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ANTI-CARTEL ENFORCEMENT MANUAL

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Chapter
Investigative strategy
and interviewing
Section I: Investigative strategy

5

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1. INTRODUCTION

The purpose of this chapter is to examine the use and relevance of strategy in anti-cartel investigations. The chapter draws together established practices, research and legal issues relevant to investigative strategy and highlights the experiences of a number of International Competition Network (ICN) members. As with previous chapters, the relevance of some sections will, to some degree, be determined by the legal and policy environment that governs an agency's enforcement practice.

This chapter is intended to be a reference tool for agencies that enables them to evaluate their own approaches and benchmark their experiences against those of their counterparts around the world.

The chapter is divided into two parts:

1. Establishing the investigation strategy: this part will bring into focus the full-scale investigation of a cartel and explore manners in which competition agencies define and conduct the strategy of the full-scale investigation.
2. Evaluation of the investigation strategy: this part will illustrate how an investigative strategy should be revised and modified as evidence of the alleged cartel is obtained.

Sources consulted to create this chapter in 2008 include relevant reports from the Organization for Economic Cooperation and Development (OECD), proceedings from various international cartel conferences and workshops and the manuals of several competition agencies. Most importantly, the text reflects the contributions of ICN member agencies and Non-Governmental Advisors (NGAs).

This chapter reflects current practices adopted by various ICN member agencies in conducting a full-scale investigation, including evidence-gathering and interviewing. However, it is not intended to serve as a comprehensive guide. The *ICN Anti-Cartel Enforcement Manual* is a work in progress. This version of the chapter represents a first 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.

This chapter and others that form part of the manual must be read in the context of current enforcement laws, policies and practices.

2. DEFINITIONS AND QUALIFICATIONS

2.1. Agency

The term ‘agency’ refers to a competition agency – that is, an agency that undertakes anti-cartel investigations. Where the term ‘agency’ is used in reference to an agency other than a competition agency, a modifier will accompany the term—e.g. ‘other government agency’ or ‘domestic agency’.

2.2. Staff

The term ‘staff’ refers to officials participating in the investigation and will include officials conducting full-scale investigations, such as an investigator or prosecutor.

2.3. Pre-investigatory phase or preliminary inquiry

The terms ‘pre-investigatory phase’ and ‘preliminary inquiry’ are used to cover activities undertaken from the time an agency becomes aware of potential cartel conduct to when a determination is made to undertake a full-scale investigation into the allegations. Activities undertaken during the pre-investigatory phase or preliminary inquiry are aimed at evaluating the allegations and assessing whether legal thresholds for the use of investigatory powers are likely to be met before beginning a full-scale investigation. Other terms used synonymously with the terms ‘pre-investigatory phase’ or ‘preliminary inquiry’ include ‘preliminary investigation’ and ‘preliminary examination’. For the unification of terminology, the term ‘preliminary inquiry’ is used in this chapter.¹

2.4. Investigation

The term ‘investigation’ refers to enforcement activities following the preliminary inquiry.

This manual uses the term ‘full-scale investigation’ to cover all activities undertaken following an agency’s decision to exert all necessary and available investigative powers and resources to resolve a case under competition laws.

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.²

2.5. Investigative plan

The term ‘investigative plan’ refers to a plan developed by the investigation team setting out the investigative and administrative tasks relevant to proving the alleged infringement.

The investigative plan serves to guide the investigation and its structure will be based on the specific issues of each investigation. However, in general it will include an analysis of the target cartel, the investigative environment and the investigative strategy. As a useful project management tool, the investigative plan may also detail investigative actions and milestones, and may often incorporate dates, budgets and staff availability.

2.6. Features of target cartel

The term ‘features of target cartel’ refers to the features of the cartel relevant to the investigative plan, including (but not limited to) the type of cartel, affected market, participants and their relationships, functioning of the cartel and duration of the conspiracy.

¹ Refer to section 2.5 of chapter 4 of the ICN manual, ‘Cartel case initiation’.

² *ibid.*

2.7. Evidence

The term ‘evidence’ refers to information used by the agency or by a court of law to prove the cartel. For example, evidence might be obtained from documents, or witnesses.

In general, evidence may fall into two categories: direct evidence and indirect (or circumstantial) evidence. Direct evidence is testimony or other proof that expressly proves the existence of an element of the offence. Indirect evidence, without providing direct proof, gives rise to a logical inference that such agreement did, or does, exist.

2.8. Business

The term ‘business’ means any undertaking, business, company, firm or association.

2.9. 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 means³.

2.10. 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 method⁴. 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.

