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Network

ANTI-CARTEL ENFORCEMENT MANUAL

CARTEL WORKING GROUP
Subgroup 2: Enforcement Techniques

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“Good Practices” from the
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INTRODUCTION

This document summarizes the good practices identified in each Chapter of the Anti-Cartel Enforcement Manual developed by the ICN Cartel Working Group. The Anti-Cartel Enforcement Manual is a compendium of the investigative approaches used by ICN Members possessing differing levels of experience. Each Chapter explores techniques employed at various stages of anti-cartel enforcement and identifies approaches that have proven effective and successful.

This compilation of good practices reflects key practices common to many of the competition agencies responding to surveys which formed the basis for the Chapters of the Anti-Cartel Enforcement Manual. “Good practices” are generally considered to be practices which work well in the jurisdiction(s) where they are applied, but which may or may not work well in the legal context of another jurisdiction, and, therefore, cannot necessarily be recommended for adoption by other ICN members. This compilation does not purport to present all of the possible practices, nor does it necessarily recommend these practices over others, as the appropriate choice of approach will depend on the circumstances of each particular situation.

CHAPTER 1: SEARCHES, RAIDS AND INSPECTIONS

<http://www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf>

SEARCHES¹ VS. OTHER INVESTIGATIVE TECHNIQUES

Searching as Tool of Choice

- It is good practice to consider whether to conduct a search within the context of available investigative tools and the facts and circumstances of the investigation.

ORGANIZING THE SEARCH

Planning

- It is good practice to engage in comprehensive planning prior to a search, including, as appropriate: identifying the premises to be searched, the type of evidence to be seized, and the composition of search teams; assigning responsibilities during the search; undertaking covert reconnaissance of the search venue; and coordinating with other entities that will participate in the search.
- It is good practice, where permitted, to ensure the search authorization covers moveable objects such as briefcases, handbags, electronic diaries, and portable computers.
- It is good practice to precede searches with thorough briefings for team members.
- It is good practice to prepare “search kits” ready-packed with stationary, seals and other necessities for team members.

Search Team Composition

- It is good practice to consider requirements such as language, gender, and information technology capacity in the team’s composition.
- It is good practice, when resources permit and having regard to the nature of the premises to be searched, to include both male and female personnel on search teams (particularly when a private residence is to be searched).
- It is good practice for the officers assigned to the case to participate in the search, and for the team to be augmented with other officers and experts, as appropriate.
- It is good practice to ensure the appropriate resources are available on a stand-by basis to aid the search team if necessary (e.g., legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).
- It is good practice to appoint a Team Leader who will be responsible for the overall conduct of the search at a premises.
- It is good practice, in the instance of simultaneous raids, to plan for a central command post to coordinate the sharing of emerging information and strategies among the search teams and ensure overall consistency of approach.

Training

- It is good practice to offer training programs to professional staff involved in conducting searches.

¹ In this document, the term “search” includes “inspection” and “raid” and is intended to describe any type of “on-the-spot” investigation where the agency, police, or other designated enforcement body examines, copies and/or removes relevant paper and electronic records from a premises.

TIMING

Sequential or Simultaneous Searches

- It is good practice to conduct searches with the element of surprise.
- It is a good practice to make entry simultaneously with search teams on other premises, and equip each Team Leader with a mobile phone and the numbers of a central command post and/or all other relevant Team Leaders in order to enable continuous coordination.

Coordination with other Agencies

- It is good practice, where appropriate, to communicate and coordinate with relevant foreign competition authorities.
- When coordinating with relevant foreign agencies, it is good practice to communicate early in the investigation and on a regular basis.
- It is good practice, when two agencies have the same leniency applicant, to request waivers of confidentiality from the leniency applicant as early as possible.

ARRIVAL AT PREMISES

Entry

- It is good practice to preserve the element of surprise during entry by not disclosing your precise purpose to a receptionist.

Presentation of Warrant²

- It is good practice for the Team Leader to furnish a copy of the search authorization to a senior company official, explain the nature of the search, and caution against obstruction.

Requests to Delay the Search

- It is good practice, if acceding to a request to delay searching, to first ensure that the premises have been adequately secured so the delay does not prejudice the outcome of the search.

CONDUCTING THE SEARCH

General

- It is good practice to be courteous and diplomatic.

