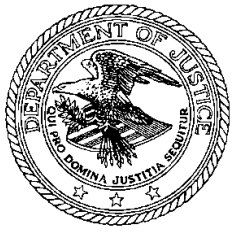

DEPARTMENT OF JUSTICE

THE BASICS OF A SUCCESSFUL ANTI-CARTEL ENFORCEMENT PROGRAM

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I. Introduction

Good Afternoon. I am pleased to be here this afternoon on such a distinguished panel to provide an American perspective on the basic requirements for a successful anti-cartel enforcement program. As all of you know, the United States has had many years of experience in the cartel enforcement area. Over the last ten years, as commerce has become increasingly globalized, the United States has successfully prosecuted scores of international cartels, generating more than a billion dollars in criminal fines in the process. As a result of our extensive experience in this area, we have come to recognize that there are some requirements central to the maintenance of a successful anti-cartel program. I'd like to speak briefly with you today about what we believe those requirements are, and why we think they are important. In our experience, the four necessary ingredients to a successful anti-cartel program are:

(1) severe penalties;

(2) effective legal tools;

(3) a high risk of detection; and

(4) transparency and predictability in application.

I'll focus briefly on each of these. I will also say a few words about a fifth ingredient that is playing an increasingly important role in ensuring that anti-cartel programs are effective in our ever-more-globalized economy: cooperation and assistance among competition law enforcement authorities across jurisdictions.

II. Severe Penalties

I think there is general consensus on the proposition that a successful cartel enforcement program requires significant penalties. One - if not the - core goal of an anti-cartel program is general deterrence. That is, by imposing significant penalties on the participants in those cartels that are detected and successfully prosecuted, we discourage others from entering into or continuing to engage in cartel conduct. However, cartel activity will not be deterred if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential punishments are not sufficiently significant, the potential sanctions will likely be internalized merely as a cost of doing business – a tax, if you will.

In the United States, we treat hardcore cartel activity as a crime, and we prosecute offending corporations and individuals criminally. I realize that there is not an international consensus on the need for criminal sanctions in this area, but based on our experience, we believe that there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Few corporate executives regard spending several months or years in a federal prison as a "cost of doing business" that they will readily absorb. As we have seen time and time again, the potential rewards from engaging in cartel conduct can be enormous - measured in additional corporate profits and in individual professional advancement and bonuses. And in some cartels, such as the graphite electrodes cartel, individuals personally pocketed millions of dollars as a direct result of their criminal activity. Given the enormous potential gains to corporations and individuals from engaging in cartel conduct, a corporate fine alone, no matter how punitive, may not be sufficient to

deter such conduct.

While corporate fines alone may not provide the optimal deterrent to cartel conduct, heavy corporate fines do send a powerful deterrent message. To this end, we have recently "upped the ante" by obtaining record-breaking fines against firms that engage in cartel activity. Just ten years ago the highest antitrust fine ever obtained in the United States was less than $3 million. Today, fines of $10 million or more have become almost commonplace with more than 40 imposed in the last seven years. This dramatic leap in the level of criminal fines, however, is more than just a reflection of our aggressive approach to deterring cartel activity. Rather, because fines in the United States are based in large part on a company's sales in the United States affected by the conspiracy, the record fine levels demonstrate the mammoth size of the international cartels that we have been uncovering.

The United States is not alone in imposing record-breaking fines on international cartels. Both the European Commission and Canada also regularly impose very significant fines on companies found to have engaged in cartel activity. In fact, both jurisdictions have imposed their own record-breaking fines in cartel cases over the past several years. Over the past three years, the EC alone has imposed penalties on cartel members totaling more than 3 billion euros. For companies engaged in conspiratorial conduct that affects commerce in North America and Europe, the possibility of stiff corporate fines in three different jurisdictions should considerably affect their risk/reward calculation.