³ Eurostat's Concepts and Definitions Database; OECD Glossary of Statistical terms; Economic Commission for Europe of the United Nations (UNECE), "Terminology on Statistical Metadata", Conference of European Statisticians Statistical Standards and Studies, No. 53, Geneva, 2000.

⁴ OECD Roundtable on Algorithms and Collusion, Background note by the Secretariat, June 2017.

3. Establishing the investigative strategy

3.1. Introduction

The level of information an agency has in the early stages of a cartel investigation will vary from case to case. Generally, most cartel investigations begin on the basis of limited information. Establishing a clear methodology and investigative plan will assist agencies to build upon the cartel allegations and conduct successful investigations.

The objectives of establishing the investigation strategy are to assign scarce agency resources to enhance anti-cartel enforcement and foster the success of a cartel investigation.

3.2. Investigative plan

It is good practice to begin investigation planning in the early stages of a full-scale investigation, based on the issues and specific facts available to date.

There are numerous ways to conduct a cartel investigation. The degree of information that an agency has during the early stages of the investigation is a critical factor in determining how an investigation will be conducted. The key concern of agencies in the beginning phase of a full-scale investigation is the identification of evidence and potential sources of such evidence.

Accordingly, an agency should analyse and assess information and evidence gathered during the preliminary inquiry before embarking on a full-scale investigation.⁵

In light of this consideration, it can be useful for an agency to establish an investigative plan to assess the facts and evidence relevant to determining whether an offence has been committed. The investigative plan is a living document that should be revised throughout the life of the investigation.

There is no single model for investigative planning. It is a continuous process driven by the course of the investigation and should serve as a guide for the investigation. Accordingly, investigative plans should be revised and adjusted to reflect the developments in and the understanding of the case.

Two essential features are typically reflected in an investigative plan—the analysis of the target cartel and investigative environment, and the activities relevant to evidence-gathering.

3.3. Analysis of target cartel and features of the conspiracy

It is good practice to include the following in investigation planning:

- 1. The features of the suspected cartel;**
- 2. The proposed evidence-gathering strategy; and**
- 3. The administrative tasks and assignments for the investigation.**

The investigative plan is intended to serve as a guide to assist in developing the information necessary to prove the infringement, to test theories of the case and to evaluate the course of the investigation. The investigative strategy is thereby based on the analysis of the target cartel and the

⁵ Refer to sections 5.4.1 and 5.4.2 of chapter 4, 'Cartel case initiation', in the ICN manual.

investigative environment serves as a basis upon which the investigative strategy is set up.

Most importantly, the analysis of the target cartel and the features of the conspiracy include:

- summarising features of the target cartel
- analysis of evidence obtained through the preliminary inquiry
- forming a hypothesis or case theory
- testing the hypothesis against evidence as it is developed from time to time
- determination of evidence required to establish an infringement/violation
- determination of the most effective strategy to obtain required evidence
- consideration of the use of special powers to collect required evidence
- determination of businesses, persons and locations to be investigated.

3.3.1 *Summarising features of the target cartel*

It is good practice to use the information gathered in the preliminary inquiry and other additional information as a basis for investigative planning.

In the early stage of a full-scale investigation, agencies usually use information gathered during the preliminary inquiry to gain an understanding of the key features of the cartel. The early evidence and information-gathering about the infringement obtained through a complaint, leniency applications, informants, or any other method of detecting cartel conduct assumes an important role in determining the features of the cartel.⁶

In the early stages of a full-scale investigation, agencies may not initially communicate with individuals within the industry or individuals and corporations that may be implicated in the alleged violation, with the exception of leniency applicants. If additional information on the infringement is needed in the early stages (for example, to prepare covert operations, such as dawn raids or searches), agencies should take care to ensure that cartel participants are not prematurely alerted to the investigation.

The key features of the target cartel include the type of activity, affected product or service and cartel participants and their relationships. This process of determining the features of the target cartel is separate from the process of obtaining and verifying information of cartel violations during the preliminary inquiry.⁷ The main purpose of the former process is to identify the existence and source of relevant evidence.

Features of the target cartel frequently contained in an agency's investigative plan include, inter alia:

- subjects of the investigation (companies and individuals)
- the industry, commodity, or service involved
- duration of the conspiracy
- geographic area affected

⁶ Refer to section 3 of the chapter 4, 'Cartel case initiation'.

⁷ See sections 5.4.1 and 5.4.2 of chapter 4, 'Cartel case initiation', of the ICN manual.

- type of agreement or arrangement
- details of the cartel's operation
- how the cartel was implemented (e.g. by trade association or coordinators) and how cheating is 'policed.'

When the target cartel appears to use digital tools for monitoring and/or enforcement of agreed behaviors, the following features may be relevant:

- 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 prices etc.);
- Availability of market databases.

