

[Introduction]

MR. BRACKEN: My name is Gary Bracken. I'm an Assistant Director of Investigations at the UK Competition and Markets Authority.

MR. CALVANI: And my name is Terry Calvani with Freshfields Bruckhaus Deringer here in Washington, DC. Previously, I served as a member of the Irish Competition Authority where I held the criminal cartel portfolio.

MR. BRACKEN: We are moderating this ICN Training Module on the practical issues around the planning for and execution of dawn raids. While this module will be generally available to all, it is designed with the needs of competition authorities with little or no experience conducting dawn raids. The good practice and tips set out in this training apply to raids in both civil and criminal investigations.

The powers that allow us to conduct dawn raids are extraordinary because they allow us to do an act that is otherwise illegal. That is, enter a private business or residential premises, search through documents and records, and seize items and take them away. Accordingly, the decision to conduct a dawn raid is a serious action that should not be exercised lightly. Dawn raids are costly in terms of both time and money. Depending on the relevant law, there can also be serious consequences for organizations and even individuals if they are not carried out correctly. It is important that we get them right.

Throughout the module, we will draw on the learning of the ICN in this area and we will be providing you references to the existing ICN cartel materials. Perhaps a good place to begin is by defining precisely what we mean by dawn raid.

The language on the board is taken from the ICN Anti-Cartel Enforcement Manual. "Search" and "raid" are terms variously used by competition authorities to describe the process

that authorizes the authority or a sister organ of government to enter premises, forcibly if necessary, to inspect and seize records in the context of an investigation.

MR. CALVANI: And while the slide is on the board or on the screen, let me make the -- what I think is an important point, that every case officer in your cartel unit ought to be familiar with this ICN manual. In fact, I think it ought to be required reading.

This slide, taken from the manual, summarizes good practices associated with the planning exercise. Now, we appreciate that the powers of your agencies differ and that some of your agency's discretion will be limited by national law. Nonetheless, we hope that you'll find this presentation both interesting and helpful.

MR. BRACKEN: Competition authorities often possess both powers to conduct dawn raids, as well as powers to compel the production of documents. Sometimes, you will confront the question of whether you ought to use one power or the other, or perhaps both, in the context of a particular investigation. To explore this issue, we go to Washington to visit with Brent Snyder, Deputy Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice. Brent's agency probably has more experience with addressing this issue than any.

[Whether to Undertake a Raid]

MR. BRACKEN: Brent, thank you for taking time to visit with us today. Your agency possesses the power to execute a search warrant, dawn raid in the language of many, and the power to compel the production of documents. Given the experience of your agency, we are particularly delighted that you are willing to share your experience with our audience today.

What tools does the USDOJ have to compel the production of documents?

MR. SNYDER: I should preface everything that I say by noting that in the U.S., we pursue cartel violations as criminal conduct. So, we first have to have enough evidence to

believe that we can open a criminal investigation. Once we have a criminal investigation open, then the two main ways that we have to obtain evidence, physical evidence, are either through Grand Jury subpoenas, which are a form of compulsory process, we serve essentially a document demand on a company and they have to produce the documents to us, or by executing a search warrant.

MR. BRACKEN: Okay. And the focus today is on searches. So, can you tell us what the legal standard is to conduct a search in the U.S.?

MR. SNYDER: Yes, it's a probable cause standard. So, in the United States, we are able to execute a search warrant in a criminal investigation if we have probable cause to believe both that a crime has been committed and that evidence of that crime will be found in the location to be searched, as well as on any devices that we intend to search while we're on the location.

MR. BRACKEN: Could you tell us a little bit about the practical considerations you take into account when you're deciding whether to use a search warrant or to use a subpoena?

MR. SNYDER: One of the first things we have to consider is how recent is the conduct that we're aware of. Obviously, if we believe the cartel conduct is ongoing or has only been terminated a short time earlier, then we have probable cause to continue to believe that there may be evidence at the location to be searched. If it's conduct that we're hearing about maybe a year or two or three years after the cartel was ended, then we have less reason to believe that there may still be evidence of the crime at the location to be searched. So, that would be the first consideration we would have to take into account.

The next consideration would then be can we meet the legal standard, do we have probable cause to believe that a crime has been committed and that the evidence will be found in that location. Additionally, the other kind of practical considerations are how resource intensive

will searches be, how many people are we going to need to be.

At the Department of Justice Antitrust Division, we don't conduct the searches ourselves. We have to have the Federal Bureau of Investigation conduct the searches for us. So, we have to take into account their resources. And then, also, one of the things we always have to consider is what is the likelihood that evidence is going to be destroyed if we choose to proceed by other form of compulsory process rather than executing search warrants. If the evidence is -- we deem it unlikely to be destroyed, then that might weigh ultimately against executing search warrants just because of the resource issue.

MR. BRACKEN: And do you -- just focusing on sort of the compulsory powers at the moment, do you differentiate between a widely drawn power of compulsion or do you try to issue narrowly focused subpoenas to the undertakings?

MR. SNYDER: Traditionally, we serve broad requests for the production of documents. We are actually in the process of rethinking that a little bit and narrowing the scope. And we'll talk a little bit about this when we talk about search warrants as well. But, you know, the broader the request that we make, the more materials are going to be given to us that we will then have to sift through in order to find the relevant evidence.

So, we are really starting to think a lot about being more refined in our requests for production, but then serving along with it, a notice to the companies that they should continue to retain all other documents because we could always go back later and issue a second subpoena if we decide there are other materials that are relevant to our investigation that we have not yet requested.

MR. BRACKEN: Well, that's interesting to hear because that's a similar approach that we are having -- finding that we're having to adopt in the UK as well. So, it's interesting to see

that you face the same challenges as we do.

