

COMPETITION CASES FROM A JUDICIAL PERSPECTIVE



Regional Training Workshop for Commissioners of Competition Authorities in the Caribbean

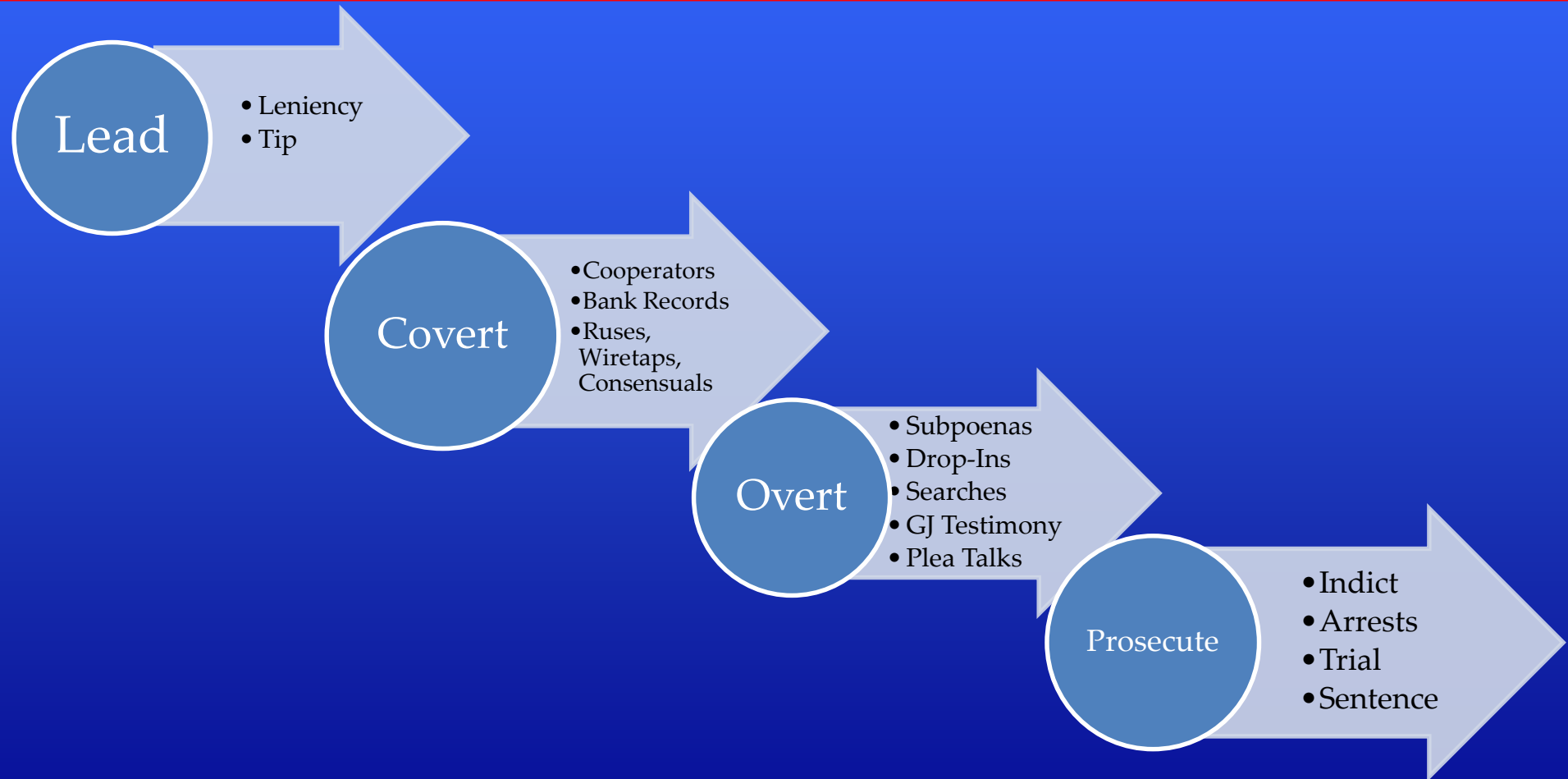
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Steps and Plans

THE INVESTIGATION

INVESTIGATIVE STEPS



BEGINNING THE INVESTIGATION: OTHER ENFORCERS

- **International cartels may be investigated by multiple competition authorities**
- **Consider:**
 - Ability to share information
 - Can share information regarding leniency applicants with a waiver
 - Coordination of investigation
 - Timing of raids & searches

BEGINNING THE INVESTIGATION: CONSIDER COVERT STEPS

- **Benefits:**

- Learn industry & players
- Learn nature & scope of conspiracy
- Identify sources of evidence