As an investigation proceeds, it is critical to revise and update the features of the target cartel in the investigative plan to ensure that it accurately reflects the evidence gathered at various stages of the investigation.

Although the method of formulating an outline, or summarised information, may differ according to the needs of respective agencies, it is generally regarded as a good starting point to use the 5W 1H method of inquiry:

- (1) Who (subjects of the investigation): identify the businesses and individuals related to the target cartel and their relationship to each other;
- (2) What (types of agreement or arrangement, product or service affected): identify the events or actions and affected product or service;
- (3) Where (geographic area affected): identify locations where cartel participants have held meetings and the geographic area affected by the cartel;
- (4) When (duration of the conspiracy): identify all time factors related to the target cartel, including the period of each business's participation in the cartel;
- (5) Why (motive of the conspiracy): identify causes for events or actions related to the conspiracy; and
- (6) How (the way the cartel operates): identify the sequence of events. The events include the role of trade association or coordinators in the cartel and how cheating was policed.

These six factors, explained in further detail below, are a good starting point when formulating an effective investigative plan.

3.3.1.1 *Subjects of the investigation*

Agencies should identify the participants of the suspected cartel, the industries in which the relevant companies operate, and the functional level at which they operate. Participants involved in a cartel often operate at the same level in the supply chain. Identification of the products or services involved is an important issue in understanding the affected industry. It can assist in proving the infringement

and during the sanctioning phase.

To make the list of subjects of the investigation as complete as possible, investigators should understandfully the commodity or service and the industry related to the target cartel. Understanding the affected industry enables investigators to understand the mechanism of the cartel behavior. Factors frequently examined by investigators include:

- major competitors in the industry
- the commodity or service affected
- degree of customer dependence on the suspected cartel participants
- pricing mechanism.

3.3.1.2. *Type of agreement or arrangement*

The type of the suspected cartel agreement can provide guidance on investigative planning related to evidence.

The outline of the cartel should contain the basic facts of the conspiratorial agreement. A cartel in simple terms is an agreement between horizontal competitors not to compete with each other.⁸ Typically, cartels involve an agreement on price fixing, output restriction, bid-rigging (collusive tenders) or allocating customers, suppliers, territories or lines of commerce. Cartels can occur in almost any industry and can involve goods or services at the manufacturing, distribution or retail levels.

Ascertaining the type or character of agreement at issue can be a difficult exercise. Agreements may be complex in nature, involving several parts that comprise the same overall agreement.

The features identified in respect of the target cartel should identify the agreement sufficiently to provide a basis upon which to establish the evidence gathering strategy.

The type of agreement under investigation is a critical factor that will assist in identifying the evidence necessary to prove the infringement.

Price fixing

The evidence section of the investigative plan for a price-fixing cartel should identify elements that would assist in determining the existence of the conspiracy. Key elements are likely to include:

- price lists, or industry wide or association price schedules
- price formulas, be it in written or digital forms (including computer programming code)
- price change notices
- meetings or telephone conversations among competitors
- exchanges of pricing information between competitors
- evidence of competitors monitoring or policing their agreement
- testimonies from members of the conspiracy

⁸ Refer to the ICN document, Building Blocks for Effective Anti-Cartel Regimes.

- documents, emails, or faxes that provide evidence of price fixing.

Market allocation

The evidence section of the investigative plan for a cartel involving market allocation agreements should focus on the allocation scheme implemented by the cartel members. Key evidence would include conspirator testimonies. Evidence indicating that a particular customer (or territory, supplier or line of commerce) is exclusive to a particular company or business may be indicative of market allocation agreements.

Output Restriction

Considerations for investigation of suspected output restriction cartels may include evidence related to means of production for the subject products, capital and lead time to develop production capacity, transparency of investment decisions or of output levels, marginal costs related to additional output, elasticity of demand.

Bid rigging

Bid-rigging activities often involve an agreement or arrangement among competitors that pre-determines the successful bidder and price of the successful bid. Sometimes potential bidders may agree to refrain from bidding on a particular project. In other situations, competitors may agree to take turns at being the successful bidder and rotate projects among themselves.

When investigating a bid-rigging cartel, the evidence section of the agency's investigative plan should identify elements that could assist in determining the existence of a bid-rigging conspiracy. Key elements are likely to include:

- industry-wide or association price schedules
- evidence indicating advance non-public knowledge of competitor's bids or pricing
- evidence indicating competitors have discussed bids or have reached an understanding about bids
- evidence indicating that a particular customer or contract is exclusive to a particular company or business
- similar spelling errors or similar handwriting, typeface or stationery in the proposal or bid forms submitted by competitors
- testimonies from members of the conspiracy
- wide spread subcontracting among the bidders
- discernable and predictable winning patterns
- marked differences in bids and/or bid patterns when a non-regular or newcomer bids.

