



International  
Competition  
Network

# ANTI-CARTEL ENFORCEMENT MANUAL

CARTEL WORKING GROUP  
Subgroup 2: Enforcement Techniques

March 2010  
Updated in 2021

Chapter  
Cartel Case Initiation

4

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# 1 INTRODUCTION

Competition agencies worldwide are in agreement that cartel conduct is the most serious of competition law offences and the detection, investigation and prosecution of cartel behaviour is a priority in every such agency. Since cartels are typically shrouded in secrecy, their detection and the strategies used by a competition agency within the initial investigatory period are of the utmost importance to effective enforcement. The challenge to enforcement include:

- increasing investigative capacity to detect cartels
- initiating robust investigations, and
- prioritising multiple enforcement matters to make the best use of available resources.

This chapter draws together selected key practices used in the initiation of a cartel investigation, and identifies some strategies that may be applied in the detection stage and throughout the early development of a case. It will also highlight some of the more established practices useful to cartel case initiation.

The chapter is divided into three sections:

- Methods of detecting cartels** explores various methods a competition agency might employ to detect to detect cartel activity and substantiate the basis for the subsequent launch of an investigation.
- Pre-investigatory phase of cartel allegations** seeks to present a range of approaches and tools that competition agencies may use at the preliminary stages of an investigation.
- Decision to initiate a full scale investigation** illustrates some of the factors which may inform an agency's decision about which cartel cases to pursue, including how cases may be prioritised. This section also provides insight into the steps necessary to initiate a full scale investigation and some of the tools and processes that may be used to support investigations.

The chapter has been structured to highlight three key stages involved in initiating cartel cases.

First, cartel conduct is detected using a range of detection activities. Second, an assessment of the information evidencing the existence of the cartel conduct is carried out; this will assist in selecting and categorising cases for the next stage of investigation. Third, a decision is made on whether the case should be progressed to full scale investigation, at which point detailed planning for the investigation usually begins. These stages, and the relevant actions, are illustrated in the diagram below.

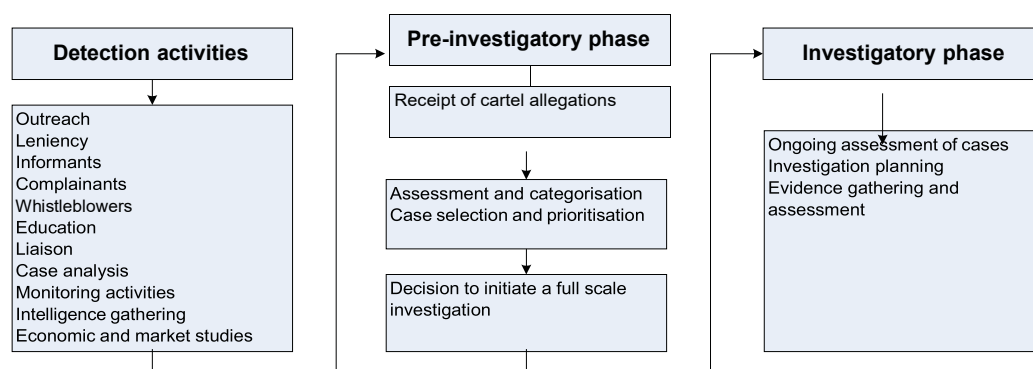


Diagram: Key Stages Involved in Initiating Cartel Cases

Each section of this chapter includes suggested “good practices” which summarise and highlight techniques acknowledged for their usefulness in effective enforcement by a number of member agencies. The underlying caution is that no single approach answers the needs of every enforcement situation. Effective complaint-screening and timely evaluation of marketplace activities are indispensable when using scarce agency resources to maximise anti-cartel enforcement results and increase public awareness and reporting of cartel activity. A summary of these good practices is set out in the box below.

The relevance and adoption of particular practices outlined in this document will be informed by the particular legal environment in which each agency operates. In some jurisdictions, certain practices may not be feasible due to legislative or policy constraints. For example, in terms of triage practices—some competition agencies have reported dedicating a large amount of time to the pre-investigation stage, usually because of legal prerequisites to the use of investigative powers that require the agency to meet certain evidentiary thresholds in the investigation.

### **METHODS OF DETECTING CARTELS**

It is good practice for agencies:

- ✓ to use a variety of techniques and methods to detect cartels, including a balanced mix of both reactive and proactive methods that will increase the opportunities for detecting cartels and help demonstrate a particular agency's enforcement capacity
- ✓ to have a formal complaint system in place for receiving, handling and responding to complaints
- ✓ to utilise a wide range of reactive methods of cartel detection including leniency programmes and systems to receive both information and complaints from whistleblowers / informants, business, government and the public in general
- ✓ to develop good working relationships with domestic law enforcement agencies and international counterparts and to have regular contact in order to promote cooperation and the sharing of information as far as permitted by applicable laws, treaties and/or cooperation agreements
- ✓ to regularly and consistently monitor media, trade press, internet sites and other publicly available industry and trade association sources which can provide an indication or early warning sign of cartel activity, and
- ✓ to engage in education and outreach programmes to raise awareness about anti-cartel laws and the harmful effects of cartels, to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be a source for the initiation of a formal investigation.

### **PRE-INVESTIGATORY PHASE OF CARTEL ALLEGATIONS**

It is good practice for agencies:

- ✓ to establish methodologies for the early verification and assessment of cartel allegations during the pre-investigative phase

- ✓ to establish clear and transparent procedures for dealing with complainants in the pre-investigatory phase and to provide ongoing training to their officers on such procedures
- ✓ to provide information to complainants outlining how their complaint will be evaluated and the agency's expectations of them
- ✓ to verify and corroborate allegations before proceeding to the investigatory phase, and
- ✓ to establish clear referral mechanisms and clear procedures for inter-agency assistance and information sharing during the pre-investigatory phase.

### **DECISION TO INITIATE A FULL SCALE INVESTIGATION**

It is good practice:

- ✓ for agencies to have a policy for, or approach to, undertaking case selection and prioritisation with easily measurable objective criteria that reflect the particular legal, economic and regulatory environment within which the agency investigates cartel conduct and enforces its competition law
- ✓ to have in place a method to assess and weigh the relative merits of cartel matters to facilitate decision-making regarding the selection and prioritisation of cases
- ✓ for investigators to have a good understanding of the methodology and its objectives and to be well trained in its use
- ✓ for agencies to have a consistent approach to the assessment of cartel matters
- ✓ for agencies to review their selection and prioritisation decisions at pre-determined time intervals to ensure that the results are still valid and determine if the approach taken regarding a particular cartel matter needs to be revisited
- ✓ to clearly identify criteria and establish procedures for deciding whether a matter being examined should proceed to the investigatory phase
- ✓ to conduct timely cartel investigations, including by planning investigations efficiently, making decisions within the relevant timeframes and undertaking investigations expeditiously, where possible
- ✓ to document key tasks and milestones in cartel investigations
- ✓ to have information management systems and tracking tools to organise and manage investigations and to regularly review and update these systems and tools
- ✓ for investigators to be appropriately trained in using such record management systems and tracking tools
- ✓ to keep records of information, documents and decisions required to initiate a full scale investigation, and to have systems in place to protect confidential investigation material.

This chapter was first published in May 2007 and as the ICN Anti-Cartel Enforcement Manual remains a work in progress, it was revised in March 2010, following a survey of member agencies during December 2009<sup>1</sup>, and September 2021. The sources consulted to create this chapter include relevant reports from the Organisation for Economic Cooperation and Development (OECD) and proceedings from various international cartel conferences and workshops. Most importantly, the text reflects the contributions of International Competition Network (ICN) member agencies and Non-Governmental Advisors (NGAs).

The aim of the survey conducted in 2009, to which 21 member agencies responded, was to identify and update approaches to the important subject of cartel detection and case initiation and to highlight good practices and procedures in this regard. In September 2009, member agencies also requested NGAs in their jurisdictions to provide comments on the chapter. As far as possible, these contributions and the overall comments from member agencies and NGAs have been incorporated into the revised chapter. References to agencies engaging in any particular practice or procedure should not be taken as a reflection of the experience of all the responding agencies. In some instances, agencies provided specific additional information and where possible, this additional information is included in the chapter.

This version of the chapter represents a second revision, that has been made in 2021 in the context of the « *Big Data and Cartels Project* » of the ICN Cartel Working Group, in particular on the basis of the findings of the Scoping Paper on « *The impact of digitalization in cartel enforcement* », which was approved by the ICN Steering Group in 2020.

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<sup>1</sup> The responding agencies are listed in Appendix IV and the actual survey questions are contained in Appendix V.



## 2 DEFINITIONS

The definitions applied to the terms used in this chapter do not necessarily represent the definitions used by all member agencies in the course of their daily work. The terms may hold different meanings depending on the jurisdiction and legal context in which they are used, and are thus provided as a point of reference to create a common understanding among agencies for the purposes of this chapter.

### 2.1 Algorithms

The term “algorithm” refers both to a standardized or automated method to solve a certain type of problems and to the practical application of such method<sup>2</sup>. Algorithms encompass a wide range of software and programs and can be used by businesses to perform different types of tasks. In particular, algorithms enable companies to quickly and automatically process large amounts of data and set very fast iterative actions in order to react in real time to changes on the market, either to rivals’ or to consumers’ behaviour. In most cases, such conduct is the result of the unilateral use of algorithms by individual companies involving no contacts among competitors. However, algorithms can also be used anticompetitively, for example to facilitate or implement a collusive agreement through automated systems or through the simultaneous use by competitors of the same algorithm.

### 2.2 Cartel conduct

Cartel conduct is the most serious form of anti-competitive practice and/or breach of competition law and it involves two or more competing undertakings, businesses or individuals seeking to limit or reduce competition by:

- fixing prices, which occurs when competitors enter into an agreement to raise, fix, or otherwise maintain the price for a product or service. Price fixing can include agreements to establish a minimum price, to eliminate discounts, or to adopt a standard formula for calculating prices, etc.<sup>3</sup>
- limiting output or sales, which occurs in the form of production or sales quota arrangements which involve an agreement between competitors to limit the volume of particular goods or services available on the market
- sharing markets, which refers to agreements between competitors that divide up the market, for example, on a geographic, product or customer basis, so that the participants are sheltered from competition between each other, or
- rigging bids, where two or more competitors agree that they will not compete with each other for particular tenders or will share information on their tenders, and/or allow one of the participants in the agreement to win the tender.

### 2.3 Complainant

A person or group of persons, often a competitor or consumer, who make(s) a complaint, verbally or in writing, to an agency about alleged cartel conduct.

### 2.4 Data

The term “data” refers to any information, or representation of such information, in structured, non-structured and semi-structured formats, big or small, static or streaming. From a statistical viewpoint, data are the physical representation of information in a manner suitable for communication, interpretation, or processing by human beings or by automatic means.<sup>4</sup>

<sup>2</sup> OECD Roundtable on Algorithms and Collusion, Background note by the Secretariat, June 2017.

<sup>3</sup> See the 2005 ICN Report on Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties at p. 10 ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

<sup>4</sup> Eurostat's Concepts and Definitions Database; OECD Glossary of Statistical terms; Economic Commission for Europe of the United Nations (UNECE),

## 2.5 Full-scale investigation

A “full scale investigation” is often formalized by an official agency action. Such actions include taking some form of official decision to investigate or exercising formal investigative powers (for example, conducting a search, raid or inspection, issuing an order for production of documents or compelling attendance at a verbal examination). These actions often have the effect of publicly disclosing the existence of the investigation. A full scale investigation can also begin with covert steps such as using informant(s) to gather evidence while the cartel is still underway. Such covert action would not publicly disclose the existence of the investigation.

## 2.6 Informant

A person who volunteers information to an agency about cartel conduct. He/she would typically have specific knowledge of, or material information about, a cartel, and may be a participant in the cartel. An Informant’s decision to come forward and disclose the existence of the particular cartel often risks his/ her continued employment, status and/or reputation within a particular organisation and/or industry. As such, an informant would normally require some guarantee of confidentiality and/or anonymity.

In some circumstances, informants may (subject to the laws of a particular jurisdiction) be willing to work undercover on behalf of an agency inside an active cartel and provide information as a witness during the course of the investigation and provide a witness statement.

## 2.7 Leniency

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be levied on a cartel member in exchange for reporting its cartel membership to a competition agency and cooperating with the agency’s investigation (where applicable).<sup>5</sup>

In this chapter “leniency” is used to mean total immunity and “lenient treatment” to mean less than full immunity. Lenient treatment could include agreeing to a reduction in penalties or not referring a matter for criminal prosecution.

## 2.8 Leniency applicant

A cartel member who reports cartel conduct, whether past or ongoing and/or its cartel membership to an agency and undertakes to satisfy certain conditions, including full cooperation with the agency (where applicable) and is eligible to obtain partial or total exoneration from penalties and/or criminal prosecution that would otherwise be applicable.

## 2.9 Pre-investigatory phase

The first actions taken by a competition agency after receiving information about an illegal cartel may be categorised by titles such as “preliminary inquiry”, “preliminary investigation”, “preliminary examination”, “screening” and “first look”, to list a few. Although many different jurisdictions use the same title, the activities denoted and level of inquiry permitted vary widely. This manual uses the term “pre-investigatory phase” to cover activities undertaken when a competition agency is initially informed of potential cartel activities and up to the time a determination is made to undertake a full scale investigation into the allegations.

The steps undertaken by an agency in the pre-investigatory phase are aimed at evaluating the allegations to determine whether a full scale investigation is warranted and meeting legal thresholds for the exercise of investigatory powers.

<sup>5</sup> “Terminology on Statistical Metadata”, Conference of European Statisticians Statistical Standards and Studies, No. 53, Geneva, 2000

The terms leniency, immunity and amnesty are used in many jurisdictions but the definitions of these terms vary between jurisdictions. For example, within one jurisdiction, “corporate amnesty” and “corporate leniency” are used interchangeably to mean a complete waiver from criminal prosecution and from fines for the anticompetitive conduct. Some other jurisdictions use the term “leniency” for both total immunity from fines and for reductions in fines, some of up to 50 percent.

## 2.10 Third party

An industry or market participant, including customers, suppliers and/or representatives of trade associations, who have knowledge about the industry or market and may have knowledge about the cartel.

## 2.11 Whistleblower

A whistleblower may be an employee who is aware that his/her employer is a member of the cartel, but was not personally involved. A whistleblower would normally ask that his/her identity be protected as far as possible out of fear of victimisation and, similarly to an informant, the decision to report on a particular cartel can risk his/her continued employment and/or status and reputation within a particular organisation or industry.

Some jurisdictions provide whistleblowers who disclose information with legal protection from victimization and dismissal from employment as a result of their disclosures.

## 3 METHODS OF DETECTING CARTELS

### 3.1 Introduction

This section discusses the various methods by which a competition agency might detect signs of cartel conduct. It begins with a brief summary of the principal methods of detection, followed by a detailed discussion of each method.

In general, a distinction can be made between methods of cartel detection that are agency generated, or the so called proactive methods, and those methods where an external event, such as receipt of a complaint or leniency application, would trigger cartel detection by an agency the so called reactive methods.

In practice the two methods of detection generally complement each other. For instance, a leniency programme that would typically be described as reactive, would be most effective where a proactive awareness campaign or education programme is launched. There may even be instances, such as affirmative amnesty (as discussed in section 3.2.3), which could potentially be classified as both proactive and reactive methods of cartel detection.

For ease of reference, the above distinction was retained by the drafting team in the 2010 revision of this chapter and is intended merely as a descriptive aid for users of the chapter; there are no hard and fast rules in this regard.

Before defining and detailing the range of proactive and reactive detection measures available, it is useful to set the context for this section. Because cartel activity is against the law in many jurisdictions, and indeed can constitute criminal conduct in a number of jurisdictions, those engaged in cartel conduct usually take steps to hide their conduct and keep the cartel secret.<sup>6</sup> Where there is a low risk of detection and/or relatively low penalties for contravening competition law, companies participating in a cartel may have little incentive to report their behaviour since the benefits derived from participation can be extensive. Conservative estimates assume that prices in a cartelised industry tend to be at least 10 per cent higher than they would be if no cartel existed.<sup>7</sup> Higher prices would suggest that the members of a particular cartel will also enjoy higher profits.

Agencies need to have a variety of effective investigative tools and approaches at their disposal to detect cartels and cannot rely on one single tool or approach alone. The extent to which there is a perceived risk of detection depends on many factors, including a history of agency detection and a belief that the agency has strong enforcement tools at its disposal. If an agency does not have sufficient capacity or means to detect cartels, its leniency programme is likely to be ineffective. To optimise its level of detection, an agency needs to find, among the array of tools, the right complement of reactive and proactive detection methods (as further discussed in sections 3.2 and 3.3 below).

This section begins with an overview of reactive methods of detecting cartels followed by some specific examples of how an agency might apply those methods. The role of complainants, whistleblowers, informants and leniency applicants are all discussed, with the caveat that the use of some strategies (such as affirmative amnesty) may, in certain jurisdictions, give rise to concerns regarding fairness and equality of treatment.