It is important to note that more and more jurisdictions are adopting legislation or regulations calling for severe penalties for those who engage in cartel conduct, so the potential cost of engaging in cartel conduct is definitely on the rise. In fact, there is

legislation pending in our Congress right now that, if passed, would increase the stated maximum corporate penalty for corporations from its current $10 million, to $100 million. That legislation also would increase the maximum jail sentence for an individual convicted of engaging in hardcore cartel conduct from its current 3 years to 10 years.

III. Need For Effective Investigative Tools/Fear of Detection

I will talk about the next two elements of a successful anti-cartel enforcement program—the need for effective investigative tools and fear of detection—together because it is the availability and the aggressive use of sufficient investigative tools that results in the fear of detection. Of course, no matter how stiff the penalties, they will serve no deterrent effect at all if cartel participants never expect them to be applied. Therefore, antitrust authorities must cultivate a law enforcement environment in which business executives perceive a real and significant risk of detection if they either enter into, or continue to engage in, cartel activity.

The first and most basic step in creating such an environment, of course, is the creation/maintenance of an enforcement authority staffed with well-trained professionals who are provided with sufficient resources to do their jobs. In the United States, we believe that we have such an authority, a happy circumstance that we share with a growing number of competition enforcement authorities around the globe. And increasingly, as you all know, enforcement officials of the "older" agencies, as Dr. Boege referred to them this morning, are sharing their expertise with each other and providing training assistance to "new" agencies. This is occurring both formally, at gatherings such as we have here today, and through an ever-increasing number of informal contacts.

But enforcement officials must also have sufficient legal tools to compel the production of relevant documents and information from subject corporations and their officials. In the United States, for example, Antitrust Division lawyers, working with the F.B.I. and federal grand juries, have the ability to subpoena relevant corporate documents, question witnesses, and compel reluctant witnesses to testify before the grand jury in exchange for immunity. Where the relevant standard can be met, Division attorneys also have the ability to obtain search warrants from the courts, allowing the FBI to conduct searches of premises where relevant evidence may be found – and seize any of it that they find. All of these powers are necessarily fortified by significant penalties for obstruction of justice – for example, destroying documents responsive to a subpoena rather than producing them – and perjury – for example, knowingly providing false testimony to a grand jury. Many of our sister enforcement authorities have similar powers.

We in the Antitrust Division take the obstruction and perjury penalties very seriously. Only by imposing severe penalties on those who obstruct our investigations can we ensure that the investigative tools available to us result in our obtaining the evidence we need to prove cartel cases. For example, in November of 2002, Morgan Crucible Company plc ("Morgan Crucible"), a UK company, pled guilty and agreed to pay a $1 million fine for attempting to obstruct the Division's investigation into price fixing of electrical carbon products. Morgan Crucible's U.S. subsidiary, Morganite, Inc., pled guilty the same day to the underlying price fixing charges. In September 2003, additional charges relating to the obstructionist behavior were filed against four of Morgan Crucible's executives. Three of these executives (a U.S. citizen, a UK citizen and a Netherlands citizens) are serving prison

sentences in the United States for their criminal obstruction of the Division's investigation. The remaining executive, a citizen of the UK, remains a fugitive. We will continue to take aggressive action against those who seek to impede the Division's investigations in order to ensure that the investigative tools available to us remain viable mechanisms for obtaining needed evidence.

In the United States, there is one investigative tool that we have found over the last decade to have been particularly effective—that is our corporate amnesty program. Under that program, a corporation that either brings to our attention a cartel that we had been unaware of, or is the first to come forward to cooperate in an investigation that is already underway, will, subject to conditions set out in our amnesty policy, receive complete immunity from prosecution for itself and for all its executives that cooperate in our investigation. Conditions for a corporation's inclusion in the amnesty program include: (i) taking prompt and effective action, upon discovery of the violation, to terminate the company's participation in the illegal activity; (ii) cooperating fully with the Division's investigation of the illegal conduct; and (iii) paying restitution, where possible, to injured parties. In addition, a corporation that coerced another party to participate in the illegal conduct or clearly was the leader in, or originator of, the illegal scheme is not eligible for amnesty. A much more complete description of our amnesty program can be found on the Antitrust Division's website.