Note-taking

- It is good practice to make accurate notes of the events and occurrences as they occur at the search premises.

Securing the Premises

- It is good practice to secure the premises and take necessary steps as soon as possible in order to avoid the loss or destruction of evidence.

Taking Statements During the Search

- It is good practice to ensure that a strategy is in place as to who will conduct the interviews, and that complete notes are made of the interviews.

² Where searches are conducted under some type of advance authorization, the term “warrant” is used to describe the order or documentary authority under which the search is conducted. For ease of reference, “warrant” is used instead of “inspection order,” “inspection decision,” or “search authorization.”

Unauthorized Removal or Destruction of Records

- It is good practice to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.

SEIZURE

Selection, Examination and Seizure of Records

- It is good practice to triage the documents in order to ensure that only documents relevant to the warrant are seized.

Document Identification

- It is good practice to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized.

Document Review

- When business representatives are permitted to review their own seized documents, it is good practice to conduct the review in a controlled fashion in order to maintain continuity of possession of the documents.

Transporting Records to the Agency's Offices

- It is good practice to deliver all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.

DEALINGS WITH COUNSEL TO PARTIES AND THE MEDIA

Parties' Lawyers

- During the execution of a search, it is good practice to designate one person (e.g., the Team Leader) to communicate with the parties' lawyers.

Media Contacts

- It is good practice to consider, before the search is carried out, what the authority's press line should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).
- It is good practice to designate one spokesperson to respond to media enquiries.

BACK AT THE AGENCY

- It is good practice, where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search.

CHAPTER 2: DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY PROGRAM

<http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>

DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY PROGRAM³

Availability of Leniency

- It is good practice to make leniency available both where the agency is unaware of the cartel and where the agency is aware of the cartel but the agency does not have sufficient evidence to proceed to adjudicate or prosecute.

PRACTICAL ASPECTS IN ADMINISTERING AN EFFECTIVE LENIENCY PROGRAM

Marker Period

- It is good practice to use markers in the leniency application process because time is of the essence in making a leniency application. It is also good practice to grant extensions to marker periods where an applicant is making a good faith effort to complete its application in a timely manner.
- It is good practice to ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel.

Leniency Requirements

- Requirements for leniency should include full and frank disclosure and ongoing cooperation by the applicant, and if applicable, the applicant's directors, officers and employees.
- There should be maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency, and the roles, responsibilities and contact information for officials involved in the implementation of the leniency program.

Dealing with Second and Subsequent Applicants

- It is good practice to provide for lenient treatment (less than full leniency) for second and subsequent cooperating cartel members.

Other Jurisdictions

- Where applicable, it is good practice for agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred.
- It is good practice for competition enforcement authorities to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed. This may assist coordination between agencies.

³ In this document "leniency" is used to mean total immunity and "lenient treatment" to mean less than full immunity. A competition agency's decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. A "leniency policy" describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency program, which also includes internal agency processes, for example on how the agency implements its leniency policy, including processes for conferring leniency and/or lenient treatment.

Protection of Information

- It is good practice to keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver, the agency is required by law to disclose the information, or the leniency applicant discloses its application.

Closing an Investigation where there is a Leniency Applicant

- It is good practice to ensure that certainty for applicants is maintained where investigations involving leniency applicants are closed.

Bifurcated Enforcement Models

- In a bifurcated system, where different authorities are responsible for the investigation and prosecution of cartels, respectively, it is important that the authorities have consistent leniency policies, a shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity, and open and constant communication.

Parallel Civil and Criminal Models

- In a parallel system it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential applicants.

EDUCATION AND AWARENESS RAISING

- It is good practice to encourage leniency applications through education and awareness campaigns.

CHAPTER 3: DIGITAL EVIDENCE GATHERING

<http://www.internationalcompetitionnetwork.org/uploads/library/doc627.pdf>

RESOURCES FOR DIGITAL EVIDENCE GATHERING

Staff

- It is good practice to have a dedicated internal organisation or staff capacity to undertake digital evidence gathering.
- It is good practice for officers and forensic specialists to work closely during all stages in the gathering of digital evidence.

Training

- It is good practice to give special training to the agency's staff that collect and process digital evidence.

Co-operation with other Public Agencies

- It is good practice to describe the scope and nature of cooperation with other public agencies in a protocol.