3.3.1.3. Geographic area affected

The first step in examining the geographic area affected by the target cartel is to consider the agency's jurisdiction to investigate and take action against the alleged cartelists. The geographic area affected by the conspiracy also may be a starting point for determining the level of applicable fines.

3.3.1.4. Duration of the conspiracy

The duration of the conspiracy covers the life period of the cartel—that is, from the formation of the cartel arrangement to its conclusion. Cartel membership may change during the lifetime of the cartel. It is therefore necessary to identify the relevant periods of participation by the various cartel members as well as identifying the overall duration of the cartel.

3.3.1.5. Motive of the conspiracy

Identifying the cartel's motive is a good starting point in understanding the overall conspiracy scheme and will assist in gathering the evidence necessary to prove the conspiracy. Market conditions that exist before the formation of cartels may include, among many others, rapid price falls in the market.

3.3.1.6. How the cartel operates

Cartel participants tend to establish mechanisms to monitor each other in an attempt to prevent cheating.

Successful cartels typically develop sophisticated and flexible systems designed to manage the cartel. Identification of the cartel's monitoring mechanisms can often be a useful way to determine the key characteristics or elements of the infringement. For example:

- Mechanisms of monitoring output and prices:
 - the creation of a joint sales agency that allows cartel members to concentrate their activities and easily monitor each other's activities
 - trade associations and industry publications that report detailed market information
 - payments made between competitors.
- Other schemes to share information:
 - Use of a trust company or a secretarial company or individuals to assist in data collection.
- Internal organisational hierarchy:
 - Many successful cartels develop a system to implement cartel policies. Such a system may involve engaging high-level executives to determine the broad outline of the cartel agreement and working-level groups of managers responsible for the day-to-day implementation of the cartel.

- Communication mechanisms:

Cartel members tend to use sophisticated communication mechanisms. In setting out the investigative plan for gathering evidence, agencies should consider the various possible mechanisms for communication. For example:

- use of software to allocate markets and customers and to control output and sales
 - periodic exchange of pricing information to give effect to the cartel agreement
 - seminars or cartel courses for relevant employees
 - the establishment of steering committees and audit systems
 - the imposition of punishment on companies that do not comply with the cartel arrangements
 - communication through an intermediary (e.g. someone hired to manage the cartel).
- Agreements using digital technology:

The development of data collection and management technology allows competitors to develop new methods of interaction that create new challenges in terms of detection and analysis of potentially anticompetitive practices⁹. The evidence section of the investigative plan for a cartel using partially

⁹ On this issue, see for instance the joint study by the Autorité de la concurrence and the Bundeskartellamt on "Algorithms and Competition" (2019), as well as the CMA's study on "Algorithms: How they can reduce competition and harm consumers"

or in totality digital technology should identify elements that would assist in determining the existence of an agreement between competitors. Key elements are likely to include:

- Evidence of a common understanding or agreement between competitors to use the same pricing algorithm in order to fix prices;
- Consciousness of the existence of a collusion by algorithm provider/engineer;
- Existence of monitoring and adaptation capacities provided by Big data and algorithms used in the sector or industry;
- Existing level of market transparency allowed by certain digital tools.

3.3.2. Forming a hypothesis and/or theory of the case

It is good practice to consider and identify relevant evidence in accordance with the case theory.

Although it can be expected that an agency's theory of the case will be refined as an investigation continues, from the outset it should be well-defined. Relevant sections of anti-cartel legislation may provide guidance in characterising the alleged cartel. Some agencies include early development of the case theory and a determination of the evidence to be sought in the section of the investigative plan reserved for summarising the cartel's features.

3.3.3. Determination of evidence required

The standard of evidence required to prove a cartel differs according to jurisdiction and will largely depend on whether an agency is undertaking the investigation as an administrative, civil or criminal matter. The validity or admission of direct and indirect evidence and the approach to the admissibility of evidence obtained through surveillance also varies from jurisdiction to jurisdiction.

Investigative planning relating to evidence gathering should focus on:

- factual issues relevant to determining and proving guilt
- identification of any gaps in the evidence
- identification of any evidence needed to address critical issues, including any relevant documentary evidence
- potential sources of evidence
- identification of potential witnesses of fact and whether they should be interviewed.

The evidence required to prove an infringement will depend on the type of agreement or arrangement under investigation (see 'Type of agreement or arrangement', above), and frequently includes:

- price lists
- price change notices
- meetings or telephone conversations between competitors
- exchange of competitor pricing or bidding information
- testimonies from members of the conspiracy

(2021).

