meet with you. That's a person you should spend some time talking to. I highly recommend that at the beginning of an investigation, if you actually have a complainant, that you spend as much time as that complainant is willing to give you to really try to understand as much as you can and learn from them.

You certainly want to talk to the competitors of the party that's being complained of, the competitors of the merging parties or the competitors of the cartel, if there are any, or the competitors of the companies that allegedly engaged in some kind of an improper agreement in restraint of trade. Competitors are particularly helpful in trying to understand how the business works. They're particularly helpful in understanding who else is out there selling. They understand the conditions of supply in the market and they understand the conditions of demand in the market, and they can be very useful for that.

You also want to talk to customers. Customers are particularly useful in helping you if you have to do a market definition exercise, if you have to try to figure out what products are the most close and reasonable substitutes to one another. Who better to ask than the people who are actually buying these products, the people that actually buy them and use them?

It can also be helpful to understand who else is in the marketplace selling products, who else has approached them to try to become a supplier

to that customer. So, customers are incredibly useful people to talk to.

Sometimes the customers are suppliers and distributors and retailers. Sometimes they're not. But suppliers, distributors and retailers can also tell you an awful lot about how the business gets conducted in that marketplace and also a lot about conditions of supply and demand in the marketplace.

Another source can be government agencies. We talked about that at the very beginning, a little while ago. Talking about it again now. Government agencies collect, in a systematic way, a great deal of information about different marketplaces and different businesses and they can be extremely helpful in finding information that can help you drive your analysis.

Most businesses out there today are members of some kind of a trade organization and trade organizations systematically collect information about their membership and compile this information and often report this information back to the membership. If they're out there collecting the kind of information you need and want, why not go to them and try to get that information, too? So they can be a very useful area to look at.

In addition to that, there often are industry experts, people who develop special expertise in a given industry, market analysts, people who work at the stock market and analyze different industries and businesses, and academics, professors at universities who study different industries and businesses and have become very expert in them and who may, over many, many years, have collected a great deal of information that could be helpful, too. So don't forget to think about those people, too.

And, lastly, I put the target of the investigation. I put them last because -- not because they're not a really important source of information because, clearly, they are. But oftentimes we want to talk to them last, we

want to approach them last, after we've learned as much as we can about the business practice at issue, after we've learned as much as we can about the industry. Because, often, unlike a complainant, who may give you a lot of time and who you may be able to go back to a number of times to talk to, targets often don't really want to talk to you and they often don't want to spend a lot of time with you. So, it's really, really important before you reach out to them, you really know what you're looking for and the questions you want to ask.

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MARKUS MEIER: So, let's move on to step four of the investigation. Step four is the step where we begin to request documents and data. Now, why are we requesting documents and data? At this point, I hope it should be obvious. We want to learn facts that will help prove or disprove the theory of our investigation, to help us determine whether there has been or is an ongoing violation of the law.

The basic methods for gathering documents and data, for getting them, can be either voluntary or compulsory, and some of that depends a little bit on the law of your country. In America, it's not unusual for us to get actually quite a bit of voluntary cooperation from people. We send them letters and ask for information and sometimes they respond. We make phone calls and talk to them and, often, they're willing to talk to us when we just call them up through a cold call on the telephone.

But, most often, we have to use compulsory requests to get documents and data and these compulsory requests can be addressed to the parties under investigation. It can be addressed to third parties and they can use different types of -- they come in different forms. In the United States, we call them subpoenas or civil investigative demands, and in a merger case,

we call them a second request. What these basically are are documents that lay out the information that we want to get from a party. They are a compulsory request that parties are required to respond to, but they are supposed to give us the things we ask. And if they don't give us the things we ask, we do have recourse to go to the courts and try to get an order to enforce our compulsory process request.

Again, some of this depends a little bit on the natures of the law in your country as to how much you can compel a company to participate in your investigation and what kind of information you can actually get from that company. So, I'll have to let you take a look at your laws to figure that out.

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MARKUS MEIER: What are the sources of documents? Now, hopefully, this list looks pretty familiar because it turns out it's the same list I showed you a few minutes ago when I talked about interviewing witnesses. Again, some of the different sources are the complainant, the party that came in and complained in the first instance. They may have documents and data that you want to get your hands on.

