

JOHN PECMAN: The ICN's Cartel Working Group has produced an extensive amount of materials addressing the full range of issues that competition agencies face in anti-cartel enforcement. The working group has created the ICN's anti-cartel enforcement manual, a compilation of effective investigative approaches used by the ICN members. It has developed several notable policy papers and online tools on topics such as cartel settlements, obstruction of justice, enforcement cooperation and cartel outreach and awareness. The working group also organizes an annual workshop for enforcers that presents topical policy discussions and investigative training exercises. This module draws upon the consensus work of the cartel-working group and its member agencies to present an overview of anti-cartel enforcement. Of course, the existing cartel working group materials cover far more details than we are able to highlight. For more on the topics presented here, we encourage you to explore all the Cartel Working Group's work available at the ICN website.

Cartels are generally recognized as the top priority for competition enforcers. A truly global effort against hard-core cartels has emerged in the past decade as competition authorities around the world have increased efforts to detect and prosecute cartels. Many countries have enacted new anti-cartel laws or strengthened existing enforcement programs with new investigative powers. There has been widespread adoption of leniency programs and enforcement cooperation between agencies has dramatically increased. In the leading statement of international consensus on the topic, the 1998 OECD recommendation on hard-core cartels proclaimed that cartels are the most egregious violation of competition law. Such consensus is based on the recognition that hard-core cartels harm consumers and damage economies. The harmful effects of hard-core cartels are well understood. The competitive process only works when competitors set prices independently. When competitors forego competition for collusion,

consumers lose the benefits of competition. Secret cartel agreements are a direct assault on the principles of competition, and are universally recognized as the most harmful of all types of anti-competitive conduct. Hard-core cartels raise prices, restrict supply, reduce innovation, and can lead to artificially concentrated markets, waste and inefficiency. The fixing of prices, bids, output and markets by cartels has no plausible efficiency justification. The nearly universal prohibition of hard-core cartels is aligned with this certainty about consumer harm: cartels are always harmful to consumers, whereas mergers and nonmerger civil conduct are sometimes harmful, but other times will lead to greater efficiencies that enhance consumer welfare. Because of its pernicious effect on competition and lack of redeeming economic value, many competition authorities properly regard cartel conduct as per se illegal, or a hard-core violation of competition laws. A per se rule for evaluating hard-core cartel conduct focuses solely on whether certain conduct took place. It does not require an agency to prove harm to competition. It does not allow parties to claim an efficiency justification. Certain agreements are presumed to be unreasonable and, therefore, illegal without detailed inquiry as to the precise harm they have caused or the business excuse for their use. The per se approach to hard-core cartel enforcement provides certainty with respect to legality of specific types of conduct.

ROD SIMS: Cartels occurs when businesses make agreements with their competitors to fix prices, rig bids, share markets or limit supply in order to maintain or increase their profits. Businesses and individuals who enter into cartel arrangements with competitors are breaking the law. Cartels are against the law because they are anti-competitive and create an unfair playing field for businesses and consumers. Now, there is no excuse for this deceptive and dishonest conduct, including in hard economic times when some businesses may be struggling to survive. Starting or joining a cartel is not only illegal, it is immoral and it's viewed by the community as

being akin to theft.

NARRATOR: Richard Whish is one of the country's leading authorities on competition law.

RICHARD WHISH: Well, the most serious anti-competitive agreement is what we call a cartel, and that's the situation where a number of competing businesses get together and basically decide let's not compete with one another. The most obvious example of a cartel is a price-fixing agreement and that's where a number of competitors get together and they agree to fix their prices. For example, they might all agree that next Monday, they will put their prices up to an agreed level. What we can say quite simply is: consumers get a raw deal from cartels. We come across very obvious cartels where firms simply agree to fix prices, but you can imagine more complicated examples. One would be what we call bid rigging, and this is where a firm that goes out to competitive tender, asking a number of companies to bid competitively to win a contract. And what they do is they get together and they decide, it is my turn to win the next contract. So, it is agreed that I will bid a price of one million pounds, somebody else will bid 1.2 million, somebody else 1.4 million. Well, obviously, I will win the bid and we have created the illusion of competition. And, clearly, the likelihood is that the price even of a million is higher than the competitive price should be. A very interesting thing about cartel activity is that it can take place at a number of different levels within a company. I mean, you could imagine a situation where somebody from the board of directors of company A has discussions with the director of company B or this might all take place at a much lower level, where perhaps salespeople from two different organizations have discussions with one another, and there are also examples where the exchange of information sometimes takes place through a third party, for example a trade association. It's a very important thing for business people to understand

