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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON RAISING AWARENESS OF THE HARM CAUSED BY CARTELS

-- United States --

The attached document is submitted by the delegation of the United States to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item IV

RAISING AWARENESS OF CARTELS IN THE UNITED STATES

1. This paper is divided into a background section on anti-cartel law and policy in the United States and two annexes consisting of some of the materials used by the U.S. Department of Justice Antitrust

certifying that there were no consultations, communications, or agreements with competitors related to pricing or intent to submit an offer. Violations of this certification have led to prosecutions for making false statements to the government.

6. In addition to criminal prosecutions, civil penalties up to treble damages under the False Claims Act are also very effective government enforcement weapons for bid-rigging violations on public contracts. The False Claims Act also provides for a private right known as a

10. A strict rotating winning bid pattern defies the laws of chance and suggests collusion. In a case involving purchases of fresh fruits and vegetables for military commissaries and local school systems, an alert government purchasing agent detected a pattern of rotating awards among a select group of wholesale vendors. This evidence led to the investigation and successful prosecution of individuals, companies and a partnership for Sherman Act and mail fraud violations.

DETECTING PRICE FIXING, BID RIGGING AND MARKET ALLOCATION

A. *CONDITIONS FAVORABLE TO COLLUSION*

11. While price fixing, bid rigging and market allocation can occur in almost any industry, they are more likely to occur in some than in others. The milk, soft drink, steel drum manufacturing, highway, electrical and general construction, waste disposal, linen supply and dredging industries are examples of industries in which such conspiracies have been detected frequently. Investigators should be sensitive to the following industry conditions that increase the probability of collusion:

Collusion is more likely to occur if there are few sellers. The fewer the competitors, the easier it is to get together and agree on prices, bids, customers or territories. Collusion also may occur when the number of firms is fairly large, but there is only a small group of major buyers or sellers and the rest are “fringe” firms who control only a small fraction of the market.

The probability of collusion increases if other products cannot easily be substituted for the conspirators’ product.

The more standardized a product or service is, the easier it is for competing firms to reach agreement on a common price structure. It is harder to agree on more subjective forms of competition, such as quality or service

12. As with most other types of criminal activity, once a conspiracy to rig bids starts it may not stop unless an investigation should occur. The Antitrust

A company appears to be bidding substantially higher on some bids than on some bids than on other bids, with no logical cost differences to account for the difference;

Two or more competitors have a “silent” joint venture even though at least one of them could have bid for the work alone;

A successful bidder repeatedly subcontracts work to competitors that submitted higher bids on the same projects;

There are irregularities (e.g., identical calculation errors) in the physical appearance of the proposals or in the method of their submission (e.g., use of identical forms or stationery), suggesting that competitors have copied, discussed or planned one another’s bids or proposals. If the bids are obtained by mail, there are similarities of postmark or postal metering machine marks;

A bidder appears in person to present his bid and also submits the bid (or bond) of a competitor;

Competitors regularly socialize, hold meetings or otherwise get together in the vicinity or procurement offices shortly before bid filing deadlines;

Statements that the representative's company "does not sell in that area" or that "only a particular firm sells in that area" or "deals with that business";

Statements to the effect that a competitor's salesman should not be making a particular proposal or should not be calling on a particular customer;

Statements to the effect that it is a particular vendor's "turn" to receive a particular job or contract.

15. Such patterns of behavior or statements do not always signal a prosecutable antitrust conspiracy. They do, however, warrant further inquiry.

- **Vitamins** - Defendants agreed to pay U.S. customers more than \$1 billion in damages.

Fines Imposed

4. Of the over \$2 billion dollars in criminal fines imposed in Division cases since FY 1997, well over 90 percent were obtained in connection with the prosecution of international cartel activity. The Division has obtained fines of \$10 million or more against U.S., Dutch, German, Japanese, Belgian, Swiss,

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FY 2001, roughly one-third of the individual defendants in our cases have been foreign nationals. Foreign

nature of this assistance, I will offer one example that I am at liberty to discuss and one compelling statistic to demonstrate the breadth of this cooperation. The example -- our investigation of bid-rigging on wastewater treatment plant construction contracts in Egypt, which were funded by USAID, was assisted by the execution of search warrants by foreign authorities on the Division's behalf to seize evidence abroad. In that investigation, over 100 German police officers assisted in the simultaneous execution of search warrants on multiple companies at several locations across Germany. The searches induced cooperation from subjects of the investigation, which previously had been lacking, and that was critical to the success of the cases we later brought. The statistic -- in the past few years, foreign authorities from five different countries have executed search warrants at our request in more than a half-dozen of our international cartel investigations. This is a remarkable advancement in international cooperation.

Cooperation And Coordination Of Investigations

other in enforcing their laws against [hard core] cartels” and the OECD’s Competition Law and Policy Committee’s Working Party 3 currently is considering a set of recommended practices to govern the formal exchange of evidence between competition law enforcement authorities. The adoption of recommended practices by the OECD will assist member countries to remove obstacles to effective co-operation in thei

imposed against 46 corporate defendants and one individual defendant. The Division has obtained fines of \$100 million or more in seven cases:

- **\$500 million** against F. Hoffmann-La Roche (vitamin cartel - May 1999), largest fine ever imposed in a criminal prosecution of any kind;
- **\$225 million** against BASF AG (vitamin cartel - May 1999);
- **\$160 million** – against Infineon Technologies AG for conspiring to fix the prices of dynamic random access memory (DRAM) chips, the most commonly used semiconductor memory product, providing high-speed storage and retrieval of electronic information for a wide variety of computer, telecommunications, and consumer electronic products (September

frequently encounters situations where a company approaches the government within days, and in some

- **USAID Construction.** The assistance of an amnesty applicant led to the conviction of four companies who engaged in a scheme to rig bids on water treatment construction contracts funded abroad by the United States Agency for International Development (USAID). To date, fines totaling more than \$140 million have been imposed in addition to over \$10 million in restitution to the U.S. government. A U.S. executive for one of the late pleading companies was convicted at trial and sentenced to three years imprisonment.

Amnesty Plus

frequently obtains waivers to share information with another jurisdiction in cases where the applicant has also sought and obtained leniency from that jurisdiction. Such waivers are helpful in ensuring that the Division is able to coordinate investigative steps with the other jurisdictions involved. In addition, amnesty applicants may issue press releases or, in the case of publicly traded companies, submit public filings announcing their conditional acceptance into the corporate amnesty program thereby obviating the need to maintain their anonymity.

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