An overview and specific examples of proactive methods of detecting cartels are then provided,

<sup>6</sup> See the 2005 OECD Report on Hard Core Cartels, "Third Report on the Implementation of the 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels" ([www.oecd.org](http://www.oecd.org)) and the 2005 ICN Report on Defining Hard Core Cartel Conduct, Effective Institutions, Effective Penalties ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

<sup>7</sup> See, for example, US Sentencing Guidelines Manual § 2R1.1, Application note 3 ([www.ussc.gov](http://www.ussc.gov)), which states that 'It is estimated that the average gain from price-fixing is 10 per cent of the selling price'. However, other studies have shown average overcharges to be even higher—see, for example, John M Connor and C Gustav Helmers, Statistics on modern private international cartels, 1990–2005, AAI ([www.antitrustinstitute.org](http://www.antitrustinstitute.org)), and John Connor and Robert Lande, How high do cartels raise prices? Implications for reform of sentencing guidelines, American Antitrust Institute working paper 04-01 (3 April 2005) ([www.antitrustinstitute.org](http://www.antitrustinstitute.org)).

including education, liaison with other agencies, monitoring, economic analysis and outreach. Throughout the section, good practices for detecting cartels are identified.

**It is a good practice for agencies to use a variety of techniques and methods to detect cartels, including a balanced mix of both reactive and proactive methods that will increase the opportunities for detecting cartels and help demonstrate a particular agency's enforcement capacity.**

## 3.2 Reactive methods of detecting cartels

Reactive methods of detection typically rely on some external event to take place before the agency becomes aware of an issue and launches an investigation. Reactive methods of detection commonly include receiving a general complaint, a leniency application or an approach to an agency by a whistleblower or informant.

Although cartels are by their nature conspiratorial activities and the circle of individuals directly involved in the conspiracy may be small, there is generally a much wider circle of individuals involved in implementing the cartel. Cartelists must always worry that someone who knows about the cartel will report the activity to a competition agency. An employee of a company participating in a cartel may recognise the wrongdoing and report it, or an individual who was himself a participant in the cartel may become disgruntled with his fellow cartelists or with his employer and decide to report the cartel conduct. There is therefore always some risk of detection and for this reason many agencies have dedicated centres and/or help-lines set up to assist anyone wishing to report suspected cartel conduct.

The losers in any cartelised industries are normally buyers of the cartelised goods, their customers and ultimately consumers. Any of these wronged groups may suspect, or become aware of, the cartel activity and report it to the agency by way of a complaint. Alternatively, an employee who is unhappy with his/ her employer's (or ex-employer's) involvement in cartel activity may decide to act as an informant or whistleblower and report the cartel activity to the agency. These risks affect the "probability of detection" assessments made by cartel participants. A cartel participant may conclude that the risk of detection is uncomfortably high and may therefore decide to apply for leniency and report the cartel before anyone else reports the conduct.

Agencies have sought to increase the incentive to report by introducing leniency programmes that provide partial or total exoneration from penalties, fines and imprisonment. The significant detection benefits of a leniency policy, and the essential constituent parts of an effective leniency programme, are discussed more fully in chapter 2 of the ICN Anti-Cartel Enforcement Manual.

Some agencies also have other incentive programmes in place to encourage third parties to bring relevant information to their attention. Several agencies have cartel informant reward programmes offering monetary rewards for information received from third-party informants not participating in the cartel.

### 3.2.1 Complaints

An agency may first become aware of alleged cartel conduct through a complaint, typically from a disgruntled member of the cartel or from a disgruntled employee of one of the cartelists. Complaints may also come from direct or indirect purchasers of the cartelised goods (although less common as a customer would normally not be in a good position to know that a cartel exists, or have evidence to substantiate their allegations), or from a competitor who is victimised by a particular cartel. Alternatively, complaints may originate from any member of the general public

who may become aware of an issue or be suspicious of cartel activities. In a survey conducted by the drafting team,<sup>8</sup> one agency indicated that complaints can also be received from businesses who have been approached by cartelists and asked to join the cartel, or from those who have been excluded from the cartel.

It is good practice for agencies to have a formal complaint system in place for receiving, handling and responding to complaints. Through a rigorous filtering process, complaints without legal foundation can be identified relatively quickly. This helps avoid diversion of valuable resources away from investigations into genuine cartel behaviour.

Agencies may use various measures to strategically influence the focus / nature of complaints. Some periodically or annually target the business sectors they are most concerned about and publicly identify specific sectors targeted for enforcement focus, based on identified deficiencies in the operation of markets and industries. In addition to encouraging complaints or leniency applications, agencies may encourage companies to comply with the jurisdiction's laws and regulations and may even have a form on their website for procurement authorities to complete if they suspect that bid rigging has occurred (see section 3.3.1.2).

"General complaints" usually arise because of confusion between illegal cartel conduct and legitimate business activities. Such complaints often lack evidence of an offence and, in rare instances, may be made as part of an attempt to cause trouble for a competitor. It is therefore important to keep all possibilities in mind, particularly during the early stages of an investigation as more information is obtained about the behaviour and the parties involved.

"Informed complaints" containing allegations that may suggest evidence of cartel activity can take a variety of forms. Customers may complain about identical price quotes from suppliers or consumers may complain that they have tried without avail or explanation to solicit different prices from competitors.

Customers may complain that they have been allocated or are locked into a specific supplier and are unable to go elsewhere notwithstanding relative high prices being charged by their current supplier. Procurement officers may spot unusual bidding patterns, such as rotation of bids between competitors. The specificity and quality of information contained in such complaints is of key importance to an agency in determining further steps to be taken.

Where possible, it may be necessary to protect the identity of a complainant throughout the lifetime of a case to avoid the possibility of reprisals, particularly if the complainant is a rival competitor or a customer concerned about future supply. In at least one jurisdiction, a written complaint will not form part of the file, instead only a note for the file is provided with details of the complaint without referring to the name of the complainant. Agency consideration should be given to the level of protection afforded to complainants, as one consequence of not revealing the identity of a complainant may be that information provided by the complainant cannot be used in evidence but only as intelligence in the search for evidence. Some agencies recognise a complainant as being a third party to the case, with the right to make representations on key documents.

In those jurisdictions where cartel violations are investigated as criminal violations of the law, it may not be possible to maintain the confidentiality of the complainant throughout the lifetime of the case.

<sup>8</sup> Survey conducted in relation to this chapter by SG 2 drafting team in December 2009.

If a matter proceeds to trial it may be necessary to disclose the information to the defence and, if the complainant has the best available evidence, it may be necessary to use that evidence in open court to prove the violation. However, even in these jurisdictions, the agency should take efforts to maintain the confidentiality of the complainant for as long as possible.

**It is good practice for agencies to have a formal complaint system in place for receiving, handling and responding to complaints.**

### **3.2.2 Whistleblowers and informants**

Agencies may also become aware of cartel activity through information received from either an informant or a whistleblower (also see sections 2.4 and 2.9 above).

#### **3.2.2.1 Whistleblowers**

A whistleblower may be an employee who is aware that his/her employer is a member of the cartel, but was not personally involved. Such an individual either disagrees in principle with his/her employer on participating in the cartel conduct, or is sometimes an employee or ex-employee who has become disgruntled with his employer for some reason, such as a demotion or a dismissal, which sparked his/her decision to report the cartel conduct to an agency. Agencies should therefore bear in mind the potential for bias when dealing with any whistleblowers. One agency surveyed indicated that from their experience whistleblowers are normally senior people who have been in the relevant industry for some time.

A whistleblower may require a guarantee of confidentiality and anonymity because of the potential risk to his/her continued employment in the industry and/or reputation. Some jurisdictions provide whistleblowers with legal protection from victimisation and dismissal, and have carefully considered policies for dealing with whistleblowers. Whistleblowers should clearly be informed about these policies at all stages of the process.

As whistleblowers are in practice often ex-employees, a fair amount of time may have passed since the whistleblower first became aware of the cartel activity and the time of reporting, thus the relevance of the information provided by whistleblowers may at times become an issue and careful consideration should be given to expedite investigative steps.

#### **3.2.2.2 Informants**

Informants often have information obtained from within the cartel which could not be obtained from sources other than the parties involved. They may agree to work undercover and may be requested to undertake further research in the form of covert intelligence gathering on behalf of the agency, where authorised by the agency's laws or regulations. Infiltration by an undercover informant can be a powerful investigative tool, but a very onerous regulatory regime setting out strict rights and obligations for the informant and agency will normally apply due to the personal risks of discovery that may be incurred by the undercover informant. For example, authorisation might only be given where such action is necessary and proportionate, and collateral intrusion is kept to a minimum.

All informant handlers should be specially trained. One agency has specially trained detectives who deal with whistleblowers and informants. To minimise the risk of discovery, any information received from informants will often be imparted to a case team only as background intelligence with the original source of the information remaining confidential. One agency indicated that informants who wish to protect their identity may use intermediates like lawyers to bring forward the information without naming them and/or send in the information anonymously. This may raise a question about the usefulness of the information and about the quality of evidence



provided, so it is good practice to corroborate the information provided with other sources. In some jurisdictions, whistleblowers are treated by the relevant agency as a confidential, undercover informant.

Several agencies now operate cartel informant reward programmes. This provides financial incentives to third parties (i.e. those not actually involved in the relevant cartel) in exchange for information or evidence provided about the cartel. Such programmes facilitate the gathering of evidence or information about cartels with minimal effort and cost, and can also help to deter cartel behaviour. One agency responding to the survey indicated that the amount of the reward payment will depend on the nature and timing of the information and evidence provided by the informant and the seriousness of the cartel offence.

Providing financial incentives to informants also presents potential risks by raising additional questions about the individual's motivation for providing the information and about the quality of evidence provided. Again, it would be good practice to corroborate the information provided with other sources.

### **3.2.3 *Leniency applicants***

In 2008, the ICN reported that over 40 jurisdictions around the world enforcing anti-cartel provisions had instituted immunity and/or leniency programmes to incentivise cartelists to report their behaviour in exchange for partial or total exoneration from, or a substantial reduction in, fines or imprisonment.<sup>9</sup> Leniency is discussed more fully in chapter 2 of the ICN Anti-Cartel Enforcement Manual.

Leniency is generally a reactive strategy in which the agency waits for companies to come forward and apply, but it is also possible for leniency to constitute a more proactive tool. An example of this, reported by one agency, is affirmative amnesty. Where a cartel is suspected and leniency is still available, but no leniency applicant has come forward to report the conduct, the agency sometimes proactively approaches one of the suspected companies to clearly set out the benefits that leniency could give to the company.

This may occasionally prompt a company to apply for leniency. However, there is the theoretical possibility that the company could decide not to come forward and instead, having been alerted to the possibility of a search, raid, inspection or other investigative action, destroy any incriminatory evidence in its possession.<sup>10</sup> In some jurisdictions, such acts could potentially be prosecuted as obstruction of justice. It should be noted that the use of such a strategy may, in certain jurisdictions, give rise to concerns regarding fairness and equality of treatment.

A further incentive, that is given by one agency to successful leniency applicants, is the possibility of reduced damages in the civil follow-on litigation by private parties that usually follows a criminal cartel investigation.

### **3.2.4 *Most successful reactive methods***

Agencies reported that complaints are still the predominant method of cartel detection worldwide. However, one agency pointed out that considering the huge number of complaints received, most of which are dismissed without successful prosecution, it may not be the most efficient method of cartel detection.

Leniency applications are the second most common means of detecting cartels and, with the usual direct access to information on the cartel conduct and the speed with which such information is normally received by agencies, leniency applications may in fact be the most effective method of cartel detection. They may often require fewer resources than are required to

<sup>9</sup> 2008 ICN Report on Cartel Settlements ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

<sup>10</sup> See 2006 ICN Report on Obstruction of Justice in Cartel Investigations ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).



sift through information, screen complaints and conduct follow-up enquiries.

Informants were listed as the third most successful means of cartel detection utilised by the agencies surveyed. A number of agencies also listed referrals by central / state government as an important method of cartel detection, especially in cases of bid rigging / collusion in public procurement projects.

**It is good practice for agencies to utilise a wide range of reactive methods of cartel detection including leniency programmes and systems to receive both information and complaints from whistleblowers / informants, business, government and the public in general.**

### 3.3 Proactive methods of detecting cartels

The methods of detection discussed thus far in this chapter are all reactive in nature, since they rely on some event external to their own initiative to trigger an agency investigative response. Agencies worldwide also use more proactive methods of cartel detection, which are initiated from within the agency and do not rely on an external event. Proactive methods of detection usually involve education and outreach programmes and may under certain circumstances include: an announcement of a period of lenient treatment, for example an amnesty for a defined period, the use of economic analyses and market studies, tracking of individuals and media, liaison with other agencies and infiltration.

Agencies may choose to use proactive methods of detection for a variety of reasons including:

- (i) An agency may wish to demonstrate the existence of a credible threat of detection and punishment (especially in the absence of a leniency application).
- (ii) An agency might come to the end of a string of concurrent investigations into the same industry, and be looking for new cases.
- (iii) An agency may have acquired new powers and/or enforcement tools and be looking to put these into practice to underline their deterrent effect.
- (iv) An agency may seek to increase the variety of cases it pursues (e.g. in terms of the size of the companies, types of conduct or types of markets / industries investigated) to improve the deterrent effect of its activities.

#### 3.3.1 Education and outreach

The first proactive method discussed in this section is raising awareness of cartels through education and outreach. The importance of competition education and outreach in raising awareness about the illegality of cartel conduct, the harm it causes and how to detect it should not be underestimated as a tool to generate significant leads. Education and outreach also serves an important role in reinforcing an agency's leniency programme. As more companies become aware of their responsibilities, and enact compliance programmes, more cartel conduct is uncovered leading to a greater number of leniency applications.

An agency will generally seek to publicise its work through various methods, such as agency publications, general and trade press articles, its own website and/or by giving speeches at conferences. One of the agencies surveyed indicated that it holds presentations for businesses and at law firms, publishes articles in local media and provides substantial information on its website. When there is a suspicion of cartel activity in a particular industry, it is worth considering

targeting particular individuals or groups for education.

Presentations to procurement officials on bid rigging, for example, might alert these officials to and/or equip them to better deal with instances of tender collusion. Education typically comes in two formats: internal and external. These terms are explained below.

### **3.3.1.1 Internal agency education**

In addition to increasing the awareness of the illegality and potential harm of cartels among external players, it is also important to ensure that the agency is maximising the opportunities for cooperation within the agency. In agencies that have dedicated anti-cartel units, other areas of the agency are no doubt already broadly aware of the work of the cartels area, but this awareness can be maximised by holding seminars on case studies, economics and other issues, and by forging closer links with those people working on particular areas and industries that are likely to be the subject of cartel activity.

It might be particularly beneficial to share information between the cartel and mergers areas in agencies where these are dealt with by separate units (subject to applicable laws), since the latter often perform a valuable market-monitoring function, particularly in jurisdictions with mandatory merger notification regimes.

### **3.3.1.2 External education**

The main focus of education will tend to be on external organisations and individuals, in order to increase awareness of the work of an agency (and specifically the cartels area) and have the twin objectives of detection and deterrence.

Under external education, there are normally three main streams targeted. The first being consumers and/or the public in general, the second being the wider business community, and the third being specific groups such as procurement divisions / officials and other government agencies.

In respect of general education, one of the agencies surveyed indicated that it holds seminars in universities and with trade associations; another has an annual national anti-cartel enforcement day. Another agency indicated that some of its officials participate in training courses for procurement officials and also present lectures to classes at junior and senior high schools.

In relation to education of procurement divisions / officials and other government agencies, attention is drawn to the potential for cartel activity in certain sectors / industries (e.g. in the form of bid rigging) and the usual cartel indicators can be highlighted.<sup>11</sup> Individuals may also become comfortable with approaching a recognised contact at the agency with their suspicions, even if these do not initially appear to constitute strong evidence. Other proactive measures can then be employed to target the area in question and investigate whether it is a situation that is likely to reach the relevant evidential threshold for starting an investigation.

Some examples of education strategies that might be adopted include:

- (i) Raising awareness among public procurement agencies—where large funds and multiple tenders (or repeat business) are often available for projects, attracting collusive tendering and other cartel activities. This might be accomplished by way of a presentation on bid rigging for procurement officials (principally local authority or government public purchasing officers and auditors).

Presentation slides can be used initially as a speaker accompaniment and subsequently designed to be self-standing so that they can be e-mailed to procurement departments with a request to respond to the agency with any suspicions. One agency surveyed published a brochure for people involved in public procurement so that they can easily identify when they

<sup>11</sup> Examples of such indicators are set out in section 3.3.8.1.

might be in danger of being targeted. Some agencies also focus awareness raising activities towards large private corporations who undertake significant procurement activities.

- (ii) Distributing “model” letters to local authorities and government departments, for transmission to contracted suppliers. These letters should state that the relevant local authority / government department is working with the competition agency to raise awareness of cartels and to improve the flow of information to the agency where breaches of competition law are suspected. The letters would normally give a description of bid rigging and set out the detrimental effect of cartels on consumers and other businesses, list the potential penalties for cartel participants and give details on and list the benefits of the agency’s leniency programme. Contact details of the relevant person within the cartels area and/or the agency’s leniency officer should be given for anyone with queries or wishing to report a cartel.
- (iii) Dispatching notes giving a brief description of the work of the agency and/or cartels area (including its leniency programme) and providing information on the “model” letter discussed above to the coordinators of regulatory services. These notes can also be included in the regular publications of the local authority / government department, which may be circulated to other bodies such as trading standards authorities. Such notes might include a statement to the effect that the agency is stepping up its efforts to work with local authorities / government departments to detect and take action against suppliers who collaborate illegally with each other when submitting tenders for any form of contract.
- (iv) Encouraging the use of certificates of independent bid determination to be used for government and local authority bids. These would require a declaration on the part of the bidder to the effect that its bid has been prepared independently and that it has not engaged in any form of collusion. Agencies should consider engaging in pro-active education about the effective use of such certificates, encouraging these certificates to be combined with a threat of disqualification from participation in future tenders to reduce the potential for false declarations.
- (v) Encouraging compliance programmes among private businesses including small and large companies. Proactive involvement in such programmes can also encourage early informing of breaches of the programme by officers of the companies. It may even be possible for agencies to assist with auditing and monitoring of employee conduct.

