



DEPARTMENT OF JUSTICE

INTERNATIONAL LAW CONGRESS 2001

EU COMPETITION LAW

**“The Fly On The Wall Has Been Bugged--
Catching An International Cartel In The Act”**

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Presented at

**The Jurys Ballsbridge Hotel
Dublin, Ireland, UK**

May 15, 2001

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I. Introduction

Who among us has never wished that they could be a fly on the wall to a conversation? There are simply times when it would be great to really know who said what to whom. I can tell you that, as a prosecutor, you get this feeling all the time. For those of you who represent targets in cartel investigations, I imagine that it is no different. Well, today you will experience that sensation. You will be the fly on the wall watching as a crime is being committed.

Actually, to be precise, you will be looking through the lens of a hidden camera, and the view is not from the wall but rather from a lamp tucked away in the corner of the room. However, the effect is still the same -- these tapes will put you in the smoke-filled rooms with the members of an international price-fixing cartel as they formulate, agree upon, and carry out their illegal conspiracy.

The undercover audio and video tapes that you will be seeing today were recorded by U.S. Federal Bureau of Investigation (FBI) agents with the help of a cooperating witness. The tapes capture an international cartel in the act of fixing prices and carving up the worldwide market for the feed additive, lysine, a product used by farmers around the world. You will see top executives from U.S., European, and Asian firms committed to conspiring together to cheat their customers. You will see a cartel that was so contemptuous of its customers and the antitrust laws that it adopted the slogan: "Our competitors are our friend. Our customers are the enemy!" Finally, you will see a cartel that operated so efficiently that it was able to set the price for lysine, down to the penny, in every country around the world, effective the very next day.

We are making these tapes publicly available because the antitrust private bar has always played an important role in deterring antitrust offenses.¹ For example, the antitrust bar is largely responsible for the current prevalence and success of corporate compliance programs. In the United States, the lysine tapes have become the single greatest antitrust compliance tool ever created. Of course, what makes these tapes such an effective deterrent is not just the unnerving notion that the FBI might be watching, but the fact that high-level executives went to jail and their companies paid heavy fines as result of their cartel activity.

¹Copies of the tape and transcripts 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, NW, Suite 200, Washington, D.C., 20530.

The tapes are also invaluable to in-house or outside counsel because they vividly demonstrate the warning signs that you should be on the look out for in order to detect cartel activity, hopefully, before it occurs. While the lysine tapes are unusual in the sense that they provide an insider's view of the inner workings of an international cartel, the operation of the cartel itself is far from extraordinary. The modus operandi used by the lysine cartel -- such as holding bogus trade association meetings, making worldwide volume and pricing agreements, and using score sheets and compensation schemes to carry out the agreement -- has turned up again and again in our recent international cartel investigations. With each audio or video tape that I will be showing, I will highlight one of these common characteristics.

Public dissemination of these tapes is important for another reason. Some commentators are quick to characterize cartel activity as merely "gentlemen agreements" that cause little, if any, harm. However, I predict that when you see these tapes you will be left with the unshakeable conclusion that what you are witnessing is a crime -- no different than common fraud, theft, or embezzlement. Make no mistake about it, the lysine cartel stole money from farmers around the world just as if they had lifted cash right out of their wallets. Price fixing is nothing less than theft by well-dressed thieves. We should not view any individual, company, or industry as above the law merely because the theft involved is accomplished via business meetings among high-level executives. Nor should price fixing be excused when companies fall on difficult economic times, any more than bank robbery should be viewed as a legitimate answer to unemployment.

II. Common Characteristics Of International Cartels

Now let me turn to a discussion of some of the common characteristics of international cartels and to the tapes, which so vividly depict a cartel at work.

A. Brazen Nature of Cartels

One of the characteristics we see over and over again in international cartels is the brazen nature of the conspiracies. By that, I refer to the contempt that the members of the cartel typically have for antitrust enforcement. I think this is a good place to begin because we are often asked by defense counsel to treat a certain member of a cartel more favorably because he/she resides in a country where cartel activity is treated differently than it is in the United States. The fundamental problem with this argument is that it is our experience, without exception, that the conspirators are fully aware that they are violating the law in the United States and elsewhere, and their only concern is avoiding detection. The international cartels that we have cracked have not involved international business persons who for cultural, linguistic, or some other innocent reason find themselves mistakenly engrossed in a violation of U.S. antitrust laws. Rather, the cartels that we have prosecuted criminally have invariably involved hardcore cartel activity -- price

fixing, bid-rigging, and market- and customer-allocation agreements. The conspirators have discussed the criminal nature of their agreements; they have discussed the need to avoid detection by antitrust enforcers in the United States and abroad; and they have gone to great lengths to cover-up their actions -- such as using code names with one another, meeting in secret venues around the world, creating false "covers" -- *i.e.* facially legal justifications -- for their meetings, using home phone numbers to contact one another, and giving explicit instructions to destroy any evidence of the conspiracy.