- documents, emails and/or faxes providing evidence of price fixing
- industry-wide or association price schedules
- evidence indicating advance non-public knowledge of competitor's bids or pricing
- evidence indicating that competitors have discussed bids or have reached an understanding about bids
- evidence of competitors monitoring or policing their agreement
- evidence indicating that a particular customer or contract is exclusive to a particular company or business
- evidence of competitors using (having used) special computer software (e.g. pricing algorithms and/or other digital tools) in order to fix prices
- similar spelling errors or similar handwriting, typeface or stationery in the proposal or bid forms submitted by competing bidders.

3.4. Investigative strategy

It is good practice to evaluate cooperation options and potential investigative powers (tools) as part of the investigative strategy.

Early analysis of the cartel and investigative environment should enable agencies to assess (i) the evidence obtained to date, and (ii) any further evidence needed to prove the case.

Having established the scope of the suspected cartel and the theory of the case, agencies will then determine their investigative strategies for resource allocation and effective evidence-gathering methods. An analysis of the evidence required to prove the offence will allow the investigation team to identify any gaps in the evidence gathered to date and will focus the investigation on acquiring any further relevant evidence from appropriate sources. Some agencies draft an outline of the evidence gathered (for instance, in 'an evidence matrix'), setting out an evidence trail.¹⁰ The evidence trail is a useful reference throughout the course of the investigation to determine whether the evidence obtained would be admissible in and likely to sustain adjudicative proceedings.

3.4.1 *Investigation tools and resources*

When determining the investigative strategy, an agency should consider any available tools or resources to maximise investigative capacity and knowledge of the case. Such tools or resources may include leniency programs and cooperation with other domestic agencies as well as foreign anti-cartel enforcement agencies.

3.4.1.1 *Leniency application*

Leniency applications are considered to be a source of direct evidence. Leniency applicants are particularly valuable because they can assist in identifying the target of the investigation and in prioritising the businesses, individuals, and locations for investigation. They are often able to offer valuable information throughout all stages of the investigation and are under a duty to cooperate fully throughout the full investigative proceedings.

3.4.1.2 *Cooperation with other domestic government bodies*

Some agencies have established formal and/or informal cooperation arrangements with other law

¹⁰ Refer to 4.4.2 of chapter 4, 'Cartel case initiation', of the ICN manual.

enforcement bodies for the detection or investigation of cartels.¹¹ Such arrangements may include basic information sharing—for example, information on specific conduct such as bid rigging or general market information such as import data.

In particular, agencies could consider exchanging and cooperating with national/regional/local procurement agencies, in order to signal relevant types of data which could be useful for antitrust investigations¹². Competition agencies could also benefit from the experience of Information and Communication Technologies (ICT) public agencies that may be present at national level and that could provide assistance to competition agencies on ICT issues in order to help them build their own internal expertise.

Issues of confidentiality, procedure and governing laws should be considered when cooperating with other domestic government bodies. In some cases, expectations for cooperation may be outlined within the framework of a cooperation agreement. When cooperating with other domestic government bodies, agencies should be mindful to ensure that cartel participants are not prematurely alerted to the investigation.

3.4.1.3. Cooperation with foreign anti-cartel enforcement agencies

Cooperation between agencies across the various jurisdictions affected by the cartel can be an important feature of full-scale investigations involving cross-border elements. Cooperation can involve coordination of simultaneous searches, raids or inspections; exchange of information; or gathering information and interviewing witnesses on behalf of another agency.¹³

The coordination of surprise inspections across relevant jurisdictions, particularly in the early stages of a full-scale investigation, has been reported as an effective way to minimise the potential destruction of evidence.¹⁴

Cooperation also plays an important role even in cases where parallel investigations are not being conducted in other jurisdictions. Other counterpart agencies may provide assistance by sharing information on a cartel that may be located outside the investigating agency's territorial borders. Information may also be available in relation to similar cartel behaviour in related, or even different, industries or country-specific regional or local cartels in the same industry. In such cases, it can be useful to secure cooperation from an agency in the jurisdiction in which potentially relevant evidence may be located.

Cooperation between anti-cartel enforcement agencies is often pursued through formal agreements or arrangements. An increasing number of agencies have established international agreements, which may include state-to-state cooperation agreements, inter-agency cooperation agreements and mutual legal assistance agreements, as well as competition-related provisions in bilateral free trade agreements.

The investigative plan should consider any timeframe issues for joint operations envisaged with other agencies, and other factors relevant to coordination.