### **3.3.2 *Liaison with other agencies***

It is important for agencies to liaise regularly on matters of common interest with other agencies, both domestically (such as industry regulators and other law enforcement agencies) and internationally (with other competition agencies). Not only would this enable an agency to learn from the experiences of other agencies and allow staff to interact with experts in their respective fields, but it would also allow the agency to build up important networks and a rapport, both locally and internationally.

#### **3.3.2.1 *Liaison with other domestic agencies***

Research and experience show that certain industries have repeatedly been subject to cartel conduct. Therefore, liaison with domestic agencies with experience in these industries and/or sector regulators can be an important source of information. For example, agencies may find it useful to partner with other domestic agencies involved in public procurement to assist in identifying cartel conduct in bidding for public sector contracts.

It is also often the case that a particular industry and/or certain companies and/or individuals within that industry might be involved in a number of illegal activities in different areas. For example, there might be abuses of competition law as well as exploitation of consumers through

unfair contracts or substandard service and evasion of taxes. For this reason, liaison with other domestic law enforcement agencies such as trading standards authorities, central (reserve) banks, tax collection authorities and police may bring forth useful leads. One agency surveyed indicated that investigating and prosecuting cartel offences with other related offences such as fraud, kickbacks and breach of fiduciary duty, for instance, can create an inducement for cartel members to cooperate and self-report cartel conduct.

Another agency stated that their domestic police forces have reported suspected cartels to them when they encountered such evidence during the course of their own investigations.

For all these reasons, competition agencies could consider including the following elements in their investigative strategies:<sup>12</sup>

- Incentives to exchange and cooperate with national/regional/local procurement agencies<sup>13</sup> as well as other law enforcement agencies investigating economic and financial matters, as to relevant data which could be useful for antitrust investigations. These agencies may come across information and leads of possible anticompetitive conduct. This information and leads may often be of high probative value and concern ongoing conduct.
- At national level, publicly available online databases collecting public procurement data (see the already existing projects such as The World Bank's Global Public Procurement Database<sup>14</sup> and the Open Tender project<sup>15</sup>) could be used by competition agencies to gather additional information in a cartel investigation involving public procurement.

### 3.3.2.2 *Liaison with other competition agencies*

Cooperation with other competition agencies is a natural part of most agencies' work, and the experience of other agencies can be highly beneficial. A number of agencies have formal agreements and arrangements with other jurisdictions / agencies on international cooperation. There are also a number of informal ways to increase and vary cooperation with other competition agencies to improve the success of cartel detection and case generation, such as:

- agencies informing each other when they uncover evidence of a possible cartel—at its most extreme, this could be done before the agency reaches its threshold for opening an official investigation<sup>16</sup>
- visits between agencies to share experiences of and solutions to, cartel-related issues
- informal contacts by telephone, or in person at enforcer gatherings, between officials of different agencies to further cooperation
- secondment or exchange of staff between agencies to build up the international pool of experienced cartel enforcers, and
- specific one-off discussions with named individuals at other agencies regarding particular issues surrounding cartel detection and case generation.

<sup>12</sup> Refer to Chapter 5 of the ICN Anti-Cartel Enforcement Manual on Investigative strategy and interviewing.

<sup>13</sup> Refer to Chapter 10 of the ICN Anti-Cartel Enforcement Manual on the Relationship between Competition Agencies and Public Procurement Bodies.

<sup>14</sup> <https://www.worldbank.org/en/topic/governance/brief/global-public-procurement-database>

<sup>15</sup> <https://opentender.eu>

<sup>16</sup> The 2005 OECD Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Investigations ([www.oecd.org](http://www.oecd.org)).

Exchange of information can be important even when, from the point of view of a given agency, the information gathered at a certain point is not sufficient to start a case. Information from a number of sources may be enough to start a new case if considered all together in a broader context.

**It is good practices for agencies to develop good working relationships with domestic law enforcement agencies and international counterparts and to have regular contact in order to promote cooperation and the sharing of information as far permitted by applicable laws, treaties and / or cooperation agreements.**

### **3.3.3 Analysis of previous cartel cases**

Analysis of previous cases is a relatively low-cost measure which may help an agency to focus its efforts on cartel behaviour in particular industries. The agency might examine its records of successful cartel cases and also of those cases which ultimately did not go anywhere, perhaps because they did not reach a particular threshold for investigation or prosecution (for more information, see section 5.2). Analysis of previous cases may either reinforce the original suspicions or shed light on different cartel activity existing within the relevant industry.

The agency may also undertake an analysis of cases conducted by other competition agencies internationally. Comments received from NGAs on the existing chapter suggested that a good method of detection could be to monitor what overseas agencies are investigating and to examine offshore private cases as a means of identifying industries or parties that could be proactively targeted. Cases that have arisen in other jurisdictions can often act as a useful indicator of likely cartelised industries since cartels have, historically, tended to arise in similar industries, mainly because of facilitating factors such as those set out in section 3.3.8.1. This will particularly be the case where the relevant market is mostly multi-national, or global, or there is some link between the companies operating in different jurisdictions.

### **3.3.4 Analysis of other competition work**

Market analyses undertaken in non-cartel areas within a competition agency (e.g. in mergers or abuse of dominance matters) may indicate cartel conduct or provide important background information on a particular industry or sector. One agency surveyed indicated that it has successfully uncovered a cartel agreement in a merger case. However, there may sometimes be issues surrounding the internal disclosure of information, e.g. the information may be useable as intelligence only, as it would quite often be submitted under privacy claims and/or contain sensitive information such as trade secrets.

### **3.3.5 Monitoring of industry activity**

Some agencies undertake systematic monitoring of industry activity. For example, some agencies have introduced a system to analyse the potential for bid rigging in the public sector. Public procurement agencies are asked, or required in one jurisdiction, to provide data to agencies containing details of procurement activities either carried out over a specified period or on a regular, ongoing basis. This data includes expected bid value, the names of bidders, information about the bidders and bids submitted, and details on successful and rejected bids, as well as decision-making methods. The results are analysed by the agency and investigations launched where the greatest symptoms of bid rigging are present. Such methods are also highly useful from

an educational perspective, since they draw procurers' attention to the potential for bid rigging.

### **3.3.6 Monitoring media, trade press and the internet**

It is important for an agency to have knowledge of what is happening in business in general and specific industry sectors that are the subject of complaints and/or investigations. Monitoring of media reports and trade press therefore forms an integral part of an agency's day to day business. Some agencies have specific divisions tasked to do this, while others employ external companies to search for articles containing specific keywords. A combination of all of those approaches is used by other agencies.

As part of an agency's role in maintaining an overview of industries, and in particular when one or more of the methods of cartel detection mentioned above raise suspicions, it often will be possible to find additional information on potential cartel behaviour in an industry by targeting media, trade press and online trade information such as chat rooms and bulletin boards. The following list illustrates the types of information that might be found:

- allegations of price-fixing, market sharing, non-competing, bid rigging and/or exchange of price information (e.g. a magazine interviews a company which alleges that others are engaged in such activities—or maybe contains a letter from a disgruntled customer who thinks he's the victim)
- one company putting prices up (or perhaps down) and other(s) doing exactly the same around the same time (of course this can be due to price following), or covert price increases, for example by a coordinated reduction of the size of the packaging
- a company losing business to others, combined with an indication of collusive activity (e.g. the other companies may be engaging in concerted action)
- apparent coordination of supply (this will drive up the price)
- coordinated or temporally suspicious (i.e. around the same time) activities such as introduction of similar discounts and/or incentive schemes
- publicised statements or interviews including comments such as "it's time the industry took action to increase its margins"
- customers saying that they have been told by a supplier that no one will quote a different price
- regular intra-industry contact between key industry figure
- industry journalists who might be open to an approach from the agency for inside industry information
- industry conferences / meetings that the agency might be able to infiltrate, and
- purchasing / acquiring of competitors and/or closing down of factories, as an indication of cartelised companies trying to get rid of "undisciplined" competitors.

Difficulties may be encountered with monitoring websites because the most relevant trade information is normally kept on secure sites accessible only by members under password. There may also be limitations, both physical and legal, on an agency's powers to set up anonymous accounts to access such sites so the monitoring of trade press may therefore prove more successful.



It is good practice for agencies to regularly and consistently monitor media, trade press, internet sites and other publicly available industry and trade association sources which can provide an indication or early warning sign of cartel activity.

### 3.3.7 *Anonymous attendance and other contact with industry representatives*

A further step that may be taken in the investigation of an industry is anonymous attendance at industry events in some form or another. The first example of this is infiltration by agency staff attending sales conferences and talking to key industry figures. Secondly, it may be possible (depending on the circumstances of the case, and on the agency's powers and legal limitations) to do a variety of things, such as: 1) establishing contacts within the industry or trade bodies; 2) using informants from within the industry; 3) or even conducting a long-term exercise using people as undercover informants (see section 3.2.2.2). Such activities must be tightly controlled to guarantee compliance with the jurisdiction's legal requirements and the security and personal safety of those participating.

It may also be possible to encourage pre-emptive action by writing letters to companies or conducting voluntary visits to ask questions and obtain information. The purpose of such questions would be to destabilise any existing cartel and encourage an application for leniency and/or a whistleblower. Articles may be placed in the media or trade press expressing concerns about particular sectors to prompt informants / whistleblowers / leniency applicants to come forward. This may, however, carry the potential disadvantage of tipping off offenders and prompting them to destroy evidence.

### 3.3.8 *Use of economic analysis*

Some agencies may use analytical tools such as economic studies, analysis of previous cases and systematic monitoring of industry activity to try to identify possible cartelised markets.

Whether economic analysis is used and the weight placed on the outcomes of any economic studies undertaken will differ between jurisdictions and will also be informed by the legal system in that jurisdiction. Most agencies, including many well-established agencies, do not use economic tools or data to detect cartels, relying instead on other tools that they consider more effective and a more efficient use of their resources.<sup>17</sup>

Each agency determines the best practice for their jurisdiction in the context of their legal regime. On their own, economic studies are unlikely to provide sufficient information to reach the thresholds that are required for a completed investigation and/or for a prosecution. Instead, they are more suited to identify factors that could be indicative of collusion or markets that may be ripe for collusion, which would have to be followed up with further investigation.

Economic studies are generally based on one or more of the following approaches:<sup>18</sup>

- a review of economic literature to assess what factors have proved useful in accurately modelling the formation and stability of cartels
- an empirical approach using recent evidence of public infringement decisions and economic data to identify factors that are relevant in identifying cartels

<sup>17</sup> For example, the Antitrust Division of the US DOJ does not use economic tools or data to attempt to detect cartel activity. Such efforts in the past have not proven fruitful and the US DOJ does not believe that such efforts are a good use of its resources.

<sup>18</sup> See for example OFT (UK) economic discussion paper (2005), "Predicting cartels" ([www.oft.gov.uk](http://www.oft.gov.uk)).

- economic modelling to provide predictions of the probability of cartels within various industry types, and/or
- a number of industry or market studies that might provide additional insight into our understanding of the price effects and profitability of cartels.

The cost of economic studies should always be assessed against any likely benefits and may in some cases (particularly for smaller agencies) be prohibitive. Nevertheless, with increased information-sharing across agencies it is possible for benefits to be more widely realised.

#### **3.3.8.1 *Existence of factors facilitating cartel behaviour***

As shown, economic literature has identified several factors which facilitate cartel behaviour. These factors may also provide agencies with some potential indicators of cartel conduct. Factors identified include the following:

- small number of firms—easier to manage covert relationships and agreements
- high entry barriers—prevents newcomers from disrupting or undercutting the cartel (or slows them down)
- excess capacity and inventories
- shrinking markets and declining industries—the difficult circumstances encourage firms to collude to survive
- stable market conditions (even within shrinking markets)—makes cheating on the cartel easier to detect
- frequency of interaction through trade associations—e.g. people moving between companies
- geographical proximity, e.g. where a raw resource is being extracted and refined
- market transparency, e.g. in bid rigging where openness makes it easier to monitor for cheating
- homogenous or fungible products such as chemical products, vitamins and food additives
- ending of a price war and/or concerted moves to “discipline the market”
- existence of joint ventures
- pricing patterns
- price inelastic market demand, providing enhanced scope for a profitable rise in the price and hence added incentive to collude
- industries with a history of anticompetitive conduct
- buyer characteristics, in that it can be easier for cartels to impose higher prices on smaller buyers with less countervailing power, rather than on large buyers with strong buyer power
- commonality of costs, and
- mature technology.

#### **3.3.8.2 *Empirical approaches***

Empirical approaches often use economic evidence (models containing relevant economic variables) from previous cases (see section 3.3.3) to predict the industries in which future cartels may be discovered.

Industries where cartels have not previously been detected may also be identified as being susceptible to cartel activity by means of such approaches. Patterns of cartelisation observed



from such studies include the importance of demand factors such as scale (in terms of turnover) and a lack of variability in growth of demand. Strong positive correlations between cartelised industries have also been noted in some jurisdictions. It should be noted, however, that such studies may suffer from sample selection problems due to the fact that many cartels are yet to be detected and in fact may never be detected.<sup>19</sup>

### 3.3.8.3 *Industry or market studies*

Industry or market studies may be conducted into particular industries where cartels are historically most prevalent and previous studies have identified a number of common themes. For example, cartels may be prompted by a decline in prices or by intense competition following the expansion of an incumbent or a large new entrant. Destabilisation of a cartel may be encouraged by entry or the threat of potential entry, and this may increase the incumbents' need to coordinate their activities, thereby making the collusive agreement more explicit and easier to prove. The likelihood of collusion can be inversely correlated with the number of firms and the degree of concentration in the market.

Another factor which can help identify cartels is the existence of large differences in market shares between countries or regions, which may be an indication of geographic allocation / market sharing.

As such studies are generally based only on publicly available information, some agencies may consider seeking information from other governmental entities or requesting information on a voluntary basis. The derivation of the information may have implications for the use of the information; it will often be possible to only use it as general intelligence, rather than as specific evidence forming part of a subsequent investigation. Further, in a criminal context agencies will usually need reasonable grounds to demand information from potential targets.

In the context of bid-rigging practices, publicly available online databases collecting public procurement data could be used by competition agencies to gather additional information in a cartel investigation involving public procurement.

Furthermore, competition agencies are increasingly considering the development of in-house data connection flux/platforms ("data screening tools") based on the use of algorithms that could help them to improve the detection of cartels in public bidding procedures. As this process requires significant investment in time and resources, it is advisable to contact beforehand other agencies with prior experience with similar projects so as to gain a better understanding of the challenges and the potential added value to be expected from these types of tools.

### 3.3.9 *Digital features of the Sector*

Further, competition agencies may include in their investigative strategy<sup>20</sup> an analysis of the following digital features of the sector under investigation:

- Degree of digitalization of the sector ;
- Development and degree of use of algorithmic/dynamic pricing systems; this could include all market levels: retail but also wholesale and raw material/inputs;
- Pricing algorithms developed internally vs. contracted to external providers;
- Use of artificial intelligence / deep learning algorithms in relation to market actions;
- Number and identity of suppliers of electronic/dynamic pricing software solutions;
- Existence of industry-wide standards/discussions for dynamic pricing solutions;
- Industry specific communication mechanisms (dedicated messaging apps, reference

<sup>19</sup> Harrington, J. (2006) Modelling the birth and death of cartels with an application to evaluating antitrust policy, Working Paper 532 (pp. 1-29) (Harrington): John Hopkins University notes that the cartel population is largely unobservable and we can only observe the population of discovered cartels.

<sup>20</sup> Refer to Chapter 5 of the ICN Anti-Cartel Enforcement Manual on Investigative strategy and interviewing.

prices etc.);

- Availability of market databases.

### **3.3.10 Developing follow-on investigations from leniency and lenient treatment candidates**

Finally, a more general lenient treatment / settlement strategy (to be distinguished from leniency programmes) may be used as a proactive method of cartel detection. When an agency is concerned about possible endemic cartel conduct within a particular industry, it may be appropriate to consider some kind of general lenient treatment / settlement strategy under which the agency invites implicated companies to come forward under conditions akin to leniency, but under specific terms and within a specific period (e.g. one agency effectively used this method to combat a problem with bid rigging in the construction industry<sup>21</sup>).

At least one agency adopted a strategy in which it announced that there would be a leniency period for companies admitting participation in a cartel. Companies making admissions within the given period were given more lenient treatment than those companies which did not make any admissions and were subsequently found guilty. In some instances, companies may be treated differently in the future regarding tendering for public sector procurement contracts and/or they may face a relatively low lump sum financial penalty following a short and resource-light investigation.

### **3.3.11 Tracking of individuals**

It may be useful to probe the employment history of managers involved in cartels when conducting interviews, as similar conduct may have taken place within the other companies for which they have previously worked. Some agencies follow the career progression of certain individuals from company to company closely and record these details in a database. Other agencies have cited barriers to the collection of such information, such as strict privacy legislation.

This “tracking of individuals” could also be carried out when dealing with new leniency applications, asking the applicants to provide background information on the individuals directly involved in the cartel activities.

### **3.3.12 Other proactive methods used**

One agency surveyed noted that it uses a private consulting company to scan all public procurement carried out for specific periods in specifically identified markets. The purpose of this strategy is twofold: to examine the competitiveness of the markets and the conditions in which they operate, as well as to identify potentially collusive behaviour between bidders. The agency also finds the method useful for dismissing further investigation in industries where no signs of collusion have been found.