So, perhaps we could move on to what you see is the advantages of using a search warrant as opposed to using a subpoena.

MR. SNYDER: Well, the first and greatest advantage is that it's the best way to ensure there is no destruction of evidence. If you choose to proceed by some other form of compulsory process that puts it in the hands of the company or their counsel to produce the materials, there is always the risk that individual employees at the company might destroy evidence. If you go in and execute a search warrant in the United States or have a dawn raid in other jurisdictions, you're limiting the ability of the individuals to destroy evidence.

But other considerations are that it is a great way to signal and start off the public part of your investigation. So, for us, up to the point where we have executed search warrants, we have probably had a covert investigation. People don't know we're investigating and certainly don't know the strength of our evidence.

In the United States, if we start out by executing search warrants, we are signaling that we have a strong case, that we have, you know, met the standard for executing a search warrant and that, in all likelihood, we have cooperators. That can have a couple of practical benefits.

The first is that it can ultimately spur people to come in for either leniency, to the extent we don't have a leniency applicant, or at the least to begin coming forward to cooperate. They tend to understand we have a fairly strong case if we're executing search warrants. Additionally, in those instances where we are executing a search warrant on an individual, for instance, on their home or their personal computer. That tends to give us a lot of leverage with those individuals for the same reasons. And very often, we have the experience that when you're executing a warrant on an individual, they know you may be pulling very incriminating materials

off of their computer, then they may decide to confess on the spot and begin to cooperate.

The execution of search warrants both with individuals and companies then may very well also create the opportunity for other types of covert techniques. So, it could be that the individual might agree to place a consensually monitored telephone call to co-conspirators that may result in incriminating statements. It may also be the case that at the time we go and execute a search warrant, we have obtained pen registers or what are called trap and traces that allow us to follow the phone calls of the companies and the executives at the companies to see if they begin calling each other. And continue to develop other types of evidence. And that works particularly well when you have -- are executing a search warrant as opposed to, you know, serving a Grand Jury subpoena.

MR. BRACKEN: So, it sounds like the search warrant can also open up other avenues of investigation for you that weren't available beforehand.

MR. SNYDER: Correct.

MR. BRACKEN: Do you find that there's a -- sort of a corollary with subpoenas and demands for information that that can also prompt those sorts of lines of inquiries in the same way?

MR. SNYDER: Yes, although I don't think that it's quite as effective. There is something fairly dramatic and it certainly focuses the attention of a company or an executive when we execute a search warrant in not quite the same way that occurs when we are just issuing a subpoena.

MR. BRACKEN: Sure, that's for sure. Absolutely. So, moving on to subpoenas, what would you see would be the main advantage of using those sorts of compulsory production powers?

MR. SNYDER: Certainly, with subpoenas, if we don't believe we can meet the standard for a search warrant, that is the avenue that's available to us to obtain physical evidence. Additionally, if the evidence -- you know, our evidence is older and we don't have as strong a belief that the evidence of the crime may still be located in the location to be searched. When we serve the Grand Jury subpoena on a company, it requires them to produce documents to us wherever they're found within the United States. So, it wouldn't be limited to our ability to show probable cause as to a particular office or a particular executive.

The other advantage to subpoenas is that they often work quite well in tandem with a search warrant. So, it would almost never be the case for the Antitrust Division that we would only execute a search warrant. We would almost always serve a subpoena along with it that probably is going to be broader than the search warrant to pick up anything that isn't covered by the warrant. I don't know if you'd agree with the UK view, but we find that the use of compulsory demand powers enables us to focus a search on the material in the areas that we think are really crucial to the investigation rather than maybe drawing more widely relevant information into the case.

MR. SNYDER: We would definitely agree with that and, in fact, just as we are undertaking a review of the breadth of our subpoenas, we are also undertaking a review of our typical demands and search warrants. I personally am of the view that going in with a very focused search warrant and then following it with a broader, but still not overly broad subpoena is the best combination because it allows you, hopefully, to extract the key information in connection with the search warrant. It's not going to then require you to sift through servers, you know, image servers and desktop computers and things like that, and then you're still preserving

your ability to get the documents by following it up -- you know, broader documents by following it up with a subpoena.

MR. BRACKEN: It's really interesting to hear that we've come to the same conclusion on both sides of the Atlantic at different times, but probably from the same origins, I suspect, but there we are.

So, I wondered if you could give us any best practice pointers around warrants and compulsory powers.

MR. SNYDER: I think we've definitely already talked about some of the practical pointers, which is combining both -- you know, combining a dawn raid with other forms of compulsory process just to make sure, on the one hand, you're covering the entire waterfront and on the other hand, allowing you maybe to conduct your search as efficiently as possible.

In the United States, we also have to really think about due process considerations when we are executing a search warrant. Our Constitution guarantees the right of individuals, as well as companies, to be free of unreasonable searches and seizures. So, we not only have to make sure that we're meeting the standard, but then it's always our goal to conduct the search in such a way that reflects really the intrusiveness of the procedure.

So, you know, we try very hard to conduct searches in a way where we are not walking off with the company's computer equipment or depriving them for a lengthy period of time of files, contract files and things like that that the company requires for their continued business operations.

So, we're always trying to balance the -- our need to obtain and protect the key evidence with the company's need to be able to get back to their normal businesses as quickly as possible and obviously to have the key documents that they need to conduct that business. You know, we

talked a little bit about combining the search warrant with the compulsory process. So, I think those are really some of the key things.

MR. SNYDER: It's -- to -- when you execute a warrant or you conduct dawn raids to really think about not only your need to preserve the evidence, but also the need of the company to continue in its business and then to think about how you can use the different techniques in tandem to get the optimal coverage and provide – get the information as efficiently as you can for your investigation.

