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Beating Cartels at Their Own Game – Sharing Information in the Fight against Cartels*

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**"How Should Competition Policy Transform Itself?
– Designing the New Competition Policy "**

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**"BEATING CARTELS AT THEIR OWN GAME –
SHARING INFORMATION IN THE
FIGHT AGAINST CARTELS"**

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INTRODUCTION

I am honored by the JFTC's invitation to speak here today, to share the stage with such distinguished panelists, and to have the opportunity to address all of you. It is a special privilege to have this opportunity at such a historic time. Anti-cartel enforcement in Japan is at a crossroads. The JFTC's Study Group on the Antimonopoly Law has recommended a number of monumental proposals for fighting hardcore cartels. If these proposals are implemented, it will have a profound impact on anti-cartel enforcement not only in Japan, but around the world. If, however, the JFTC should be deprived of these necessary tools, then it is certain that many international cartels will go undeterred, undetected, and unpunished. In the second half of my remarks this afternoon, I will address these Study Group proposals in more detail, but first I would like to talk about the need for international cooperation in the fight against cartels.

There is now a willingness and a desire among competition authorities to work together against a common enemy -- hardcore cartels -- that is unmatched at any time in history. This cooperative spirit was demonstrated earlier this year when the JFTC, the Antitrust Division, the EC, and the Canadian Competition Bureau coordinated searches and drop-in interviews in the plastic additives industry. This was the first time that the United States coordinated simultaneous investigative raids with three other jurisdictions.

The international cartels we are fighting understand the importance of the timely sharing of critical information among the participants. If we are to be successful in the fight against cartels, then we must beat cartels at their own game. We must share leads and information. We must coordinate our investigative strategies. We must ensure the element of surprise so that we can simultaneously seize evidence in multiple jurisdictions before it can be concealed or destroyed. We must gain access to subjects, evidence and witnesses that are located outside our borders. International borders can not serve as barriers to our ability to investigate. There can be no safe harbors from which cartel members can operate.

The Antitrust Division, like competition authorities around the world, strongly supports improving the ability of governments to share information in the investigation of hard core cartels. Many consumer

groups and even some members of the private antitrust bar take a similar position. On the other hand, many business groups, although by no means all, take a different view. They advocate a more cautious approach that creates barriers to information sharing in cartel cases; barriers that do not exist when governments exchange information to investigate other financial offenses, such as fraud, tax, or security violations.

Let me give you an example. The OECD has for many years been encouraging improved information sharing between competition authorities. In an effort to further the debate, the OECD has repeatedly invited the Business and Industry Advisory Committee to the OECD (BIAC) to participate in these working group discussions. While some progress has been made in that time, to date BIAC and the member countries have failed to reach a consensus on many of the most salient points. Clearly, there remains deeply held, diverging beliefs.

I would like to explore why that is. Many business groups say that they support vigorous enforcement of the antitrust laws, so why does their enthusiasm for strong anti-cartel enforcement not translate into support for improving information sharing? Are there any misconceptions or false assumptions that exist that may lead to our contrasting views on information sharing? Why is there no consensus? Since you have so kindly invited me to travel 10,000 miles to be here today, I will not only ask these questions, I will at least try to answer them.

THE CASE FOR IMPROVING INFORMATION SHARING IN THE FIGHT AGAINST INTERNATIONAL CARTELS

I will begin by making the case for why we need to improve the ability of enforcement authorities to share information in order to crack international cartels. After that, I will advance five opposing arguments that have been espoused for restricting, and in some cases even prohibiting, information sharing between antitrust enforcers. I will refer to these opposing views as The Five Myths that often permeate the debate on information sharing. In fairness, The Five Myths are not the only arguments relied upon by those who hold the opposing view, and I may not do them justice, but these misconceptions certainly seem to fuel the debate among those who seek to restrict information sharing in cartel investigations.

However, before I address The Five Myths, I will begin with the argument for improving the ability of foreign governments to share

information in order to successfully investigate and sanction cartel activity. To make this point, I have decided to follow the old adage that a picture is worth a thousand words; only I'm going to take that sound advice one step further by showing you some video-tapes which I hope you will find of even greater value.