Competitors of the parties that you're investigating may have important information, important documents and data that you'd like to see.

Customers may have that kind of information, too, as do suppliers, distributors, retailers, other government agencies, business and trade organizations, industry experts, market analysts, academics who study the industry, and, of course, the target of the investigation.

And, again, just like during the interviews, I often like to try to send a document request to the target somewhat later in the investigation at the point where I really understand what I'm looking for or I really

understand the kind of information that I want to get because, oftentimes, the targets just don't cooperate with you very much and it's really important to know exactly what you need and want from them before you make a request to them.

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MARKUS MEIER: Let's talk a little bit about the types of documents that you want to request. Again, a lot depends on your theory of the case and a lot depends on the elements of proof for your theory or theories of the case. But, generally speaking, the kinds of documents you'd like to get include a contract or the agreement that's at issue in an agreements case, agreement in restraint of trade, company formation documents, the articles of incorporation and other documents like that that help set the company up to begin with, company organization charts. These can be really useful. They tell you who are the different people that you really want to interview if you get a chance to interview some of the people in the company, who's really important in the chain of command for the type of issue that you're looking at.

So, again, using the example of the pharmaceutical cases that I look at, turns out that every major pharmaceutical product has a team leader, a marketing team leader, a manufacturing team leader of some kind, and by looking at the organizational charts, we can figure out who are the right people in the company, in these multinational huge companies with sometimes tens of thousands, if not a hundred thousand employees, we want to find the right people to talk to, and organizational charts can help us do that.

Every company, whether they're publicly traded or privately held, have some kind of financial reporting obligations. They have to pay taxes. They have to report what kind of money they make and usually on an annual basis.

So, you want to get those financial reports and take a look at them.

Most companies that do business also have some form of a business plan or a marketing plan or strategic plans and these can be incredibly valuable sources of information because this is where the company itself goes out and tries to survey the market, tries to figure out who its competitors are and how to position its products against its competitors. This can be incredibly valuable information, helping you to understand the industry.

Every company that does business has a list of its customers and knows who its customers are. If it doesn't, it's probably not doing very well. It also knows who its suppliers are and, generally speaking, it knows who its competitors are and they may actually keep lists of those information, too. What are those lists useful for? Those lists are useful to figure out who else to talk to, who else do you want to interview, who else do you want to get documents from. If you can get a hold of the customer lists, supplier lists and competitor lists, this will help you figure out what you need to be doing to move your investigation forward.

Most every company keeps information about its sales, about its pricing policies and how it prices its products and production data. These are the kinds of things that our economics friends, in particular, our economists, really like to get their hands on and see. And if we can collect that from the target of the investigation and other competitors and other companies doing business in the marketplace, we can really get a good picture of how the market's working and how companies are positioning their products and what kind of ability they have to supply the market and what kinds of responses they can take to the actions of their competitors under varying circumstances.

And another type of document we want to get our hands on, if we can, are records of meetings. Most companies have a board of directors, they may

have an executive committee of some kind. They may have different product groups within the company and it's very common for these groups, the board of directors or the executives of the organization to get together on a regular basis for discussing different issues. And when they discuss these different issues, somebody takes minutes or their notes from these meetings and these are recorded and kept in the ordinary course of business, they're kept in files, and they can be incredibly valuable -- give you incredibly valuable insights about how the company was actually thinking at the time of the events which the records report on.

So, we don't have to just rely on after-the-fact recollections of what happened at these meetings, we can often get the minutes from the meetings themselves and see what the company was actually talking about contemporaneous to the actions that we're investigating.

So, these are just some examples of the types of documents to request and the types of information to get. And, again, if you take a look on the ICN website and you look at the different work product of the different working groups I talked about, the cartel working group, the merger working group and the unilateral conduct working group, you'll find that they talk about some of these kinds of things, the types of information you want to get and some of the tools and there are some examples there of document requests that have been submitted by different members of ICN, that you can use as a model in helping you develop the document requests that you want to send out to get the information you need to conduct your investigation.

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MARKUS MEIER: So, now, let's talk about how to review the documents. The first thing you want to do is you want to make sure that you got what you asked for. So, what you do is you check the documents for completeness

and for compliance with your document request. Somebody should go through and look to see, did you actually get what you asked for?

