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ANTI-CARTEL ENFORCEMENT MANUAL

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Chapter
Interviewing techniques

6

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INTRODUCTION

The purpose of this chapter is to examine the question of interviewing and its place and importance in cartel investigations. It attempts to draw together established practices, research and law on the subject of interviewing and to highlight the experiences of a number of agencies who have contributed to the compilation of the chapter. However, as with previous chapters, the relevance of some sections of the chapter will largely be determined by the legal environment that governs each individual agency's enforcement policies and activities. The aim of the chapter is to be as inclusive as possible and provide information to ICN members for their own consideration and assessment in light of the legal principles that apply to them.

Organisation of the chapter

The chapter is divided into three parts:

1. **Pre-interview preparation** explores various methods and issues that a competition agency might use and consider in preparing for an interview in cartel cases.
2. **Conducting the interview** provides a look at some of the issues which may have an effect on and determine the success or otherwise of interviews. It will also take a brief look at some of the more popular interviewing methodologies that are used in practice.
3. **Post-interview evaluation and follow-up** looks at the issues to examine after the interview has taken place, including, analysis of interview, transcription of notes, evidence storage and assessment of next steps in the investigation.

Each of the sections will include a number of suggested 'good practices' which summarise and highlight techniques and or practices, which have been recommended as particularly useful by a number of member agencies. The *ICN Anti-cartel enforcement manual* remains a work in progress. The sources consulted to create this chapter include proceedings from various international cartel conferences and workshops, psychological research books, journals and papers. The text also reflects the contributions of ICN member agencies. These contributions and the overall comments from member agencies have been captured in the text to the extent possible. In some instances, agencies provided specific additional information and where possible, this additional information is included in the chapter.

TERMS AND DEFINITIONS

There are many definitions of exactly what constitutes an interview, but it may best be described as a conversation with a purpose. The purpose of the interview, from the interviewer's perspective, is to obtain as much reliable and relevant information and/or evidence as possible. Interviews can range from the informal, where an investigator meets with someone and takes the opportunity to speak with them about an aspect of the case, to the more formal which may take place in an official setting where counsel may perhaps be present and the conversation electronically recorded or transcribed. The precise format of a formal interview will obviously be jurisdiction-specific.

The approach taken to any interview will depend on a number of factors, including but not limited to:

1. the available evidence and information
2. the status of the interviewee (immunity/leniency applicant, informant, individual with knowledge, employee, company officer, director, manager; suspect, target, third-party, whistleblower, witness)
3. the status of the investigation at the time of the interview (preliminary inquiry, inquiry to which legal process has attached)
4. whether evidence will be developed to a criminal or civil standard and whether individual culpability is possible
5. the rights and responsibilities of the interview participants.

In terms of value to investigations and any subsequent court hearings, eyewitness testimony and confessions are generally considered to be the most persuasive evidence. In some jurisdictions, the process of conducting interviews is one of the most frequent tasks undertaken by some competition agencies in the investigation of cartels. Perhaps no skill is more important than the ability to ask questions and interpret the answers. Successful interviewing may be viewed as a combination of 'art' and 'science', a mix of individual interpersonal skills informed by a considerable body of empirical research about interviewing techniques. Successful interviews rely on both. The common starting point for any interview is preparation.

Several interviewing models, which have gained widespread international acceptance, will be referred to within the chapter. They include the PEACE model, the Reid technique, the cognitive model and others. The model an agency adopts will be informed by many factors including the legal framework relevant to law enforcement and specifically to competition law enforcement, as well as the role of investigators within that framework.

This chapter should not and does not seek to recommend any particular methodology, but rather offers a brief look at some that are used by ICN member countries for the sake of completeness. More information on the merits, or otherwise, of any model is easily accessible through the internet or many agencies offering training in this area.

Definitions

Accused

A person who has been formally charged with a cartel offence, either as a crime or a civil offence.

Arrest and detention

The seizing of a person, with legal authority, in connection with a crime. In some jurisdictions questioning of witnesses can and does take place in connection with alleged cartel activity while the person is under arrest and in custody. The circumstances of questioning a witness in custody will inevitably have additional procedural requirements that will require consideration prior to the arrest and questioning.

Questions asked and statements made by suspects and witnesses while in custody are likely to be subject to greater scrutiny by courts and legal challenges by defendants. The use and admissibility of evidence obtained from persons in custody are factors particular to each jurisdiction.

Complainant

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

Compulsion

The legal requirement on a person to follow a course of action. The precise method for compelling production of information or evidence will be jurisdiction specific.

Documents

National Competition Agencies (NCAs) often have formal definitions of documents that are used in summons and subpoenas and comprise a broad spectrum. As an example: in Ireland, documents are deemed to include

... all written material, including but not limited to: memoranda; letters; faxes; fax transmission sheets; e-mail and other communications recorded in any form or medium to include all notes; transcripts and minutes of meetings; conferences and telephone calls; all contracts, heads of terms and other agreements or arrangements; all appointment books, calendars, notebooks and diaries; all reports (whether prepared internally or by external parties), graphs and statistical information; and all trade publications, circulars, memoranda and recommendations issued, circulated or otherwise made available and all computer printouts, tallies and summaries. The term further includes all information stored in machine-readable form or accessible through computer or other electronic information retrieval systems, together with instructions and all other materials necessary to use or interpret such information.

Immunity/leniency applicant

An individual or company/undertaking that obtains assurances of non-prosecution or non-culpability for cartel offences in exchange for self-reporting, acceptance of responsibility and cooperation with on-going investigations and prosecutions. A number of jurisdictions worldwide now have some form of cartel immunity or leniency program.

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.

Interview

A formal or informal meeting between representatives of a NCA and an interviewee for the purpose of obtaining information and/or evidence in a cartel investigation.

Summons/subpoena

A legal request that compels under penalty of law the production of evidence in the form of testimony, written interrogatories or documents from an individual or legal entity.

Suspect

A person whom law enforcement personnel believe has committed a cartel violation.