MR. BRACKEN: And I think it just shows in some of the themes we've been exploring with this module, it just shows you the amount of thinking and planning time that you need to build into these operations, whether you go purely down the search warrant route or a mix of the two, it takes a lot of thought and planning and preparation and they're key to the success of these operations, I guess.

MR. SNYDER: Absolutely. And I know this is for the ICN, but one of the major areas of kind of global communication and coordination is with these issues. Because, very often, it's not just the United States or the European Union or the JFTC that is thinking about conducting a dawn raid, it's all -- all these jurisdictions. And, so, making sure we're doing it in a coordinated fashion is very, very important because it can be problematic for one jurisdiction if another jumps the gun and goes early because then it forces the other jurisdictions to scramble, and it is not easy to do that on short notice or to do it effectively on short notice.

MR. BRACKEN: Oh, absolutely. Well, you've given us really a lot of really helpful pointers there and some serious areas for us to think about, so thank you for joining us today. I'm really pleased that you were able to impart the knowledge that you and your agency have gathered over a number of years, and we thank you for being here.

MR. SNYDER: My pleasure. Thank you for the opportunity.

[Authorization of the Raid]

MR. BRACKEN: In a good many jurisdictions, the application for permission to undertake a dawn raid requires that the competition authority secure authorization from either a court or a specified official or group of officials. Most of these jurisdictions require that the application specify the subject of the investigation, the premises to be searched, and the information sought. Accuracy is critical and a mistake in naming the subjects or describing the premises can be fatal. Obviously, you must understand the legal requirement in your own jurisdiction.

MR. CALVANI: You should have the confidence that you have identified the right subjects and the right premises. And, put differently, you really need reason to believe that the subjects holding the documents located at this particular location have evidence relevant to your investigation. In many jurisdictions, you'll have to make representations to this effect before a court or other official in order to obtain the requisite authorization.

MR. BRACKEN: Accurately describing the venue to be searched is an important aspect of securing the requisite permission to undertake the search, a topic that the following vignette explores.

CASE OFFICER #1: That was a terrible experience.

CASE OFFICER #2: Yeah, I can't believe that Luca typed 950 Green Street instead of 960 Green Street, and I didn't catch the typo.

CASE OFFICER #1: Well, you had a lot on your mind. But going forward, we should have a policy that all applications for warrants are reviewed by two case officers, four eyes, no

exceptions.

CASE OFFICER #2: Yeah, let's go, we need to return the evidence before the end of the day.

MR. CALVANI: This may seem like a small point, but the consequences of making an error in the application can be very serious.

MR. BRACKEN: Although laws vary, getting the address of the premises to be searched right is critical in most jurisdictions. There needs to be a formal process in place to ensure that the application is correct.

Having a requirement that at least two case officers review the application is a good one as some jurisdictions regard an authorization with an incorrect address as null and void. This may seem simple and it is, but a failure to get this right can be serious. Not only may the authorization be ineffective, perhaps requiring you to return the seized materials, but your credibility before the courts or other person who authorizes the search may be injured affecting the next time you apply for authorization.

MR. CALVANI: You also want to think about the timing for securing the authorization if that authorization comes from a court or someone external to the authority. First, it's important that you have sufficient time to accurately draft the application for authorization to search and sufficient time to obtain whatever internal clearances are necessary in your own organization. Hurried work often produces a sloppy result. Now, we know that sometimes time is of the essence, but you should recognize the importance of accuracy in the application.

Second, even where the application is legally protected and confidential, there is always a danger of a leak. I have personally experienced that issue when a supposedly confidential request for a search warrant was misplaced by a court official and the security, the confidentiality

of the raid was impaired.

Operational security must be uppermost in your mind and demonstrated by things like limiting the circle of knowledge, ensuring the security of key documents like the application, briefing staff not to discuss the search outside the office, and you may even want to visit the court to satisfy yourself that they have processes in place to protect your information. People make mistakes, so you want to have sufficient time to obtain the warrant, but you don't want it to be outstanding for any more time than is absolutely necessary.

MR. BRACKEN: Of course, getting the name of the subjects and the address of the premises to be searched right are just two, albeit important, ingredients to a proper search authorization. Accurately describing the object of the search, that is what the authority seeks to seize, is also critically important. In many, probably most jurisdictions, this description limits your ability to legally search for and seize materials. Obviously, the case team needs to consider this issue very carefully in the initial planning for the raid.

[Understanding the Premises]

MR. CALVANI: I know we keep saying it, but planning is really essential to the execution of a productive raid, that we appreciate that sometimes the ability to plan is limited by circumstances. I mean, we have all had the occasion to conduct a search where we have had limited time to plan. But, hopefully, those cases are exceptional. In the vast majority of cases, you'll have time to plan and you should use it.

MR. BRACKEN: A proper risk of the proposed search is also critical. Chief among those risks is the safety of your personnel and of the occupants. These risks vary, and range from an inherently dangerous working environment, such as an office located actually within a steel mill where hard hats and other protective clothing would be required, to the possibility of

weapons being on the premises.

MR. CALVANI: A very important aspect of that planning is to understand the premises to be searched. Some aspects are probably obvious. Showing up before anyone is at the premises makes no sense, and it certainly may destroy the element of surprise. But other aspects may be less so. The following vignette illustrates one important element, understanding the layout of the premises to be searched.

CASE OFFICER #1: I can't believe we executed the warrant in the beer matter and didn't understand the layout of the premises we searched.

CASE OFFICER #2: No telling what we lost out the back door. We really didn't understand what was required to secure a premise until it was too late.

CASE OFFICER #3: Yeah, I'm sorry, I really didn't know about the exit onto Second Street through that restaurant. I thought we had all the exits covered.

CASE OFFICER #1: Yes, and that's why we have the floor plan from the city planning office for the upcoming search. It should give us a better idea of what the layout really is.