- **Risks:**

- Investigation uncovered
- Evidence corrupted or destroyed

- **Need a contingency plan in case of leaks**

EVIDENCE GATHERING: INVESTIGATIVE TOOLS

- **Covert Tools**

- Consensual Recording — Telephone and Body Wires of Conversations/Meetings
- Subpoenas/search warrants for telephone or email records
- Wiretap
- Undercover
- Knock and talks
 - But risk of overtaking investigation

EVIDENCE GATHERING: INVESTIGATIVE TOOLS

- **Overt Tools**
 - Raids — offices and homes
 - Subpoenas for documents and/or testimony
 - Witness interviews

Pros and Cons

Key Objectives

DAWN RAIDS

OVERVIEW

- **Dawn Raids: One of Many Investigative Tools**
- **Dawn Raids: Identifying Key Objectives, Benefits & Costs**
- **Practical Considerations**

BUT FIRST: TERMINOLOGY

- Search Warrants=Dawn Raids

WHETHER TO SEARCH?

- **Consider factors:**
 - Where is the evidence located?
 - Can you meet the legal standard to search?
 - What are the investigative alternatives?
 - Manpower cost/benefit analysis
 - Pre-search
 - Search Day
 - Post-search

BENEFITS

- **Best access to unsanitized evidence**
- **The fact of a search signals the U.S. already has a substantial amount of evidence**
- **Effect magnified if other international law enforcement agencies conduct simultaneous raids**
- **Simultaneous unannounced “drop in” interviews can result in useful admissions**

SURPRISE

COSTS

- **Legal Standard for Search Warrant**
- **Resource-intensive**
- **Risk of Leaks**
- **Lose covert options**
- **Planning, preparation and determining nature of evidence**
 - What electronic evidence are you looking for?
 - Servers, offsite storage, data backup locations?

LEGAL REQUIREMENTS IN THE U.S.

- **Develop sufficient facts for probable cause**
 - Crime; search location; evidence to seize
- **Affidavit [FBI or Other Law Enforcement]**
 - Multiple search locations
 - Types of documents to seize
 - Seizure of ESI -- servers, computers, cell phones, tablets, removable storage devices . . .
- **U.S. District Court Magistrate – Issues search warrant upon finding of probable cause**
 - File under seal

DAWN RAIDS

- **Seize documents**
 - Multiple sources and locations simultaneously
- **Seize electronic evidence**
 - Server evidence
 - Computers, smart phones, storage devices
- **SURPRISE**

Practical Considerations

EXECUTING SEARCH WARRANTS

PLAN THE SEARCH

- Search Plan
- Search Teams
- Computer Forensics
- Interview Teams
- Coordinator

CONSIDERATIONS BEFORE THE SEARCH

- **Maintaining Secrecy**
 - Maintain element of surprise
 - Don't leave digital footprints!
 - Don't use networked computers
- **Safety**
- **Timing**
- **Locations**
- **Arrests**

WHEN?: SELECTING THE SEARCH DATE

- **Considerations in selecting the date**
- **Risk of leak**
- **Coordinating the search team(s)**
 - Interview teams
- **International Case – coordinating all countries**
- **Upcoming event that would draw culpable executives into the U.S.**
- **Other investigative opportunities**
 - Still in process?

WHAT TO LOOK FOR?

- **Conspiratorial Evidence**
- **Economic Evidence**
- **Corporate Structure**

WHAT CONDUCT?

- **Price-Fixing**
 - Competitor meetings
 - Confirming agreement
- **Bid Rigging**
 - Written bid responses, auctions, etc.
 - Pre-arrangement
- **Conspiracy**
 - Communication channels
 - Enforcement of conspiracy
 - Co-conspirator roles
- **Obstruction of Justice**
 - How deletions were made?
 - Instructions to destroy records
 - Knowledge of the investigation

WHERE TO SEARCH?

- **Premises**
- **Briefcases**
- **Storage containers**
- **Computers**
 - CPU
 - Laptops
- **Out Buildings**

WHERE TO SEARCH?