3.4.2. Time constraints

The investigative plan should include a basic schedule that identifies tasks, assigns responsibilities and sets deadlines and timeframes for completion. Such a schedule ensures that time constraints (such as statutes of limitations) are taken into account appropriately. Some agencies also create case agenda, task lists or timetables with a similar purpose in mind. These tools will become more

¹¹ Refer to the ICN document, Building Blocks for Effective Anti-Cartel Regimes.

¹² Refer to ICN manual, chapter 10, "Relationship between Competition Agencies and Public Procurement Bodies".

¹³ Refer to the ICN document, Cooperation between competition agencies in cartel investigations.

¹⁴ Refer to ICN manual chapter 1, 'Searches/Raids/Inspections'.

important as staffing resources grow. Case agenda can take different forms such as a calendar or a 'to do' list.

In some cases, more than one method may be useful; in all cases, the investigation schedule should cover tasks to be accomplished, prioritising the most critical items. Agencies may also use software packages that assist with the creation of case agenda. Effective planning is important to ensure that all aspects of the investigation are accomplished within the prescribed statutory period.

3.4.3. Selecting voluntary and/or compulsory tools

Most agencies with compulsory powers to obtain evidence will generally use them because of the seriousness of cartel conduct and the efforts exerted by cartelists to hide or destroy evidence.

Some agencies have no compulsory powers to obtain evidence or information, and therefore rely on the voluntary cooperation of the parties under investigation and other market participants.

An agency may rely upon informal voluntary requests for information—both in the form of interviews and requests for documents—from the potential subjects of the investigation, other companies within the industry, customers, trade associations, and other sources. Voluntary requests may be useful to keep communications less formal, avoid the adversarial tone injected by the use of compulsory processes and expedite the collection of useful information. Reliance on voluntary requests for information may also be appropriate where the evidence already obtained is insufficient to justify the use of formal compulsory powers.

However, voluntary requests for information should be made with caution. Such requests may not always produce valuable evidence and may alert the cartel participants to the investigation, enabling them to conceal or destroy evidence before compulsory requests are issued. Accordingly, to minimise the risk of document destruction, where the agency has compulsory powers, it may wish to consider pursuing voluntary requests for information only after compulsory requests have proved problematic.

It should also be noted that under criminal regimes, there may be a need to provide proper warnings in relation to self-incrimination.

3.4.4. Choice of investigative tools may vary by type of proceeding

Whether action is being sought on a civil or criminal basis will have a direct bearing on the burden of proof and the choice and availability of investigative tools.

In some countries, cartels are investigated and prosecuted administratively. The principal administrative sanctions applied to this conduct are fines, usually only assessed against organisations but sometimes against natural persons, and remedial orders. In some countries, cartels are investigated and prosecuted criminally. The principal criminal sanctions applied to cartel conduct are jail time, fines for individuals and fines for companies.

Some jurisdictions have a mixed regime whereby civil, administrative or criminal options are available depending on the scope and type of suspected cartel. It is important when planning an investigation to determine the legal basis upon which the investigation is being pursued. In general, the burden of proof in a criminal case will be higher than that required in administrative proceedings.

3.5. Use of investigative tools at different stages of investigation

The success of an investigation often largely depends on the choice of investigative tools. Inappropriate choice of investigative tools may lead to the investigation being ineffective. The choice of investigative tools should be reevaluated as facts and evidence come to light during the course of the investigation.

Several factors may influence the choice of investigative tools at particular stages of an investigation.

Provisions in the general legal framework (such as constitutional law principles) may limit the use or introduction of a certain tool in a particular jurisdiction. The investigation will often become public knowledge once an agency takes formal action on the basis of official decisions, such as conducting a search, raid or inspection. Searches often prompt leniency applications or cooperation from cartelists, which may provide a valuable source of evidence. The element of surprise is often a key factor when conducting searches to ensure that all relevant evidence is secured.¹⁵

Accordingly, agencies will often conduct investigations in a discreet way before taking any formal public action.

Investigative tools can be divided into three categories:

- (1) Investigative tools for covert investigative actions.
- (2) Investigative tools for public investigative actions.
- (3) Investigative tools for corroboration of evidence.

3.5.1 Investigative tools relevant to covert investigatory actions

Agencies will often conduct their investigations in a covert manner before taking public investigative action such as dawn raids or searches. Conducting an investigation covertly ensures that the cartelists are not alerted to the investigation before the public searches begin, which reduces the opportunity for evidence to be hidden or destroyed. Accordingly, in the covert investigatory phase, with the exception of leniency applicants, agencies usually do not communicate with individuals within the industry, or individuals and corporations that may be implicated in the alleged violation.