that cartels don't only mean cloak-and-dagger operations. If competitors are all together at a social event, for example, they go to a trade association dinner and then after the dinner, they go to the bar and they start talking to each other about their future plans and that they're thinking of raising prices, this can also be illegal.

BRENT SNYDER: Cartels usually involve secret conspiracies. They often are characterized by the brazen nature of the conduct and utter disregard for competition rules. They go to great lengths to avoid detection and cover up their conduct by using secret meeting locations, creating false explanations for meetings and instructing conspirators to destroy any evidence of the cartel. Cartels can occur in almost any industry and can involve goods or services at the manufacturing, distribution or retail levels.

Enforcement experience in economic literature has identified several factors that facilitate cartel conduct. These factors may also provide agencies with some potential indicators of cartel conduct. These potential indicators include: small number of competing firms; high entry barriers; homogenous or fungible products such as chemical products, vitamins, food additives and standardized component products; excess capacity and inventories; shrinking markets, declining industries or mature technology where firms may collude to survive; stable market conditions that make cheating on the cartel easier to detect; frequent interactions through trade associations that provide cover for secret cartel meetings; market transparency, such as in bid rigging where openness makes it easier to monitor for cheating; ending of a price war and/or concerted moves to discipline the market; pricing patterns; industries with a history of anti-competitive conduct; commonality of costs.

Determining the type or character of agreement at issue can be a difficult exercise. Agreements may be complex in nature. The type of agreement under investigation is a critical

factor that will assist in identifying the evidence necessary to prove the infringement. Evidence that can assist in determining the existence of a conspiracy includes: price lists, or industry-wide or association price schedules; price change notices; calendars, visitor logs and telephone bills reflecting meetings or telephone conversations among competitors; exchanges of pricing information between competitors; evidence of competitors monitoring or policing an agreement; testimony from members of the conspiracy; documents, emails or faxes that provide evidence of cartel conduct; evidence indicating advanced nonpublic knowledge of competitors' bids or pricing; evidence indicating that a particular customer or contract is exclusive to a particular company or business; widespread subcontracting among bidders; discernible and predictable winning patterns of bids; marked differences in bids and/or bid patterns when a nonregular or newcomer bids.

LISA PHELAN: Competition agencies need to have a variety of effective investigative tools and approaches at their disposal in order to detect cartels. The extent to which there is a perceived risk of detection depends on many factors, including a history of agency detection and a belief that the agency has strong enforcement tools at its disposal. Agencies should use a variety of techniques and methods to detect cartels, including a mix of both reactive and proactive methods that will increase the opportunities for detecting cartels and help demonstrate a particular agency's enforcement capacity.

Some of these methods of detection include: A formal complaint system for receiving, handling and responding to complaints; leniency programs and systems to receive both information and complaints from informants, business, government and the public in general, often featuring a promise of confidentiality for those providing information; good working relationships with domestic law enforcement agencies and international counterparts based on

regular contacts and a shared commitment to combating cartels; regular and consistent monitoring of the media, trade press, internet sites, and other publicly available industry and trade association sources which can provide an indication or an early warning sign of cartel activity; and education and outreach programs to raise awareness about anti-cartel laws and the harmful effects of cartels to educate people about the operation of the law and the typical signs of cartel conduct and to generate leads about cartel activity that may be a source for the initial of a formal investigation.