- **Email**
- **Phones**
- **Notebooks or Yearly planners**
- **Calendars**
- **Travel Records - Passports**
- **Correspondence files**

ELECTRONIC EVIDENCE

- **Email And Other Computer Programs**
- **Electronic Storage**
 - Network? Where?
 - CPUs?
 - Maximum Storage Space for E-mails and Attachments?
 - Auto-delete Function Or Accessible?
- **Corporate Document Retention Policy**

Witnesses & Documents

EVIDENCE GATHERING

EVIDENCE GATHERING: WITNESSES

- **Voluntary Witness Interviews**
 - Field Questioning (“Knock and Talks”)
 - Pre-arranged interviews
- **Grand Jury Testimony – Testimony Under Oath**

EVIDENCE GATHERING: WITNESSES

- **Who we talk to:**
 - Informants
 - Former Employees of Subject Companies
 - Competitors of Subjects
 - Subjects
 - Customers (victims)
- **General rule: witness order – work from the bottom up or the outside in**

EVIDENCE GATHERING: WITNESSES

- Documents rarely tell the whole story
- Witnesses can explain documents, fill in gaps, corroborate other witnesses
- Work from the “bottom up” or the “outside in”
 - Former employees
 - Lower level witnesses

GOALS DURING WITNESS INTERVIEWS

- **Elicit answers that will lead to:**
 - Better understanding of the scope of the conduct
 - Evidence against each witness on the elements of the offense
 - Leads about other potential witnesses and existence/location of “hot” documents

BASIC PRINCIPLES

- **Remember the point of the interview is to obtain accurate & reliable information**
- **Be open minded**
 - Often best to start with open-ended questions and let the witness tell his story
- **Treat subject fairly**
 - Especially the vulnerable
- **Not required to accept first answer**

EVIDENCE GATHERING: DOCUMENTS

- Requests for Documents
- Voluntary requests
- Grand Jury Subpoenas (compulsory)
- Search Warrants/Dawn Raids

TYPES OF DOCUMENTS TO SEEK

- **Corporate Structure**
- **Identifying Information on Officers, Directors, and those Responsible for Pricing Decisions**
- **Trade Associations**
- **Competitors**
- **Customers**

TYPES OF DOCUMENTS TO SEEK

- **Calendars, Appointment Books, Travel Records, Expense Records, Telephone Logs, Passports**
- **Agreement Documents**
- **Contact/Meeting Documents**
- **Price Lists/Announcements**
- **Market Studies**
- **Annual Reports**

TYPES OF DOCUMENTS TO SEEK: EMAILS, TEXTS, CHATS

- **Most powerful documentary evidence in most contemporary litigation**
- **Direct evidence: documents that memorialize illegal agreements or constitute steps in the conspiracy**
- **Often the best evidence in U.S. prosecutions, the “smoking gun”**
 - Lead to plea agreements
 - At trial, contemporaneous documents negate defense impeachment tactics
- **Circumstantial evidence: establish knowledge/familiarity, motive, eliminate defenses**
- **Expert analysis of metadata can establish compelling evidence of knowledge, involvement**

TYPES OF DOCUMENTS TO SEEK

- **Communications with Competitors**
- **Pricing Documents**
- **Documents Referencing Geographic Areas**
- **Bid Documents**
- **Invoices**
- **Payments from Customers**

CORPORATE STRUCTURE

- **Organizational Charts**
- **Internal Directories**
- **Annual Reports**
- **Financial Statements**

HYPOTHETICAL EXERCISE

HYPOTHETICAL: STEEL PIPE CARTEL

- **American Pipe and Steel Works manufacture steel pipes for use in oilfields, refineries, water works, and other heavy industrial uses. Customers include private companies, NGOs, and governments.**
- **You learn of vague allegations that, starting in 2013, American Pipe and Steel Works allegedly engaged in a worldwide price-fixing and market allocation cartel relating to steel pipes, which was implemented by rigged bids (coordinated tenders) to purchasers.**
- **Pursuant to the agreement, American Pipe was allocated North American and South American markets, and Steel Works was allocated Europe, Central Asia, and the Middle East.**

HYPOTHETICAL: STEEL PIPE CARTEL

- **By late 2015, however, the alleged cartel appears to fall apart as Japan-based Pipe Bender launches an aggressive sales and marketing push into a new territory, North America, which had historically been dominated by American Pipe. Pipe Bender also aggressively markets its products in North Africa and the Middle East. Prices begin a steep drop worldwide.**
- **By mid 2017, prices for steel pipes all start trending upwards, and Pipe Bender stops bidding on projects in North America, North Africa, and the Middle East.**
- **The market soon stabilizes, and American Pipe is the primary bidder for projects in North America, Pipe Bender is the primary bidder for projects in Asia-Pacific for Pipe Bender, and Steel Works is the primary bidder for Steel Works.**

HYPOTHETICAL: STEEL PIPE CARTEL

- You learn of January 2017 trade show attended by executives from American Pipe, Steel Works, and Pipe Bender.
- Executives from the three companies had an informal dinner while at the trade show.
- Attendees
 - Danielle Hardy, American Pipe's Vice President of Global Sales and Marketing
 - Kurata Hiroto, Pipe Bender's Vice President of Global Sales and Marketing
 - Lukas Modrić, Steel Works' Director of Sales for Europe

POTENTIAL INTERVIEWS

- Who do you want to interview? In what order?
- What do you hope to learn from the interviews? What strategies will you use in your questioning?
- What questions will you ask?