3.5.1.1 Use of existing internal information

Before beginning any public investigative actions, agencies may already possess or have access to a wide range of internal information that may be relevant to the investigation. Such information may include

- (1) material from previous investigations or litigation, and (2) trade and industry data and information available through an agency's library or information supporting branch.

However, in some jurisdictions it is not appropriate to rely on evidence gathered during a prior investigation, particularly when criminal compulsory processes were employed to collect the evidence.

3.5.1.2 Publicly available information

Most agencies will use public sources to obtain evidence such as records of business meetings and sales price data etc. These sources may include online articles about relevant industries, companies and press accounts, and company websites. Some agencies access the homepages of suspected cartelists anonymously to prevent alerting the cartelists to the investigation.

In the context of bid-rigging practices, publicly available online databases collecting public procurement data¹⁶ may 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 on similar projects to gain a better understanding of the challenges and the

¹⁵ Refer to ICN manual chapter 1, 'Searches/Raids/Inspections'

¹⁶ See for instance existing projects such as The World Bank's Global Public Procurement Database and the European Open Tender project.

potential added value to be expected from this type of tools.

3.5.1.3. Electronic surveillance

Electronic surveillance is a practical investigative tool if the cartel under investigation is ongoing and the agency has sufficient information about the details of the cartel's operations. Electronic surveillance can provide valuable and powerful evidence of cartel activity and may be a viable option where an agency has secured insider cooperation to assist with the use of hidden recording devices. It should be noted, however, that in many countries national laws impose strict limits on the use of electronic surveillance as an investigatory tool, often restricting such use to criminal investigations. In addition, as electronic surveillance may involve significant costs and resources, it may be preferable to reserve use of this tool for the most serious and complex cartel cases.

3.5.1.4. Infiltration

Infiltration as an investigative tool may involve an agency sending an undercover agent inside an industry for a period of time to obtain evidence of conspiracy.

3.5.1.5. Involvement of lawyers, economists and industry experts

The involvement of lawyers, economists and industry experts at the early stages of the investigation may assist investigators in framing the most appropriate questions for subpoenas, voluntary requests, interviews or depositions.

3.5.2. Investigative tools for public investigations

3.5.2.1. Searches, raids or inspections

Many agencies consider searches, raids and inspections to be effective methods of gathering evidence. Searches, raids, and inspections can minimise the opportunity for document destruction and concealment, and can avoid deliberate or inadvertent failure to produce documents following an agency request.¹⁷

3.5.2.2. Management of digital evidence¹⁸

Nowadays, investigations almost always include evidence obtained on digital support. It is therefore advisable to incorporate in the investigative strategy some elements of planning on how digital evidence will be gathered, managed and treated. Agencies could for instance identify:

- Companies' computer system and infrastructure, software and hardware used;
- Companies' data/IT servers location;
- Availability of documentation, code and databases in company premises;
- Companies' purpose and use or degree of control over digital tools (including algorithms) that they may be using for monitoring and/or enforcement of agreed behavior among competitors;
- Companies' use of cloud computing services, including web-based e-mails;
- Likely volume of data to manage;
- Legal powers of right of communications, according to each jurisdiction's legal framework;
- Notion of publicly available evidence according to each jurisdiction's legal framework (e.g.

¹⁷ Detailed procedures and methods for conducting searches, raids and inspections can be found in chapter 1 of the ICN manual.

¹⁸ Chapter 3 of the ICN Anti-Cartel Enforcement Manual on Management of Electronically Stored Information develops these issues in more details.

status of web scraping activities).

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

- Capacity to analyze large data bases;
- 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.

3.5.2.3. Compulsory requests for information

Compulsory information requests can result in the production of valuable information. Agencies may consider requesting information from the alleged cartelists as well as other industry participants.

Agencies should first identify the parties to which it is appropriate to issue a request for information and should then draft the request accordingly. Unnecessarily broad requests for information may cause investigational delays because of the time required to respond. Agencies should take special care to

keep compulsory requests for information as specific and targeted as possible. Often a succinctly drafted document-production order with minimal instructions and definitions and a very limited number of requests can encourage a prompt response.

Items commonly requested under a document-production order include:

- corporate and financial information, including minutes of meetings
- documents indicating sales volumes
- sales invoices
- telephone records
- travel records
- calendars
- product and/or service information
- price lists
- documents and e-mails indicating communications between competitors.

Document-production orders are used by many agencies to clarify and confirm information obtained through other sources. Some agencies limit the use of document-production orders to documents that attract a small risk of alteration or destruction (such as financial statements), targeting documents with a higher risk of alteration or destruction in raids or searches.