ELEMENTS OF DIGITAL EVIDENCE GATHERING

Tools (Software and Hardware)

- It is good practice to use tools that are thoroughly tested and generally accepted in the computer forensics field.

Gathering

- It is good practice to document every step taken in the digital evidence gathering process.
- It is good practice to seek the company's systems administrator's cooperation as the administrator is generally an important person with regard to digital evidence gathering.
- It is good practice to solicit information about the computer systems, devices, access codes and practices and procedures for backups, destruction and retention of digital information.

Obstruction

- It is good practice to establish control of the company's digital information in order to prevent destruction of digital information and evidence.
- It is good practice to have digital evidence gathering practices and procedures that inhibit and help prevent destruction of digital evidence and obstruction.

Processing

- It is good practice to work on duplicates and not on the originally-acquired digital information for ensuring the chain of custody / evidence.
- It is good practice to keep data and forensic images until the case is closed, all defendants are successfully prosecuted, or all appeals are exhausted.

LEGAL ISSUES CONCERNING DIGITAL EVIDENCE GATHERING

General

- It is good practice to be cautious in drafting the scope and wording of terms in search warrants or record production orders.
- It is good practice to keep in mind the principle of integrity and authenticity of digital evidence during the entire proceedings.

Legally Privileged and Private Digital Information

- It is good practice to have a systematic approach for the review, selection and handling of privileged and private and potentially privileged and private digital information.

CHAPTER 4: CARTEL CASE INITIATION

<http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf>

METHODS OF DETECTING CARTELS

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

Reactive Methods of Detecting Cartels

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

Proactive Methods of Detecting Cartels

- It is good practice 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 as permitted by applicable laws, treaties and/or cooperation agreements.
- 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.
- 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 a source for the initiation of a formal investigation.

PRE-INVESTIGATORY PHASE OF CARTEL ALLEGATIONS

Methodologies

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

Complainants

- 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.
- 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.

Evaluating Cartel Allegations

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

Involvement of other Government Agencies

- It is good practice for agencies 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**Case Selection and Prioritization**

- 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.
- 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 prioritisation 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.
- 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 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.
- 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.

Timeliness

- 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.

Planning and Tracking Investigations

- 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.

Managing and Protecting Documents

- 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.

CHAPTER 5: INVESTIGATIVE STRATEGY

<http://www.internationalcompetitionnetwork.org/uploads/library/doc344.pdf>

ESTABLISHING THE INVESTIGATIVE STRATEGY

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.
- 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.
- It is good practice to use the information gathered in the preliminary inquiry and other additional information as a basis for investigative planning.
- The type of the suspected cartel agreement can provide guidance on investigative planning related to evidence.
- It is good practice to evaluate cooperation options and potential investigative powers (tools) as part of the investigative strategy.

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.

EVALUATION

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

CHAPTER 6: INTERVIEWING TECHNIQUES

<http://www.internationalcompetitionnetwork.org/uploads/library/doc345.pdf>

PRE-INTERVIEW PREPARATION

Interview Plan

- It is good practice to prepare a written plan of the topics/areas and questions that it is intended to cover during the interview to ensure that all the relevant issues are addressed during the interview.

Interview Team

- It is good practice to ensure that, where possible, the interview team consists of two persons, thereby ensuring that more information is retained and recorded

Interview Timing

- It is good practice to allow more rather than less time, when estimating how long an interview may take.

CONDUCTING THE INTERVIEW

Questions

- It is considered good practice, where jurisdiction rules allow, to ask an 'omnibus question' of an interviewee.⁴

INTERVIEWING CONSIDERATIONS

Deception

- The best method of proving deception is by way of concrete evidence, so, it is important for investigators to keep an open mind before and during the interview.

POST-INTERVIEW: EVALUATION AND FOLLOW UP

Evaluation/Debriefing Interviewers

- It is good practice to review the performance of the investigators and the results of interviews to ensure that all relevant information and evidence was obtained, new information is properly recorded and stored for future use, and the future strategy/direction of the investigation is reviewed in the light of any new information/evidence.

Storage

- It is good practice to have protocols in place to ensure the safe and secure storage of documents, evidence, and exhibits. Local law or procedure also determines the methodologies to be used.

⁴ That is, whether the witness is aware of any other cartels or illegal anticompetitive practices.