Possible Sentences &
Collateral Consequences

Calculating Harm

CONSEQUENCES OF CRIMINAL VIOLATIONS

MAXIMUM CRIMINAL PENALTIES

- **Individuals**

- 10 years imprisonment;
and/or
- \$1,000,000

- **Corporations**

- \$100,000,000, twice the gain,
or twice the loss, whichever
is more

ADDITIONAL CONSEQUENCES OF CRIMINAL CONVICTION

- **Restitution**
- **Probation**
- **Treble Damages in Civil Suits**
- **Debarment**

ESTIMATING HARM IS DIFFICULT

- Understanding “but for” world of what prices would have been
 - When did the cartel conspiracy begin or end?
 - Changes in costs and demand over time?
 - Data difficulties

VARIOUS WAYS TO ESTIMATE HARM

- **Using prior studies**
- **Before-and-after method**
- **Yardstick method**
- **Econometric (statistical) analysis**

ESTIMATING HARM

- **Using prior studies**
 - Assume that the cartel's price effect is similar to the average effect from prior cartels
 - Of course, some cartels are more successful than others, and some likely fail completely

ESTIMATING HARM

- **Before-and-After Method**
 - Compare prices during the cartel period to a benchmark period (before or after) indicative of what prices would have been absent the cartel
 - Difficult to obtaining reliable data
 - Difficult to determine proper time period
 - Imperfect estimate because prices may change because of reasons other than cartel

ESTIMATING HARM

- **Yardstick Method**
 - Compare change in prices in cartelized market to change in prices over the same period in non-cartelized market
 - Prices should be more positively correlated before and after cartel period than during cartel period
 - Difficult to get data before, during, and after cartel period
 - Non-cartelized market may have different supply/demand conditions than cartelized market

ESTIMATING HARM

- **Reduced Form Estimation**
 - Use econometric (statistical) analysis to estimate a model of how prices are affected by various factors
 - Can potentially deal with weaknesses of previous methods by accounting for non-cartel factors that affect prices
 - The estimated equation relates prices in the cartelized market to factors that explain the variation in prices over time. For example,
 - changes in demand
 - changes in input costs
 - interruptions in supply
 - regular seasonal variation
 - general price inflation

U.S. APPROACH

MAXIMUM FINES AND JAIL TIME

- **Maximum individual fine**
 - \$1 million or twice the pecuniary gain or loss under 18 U.S.C. § 3571(d).
- **Maximum corporate fine**
 - \$100 million or twice the pecuniary gain or loss under 18 U.S.C. § 3571(d).
- **Maximum jail time**
 - 10 years

U.S. SENTENCING GUIDELINES

Courts consider U.S. Sentencing Guidelines

- They reflect application of the other factors by an expert commission
- Specific guideline for specific offense
- Applying Guidelines yields guideline ranges for fines and jail terms
- Guidelines once mandatory, now advisory

U.S. APPROACH

EASY TO USE PROXY FOR HARM

- Instead of complex estimations of harm, fines are keyed to a straight-forward proxy
- Volume of affected commerce attributable to defendant is key factor under Guidelines
- Sentencing Guideline 2R1.1(d)(1): Base Fine used as the proxy for loss is “20% of the affected volume of commerce.”

CARTEL PENALTIES UNDER THE SENTENCING GUIDELINES

Individual Fines

For individuals, fines are 1-5% of volume of affected commerce but not less than \$20,000

- Example: Fixed price of \$45 million in commerce and no other aggravating or mitigating factors
 - Fine range \$450,000 - \$2.25 million
 - Likely inability to pay problems

CARTEL PENALTIES UNDER THE SENTENCING GUIDELINES

Corporate Fines

Base fine: 20% of volume of affected commerce

- Rationale: Estimated average gain from price-fixing is 10% of the selling price
- Double that estimate because the loss from price-fixing exceeds the gain
 - because, among other things, consumers who cannot or do not buy the product at the higher price suffer injury

Base fine is adjusted based on mitigating or aggravating factors

- But minimum fine of 15% of affected volume

PROCEDURAL FAIRNESS IN DETERMINING PUNISHMENT

- Defendant has right to counsel
- Defendant has right to review evidence
- Defendant has right to confront witnesses (in court questioning and access to information that the prosecution has about those witnesses)
- Defendant has right to appeal sentences

QUESTIONS?

