



# DEPARTMENT OF JUSTICE

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## ANTITRUST IN THE TWENTY-FIRST CENTURY

### “STATUS REPORT ON INTERNATIONAL CARTEL ENFORCEMENT”

By

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# STATUS REPORT ON INTERNATIONAL CARTEL ENFORCEMENT

## **I. Introduction**

The Antitrust Division of the U.S. Department of Justice (“the Division”) continues to focus a large amount of its resources on international cartels that victimize U.S. businesses and consumers. During the course of the Division’s fiscal year 2000 (October 1, 1999 through September 30, 2000), the Division conducted approximately thirty grand jury investigations of suspected international cartel activity. Currently, approximately one-third of the Division’s criminal investigations involve international cartel activity.

This enforcement emphasis has led to the breakup of major international cartels, the convictions of key conspirators, and the imposition of substantial fines. In fiscal year 2000, approximately one-third of the criminal cases filed by the Division involved international conspiracies. These conspiracies affected many hundreds of millions of dollars of U.S. commerce annually. The enormous amount of the harm inflicted by these international cartels is reflected in the fact that the fines obtained by the Division in international cases in the last fiscal year represented over ninety percent of the total dollar volume of criminal fines obtained by the Division in all cases during that period.

## **II. Recent Prosecutions**

In the last fiscal year and the beginning of the 2001 fiscal year, the Division continued its prosecutions of international cartels in the vitamin, graphite electrodes, and sorbates industries, and also initiated new prosecutions of the isostatic graphite, wastewater construction, and fine arts industries, as well as others. Companies based in the United States, Germany, Japan, France and Israel were prosecuted for these international conspiracies, as well as

individuals who were citizens or residents of the United States, France, South Africa, Spain, Germany, Switzerland, and Japan. These cases show that we will prosecute key conspirators no matter what their nationality or where they reside. In addition to these new case filings, the Seventh Circuit recently upheld the convictions of members of the lysine cartel and issued important rulings on the per se rule and two sentencing issues. I would like to highlight briefly the major developments in some of these international investigations and cases.

**A. Vitamins**

Thus far, our Dallas Field Office has filed 24 cases against 11 companies and 13 individuals for their involvement in the vitamin cartel, and the investigation is continuing. Corporate fines imposed or agreed to now total more than \$910,000,000, while individual fines imposed or agreed to total over \$1 million. The jail time imposed thus far ranges from three months to one year and one day.

The vitamin cartel was one of the most pervasive and harmful ever prosecuted by the Antitrust Division, affecting billions of dollars of U.S. commerce and lasting for almost a decade. Its longevity and success were due in part to how well organized the cartel was. In fact, the cartel was so well organized that it was referred to as “Vitamins, Inc.” Different layers of conspiratorial tasks were divided among different layers of management at the various companies involved, as if the competitors were part of the same large company. The top management of the companies in the cartel initiated, negotiated, and directed the cartel activity, middle management implemented the cartel agreements, and lower-level management monitored compliance with the agreement. The investigation of the cartel and the resulting prosecutions have really brought home the significance of antitrust violations and how antitrust

conspiracies affect the average American. The cartel's price-fixing and allocation agreements involved products used and recognized by virtually every American consumer. The cartel members agreed upon prices and sales volumes for every major vitamin used for human or animal consumption sold throughout the world, including Vitamins A, B2, B5, C, E, Beta Carotene, and vitamin premixes, which are used to enrich breakfast cereals and many other foods.

The results obtained in the vitamin investigation are particularly noteworthy in two important respects -- the number of foreign citizens receiving jail terms and the amounts of the corporate fines imposed. In our earlier prosecutions of international cartels it was not uncommon, due to jurisdictional issues, for the foreign individual cartel members to receive either nonprosecution coverage in their corporate employers' plea agreement or to agree only to pay a fine in return for their cooperation. However, in the vitamin investigation, of the thirteen individual defendants prosecuted, six are foreign nationals, from either Germany or Switzerland, and all six of these foreign nationals agreed to serve time in U.S. prisons for their role in the vitamin cartel. The vitamin investigation marks the first time that any European national has served time in a U.S. prison for an antitrust violation.