In the context of bid-rigging practices, agencies may consider requesting information from procurement authorities. In particular, the level of development of e-procurement and electronic submissions/auctions, as well as the existence of structured databases run by procurement authorities, may be taken into account in the investigative strategy.

3.5.2.4. Offer to discuss problems with compulsory process recipients

Compulsory requests for information are often drafted with limited information about the way in which a respondent's documents are organised, their geographic distribution, accessibility and other factors relevant to setting a reasonable response date. To address any uncertainty, the compulsory

request may invite respondents to discuss the details of the request with an agency officer. Such an invitation for discussion may be an effective way to resolve any issues or uncertainties concerning the information requested.

3.5.3. Investigative tools relevant to corroborating evidence

3.5.3.1. Information from third parties

Information from third parties can assist agencies to obtain a better understanding of the relevant market, to gather evidence and to confirm information received from other sources. Third parties not associated with the cartel may include customers or suppliers of the cartelists. Sometimes agencies rely on information obtained from an immunity applicant to obtain documents from other cartel participants or third parties.

3.5.3.2. Compulsory interviews

Some agencies prefer to conduct interviews with relevant individuals on a voluntary basis.

In some circumstances, and where an agency has such powers, it may be necessary or desirable to compel individuals to appear in a compulsory interview.

Such circumstances are:

- interviews must be conducted quickly because of time constraints
- the individual concerned is willing to speak with the agency but wants to be compelled so that they are not seen to be voluntarily providing information an individual has a contractual or other legally binding confidentiality obligation, and compulsion is required to override that obligation
- the individual refuses to consent to a voluntary interview or tries to stipulate conditions that are not acceptable (e.g. privilege against self incrimination)
- the investigator suspects the interviewee may not be truthful in a voluntary interview
- the investigator wishes to confront the interviewee with a more formal environment to reinforce the need to give truthful accounts (e.g. with a leniency applicant)

Some jurisdictions impose confidentiality obligations on the interviewee to ensure that the content of the interview is kept confidential.

One drawback of a compulsory interview is that, in a number of jurisdictions, while interviewees, if immunized, may not decline to answer questions on the grounds that anything they say may incriminate them, anything they do say may not be directly admissible against that person (this is generally the case in criminal jurisdictions but not necessarily in a civil regime). However, incriminating documents supplied by that person in a compulsory interview may be admissible in some jurisdictions.

Despite the protections on self-incrimination being extended to the subjects of compulsory interviews, such interviews often allow collection of evidence that may be used against a company in subsequent legal proceedings. Further, compulsory interviews often unearth valuable information, providing the agency with leads to collect admissible evidence by other means and from other sources.

4. Evaluation

It is good practice to revise and adapt the investigation plan and strategy to reflect the evidence as it is obtained.

4.1. Adjusting hypothesis and the investigative plan as new evidence is obtained

The investigation team should evaluate the investigative plan and revise the theory of the case as new evidence comes to light.

Throughout the course of the investigation, the investigation team should evaluate the relevant issues, consider any emerging issues, assess evidence-gathering strategies and redistribute administrative tasks.

Periodic team meetings are an effective way to ensure that the investigative plan is kept up-to-date and incorporates all relevant issues. In particular, the investigation team should discuss the investigative plan at key stages of the investigation, such as prior to conducting dawn raids or inspections, interviewing parties, or following evidence evaluations.

4.2. Interim reports on the state of investigation

In addition to team meetings, agencies often hold more formal internal meetings periodically to update senior staff and decision-makers within the agency on the progress of the investigation. Such meetings can allow progress to be monitored and provide opportunities to discuss the theories underlying the investigation. Such meetings also may be held at critical stages of the investigation when decisions need to be made. Agency staff may prepare papers setting out updates, proof issues and case agenda for presentation and distribution at such meetings.

4.3. Completing the investigation and recommending administrative measures or civil/criminal suit

Once the investigation has been completed and an evaluation of enforcement options conducted, agency staff commonly prepare an internal staff paper that sets out recommendations for agency action (e.g. administrative measures, institution of civil or criminal proceedings) and the basis for such recommended action. Where enforcement action is recommended, the staff paper might include:

- a summary of offence
- details of the relevant legal provisions violated
- details of proposed corporate and individual defendant
- the product or services involved
- product distribution or functional levels involved and/or affected—manufacturers, wholesalers, retailers
- geographic market affected
- the amount of commerce affected (on an annual basis)
- the duration of the conspiracy
- a brief summary of the evidence outlining details of the formation of the cartel and cartel operations

- details of any legal risks or issues that may arise (e.g. statute of limitations, jurisdictional limitations etc.)
- details of any proposed settlements.