Actually, there are three video clips in all that I will rely upon to make my point. The video clips reveal the inner workings of a real cartel captured on tape. They provide you with a ringside seat at cartel meetings that were held in the United States and secretly recorded by the United States Federal Bureau of Investigation (FBI) in its investigation of the worldwide lysine cartel, and were eventually made public at the trial of the three U.S. executives who are shown on the tape.¹ The tapes reveal how the world's major lysine producers were able to secretly meeting at trade association meetings around the world and agree on the exact tonnage each of them would produce and sell the next year, and then fix the price of it down to the penny in the United States and every country around the world, effective the very next day.

¹The three U.S. executives representing Archer Daniels Midland (ADM) at the meetings -- defendants Andreas, Wilson, and Whitacre -- were convicted by a jury of violating the Sherman Antitrust Act (15 U.S.C. § 1) and were sentenced to lengthy terms of imprisonment. The investigation also resulted in the conviction of all of the world's major lysine producers -- including one U.S. company, two Japanese companies, and two Korean companies. All of the producers pled guilty before trial and received substantial fines, including what was then a record-breaking \$100 million fine imposed on ADM. Two Japanese executives and a Korean executive also agreed to plead guilty and cooperate after the search warrants in the investigation were executed, and they paid heavy individual fines. The lysine investigation eventually led the Division to evidence that exposed additional worldwide cartels operating in other chemical markets, including citric acid, sodium gluconate, sodium erythorbate, and maltol. In all, 10 companies and 11 individuals from 7 different countries were convicted and paid over \$225 million in criminal fines (in the United States alone) as a result of the these five inter-connected investigations.

As you are watching these tapes, which together last about ten minutes, I would like you to consider three remarkable aspects of what you are seeing. First, notice the amazing ease and comfort with which the cartel members share sensitive business information relating to pricing and production figures in order to stifle competition. Second, observe how effective and sophisticated international cartels can be in agreeing, implementing, enforcing, and concealing their anti-competitive agreements. Lastly, witness the brazenness, the lawlessness, and the utter contempt with which cartel members regard both competition laws as well as their own customers. Here is the lysine cartel at work.²

Since the lysine investigation was exposed, we have uncovered numerous worldwide cartels operating in virtually the same fashion. In fact, many of the international cartels that have been exposed over the last ten years have shared the following characteristics:

- a deliberate and brazen disregard for competition laws and for customers -- best summarized by the words of an ADM executive in another tape segment that I did not play who announced to his fellow conspirators that his company's philosophy was "our competitors our friends. Our customers are the enemy;"
- the involvement of top management in hatching and agreeing on the terms of the conspiracy, usually followed by the work of subordinates to carry out and police it -- for example, in the worldwide citric acid cartel, the cartel members referred to the dual layers of management by the code names "elephants" and "sherpas;"
- a growing fear of detection, particularly by U.S. enforcers -- after reading reports of FBI taping of lysine meetings in the United States, a number of cartels were later revealed to have decided to hold future cartel meetings outside of the United States to avoid detection but continued, without interruption, to target the U.S. market

²We are making the undercover tapes publicly available for the purpose of informing the debate on the seriousness of international cartel activity, and to enlist foreign governments as well as the international antitrust bar and the business community in deterring antitrust offenses. Copies of the tape and transcript are available at no charge by mailing or faxing (202/616-4529) your request to the United States Department of Justice, Antitrust Division, Freedom of Information Act Unit, 325 Seventh Street, N.W. Suite 200, Washington, D.C. 20530.

with their schemes;

- the goal of fixing prices and allocating sales volumes on a global basis;
- the creation of sophisticated schemes for auditing and policing their agreements which are designed to discourage cheating and still avoid detection; and
- the use of extreme measures to conceal the existence of a cartel, including everything from creating bogus trade associations, the use of code names, and sophisticated ruses to keep general counsel in the dark, to hiding incriminating evidence in the attic of a cartel member's grandparent's home, wholesale document destruction and witness tampering after an investigation begins.