CASE OFFICER #2: Yeah, of course the building could be modified after the building authorization was given.

CASE OFFICER #3: That's true, but still much better than going in blind. But, anyway, we still need to do a lot to understand the buildings as much as we can.

CASE OFFICER #1: Oh, yes, and you two are going to check out the premises later today, aren't you?

CASE OFFICER #2: Yes, and the adjoining buildings as well.

MR. CALVANI: Hopefully, the vignette brings home the point that getting your arms around the premises is really important. The vignette shows case officers reviewing the

architectural plans of the building to be searched. Now, these may or may not be available and they may or may not be currently accurate. But they merit exploring when they are available.

MR. BRACKEN: It's also important to have prior knowledge of the premises where the raid is going to take place. Ideally, you would want to establish the following things before you turn up on the day. Where are the entrances and exits, whether the premises will be open when you intend to arrive, and who is likely to be present on the premises and what their functions are, what languages are likely to be spoken so that you can arrange an interpreter, if necessary, and whether there is anything that may impede entry into the premises, for example, an external gate with a security guard.

There are a number of ways that you can obtain this information, but in deciding the most appropriate way, it is important that you are aware of the laws of privacy in your jurisdictions. The last thing that you would want is to stand accused of violating the law in connection with the conduct of a dawn raid.

MR. CALVANI: Yes, and special planning is required for IT forensics that you will undertake when doing your search. For example, what can you learn prior to the raid about the company's computer system? Who manages IT within the company? Where is the server or servers located? What can you learn about Cloud computing, email systems and offsite data storage. Obviously, you may not be successful in obtaining all of this information beforehand, but you can learn a lot more than you think. At any rate, you should try to learn as much as is possible about the company's IT.

MR. BRACKEN: Care should be taken that you don't compromise the search by prematurely disclosing your interest or, as they say, by blowing your cover. For example, it is important to consider the impacts of undertaking open source internet research from office

networks as you don't want to leave a trace of your actions or interests. It may therefore be necessary to consider an alternative approach.

[The “Game Plan”]

MR. BRACKEN: In some sense, “game plan” is a good shorthand characterization of this planning process. The players are to be identified and their positions determined. Composition of a search team is obviously an important point. When the authority conducts a search, it should be obvious that case officers assigned to the case, augmented as necessary, should be on the search team. They know the case, the issues presented and at least some of the cast of characters. They simply have a comparative advantage on the best place to conduct an intelligent search.

MR. CALVANI: When considering the makeup of the search team don't forget issues such as gender. In most situations, the personnel at the premises to be searched will be both male and female, and in almost all situations, there will be toilets for both sexes to which you will need access for search purposes. Now, while the company may not store important documents in the toilets, they may be a convenient place to hide material when it's apparent that a search is getting underway.

MR. BRACKEN: A few moments ago, I noted that you ought to try to determine the languages spoken at the premises. Where foreign languages are spoken, this needs to be considered in your team makeup and augmented as appropriate to deal with this situation.

MR. CALVANI: And as in a ball game, roles need to be assigned. While the needs of searches will vary, the team needs a leader who will supervise the exercise. This might or might not be the senior case officer on the matter, but it should be an experienced case officer, preferably someone with substantial search experience. Where multiple searches are being made

at the same time, the most senior person will want to be at some central command location to coordinate these searches with other senior persons heading the different search teams. General coordination between the different search sites is also vitally important.

For example, where you locate important evidence at one search location and you want to pass that information on to the teams at other search locations so that you can try to find corresponding material there. There should be a designated person who's responsible for presenting credentials, search authorization and interacting with the person responsible for the premises to be searched. This could be the team leader, but it might be a designated case officer which would free up the team leader to supervise a particularly complicated search.

MR. BRACKEN: In addition, there ought to be a chief IT forensics person who is responsible for the IT elements of the search, again, augmented with additional IT personnel as needed. In those jurisdictions where the legal privilege is respected, there ought to be a qualified lawyer who can assume responsibility for handling these issues, and it is my personal view that having a qualified lawyer on the team is a good idea in the event that unanticipated legal issues were to arise. In addition, it is generally a good idea to have one person responsible for taking notes who is unencumbered with other responsibilities.

MR. CALVANI: It's also a good idea, in my experience, to have a couple of uniformed police officers present. Even if the case officers have police powers themselves, the presence of these uniformed officers will help ensure that the search is not encumbered and they can have a calming effect on the search environment. When using the assistance of other agencies such as the national police, it is important that the roles of each are clearly understood. Some competition authorities have formal protocols with sister agencies and you might want to consider doing likewise at your agency.

MR. BRACKEN: Yes, and perhaps more importantly, the presence of uniformed office will diminish the possibility that persons on the premises will attempt to obstruct the execution of the search. We should take a minute and discuss obstruction in the larger sense. Most, although not all, jurisdictions have laws that prohibit obstruction of justice.

For example, someone in the back room shreds documents before the case officers can gain entry. We are not equipped to discuss the differing legal treatment of this issue, but you should know the laws of your own jurisdiction. For example, if you encounter a secretary leaving the premises during the conduct of the search, may you impede her exit to search her bag to see if she is taking documents out of the building? In some jurisdictions, you may. In others, you may find yourself charged with false imprisonment. You must know the answers to these questions, and this is another reason why it is important to have a qualified lawyer on your team.

In an ideal world, you would staff each of these roles with a separate individual, but where you are not able to do that, consider doubling up on responsibilities or split roles across search sites that are located geographically close to each other.

MR. CALVANI: When undertaking multiple searches at the same time, things obviously get more complicated. In those situations, you may need to obtain additional resources from other entities of government. Given that surprise is a significant advantage to the authority, it's important, generally speaking, that searches begin at exactly the same time to the extent that this is possible. Good planning and coordination necessarily includes adequate pre-search briefings of those who will participate in the search or searches.