Another agency surveyed noted that it conducts surveys of industry participants in sectors that might be susceptible to bid rigging in an effort to search out possible competition offences and to raise awareness that bid rigging is an important enforcement priority. As a result of such surveys, several industry participants reported they were giving renewed attention to the importance of compliance with competition legislation.

### **3.3.13 Evaluation of proactive methods**

From the discussion above and from survey responses, it appears as if proactive methods of cartel detection, although historically less successful than reactive methods in detecting precise instances of cartels, are an increasingly important tool in an agency’s battle against cartel conduct. Monitoring of media, trade press and internet in addition to contact with industry and trade representatives appear to be the most effective sources of information on cartel conduct, but more and more industry players are becoming aware of, and instituting, compliance

<sup>21</sup> This was in a particular situation where there was a very large number of companies concerned which could not be addressed individually under leniency.

programmes and the importance of education and outreach should therefore not be underestimated.

It is good practice for agencies to engage in education and outreach programmes to raise awareness about anti-cartel laws and the harmful effects of cartels, to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be source for the initiation of a formal investigation.

### 3.4 Summary

This section of the chapter has discussed a variety of reactive and proactive measures that agencies can use to assist them detect cartel conduct and initiate subsequent cartel investigations. Once a cartel has been detected, an agency will typically need to make decisions about the cases it will select to pursue, as well as the criteria that may be considered when prioritising one investigation over another. This information is detailed within the next section of this chapter.

## 4 PRE-INVESTIGATORY PHASE OF CARTEL ALLEGATIONS

### 4.1 Introduction

Information concerning cartel conduct can come to the attention of competition agencies from a variety of sources. The early stages of any investigation following receipt of information about an alleged cartel are particularly important and actions taken at the beginning of the process can influence the ultimate success and outcome of such investigations. Timely screening and early evaluation of allegations is necessary for an appropriate assignment and use of resources in any further steps. There might be different types of evaluation required in jurisdictions that have criminal enforcement vis-à-vis those jurisdictions that have administrative systems of enforcement. To a large extent, however, the types of inquiry taken during a pre-investigatory phase are the same whether cartel enforcement proceeds on either a criminal or an administrative civil basis.

Systems designed to deal expeditiously with complaints received and members of the public in general are critical. Development, articulation and application of clear standards for dealing with cartel allegations will increase public confidence that cartel conduct will be pursued and increase confidence regarding the manner in which that is done. Establishing methodologies for early verification and assessment will assist competition agencies to make determinations about the likelihood of developing the allegations into successful cases.

This section presents a menu of approaches and tools that competition agencies may use at the pre-investigatory phase. While no single approach addresses the needs of every situation, the goals of complaint screening and early evaluation are to assign scarce agency resources to enhance anti-cartel enforcement.

### 4.2 Categorisation of cartel allegations in a pre-investigatory phase

The pre-investigatory phase should enable a competition agency to classify allegations of cartel conduct expeditiously into one of the following three general categories:

- (i) Category I: fast-track matters that require no agency action and will be dealt with summarily.
- (ii) Category II: uncertain matters that require further evaluation to determine whether agency action is required, or contain allegations of anti-competitive behaviour other than cartel conduct that will be referred to other sections of the agency for evaluation and potential enforcement.
- (iii) Category III: plausible allegations of cartel conduct that require further information or verification before a full scale investigation is initiated.

With regard to each category of allegations, an agency should develop clear procedures that may be uniformly applied by those handling complaints intake, screening and pre-investigatory phases.

**It is good practice for agencies to establish methodologies for the early verification and assessment of cartel allegations during the pre-investigation phase.**

### 4.3 Receipt and screening of cartel allegations

Cartels are notoriously difficult to detect, because the existence of illegal cartel conduct is almost always hidden and cartel participants rely on secrecy to further and preserve the benefits of their anti-competitive agreements. To encourage disclosure of cartel conduct, agencies widely publicise methods for public complaints. When a cartel is brought to the attention of an agency, it is of vital importance to ensure that it is handled appropriately. The early interaction between a complainant and the competition agency may ultimately determine the future success of any investigation. One agency surveyed indicated that it is of great importance to gain the trust of complainants and that this may take more than one meeting.

#### 4.3.1 *Agency procedures for screening and tracking complaints*

Most competition agencies will have established procedures for initial screening and processing of complaints. The object is to determine the validity of complaints, disposing of those that do not disclose cartel conduct and referring those that require further evaluation and/or investigation to the relevant division.

Some agencies have screening committees that meet on a regular (weekly or bi-weekly) basis to screen complaints expeditiously and in a routine manner and to dispose of complaints that require no further action. Other agencies rely on individuals within the agency with experience in dealing with complaints, mostly well trained staff members in the complaints centre, to screen and assess complaints received and to dispose of those complaints for which no further action is warranted. Some agencies have developed standardised (pro-forma) response letters, which are to be personalised to the specifics of a complaint and, in some instances, sent out within a prescribed time after the complaint is received. These agencies use form letters in the interest of administrative efficiency and uniform treatment of the public. Others might take a less uniform approach, but most would advise a complainant as expeditiously as possible on the outcome of his/her complaint.

Electronic databases and searchable files are particularly valuable devices for agencies. Such tools, if conscientiously employed, allow agencies to consolidate multiple complainants or sources of evidence concerning a particular cartel. Robust tracking systems provide resources for agency staff to draw on institutional expertise or prior cases to assist in assessing and developing new complaints, particularly in large agencies with geographically dispersed staff (these are further discussed in section 5.3 below).

### 4.4 Source of information

As discussed in the previous section, reactive methods of cartel detection would normally include an agency receiving information on suspected cartel conduct from external stakeholders such as complainants, leniency applicants, whistleblowers, informants and bodies such as local and/or state government departments.

#### 4.4.1 *Complaint's receipt and review procedures*

It is important for agencies to standardise the procedures for the public to make complaints and useful to train relevant staff members on those procedures and their applications in practice. The public should receive consistent information regardless of whom they speak to within the agency. Procedures should be established for records to be made of all contacts with the public. Some agencies have developed and applied written standards for dealing with the public which require staff to:

- treat members of the public with courtesy and consideration
- attend promptly to peoples' questions and needs

- exercise the utmost integrity in providing services, and
- refrain from disclosing information acquired in carrying out their functions, except as permitted by law (this is further discussed in section 5.3.2 below).

In general, information about complaints procedures should be readily available in written form on websites and in agency publications. Complainants should be given clear information about what they may expect from the agency regarding their complaint. As complainants may be concerned about the level of confidentiality and disclosure protections accorded by the agency to their complaint, agencies may need to ensure that these protections are clearly articulated to each complainant. Complainants may continue to have questions about agency procedures after the first contact. If document disclosures are part of the complaint, these may present additional questions that need to be thought about in advance (see section 4.6.1.2).

Some agencies confirm receipt of a complaint in writing, while others make no such provision. In some agencies the complainant may expect to be apprised of the processing of the complaint and the progress of the investigation, while other agencies as a practice inform the complainant at the outset that no further disclosure on the course of the investigation may be expected. Some agencies view the complainant and third parties as potential stakeholders in the process. Other agencies take the view, based on policy and/or because of legal or other non-disclosure requirements, that complainants will be provided with no information concerning the progress or outcome of their allegations apart from what would be available in the public domain. Some agencies make it their practice to inform a complainant when an investigation is completed or closed, while others have explicitly chosen not to do so. Whatever approach an agency adopts should be clearly stated and widely publicised.

**It is good practice for agencies to establish clear and transparent procedures for dealing with complainants in the pre-investigatory phase and to provide ongoing training to their officers on such procedures.**

Many agencies refrain from offering views on the validity of a complaint. Some agencies may find it appropriate to inform complainants about the private rights of action, or other routes for self-help they may pursue, particularly in those systems where public enforcement confers no rights or status on the complainant and where separate private rights of action may expire or become judicially time-barred.

Complainants should be given a clear understanding of:

- the procedures that will be followed regarding their complaint
- the agency's expectations of them in terms of providing additional information, and
- the level of information that the agency will impart to them in the future about the status of their complaint.

#### **4.4.2 Methods for complaints and disclosures by the public**

Competition agencies normally receive cartel allegations from complainants in person, by telephone or through written (including electronic) correspondence. A number of agencies indicated in the survey that they would prefer for any initial contact with a complainant in person or by telephone to be followed up in writing. Agencies will wish to establish and use effective systems to deal with each method.

Agencies should be alert to the possibility of serial complainants, who have made the rounds to other agencies and whose allegations have no relationship to competition violations. Like other complainants, serial complainants should be dealt with professionally and assisted where possible.

#### **4.4.2.1 Complaints made in person**

Any individual who makes a complaint to an agency in person is likely to be highly motivated to do so, as it takes more time and effort to go to the agency's offices and make a complaint in person than to pick up the telephone or send an e-mail. However, such complainants may not necessarily have information that is inherently better or more useful than that provided by telephone or by e-mail.

Occasionally a drop-in complainant may have credible and/or substantiated information of great interest to the agency. Such an opportunity should be seized. Sufficient resources at the appropriate level within the organisation should be devoted to such a complainant, recognising that the first meeting may be the best opportunity to obtain all the information the complainant wishes to impart. Therefore agency staff should be alert to trying to answer as many questions from the list below as possible during this meeting with the complainant (see for example section 4.6.1.1 and appendix I). It is important in the first meeting to listen carefully, think about what is said and ask the relevant follow-up questions.

#### **4.4.2.2 Telephone complaints**

Responding to complaints made by telephone requires particular thought on the part of the agency. Even when complaints are directed to a specific intake point, telephone complaints may be received by almost anyone in the agency. It is therefore important that clear procedures are established and that all staff are aware of, and trained in, how to apply them.

Telephone complainants may pick up the telephone based on impulse or emotion. Once in contact with the agency, they may become reticent or have difficulty articulating the information they possess.

Nonetheless, such complainants may possess solid, verifiable information that is extremely valuable and which may form the basis for very fruitful investigations.

Telephone receptionists and others whose telephone numbers are readily accessible by the public should have clear directions about handling telephone complaints. Even if calls will immediately be forwarded for initial screening, basic information such as the name of the caller and a call-back number in case of a disconnection should be obtained and recorded. Because receptionists are likely to be interrupted by other calls, complaints screeners to whom the call may be forwarded are a good use of resources.

Some larger agencies also have established phone banks for complaints, including anonymous complaints, to be taken 24 hours a day. These may be monitored by personnel especially contracted for that purpose. Agencies without the size or resources to justify such phone banks may wish to have well-publicized numbers that allow for after-hours callers to leave a message and which include an out-going message for members of the public, encouraging the caller to leave information on the system.

Some agencies have determined that they will not accept anonymous complaints. Such a policy does not mean, however, that an anonymous caller should be dealt with summarily or discouraged from making a full airing of their allegations. In some instances, with proper encouragement over time, such callers will disclose not only their identities, but also provide valuable investigative leads. Sometimes this requires the agency to field multiple calls from the same anonymous caller over a period of months. Accordingly, it is important to elicit as much



information from the anonymous caller as possible during their first call. Detailed information about agency procedures should be supplied. To develop a rapport, the anonymous caller should be supplied with direct telephone numbers to a complaint screener for future calls.

If the information provided by anonymous callers can be corroborated, it may provide sufficient basis for an agency to launch an investigation without knowing the identity of the complainant. Indeed, if sufficient resources are available to the agency, such anonymous calls may be grounds for initiating some market inquiries or the application of a proactive measure such as affirmative amnesty (see section 3.2.3 above). Alternatively, corroboration may provide for continued dialogue with the caller, which over time may create sufficient confidence in the agency's processes and confidentiality protections to enable them to reveal their identity.

#### **4.4.2.3 Written complaints**

From the standpoint of receipt and review procedures, written complaints, received either by letter or electronically, are generally easier to process because they typically provide specific information relating to conduct and/or companies. Some agencies have a policy of not processing complaints other than those made in writing. When such procedures are adopted, those receiving verbal complaints must ensure that it is clear to the complainant what action is required for a complaint file to be opened and for a complaint to be further investigated. Under such circumstances, telephone complainants should be given instructions about what information is required and methods for submitting written complaints.

E-mail provides complainants with a readily accessible way of putting their complaints in writing. Some agency websites provide for online complaint registration processes and these should contain clear and easy-to-use procedures to make electronic complaints.

**It is good practice for agencies to provide information to complainants outlining how their complaint will be evaluated and the agency's expectations of them.**

#### **4.4.3 Special considerations for whistleblowers and informants**

Whistleblowers and informants generally possess valuable information that they are willing to share with the agency. They are often industry insiders who have decided to come forward with cartel disclosures despite risks to their continued employment or reputations should they be identified. Because of the nature of their disclosures, they often view themselves as stakeholders in the process and may want special consideration by agencies. Agency policies for dealing with whistleblowers and informants require careful thought and whistleblowers and informants should be clearly informed about those policies at all stages of the process.

Some jurisdictions have whistleblower protection statutes, while others do not. Agencies should be prepared to inform whistleblowers of the level of their own and ancillary whistleblower protection legislation. It is important to ensure that expectations are properly managed about the level of information and involvement that the whistleblower may expect in the agency investigation. If there are alternative routes that whistleblowers may pursue, it is useful for the agency to inform the whistleblower about those options at the outset so that they are not later foreclosed because of time bars from self-help or private rights of action, although some agencies are careful not to provide complainants with legal advice.



#### 4.4.4 *Leniency applicants*

When an approach to an agency is made by an individual or a representative of a company that is seeking leniency, additional considerations will apply to the intake of information. Leniency programmes and suggested procedures are dealt with in chapter 2 of the ICN Anti-Cartel Enforcement Manual and will not be reiterated here. Where leniency is an option, agencies will have well-publicised requirements and procedures for leniency applicants. Before making any disclosures, the individual or a representative approaching an agency would want to know whether leniency is available and the agency would want to encourage the applicant to provide as much information as possible to be able to assess the merits of the application adequately and answer the question of whether leniency is available.

Some agencies have adopted procedures that permit disclosure of information on an alleged cartel to be made in the first instance by means of a hypothetical submission, often presented by legal counsel, which provides for some measure of protection and anonymity for the applicant, but allows the agency to assess the information provided and determine whether leniency would be available. Likewise, some agencies have now adopted procedures that allow verbal (oral) statements of cartel conduct in which the applicant has participated (“proffers”) to be made by leniency applicants to protect against undue disclosure in actions for damages elsewhere.

In jurisdictions where there is the potential for more than one grant of leniency, it is important for agencies to adopt clear methods for establishing the ranking of leniency applicants and inform potential leniency applicants of their options. The ease of making leniency disclosures and the confidence created by agency procedures for dealing with leniency applications may set the stage for the success of the relationship. Where procedures are clear and transparent and agencies create confidence among leniency applicants, those factors can lead to the ongoing success of the leniency programme.

#### 4.5 **Disposing of matters that require no further action**

To the extent possible, agencies will find it useful to establish tight time frames for the initial screening and review of complaints, particularly those that fall into categories I and II (see section 4.2). Each agency is best placed to establish its own time frames, but as a general rule of thumb, category I and II decisions may be made within a period of a few days to a few weeks. If it is decided (for whatever reason) that the complaint does not justify further action at that time, the report and decision should be formalised and archived in a manner that will facilitate easy retention and access in the future. Category III complaints, which require more verification, may take longer, although some agencies have tight decision time frames.

Electronic databases and information retrieval systems can assist in developing so-called institutional memory concerning industries. Individuals within the organisation who have previously dealt with allegations or cases in an industry can be readily identified and may provide valuable early assistance in evaluating allegations. In some instances, multiple complaints concerning an industry, made separately and over a period of time, which are not individually sufficient to justify further inquiry may, when evaluated together, provide a basis for further investigation.

#### 4.6 **Evaluating cartel allegations**

When the screening process establishes that the complaint contains allegations of cartel conduct sufficient to warrant further action (i.e. allegations of category III), it would then be necessary to evaluate the complaint with reference to factors such as:

- credibility / accuracy of complaint / complainant
- possibility and / or availability of further persons with knowledge

- identity of possible / potential witnesses
- possible extent / seriousness of the illegal activity
- previous or similar complaints regarding the sector
- structure of the sector or market, and the position of the alleged cartel within that market, and
- any international dimension to the complaint or those complained of.<sup>22</sup>

The results of those inquiries will form the basis for determining whether a matter should progress to the next investigative level and whether a full scale investigation into the allegations is undertaken. Such a determination will necessarily be evaluated in-house, and some agencies have established decision-making processes and/or protocols, written formats and/or use formal decision trees to carry out this evaluation (this is discussed in section 5 below).

Even in jurisdictions without formal published criteria for case selection and prioritisation, agency resources are limited and must be assigned for the maximum public benefit. Agencies will wish to ensure that their practices for assigning investigatory resources to allegations are consistent and in keeping with international best practices.

It is important that agencies which pursue cartel allegations as either criminal or civil cases determine the theory of harm and their investigative route as early as possible. This early determination may however carry additional obligations and prohibitions and clear decision-making criteria and procedures should be established within the agency to assist such determinations.

#### **4.6.1 *Obtaining and verifying information of cartel violations***

During the pre-investigatory phase, the agency will be obtaining information about the cartel allegations and assessing the quality of the allegations and the credibility of the complainant (or whistleblower / informant, whichever the case may be). It is desirable at this stage for the agency to obtain as much detail as possible about the operation of the cartel and the industry from the complainant. The timing of the interview(s) and the extent to which the agency will be able to control the flow of information depends largely on the complainant and the quality of information he/she possesses.