SCOTT HAMMOND: Leniency programs are unquestionably the most effective investigative tool available to enforcers for detecting and cracking cartel activity. The vast majority of the large international cartels that have been prosecuted over the last decade or longer have been assisted by leniency applicants. The leniency programs have also been embraced by the private bar and by the business community who recognize them as an effective way to incentivize companies to be on the lookout for cartel activity, and when it's detected, to report it. The success of leniency programs has led to their widespread adoption in jurisdictions around the world. By last count, more than 75 jurisdictions around the world had adopted leniency programs. But simply publishing a leniency program will not be enough to ensure that it will be utilized by companies willing to report. Many jurisdictions, including the United States, had to learn how to create an effective leniency program before companies would race to the door to take advantage of it.

Before an authority can establish an effective leniency program, it must lay the foundation with three cornerstones. First, the competition laws must provide the threat of serious sanctions for those who participate in cartels and fail to self-report. The carrot may be sweet, but one must bring a heavy stick as well. Two, cartelists must perceive that there's a high risk of

detection by competition enforcers if they fail to self-report. Regardless of how heavy the sanctions are, if would-be applicants do not believe that the enforcement authority is capable of successfully detecting and bringing a case on its own, then they're unlikely to self-report. And third and most importantly, there must be transparency and predictability and it must be to the greatest extent possible so that companies can predict with relative certainty as to whether they will qualify for leniency if they self-report. This is not always easy for competition enforcers. It's not easy to give up your prosecutorial discretion, but enforcers have to if they want to build a program that the bar and the business community will have confidence in. Enforcers have to be prepared to tilt the program in favor of helping companies to qualify. They have to develop a track record of good faith and fairness in its application and they have to arm the private bar with information that those lawyers can use to convince companies that self-reporting is the right thing to do. Now, fortunately for those jurisdictions that are just considering leniency programs now or trying are to make theirs more effective, you don't have to learn all these lessons the hard way. The cartel working group has several work products related to leniency that are available to you. Notably, there's an anti-cartel enforcement manual chapter entitled "Drafting and Implementing an Effective Leniency Program." It's available online, as well as a complementary online training module that's also available through the ICN curriculum. For more details about the benefits and implementation of leniency programs, we encourage you to read the chapter and view the leniency module. Now, I'd like to share a clip with you from the leniency module, followed secondly by a clip from the ACCC in Australia that shows the harm caused by cartel conduct and how leniency programs operate.

RICHARD WHISH: It is important at the outset to establish what precisely the key cornerstones of an efficient leniency program are. There's fairly widespread agreement about

this nowadays. The first is that there should be severe sanctions for members of a cartel who do not report them to a competition authority. The second is that it should be abundantly clear that there is a high degree of likelihood that participants in cartels who do not report them to a competition authority will be discovered and punished. The third requirement is that the leniency program itself should be transparent and predictable so that firms understand precisely how the process of making an application to a competition authority will work. What are the benefits of implementing a leniency policy? We have to remember it's not easy for competition authorities to detect cartels. Firms that enter into cartels, for example, price fixing or sharing markets often know that what they are doing is illegal and that they should take precautions in order to prevent detection. An effective leniency policy provides incentives to firms that are in cartels to go to the competition authority and provide details of what they have been doing. This means that the competition authority gets firsthand, direct, insider evidence of what has been taking place, while the firm in question gets a total or partial reduction in its penalty. This is a win-win situation if it means that the competition authority can punish the other members of the cartel and the leniency application gets a total or partial reprieve. It is worth adding that the very fact of their being a leniency policy in place may, in itself, destabilize the cartel. In the end, if the leniency policy works well in practice, this will mean that the competition authority will detect and punish more cartels. The deterrent effect of the law is increased because it can be demonstrated that cartels will be detected and punished and this leads to greater competition, or to put the point another way, to fewer cartels with all the benefits that competition brings, lower prices, better service, more innovation and greater choice for consumers.