There should be no mistake about it. These cartels are hardcore in every sense of the word. The members of these cartels know what they are doing is illegal, but they are not deterred. Instead, they go to great lengths to conceal their conduct. If we are to deter it, if we are to detect it, if we are to punish it, then we must use every investigative tool available to law enforcement as well as take advantage of a new one -- Corporate Leniency Programs - and still that is not always enough. Antitrust enforcers must also work together. If antitrust enforcers are to beat cartels, we must share information in the investigation of hardcore cartels as law enforcers do in the investigation of other financial crimes.

MYTHS AND MISCONCEPTIONS SURROUNDING INFORMATION SHARING

- *Myth I: Information Sharing In The Investigation Of Hardcore Cartels Should Be Treated Differently Than Other Financial Offenses*

This brings me to the first misconception that permeates much of the opposition to stronger information sharing among enforcers. Namely, that information sharing in the investigation of hardcore cartels should be treated differently than in investigations of other financial offenses. Though it is rarely expressed this way, the attitude seems to be that hardcore cartels are really no more than "gentlemanly agreements" that should be treated with velvet gloves and deserve a special exemption from normal investigative techniques. Some business groups have suggested limitations and "safeguards" that are unheard of in the context of information sharing between

governments in the investigation of other financial crimes.

Again, my purpose in showing the lysine tapes was to demonstrate that cartel offenses are no different than other crimes of deceit or fraud. Cartel members cheat their customers out of honest competition, and they pad their pockets with the profits of their conspiracy. Any special restriction that would apply only to information sharing on cartel investigations but would not apply to tax, securities, or other financial crimes is unjustified. Any suggestion that hardcore cartels deserve special treatment is a myth.

- *Myth II: Increased Information Sharing Will Lead To The Rampant, Uncontrolled Exchange Of Sensitive Confidential Business Secrets*

My second myth is the often repeated fear that strict prohibitions on information sharing among enforcers are required to prevent the rampant, uncontrolled exchange of sensitive, confidential business secrets. This concern is simply misplaced. A document may be sensitive because if revealed it could expose a company to dire consequences. It may be confidential because it was never meant to be seen by government authorities. And, it may be secret because it implicates the author and others in illegal conduct, and they are the only people who are meant to know about it. That, however, does not make a document a sensitive, confidential *business* secret. It just makes it evidence of a crime. Unfortunately, as a consequence of the restrictions advocated by some business groups, most competition authorities are not entrusted with the discretion to differentiate between the two. So, the "smoking gun" document secretly stored away in grandma's attic is subjected to the same prohibitions on information sharing as the secret formula for Coca Cola. Does that make sense? If you restrict the ability of governments to share information, you risk putting competition authorities in the situation where they can possess unequivocal written proof that other countries were victimized by an international cartel and yet be prohibited from sharing that information, much less the actual document, with other governments.

To be clear, what competition authorities look for is any evidence of meetings or communication between competitors regarding pricing, customers, markets, or sales volumes. This evidence is commonly found in handwritten notes, calendars, expense reports, phone logs, trade association minutes, and the like. The key types of information we rely upon to investigate cartel conduct is notably different than the information sought in connection with the review of a proposed merger. For example, whereas prospective business

plans or sensitive trade secrets may be invaluable in connection with the review of a proposed merger, they would not be typically exchanged in connection with a cartel investigation where the emphasis is not on prospective business plans but rather on historic pricing decisions.

- *Myth III. Strict Protections On Information Sharing Must Be Imposed Because There Is A High Risk of Misuse Or Leaks Of Shared Information*

The third myth relates to the perceived threat that confidential information will be misused or leaked by the requesting authority. Apparently, there is a mistaken belief among the opposition that the risk of misuse or leaks of confidential information is significantly higher in cartel cases than it is anywhere else. I say that because it appears that cartel investigators are singled out for suspicion even though companies routinely voluntarily consent to information sharing by the very same competition authorities in merger and other civil investigations. No basis or precedent exists for discriminating against cartel investigations in this regard. The fact of the matter is that the Division knows of no instance, or even an allegation, of a misuse or leak of confidential business information shared between competition authorities, and our invitation to BIAC and others to identify examples of such transgressions have gone unanswered. Indeed, by virtue of being charged with promoting competition, antitrust authorities have every incentive to keep sensitive confidential business information from falling into the wrong hands. This incentive is the same whether the antitrust authority is conducting a merger review or investigating hardcore cartel activity.