The amount of information available will vary widely depending on the source of the complaint. Unlike leniency applicants and informants to a certain extent, public complainants and whistleblowers peripheral to the industry may possess less knowledge and their allegations may require more verification, which may create challenges for the inquiry. At the early stages of verifying a complaint, when the cartel may still be in operation and the participants unaware that disclosures have been made to the enforcers, secrecy about the inquiry is extremely critical. The element of surprise must be preserved until the appropriate moment. Accordingly, it may be appropriate to provide advice and guidance to the person providing the information or making the allegation about the need for discretion, particularly in circumstances where the person is asked by the agency to return with more information to substantiate their initial claim. Such efforts may prove crucial in avoiding the potential for the destruction of evidence.

The following considerations are designed to inform the pre-investigatory phase into allegations of cartel conduct. They are not meant to form an exhaustive list and it is neither necessary nor desirable that all are answered before determining whether to institute a full scale cartel investigation. They are offered only as suggestions. Obtaining answers to these considerations will require strategic thought and will involve taking the specific practices of the individual

<sup>22</sup> Appendix 1 can assist with such an evaluation.

enforcement agency into account.

#### **4.6.1.1 Information from the source of the allegations**

Agencies should verify information about the complainant, his/her credibility, the cartel and the industry, as well as market sector considerations. Suggestions for undertaking this verification process are contained in appendix I. One agency pointed out in the survey for instance, that a complainant reporting anti-competitive behaviour of their direct competitor (i.e. with clear self-interest) may need to produce more compelling information than an immunity applicant reporting its own involvement in a cartel.

#### **4.6.1.2 Paper or electronic evidence?**

Complainants, whistleblowers and informants may possess evidence (paper or electronic) that corroborates their allegations. At times they rightfully possess evidence; in other instances, evidence has been obtained in a way that could potentially subject the complainant, whistleblower or informant to legal consequences. Some jurisdictions have laws governing the disclosure of confidential information by informants and whistleblowers; in others, the protocols and legal requirements are still untested.

Before agencies accept evidence from complainants, informants or whistleblowers they should, at the minimum, determine the source of the documents and circumstances under which they were obtained. The answer to these questions will help agencies decide what steps may be taken regarding the documents. In instances where the complainant, informant or whistleblower is still employed at the firm against which allegations are made, agencies should ensure that they are not creating a relationship with the complainant, informant or whistleblower that might later implicate the competition agency in wrongfully obtaining information. For example, an agency should have clear procedures in place so that it does not inadvertently turn a whistleblower into an agent of the agency and/or government.

In the same way as an agency would create clear protocols and legal checks before using an informant or whistleblower to voluntarily obtain information about an ongoing cartel through the use of surveillance and consensual monitoring techniques, it should give careful thought to the treatment of evidence obtained from complainants, informants or whistleblowers. An agency should ensure that later investigatory and enforcement steps are not compromised and evidence potentially excluded because of a failure to adhere to required legal procedures.

#### **4.6.1.3 Verifying allegations and obtaining evidence**

Verification of the allegations, even if such verification is extremely limited, is necessary to determine whether to initiate a full scale investigation and the manner in which such an investigation will be launched. Verifying allegations from sources of information without risking disclosure and prematurely giving the industry notice about an investigation may be extremely delicate. Even seemingly non-public sources of information, such as the internet, may actually tip off the cartel participants to an investigation. Therefore the use of third-party sources, even public agencies, merits some risk/benefit assessment before being used at the pre-investigatory phase and should be determined on a case-by-case basis.

#### **4.6.1.4 Public sources**

##### **4.6.1.4.1 Media reports**

Media reports may provide a useful source for verifying complaints; conversely, they may be the source of information in the first instance about the existence of a cartel. Investigations that have resulted in multi-million dollar/euro fines and jail terms have sometimes come to light through monitoring the public media. Although such instances are understandably rare, the public media are a very useful source of information about industries and from which the details associated

with the existence of a cartel may be verified.

#### 4.6.1.4.2 *Internet research*

Internet research can provide an inexpensive, quick and diverse source of information about industries, individuals and sectors of the economy (see section 3.3.6). The use of search engines, industry-specific websites, press releases and product/service information are very useful in assessing the bona fides of complaints. However, because they are public and can be readily monitored and mined by those who operate websites, information technology tools that block the taking of “cookies” and other tools that will not disclose the agency’s search should be used. Some agencies install secure computer facilities that can be used for internet searches while others will use aliases or other tools to avoid detection.

#### 4.6.1.5 *Professional and trade associations*

Information published by professional and trade associations, along with industry journals and trade publications supporting industry activities, can be extremely valuable sources of information about how industries operate. Such associations, which are normally composed of members of a specific profession / industry, often have large risks associated with them, as members might end up discussing issues other than the stated issues for which the association was established. These associations might end up actively involved in cartel conduct, be complicit in the cartel conduct or merely aware of such conduct. Obtaining information from professional and trade associations almost always risks detection with the consequence that the offenders will be tipped off. Publications may also provide essential information about product prices and price trends. In addition, if a complainant (or informant / whistleblower or leniency applicant) is / was actively involved in such an association, he/she may well be a source of information on the operation of the association and how it was used to advance the cartel.

Publications may provide information about industry participants and/or even give some insight on how a particular cartel might operate.

#### 4.6.1.6 *Other third party sources*

Among the possible third party sources of information, particularly useful when assessing bid rigging allegations, are funding sources, estimators, public officials and procurers. Each of them has the potential of both having knowledge of the cartel and complicity in it. Accordingly, the extent to which an agency will use such sources before the investigation becomes public will depend on a case-by-case assessment.

Customers may also have relevant information (e.g. they may have noticed simultaneous price increases or suspicious comments made by suppliers).

**It is good practice for agencies to verify and corroborate allegations before proceeding to the investigatory phase.**

#### 4.6.2 *Involvement of other government agencies: parallel investigations and information-sharing*

During the pre-investigatory phase it may become apparent that the allegations:

- are allegations of breaches of competition law best suited to investigation by another agency within or outside the jurisdiction
- involve wrong-doing outside of the competition law that should be investigated by another enforcement agency, and/or

- include both cartel violations and other criminal violations that are ancillary to the cartel, such as fraud, tax-evasion, perjury or obstruction of justice.

Agencies should have clear referral mechanisms in place for matters that are best placed outside of the agency. Similarly, competition agencies may turn to other law enforcement or administrative agencies for information that would further and/or assist evaluation of the allegations or the inquiry. Clear channels and mechanisms for disclosure of such information should be established and staff should be trained in these. The use of sources should be carefully documented, with keen appreciation for the privacy and other rights of individual citizens associated with information in the possession of other agencies and/or legal prohibitions on sharing of information. Where information has been improperly obtained, it may risk tainting all subsequent investigatory leads flowing from it.

Where assistance is required from other investigatory or administrative agencies, approvals at the proper levels within both the requesting and assisting agencies should be clearly established. Statutory requirements and procedures for meeting them should be clearly identified to withstand legal challenges.

Certain types of investigations may be sufficiently sensitive to require higher levels of approval before taking even preliminary investigative measures. For example, in some jurisdictions, investigations that require the summoning of members of the media or investigations that involve lawyers turning over material about their clients are considered sufficiently sensitive to require additional approvals. Where investigations involve individuals and/or information outside of the jurisdiction, other considerations will necessarily come into play.

Where violations in addition to cartel violations are discovered in the course of a pre-investigative phase, a determination should be made on how best to proceed. Some agencies have the authority to investigate crimes ancillary to cartel offences, such as fraud, false statements, tax and revenue offences, perjury and obstruction of justice, while other agencies must refer evidence of such offences to other branches of law enforcement.

Some jurisdictions provide for the possibility of joint and/or parallel investigations of the additional criminal allegations, while in other jurisdictions the competition agency must wholly divest itself of such matters and rely on other branches of law enforcement to pursue those leads. In the latter case, it is particularly important for the competition agency to develop open lines of communication so that neither agency jeopardises the investigations of the other (this is further discussed in section 5.2.4 below).

Both formal and informal means for inter-agency assistance and information-sharing should be clearly established within and among agencies. The appropriate levels of approvals and documentation should be set out in advance to enhance the levels of assistance and to avoid unnecessary duplication of effort and the wasting of public resources.

At an international level, a wide variety of information-sharing protocols and procedures are normally in place to facilitate information-sharing. Many countries, regions and agencies have in place formal and/or informal mechanisms for sharing information, including notices, regulations and bilateral or multilateral agreements or arrangements. Case officers and complaint screeners should be knowledgeable about these regimes.

**It is good practice for agencies to establish clear referral mechanism and clear procedures for inter-agency assistance and information sharing during the pre-investigatory phase.**

## 4.7 Summary

This section of the chapter has addressed some of the approaches and tools that competition agencies may use during the pre-investigatory phase of a cartel investigation. The key message from this section is that early interaction between the source of information on a particular cartel (whether a complainant, informant / whistleblower or leniency applicant) and the competition agency is a particularly delicate and important phase because it may determine the ultimate success of an investigation. In addition, timely screening and early evaluation of allegations is necessary to appropriately assign resources to take further steps. Therefore, establishing methodologies for early verification and assessment of cartel allegations are crucial for competition agencies.

This section has presented various tools and approaches that competition agencies may use at preliminary stages: systems designed to handle complaints received under various forms (in person, by phone or in written form), procedures for review and screening of complaints, tracking methods, procedures to deal with the public, checklists for early verification of cartel allegations, and, finally, mechanisms for inter-agency assistance and information-sharing.

The section has also pointed out the importance for competition agencies to provide ongoing training to their investigators about methodologies and techniques for early assessment of cartel allegations, including procedures for dealing with complainants and the public in general.

## 5 DECISION TO INITIATE A FULL SCALE INVESTIGATION

### 5.1 Introduction

Once cartel conduct has been detected, it is essential for competition agencies to make informed decisions regarding which cases should be progressed to full scale investigations. In most jurisdictions, this decision is made on a case-by-case basis and according to the agency's enforcement priorities (where such priorities exist), overall activities and resources and internal decision-making processes.

In some jurisdictions, the law may require a full scale investigation to be commenced once a certain threshold is met.

A variety of external factors can influence the decisions that are made about cartel investigations including:

- relevant legislation
- the current regulatory, judicial and economic environments
- international developments
- government priorities, and
- activities undertaken by other domestic and international agencies.

All of these factors create the need for a consistent and coherent process through which the selection and prioritisation of cartel cases are managed.

The aim of this section of the chapter is to raise awareness of some of the criteria agencies use to select and prioritise cases. This section also identifies some of the tools used by agencies to assess the merits of new cases and support investigations.

This first part of the section introduces the context within which agencies investigate and adjudicate cartels. The second part briefly explores how decisions to initiate full scale investigations are made, including processes and tools used to assess new cartel cases. It then sets out criteria agencies may wish to incorporate into their own framework to assist with case selection and prioritisation. The criteria are set out in four subsections. The first deals with initial information about the case and covers matters such as the strength and availability of evidence and legal considerations. The second sub-section deals with cooperation with third parties, including domestic agencies and international counterparts. The third subsection addresses the nature and impact of the cartel conduct including its seriousness and economic impact, the extent of consumer detriment and public interest considerations. The final sub-section details some of the broad resource and strategic considerations which may influence the decision to initiate a full scale investigation, including available resources, the strategic importance of the investigation to the agency and the likelihood of success.

In the third part, tools used to support the planning and tracking of investigations and the management and protection of documents are discussed.

The section concludes with a summary of good practices.

#### 5.1.1 Terminology

Case selection is an enforcement threshold tool established according to a set of criteria. If a potential investigation is found to meet certain criteria or have certain attributes and therefore



reaches the threshold point, a decision will be made to proceed to prioritisation.

Prioritisation occurs once a decision to conduct some level of investigation has been made and consists of weighing a variety of factors to advance some investigations while at the same time devoting fewer resources to other investigations or perhaps even abandoning them altogether.

Case selection and prioritisation rarely occur in two clear steps, but are part of an overall, often continuing, assessment affected by a range of factors. Because of this, the terms “case selection” and “prioritisation” may be used somewhat interchangeably. This section of the chapter uses both terms as complements. In some instances, it may be difficult to make an informed decision on case selection and prioritisation at the beginning of an investigation, particularly as the full extent of the alleged conduct may not become evident until after the investigation has started. Further, prioritisation following the commencement of an investigation may result where certain parameters are set to maximise the likelihood of successful adjudication and/or to use available resources to their greatest extent.

### 5.1.2 Context

Competition agencies will often become aware of more cases of cartel behaviour than available resources will enable them to investigate. It is therefore useful to have procedures and criteria in place to evaluate matters brought to the attention of the agency in order to determine in an objective, consistent and timely manner which investigations to pursue. Adopting such procedures and applying such criteria in relation to each case received by the agency is considered not only resource-efficient, but also promotes procedural fairness.

There are numerous approaches to case selection and prioritisation, which depend in part on the legal, economic, and/or regulatory framework in which a competition agency is working. There are large disparities between the enforcement resources and priorities in different jurisdictions, and some cartel investigations may be delayed due to resource constraints and/or other limitations on agencies. There are also significant differences in the way agencies assess and make decisions about cartel cases.

**It is good practice for agencies to have a policy for, or approach to, undertaking case selection and prioritization with easily measurable objective criteria that reflect the particular legal, economic and regulatory environment within which the agency investigates cartel conduct and enforces its competition law.**

## 5.2 Case selection and prioritisation

It can be useful for a competition agency to have specific selection and prioritisation criteria in place to assess which matters are most important to the agency. Cases may then be measured against such criteria to determine which will warrant full scale investigation. Publishing such criteria may further demonstrate transparency, objectivity and accountability. Some agencies have specific criteria that must be met before a full scale investigation can be initiated, while others have more informal criteria used to guide how they will prioritise the use of their resources. Agencies that do not have formally published criteria for case selection and prioritisation will generally have informal means for prioritising investigatory activities and assigning cases.



### 5.2.1 *Deciding to initiate a full scale investigation*

Each jurisdiction chooses cases differently and has varying priorities, investigation strategies and resources. In such an environment, the issue for a competition agency is which cartel investigation it prioritises over others. Making these decisions in an informed manner, through which particular criteria are measured and analysed, goes some way to ensuring that limited resources are used in the best possible way to enforce the law. Ideally, informed decision-making about case selection and prioritisation will also result in a greater likelihood of successful outcomes, leading to greater awareness and deterrence.

**It is good practice to have in place a method to assess and weigh the relative merits of cartel matters to facilitate decision-making regarding the selection and prioritization of cases.**

**It is good practice for investigators to have a good understanding of the methodology and its objectives and to be well trained in its use.**

Once cartel conduct has been detected (and any screening and/or pre-investigatory procedures, such as verification, carried out), the matter will be assigned to either a case officer or an investigation team to assess the merits of the case and prepare a recommendation to the relevant decision-maker on the appropriate course of action. Where a case officer is assigned, an investigation team will not usually be required until a decision to initiate a full scale investigation is made.

The size and experience of the investigation team will depend on the case. (For example, in some jurisdictions, cases are assigned to investigators with experience in, and/or knowledge of, the industry affected by the cartel). It is not uncommon for an investigation team to include a case manager (which is usually a senior or experienced investigator) and at least one or two case handlers (responsible for the day-to-day running of the investigation). Investigation teams often include personnel with legal and/or economic skills. In some jurisdictions a support officer and/or paralegal is assigned to assist the team with document management and administrative tasks.

In some agencies, a full scale investigation may only be initiated by the decision of a designated senior official (such as the head of division or commissioner), or a formally established decision-making body (such as a board or committee). Many agencies hold meetings at regular intervals (e.g. weekly, fortnightly or monthly) to discuss new cases and make decisions on how these should be dealt with, including which cases should be prioritised for full scale investigation.

In some jurisdictions, an investigation may only be initiated if the relevant statutory thresholds are met. For example, if there are reasonable grounds to believe that a contravention of the law has occurred and/or there is a reasonable possibility that a case can be developed.

In jurisdictions where cartel conduct is criminalised, there may be a separate decision-making process within the agency for determining which matters should proceed to prosecution. In one jurisdiction, where cartel conduct is subject only to criminal enforcement, once sufficient evidence has been gathered to warrant indictment (during what is known as the “grand jury investigation”), staff must prepare a case recommendation package and submit this to the decision-maker. Before a final decision is made, counsel for the defendant may, but need not, request a meeting to try to convince the decision-maker to view the evidence in a light favourable to the defendant. At the conclusion of the review process, the decision-maker determines whether to bring the

action or to decline to prosecute in accordance with the applicable principles of prosecution.

Depending on the internal processes of an agency, the case officer or investigation team may evaluate new cartel matters against the criteria and/or priorities set by the agency (discussed in sections 5.2.3 to 5.2.6 below).

### 5.2.2 *Assessing new cases*

The use of established and well-developed selection and prioritisation criteria should greatly enhance an individual agency's efforts to bring about a consistent, focused and strategic approach to cartel investigations.

There is no all-encompassing template for determining what a significant matter is, but rather a range of criteria that can be used to guide decision-makers. Case selection is by necessity a case-by-case issue whereby the decision-makers' discretion is guided by experience and informed by the evidence before them, therefore making the process a combination of objective and subjective factors.