While the agenda of such briefings will vary, the ICN Anti-Cartel Enforcement Manual lists some prominent topics that will likely be ones that you should consider. And these include the composition of the team and the team leader and their assignment to specific teams if

multiple premises are to be raided. It also includes an overview of the alleged conduct at issue and the names and descriptions of the businesses and the key individuals involved in the case and also a description of the location of the premises to be searched and, if possible, the layout of those premises.

MR. BRACKEN: They should also include ensuring the team are aware of and understand the things that they are authorized to do or not do under the warrants, such as the powers that they possess for taking photographs or video footage, using equipment located on the premises like photocopiers or using reasonable force, the type of evidence sought, a list of keywords for electronic and paper searches, the names and positions of the key individuals likely to be at the premises, the overall search strategy and the procedures to be followed and the role of each member, any instructions for dealing with the media, any occupational or safety risks, any important cell phone numbers, and amongst this, don't forget the basics. Include all logistical elements necessary to undertake a search and provide for all personnel during the course of the raid. For example, everything from transportation and accommodation to equipment and food and water. Finally, remind the team to conduct themselves professionally and reasonably at all times.

After the search, consider holding a debrief with all the team present. This will give you the opportunity to discuss key evidence found and this has particular strength where searches have been conducted across multiple sites and where the important context of material found in one location may not be immediately apparent for those who are at another site. Or, putting it another way, a previously insignificant item or an innocuous piece of evidence may take on a whole new meaning when put together with knowledge from elsewhere.

New lines of inquiry and how the search unfolded to identify any lessons learned that could be shared within the agency to improve logistics or practices for the next search warrant, that is what worked well and what didn't work well.

MR. CALVANI: A few moments ago, Gary mentioned the need for a note taker. You might ask, why is that important? Let's look in on this vignette.

TEAM LEADER: Come on in.

CASE OFFICER: Hi, Maria, do you have a minute?

TEAM LEADER: Yeah, sure, come in.

CASE OFFICER: Thanks. So, Maria, at the meeting, you gave me the role of a note taker. I guess as a new member in the unit that job goes to me because I don't have any experience doing dawn raids.

TEAM LEADER: No, Daniel, not at all. I'm glad you stopped in as I wanted to talk to you about the importance of this role. Dawn raids are very difficult for everyone involved. Just think if you were -- if we were invading your house or your home office, how would you feel? For this reason, conflicts sometimes arise as to what did and did not take place. This is one reason why it's so important to have an accurate record of what we are doing.

CASE OFFICER: Okay. So, what do I do? Do I just take notes on everything?

TEAM LEADER: I think you can start now by putting down the details about the search that we have just discussed so that the file has a record of our briefing and what information the case officers possessed before the raid.

CASE OFFICER: Okay.

TEAM LEADER: With the search itself, it's really important to capture the exact time that the team entered the location and if the team was properly identified.

CASE OFFICER: Okay.

TEAM LEADER: You also want to make sure that your notes captured the details of the presentation of the search, the authorization document and if it was presented to the right person in the company, and you also want to make sure that you capture the name and title of that person.

CASE OFFICER: Okay, in case the – in case the company later claims that we did not produce the authorization?

TEAM LEADER: Exactly. And you also want to get a good description of the premises searched.

CASE OFFICER: Like all of the rooms?

TEAM LEADER: Yes. You got the right idea. You want to note the condition of the premises on arrival, any damage during the execution of the search. This can often be a matter of dispute. So, taking photographs of the premises and any damage that might occur should be considered.

CASE OFFICER: I see.

TEAM LEADER: Then you will want to document the steps taken to secure the premises and it's also very important to take down -- to take notes of any relevant discussions with the business people.

CASE OFFICER: Okay. I guess I would want to note any cautions administered and any statements made word-for-word if possible.

TEAM LEADER: Exactly, of discussions, of any claims of legal privilege are also important and obviously any discussions with the legal counsel.

CASE OFFICER: Right. I should also take notes of any instances of obstruction?

TEAM LEADER: Daniel, the record needs to be complete and factually accurate. So, you need to note any significant deviation from established agency procedures.

CASE OFFICER: Okay.

TEAM LEADER: You should also try to get the details of statements or comments made by any person or events that might occur or that have a direct relationship to the substance of the investigation.

CASE OFFICER: That makes sense, of course.

TEAM LEADER: And it's important that you also note the time, the location and descriptions of the records seized during the execution of the search and any unique identifying number that you was assigned in such records. You need others to assist you here.

CASE OFFICER: I guess this is part of the need to maintain the chain of custody.

TEAM LEADER: Yes, and we want to have a good inventory of what we have and this will serve as the basis for providing the company a schedule of what we took.

CASE OFFICER: Okay. So, I guess I'm responsible for putting that together and giving it to someone in the company?

TEAM LEADER: I would give it to the company representative and I need you to make sure that you take notes of me doing so.

CASE OFFICER: Okay. Wow, I thought this was a tiny job that you gave to me because I was new. I can see now this is pretty important.

TEAM LEADER: Oh, Daniel, not at all. By the way, I need you to take notes of the exact moment that the search was completed.

CASE OFFICER: Okay. I'm going to copy this down now so that I have a good outline

going into the search.

TEAM LEADER: Exactly. Excellent practice. By the way, this is -- those are some notes Elise took during the last search. They're very good. I guess, you know, just look and then you'll have a pretty good idea of the level of detail that we need and why don't you just give a look at them.

CASE OFFICER: Okay, I'll take a look at it and let you know if I have any questions. Thanks again.

TEAM LEADER: Yeah, sure.