B. Involvement of Senior Executives

Moreover, the cartels typically involve senior executives at firms -- executives who have received extensive antitrust compliance counseling, and who often have significant responsibilities in the firm's antitrust compliance programs. For example, the vitamin cartel was led by the top management at some of the world's largest corporations, including one company -- F. Hoffmann-La Roche -- which continued to engage in the vitamin conspiracy even as it was pleading guilty and paying a fine for its participation in the citric acid conspiracy. Just imagine - some senior executives of this multi-national firm knew about the firm's participation in international cartels in two industries. When the firm's illegal activities were uncovered in one industry, and the firm had to plead guilty and pay millions of dollars in fines, those executives could have and should have terminated the firm's cartel activities in the second (and larger) industry. Instead, those executives orchestrated false statements to enforcement authorities, took steps to further conceal the firm's illegal activities, and continued to lead the world's other producers in a global cartel -- actions which will end up costing the firm billions of dollars in fines and damages. This amazing and costly failure to heed a warning takes us back to the characteristic I just mentioned: the contempt of cartel members for antitrust enforcement and the brazenness with which they perpetrate their offenses.

The first segment on the tape demonstrates not only the brazen nature of the lysine cartel, but the utter contempt that the conspirators exhibited towards their victims and the law enforcement community. The meeting that you are about to see was attended by executives from the world's five dominant lysine producers. As you will see in this tape, the cartel members took steps to conceal their meeting, including staggering their arrival and departure times for the meeting so as not to arouse suspicion by having the entire group enter and leave the room at the same time. The members of the cartel had to be careful because the meeting coincided with the largest poultry industry trade association convention, so all of their customers were in town for the trade show. But, as you will see, the lysine executives laughed at the thought of being observed by their customers or by law enforcement. The videotaped recording of this meeting shows that, as the meeting begins, there are some empty seats around the table because of the staggered arrival times. The cartel members are captured on tape jokingly discussing who

will fill those empty seats. One cartel member offered that one empty chair was for Tysons Foods, the largest purchaser of lysine in the United States, and that another chair was for Con Agra, also a large U.S. customer. Another cartel member mocked, ironically, that one chair was for the FBI, and a third cartel executive added that the remaining chairs were for the Federal Trade Commission.

- *Tape Segment One: January 18, 1995 Cartel Meeting in Atlanta, Georgia -- The Lysine Cartel Members Show Disdain For Customers And Antitrust Enforcement (Transcript at Tab 1)*

The knock at the door heard at the very end of this tape segment, in fact, was an FBI agent, disguised as a hotel employee returning to the cooperating witness the briefcase containing a hidden audio recorder he had mistakenly left in the hotel restaurant.

In another tape played at the lysine trial, ADM's President summed up the company's attitude toward its customers in a single phrase, when he told a senior executive from his largest competitor that ADM had a corporate slogan that "penetrated the whole company": "Our competitors are our friends. Our customers are the enemy." Imagine, one of the world's largest companies, which bills itself as "the supermarket to the world," having such a disdainful slogan as its internal corporate trademark.

Not only are cartel members disdainful of their customers and law enforcement authorities, some are even defiant of their own company's rules -- rules adopted to protect the company and them from criminal conduct. Clearly, some executives will go to great lengths to make sure that you, as inside or as outside counsel, don't find out about their criminal activity. For example, consider the impressive, yet unsuccessful, antitrust compliance efforts of the general counsel of a corporation we recently prosecuted for its participation in an international cartel.