It is clear that our amnesty program has changed the dynamic among cartel participants over the last decade. It exploits the principle that "there is no honor among thieves." The more anxious a company is that its cartel participation may be discovered by

the government, the more likely it is to report its wrongdoing in exchange for amnesty. The promise of zero dollars in fines and immunity for culpable executives looms large. Of course, amnesty is only available to the first one in the door. If you are second, even if only by a matter of a few hours, which has happened on a number of occasions, the second firm and all of its culpable executives will be subject to full prosecution.

The "winner-take-all" race dynamic leads to tension and mistrust among the cartel members. Remember – no honor among thieves. For example, consider a scenario where five members of a cartel are scheduled to hold a meeting. When the meeting starts there is an empty seat at the table – one of the conspirators has not returned calls and has unexpectedly not arrived at the meeting. Red flags go up. One of the cartel members at the meeting starts to get nervous. Has the missing cartel member had a change of heart and abandoned the cartel? Has he gone to the DOJ? Or, did he just miss his plane? In this environment, with the risk of detection and the stakes so high, who can you trust? Consider also the common situation when a cartel first learns that it is under investigation. Each member of that cartel knows that any of its co-conspirators can be the first to come forward in exchange for total amnesty and seal the fate of the rest. Imagine the vulnerability of being in that position and asking yourself, "Can I really trust my partners in crime?" This is really a destabilizing effect.

The question is often asked whether an amnesty program will work in a jurisdiction where there is no individual liability and, therefore, no possibility of incarceration for culpable executives. Clearly, the opportunity to avoid imprisonment for corporate officials is a significant inducement for firms to seek amnesty. However, we believe that an amnesty

program can still succeed if the threat of heavy fines is sufficiently great. This belief is supported by our experience with foreign-based firms that have sought and obtained amnesty in international cases at a rate almost equal to their domestic counterparts. For example, the worldwide vitamin cartel was cracked by the cooperation provided by French-based Rhone-Poulenc SA. The company made the decision to come forward even though the culpable French executives resided outside of the United States and our extradition treaty with France does not cover antitrust offenses. So, the opportunity to avoid incarceration for its culpable executives was probably not the major inducement to Rhone-Poulenc's decision to come forward, but rather the desire to avoid a criminal conviction and heavy fine for the corporation. And, indeed, while Rhone-Poulenc paid zero dollars in fines, its principal co-conspirators, Hoffman La Roche and BASF, paid fines of $500 million and $225 million, respectively. Furthermore, the recent well-known success of the European Commission's amnesty policy is additional evidence that a successful program is not necessarily dependent on the threat of individual sanctions.

Of course, the perception that engaging in cartel conduct is risky business is at its highest when antitrust enforcement agencies put their highly trained professional staff together with their effective legal tools to generate a track record of successful prosecutions.

IV. Transparency and Predictability in Application

Transparency and predictability are the next key ingredients in a successful anti-cartel program. Whether in the context of our amnesty program or otherwise, self reporting and cooperation from offenders have been essential to our ability to detect and prosecute

cartel activity. Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency and predictability, throughout our anti-cartel enforcement program. If prospective cooperating parties cannot predict, with a high degree of certainty, their treatment following cooperation, then they are less likely to come forward.

Transparency must include not only explicitly stated standards and policies; it must also include clear explanations of prosecutorial discretion in applying those standards and policies. The Division has sought to provide transparency throughout the enforcement process, with: (1) transparent standards for opening investigations; (2) transparent standards for deciding whether to file criminal charges; (3) transparent prosecutorial priorities; (4) transparent policies on the negotiation of plea agreements: (5) transparent policies on sentencing and calculating fines; and (6) transparent application of our Amnesty Program.