And, now, you want to start making assignments, handing out the documents to different people to review. And as you review the documents, there's actually a number of things you want to look for. First and foremost, you want to look for facts that prove or disprove your theory of the case, the facts that are necessary to your elements of proof. But in addition to that, you want to try to look for information on the background of the industry, the background of the companies, the competitors and the customers so that you can better understand the industry, the business practice at issue and the context in which the investigation arises.

Another thing you want to look for are things that are not clear and that may require a follow-up by the questioning of a witness. Oftentimes, some of the things in the documents may not be clear. Perhaps the document's not printed very clearly, perhaps there's handwritten notes that you can't understand or sometimes, especially in merger investigations, companies sometimes use code terms to describe the merger and you may not be 100 percent sure that you actually understand what's in the document and you may want to follow up with a witness by asking them questions.

And the fourth thing you want to look for when you're looking at documents is other potential sources of relevant information. This is always part of the investigation, to look for other sources, other people to talk to, other organizations to get documents and data from.

And once the review is substantially underway, you want to start organizing the documents. And there's actually a number of different ways that you can organize the documents. You can organize the documents by date, you can organize the documents by issue, you can organize the documents by witness.

When you organize the documents by date, basically you're putting them in chronological order. That allows you to see how one event proceeds or comes after, comes before, comes after another. When you organize it by issue, you're looking at the different elements of proof and you're putting the documents into groups, such as documents that tend to shed light on the product market, documents that may help you understand entry, documents that may help you understand the specific conduct at issue, if it's an exclusive dealing case, documents that tend to show that exclusive dealing is going on. You might want to put documents that deal with the business justifications or possible defenses, but you want to start organizing the documents by the different issues in the case.

And a third way that you might want to organize the documents are by witnesses, because if you're going to follow up and actually interview some of these witnesses, it can be very helpful to have the documents that deal with that particular witness, maybe documents that that witness wrote or the documents that that witness received, to have them together in a group so that when you go out to interview that witness, you have all those materials collected together.

So, let's see how the team in Singapore discusses the kinds of documents and data they want to get and the ways they're going to try to get that information.

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INVESTIGATOR 3: We should start requesting documents and data from various parties, including Tickets Link, Pandam Theaters, Peronica Stadium and also the show promoters. I'm sure the data will be very useful when we arrange for interviews with the parties under investigation.

INVESTIGATOR 1: I think we should also bear in mind that this is

actually abuse of dominance investigations and, therefore, we would need to establish if Tickets Link is dominant in the ticketing services market. I think that we can begin to request for some data from Tickets Link as well as the other ticketing services providers in the market to give us their sales figures for maybe the last five years, sales figures by both volume of tickets sold as well as the revenue from these ticket sales. This will give us some indication of their respective market size.

INVESTIGATOR 2: In addition, I think we should also ask for information on the fees charged by various ticketing service providers so as to find out whether some players are charging above the competitive levels in the market. You know, the ability to price profitably above competitive levels is an indication of possible dominance. And in this regard, we should ask for some P&L statements from the market players.

INVESTIGATOR 3: I'm thinking that we also should request for all the contracts that these ticketing service providers have entered into with the various venue operators and show promoters as well.

INVESTIGATOR 1: At the same time, we can also get the minutes of meetings that they had with the various venue operators and show promoters as well.

INVESTIGATOR 2: Right. We should also obtain a list of customers, suppliers and competitors. This would allow us to check against our own list and confirm that we are not missing anyone and can also match with our numbers.

INVESTIGATOR 3: Mm-hmm. At the same time, I think we should also be approaching the venue operators and show promoters for a copy of their contracts and minutes of meetings. This is to ensure that nothing gets swept under the carpet.

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MARKUS MEIER: All right. Now we're on to step number five. Step number five involves organizing and assessing the evidence. You've been out there now for a while talking to different witnesses, you've been getting documents, your economists have been getting the data, you've been reviewing the data, you've been reviewing the documents, you've been reviewing the information that you're getting from witnesses and the interview reports that you've been writing, and you want to start to organize that information.