This general counsel had instituted a comprehensive antitrust compliance program, and had made sure that the senior executives were well schooled on the antitrust laws. He had laid out specific rules to follow and adopted stiff penalties for failure to follow those rules. When a top executive at his firm arranged a meeting with his chief foreign competitor to discuss exchanging technological information, the executive, as required by the policy, notified the general counsel's office of the meeting. The general counsel (perhaps suspecting the worst) insisted on accompanying the executive to the meeting and remaining at his side throughout the meeting -- never letting him out of his sight even when the executive went to the bathroom. He was certain that this way there could be no chance conversation between the company executive and his competitor, and the general counsel would be a witness to everything said. Surely no antitrust problems could arise in such a setting. And the general counsel must have taken some comfort when he, the executive, and the executive from the competitor firm

greeted one another at the start of the meeting and the two executives introduced themselves to each other, exchanged business cards, and engaged in small talk about their careers and families that indicated that the two had never met each other before. Imagine how that general counsel must have felt when he learned, during the course of our investigation, that the introduction between the two executives had been completely staged for his benefit -- to keep him in the dark. In fact, the two executives had been meeting, dining, socializing, playing golf, and participating together and with others in a massive worldwide price-fixing conspiracy for years. Furthermore, other employees at the company knew of this relationship and were instructed to keep the general counsel in the dark by referring to the competitor executive by a code name when he called the office and the general counsel was around.

We hope that, armed with these materials and the glimpse inside an international cartel at work that they provide, all of you will be able to avoid the repetition of this shameful conduct on the part of senior executives of your corporate clients.

C. Fear Of Detection By U.S. Enforcers

While cartel members know full well that their conduct is illegal under the antitrust laws of many countries, they have a particular fear of U.S. antitrust authorities. For that reason, international cartels try to minimize their contacts in the United States by conducting their meetings abroad. This has been particularly true since 1995, when the lysine investigation became public. In fact, cooperating defendants in several recent cases have revealed that the cartels changed their practices and began avoiding contacts in the United States at all costs once the Division began cracking and prosecuting international cartels. However, the cartel members continue to target their agreements at U.S. businesses and consumers; the only thing that has changed is that they conduct nearly all of their meetings overseas. This next segment demonstrates the reluctance of foreign cartel members to conduct cartel activity in the United States for fear of detection. The conversation is between an ADM executive, who also was a cooperating witness, and an executive at the Japanese firm, Ajinomoto. They are discussing the location for the next cartel meeting. As you will hear, the Ajinomoto executive is clearly reluctant to have a cartel meeting in Hawaii, but ultimately agrees to consider it because Hawaii is a convenient location for everyone and because of the lure of the golf courses located near the meeting site. The Ajinomoto executive's reluctance was well founded, as the meeting was video taped by the FBI and became a critical piece of evidence in the prosecution of the lysine conspirators.

- *Tape Segment Two: July 13, 1993 Telephone Call From ADM Headquarters -- Foreign Co-Conspirator Expresses Reluctance To Meet In The United States (Transcript at Tab 2)*

D. Using Trade Associations As Cover

Another characteristic of international cartels is that they frequently use trade associations as a means of providing “cover” for their cartel activities. In order to avoid arousing suspicion about the meetings they attended, the lysine conspirators actually created an amino acid working group or subcommittee of the European Feed Additives Association, a legitimate trade group. The sole purpose of the new subcommittee was to provide a false, but facially legitimate, explanation as to why they were meeting.

As I mentioned, the lysine cartel members did end up meeting in Hawaii, and the FBI was there to video tape the meeting. As you are about to see, the executives discussed how they would use the trade association as the “perfect cover” for their price-fixing meetings. They also talked about such details as preparing false agendas and false minutes of the meeting to send to the parent association based in Brussels. In addition, they discussed their shared concern that the EU authorities not discover their activities.

- *Tape Segment Three: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Cartel Members Use Trade Association As A Cover For Conspiracy Meetings (Transcript at Tab 3)*

In your binders (at Tab 9) is an example of one of the false agendas that was created by the lysine conspirators and submitted to the parent trade association, listing legitimate topics that, according to witnesses at trial, were never discussed at the meetings. None of the items on the agenda were addressed at the meeting except agenda item “Miscellaneous” -- a euphemism for the negotiations by cartel members to divide up the world lysine business among themselves and to fix the prices they charged their customers worldwide.