Target

The subject of a cartel investigation, usually a suspect. In some jurisdictions special rules attach to those who have been identified as suspects or targets of the investigation, which may include being told of their status or being given an opportunity to respond to charges, allegations or evidence prior to being formerly charged with a criminal or civil violation.

Whistleblower

A person, usually an employee or ex-employee, who provides information regarding illegal cartel activities by his or her employer.

Witness

A person who has knowledge of or has observed something of value to an investigation.

or

A person who has knowledge or personal information relevant to an investigation.

PRE-INTERVIEW PREPARATION

Introduction

This part of the chapter discusses planning and preparing for an interview. Interviews are one of the most frequently performed and potentially effective evidence-gathering steps taken while conducting a cartel investigation. Whether you are interviewing a complainant, customer, competitor, expert witness or suspect, the primary objective is the same. That is, to obtain in an impartial and ethical manner, all of the information possessed by the interviewee that is relevant to the elements of the alleged offence or matter being investigated. Investing time to prepare for an interview can pay big dividends in terms of the quality of the evidence collected. By collecting facts, and testing and confirming their case theory throughout the interview process, investigators can gather the evidence required to determine whether sufficient grounds exist that a cartel offence has occurred and support any further enforcement action.

The section begins with a discussion of the importance of conducting research to prepare for an interview. Interview preparation must take into account the known facts and the theory of the case. These enable the interviewer to identify the key individuals or groups of individuals to be interviewed. The benefits of developing an interview plan are also discussed, as well as the methodology of an interview, selection of an interview team and the involvement of other law-enforcement agencies in the interview process. Finally, key logistical issues are highlighted, such as location, timing and the involvement of third parties. Good practices in the preparation of an interview are identified throughout.

Research before interviews

Without a doubt, research before interviewing is the most important aspect of effective questioning. Before posing the first question, investigators must be as informed as possible as to the facts of the case, the subject of the interview and all relevant background information about the interviewee. They should also understand the elements of the cartel offence being investigated and any relevant case law where the courts or tribunals have indicated what evidence constitutes proof of the offence.

A global view must be taken with regard to the interview and the level of information/evidence available. Where the complaint source is an anonymous complaint, there may not be very much industry-related information and intelligence available and consideration must be given to a whole host of matters such as: research into the industry under investigation, background, business models/practices, the main players, subsidiaries and business and personal relationships. In cases where there is an immunity candidate there will likely be a wealth of information available to the interview team—which, if properly evaluated will be of benefit in determining the issues and questions to be pursued

In terms of the facts of the case and the subject of the interview, an interviewer should be familiar with the overall theory of the case without discounting the possibility that different theories may evolve. Going into an interview without case knowledge is bound to be unsuccessful, despite the skill of the interviewer.

An interviewer should be informed about the interviewee's relevant personal data, their affiliation with other subjects of interest and their role in the alleged cartel activity. Other factors such as prior criminal convictions, responsibilities in the business/industry, their professional status, potential language and translation issues are likely to affect the level of co-operation, which may be forthcoming. Before the interview, this information can be used to develop an interview plan. During the interview, this information can be used to build rapport with the interviewee, as well as to ask questions and probe any inconsistencies. In certain jurisdictions and circumstances, it may not be possible to research all of these issues because of privacy legislation.

Before the interview investigators should gather and review any relevant documents that the interviewee may be able to speak to. Where national laws allow, these documents may be made available during the interview so that the interviewee can refresh their memory. In some jurisdictions, steps may have to be taken to conceal the source of the document. The interviewee can also identify the document and/or identify the person who is best able to speak to the document.

Who to interview

Investigators should remain open and flexible as they identify potential interviewees. They should be mindful that the theory of a case will evolve as new evidence is gathered. As the case develops, investigators will undoubtedly uncover additional information that may cause them to reconsider their investigative plan and their list of potential interviewees.

When deciding who to interview, investigators need to consider the value of the information that can be provided by a potential interviewee. Investigators need to assess existing information and determine if an interviewee can verify it or fill in any information gaps. Investigators should also consider whether an interviewee is available or willing to participate in an interview, as well as their competence and credibility.

Investigators also need to consider whether a potential interviewee is a witness or a suspect.

While a jurisdiction's law may differ, generally a person may be treated as a suspect if investigators:

- A. have some information that causes them to suspect that the individual is implicated in an offence contrary to relevant competition law or
- B. are attempting to obtain information that would incriminate the individual or
- C. do not suspect the individual, but realise that a court might find that there are objectively discernable facts that provide grounds to suspect the individual.

Investigators must be cognizant of the potential that a person originally perceived as being a witness might, as a result of information obtained during the course of an interview or investigation, become a suspect. Certain rights, such as the right against self-incrimination, may be triggered if the interviewee is deemed a suspect. Investigators should consult the relevant law in their jurisdiction before making such a determination. Once deemed a suspect, investigators may have to decide whether the value of that person's evidence as a witness is likely worth more than that person being a potential accused.

On its face, it may appear that all persons being interviewed in a civil cartel investigation would fall into the category of being a witness only. However, investigators must be aware of the possibility that those investigations may uncover anti-competitive conduct that may also be contrary to criminal law.

A person who is a suspect may have specific legal rights that must be respected during an interview, in order that the evidence obtained from them can be admissible in court.

Preparation of an interview plan

Flexibility is an important aspect of the interview process. Some experienced interviewers may argue that it is easier to conduct a flexible interview without scripting questions in advance. Alternately, many novice interviewers find that writing out questions before an interview helps them remain on topic and ensures that they do not miss any relevant points of discussion.

At the very least, it is a good idea to plan out topics or areas to consider before an interview. Some investigators may also find it beneficial to put their plan into writing. This can prevent the interviewer from getting lost and missing the opportunity to probe issues as needed. No matter what format is chosen for the interview plan, investigators should always be willing to adapt to new information as it is divulged.

