

# INVESTIGATIVE PROCESS: FROM START TO FINISH

## Overview of the French Competition Authority's Process

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# Outline

- Initiation of Investigative Efforts
- The French Competition Authority's Investigative Process and Procedure: Overview
- Finding Evidence: Regular Investigations
- Finding Evidence: Searches and Seizures

# Initiation of Investigations

- Principle of separation of investigations and decision:
  - The Competition Authority's case-handlers are in charge of investigating cases, under the supervision of a "General Case-Handler"
  - The Competition Authority's Board decides
- Investigative Proceedings may start in 3 ways:
  - Based on preliminary evidence of anticompetitive conduct received from the field:
    - preliminary examination of evidence by case-handlers
    - if the evidence is deemed sufficient upon preliminary examination, the General Case-Handler submits a request to the Authority's Board for an ex-officio case opening
  - Based on complaints
  - Based on leniency applications (leniency procedure will be explained in separate presentation)

# The French Competition Authority's Investigative Process and Procedure *Overview*

- 2 types of investigations:
  - Regular investigations
  - Inspections and seizures
- Regular investigations:
  - Article L. 450-3 of the French Commercial Code
  - Scope: all kinds of prohibited conduct
  - Limits:
    - companies are forewarned of the purpose of the investigation
    - Inappropriate in cases where evidence can be hidden or destroyed (cartels)
- Inspections and seizures:
  - Article L. 450-4 of the French Commercial Code
  - Scope: all kinds of prohibited conduct (generally cartels, may also be used in unilateral conduct cases)

# Finding Evidence

## *Regular investigations (1/7)*

- The Authority's case-handlers' general powers of investigation include legal right to compel companies or persons investigated to:
  - provide access to business premises;
  - provide business documents;
  - provide information or explanations concerning business conduct, whether in interviews or in written responses to information requests.
- 4 rules apply in all investigations:
  - loyalty in investigations;
  - access to the file and right to provide counter-evidence and arguments;
  - illegitimate evidence is disregarded;
  - Territoriality.

# Finding Evidence

## *Regular investigations (2/7)*

- Loyalty:
  - Case-handlers must explain the purpose of their investigations when first contacting a company or person, i.e.:
    - that investigations concern potential violations of competition;
    - the sector concerned;
    - or if the Authority formally opened investigations, explain the investigations formal purpose.
  - No obligation to disclose or justify the reasons for the investigations
  - Example of disloyal evidence: covert recording of phone conversations

# Finding Evidence

## *Regular investigations (3/7)*

- Defendants are given an access to the file and have the right to provide counter-evidence and arguments:
  - 4 steps procedure:
    1. Investigations (including, depending on each case, examination of a complaint, search and seizures, interviews, information requests, etc.)
    2. Issuance of a “statement of objections” (SO) by case-handlers; states relevant facts, forms legal qualifications (infringement), identifies defendants (imputation), opens access to the file and defendants may provide written response and counter-evidence (within 2 months of receipt of SO)
    3. Issuance of a final report by case-handlers: examines the defendant’s written response and counter-evidence
    4. Hearing and debate before the Competition Authority’s Board in the presence of case-handlers and all defendants
  - Defendants may provide information and evidence during investigations, after the statement of objections and during the hearing. Post-hearing submissions are also possible.

# Finding Evidence

## *Regular investigations (4/7)*

- “Illegitimate” evidence:
  - Evidence that has not been knowingly provided
  - Evidence that is not legally held (i.e., evidence not held in formal affidavits or in responses to requests of information or in written communication to case-handlers)
- Territoriality:
  - Case-handlers hold legal powers of investigations in France
  - Evidence held elsewhere may nevertheless be obtained:
    - in the EU by way of cooperation with National Competition Authorities of other Member States (Regulation 1/2003, art. 22)
    - outside the EU, by way of companies’ voluntary cooperation (outside the EU, companies cannot be compelled to cooperate with French Competition Authority)



# Finding Evidence

## *Regular investigations (5/7)*

- Rules regarding information or document requests:
  - Information requests must be specific and sufficiently precise
  - Information requests must be addressed to the company's representative, her employees, the company's counsel
  - All business or corporate documents must be provided upon request, whether documents required by law (e.g., financial statements) or any other business documents or information
  - Documents that contain business secrets must be provided upon request. Exceptions:
    - legal privilege (attorney-client communications);
    - government classified documents

# Finding Evidence

## *Regular investigations (6/7)*

- Rules regarding interviews of individuals:
  - Affidavits of oral declarations (interviews) and/or factual observations are admissible evidence
  - Affidavits of oral declarations must be drawn up and signed by interviewee
  - Affidavits must indicate the nature, date and location of interview or factual observation
  - A copy must be given to the interviewee
- Companies investigated may be accompanied and counseled by attorneys at all stages of the investigation

# Finding Evidence

## *Regular investigations (7/7)*

- Compliance with case-handlers' requests are mandatory
- Compliance can be ordered by the Authority:
  - Compliance orders may include a daily penalty for non-compliance (maximum penalty: 5% of daily average turnover)
- Refusal to comply, providing incomplete or false information or documents can be punished:
  - by the Competition Authority: maximum penalty: 1% of worldwide turnover
  - as a misdemeanor: maximum penalty: 6 months jail time and 7,500€ fine

# Finding Evidence

## *Inspections and seizures (1/4)*

- Searches and seizures: surprise inspections (or “dawn-raids”)
- Under article L. 450-4 of the French Commercial Code, the Competition Authority’s case-handlers have the power to access all business or non-business premises and seize documents and information contained in any medium (electronic seizures)
- Strict legal requirements for searches and seizures:
  - Must be requested by the Authority’s General Case-Handler, the Minister of the Economy or the European Commission
  - Must be allowed by a Court order (warrant)
  - Searches and seizures must be conducted with the assistance of police officers authorized to control operations and inform judge of proceedings

# Finding Evidence

## *Inspections and seizures (2/4)*

- Obtaining a Court order (warrant):
  - Judge requires sufficient evidence of conduct that may constitute abuses of dominance or anticompetitive agreements
  - Evidence must be sufficient to justify searches and seizures (not actual evidence of an infringement)
  - Evidence should relate to a relevant sector of the economy (not a relevant market), and lead to premises that may hold evidence of infringements

# Finding Evidence

## *Inspections and seizures (3/4)*

- Actual searches and seizures proceedings:
  - Actual operations are under the judge's control, via police officers present on site during searches
  - A copy of the Court order authorizing searches and seizures is given to the premises' occupant
  - Case-handlers inform the premises' occupant of its right to appeal the Court order (appeal does not stay search operations)
  - Premises are sealed pending search
  - All information provided, proceedings and items seized are described in an affidavit
  - The searched company's counsel may be present but shall not impede operations: may simply observe operations, notify the judge (or police officers) of fundamental rights violations and counsel his client

# Finding Evidence

## *Inspections and seizures (4/4)*

- Electronic seizures:
  - Digital forensic process is used by trained case-handlers:
    - computers are blocked
    - deleted files are restored
    - files are digitally authenticated
  - Keyword filters are used to disregard irrelevant files
  - Files are then manually selected on-site
  - An authenticated copy of all relevant files is burned on disk
  - Seized files are inventoried (name, description, size, digital authentication number, pathway)
  - Files are later analyzed in-depth by case-handlers in the Competition Authority's premises
  - Due to technical difficulties in singling-out relevant emails on site, entire mailboxes are seized (i.e., copied) (personal e-mails and business secrets may be redacted later in the proceedings)