Where subjective factors form part of the decision-making process, it is important to ensure that decisions are consistent. Such decisions may need to be properly documented to address any questions regarding transparency and objectivity of the case selection and prioritisation process. This may be particularly important in jurisdictions where there is a discretion to pursue either criminal or civil proceedings. Agencies may wish to review their selection and prioritisation decisions at predetermined time intervals to ensure that the results are still valid and determine if the approach taken regarding a particular cartel matter needs to be revisited.

In certain jurisdictions the decision to close a case without proceeding to adjudication may be open to challenge—or at least consideration—by administrative authorities. In some cases, the agency is deemed to have begun the investigation by virtue of gathering initial information. Even in these situations, the criteria presented in this section may still be relevant and may even assist in potential challenges to decisions by demonstrating that those decisions were made within a defensible and sound framework. If it is decided that the complaint does not warrant further action (for whatever reason), the report and decision should be formalised and archived in a manner that will facilitate easy retention and access in the future.

**It is good practice for agencies to have a consistent approach to the assessment of cartel matters.**

**It is good practice for agencies to review their selection and prioritization decisions at pre-determined time intervals to ensure that the results are still valid and determine if the approach taken regarding a particular cartel matter needs to be revisited.**

Agencies may use a variety of tools to assess whether a new case should be selected and prioritised for full scale investigation such as a business case, a resource plan (including a budget) and a prioritisation matrix. These documents and tools are necessary to assist the decision-maker in forming a view about the merits of the case, including why the matter warrants full scale investigation and how the investigation's objectives will be achieved taking into account the agency's resources and overall activities. In some jurisdictions, an investigative plan may also be required at this stage, although it is more common for one to be prepared once a decision to

initiate a full scale investigation has been made (see section 5.3.1). Initial evaluation

#### **5.2.2.1 Initial evaluation**

An initial evaluation, which some may refer to as a “business case”, may be used to determine whether there is sufficient merit in a new case to warrant committing the resources necessary for a full scale investigation. This is usually prepared by the case officer / case manager, in the form of a report or memorandum, and may include all or some set of the following considerations:

- a description of the parties and the factual background to the case
- a description of the alleged contravention including the markets (both product and geographic) involved, volume of commerce affected, duration of the conduct, how the relevant conduct triggers jurisdictional thresholds and applicable sections of the law
- a theory of the case
- identification of what the investigation is intended to achieve and how this will be done
- an assessment of the relevant criteria (outlined in sections 5.2.3 to 5.2.6 below)
- consideration of any leniency applications which have been received
- a strategy to gather the required information / evidence to prove a contravention including an assessment of how easy or difficult it will be to gather the evidence needed
- an estimate of the likely resources (including costs) and time-frames needed to complete the investigation
- identification of any persons harmed by the contravention and steps the agency may take to protect their interests, and
- an assessment of:
  - the benefits and risks of undertaking a full scale investigation (including the likelihood of success)
  - any potential negative impacts which might arise from not undertaking a full scale investigation, and
  - any alternative options or steps the agency might take instead of undertaking an investigation.

#### **5.2.2.2 Resource plan**

Resourcing is a key issue for most agencies when deciding whether to initiate a full scale investigation (see section 5.2.6.1). Resources may need to be allocated either immediately or in the near future for:

- internal staffing (e.g. investigators)
- travel (e.g. to conduct witness interviews and searches)
- consultants (such as legal and economic advisers), and
- specialist services (such as forensics experts and recording interviews).

A resource plan would normally focus on issues such as human resources, time and capital requirements and may include a preliminary budget for the investigation. It can be difficult to predict the resources necessary for a cartel investigation at the beginning of the matter as a certain level of information may be needed before resourcing can be accurately determined. Resource plans should be regularly reviewed and updated according to the requirements of the investigation.

### 5.2.2.3 *Prioritisation tools*

Agencies use a variety of methods to help assess new cases and the priority which should be given to them.

One agency advised that cartel cases are prioritised using “prioritisation principles”. These principles cover four key factors (impact on consumers, strategic significance, risks and resources) which are weighed together based on the facts of the case to determine which new projects and work programmes to take on. The weighing process is flexible, with a balancing exercise required for each case and the established principles applied on a case-by-case basis.

Another agency reported that it uses a system of objectives-based triage to evaluate the relative merits of potential cases and to stream matters towards an appropriate resolution. This system assesses cases according to factors such as the competitive effects of the conduct, consumer detriment, meeting the obligations and expectations of national and international partners, agency resources and overall agency priorities.

Other prioritisation tools work by assigning each investigation or project a ranking, for example between 1 and 10, against each criterion in a set of fixed criteria. Criteria may be weighted according to whether they contribute to a “complexity” score (e.g. if there are multiple jurisdictions or possible contraventions involved) or an “importance” score (e.g. consumer detriment involved and economic impact).

**It is good practice for agencies to clearly identify criteria and establish procedures for deciding whether a matter being examined should proceed to the investigatory phase.**

## 5.2.3 *Initial information about the case*

### 5.2.3.1 *Availability and strength of evidence*

The strength of the available evidence will be a significant factor in an agency's decision-making process. While there may be a very strong suspicion that cartel conduct is occurring in a particular market, it may not be worth committing resources to a matter for which there is a low likelihood of uncovering evidence and therefore is not likely to be a successful case in subsequent litigation.

Furthermore, many agencies can only exercise some of their formal investigative powers (such as a search, raid or inspection) if they are able to satisfy the agency's decision-maker and/or a court that there is sufficient evidence available to issue the requisite notice and/or obtain a search warrant or court order. The standard of proof varies across jurisdictions. For example, to obtain a search warrant:

- in one jurisdiction, a judge must be satisfied that there are reasonable grounds to believe that an offence has been or is about to be committed and there are, on the specific premises to be searched, records that will afford evidence of the offence, and
- in another, a judge or registrar must be satisfied that there are reasonable grounds to believe it is necessary for the purpose of ascertaining whether a person is engaging in conduct that may be a contravention of the Act (including by showing that there are no other reasonable means for obtaining the information).

Different agencies use different methods for determining the availability and evaluating the strength of evidence. In some instances, an evidence matrix is created to set out the evidence trail, including by identifying whether the evidence gathered satisfies each element of the

contravention. The purpose of using an evidence matrix to plan an investigation in its formative stages is to determine whether the evidence obtained is likely to sustain adjudicative proceedings. In other situations, more weight will be given to a matter if there is direct evidence (e.g. documents or witnesses) and less weight given to matters with circumstantial evidence.

Decisions regarding the strength and availability of both direct and circumstantial evidence necessarily involve a process of ongoing and regular assessment. Therefore, any investigative plan and/or evidence matrix can be viewed as a “living” document that needs to be updated regularly and enable decision-makers to assess the appropriate priority level of any particular matter as the investigation progresses.

#### **5.2.3.2 Legal considerations**

Competition agencies should be mindful of any legal requirements or considerations that may impact on their ability to decide on case selection and prioritisation. Examples of such requirements may be the impending passage of a limitation period, whether a company exists anymore (or has perhaps been liquidated) and/or whether there are any targets within a given jurisdiction to adjudicate against should an investigation proceed.

#### **5.2.3.3 Recidivism**

If an alleged cartel participant is a recidivist (i.e. either an individual or a company is known to the agency because of its history of previous contraventions), it is more likely the agency would want to pursue that particular cartel and/or individual or company. An agency will tend to consider whether:

- the parties are likely to be party to other similar arrangements
- the issue considered affects the whole industry and not just the parties being investigated
- it is a wider issue affecting other industries, and
- other recent cases have covered the same industry or issues.

### **5.2.4 Potential for cooperation**

#### **5.2.4.1 Cooperation with other domestic law enforcement authorities**

Competition agencies may turn to other law enforcement or administrative agencies for information or services that could further inform the decision to select and prioritise particular cases.

Cooperation and coordination may arise between competition and other law enforcement agencies in the context of a criminal investigation. For example, a competition agency may be able to seek investigatory and/or enforcement assistance from others, including the police, to assist in conducting a search or raid. Another example is cooperation and coordination which may arise where competition agencies and public prosecutors work together to prosecute cartels. In some jurisdictions, a memorandum of understanding has been signed, specifying the respective roles and responsibilities of each agency in the investigation and prosecution of cartel conduct. In one jurisdiction, a programme has been instituted which allows the agency to request investigative assistance from State Prosecutors. This sharing of personnel has several advantages. First, State Prosecutors often bring special knowledge of local markets that may prove helpful in the investigation. Second, State Prosecutors have an opportunity to gain experience in criminal cartel enforcement which may result in increased detection and increased State prosecution of cartel cases.

Where assistance is sought, or provided, by other investigatory or administrative agencies, approval protocols at the proper levels between both the requesting and assisting agencies should

be clearly established and followed.

The decision to proceed with an investigation and subsequent adjudication of a cartel matter may also result in an expectation from other domestic or international authorities that cooperation and coordination will be forthcoming and/or an obligation of such cooperation. Agencies making such requests should consider the resourcing implications for the complying agency.

#### 5.2.4.2 *International cooperation*

As discussed above (in section 3.3.2.2), cooperation with other competition agencies may assist agencies to detect cartels and generate cases. Such cooperation is also increasingly important to the manner in which competition agencies conduct their investigations.<sup>23</sup>

A number of agencies prioritise the investigation of cartel cases which have an international dimension and/or which involve meeting an obligation or expectation of another agency. In some jurisdictions, the principles of comity may apply and may affect the priority given to particular cases.<sup>24</sup>

Other circumstances when international cases may be prioritised include where enforcement actions in another jurisdiction affect the timing of an agency's investigation (such as when searches are conducted), and where such actions create incentives for immunity applicants from other jurisdictions to request immunity with an agency. Another potentially relevant factor is where the remedies to be pursued in other jurisdictions might provide the desired deterrent effect within a particular agency's jurisdiction. This may be the case, for example, where the harm arising from the cartel in the agency's jurisdiction is limited.

In these circumstances, an agency may decide to focus its resources on cases where it is best placed to secure deterrence.

Equally, agencies may decide to prioritise international cases where this would ensure the overall effectiveness of the investigation for most, if not all jurisdictions concerned.

Most agencies do not have formal procedures for referring cases to, or for running parallel investigations with, other competition agencies. Cooperation agreements and arrangements (both competition and non-competition specific) between jurisdictions or agencies may set out procedures to be followed. Where cooperation agreements are not in place, or used, agencies may refer to the OECD's recommendations on co-operation and information exchange as a basis for working together.<sup>25</sup>

In the European Union, Regulation 1/2003 and the Rules of Cooperation of the European Competition Network (ECN) apply. Regulation 1/2003 allows member states' national competition authorities and the European Commission (EC) to, among other things, exchange information within the ECN, and allows national authorities to request investigative measures. There are also provisions relating to parallel investigations including, to allow a national authority to stay or close its proceedings if another national authority is investigating the same contravention and, to enable the EC and a national authority to undertake parallel investigations where the former is pursuing a civil investigation against a corporation and the latter is pursuing a criminal investigation against an individual.

When sharing information in international investigations, it is important that agencies adhere to confidentiality requirements. This may include obtaining a waiver from a leniency applicant, informant or whistleblower, or following the terms of a cooperation agreement.

<sup>23</sup> See section 3.4.1.3 of chapter 5 of the ICN Anti Cartel Enforcement Manual on "Investigative Strategy" ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

<sup>24</sup> See the 1999 OECD Report on Positive Comity ([www.oecd.org](http://www.oecd.org)).

<sup>25</sup> See 1995 OECD Recommendation on Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade, 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels and 2005 OECD Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations ([www.oecd.org](http://www.oecd.org)). The 2007 ICN Report on Co-operation Between Competition Agencies in Cartel Investigations ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)) contains more information.



It may be necessary to consult the agency's lawyers before sharing information to ensure that all legal and other relevant requirements are adhered to. In some circumstances agencies may impose conditions on the use of any information shared with another agency.

### **5.2.4.3 Cooperation from leniency applicants, informants or whistleblowers**

The presence of a leniency applicant, informant and/or whistleblower may affect an agency's decisions regarding case selection and prioritisation. Typically, an investigation with a leniency applicant, informant and/or whistleblower features substantial levels of evidentiary material and cooperation. Therefore, jurisdictions with leniency programmes may place a high priority on investigations initiated through these methods. The majority of agencies surveyed stated that cases involving one or more leniency applicant(s) are likely to be prioritised above others, due to the strength and breadth of evidence which is often obtained through leniency applicants and the potential for such cases to be expedited and/or require fewer resources.

However, rigorous decision making and thorough investigations are still required. To ensure rigorous standards are maintained in such cases, one agency has developed a "Six Month Protocol for Leniency Applications / Investigations" setting out the steps and timeframes to be met in the first six months of investigating a leniency-initiated cartel matter. Another agency tries to have a balance of cases in order to demonstrate the various ways in which cartels can come to light and thereby encourage people to come forward.

## **5.2.5 Nature and impact of the cartel conduct**

### **5.2.5.1 Seriousness of the conduct**

The majority of agencies surveyed indicated that a new case involving serious cartel conduct would more than likely be strongly considered for full scale investigation. In effect, the more serious the conduct, the more likely it is to be prioritised.

The OECD recognises that hard core cartels are the most egregious violations of antitrust laws, which injure consumers by raising prices and restricting supply. In its 1998 Hard Core Cartel Recommendation, the OECD defined a hard core cartel as "an anticompetitive agreement, anticompetitive concerted practice or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories or lines of commerce".<sup>26</sup>

The OECD recommends member countries ensure that their competition laws effectively halt and deter hard core cartels by providing for both:

- effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels, and
- enforcement procedures and institutions with powers adequate to detect and remedy hard core cartels, including powers to obtain documents and information and to impose penalties for non-compliance.<sup>27</sup>

A number of jurisdictions have followed this recommendation, and implemented laws prohibiting hard core cartel conduct. In some jurisdictions, antitrust laws provide for both civil and criminal sanctions, with criminal sanctions reserved for the most serious cartel conduct.

Some of the considerations used by agencies to determine whether conduct should be proceeded against on a criminal basis (where a criminal regime exists) are:

- the degree of culpability, the level of understanding or seriousness of the actions by the

<sup>26</sup> 1998 OECD Council Recommendation Concerning Effective Action against Hard Core Cartels ([www.oecd.org](http://www.oecd.org)).

<sup>27</sup> See the 2005 OECD Report on Hard Core Cartels, "Third Report on the Implementation of the 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels" ([www.oecd.org](http://www.oecd.org)).



parties (e.g. where the conduct is deliberate, reckless or very careless)

- whether the actions demonstrate a contempt or blatant disregard for the law and business norms
- whether the conduct is repeated, longstanding or had or could have had a significant impact on the market in which it occurred
- whether significant public detriment or significant loss or damage to consumers has been or could be caused by the conduct
- whether the monetary value of the affected commerce exceeds certain thresholds
- the degree of secrecy and whether the conduct is difficult to detect
- the extent to which coercion has been brought to bear on any of the participants, and
- whether the conduct is likely to contravene a *per se* provision.

These factors will often be considered once the indicators of cartel conduct (such as those described in section 3.3.8.1) have been established.

In some jurisdictions, the decision to prosecute may not rest with the competition agency, or may be required to be jointly made with another law enforcement authority. For example, where the competition agency is responsible for investigating cartel conduct and must refer serious cartel conduct to the national public prosecutor for prosecution. In this case, the competition agency's assessment of the priority of the case may subsequently be subjected to the priorities of the other law enforcement authority (see section 5.2.4 for further information).

#### 5.2.5.2 *Economic impact*

In prioritising one cartel investigation over another, agencies may take into account how widespread the economic impact may be, the affected volume of commerce and the duration of the conduct. In assessing these factors, the agency may allocate a lesser priority to those cases where the effect is not as great.

##### 5.2.5.2.1 *Industry-wide conduct or likelihood of conduct spreading*

Cartel conduct will almost always have a significant effect on the relevant industry and sometimes on associated industries. It is also possible that, for other competitors in the market, the threat of reprisal may be used to encourage them to join the cartel. Therefore, if there is no intervention to stop the cartel conduct, it is possible the conduct will become more widespread.

Cases having a broader geographic (i.e. national) effect may be weighted more heavily due to an assumption that they will have a greater impact on the population and economy as a whole, rather than one with more limited (typically regional or local) impact.

In assessing the market, agencies will generally allow a degree of flexibility to account for both qualitative and quantitative aspects of a particular market. For example, a product or service may not be large in terms of its total market or in terms of the percentage of input into particular downstream operations, but may be essential in the production process with an impact on products and/or services that would in turn constitute substantial markets.

##### 5.2.5.2.2 *Volume of commerce*

Some agencies use the volume of commerce affected by a cartel as a way of prioritising cartel investigations. Agencies may set monetary thresholds and where the volume of commerce exceeds those thresholds, those matters may be prioritised. The volume of commerce affected is often one of many factors to be considered and will need to be balanced against other countervailing considerations such as the object of the cartel. One agency reported that it may give greater priority to matters where critical resources or supplies are affected (regardless of the volume of commerce affected).

While cartel arrangements that affect large volumes of commerce may be more of a priority for some agencies, it is important to keep in mind that cartels do not just affect large contracts and/or big business. In some circumstances, cartels can arise at a more local level and on a smaller scale yet can still damage the economy, other businesses and consumers. Most agencies will aim to investigate a broad range of cartels involving companies of different sizes and with different volumes of turnover to balance the deterrence of cartel behaviour across all parts of the economy.

#### 5.2.5.2.3 *Duration of cartel conduct*

Empirical studies estimate the average length of a cartel is between four and nine years, though cartels have been known to exist for more than 20 years.<sup>28</sup> Given the economic damage caused to consumers and economies as a result of a cartel's existence, the duration of the cartel may be a factor that could lead to one cartel being investigated in preference to another.