If an interviewer wants to catch someone off-guard, it would be counter-productive to inform an

interviewee as to the direction of the interview and information being sought. However, in cases where the intent of the interview is to obtain background information relating to an industry/sector from say an 'insider' source, it may be useful to share the proposed agenda of that interview in order to ensure that the proposed interviewee is aware of the particular areas of interest and in a position to identify issues which may not have been apparent to the interviewer. Similarly, during the leniency/immunity process, the volume of information to be covered and knowledge of the applicant(s) may require more than a single interview and it may be necessary to provide background about the topics and areas to be covered in order to permit the witness to refresh his/her recollection before the interview and to permit counsel representing the witness an opportunity to appropriately prepare the witness.

Proper interview planning and research are undoubtedly useful. However, an interviewer must be open and flexible to process new and unexpected information as it arises. No matter the degree of preparedness, unexpected information may arise and an altered line of questioning may be required.

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.

The record of the interview—written or electronic

Accurate interview records are fundamental components of cartel investigations in some jurisdictions and may be a key to proving a cartel offence. An interview record can also form the basis for investigative or case management decisions and serve as a record of interviewer conduct, should questions arise. In some jurisdictions an interview record may also be used as evidence.

Some agencies accept oral proffers of information from leniency applicants. During an oral proffer, investigators should take special care in ensuring that the interviewee states all information clearly and that both interviewer and interviewee are in agreement on the nature and content of the information provided. Accuracy is critical in this situation as agencies rely on the information provided to assess the leniency application and to pursue an investigation into other participants of the alleged offence.

Interviews can be recorded electronically or through hand-written or typed notes. When deciding which method to employ, agencies should consider the cost and logistics involved, the potential impact on interview participants and any legal requirements pertaining to admissibility.

Hand-written notes created by agency personnel during or shortly after an interview are a convenient and efficient way to record an interview as long as the note-taker consistently and clearly records everything they have done, said, heard and observed. It may, however, be impossible for note-takers to take down every word that is spoken during an interview. This can be particularly true for cartel investigations, where witnesses are often describing numerous events that may have occurred over a long period of time. Furthermore, since notes are an individual recollection of what occurred during the interview, it is possible that notes taken by different investigators may be somewhat inconsistent. To minimise this problem, investigators may wish to designate a single, primary note-taker for the interview. If possible, the note-taker should be trained and aware of any relevant document creation policies. If accuracy and clarity are issues, investigators may also consider typing their notes or hiring a professional transcription service.

In certain jurisdictions a video or audio recording of an interview can be particularly compelling evidence during legal or administrative proceeding. In the event the witness recants on some material fact while testifying, the prosecutor may seek to have the video or audio recording admitted as evidence for the truth

of its contents. This may help ensure that the necessary evidence is brought before the courts, and is not held hostage by an uncooperative or hostile witness. A video recording will allow the trier of fact to assess the non-verbal communication of the interviewee and the interviewer's style of questioning. In other jurisdictions, such records will only be admissible where the interviewee is unavailable. Interviewees may need a certain amount of time to accept or become at ease with the fact that they are being taped and with the future effects of the tape. Interviewers can take time during the interview to discuss this issue and explain that the video recording is a way of protecting both interviewer and interviewee. It is likely that once an interviewee begins talking they will become more comfortable with the recording process.

Investigators should also consider a number of technical factors including lighting or camera angle. For example, research has shown that a change in camera angle can affect whether a confession is viewed as voluntary or involuntary at trial.¹

Finally, to ensure that technical issues do not interfere with the interview process interviewers should test all equipment beforehand and use a back-up recording method during the interview.

Selecting an interview team

When preparing for an interview it may be useful to assemble a team and assign specific roles to each team member including questioning the witness, taking notes and arranging logistics. Depending on the size of the case and the number of interviews to be conducted, it could be necessary to have more than one team. To build rapport and ensure consistency, the team that conducts an initial interview with a witness, should also conduct any subsequent or follow-up interviews with that person whenever possible.

The optimal interviewing team comprises two investigators—the investigator most familiar with the subject matter of the interview and the questions to be posed, should lead the questioning; the second investigator should keep a record of the interview and attempt to fill any gaps in the questioning that the lead interviewer may not spot. This approach allows each investigator to focus on the task-at-hand and prevents some of the difficulties that can arise when a single interviewer is responsible for simultaneously formulating questions, listening and recording responses. The two-person approach also allows investigators to take breaks and switch roles as necessary. For example, if one investigator leading the questioning fails to establish rapport or build trust with the interviewee, it may be necessary for the investigators to switch roles.

Interview teams of more than two people have the potential to overwhelm or intimidate the interviewee. By limiting the number of interviewers present for the interview an agency can also limit the number of personnel that may be required to testify about their interaction with the interviewee during any subsequent legal or administrative proceedings.

When deciding which team member should lead a particular interview, agencies should consider an investigator's experience and training. Successful interviewing is a skill that must be developed in an investigator. Training and experience are essential parts of the development process. It is important to ensure that all members of the interview team are familiar with agency policies and are trained in relevant interview techniques. If possible, an investigator should have the opportunity to observe an interview prior to leading an interview themselves.

While certain investigators in the team may have a natural flair for interviewing or significant expertise they will not necessarily be the best placed to lead an interview. An interviewer's familiarity with the case and their ability to build rapport should also be considered. For example, if an interviewer has the same sociological background as the interviewee this is a factor that may be taken into consideration where

¹ G Daniel Lassiter et al, *Videotaped confessions and interrogations: a simple change in camera perspective alters verdicts in simulated trials*, *Journal of Applied Psychology*, 87, 2002, 867-874.

considering their suitability or otherwise to lead the interview. Similarly, if an interviewee has dealt with a particular investigator on a previous occasion, or made admissions to a particular investigator, they may be best placed to conduct an interview.

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

Involvement of other law enforcement agencies

There are a number of circumstances where the attendance of police or other law enforcement personnel may be required at an interview. These circumstances, of course, are jurisdiction-specific. For example, in one jurisdiction, interviews of individuals in detention can only be conducted by the state police service. Likewise, if an offence other than a competition offence is suspected or uncovered in the course of a cartel investigation other agencies may have to be involved as appropriate. There are also circumstances, where although not required by law, it may be beneficial to have other law enforcement personnel present during an interview. For example, an agency may consider involving the police if they anticipate that an interviewee may react badly to an approach for an interview.