The criteria the Division applies for opening an investigation are set out in the Antitrust Division Manual, which is available on the Division's website. In general, the long-standing Division policy is to proceed by criminal investigation and prosecution only in cases involving hard-core, per se unlawful agreements between or among competitors, i.e., horizontal price fixing, bid rigging, or market allocation. We believe it is important for the business community and the bar to have a clear understanding of the conduct likely to subject companies and their executives to criminal sanctions.

The Division strives also to make transparent its prosecutorial priorities. Our focus on international cartels was announced beginning in 1995 in a series of speeches to a wide range of relevant audiences; those speeches have also been posted on the Division website. So also, the methods used in calculating criminal fines and terms of incarceration can be

found in the United States Sentencing Guidelines and senior Division officials have given a number of speeches explaining how the Division interprets and applies these Guidelines in hardcore cartel cases.

The Division goes to great lengths to treat offenders equitably vis-a-vis one another, that is, after taking into account all mitigating and aggravating factors. The Division attempts to ensure that each offender in each cartel is treated proportionally to others in that cartel, and that offenders across cartels also are treated proportionately. The timing and value of cooperation by offenders is given heavy weight in this analysis. In bar association speeches and in individual plea discussions, Division officials regularly explain the Division's application of the above principles of transparency and why a proposed disposition as to any individual defendant is proportional and equitable.

One area in which we think the Division's commitment to transparency has been particularly important has been in connection with our amnesty program. The Division has a written Amnesty Policy and has published a number of papers in order to make clear the Division's application of its Corporate Amnesty Program. In addition, representatives from the Division regularly speak about the Amnesty Program before national and international bar associations, trade groups, other law enforcement agencies, and the media. However, in order for an Amnesty Program to work, you need to do more than just publicize your policies and educate the public. You also have to be willing to make the ultimate sacrifice for transparency – the abdication of prosecutorial discretion.

The Division's Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application. If a

corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is virtually automatic and is not subject to the exercise of prosecutorial discretion. We have had to swallow hard on a number of amnesty applicants that we would have much preferred to have prosecuted. However, we had roughly 15 years of experience with an Amnesty Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Our new amnesty program has been in place since 1993. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. It is important to emphasize that uncertainty in the qualification process will kill an amnesty program.

V. Cooperation and Assistance among Competition Law Enforcement Authorities

The last point I would like to mention today is that cooperation and assistance from foreign governments is increasingly becoming an important ingredient in the successful detection and prosecution of international cartel activity. Cooperation among competition law enforcement authorities has undergone a sea change in the past several years, reflecting the growing worldwide consensus that international cartel activity is pervasive and is victimizing businesses and consumers everywhere.

This shared commitment to fighting international cartels has led to the establishment of cooperative relationships among competition law enforcement authorities around the world in order to more effectively investigate and prosecute international cartels. This cooperation takes many forms. It may involve, among other things, the execution by one jurisdiction of a formal assistance request from another, the informal discussion of best

practices and sharing of experiences among law enforcement officials at the annual cartel enforcers workshop, or in parallel investigations. It also includes launching an investigation with coordinated, simultaneous dawn raids, searches, service of subpoenas, and surprise witness interviews in a number of jurisdictions such as was done among the United States, the EC, Canada, and Japan last year in the impact modifiers investigation. In fact, it is no longer uncommon for authorities in multiple jurisdiction to plan and conduct simultaneous searches, service of subpoenas, and drop-in interviews.

VI. Conclusion

Let me conclude by simply saying that our experience in law enforcement has convinced us that the hallmarks of a successful anti-cartel enforcement program are (i) the availability and imposition of severe sanctions for those found to be engaging in cartel conduct; (ii) effective legal investigative tools; (iii) a high risk of detection; and (iv) transparency and predictability throughout the enforcement program. These, combined with cooperation and assistance among competition law enforcement authorities, form a solid foundation for anti-cartel enforcement reaching all the way from the small domestic cartels within our own borders to the massive international conspiracies that have harmed consumers worldwide.

We in the United States stand ready to continue to assist our friends abroad by sharing our experiences in the cartel area to further our mutual goal of rooting out hard-core cartels. Thank you.