MR. BRACKEN: This vignette explores the role of the note taker, but you will want to consider the legal requirements in your own jurisdiction. For example, is use of video and/or audio recorders permitted under the relevant law for note taking purposes? What are you required to do in the event that you uncover a law violation enforced by another agency?

MR. CALVANI: Perhaps this is the place to discuss timing. Obviously, this will depend in large measure on the facts and the type of warrant you have. For example, some jurisdictions issue only single-entry warrants; others issue multiple-entry warrants. You may have also little discretion as to the situation when your authority has been brought into an international investigation late in the day and the other authorities want to commence their searches immediately. But hopefully this should be rare.

MR. BRACKEN: Generally speaking, you will want to start early to make the best use of the day, but there may be a critical witness who will not arrive until later and he or she might not arrive at all if they knew the raid was being undertaken.

If the warrant allows the search to cover multiple days, you generally will want to begin earlier in the week to maximize your ability to complete the search during the week. If you

know precisely what you're looking for and where it is stored and that it will take little time to take possession of it, then these considerations may be less important.

MR. CALVANI: As Gary just noted, some authorities undertake raids that last more than one day and they -- those authorities sometimes use seals to ensure that the premises remains secure during the night when the search team retires. That may be necessary at times, but my view is that you should endeavor to complete your search at one time, working late into the night if necessary. This also may be a necessity if you receive only a single-entry warrant.

Now, one way of potentially shortening your search would be to seize only relevant documents. Now, that may seem like an obvious thing to say, but it's not obvious -- not always achieved in practice. Conducting a preliminary analysis of the material identified on the premises and only seizing that which is relevant can really minimize the quantity of material being seized, and as a result, shorten the time that you are there. Nevertheless, the volume of the hard copy material, the IT material, or perhaps legal issues, or the welfare of your own team may mean that it's not possible to finish in one day.

If these circumstances arise, you should carry out an assessment of the risk of losing undiscovered evidence or the possibility of interference with your equipment at the premises. Then, take steps to mitigate those risks as best you are able. For example, warn the company about the consequences of noncompliance. In many jurisdictions, noncompliance can produce quite hefty fines and, in some, terms of imprisonment. You may want to use one-time tamper-proof seals permitted by local law. You also may want to show the company that you're very serious about noninterference by, for example, taking photographs of the sealed rooms.

But if you must retire, then I think it very advisable to have personnel, your own or police resources, present overnight to ensure that the premises remain inviolate or, alternatively, I've

seen private security guards used on occasion. However you proceed, this needs to be part of your planning process. If you think it's reasonably possible that you won't be able to complete your search on the same time.

[Augmentation of the Team]

MR. BRACKEN: Almost all agencies, especially smaller ones, will on occasion find that they need to raid multiple locations at the exact same time. This can present a logistical nightmare for the cartel units. This is further complicated where the premises are large with multiple points of entry and exit.

MR. CALVANI: On such occasions, you may find yourself in need of assistance from other government agencies with experience in conducting dawn raids or, at a minimum, police officers with search experience. The following vignette presents such a situation.

DIRECTOR: Oh, Louisa, hi. Oh, have you thought about how you're going to staff the search?

CASE OFFICER: Yes, that's at the top of my agenda. With three premises being searched simultaneously, it's going to be very hard.

DIRECTOR: Have you thought about getting assistance from other agencies?

CASE OFFICER: Yes, I thought of placing a call to Jeff at the police fraud unit and asking him for ten officers. He lent us some officers back in January and it worked out pretty well. I'm hoping he will be helpful again.

DIRECTOR: Well, you're going to want to get on it because you'll need time to prep, especially if you're using officers from another agency who don't know anything about the case. It's not like we're looking for a stash of drugs, so you'll want some time to bring the team up to speed on the nature of the case.

CASE OFFICER: Yes, I'm hoping to use half a day to brief them if I can get it, and I'm also hoping to build up the case team with officers from their agency and ours so then each team would be led by us and staffed with people from both agencies.

DIRECTOR: Well, don't forget to bring a couple of uniformed officers to each location, even though we're using our own officers and loaned police detectives, the presence of uniforms always keeps things nice and calm.

CASE OFFICER: You're right, thank you. I'm on it.

MR. BRACKEN: Terry and I are joined by Commissioner Patrick Kenny of the Irish Competition and Consumer Protection Commission. Until recently, Patrick was responsible for criminal enforcement of the competition and consumer protection laws of Ireland.

MR. CALVANI: Thank you, Pat, for joining us from Dublin. When I was at the Irish authority, it was a much smaller agency, and when we conducted raids at multiple locations, we almost always had to rely on Garda Siochana or what's better known as the Irish National Police Force, to assist us in conducting those raids.

Now, the Irish authority is a much bigger organization and I understand that you no longer have to utilize the national police in executing multiple search warrants. But you mentioned to me the other day that they still had a role to play in situations where there were IT resources that needed to be seized or examined and also when arrests were made. Could you tell us a little bit about both?

COMMISSIONER KENNY: Yes, sir. I mean, in the past, we certainly would have used them for searching activities because we were down low in numbers. With the amalgamation, we have a larger pool of people with investigative experience. So, we no longer use them for that. But you're absolutely correct. When we're doing multiple sites, when we're looking at

heavy IT-related searches, we do actually -- we work with the police force computer crime investigation units, which are connected to the Irish fraud squad. We have a seconded member of the fraud squad here and just sort of the logistics of coordinating are done through him.

What we would do normally is we would -- if you're looking at a large number of search sites, we can possibly do three or four on the day depending on how close they are to each other. And although Ireland is not a very large country, you can often end up with eight or nine, ten search sites. So, we would ask them in advance. We would really be stuck by their timetable. In a sense, that's one of the things you have to accept when you ask for help, outside assistance, in the sense that you will be stuck with their timetable in terms of when they are free, given they have a lot of things to do, other work.