- *Myth IV: Unchecked Information Sharing Threatens The Continued Success Of Leniency Programs*

The fourth myth relates to the claim that information sharing will damage leniency programs. BIAC recently advanced this argument in its October 2003 paper submission to the OECD when it claimed that the restrictions in information sharing it proposed were necessary to protect the integrity of leniency programs. Fortunately, this concern is entirely misplaced.

The Antitrust Division's policy is to treat as confidential the identity of leniency applicants and any information obtained from the applicant. Thus, the Antitrust Division will not disclose a leniency applicant's identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order.

Consistent with this policy, the Antitrust Division has adopted a policy of not disclosing to foreign authorities, pursuant to cooperation agreements, information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure. Since this confidentiality policy was announced, every jurisdiction that I am aware of that has considered the issue has arrived at the same policy. Thus, leniency applicants have control over the flow of *their* information between governments.

This policy gives leniency applicants a measure of control over investigations that might strike some as problematic. However, the confidentiality policy is a necessary inducement to encourage leniency applications. Moreover, leniency applicants routinely consent to the sharing of information between jurisdictions where they have obtained conditional leniency, so that those jurisdictions may conduct coordinated investigations. Just as it has become the norm that companies will simultaneously seek leniency in the United States, the EC, and Canada (and often in other jurisdictions as well), applicants commonly consent to the sharing of their information between the jurisdictions where they have sought leniency. Thus, we routinely discuss investigative strategies and coordinate searches, service of subpoenas, drop-in interviews, and the timing of charges with the EC and Canada in order to avoid the premature disclosure of an investigation and the possible destruction of evidence. Conversely, the lack of a leniency program in Japan severely limits the ability of the United States and others to share information and coordinate investigative activities with the JFTC in a great number of investigations. Since applicants have no reason to consent to information sharing with jurisdictions where leniency is not available, we are currently unable in those matters to conduct parallel investigations with the JFTC. As I will discuss in a few minutes, if Japan adopts a leniency program that is consistent with the U.S. and EC policies, that will change.

- Myth V. Business And Trade Groups Do Not Support Enhanced Cooperation Between Foreign Governments Because They Fear Vigorous And Effective Enforcement Of The Antitrust Laws

My last myth is the assertion that business groups do not support enhanced cooperation between foreign governments because they fear vigorous and effective enforcement of the antitrust laws. Is this fact or fiction? I say it is a myth or, at the very least, it should be one. It just makes no sense that honest businesses operating in a free market economy would not favor strong cartel enforcement. Why? Because businesses are usually the first to feel the pain caused by cartel activity. Of course, they may try to pass along price increases

to their customers and, ultimately, to consumers, but that will not always be successful. Take, for example, the worldwide cartel that operated in the graphite electrodes market that was cracked with the help of a leniency applicant. Graphite electrodes are used in steel mills to melt scrap steel. Over a five-year period, the major producers conspired to fix the price and allocate market shares for graphite electrodes sold worldwide. The conspirators were successful in raising prices nearly 60 percent during the life of the cartel before it was abruptly ended by the Antitrust Division's investigation. Now, were the tens, if not hundreds, of millions of dollars of illicit overcharges paid by the steel makers for fixed graphite electrodes passed on by the beleaguered steel makers to their customers? Given the depressed nature of the steel industry, I very much doubt it. The bottom line is a business is far more likely to be the victim of a cartel than a member of one.

Those in the business community who have historically opposed attempts to improve information sharing between competition authorities may wish to rethink their position based on facts not fiction. Special restrictions on information sharing that apply only to cartel investigations do far more harm than good to the international business community.

THE STUDY GROUP'S PROPOSALS ARE A RECIPE FOR SUCCESS

With the time that I have remaining, I would like to briefly comment on the four important proposals of the JFTC sponsored Study Group on the Antimonopoly Act -- raising the surcharge calculation percentage for fines; increasing the use of criminal referrals and prosecutions; introducing compulsory investigative authority; and adopting a corporate leniency program into the JFTC's arsenal of investigative tools. I will then conclude with a prediction as to what these reforms would mean to international cartel enforcement in Japan and around the world.