If personnel from another agency do participate in an interview, it is crucial that they are briefed about the alleged cartel offence, investigative steps taken to date, the nature of any existing evidence and the ultimate objectives of the interview. Before the interview, an agreement should be reached about who will lead the interview, as well as which agency will take responsibility for any legal or administrative action that may come about as a result of the interview. If applicable, investigators should also be aware of any disclosure issues that may arise when other law enforcement agencies are involved in the interview process.

Choosing an interview venue

The ultimate goal of selecting an interview venue is to create an environment that is conducive to securing the best information. Interviews can take place in a number of locations including private residences, business premises, police departments or agency offices. When choosing an interview venue it is important to consider the potential impact on interview participants, as well as any specific legal requirements.

Often it is easiest to remember events while in the location where they occurred. Admittedly, it is not always possible to conduct an interview in the location where the events in question took place. This will depend on the circumstances pertaining to each interviewee. For example, where the employee of a target company agrees to be interviewed they may not be comfortable submitting themselves for interview in their employer's premises. Investigators should be flexible in choosing a location, and should make the best of what is available.

An interview can be conducted in any reasonably quiet and comfortable setting. The chosen location should be one that allows the interviewee and interviewer to concentrate without distractions. The physical layout of an interview room should allow investigators to conduct the interview and take notes in a professional manner. It should also be conducive to the flow of information. It may be helpful to remove distracting elements such as clocks or pictures from the room. During the interview investigators should also be aware of personal space and their physical position vis-à-vis the interviewee. For example, to minimise confrontation, an interviewer can sit at an angle to the interviewee, rather than face-to-face.

Circumstances may arise where an investigator is required to conduct an interview in public places, such as bars, coffee shops, and restaurants. This may be required if the interviewee refuses to meet elsewhere or the time available is so short as to prevent travel to another location. In such circumstance, the investigator may decide to proceed with the interview. However, care should be taken to ensure that the interview is private and confidential and if there is any possibility that the conversation may be overheard, the interview should be suspended and a new location sought.

There may be circumstances where a National Competition Authority would find it necessary to interview an individual in another jurisdiction in the course of an investigation. Investigators should consider the requirements set out in relevant international cooperation agreements, when considering whether or not to conduct an interview in a foreign jurisdiction. Where cooperation agreements are not in place, the use of more formal procedures will be required. Cooperation and the considerations associated with obtaining evidence in another jurisdiction are covered in the ICN paper, *Co-operation between competition agencies in cartel investigations*.²

Interview timing

Choosing when to conduct interviews during the course of an investigation is a significant strategic decision. Generally speaking, an interviewee's ability to recall particular details or events diminishes as time passes. As a result, it may be advantageous to interview witnesses or other parties as soon as possible after the events in question have occurred. In other situations it may be beneficial to postpone an interview until after the team has had time to develop its case theory and/or review documentary evidence.

If applicable, agencies should also consider whether they wish to conduct interviews as part of the dawn raid or search process. It may be that a search or dawn raid environment is not the best one in which to conduct an interview, due to its potentially stressful effect on the interviewee. Nonetheless, it is possible that some interviewees may be open to sharing information during the course of a dawn-raid or search. In this situation investigators could consider conducting an interview.

Some jurisdictions also conduct drop-in interviews. These are 'unplanned' visits to an interviewee's place of business, home or other location. Due to the surprise nature of these interviews, timing is extremely important. Unlike during a planned interview, interviewees will not have time to refresh their memory or prepare in advance. However, catching an interviewee off-guard may allow investigators to gain leverage over the interviewee and gather important evidence from them.

When scheduling interviews investigators should ensure ample time is available so that the interviewee does not feel rushed. Sufficient time should be allowed during the interview to ensure that the interviewee is allowed to take legal advice. Time should be allotted to discuss the interview process and to answer questions posed by the interviewee. Investigators should also ensure that they account for the interviewee's physical needs (food, drink and rest).

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

² www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/CompetitionAgenciesInCartelInvestigations.pdf.

Presence of third parties during an interview

Group or joint interviews are generally ill-advised for the obvious reasons that the interviewer is interested in developing and testing a single person's recollection and knowledge of events. However, an interviewee may request that a friend, relative or lawyer be present during the interview. In these situations investigators should be aware of any relevant legal requirements. In particular, in those jurisdictions where the right to counsel exists, judges or other decision-makers make not look favorably upon refusals to allow counsel to be present during an interview.

As the practice differs across jurisdictions, requests by an interviewee to have a third party present at his/her interview may be considered by agencies on a case-by-case basis. The presence of a third party such as a friend, relative or lawyer may put the interviewee at ease. A third party may also facilitate the flow of information by helping the interviewee understand what is being asked of him or her. On the other hand, third parties can also be a significant distraction. For example, third parties may interrupt the interview. Interviewees may also look to a third party for approval before attempting to answer a question.

Interviewers should prepare in advance to ensure that a third party presence does not impede their ability to secure accurate information. For example, the interviewer can speak to the interviewee and third party before the interview, to explain the 'ground rules' of the process. During the interview, investigators can minimise interference by ensuring that all questions are posed directly to the interviewee. Although a third party should not have a role in the interview, any comments made by them should be reflected in the interview record.

Summary

This part of the chapter has outlined considerations relevant to the preparation of an interview in a cartel investigation. As noted, planning and preparation are vital to the success of any interview. Once the planning has been done, interviewers can focus on the upcoming task—the interview. This information is detailed in the next section.

CONDUCTING THE INTERVIEW

Introduction

Interviews in cartel investigations should be conducted with integrity, commonsense and sound judgment. It is important that the interviewee understand both the reason for the interview and the procedure that will be followed.

During the interview, as information is developed in dialogue with the interviewee, the interviewer may revise approaches, abandon working assumptions and be called upon to nimbly redirect the flow of questioning or the approaches taken with the topics to be covered. Flexibility that is based on sound preparation and a thorough knowledge of the subject matter is essential to a successful interview. However, the interviewer should not forget that the interview is the opportunity for the interviewee to inform the investigation and for the interviewer to obtain information, not to show superior knowledge.