E. Fixing Prices Globally

Another common characteristic of an international cartel is its power to control prices on a worldwide basis effective almost immediately. Prosecutors got an unprecedented view of the incredible power of an international cartel to manipulate global pricing in the lysine videotapes. Executives from around the world can be seen gathering in a hotel room and agreeing on the delivered price, to the penny per pound, for lysine sold in the United States, and to the equivalent currency and weight measures in other countries throughout the world, all effective the very next day. Our experience with the vitamin, citric acid, and graphite electrode cartels, to name a few, shows that such pricing power is typical of international cartels and that they similarly victimize consumers around the globe. Cartel members often meet on a quarterly basis to fix prices. In some cases the price is fixed on a worldwide basis, in other cases on a region-by-region basis, in still others on a country-by-country basis. The fixed prices may set a range, may

establish a floor, or may be a specific price, fixed down to the penny or the equivalent. In every case, customer victims in the United States and around the world pay more because of the artificially inflated prices created by the cartel.

In the next two tape segments you will see international cartel activity at its core -- price fixing and market allocation on a global basis. In the first segment the lysine cartel members agree upon the prices to be set for the United States and Canada.

- *Tape Segment Four: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Cartel Members Fix Prices On A Global Basis (Transcript at Tab 4)*

The lysine cartel used the U.S. price as the primary benchmark for the world price, and then specific prices were fixed on a country-by-country basis at the meetings. As you just saw, the cartel became very efficient in fixing prices, and it did not take them long to agree on price increases. Remember that these cartel members were not discussing general price levels or a range of prices; rather the lysine cartel fixed the price to a specific penny per pound in the United States or, in the case of the Canadian market, to the penny per kilogram. These executives sitting in a room in Hawaii decided that the truckload price in the United States and Canada would be \$1.16; not \$1.10, not \$1.20, but \$1.16. All prices to be effective the very next day. Later in the meeting, they did the same thing for other countries.

F. Worldwide Volume-Allocation Agreements

The members of most cartels recognize that price-fixing schemes are more effective if the cartel also allocates sales volume among the firms. For example, the lysine, vitamin, graphite electrode, and citric acid cartels prosecuted by the Division all utilized volume-allocation agreements in conjunction with their price-fixing agreements. Cartel members typically meet to determine how much each producer has sold during the preceding year and to calculate the total market size. Next, the cartel members estimate the market growth for the upcoming year and allocate that growth among themselves. The volume-allocation agreement then becomes the basis for (1) an annual "budget" for the cartel, (2) a reporting and auditing function, and (3) a compensation scheme -- three more common characteristics of international cartels.

In this next tape segment, you will see the lysine cartel members divide up the world's lysine market. The meeting was attended by two high-ranking ADM executives. Representing all of the Japanese and Korean cartel members were two senior executives from Ajinomoto. Earlier in the meeting, the cartel members had determined how much each producer had sold in the prior year. Then, they used those figures to determine the total market size. Next, they estimated what they believed the sales growth would be in the coming year. All of these figures were

written down on the easel board by one of the cartel members. On the tape, you'll see them decide how they are going to allocate that sales growth among the five cartel members. As you will hear, the growth in the market is estimated to be 14,000 tons, and the question posed by the senior ADM executive is: how do we divide this market growth?

- *Tape Segment Five: October 25, 1993 Cartel Meeting In Irvine, California -- Cartel Members Allocate Worldwide Sales Volumes (Transcript at Tab 5)*

G. Retaliation Threats -- Policing The Agreement

As is often said, there is no honor among thieves. Thus, cartel members have to devise ways -- or even make threats -- to keep their co-conspirators honest, at least with respect to maintaining their conspiratorial agreements. It is common for cartel members to try to keep their co-conspirators in line by retaliating through temporary price cuts or increases in sales volumes to take business away from or financially harm a cheating co-conspirator. Sometimes, the mere threat of such retaliation is enough to keep would-be cheaters in line. In this next tape segment, you will see one of the ADM conspirators pose such a threat in order to get his co-conspirators to agree to his proposed volume-allocation scheme.

- *Tape Segment Six: October 25, 1993 Cartel Meeting In Irvine, California -- Co-Conspirator Threatens Retaliation If Others Don't Agree To Proposed Market-Allocation Scheme (Transcript at Tab 6)*

H. Audits And The Use Of Score sheets

Most cartels develop a "scoresheet" to monitor compliance with and enforce their volume-allocation agreement. Each firm reports its monthly sales to a co-conspirator in one of the cartel firms -- the "auditor." The auditor then prepares and distributes an elaborate spread sheet or scoresheet showing each firm's monthly sales, year-to-date sales, and annual "budget" or allocated volume. This information may be reported on a worldwide, regional, and/or country-by-country basis and is used to monitor the progress of the volume-allocation scheme. Using the information provided on the scoresheet, each company will adjust its sales if its volume or resulting market share is out of line. An example of such a scoresheet from the lysine cartel can be found at Tab 10.