It is clear that the Study Group has done its homework. Taken together, the Study Group's proposals read like a recipe for creating an effective leniency program -- stronger sanctions mixed with an increased risk (and fear) of detection followed by a heavy dose of criminal prosecutions. With respect to the maximum surcharge level, as I understand it, the goal of the surcharge is to divest cartels of their ill-gotten profits. The current maximum surcharge level of six percent is clearly insufficient to meet this purpose in a significant number of cases and, therefore, the United States has recommended to the Japanese government that the maximum surcharge

level be raised to at least twenty percent. Indeed, we have prosecuted a number of international cartels over the last five years that have pocketed gains in excess of twenty percent. Compared with fine methodologies used by the United States, the EC, Canada, and many other jurisdictions, capping surcharges at even twenty percent may result in relatively low recoveries. Second, if the surcharge calculation is further limited to only the last three years of a cartel's existence, instead of its full duration, then the objective of disgorging the cartel of its illicit profits may again be thwarted. The seventeen-year worldwide cartel that existed among the world's major producers of sorbates and the nearly ten-year cartel that existed in vitamins are but a few examples of international cartels that extended far beyond the surcharges' three-year cap. Not only will a three-year limitation fail to account for the gain reaped by cartels that last longer than three years, it actually may provide a negative deterrent message by signaling that the cartel has nothing to lose, and everything to gain, by continuing to conspire after it reaches the three-year mark.

The deterrent concerns that I mentioned with regard to the surcharge percentage can be overcome by another one of the Study Group's proposals, namely the recommendation to increase criminal prosecutions under the Antimonopoly Act. It is widely accepted, and it has certainly been our experience in the United States, that holding executives accountable for participating in cartel offenses by prosecuting them criminally and imposing jail sentences provides the greatest deterrent to these crimes. Because while cartel members may regard surcharges and fines as simply a cost of doing business, the loss of individual liberty is rarely viewed the same way. So it makes sense that the threat of incarceration is also the greatest inducement to self reporting and cooperation which brings me to the proposal to institute a leniency program.

Leniency is the single greatest investigative tool available to antitrust investigators. It destabilizes cartels by increasing the risk and fear of detection. It breaks up cartels by causing members to compete again, only this time the competition is a footrace to the government's door. The first to report earns a complete pass from prosecution for the company and its cooperating executives. The losers face prosecution, heavy fines, and the incarceration of culpable executives. The stakes are so high that the competitors can no longer afford to trust each other. Panic ensues, and it is a race for leniency.

Consider the success that the United States and the EC have had in cracking cartels since the adoption of their revised leniency

programs. There has been more than a ten-fold increase in U.S. leniency applications since we revised our program in 1993, resulting in over \$1.75 billion in criminal fines, scores of convictions, and the dismantling of numerous international cartels. There has been a parallel surge in leniency applications in the EC, with similar record-breaking results, since they revised their program in 2002.

In conclusion, let me leave you with this prediction. If the Study Group's proposals are implemented, giving the JFTC the necessary tools, Japan can join the United States and the EC in achieving the same measure of success in fighting international cartels. All of the necessary ingredients will be in place. As with the United States and Europe, a high percentage of the world's multinational companies either are based, or at least do significant business, in Japan. As a consequence of this, there is a stronger likelihood that important documents and witnesses will be located in Japan. In addition, the subjects of the investigation can not easily avoid prosecution in Japan by simply remaining outside of Japan's borders. Moreover, the size of the Japanese market will warrant heavy surcharges on companies, and these sanctions can be supplemented with the criminal prosecution of individuals and the possibility of jail sentences. If, in this environment, Japan adopts a leniency program that is in significant convergence with the transparency elements of the U.S. and EC programs, it will lead to a tsunami of leniency applications resulting in unprecedented numbers of cartels being exposed, prosecuted and sanctioned in Japan. Anti-cartel enforcement in Japan is at a crossroads. The next step is a big one.