As I noted earlier, corporate fines in the vitamin prosecutions agreed to or imposed total more than \$910,000,000. The \$225,000,000 fine against BASF and the \$500,000,000 fine against F. Hoffmann-La Roche are the two largest fines ever imposed in Antitrust Division cases, and the Hoffmann-La Roche fine is the largest fine ever imposed in any Justice Department case. The \$500,000,000 fine against Hoffmann-La Roche is particularly stiff in light of the fact that Hoffmann-La Roche had the opportunity to cooperate with the Division

early in its investigation, and thereby could have avoided the payment of such a large fine and possibly could have avoided jail sentences for its executives. Hoffmann-La Roche was well aware from its prosecution in the citric acid investigation of the consequences of its involvement in the vitamin cartel. However, instead of confessing its role and cooperating with the vitamin investigation after it was prosecuted and fined \$14 million in March 1997 for its role in the citric acid cartel, Hoffmann-La Roche officials continued to meet regularly and collude on vitamin sales and lied to government investigators about the existence of the vitamin cartel. As a result of the company's brazen disregard for the antitrust laws, it ended up paying the highest fine in the history of the Justice Department and three of its foreign executives served jail time in the United States for their role in the cartel.

#### **B. Graphite Electrodes**

Our Philadelphia Field Office's investigation of the graphite electrodes cartel has resulted in guilty pleas from almost every major producer of graphite electrodes in the world. Six corporations and three individuals have pled guilty to participating in the cartel, which ended only upon the execution of search warrants in the United States and 'dawn raids' in Europe in June 1997. Fines in excess of \$290 million have been imposed against the corporate defendants, and fines ranging from \$1 million to \$10 million and jail sentences up to 17 months have been imposed against the individual defendants.

This cartel affected over \$1.7 billion dollars in U.S. commerce, which is estimated to account for between one quarter and one third of the worldwide sales of graphite electrodes. The cartel members conspired to raise graphite electrode prices more than 60 percent in the United States during the five-year term of the conspiracy. They agreed on similar collusive

increases throughout the world resulting in price increases from roughly \$2,000 per metric ton to \$3,200-\$3,500 in various markets.

Earlier this year, the graphite electrodes investigation culminated in the indictment of Mitsubishi Corporation for its role in aiding and abetting the cartel and the indictment of Georges Schwegler, a former UCAR International Inc. official, for his participation in the conspiracy. From 1991 until early 1995, Mitsubishi owned one-half of UCAR, the world's largest graphite electrodes producer, and was also a distributor of graphite electrodes. The Mitsubishi trial is scheduled to begin in January. Schwegler, a citizen of Switzerland and a resident of South Africa, was UCAR's Director of European Export Sales. Schwegler remains an international fugitive.

Like many international cartels, some members of the graphite electrodes cartel were also involved in additional cartel activity, and our investigation has accordingly expanded into other areas. Earlier this year we brought the first prosecution involving another graphite product, isostatic graphite, which is used in the production of electrodes and metal casting dies. In March, we filed a case against Carbone of America Industries Corporation, a subsidiary of a French company, and its president and chief executive officer, Michel Coniglio, for fixing the price of isostatic graphite sold in the United States and elsewhere. Carbone was sentenced to pay a fine of approximately \$7 million, and Coniglio, a French citizen and a resident of the United States, was sentenced to pay a fine of \$100,000. In addition, as part of his Plea Agreement, Coniglio agreed to abandon his status as a U.S. permanent resident alien and to depart from the United States not later than seven days after the entry of judgment.

### **C. Sorbates**

In July, our San Francisco Field Office entered a plea agreement with Daicel Chemical Industries, Ltd. of Tokyo and indicted three Daicel executives for their participation in the sorbates price-fixing and volume-allocation conspiracy. Sorbates are chemical preservatives used as mold inhibitors in high-moisture and high-sugar food products. This cartel once again proves that antitrust conspiracies are not unstable or ineffectual. The cartel lasted eighteen years and affected almost \$1 billion in U.S. commerce. The sorbates conspirators met at least twice a year and agreed on the prices and volumes of sorbates to be sold in four regions of the world -- the United States, Europe, the Americas (including Canada, Mexico, and South America), and the rest of the world, including Asia. The conspirators went to great lengths to conceal the existence of the cartel by agreeing to stagger the timing of price announcements, agreeing to hold meetings outside the United States, and agreeing to destroy documentation of the meetings.

Daicel was sentenced to pay a fine of \$53 million for its role in the cartel. Daicel is the fourth company that has agreed to plead guilty in this investigation, and its fine brings the total fines obtained in the investigation to more than \$120 million. The three Daicel executives who were indicted are all residents and citizens of Japan, and they remain international fugitives. This investigation is continuing.