At the end of the interview, the interviewer should have usable information about the level of knowledge the interviewee has about the subject, the ability of the interviewee to recall and convey that knowledge, inconsistencies between the interviewee's statements and recollections and other statements or evidence developed in the investigation, and an ability to evaluate the information adduced during the interview and place it within the context of the investigation.

Structure of the interview

The introduction

The introduction of the interview allows the interviewer to establish the tone of the interview, set out any ground rules of the process and establish rapport with the interviewee. The interviewer should make the introductions and provide all necessary credentials to the interviewee and their counsel. A general overview should then be provided, which can include, as appropriate, a short background to the cartel investigation and the objectives of the interview. The interviewer should also take the time to answer any questions the interviewee may have about the interview process. This introduction is extremely important as it gives the interviewee and their counsel an idea of the direction the interview is likely to take. It is therefore advisable to think about drafting this introduction in advance as part of the general preparations for the interview. It should then be delivered in the manner most suited to the interviewee. That is to say the category of interviewee will determine whether the tone is to be serious, light, formal or confrontational.

Generally speaking, the first few minutes of an interview will largely determine the success or otherwise of the interview. Interviewers who introduce themselves and their colleague by name and addresses the interviewee by their name, thereby personalising the interview, has made a good start. Treating the interviewee as an individual and interacting with them in a meaningful way means that the interviewer has started the process of establishing a rapport. An interviewer who is polite, professional and who appears to acknowledge the interviewee as an individual will be more successful in helping them to relax and reduce their stress level, leading to a more open and constructive interview.

Questioning

The status of the interview, the legal formalities, the setting and whether the interviewee is a suspect or a witness will have an impact on how the interview proceeds. Where the purpose of the interview is to obtain eyewitness testimony or background information, the questions will be substantially different than if the interviewee is suspected of active involvement in the commission of a cartel infringement.

When the interviewee is a witness, they should be encouraged to provide their account of events in an uninterrupted manner. To facilitate this, the interviewer should not rush the account, appear interested and be a positive listener. The interviewer should not attempt to finish the interviewee's sentences and presuppose a certain version of events by doing so. During this initial stage the interviewers will be able to get a clear account from the interviewee of his/her version of events. Generally, when the intent is to get the interviewee to provide large amounts of information, the questions posed should be 'open' and when the appropriate answer is of the yes/no variety, the question should be 'closed'.

When the interviewee is a suspect, the questioning may be more focused and directly related to the crime being investigated. However, in these circumstances it is also a good idea to allow the interviewee to provide an uninterrupted account of the general circumstances surrounding the issue under investigation.

When the interview is not being recorded in a video/audio format, the role of the second interviewer is to take detailed notes of the interview and to summarise the history upon conclusion.

Summation

The summation can be of crucial importance in pinning down the interviewee's version of events and by doing so any gaps in the information can be rectified. It also provides the interviewee an opportunity to hear back his/her account and amend as they see fit.

The 'omnibus question'

In any cartel investigation interview there may be matters large and small that the interviewer does not inquire about, either inadvertently, out of ignorance, or because of deception. At intervals during the interview or at the end of the interview it may be useful for the interviewer to directly inquire about whether there is anything else that the witness can remember or that has been left out of the questioning.

Likewise, at the end of the interview a witness may be asked if they are aware of any other cartels or illegal anticompetitive practices that they have not been questioned over and about which they can provide information. This is sometimes referred to as the 'omnibus question.' It is common practice for many NCAs, but there may be jurisdiction-specific rules preventing the use of such a general question. If the question is asked, the interviewer should consider the implications of a response that indicates additional knowledge on matters such as: the scope of previously negotiated individual or corporate immunity; status as a leniency recipient and the coverage of the leniency grant; the voluntary nature of the information; and subsequent use of the information or its fruits in an investigation and cartel enforcement action.

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

Confrontation

If the interviewers have evidence that would contradict the interviewee's version of events, they may, at this stage, want to proceed to confront him/her with such evidence. This portion of the interview is to challenge the interviewee and ascertain the credibility of their account. Jurisdiction-specific procedures and practices should be considered to cover those instances where a witness is covered by immunity or leniency and the investigator believes that the witness may be stating information that is inaccurate. Certain jurisdictions may have specific requirements covering such an eventuality and it is a good practice to have a clear understanding of them before the interview.

The act of having the witness record their confirmation of the official account of the interview may be crucial in some jurisdictions to having such an account admitted in evidence afterwards. National laws and judicial precedents will provide for the format of such records and how they are accepted in national courts. However, it is important that if a signature is required, it is properly recorded and witnessed to allow for later admission into evidence.

Close

Interviewers may consider leaving the way open for the interviewee to be able to approach the NCA or be approached at a future date. If the interview was with a witness, the interviewer may need to address questions the witness may have about the confidentiality of their identity or their role in future proceedings, consistent with the NCA's law and policies. This may also be an opportunity to explain to the interviewee, as appropriate, the procedure that will be followed regarding their evidence, if/how they may get a copy or transcript of their statement, the next steps in the case, or their situation as an immunity candidate. Interviewers can also provide their contact information to the interviewee and invite them to get in touch if they have any further questions or information they wish to share.

USE OF EVIDENCE DURING THE INTERVIEW

In the preparation for the interview it is likely that the interviewers will have documentary evidence that they wish to put to the interviewee. This documentary evidence may be presented in the following form:

Exhibits

These may be documents that were seized during a search or dawn raid, obtained voluntarily or under compulsion based on a subpoena or summons, or documents that have been obtained as part of the leniency or immunity process. The documents may have been obtained from companies or individuals, from third parties, whistleblowers and informants, or from a complainant. The source of the documents to be used in an interview and the relationship of the documents to the interviewee must be taken into consideration before the interview for tactical, legal and evidentiary reasons.