But we would then meet with them, brief them in detail about the investigation, about their role and what we expect from them on the day. So, that's what we would do. It still requires -- very similar to the previous -- the previous briefings we would have given for them actually searching on the ground because really they're doing exactly the same except in the electronic environment.

MR. CALVANI: Do you find that you have to spend some considerable time acquainting with the police officers that are going to be handling IT, with the nature of the case, et cetera? How do you go about doing that? Does that take a lot of time? Is that a big part of the exercise?

COMMISSIONER KENNY: It would be in the sense the first thing we would do is sit down with them and go through what the legal provisions are, what are the breaches, so they would understand the law. I mean, these people do a lot of things in -- under different legislation every day. So, they need to be brought up to speed on that. And then really they only want to know on a need-to-know basis. So, we will meet them near enough because they won't retain it.

So, we'll meet them at least a week out and explain what the law is, what the nature of the case is and what we exactly want each of them to do in the particular location that they'll be going to.

We find that the briefings are best given verbally because you can actually get interaction. They will ask questions and, you know, you get them to – with a shorter period of time, you can get them comfortable with the role they're going to play in relation to the particular investigation.

MR. BRACKEN: Pat, I was just wondering if you had any advice for us about how they handle the material both on the site and once your staff have left the site and brought it back to the office.

COMMISSIONER KENNY: Well, I think you have to be -- you have to be clear that they will use their rules. You know, they will handle the things they receive in exactly the same way as they would in any role that they're taking. You have to make sure you understand that and that what you do -- what you do yourself is commensurate with that because any difference between what our officers would do and what they will do could be seized upon.

So, you harmonize as much as possible and you ensure that the material is seized by them and then handed over to us and then we can use it.

MR. BRACKEN: Do you set up a formal sort of agreement with them in writing or is that just on an ad hoc sort of verbal basis?

COMMISSIONER KENNY: No, I mean, it's done on an ad hoc basis. We don't have a service level agreement with the members of the police force. We discussed having one, but in a way we felt there were advantages and disadvantages in relation to that because sometimes they - - we actually rely on them for a lot of things and, in some ways, that's -- their view is that writing it down might actually hamper them in some cases.

MR. CALVANI: I guess you have -- sort of confront related issues in exercising the powers of arrest under the Competition Act, which Ireland and some other authorities have. You might tell us a little bit about that because that's another area where you work closely with the national police and I presume you're also briefing them ahead of time and working closely with them. I think our audience would be interested in how that works in reality.

COMMISSIONER KENNY: Yes. That's actually much more intensive because what you are -- what we're doing at the moment is although the law provides that we may attend at interview, the regulations – specific regulations haven't yet been finalized. So, as it stands now, only members of the police force are allowed to interview after arrest. So, in essence, you have to brief them up to the level of your case handlers dealing with the case.

So, that requires many, many, many hours of meetings, meeting to document some things so they can, and then looking through a series of questions because you'll say here's what I would ask, they will then take it on. So, that's really, really intensive. We hope that will be -- be alleviated -- the burden on the police force and ourselves when the regulations come in.

Going back to the actual experience of using another agency, one thing I would say is that -- I said earlier about the preplanning, you are really tied into their space and their agenda or in their calendar, so your timing can be affected by their availability. But afterwards you have to be aware that they're not your staff, they're very busy people. How will you follow up for debriefs? How will you follow up to get statements and things like this? These are the challenges, in a way, of using people from outside agencies.

You know, you have to plan that in advance or else things can fall through the cracks. Because if somebody hasn't given a statement in a timely fashion, you've got to go track through all their system to get it done. So, it's better to agree to that in advance in the briefing to say we

expect you to write your statement within a number of days or whatever and, so, it's clear what you expect from them. So, that's -- although there wouldn't be -- we don't have a formal arrangement, it's better to make it clear at the point that you first interact what you expect from them, and then they will do it. If you're not clear, then they will -- then there's a chance that your work might get dropped to the bottom of the very important pile.

MR. CALVANI: Pat, one thing that occurs to me is that the length of time needed to plan when you're going to use a sister agency to augment your staff, either in the situation of where an arrest is made or where you're using them on IT or in any other agencies where -- other countries where you may be using them to augment the search itself, the time period you need for planning the raid may be longer than otherwise.

COMMISSIONER KENNY: I think there's no doubt about that. But that's the trade-off you're making. You can always spread the searches over more days, but then you're going to lose potentially a lot of other information. So, once you've decided so many sites must be searched simultaneously, then you must work backwards and say, now, I'm going -- this is going to be much more complex than I think.

And you also have to bear in mind that I've had some experiences where, you know, the agenda of the sister agency resources can be changed by something very big coming down from their hierarchy and things can be changed at the last moment. You just have to accept that that is part of the furniture of using an outside agency, particularly a national police force who, you know, have a very, very wide brief. The competition offense may not be the one that's, you know, really pushing them on a particular day and they might have to change their plans.

MR. CALVANI: Sure, sure. Well, Gary and I want to thank you very much for taking time from your schedule today to visit with us and with our audience. Thanks, and we look

forward to seeing you sometime soon.

COMMISSIONER KENNY: Thank you very much.

[Custody of Seized Materials]

MR. CALVANI: We have been talking about the practical planning of a dawn raid itself and that necessarily involves planning for the custody and storage of the material seized.

MR. BRACKEN: Obviously, many of these issues will turn on national law. A great many jurisdictions have laws that govern the chain of evidence. This is essentially the story of how information is gathered, processed and analyzed such that custody is established at all times. Many jurisdictions require a record of authenticity of that evidence and that it has not been altered in any way.