### **D. Wastewater Construction**

In August, our Atlanta Field Office filed two cases involving collusion on Egyptian construction contracts that were funded by the United States Agency for International Development (“U.S. AID”) and hence victimized American taxpayers. The two companies

prosecuted were Philipp Holzmann AG of Germany and American International Contractors, Inc. (“AICI”). U.S. AID funded these contracts for the construction of wastewater treatment facilities in Egypt as part of the Camp David Peace Accords in order to promote stability and public health in the Middle East. The cartel members rigged bids for these contracts and agreed that co-conspirators would be paid off in order to reduce or eliminate competition. Holzmann was sentenced to pay a \$30 million fine for its role in the cartel, and AICI was sentenced to pay \$4.2 million fine. In the Holzmann case, the sentencing court took the unusual step of ordering Holzmann to place a quarter page advertisement in the Wall Street Journal and the New York Times publicizing the nature of the offense Holzmann committed, the fact of its conviction, the sentence imposed, and the steps taken to prevent a recurrence of similar offenses. The investigation of collusion on AID-funded contracts is continuing.

**E. Fine Arts**

In October, our New York Field Office filed charges against Sotheby’s Holdings, Inc., the largest American auction house, and its former chief executive officer and president Diana D. Brooks for conspiring to fix the fees charged to sellers of art, antiques and collectibles from 1993 until 1999. Both Sotheby’s and Brooks pled guilty to the charges and have agreed to cooperate with the continuing investigation. Sotheby’s has agreed to pay a fine of \$45 million, which is still subject to court approval, and Brooks’ sentence will be determined by the court. Earlier this year, Christie’s International announced that it has been cooperating with the investigation pursuant to the Division’s Corporate Leniency Program.

**F. Lysine**

On June 26, 2000, the Seventh Circuit affirmed the convictions of Michael Andreas and

Terrance Wilson for their role in the international lysine cartel and issued important rulings on the per se rule and two sentencing issues -- the calculation of volume of commerce and role in the offense enhancements. United States v. Andreas, 216 F.3d 645 (7<sup>th</sup> Cir. 2000).

The lysine defendants had been charged with fixing prices and allocating the sales volumes of lysine. The sales volume allocation agreement was based on a division of the expected annual demand among the conspirator companies. Each producer agreed not to sell more than its allotment, and if a producer did happen to sell more than its allotment, the agreement required that the producer buy an amount equal to the excess sales from a co-conspirator who had not sold its allotment, thus erasing the effect of excess sales and eliminating the incentive to sell more than the allotted amount. The defendants moved for acquittal on the grounds that a sales volume allocation was not a per se antitrust violation, arguing that a sales volume allocation had never appeared in the case law as a per se violation. The Seventh Circuit upheld the district court's denial of the acquittal motion, holding that "[a]t bottom, the lysine cartel's [volume allocation] agreement was a conspiracy to limit the producers' output and thereby raise prices" and that "output restrictions have long been treated as per se violations." Andreas, 216 F.3d at 667.

With respect to the volume of commerce issue, Andreas and Wilson appealed the district court's enhancement of their sentences based on an affected volume of commerce of over \$100 million.<sup>1</sup> The district court had ruled that "affected commerce" included all sales made during the conspiratorial period, following the Sixth Circuit's holding in United States v. Hayter Oil

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<sup>1</sup> Sentencing Guideline 2R1.1 provides for an enhancement based on volume of commerce "affected by the violation." United States Sentencing Commission, Guidelines Manual, §2R1.1(b) ("USSG").

Co., 51 F.3d 1265 (1995). The appellants argued that under the district court opinion in United States v. SKW Metals & Alloys, 4 F. Supp. 2d 166 (W.D.N.Y. 1997), affected commerce only includes sales at or above agreed-upon prices.<sup>2</sup> The Seventh Circuit held that a rebuttable presumption exists that all sales during the conspiratorial period are affected by an antitrust conspiracy and that defendants bear the burden of proving the “rare circumstance” of any unaffected transaction by a preponderance of the evidence. The Court further found that, in this case, the district court had considered the defendants’ evidence that certain sales were not affected and had correctly held that all sales should be included in the volume of commerce. Andreas, 216 F.3d at 676-679.