The documents may range from minutes of meetings, attendance notes, correspondence, policy documents, emails and forensically obtained/generated print-offs from personal computers. Where appropriate the interviewer should consider providing the interviewee with the opportunity to comment on any documents about which the witness may be knowledgeable and that the investigators intend to rely on in the prosecution of their case.

Depending on the history of the document it may be sufficient to present the exhibit to the interviewee and invite their comment or explanation. However, the witness may have no prior personal or professional knowledge of the document, its history and provenance. The document may be produced to set the context in which a series of questions are asked or it may be produced so that its authenticity and importance may be identified or to confront a witness.

In circumstances where there is no apparent connection between a witness and a particular document before the interview, careful assessment should be made as to the wisdom, necessity and future implications of showing the document to the witness. To the extent possible, a foundation should be laid with the witness concerning the facts that are of importance from the document before showing the document to the witness. Thought should be given as to whether the witness will be asked to confirm or deny whether they have seen the document or are aware of it; whether they will be asked about the contents of the document; or whether the document will be used as an aide memoire or for some other purpose. While it is often said that 'documents speak for themselves', there are evidentiary considerations associated with documents that require thoughtful consideration about the full implications of showing documents to a witness, particularly in circumstances where the document does not have a clear connection to the witness.

In some circumstances, it may not be possible to produce the original of the document and it is crucial that the exact status and provenance of any document produced to a witness for comment/explanation is clearly indicated and recorded. Whatever the intent of the production of a document, it should be labelled in a unique manner so that it can be clearly identified at a later date. Where chain of custody of a document will be of importance at a later date, or the date on which a document was created or viewed is critical to the chronology of a case, care must be taken to preserve the legal basis for admitting a document into evidence on a subsequent occasion.

Identification evidence

In some cases the investigation team may have observed individuals attending a meeting and taken photographic or video evidence of this. In this instance the interviewee may be asked to confirm their identity and/or provide information on the identity of other individuals present. It will likely be sufficient to play the video footage to the interviewee and where possible provide photographic stills for the purposes of identification. At the preparation stage of the interview the correct hardware should be identified, procured and made available for the interview. As with other forms of documentary evidence a clear and uniform system of numbering the exhibits should be in place.

Documents may also reflect the identity of persons who were present at an important event or aware of it. This is particularly true of email chain evidence, minutes of meetings, and like documents. Where the document reflects facts such as attendance of others at meetings, it may not be sufficient to rely on the document alone and the witness may be required to corroborate the facts with their independent or refreshed recollection of the events reflected in the document.

Statement of co-accused

In certain jurisdictions, if the law provides that the suspects in the investigation are to be charged as co-accused, i.e. their names will appear on the same summons or bill of indictment or the individuals will be charged separately, but are put forward for trial together due to the identical nature of the charges, it may be proper to advise the interviewee that a statement has been made in which they have been implicated. In such jurisdictions, the interviewee should be given the opportunity to give their version of the events.

Previous statement or memoranda of interview

A valuable tactic to assist an interviewer in challenging the credibility of an interviewee's version of events may be to present them with the previous statements or record of interviews conducted with them. If there has been some considerable time since the last meeting the interviewee may be more susceptible to variation in their version of events. These documents will be a useful guide in identifying any inconsistencies in the interviewee's histories.

The use of documentary evidence is very useful at the challenge stage of an interview and if, for example, it is introduced on a step-by-step basis, it can be a very powerful aide in highlighting inconsistencies in an interviewee's account. In some instances, the more documents that are produced the greater the pressure on the interviewee to provide an account of them. However, a potential difficulty with this approach is that it may lead to more denials and inconsistent statements and accordingly may not be an advisable approach in a testimonial-based legal system. Again, the national laws and legal precedent will serve to determine the merits or otherwise of this tactic.

Forensic evidence

This issue is the subject matter of chapter 3, 'Digital evidence gathering', *Anti-cartel enforcement manual*, cartel working group, subgroup 2, which is available at: www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/DigitalEvidenceGathering.pdf.

INTERVIEWING CONSIDERATIONS

Psychological factors

Such is the extent of the psychological research on investigative interviewing that it has led to the development of a new specialty branch of psychology—‘forensic psychology’. Practitioner’s research into the psychological factors of interviews has enhanced understanding of issues such as memory, emotions, culture, deception, identification and personalities and their likely effect on the behaviour of people under interview conditions.

Interviewers must be aware that the interviewee’s failure to recall something in detail might result from valid reasons. What might be considered crucial information might not have been recognised as such by the interviewee at that time which they witnessed it. Alternatively, investigators may want to consider whether the interviewee is attempting to obstruct the investigation.

Similarly, not all recollections are perfect since the original information stored may not have been perfectly processed. Personal factors such as mental or physical capacity or external factors such as alcohol, drugs, violence or other distractions during the process when the event was being processed into the long-term memory all affect the ability to accurately recall what was witnessed.

Ethical behaviour

Psychological research on this subject states³ that an interviewer, who respects the rights of the interviewee, and is conducted in an open-minded and tolerant manner, is more likely to be successful.

Making threats or illegal promises, using coercion or force or not respecting the interviewee’s legal rights in a cartel investigation interview may be deemed to represent unethical behaviour. In general, evidence that is obtained in illegal ways, or is legally tainted may not be admissible in evidence at a subsequent trial or legal proceeding. Agencies may wish to train investigators about acceptable and unacceptable questioning techniques, and inform them about any relevant jurisprudence.

Body language and non-verbal clues

General knowledge and awareness of body language and non-verbal behaviour may assist an interviewer in identifying possible clues as to areas and subjects that the interviewee is uncomfortable talking about. Also, the interviewer’s own body language can be used to reinforce a message—a slight nodding of the head serves to reinforce the truth and sincerity of the message being delivered verbally.

Detecting deception

There is less agreement on the extent to which non-verbal behaviour can be relied on as an accurate predictor of the honesty or otherwise of what is being said. Individual and cultural differences mean that certain behaviours cannot be definitively said to indicate untruthfulness. Equally there is no generally recognised behaviour that is accepted as indicative of deception. Some of the very behaviour that have come to be associated with deceit—for example, fidgeting or breaking eye contact—are also associated with people who are nervous or have simply been accused of an illegal act.