MR. CALVANI: I recall closing two important criminal investigations when it was determined that we could not properly verify the chain of evidence seized because the documents were not properly stored in a secure setting. While the documents were stored improperly before my own arrival, it fell to me to close what was otherwise a very attractive case, and I assure you, you don't want to have this experience.

MR. BRACKEN: The laws of evidence that govern the authenticity and custody of evidence vary from jurisdiction to jurisdiction.

MR. CALVANI: Given the variety of ways that different jurisdictions treat these issues, it's imperative that you understand your own jurisdiction's legal requirements.

MR. BRACKEN: Concluding this discussion, I want to stress that it is also important that evidence be stored in a secure facility with very limited access and where any access is documented, and that that documentation is itself preserved. It is good practice to have a designated evidence room which serves no other purpose.

[Legal Privilege]

MR. CALVANI: Jurisdictions vary widely on the subject of legal privilege. Some jurisdictions don't recognize it, but most do. There, however, the commonality ends and there are endless variances. This module would take days if we were to try to cover the waterfront on the various treatments of legal privilege. But these variances should not really be that important to you. But what is important, indeed very important, is that all case officers in your authority understand the law of privilege in your own jurisdiction. And, as noted earlier, this is one reason why your team ought to have at least one qualified lawyer.

[Forensic IT]

MR. BRACKEN: As noted in the ICN Anti-Cartel Enforcement Manual, digital discovery has become an exceedingly important subject. The fact is that in today's world, more and more information is being generated and stored electronically. Some information has never been put to paper and some paper evidence doubtlessly has been destroyed or lost.

Moreover, digital files may contain additional information seldom captured on paper. For example, digital files contain meta data that may provide information about the origin of the information, its author, its recipients, the date of creation, modification, accession, and even its destruction. Accordingly, the ability to gather digital or electronic information is a necessary part of the cartel unit's toolkit.

MR. CALVANI: While very important, we're not able, in this module, to focus in great detail on this subject for a couple of reasons. First, the laws that govern the scope of a permissible electronic search, well they vary from jurisdiction to jurisdiction. And oversimplifying, jurisdictions generally address these issues in two quite different ways.

Does your national law permit you to review and take possession of all data that is

accessible from a desktop unit located within your jurisdiction without regard to the location the server or Cloud storage, or does your law take a territorial approach to these issues? Under this view, your authority to search does not extend beyond your border. And as one commentator recently put it, where does the key state action occur, at the place where the data is accessed, or the place where it is stored?

The former approach also poses an area of potential conflict. Consider a non-EU authorized search using the computer located outside the EU to search documents located in a storage facility let's say in Ireland. One former EU commissioner has warned that execution of such a warrant might constitute a breach of international law. And to make matters even more complicated, there are many jurisdictions where the answers to these legal questions are less than clear.

And there's another complicating factor, domestic law may impose special requirements on the chain of evidence in this area and also require forensic investigators to have a requisite level of expertise and perhaps even certification. Oh, and then there are issues of privacy under domestic law that may arise in some countries.

MR. BRACKEN: There's another reason why we cannot treat this issue in greater detail in this module. IT is incredibly dynamic. It changes constantly. State-of-the-art learning today may be virtually useless tomorrow. The dynamic nature of IT has implications for many small agencies. The cost of training and maintaining the requisite expertise could be very expensive for smaller agencies when discovery software may have a short life span and where retraining is a constant and expensive requirement.

Simply put, there are many agencies that do not have the budget for this necessary element of cartel enforcement. While we won't address the technical IT issues today, there are still

things worth noting and discussing.

MR. CALVANI: These problems may be partially solved by relying on other government agencies that do have and do maintain an appropriate level of expertise like perhaps the national police. This may be an attractive solution.

When I headed a cartel unit, this is what we did. An excellent IT unit was available to us with the latest software and well-trained IT detectives. But using an external source is not necessarily a perfect solution. Even if no monetary costs are imposed on your authority, your request for assistance may not receive the priority that at least you would like since the police likely have their own priorities.

MR. BRACKEN: Alternatively, an agency might be able to form a common cause with similarly situated agencies of government, which also confront the same problem. Many sister agencies that regulate corporations or customs have similar needs. Perhaps you could form a joint venture, so to speak, where you might have a first class IT unit where costs are shared among multiple agencies.

Another option is some agencies have contracted out this expertise to private companies. Obviously, you will need contractually appropriate confidentiality standards and conflict of interest provisions if you decide to go with that option.

There are a couple of final points of ICN learning that I want to mention that go beyond the details of the IT search. You immediately want to establish control of the company's digital information in order to prevent destruction of digital information and evidence. So, it is very good practice to seek the company system administrator's cooperation. That person can be a great resource to you.

MR. CALVANI: A surprisingly good resource in many instances. Well, it's often a good

idea to invest time in building rapport with the company's system administrator as they can be very helpful in solving IT issues that you might confront.

MR. BRACKEN: Lastly, you will want to make sure that you have taken any necessary chargers for the devices you seize and that you have solicited information about the computer system's devices, access codes, people's passcodes and practices and procedures for backups, destruction and retention of digital information so that you can better understand the task at hand.

Perhaps the ICN will sponsor another program that can treat the technical IT issues with the care that they deserve, but that awaits another day.

[Conclusion]

MR. CALVANI: Finally, some closing advice could be: expect the unexpected. No matter how much planning and intelligence you gather in the lead-up to a raid, something unexpected probably will happen. If that occurs, it's important to be prepared for the unexpected. Be flexible and have backup staff on call at command to assist if plans need to be adjusted.

MR. BRACKEN: We hope that this ICN training module has been helpful to you as your agency considers how to practically plan and conduct dawn raids. In closing, we encourage you again to look closely at the learning contained in the other parts of the ICN Anti- Cartel Enforcement Manual that we think you will find helpful.

MR. CALVANI: Thank you for joining us today.