Very simple file organization would include a correspondence file. That's for all the correspondence that goes back and forth between you and the various parties that you're getting information from, files of the documents and data, which we just talked about a few minutes ago, interview reports if you've been collecting notes and making reports from the different interviews you've been taking or if you have transcripts because you've taken the witness' statement under oath with a court reporter present.

You want to develop witness files for the different people that you're going to follow up on and follow up with to try to get more information from them. And you're probably going to want to keep a file of your various memoranda and your legal research that you're doing as part of the investigation, the different memos that you prepared for your bosses and your bosses' bosses and the other decision-makers in the agency.

Another tool you want to use -- and I mentioned this a few minutes ago, too -- is it's often useful to develop a case chronology, that is to say how things happened in time. This is especially important, I think, in cases involving agreements in restraint of trade because it's often important to see when a meeting occurred and then when certain actions took

place, and maybe you can also put in that chronology when certain things happen with the price of a product, when it went up or down in close correlation with meetings that happen between participants in the industry. So, a case chronology can be a very, very important tool.

And, frankly, one of the most important tools is something called a proof checklist. Now, that might not be something that's immediately apparent to you what that is and in some places it's very routine to prepare these. In other places, you may never have heard of this before. But I recommend that in any investigation you do, you begin to develop a proof checklist because it's really an important way to help you assess and evaluate the evidence that you're getting. 'm going to show you what one of these looks like.

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MARKUS MEIER: Basically, here's a proof checklist. The beginning's a very rough outline of a proof checklist for an investigation involving abuse of dominance. It consists of three major parts. You want the elements of proof. What do you have to prove that there was an abuse of dominance? You want to start listing the evidence that you have for each of those elements of proof and you want to list the source. Where did that information come from? Did it come from a witness? If it came from a witness, which witness and what page of the interview report or what page of the transcript of the deposition? If it came from a document, what document did it come from and what pages and what paragraphs? If it came from an expert or somebody else that you've hired to help you with the investigation, what's the source of the information?

Now, it's not essential that you make it in a chart form like the picture that I have on the screen right now, but it can be useful to do so

because if you start filling this in, you may start to see where holes are. Where are you missing information? If you have to prove something to prove a violation, you need to make sure you know what you have to prove and you need to make sure you have evidence for each of those elements of proof and you need to make sure you have sources.

And, ideally, you'd have more than one source for most of the important pieces of information in a case so that you don't have to rely just on one document or just on one witness. It's not always possible, it doesn't always happen that way. Sometimes you only have one source of information, but where you can, it's particularly useful to have multiple sources, to go look for multiple sources.

So, a proof checklist is a check on your investigation, are we really getting the information we need in order to conclude whether there has or has not been a violation of the law? And if it's done right, it's going to make it very easy to convert that proof checklist into a recommendation memo or into a complaint or whatever other forms of documentation that you need to do and you need to prepare in order to present to the decision-makers who are ultimately going to decide whether it is or is not a violation of the law.

And, again, remember, when I have these elements there, I have dominant position, I have conduct, I have no justification, I have competitive effects. Each of those elements may have a lot of sub-parts. So, for a dominant position, we're going to have information in there about the relevant market and how we determine what the relevant market is. We're going to have information in there about market shares. We may put information in there about entry conditions into the marketplace with the conduct, depending on what you're looking at, if you're looking at exclusive dealing, if you're looking at tying, if you're looking at bundling, full

line forcing, most favored nations clauses or predatory pricing. Each of those forms of conduct are going to have some different elements of proof that you're going to need to look for facts for, so keep that in mind as you put together your proof checklist.

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MARKUS MEIER: So, assuming that you've put together some form of proof checklist, you need to start assessing the quality of that evidence. How good is your evidence?

So, one question you're asking yourself, is there really evidence for each element of proof? And if you've done a proof checklist, you'll be able to see that very quickly whether you do or do not have evidence for any given element of proof.

Another question you want to ask yourself is whether that evidence is legally sufficient. And what I mean by that is does it meet the rules of evidence if you're in a country where you're going to have to go into court and prove a case? Or does it meet the standards of the decision-making authority who's ultimately going to decide whether there is or isn't a violation? When you make your recommendation, you're making it to somebody above you and that person's ultimately going to have to decide, that person or that body, that tribunal, and you need to make sure that the kind of evidence you're collecting, the kinds of facts that you're gathering meet the standards that are required by the decision-making authority in your case.