With respect to the role in the offense issue, the district court had denied enhancements requested by the government under USSG §3B1.1 for the aggravating roles played by Wilson and Andreas. Under USSG §3B1.1(a), a defendant’s offense level is increased by four levels if he was “an organizer or leader of a criminal activity that involved five or more participants.” Under USSG §3B1.1(b), a defendant’s offense level is increased by three levels if he was “a manager or supervisor” of a criminal activity involving five or more participants. The district court rejected the enhancement requests, holding that neither defendant was more culpable than

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<sup>2</sup> After Andreas and Wilson filed their initial briefs, the Second Circuit reversed this district court opinion, rejecting the holding that affected commerce only includes sales at or above the fixed price. United States v. SKW Metals & Alloys, 195 F.3d 83 (2d Cir. 1999). The Second Circuit held that affected commerce includes all sales during the conspiratorial period that were influenced in any way by the conspiracy. SKW, 195 F.3d at 89-92. In discussing the types of conspiratorial influences that should be considered in determining the volume of commerce for sentencing purposes, the Court mentioned not only influences on price, but also influences on negotiations, volume of goods sold, and other transactional terms.

his co-conspirators and that neither controlled the required number of participants. The Seventh Circuit reversed. First, the Court found that the size requirements of Section 3B1.1 were met by counting three ADM sales executives subordinate to Andreas and Wilson who helped implement the pricing and volume allocation schemes, as well as co-conspirators from other companies. The Court held that one could qualify as an organizer by guiding or directing co-conspirators even if the defendant had to negotiate some aspects of the conspiracy with the co-conspirators. Next, the Court held that a four-point adjustment was appropriate for Andreas as a leader or organizer because he used coercive power resulting from ADM's market power to force competitors to accept ADM's leadership role and he was also called upon to resolve disputes within the cartel. With respect to Wilson, the Court held that a three-point enhancement was appropriate for him as a manager or supervisor due to his role in running the cartel meetings and noted his sole purpose in attending the cartel meetings was to apply his management skills to the cartel. Andreas, 216 F.3d at 679-680. On resentencing, the district court applied the role in the offense enhancements, increasing Andreas' sentence from two years to three years and Wilson's sentence from two years to thirty-three months.

### **III. Factors Underlying Success of International Enforcement Program**

In recent years, the increasing globalization of the economy and the lowering of government trade barriers have increased the incentives and opportunities for international cartel activity. We believe that two key factors have helped the Division in meeting the challenge of investigating and prosecuting such harmful cartel activity. First, the revision of our Corporate Leniency Policy in 1993 created much greater incentives for companies involved in cartel activity to self report their involvement in the cartels. Second, foreign enforcement

authorities have become more vigilant in prosecuting antitrust violations, which has led foreign defendants to realize that the safe harbors in which they can escape detection and prosecution are shrinking and has also increased the willingness of such governments to cooperate with our investigations.

#### **A. Corporate Leniency Policy**

The Division's Corporate Leniency Policy continues to be its most effective generator of international cartel investigations and cases.<sup>3</sup> The program was revised in August 1993 to make it easier and more attractive for companies to come forward and cooperate with the Division. The major revisions to the program were that: (1) amnesty is automatic if there is no pre-existing investigation; (2) amnesty may still be available even if cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution. Under the original amnesty program, which was adopted in 1978, amnesty was only available to applicants prior to the initiation of an investigation and the grant of amnesty was not automatic, but rather was subject to a great deal of prosecutorial discretion. As a result of these limitations, the original amnesty program resulted in relatively few amnesty applications and did not lead to the detection of a single international cartel. The revised program has resulted in a tremendous increase in the number of amnesty applications.

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<sup>3</sup> For further information about the Division's amnesty program see "The Corporate Leniency Policy: Answers To Recurring Questions," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before ABA Antitrust Section 1998 Spring Meeting (April 1, 1998) located at [www.usdoj.gov/atr/public/speeches/1626.htm](http://www.usdoj.gov/atr/public/speeches/1626.htm); and "Making Companies An Offer They Shouldn't Refuse," speech by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, before Bar Association of the District of Columbia's 35<sup>th</sup> Annual Symposium on Associations and Antitrust (February 16, 1999) located at [www.usdoj.gov/atr/public/speeches/2247.htm](http://www.usdoj.gov/atr/public/speeches/2247.htm).

Under the old amnesty policy, the Division received approximately one amnesty application per year. Under the new policy, the application rate has been more than one per month. The leniency program contributed to the filing of the majority of the international cases prosecuted by the Division in this past fiscal year. The revisions to the amnesty policy have made it the most successful amnesty policy within the Justice Department. In addition, the success of the revised policy has spurred other governments to develop their own amnesty policies.