#### 5.2.5.2.4 *Extent of potential consumer detriment*

In 2002, the OECD conducted a review of the estimated harm caused by cartels, and concluded that "the total harm from cartels is significant indeed, surely amounting to many billions of dollars each year."<sup>29</sup>

The harm inflicted by cartels on the economy and the general public may include:

- consumers being forced to pay higher prices for goods or services, alternatively, consumers may be unable to afford the products at all
- businesses being forced to pay higher prices or having to pass this cost on to their customers
- government agencies paying higher prices for goods and services and passing these costs on to taxpayers, or
- businesses involved in cartels having less incentive to innovate or operate efficiently.

In some jurisdictions, consumer detriment may be measured principally by the level of price changes for consumers. That is, agencies may measure consumer detriment according to the percentage of the price change affected by the offending conduct over time, with more weight given to situations involving a high price change over a short period. Such calculations may often prove difficult and may require the engagement of expert economic advice to calculate the extent of the consumer detriment. This need is typically brought about due to the complexity of separating elements of price rises that are due to natural changes such as increases in cost of raw materials or labour. When products are essential commodities, the effect of cartel behaviour can be considerable.

Agencies may also place additional weight on cases where the conduct affects disadvantaged or vulnerable consumer groups, or where action may benefit such groups.

#### 5.2.5.3 *Public interest*

Factors to consider when assessing the public interest of a particular investigation include whether there is likely to be significant consumer and business interest in the issue, how enforcement action might affect public confidence in the law, and whether action by an agency against the alleged cartelists would, in all the circumstances, be appropriate.

<sup>28</sup> See for example, John M Connor, "Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008" American Antitrust Institute Working Paper #09-06, September 2009; and Oindrila De, "Analysis of Cartel Duration: Evidence from EC Prosecuted Cartels", Centre for Competition Policy, University of East Anglia, undated.

<sup>29</sup> 2002 OECD Report on Hard Core Cartels, "Second Report on the Implementation of the 1998 Council Recommendation Concerning Effective Action against Hard Core Cartels (www.oecd.org).

## **5.2.6 Resource and strategic considerations**

### **5.2.6.1 Availability of resources for the investigation and adjudication of the cartel**

One of the most significant issues faced by agencies in selecting and prioritising cases is the availability of resources, both human and financial, to investigate and adjudicate a cartel. Several agencies noted that whether or not a case is selected and prioritised for full scale investigation involves weighing the desired outcome(s) against the time and resources that may be required to achieve that outcome. If the weighing process indicates that pursuing the case would be an efficient and effective use of the agency's time and resources then it is more likely to be prioritised for full scale investigation.

Some agencies may have limited budgets and can only undertake a few cases at a time or make decisions according to set ratios (e.g. one investigation per year). In some agencies, staff undertaking cartel investigations may work across a number of areas that deal more broadly with competition matters, such as mergers and dominance issues.

The emergence of new types of collusive practices, the possibility of using new detection tools based on algorithmic technology, big data or artificial intelligence, as well as the characteristics of certain markets with a significant digital dimension, may lead competition authorities to consider the possibility to recruit technical profiles (engineers, data science specialists, economists) who may provide valuable support to case handlers in the investigation of anticompetitive practices in the digital economy.

### **5.2.6.2 Strategic importance of the investigation to the agency**

An agency's overall strategic planning and objectives may have an important impact on the selection and prioritisation of cases. It is not uncommon for decisions on case selection and prioritisation to be made in light of the overarching agency priorities that are pre-determined by an agency's management group.

Factors which may determine the strategic importance of particular cases include, whether the agency is best placed to take enforcement action, whether taking action will enhance the agency's capacities and capabilities and how the investigation fits within the agency's other activities. Two additional factors are whether the agency has a focus on particular markets or sectors and whether there are any new legal or economic issues or approaches to be explored.

#### **5.2.6.2.1 Priorities of particular markets or sectors**

Most agencies investigate the scope of cartel conduct in the context of the market(s) in which the cartel operates. Identifying a market, including identifying the sellers and buyers who potentially constrain the price and output decisions of the players in that market, is an integral part of a cartel investigation. It is important to establish how large the market is, specifically, whether it is substantial enough for the alleged cartel conduct to have a significant effect on businesses and consumers. The larger the market, the wider the effect of the detriment which is likely to occur and the more likely it is that the agency will prioritise one case over a case concerning a smaller market. Agencies may also consider whether cartel behaviour is endemic in a particular industry and whether this is another case in a pattern of cases affecting that industry. This may mean that more needs to be done to educate and monitor a particular industry.

Some agencies publicly identify the markets or sectors of particular interest. For example, some agencies publish annual corporate plans and priorities which set out the conduct (for example bid rigging), sectors or industries, in which enforcement of the law is a priority. Such plans then enable comparisons between the matters at hand and the overarching agency priorities to assist in the case selection process.

#### 5.2.6.2.2 *Cases which raise novel legal or economic issues*

An agency's decision may also be influenced by its assessment of the benefits that may flow from any action. Priority may therefore be given to matters likely to lead to new competition law jurisprudence or which impact on the policies and/or practices of the agency. Some agencies may want to test the extent of jurisdiction or obtain a judicial interpretation of cartel provisions, and a particular case could be pursued with this as a major objective.

#### 5.2.6.3 *General and specific deterrence*

When considering case selection and prioritisation, there is an opportunity to assess the potential for education and the promotion of general compliance. Agencies may prioritise matters where it is anticipated that resolving the case (e.g. by way of a fine, imprisonment, undertakings, private litigation and/or publicity) will have a significant educational and deterrent effect on firms in an industry and on potential cartellists in other industries.

#### 5.2.6.4 *Timing considerations*

If a limitation period applies for the commencement of proceedings or imposition of penalties, and an agency receives information about an alleged cartel which is several months or years old, the amount of time left to investigate may influence the decision whether any investigation is initiated, or not, and whether the matter would be prioritised.

A number of agencies have timeframes which apply to different stages of an investigation. In some cases these timeframes have a statutory basis and, in others, a policy basis. Agencies may have statutory timeframes for the different stages of a matter, such as responding to complaints, initial examination / screening, preliminary investigation / inquiry, and/or investigating matters involving a leniency applicant. Some jurisdictions impose statutory timeframes for the completion of investigations, which may vary across different jurisdictions. Other agencies do not have any strict timeframes to adhere to but endeavour to complete their investigations within a reasonable timeframe, depending on how complicated the case is and the evidence available. Details of all timeframes are usually incorporated into and highlighted in the investigative plan.

**It is good practice to conduct timely cartel investigations, including by planning investigations efficiently, making decisions within the relevant timeframes and undertaking investigations expeditiously, where possible.**

#### 5.2.6.5 *Likelihood of a successful outcome*

In selecting and prioritising cases, agencies will often take into account the likelihood that the case will achieve the desired outcome(s). Outcomes may range from stopping the alleged illegal conduct to increasing deterrence and/or compliance, undoing any harm caused by the conduct and, where warranted, punishing the wrongdoer. Agencies may find it useful to conduct an assessment of the risks of taking a particular course of action against the benefits sought to be achieved. Such a process may also assist to ensure a transparent and accountable decision-making process.

#### 5.2.6.6 *Possibility of different action resolving the problem*

Some agencies may consider whether progressing a case to full scale investigation is the best way to resolve a particular cartel problem. The use of other case resolution strategies may depend on the particular laws governing cartel conduct in any given jurisdiction. In other cases, different

actions such as education, private enforcement and/or undertakings committing not to engage in similar behaviour in the future may be effective and, in some cases, may even use less of the agency's resources.

### 5.3 Tools to support cartel investigations

Agencies use a range of tools to record, track and support cartel investigations. These tools include investigative plans, databases for tracking and managing investigations, hard copy and electronic files for storing case documents, and software for analysing evidence.

Investigators find such tools useful as they can help to identify patterns and missing evidence, disclose new relationships and/or uncover inconsistencies, and facilitate the transfer of the matter to others by increasing the transparency of the file.<sup>30</sup> As with all data storage tools, their efficacy depends on the willingness of investigators to input information and documents regularly and in a uniform manner, and to ensure that these are appropriately protected from unauthorised disclosure. A detailed discussion of investigative tools is contained in chapter 5 of the ICN Anti-Cartel Enforcement Manual.

#### 5.3.1 Planning and tracking investigations

The most useful planning and tracking tools are those which assist investigators to manage their investigations efficiently and effectively. The appropriate mix of tools will ultimately depend on the complexity and size of the matter, and the resources which are available to the agency.

In some cases, an investigation may be tracked using a simple project table, spreadsheet or Gantt chart. An investigative plan can be used to guide the investigation and it sets out key investigative tasks, and timeframes, for proving the alleged infringement.<sup>31</sup> An example of such an investigative plan is included in appendix III. An investigative plan is usually prepared by a case officer or case manager and updated as the investigation develops. It is important that the investigative plan be a flexible and forward looking document.

While there is no standard approach to developing an investigative plan, the plan may include some or all of the following:

- a theory of the case
- the aims of the investigation and a strategy for achieving these aims
- actions required to meet the aims of the investigation, such as inquiries, preparation of notices and reporting to senior personnel / decision dates
- how any leniency applicants should be dealt with
- consideration of whether any legal and/or economic advice is likely to be required
- information to be gathered, including identifying sources to be explored and third parties to be approached, and when and how this will happen (e.g. by use of formal investigative powers)
- details of any cooperation and/or coordination which may be necessary between the agency and other domestic law enforcement authorities and/or competition agencies (see section 5.2.4) and when and how this is likely to take place
- timeframes and milestones for events to occur, and
- the resources required for the investigation (for example staff as well as economic, industry and/or legal experts).

<sup>30</sup> See Henry Prakken, "Sense-making software for crime investigation: how to combine stories and arguments?", University of Groningen The Netherlands, 24 January 2007 and related article with the same title by Floris Bex et al in *Law, Probability and Risk*, 2007 6(1-4):145-168.

<sup>31</sup> For more information, see sections 2.5 and 3.2 of chapter 5 of the ICN Anti-Cartel Enforcement Manual on "Investigative Strategy" ([www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org)).

Investigative plans are used by agencies for various purposes and to varying degrees. For some agencies, an investigative plan is an essential planning tool, used throughout the life of the investigation to identify, and track the completion of, work. For others, it is simply used as a starting point, to track high level issues, or as a reporting tool. Whichever approach is taken, it is important for an investigative plan to be flexible and adaptable to allow it to evolve with the investigation. This will help to reduce time spent unnecessarily on details which may become irrelevant during the course of an investigation.

Many agencies employ basic information management systems to track their investigation activities. These systems allow information from one or more sources to be collected and managed including by creating links with other databases where key documents are stored. Such systems have the capacity to track performance standards and produce reports for management.

A more sophisticated method for tracking investigations is fact/investigative analysis software which can produce reports on the development of a cartel under investigation. Such software allows investigators to present information visually to facilitate analysis and interpretation (for example, charts demonstrating links between people and events and timelines). This software can also identify patterns (e.g. investigators can import phone records and the software can identify links between particular telephone numbers). There are a number of such commercial applications available.

Agencies also use project management and mind mapping software to map planned investigative actions and to allocate resources against timeframes for the investigation. Regular project update reports are able to be prepared to monitor actual investigative progress against the timeframes established in the project plan. This allows for project managers to quickly identify any issues that may be impeding the progress of the investigation. Mind mapping software allows investigators to connect gathered evidence (such as witness interviews and documents) with elements of the relevant offence to assist in building a case.

Electronic platforms for storing and analysing evidence are common among agencies. Some agencies use specially designed databases and software to store and search documents and develop patterns in evidence. Such databases and software allow for targeted searches and have applications for evidence analysis including note creation. They may also allow investigators to track issues, people and organisations, create timelines and compare evidence. Evidence matrices are also used.

**It is good practice to document key tasks and milestones in cartel investigations.**

**It is good practice to have information management systems and tracking tools to organise and manage investigations and to regularly review and update these systems and tools.**

**It is good practice for investigators to be appropriately trained in using such management systems and tracking tools.**



### 5.3.2 *Managing and protecting documents*

At the start of a new matter, the investigation team will usually open official hard copy and electronic files to record and store information, documents and decisions relevant to the matter.

When obtaining large data sets from undertakings (or after seizure during dawn raids) competition agencies should take into account their<sup>32</sup>:

- Capacity to analyze large databases;
- Capacity to index and clean large data sets;
- Capacity to install/run company software on their premises;
- Human capital with the ability to process and analyze the data.

Electronic work products (such as internal memorandums and reports) may be stored on shared drives and/or in electronic databases such as a document management system which allows investigators to store and review information and documents, assess their value to the investigation and conduct searches.

Electronic evidence from ongoing investigations is usually stored in special restricted-access folders on agency computer systems or in a forensic IT lab. Documentary evidence obtained in respect of an ongoing investigation is often stored in special locked rooms, cabinets or other secure file storage.

To protect sensitive cartel-related information and documents from unintended disclosure, agencies may adopt procedures for investigators to follow, such as:

- storing investigation material in locked cabinets or rooms
- transporting investigation material outside the agency in locked briefcases
- refraining from leaving confidential material on desks
- mailing confidential material in a double envelope (with a plain brown envelope on the outside and the officer's contact details along with a warning on the second inner envelope)
- using code names for investigations
- limiting access to case information and documents to authorised personnel only, or on a "need to know" basis, and
- not discussing investigations in public.

Information and documents gathered by investigators in the course of the investigation may also be subject to legislative protection, preventing their unauthorised disclosure. Sanctions for unauthorised disclosure may also apply. It is good practice to have systems in place to protect confidential investigation material.

**It is good practice to keep records of information, documents and decisions required to initiate a full scale investigation.**

**It is good practice to have systems in place to protect confidential investigation material.**

<sup>32</sup> Chapter 3 of the ICN Anti-Cartel Enforcement Manual on Management of Electronically Stored Information develops these issues in more details.



## 5.4 Summary

This section of the chapter has introduced a variety of factors by which agencies can develop a policy or approach to make decisions to initiate full scale cartel investigations, including selecting and prioritising cases. It has also briefly explored the steps necessary to initiate a full scale investigation and some of the tools and processes used by agencies to make these decisions and support cartel investigations.

In particular, this section has highlighted the importance of adopting policies and procedures for assessing the relative merits of cartel matters and informing the decision to initiate full scale investigations. It has emphasised the need to adopt systems, tools and methods to plan and track key stages of an investigation, ensure appropriate records are kept and maintained and protect the confidentiality of investigation materials. Finally, an important message in this section (and elsewhere in this chapter) is the significant role early and ongoing engagement with domestic law enforcement agencies and international counterparts can play in helping agencies to detect and investigate cartels.

## APPENDIX I: INFORMATION FROM THE SOURCE OF THE ALLEGATIONS

### (a) The complaint

- Origin of the complaint.
- Are the complained events illegal / within the ambit of competition law / appropriate for investigation?
- Do any waivers, exemptions or exonerating decisions apply?
- Is the suggested scenario / allegation credible?
- Is it credible—what are the advantages to the cartel participants?
- Degree of detail—is there sufficient detail in it?

### (b) Credibility of the complaint

- Background—whistleblower, customer / client, concerned citizen.
- Is this a serial complainant?
- Is complaint vexatious?
- Degree of knowledge of events.
- Degree of involvement in events.
- Benefit to the complainant (including, for example, does the complainant have an expectation of some personal reward—financial, etc. or anticipate potential business advantage from the outcome? Could it be revenge / retribution?)
- Will the complainant back up the allegations with specific evidence—statement, documents, names, locations of meetings?
- Can the information provided by the complainant be corroborated by independent sources (either documents or witnesses)?
- Is the complainant willing to go on the record?
- Assessment of complainant as potential witness.
- Does the complainant have a criminal record?
- Protection / anonymity.
- Familiarity with the relevant industry, for example has the complainant worked for a long time in that industry?

### (c) Information about the cartel

- How and when did the cartel start?
- What is the scope or focus of the cartel agreement? (For example, fixing prices, eliminating discounts, allocating markets or rigging bids).
- What is the relevant product / service and geographic market?
- Who are the participants / ring leaders?
- What is the level of involvement, awareness and support from senior management (including from regional / head offices which may be overseas)?
- Is the cartel still active and how long has it operated?

- How does the cartel operate?
- How is the cartel policed?
- Are there any individuals who have left the cartel and can corroborate the story?
- Geographic location of / area covered by the cartel.
- Existence of trade association.
- Evidence of bid rotation.
- Inter-party movement of personnel.
- Uniqueness of service:
  - limited available expertise
  - high degree of specialisation.
- Individual participant's history:
  - involvement in previous contraventions of competition or consumer laws (recidivism)
  - involvement in violations other than competition violations (e.g. fraud).
- Horizontal and vertical issues involved in the allegations.
- Supply lines.
- Management / administration / sales unit size.

**(d) The industry and market sector considerations**

- Structure of sector.
- Background—sales, market share, location, capacity and size of plants, other lines of business, etc.
- List of customers—top 25 customers (name, address, telephone number and contact person).
- Other producers and estimated sales and market shares.
- Any new entrants into the market in the past few years?
- Market buoyancy (a buoyant market can more easily absorb higher costs passed on from cartel activity).
- Degree of demand fluctuation.
- Recent sector history, from a competition perspective.
- Experience in other jurisdictions.
- Overspill into other sectors.