3 Milne & Bull, *Investigative interviewing, psychology and practice*, Wiley, 1999.

Interviewers should also be mindful of ‘investigator bias’ that can occur when information that is consistent with the investigator’s hypothesis is given credence while that information that is viewed as inconsistent is likely to be discounted, ignored or re-evaluated so that it fits. Such behaviour is not conducive to approaching an interview with the open mind deemed necessary for a productive encounter.

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.

Active listening

Conversations are rarely evenly divided between the amount of time the participants talk and the time they spend listening. Simply, some people talk more than others. However, in an interview setting, this behaviour is changed. The interviewee may have never or rarely been in such a formal and legal setting. If the interview is conducted in an unfamiliar building or has legal or regulatory overtones, then they are likely to be nervous and stressed.

To show the interviewee that the interviewer is listening actively, certain strategies can be followed:

- Summarising what the interviewee has said in different language indicates that the interviewer is actively listening, assists in ensuring that they understand what has been said and helps the interviewer in storing the information in their long-term memory for later recall.
- Echo probing is a process where the interviewer uses the same language or words used by the interviewee in a question, thereby indicating they are listening actively and to elaborate answers that are unclear.
- Querying is where a word or phrase used by the interviewee is repeated and queried. Apart from indicating active listening, this process also assists in clarifying what the interviewee meant by their use of the word, which may be industry specific.

INTERVIEWING METHODOLOGIES

Listed as appendixes to this chapter are a number of brief mention and explanations of the most frequently internationally used interviewing methodologies. **The models examined are not exhaustive and do not carry any recommendation for any single method over others. They are provided as information for agencies to consider whether they would be beneficial for use in their respective jurisdictions.**

Generally, these models are used by police forces and other law enforcement and regulatory bodies. National, legal and cultural imperatives and legislation will largely determine which method, if any, is best suited to any single environment.

Summary

This part of the chapter discussed the factors to be considered when conducting an interview. Interview structure, the use of exhibits and other psychological and ethical factors can affect the success of an interview.

After the interview is conducted, the investigative team must evaluate the information obtained and decide on next steps. This process is detailed in the next section.

POST-INTERVIEW: EVALUATION AND FOLLOW UP

Introduction

Interviews are typically conducted within the context of an investigative strategy. To ensure that maximum benefit is and has been obtained from the interview, it is crucial that interviews are critically assessed, any information/evidence arising is properly recorded and stored; and that the future direction of investigations is guided by the interview outcomes.

Evaluation/debriefing interviewers

As soon as possible after the completion of the interview, interviewers, managers and other members of the investigative team should evaluate whether the interview objectives were met. Information gathered during the interview can be compared against existing evidence and any new or remaining information gaps can be identified. As a result of this evaluation the investigative team can identify next steps.

It is good practice to review the performance of the investigators and 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.

Transcription of notes or data into statements

In some jurisdictions, after the interview is finished, interviewers may wish to type their notes or transcribe any electronic recordings. Notes and recordings may also need to be converted into a witness statement in some jurisdictions. When the interview is recorded electronically the choice may be whether the statement should be written down in full or summarised. In other jurisdictions, a court reporter will be in attendance to record verbatim the compelled evidence of a witness—ownership of the resulting transcript remains with the NCA and it is not provided to or reviewable by the witness.

In some jurisdictions, legal procedure and case law require that the interviewee verify a written record of an electronic recording and for others the recorded version is sufficient for evidentiary purposes. Decisions regarding how best to record and ratify a statement or interview will be taken by each NCA in the light of their national legislation and procedures.

Storage

To ensure the security of both the evidence and the evidence storage process, it is recommended that original copies of statements, in either written or recorded format, are stored in a secure system. Working copies, electronic or otherwise, can be used by the investigators and the originals can be accessed and retrieved, under controlled access and only when there is a compelling need to view/use them.

Unless the storage and access to the original copies of such documents/recordings is professionally maintained and audited, successful legal challenges can result. For more on this issue, please refer to chapter 3, 'Digital evidence gathering', *Anti-cartel enforcement manual*, cartel working group, subgroup 2, which is available at: www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/DigitalEvidenceGathering.pdf.

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.

Assessment of success of the interviewer in the process

Once the interview is finished the interviewers may wish to evaluate the process for themselves:

- In what way did the interviewers prepare themselves for the interview? Did they only look at the case or was there also some preparation regarding the interviewee?
- Did the interviewers try to establish a personal relation with the interviewee? Was that successful? If yes, was that the result of the preparation?
- Did the interviewers keep themselves to the original plan for the interview or were there valid reasons to go another way?
- Did the interviewers react directly to the things the interviewee had mentioned? Did they really listen to what was said and did they react to that or did they just ask the questions they had prepared?
- Was the interviewee willing to talk or did they remain silent? If they didn't talk, why not? Consider their likely motivation—nervousness, fear of self-incrimination, adverse consequences for their employer—and how to address these concerns, if possible.

Technical or forensic analysis

If the interview was intended to get information about technical facts, for instance about the IT system of an organisation that is suspected of involvement in an infringement of competition law, it might be useful (if appropriate) to hand the information that was supplied by the interviewee immediately to a colleague in an in-house IT-department, to check its accuracy.

Next steps

Once all of the supplied information is analysed, the investigation team should consider the appropriate steps to take. When the supplied information does not confirm the information supplied in other interviews, it might be useful to plan a second interview with the interviewee. Otherwise, the supplied information could lead to the decision to go for an interview with new persons, identified by the interviewee. Other options that might arise at this stage are to organise a dawn raid or to close the investigation.

Summary

Interviews, if properly and professionally conducted, can make an enormous contribution to the success of a cartel investigation—providing information and evidence that documents cannot. However, they should not be seen as one of the last steps in the investigative process but rather one of the steps in a process.

A critical analysis of investigator's and the interviewee's performance during the interview and the evidence/information obtained will be of value in determining the truth or otherwise of what is already known. This analysis may also assist in determining new lines of inquiry, new suspects/witnesses and new directions for the investigation.