Many of our amnesty applicants have taken advantage of what the Division refers to as “amnesty plus.” Amnesty plus results when a company is negotiating a plea agreement in a current investigation and seeks to obtain more lenient treatment in its plea agreement by offering to disclose the existence of a second, unrelated conspiracy. In such a case, the company will receive amnesty, pay no criminal fines, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with the second offense. In addition, the company will receive a substantial additional discount by the Division in the calculation of the fine for its participation in the first conspiracy. Many of our international cartel investigations have resulted from such spin-offs of ongoing investigations of international cartels.

## **B. Change in Enforcement Atmosphere Abroad**

### **1. Strengthening Of Antitrust Enforcement By Foreign Governments**

In the last few years, we have witnessed a radical transformation in the way foreign authorities view antitrust enforcement. No longer does the United States stand virtually alone in its commitment to vigorous antitrust enforcement. Approximately 90 countries now have antitrust laws, most of which were enacted during the last five to ten years, and approximately

20 additional countries are drafting antitrust laws. Obviously, these laws vary in type and scope, but almost everyone now agrees that hard core cartels should be prohibited.

As evidence of this growing widespread condemnation of hard core cartels, in 1998, the Organization for Economic Co-operation and Development (“OECD”), an organization of 29 industrialized democracies from Europe, North America and Asia, issued a Council Recommendation Concerning Effective Action Against Hard Core Cartels. The Recommendation labeled hard core cartels as “the most egregious violations of competition law,” which “injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.” Through the Recommendation, the OECD called on member nations to ensure that their competition laws are effective to halt and deter hard core cartels by providing for appropriate sanctions and powerful investigative tools. The Recommendation also stated that member countries should cooperate in enforcing anti-cartel laws through the sharing of documents and information and the gathering of documents and information on behalf of foreign competition authorities. Member nations were encouraged to consider legislation or bilateral or multilateral agreements to reduce or eliminate obstacles that hamper cooperation with other nations. Since this Recommendation was issued, the OECD has announced that member nations have strengthened their enforcement actions and legislation but that cartels remain a major drain on the world’s economy and hence much remains to be done in the fight against cartel activity. The OECD has accordingly launched an intense three-year program to improve the methods of fighting cartels by promoting better investigative tools, stricter sanctions, and the increased ability to share information with foreign agencies.

The global interest in cartel enforcement was also confirmed by the response to the first International Anti-Cartel Enforcement Workshop, hosted by the Division last fall. Senior cartel enforcement officials from more than 25 countries from 6 continents attended the conference. Earlier this month, the British government hosted the second annual International Anti-Cartel Enforcement Workshop in Brighton, England. During these conferences, enforcement officials share information about the tools of international cartel enforcement in order to strengthen enforcement efforts and promote cooperation among different governments.

Many foreign authorities, including Canada, the United Kingdom, and Germany, as well as the European Union, have strengthened their enforcement efforts by developing amnesty programs. Many of these governments have used our amnesty policy as a model in the drafting of their leniency policies. Additional foreign governments are currently developing amnesty policies.

The strengthening of antitrust laws and enforcement abroad has led to the shrinking of safe harbors where foreign cartel members can escape prosecution for their cartel activities. Targets who choose not to cooperate with the Division and instead remain international fugitives take greater risks today in this changing global atmosphere.

## **2. Cooperation Of Foreign Governments**

The increased interest on the part of foreign governments in enforcement of their own antitrust laws has made them more receptive to providing assistance to the United States in its enforcement activities. Such assistance often plays a critical role in the detection and prosecution of international cartels affecting American consumers.

To foster cooperation with foreign governments with respect to the investigation and

prosecution of international cartels and other aspects of antitrust enforcement, in the last fiscal year the Division entered antitrust cooperation agreements with three foreign governments -- Japan, Brazil, and Mexico. The agreements strengthen cooperation with these governments through provisions regarding coordination and notification of enforcement actions and complement agreements previously reached with Australia, Germany, Canada, the European Union, and Israel. In addition, in the last fiscal year, the Division's International Antitrust Enforcement Assistance Agreement with Australia became effective. This agreement is a comprehensive antitrust mutual legal assistance agreement which allows the two countries to exchange evidence and assist each other's antitrust investigative efforts.

#### **IV. Conclusion**

Hopefully, this presentation has given you an overview of the vigilance of the Antitrust Division and foreign authorities in prosecuting international cartel activity. The financial incentives for such activity will undoubtedly continue to grow in our global economy.

However,

those who choose to participate in international cartels should be aware that enforcers in the United States and abroad will be ready to meet the challenge of investigating and prosecuting such activity.