And you want to ask yourself, how strong is that evidence? Are the witnesses I've been talking to really credible? Do they really know what they're talking about? Do they have firsthand knowledge about what they're talking about or are they merely telling me what somebody else told them?

Obviously, they're more credible if you get witnesses who have firsthand knowledge.

You also want to look at the consistency of the story and the completeness of it. That doesn't mean that every piece of evidence you're ever going to find all points in the same direction, because it never does. You're going to find information that sometimes is contradictory. But the question is, do you have enough good, credible, solid evidence that points in the same direction so that you can confidently make a recommendation to your bosses and, ultimately, to the decision-making authority?

And so, the question becomes, how long does this go on for, how long do you do this process? And my answer is, the investigative process should continue until you have sufficient evidence to confidently either support your theory or reject your theory.

Now, of course, in a lot of countries, you also have time limits and you have to abide by the time limits that your laws require and get your investigations done within those time limits. But, generally speaking, you want to continue to investigate long enough so that you can either be confident that you have sufficient evidence to prove a violation or you conclude that, well, maybe there isn't been a violation here -- there hasn't been, or even if there was, I can't really prove it and I better move on to something else because it's not worth the time to try to go after a case that I can't prove. That's a decision that you're going to have to work out with your bosses and with the people that run your agency.

At this point, we're going to go ahead and check in one more time with our colleagues in Singapore and see how their investigation is progressing, see how they're working on a proof checklist and how they're beginning to assess the evidence that's been coming in during their investigation.

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INVESTIGATOR 3: So, taking our assessment together, it does suggest Tickets Link has sustained market power and hence the ability to profitably sustain high prices above competitive levels. So, I think, in my view, we do have sufficient grounds to show that Tickets Link is dominant in the ticketing service market in Peronica.

INVESTIGATOR 1: Right, right. But dominance is just one part of the story. We know need to assess whether Tickets Link's conduct demonstrates any abuse of its dominant position, specifically we want to examine if the conduct is exclusionary in nature and whether it has some effect on foreclosing competition in the ticketing services market. You know, as well, we may also want to consider if Tickets Link is able to objectively justify its conduct.

INVESTIGATOR 3: Mm-hmm. Well, I have made the following observations regarding Tickets Link's conduct based on the information collected. One, Tickets Link has initiated the exclusive restrictions; two, Tickets Link's exclusive agreements contain explicit and total restrictions imposed on its contractual partners; and also, the agreements contain individualized discounts and incentives; and lastly, the exclusive agreements have repeatedly renewed and carried on by Tickets Link's contractual partners. And the foreclosure attributable to all the agreements is about 60 to 70 percent of the market by ticket volume as well as ticket sales.

INVESTIGATOR 1: Mm-hmm.

INVESTIGATOR 2: Based on these factual observations, I've also performed a detailed economic assessment on the foreclosure effects and the results show that, first, Tickets Link's conduct makes no economic sense, that they are chiefly being anti-competitive. Second, an equally efficient firm would not be able to compete effectively against Tickets Link. And,

finally, the harm caused by Tickets Link's exclusivity restrictions is disproportionate to any benefits arising.

INVESTIGATOR 1: Right. All these actually point to the fact that some form of exclusive restrictions imposed by Tickets Link and these exclusive restrictions seem to be explicitly exclusionary in nature and has actually led to some form of substantial foreclosure effects on competition in the ticketing services market.

INVESTIGATOR 2: Yes. And just to add to that, I notice that Tickets Link has not made any submission to objectively justify its conduct as well.

INVESTIGATOR 1: Right, right. So, I think overall we can say that we have sufficient grounds to find that Tickets Link has abused its dominant position and, therefore, has infringed our Competition Act.

INVESTIGATOR 3: Yeah, agreed.

INVESTIGATOR 1: So, maybe from here what I want to do is to get the key to draft a statement of objections and detail out our reasoning as to why Tickets Link has abused its dominance and infringed the Competition Act, as well as any financial penalties that we want to recommend and any other directions we can enforce on Tickets Link and then we can table the statement of objections to our Commission for a decision before issuing it to Tickets Link. Then, thereafter, the process will keep up from there, and then we'll get Tickets Link's statements of facts and make representations to us before the Commissioners' final decision.