APPENDIX I: THE PEACE METHOD

Overview

The PEACE interviewing methodology arose out of a UK Home Office review of investigative interviewing in 1991. The review team came up with an interviewing model aimed at offering a more effective and ethical alternative to persuasive interviewing. As such, the development of the PEACE model attempted to counter the ‘confession’ culture and focused on a neutral inquisitorial role.

The PEACE model was designed as a framework for interviewing in any situation with any type of interviewee. PEACE is an acronym for the five stages of an interview:

- planning and preparation
- engage and explain
- account clarification and challenge
- closure
- evaluation.

Use

The model was developed by and for police in England and Wales. It has also been embraced to some extent by other policing jurisdictions in parts of Australia, New Zealand, Canada and Europe.

APPENDIX II: THE REID TECHNIQUE

Overview

The Reid technique of interviewing is built around basic psychological principles. It was developed by the firm John Reid and Associates and is widely used by law enforcement agencies in North America. The Reid technique involves three different components—factual analysis, interviewing, and interrogation. While each of these is a separate process, they are interrelated in the sense that each serves to help eliminate innocent suspects during an investigation. This allows the investigator to focus on the person most likely to be guilty and to interrogate that person to uncover the truth. The interviewing component makes use of behavioral analysis tools, and the interrogation component advocates a nine-step process, with a view to leading to an admission of guilt.

The Reid interview is based around active persuasion by moral justification. The technique includes identification of deceptive behaviours or symptoms in speech or body language, and the interpretation of verbal and non-verbal behaviours. The technique focuses on how to move toward obtaining solid confessions from guilty people.

Use

The technique is reported to be particularly useful for extracting information from unwilling suspects.

APPENDIX III: THE COGNITIVE MODEL

Overview

The cognitive interview was initially developed in an attempt to enhance interviewee memory performance by using various cognitive techniques to gain as much correct information as possible. The technique was developed in the 1980s by two American cognitive psychologists, Ed Geiselman and Ron Fisher. The cognitive interview aims to increase both the quantity and quality of information elicited from cooperative witnesses, victims and suspects. It is incorporated into the PEACE police training packages in investigative interviewing and is one of the main approaches used in the interview stage of PEACE.

The original cognitive interview contained a set of four instructions given by the interviewer to the interviewee. The four instructions are:

1. The report everything instruction: this encourages the interviewee to report everything they remember without any editing, even if the interviewee thinks some details are not important.
2. Mental reinstatement of context: this instruction asks interviewees to reconstruct in their minds the context—both physical and personal features of the witnessed event.
3. The recalling of events in a variety of different orders: the interviewer encourages the interviewee to recall the event using a variety of different orders, for example from the end to the beginning of the event, working backwards from the most memorable aspect of the event, etc.
4. The change perspective technique: the interviewer asks the interviewee to recall the event from the perspective of another person who was present.

Memory 'jogs' are used in conjunction with the four cognitive interview techniques above. These memory aids are used to help the reporting of specific details concerning people and objects, as opposed to the four techniques above that focus on general recall.

The enhanced cognitive interview was devised by the creators of the original technique and its aim was to incorporate aspects of the psychology of interpersonal communication. The enhanced interview consists of the original techniques plus some additional techniques such as guidance on the interview structure and establishing rapport.

Use

The cognitive interview is used mainly for cooperative witnesses, victims and suspects. It is also most useful for interviews relating to a particular event that occurred over a short space of time.

APPENDIX IV: CONVERSATION MANAGEMENT

Overview

Conversation management is the other main approach incorporated into the interview stage of PEACE and is used by police in various countries. Psychologist, Eric Shepherd, coined the term ‘conversation management’ in 1983 when he was training members of the City of London police. The conversation management technique was developed specifically for use on unwilling interviewees. In these interviews the interviewer has to take control much earlier in the interview and manage it differently from interviews with willing suspects. Eric Shepherd devised a ‘script’ for managing any conversation with any person with whom the police converse on a day-to-day basis. In 1986 conversation management was further developed into a formal model of investigative interviewing that was subsequently incorporated into the PEACE package of investigative interviewing.

Interviewing is essentially a conversation with a purpose and therefore needs to be appropriately managed. Conversation management aims to provide an interviewer with an appropriate framework to manage a conversation. Interviewers need to be able to manage both verbal and non-verbal behaviour of themselves, the interviewee and possibly a third party.

Five key elements have been put forward as being necessary for the appropriate management of an interview:

1. Contact—establishing rapport and setting out the aims and objectives of the meeting.
2. Content—obtaining facts using appropriate questioning.
3. Conduct—the way in which the content is covered.
4. Credibility—the way in which the interviewer is perceived.
5. Control—directing the overall flow of the interview.

APPENDIX V: OTHER TECHNIQUES

Free recall

Free recall is a third model of interviewing used within the PEACE model. It is similar to cognitive interviewing, and is a major technique for interviewing cooperative witnesses. Free recall has been a feature of police interviews since 1990, but the early style of getting a witness to give an uninterrupted account followed by direct questioning had limited success, as the information was often incomplete. Recent literature and teaching emphasise the need for officers to draw on a range of practical techniques within the free recall model to help interviewees retrieve information stored in memory.

SUE technique

The strategic use of information during interviews (the SUE technique) involves the following:

- planning the interview during which the interviewers review potentially incriminating information
- the interview should have a free recall phase, before the questioning phase, during which suspects are encouraged to provide relevant information
- a questioning phase then starts, in which the interviewer poses questions relating to the potentially incriminating information that the interviewer possesses, but without revealing such information to the suspect and
- only when the suspect has responded to all the questions are the contradictions/inconsistencies between the account and the potentially incriminating information revealed (step-by-step/one-at-a-time) by the interviewer and the suspect asked to deal with these.

RPM techniques

RPM techniques are the tactics of rationalising, projecting and minimising used by interviewers to manipulate and persuade suspects so that, if guilty, they confess. The general approach is that investigators try to rationalise suspects' actions, project the blame onto others and minimise the suspect's crimes.