I. Compensation Schemes

Another common feature of international cartels is the use of a compensation scheme to discourage cheating. The compensation scheme used by the lysine cartel is typical and worked as follows. Any firm that had sold more than its allocated or budgeted share of the market at the end of the calendar year would compensate the firm or firms that were under budget by purchasing that quantity of lysine from

any under-budget firms. This compensation agreement reduced the incentive to cheat on the sales volume-allocation agreement by selling additional product, which, of course, also reduced the incentive to cheat on the price-fixing agreement by lowering the price on the volume allocated to each conspirator firm.

In this next segment, one of the lysine conspirators from ADM explains the importance of a compensation scheme to the cartel and gives the other cartel members a motivational speech that has to be one of the best pieces of evidence ever obtained in a cartel investigation.

- *Tape Segment Seven: March 10, 1994 Cartel Meeting In Maui, Hawaii -- Co-Conspirator Explains How End-Of-Year Compensation Scheme Eliminates Incentive To Cheat On Cartel (Transcript at Tab 7)*

J. Budget Meetings

Cartels nearly always have budget meetings. Like division managers getting together to work on a budget for a corporation, here senior executives of would-be competitors meet to work on a budget for the cartel. Budget meetings typically occur among several levels of executives at the firms participating in the cartel; their frequency depends on the level of executives involved. The purpose of the budget meetings is to effectuate the volume-allocation agreement -- first, by agreeing on the volume each of the cartel members will sell, and then periodically comparing actual sales to agreed-upon quotas. Cartel members often use the term “over budget” and “under budget” in comparing sales and allocations. Sales are reported by member firms on a worldwide, regional, and/or country-by-country basis. In our experience, the executives become very proficient at exchanging numbers, making adjustments, and, when necessary, arranging for “compensation.”

The last tape segment that I am going to play will give you a ringside seat at one of the quarterly lysine cartel budget meetings where the members reported their sales on a regional and worldwide basis. The numbers you will hear are monthly and year-end tons of lysine sold by each conspirator firm. As you are watching this video, consider how comfortable the cartel members are with each other and the precision with which this cartel operated.

- *Tape Segment Eight: January 18, 1995 Cartel Meeting In Atlanta, Georgia -- Cartel Members Report End-Of-Year Sales Figures And Find That Sales Volumes Were “Right On Target” (Transcript at Tab 8)*

III. Epilogue

All of the companies, or their corporate parents, represented in the lysine cartel eventually pled guilty and paid large criminal fines. ADM, the last company to accept responsibility and plead guilty, ended up paying a \$100 million fine -- which at the time was nearly seven times larger than the previous record fine in an antitrust case in the United States. Three ADM executives were convicted at trial and were sentenced to pay fines of up to \$350,000 and to serve prison sentences ranging from thirty months to three years for the antitrust offense. Messrs. Mimoto (Ajinomoto), Yamamoto (Kyowa), and Kim (Sewon) each agreed to plead guilty and cooperate and paid heavy fines. Mr. Yamada, the Ajinomoto executive who struck the volume allocation agreement on behalf of the Asian competitors with ADM, was indicted and remains an international fugitive. Mark Whitacre, who was the cooperating witness from ADM who gave his consent to the recordings, lost his non-prosecution protection agreement with the government when it was later learned that he had embezzled over \$10 million from ADM -- some of it while he was cooperating with the government.

The lysine investigation was a milestone for anti-cartel enforcement in the United States and abroad capturing the interest of the media, business community, and competition authorities around the world. It was also the catalyst for what has become an explosion of international anti-cartel enforcement. For example, while less than 1 percent of the corporate defendants in criminal cases brought by the Division were foreign-based 10 years ago, since the beginning of FY 1998, roughly *50 percent* of corporate defendants in our cases have been foreign-based. Moreover, in the last four years, the Antitrust Division has obtained over \$1.7 billion dollars in criminal fines -- many multiples higher than the sum total of all criminal fines imposed for violations of the Sherman Antitrust Act dating back to 1890. Well over 90 percent of these fines were imposed in connection with the prosecution of international cartel activity. At the same time, antitrust enforcers in Europe and around the world are also stepping up their enforcement efforts. For these reasons, antitrust compliance programs are now of paramount importance. Hopefully, this tape and the other materials being made available by the Division will assist you in developing effective compliance programs.