INVESTIGATOR 2: Yeah, okay.

INVESTIGATOR 1: All right.

SLIDE 23 MARKUS MEIER: All right. Coming down towards the end. We're at step six now. And step six is where we try to make a determination whether we believe there's a violation of the law. Now, most of the time,

we're not the ones who ultimately get to decide that, but we get to decide what recommendation we're going to make to our bosses. And in deciding how to make that recommendation, we want to think about the following kinds of things.

What I really want to think about is, does the story of the case satisfy the following conditions? Does the information that I've been able to pull together, the understanding that I now have of this industry, the understanding that I now have of this business practice and what took place, does it hold together in the following way?

First, it's got to be about people and people who have a reason for acting the way they do. I know it's not an element of proof, but, generally speaking, we want to know what people's motivation is. What are their incentives, what are their interests and have these people acted consistently with those incentives and interests? Do they have reasons for the way they acted and can I explain what those reasons are?

Secondly, it has to consist of evidence that's legally sufficient, that's told by credible witnesses and, hopefully, that's supported by documents and data. Remember, I said a moment ago, often it's the case that not every piece of information points exactly in the same direction. But, in general, most of the majority of the evidence seems to point in the same direction because I have credible witnesses, I've got documents and data that back it up. I'm going to feel more comfortable that I really do have a story that I can tell about what's really taking place here.

Obviously, and I've been hammering this point all day long, it has to include all the elements of proof of a law violation under your law. So, you have to go back and make sure that you really did get all the elements of proof, that you really did find facts to support each and that those facts and elements add up to a violation of the law. If something's

missing, you don't have a case.

And the last check is you're going to ask yourself, does my story of the case make economic sense, and it maybe even, more importantly, does it make common sense? Does it really add up? Does my gut tell me that this is really a problem or not? You could have one of the most sophisticated, elaborated theories, but if it just doesn't make sense, you might have a problem. So, this is just a check that you want to use as you think about it. I'm not saying anything in here -- I'm not saying that you have to have a case that makes common sense, but I'm saying it's a heck of a lot better if you do.

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MARKUS MEIER: When I started, at the beginning of this, I gave you six steps to an investigation and I've gone through them in a very serial way, one, two, three, four, five, six. But in reality, the investigative process is much more like a cycle, much more like a circle where one piece of the process feeds into the next. But it doesn't just work that way.

Sometimes the sources will tell you other witnesses to interview, witnesses you interview will tell you other documents to ask for, documents will tell you something about how good the evidence is and how credible the evidence is, and so, it's really much more like a cycle where a number of these activities can actually be taking place at the same time and they all build on each other.

And as you begin to get that evidence and as you assess it, you may go back to your theory and refine your theory. You may throw out some of the theories that you started with because you didn't find enough evidence for them. You may decide that the theory that you started with actually requires that you move on to a different theory, depending on what you're

finding, but the point is it really isn't done one, two, three, four, five, six. It's really done much more like a cycle where one piece leads into the next and one piece affects the others, not just in the circle, but also across the circle.

So, again, for instance, documents may suggest to you other witnesses to interview, but other witnesses you interview may suggest the presence of other documents or data. I hope you get the point.

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MARKUS MEIER: So, to sum this up then, I'd like to point you one last time to the website for the International Competition Network, where there's information from the Cartel Working Group, a Merger Working Group and the Unilateral Conduct Working Group that can all help you with this. They have workbooks, handbooks, manuals that will help you think about the kinds of facts that you want to look for, the kinds of places to look for those facts, the way to get those facts, the kinds of questions to ask if you're interviewing witnesses, the kinds of documents to ask for and how to make those -- how to put those document requests together.

And I understand from my colleagues who work a lot with the International Competition Network, more information is being added to the website continually. So, if you look at it today, a month from now, a year from now, there may be even more information. There likely will be even more information available to you.

I hope this introduction to planning and conducting investigations has been useful. Good luck.

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JOHN PECMAN: Thank you for listening and I hope you found this

useful. Links to the ICN materials I've mentioned at the beginning can be found throughout this module and on the ICN website. The ICN Curriculum Project plans to develop further modules on investigative techniques. These will delve into specific skills, such as requesting documents and conducting interviews.