## APPENDIX II: GOOD PRACTICES RELATING TO CARTEL CASE INITIATION

### METHODS OF DETECTING CARTELS

It is good practice for agencies:

- to use a variety of techniques and methods to detect cartels, including a balanced mix of both reactive and proactive methods that will increase the opportunities for detecting cartels and help demonstrate a particular agency's enforcement capacity
- to have a formal complaint system in place for receiving, handling and responding to complaints
- to utilise a wide range of reactive methods of cartel detection including leniency programmes and systems to receive both information and complaints from whistleblowers / informants, business, government and the public in general
- to develop good working relationships with domestic law enforcement agencies and international counterparts and to have regular contact in order to promote cooperation and the sharing of information as far as permitted by applicable laws, treaties and/or cooperation agreements
- to regularly and consistently monitor media, trade press, internet sites and other publicly available industry and trade association sources which can provide an indication or early warning sign of cartel activity, and
- to engage in education and outreach programmes to raise awareness about anti-cartel laws and the harmful effects of cartels, to educate people about the operation of the law and the typical signs of cartel conduct, and to generate leads about cartel activity which may be a source for the initiation of a formal investigation.

### PRE-INVESTIGATORY PHASE OF CARTEL ALLEGATIONS

It is good practice for agencies:

- to establish methodologies for the early verification and assessment of cartel allegations during the pre-investigative phase
- to establish clear and transparent procedures for dealing with complainants in the pre-investigatory phase and to provide ongoing training to their officers on such procedures
- to provide information to complainants outlining how their complaint will be evaluated and the agency's expectations of them
- to verify and corroborate allegations before proceeding to the investigatory phase, and
- to establish clear referral mechanisms and clear procedures for inter-agency assistance and information sharing during the pre-investigatory phase.

### DECISION TO INITIATE A FULL SCALE INVESTIGATION

It is good practice:

- for agencies to have a policy for, or approach to, undertaking case selection and prioritisation with easily measurable objective criteria that reflect the particular legal, economic and regulatory environment within which the agency investigates cartel conduct and enforces its competition law

- to have in place a method to assess and weigh the relative merits of cartel matters to facilitate decision-making regarding the selection and prioritisation of cases
- for investigators to have a good understanding of the methodology and its objectives and to be well trained in its use
- for agencies to have a consistent approach to the assessment of cartel matters
- for agencies to review their selection and prioritisation decisions at pre-determined time intervals to ensure that the results are still valid and determine if the approach taken regarding a particular cartel matter needs to be revisited
- to clearly identify criteria and establish procedures for deciding whether a matter being examined should proceed to the investigatory phase
- to conduct timely cartel investigations, including by planning investigations efficiently, making decisions within the relevant timeframes and undertaking investigations expeditiously, where possible
- to document key tasks and milestones in cartel investigations
- to have information management systems and tracking tools to organise and manage investigations and to regularly review and update these systems and tools
- for investigators to be appropriately trained in using such record management systems and tracking tools
- to keep records of information, documents and decisions required to initiate a full scale investigation, and
- to have systems in place to protect confidential investigation material.

## APPENDIX III: SAMPLE INITIAL EVALUATION OF CARTEL CONDUCT (INCLUDING DRAFT INVESTIGATIVE PLAN)

### PRIORITY LEVEL

It is recommended that this matter be / not be\* a priority investigation (assign level of priority if required e.g. high, medium, low).

### PARTIES

#### 1. Complainant / Leniency Applicant

The Complainant / Leniency Applicant\* is:

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#### 2. Respondents

The Respondent(s) is / are\*:

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#### 3. Factual background to complaint

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### ALLEGED CONTRAVENTION

#### 4. The relevant market

##### 4.1 Product Market

The preliminary definition of the relevant product market is:

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##### 4.2 Geographic Market

The preliminary definition of the relevant geographic market is:

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\* Delete that which is not applicable.

**5. Volume of commerce affected and duration of conduct**

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**6. Jurisdictional issues**

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**7. Applicable sections of the law**

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**8. Theory of the case**

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**ASSESSMENT OF THE CASE**

**9. What the investigation is intended to achieve and how**

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**10. Initial information about the case**

During meetings with the Complainant / Leniency Applicant\*, as well as preliminary inquiries the following facts were revealed:

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**11. Potential for cooperation**

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**12. Nature and impact of the cartel conduct**

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**13. Resource and strategic considerations**

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\* Delete that which is not applicable.

### **LENIENCY APPLICANT (if applicable)**

14. About the Leniency Applicant (including who they are and their involvement in, or knowledge of, the cartel conduct etc. This part could also apply to Whistleblowers and Informants depending on the case)

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15. Initial assessment of whether the Leniency Applicant satisfies the criteria for leniency

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16. Whether the Leniency Applicant has given a waiver

The Leniency Applicant has / has not\* given a waiver. The waiver provides:

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### **STRATEGY FOR GATHERING INFORMATION / EVIDENCE TO PROVE A CONTRAVENTION**

17. Potential sources of information (e.g. Complainant, Leniency Applicant and other Witnesses)

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18. Use of informal and formal investigative powers

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### **STRATEGIC FACTORS**

19. Persons harmed and steps the agency may take to protect their interests

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\* Delete that which is not applicable.

## 20. Benefits and risks of undertaking a full scale investigation

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## 21. Negative impacts which may arise from not undertaking a full scale investigation

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## 22. Alternative options or steps to undertaking a full scale investigation

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## RECOMMENDATION

It is recommended that this matter be / not be\* prioritised for full scale investigation for the following reasons:

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\* Delete that which is not applicable.

## DRAFT INVESTIGATIVE PLAN

This table sets out a sample of actions the investigative team may need to undertake in planning for a full scale investigation:

WHAT	HOW	BY WHOM	WHEN
<b><i>Conduct inquiries</i></b>			
<ul style="list-style-type: none"> <li>- Complainant</li> <li>- Leniency Applicant</li> <li>- Other Witnesses</li> </ul>			
<b><i>Decide to grant leniency</i></b>			
<ul style="list-style-type: none"> <li>- Obtain necessary information from Leniency Applicant</li> <li>- Assess application</li> </ul>			
<b><i>Obtain legal and/or economic advice</i></b>			
<ul style="list-style-type: none"> <li>- Identify legal or economic issues</li> <li>- Prepare brief and meet with advisers</li> </ul>			
<b><i>Exercise informal and/or formal investigative powers</i></b>			
<ul style="list-style-type: none"> <li>- Issue informal request for information / formal notices and/or search warrants</li> <li>- Conduct interviews</li> </ul>			
<b><i>Contact other domestic or international agencies</i></b>			
<ul style="list-style-type: none"> <li>- Assess whether the matter raises issues for another agency</li> <li>- Cooperate / coordinate as necessary</li> </ul>			

**INVESTIGATIVE TEAM:** \_\_\_\_\_

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**Prepared by:** \_\_\_\_\_

**Date:** \_\_\_\_\_

## **APPENDIX IV: AGENCIES RESPONDING TO CARTEL CASE INITIATION SURVEY**

1. Australia
2. Brazil
3. Canada
4. Croatia
5. Cyprus
6. El Salvador
7. European Commission
8. Germany
9. Ireland
10. Japan
11. Jersey
12. Mexico
13. Netherlands
14. New Zealand
15. Norway
16. Pakistan
17. Sweden
18. Switzerland
19. Turkey
20. United Kingdom
21. United States of America

## APPENDIX V: CARTEL CASE INITIATION SURVEY DECEMBER 2009

### ICN ANTI-CARTEL ENFORCEMENT MANUAL

#### *Chapter 4: Cartel Case Initiation Survey*

As you are aware, Subgroup 2 is currently updating the Chapter on Cartel Case Initiation in the ICN Anti-Cartel Enforcement Manual (May 2007). To assist with this process, the drafting team has prepared a survey to obtain information from member agencies on methods used to detect cartels and initiate cartel investigations. It is hoped that completing this survey will also be a useful opportunity for your agency to review its existing practices and procedures.

This survey is in two parts. The first deals with cartel detection, and the second deals with case initiation. If your agency has only limited or no experience in relation to a particular matter, please respond "Not Applicable (or N/A)" as the case may be.

Please note that your responses will be used for the purposes of drafting the Chapter on Cartel Case Initiation in the ICN Anti-Cartel Enforcement Manual and for discussion at the Cartel Workshop. As such, please do not provide confidential information.

#### *Part 1 – Cartel detection*

The existing chapter on Cartel Case Initiation identifies a range of methods for detecting cartels. These methods are characterised as either **reactive** or **proactive**. Reactive methods typically rely on some external event to take place before an agency becomes aware of an issue and can launch an investigation. On the other hand, proactive methods are initiated from within the agency and do not rely on an external event. The reactive and proactive methods identified in the existing chapter are set out below. The definitions used in Chapter 4 are attached for reference.

Please answer the following questions as comprehensively as possible.

1. What are the biggest challenges faced by your agency in detecting cartel activity, and how do you think these challenges can be overcome?
2. In the table below:
  - a. Please tick in column two which methods are used by your agency to detect cartels. Please add any other methods used by your agency to detect cartel activity to column one.
  - b. Please provide, in column three, the percentage of cartels detected by your agency over the past three years using each method. Estimates of percentages will be adequate.
  - c. Are there any methods identified above which your agency has not used? If so, please explain why not.

Methods for detecting cartels	Q2a. Used by your agency?	Q2b. Cartels detected (%)?
<b>Reactive</b>		
Complaint		
Whistleblower		
Informant		
Immunity/leniency applicants		

Request by foreign agency		
Reference by central/state government		
Other:		
Methods for detecting cartels	Q2a. Used by your agency?	Q2b. Cartels detected (%)?
<b>Proactive</b>		
Market/economic analyses		
Analysis of previous cases		
Monitoring media		
Monitoring industry activity, trade press and internet, contact with industry representatives		
Monitoring individuals		
Education and outreach (internal and external)		
Domestic liaison with other law enforcement agencies		
Domestic liaison with other government agencies such as procurements officers		
International liaison		
Other:		
		100%



### *Reactive methods*

3. Which reactive methods have been most effective in detecting cartel activity and why?
4. If your agency receives information via complaints, reference filed by federal/state government, whistleblowers and informants:
  - a. What are the processes for receiving information from these sources? For example, telephone/ hotline, website, face-to-face meeting, written submission. How is this information handled and acted upon by your agency?
  - b. Is there any difference in the amount of, or type of information required to initiate an investigation depending on the source?
  - c. Are there processes to enable ongoing dialogue between your agency and the complainant, federal/state government, whistleblower or informant? Please explain.
  - d. Are there safeguards to protect the identity of, and information provided by, complainants, whistleblowers and informants? If so, please provide details.
  - e. What is the background/typical profile of most complainants, whistleblowers and informants?
5. If your agency has any incentive-based systems to encourage cartelists and others to come forward (such as an immunity/leniency policy), please provide details. In particular, please describe how your system creates incentives, whether this system has ever been used and, if so, whether it has been successful.
6. Please provide details of any other reactive methods used by your agency to detect cartel activity.

### *Proactive methods*

7. Which proactive methods have been most effective in detecting cartel activity and why?
8. If your agency gathers information from previous cases and/or conducts market/economic analyses to help detect cartels, please explain how this is done, the types of information gathered, and whether these methods have been successful.
9. If your agency monitors industry activities, please explain how this is done, which industries are monitored, how these are selected and whether this has been successful.
10. Does your agency engage with other government agencies to detect cartel behaviour such as bid rigging? If so, please provide details.
11. If your agency monitors particular individuals to help detect cartels, please explain how this is done, the type of information gathered, and whether this has been successful.
12. In relation to education and outreach:
  - a. What strategies has your agency used to educate the public about cartel detection and enforcement and have these been targeted at specific audiences? If so, who?
  - b. Which strategies have been most effective in raising awareness/changing public perceptions of cartels and why?
  - c. Has there been an increase in cartel detection in your jurisdiction as a result of increased education and outreach? If so, how is this measured?
13. If your cartel team cooperates with other areas of your agency and/or other law enforcing agencies:
  - a. Does your agency have legal basis to seek assistance from other law enforcing agencies?
  - b. Please identify which areas of your agency and which law enforcement agencies your team cooperates with.

- c. What is the nature of the cooperation? For example, how and when is contact initiated, are there regular meetings or exchanges, and what types of information and resources are shared?
- d. Has this cooperation assisted your agency to detect cartels? If so, please provide examples.

14. In relation to international cooperation:

- a. Does your agency have any MOU/agreement/arrangement with any foreign agency for international cooperation?
- b. How has international cooperation assisted your agency to detect cartels? Please provide any recent examples.
- c. What challenges has your agency experienced to detecting cartel activity through international cooperation? For example, restrictions on sharing information due to asymmetries in cartel investigations and immunity/leniency policies.

15. Please provide details of any other proactive methods used by your agency to detect cartel activity.

## ***Part 2 – Case initiation***

Once cartel activity is detected, the next steps are (1) the pre-investigatory phase (2) deciding whether to initiate a full-scale investigation and (3) initiating an investigation.

### ***Pre-investigatory phase***

- 16. Please explain the criteria used by your agency to prioritise cartel case initiations.
- 17. Are there strict time frames your agency adheres to and, if so, what timeframes apply for:
  - a. Assessing the sufficiency of information and evidence obtained through the various detection activities identified in Part 1?
  - b. Determining whether further investigation and resources will be devoted to the matter?
  - c. Case selection and prioritisation?
- 18. What tools/systems does your agency use to:
  - a. Store and track cartel-related information and evidence obtained from your agency's cartel detection activities? For example, electronic databases, evidence matrices.
  - b. Verify and assess the value/strength of this information and evidence?
  - c. Protect cartel-related information and evidence from unintended disclosure during the pre-investigatory phase?
  - d. Record steps and decisions relating to case selection and prioritisation?

### ***Deciding whether to initiate a full-scale investigation***

- 19. What is your agency's internal decision-making process for approving cartel cases for full-scale investigation and what criteria does your agency use in making that decision? Please provide details. For example, public interest, economic considerations, deterrence.
- 20. What general factors are taken into account by your agency in deciding to initiate a full-scale cartel investigation? Please indicate the relative weight given to each factor. For example, strength of available evidence, likelihood of success, resources, legal or policy requirements, agency and/or government priorities, international developments.
- 21. How would your responses to questions 19 and 20 change where:
  - a. A leniency application has been lodged with your agency?

- b. The case involves “hard core” or “serious” cartel conduct?
- c. A criminal prosecution appears likely, if your jurisdiction has criminal sanctions?
- d. Multiple jurisdictions are investigating the same alleged conduct?

22. Please explain the process(es) followed by your agency to screen cartel investigations.

23. Once a cartel case is selected for progression to full-scale investigation, how are cases prioritised? (Please state if your agency’s priorities are determined by the same criteria set out at question 16 or 19).

*How to initiate a full-scale investigation*

24. What key steps must your agency take to initiate a full-scale investigation? For example, assigning a case team and resources, developing a case theory, obtaining legal advice, setting timeframes, identifying sources to be explored and witnesses to speak to, liaising with other law enforcement and competition agencies.

25. What tools/systems does your agency use to plan and track your investigation (including determining how and when the steps above should happen, and who is responsible for them)? For example, mindmapping.

26. What requirements must your agency satisfy before exercising formal investigative powers (such as a search, raid or inspection)?

27. Does your agency have procedures for referring cases to, or for running parallel investigations with, other law enforcement agencies and/or competition agencies for investigation? If so, please provide details.

### ***Definitions***

The definitions applied to the terms used in Chapter 4 do not necessarily represent the definitions used by all member agencies in the course of their daily work. The terms may hold different meanings depending on the jurisdiction and legal context in which they are used, and are thus meant as points of reference to have a common understanding among agencies for the purposes of the chapter.

#### ***Complainant***

A person or group of persons who make a complaint, verbally or in writing, to an agency about alleged cartel conduct in violation of the law.

#### ***Informant***

A person, sometimes a participant in the cartel, who volunteers material information to an agency about cartel conduct in violation of the law. Informants typically require a guarantee of confidentiality and anonymity and may work undercover on behalf of an agency. In some circumstances, informants may be willing to provide information as a witness during the course of the investigation and to give a witness statement.

#### ***Leniency applicant***

A cartel member who reports its cartel membership to an agency and undertakes to satisfy certain conditions, including full cooperation with the agency to obtain partial or total exoneration from penalties that would otherwise be applicable to a cartel (see chapter 2).

#### ***Pre-investigatory phase***

The first actions taken by a competition agency after receiving information about an illegal cartel may be categorised by titles such as “preliminary inquiry”, “preliminary investigation”, “preliminary examination” and “first look”, to list a few. Although many different jurisdictions use the same title, the activities denoted and level of inquiry permitted vary widely. This manual uses the term “pre-investigatory phase” to cover activities taken when a competition agency is initially informed of potential cartel activities and up to the time a determination is made to undertake a full-scale investigation into the allegations.

#### ***Full-scale investigation***

A “full-scale investigation” is often formalized by an official agency action. Such actions include conducting a search, raid or inspection, issuing a subpoena (or analogous order for production of documents), or compelling attendance at a verbal examination. These actions have the effect of publicly disclosing the existence of the investigation. The steps undertaken by the agency leading to such actions are aimed at evaluating the allegations and meeting legal thresholds for the use of investigatory powers.

#### ***Third party***

An industry or market participant, including customers, suppliers and representatives of associations, who have knowledge about the industry or market and may have knowledge about the cartel.

#### ***Whistleblower***

An insider, typically a current or former employee, who reports cartel conduct in violation of the law to an agency. Such an individual almost always requires a guarantee of confidentiality and anonymity. Some jurisdictions provide whistleblowers who disclose information with legal protection from victimisation and dismissal.