ROD SIMS: When businesses compete fairly on their offers, prices, and customer service, customers and smaller business receive the benefits of wider choices on price and

quality. When businesses cheat by forming cartels, however, they damage the economy, force other competitors and clients out of businesses and rip off consumers. The ACCC wants everyone in business to know that cartel conduct is illegal and unacceptable in any circumstance. That's why I'm sending a letter and a copy of our new short film, *The Marker*, which shows the devastating effect that cartel conduct has on individuals and businesses to the CEOs at 300 of Australia's largest companies. Now, I'm urging the CEOs to take steps to ensure that all their employees understand what constitutes cartel activity, and the very serious consequences they face if they make under-the-table deals with competitors. We're also engaging with business, industry and legal (inaudible) bodies to distribute links to the film and our website to their staff, members and clients. The ACCC is always seeking out cartels, encouraging people to report suspicious activities, and urging participants to seek immunity in exchange for helping us with our investigations. We use proactive measures to educate businesses and are currently investigating evidence of several possible cartels operating in Australia. Where we find sufficient evidence of serious cartel activity, we will work with the Commonwealth Director of Public Prosecutions to bring criminal proceedings against alleged perpetrators. We work closely with our international counterparts in the USA, Europe, Japan, and Korea to deter and detect global cartels. I urge anyone with knowledge of cartel activities to contact us. Anyone currently or recently involved in cartel activity should be the first to apply for immunity. As long as you are not the clear cartel leader and have not coerced others into a cartel, any business or person can apply to the ACCC for immunity from prosecution in exchange for helping us with our investigations. As far as the law permits, we maintain the confidentiality of immunity applicants. There is no honor among thieves, so the sooner cartel members contact us for an immunity marker, the safer they will be. For details about cartels and how to apply for

immunity, go to the ACCC website or call the immunity hotline.

BRENT HAMMOND: Competition agencies must cultivate a law enforcement environment in which companies and their executives perceive a significant risk of detection if they engage in cartel activity. The fight against cartels is a legally and practically demanding task. Cartelists are secret about their illicit conduct and, therefore, agencies have to undertake great efforts to detect concealed cartels. It is very difficult to discover cartel conduct, or once discovered, to build sufficient evidence to successfully prosecute and sanction cartel members. A competition agency needs to be well-equipped to detect and investigate cartels with well-trained professionals who are provided with sufficient resources to do their jobs. Cartels can only be deterred through vigorous prosecution. Agencies should have sufficient legal tools to compel the production of relevant documents and information from subject companies and their executives. Subject to appropriate legal standards and procedures, many authorities have the ability to conduct searches of premises where relevant evidence may be found and seize any of it that they find. These powers need to be fortified by significant penalties for obstruction of justice. For example, destroying documents responsive to a request rather than producing them. And for perjury, for example, knowingly providing false testimony. It is particularly important to use investigators trained specifically for cartel enforcement. Success in detecting, investigating and prosecuting cartels relies on instruments and skills that are not commonplace in other competition work, particularly so in jurisdictions that pursue criminal investigations. Effective anti-cartel investigation encompasses IT forensics, the organization and implementation of searches and raids, the operation of leniency programs, detection of corporate fraud, and in some instances, even covert surveillance. This all occurs in an environment in which investigators commonly mount a case against uncooperative defendants and must assume

that defendants might engage in evasion and the destruction of evidence. The ICN's cartel working group has developed detailed guidance on a range of investigative techniques, including searches and raids, interviewing, case initiation, investigative strategy and case resolution. The ICN anti-cartel enforcement manual, available on the ICN's website, explores each of these topics in depth.

CARLOS MENA: Cooperation and assistance among foreign governments is increasingly becoming an important ingredient in the successful detection and prosecution of international cartel activity. Cooperation among competition agencies reflects the 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 enforcement officials at the annual ICN cartel enforcers workshop or in parallel investigations. It also includes launching investigations with coordinated, simultaneous dawn raids, searches, services of subpoenas and surprise witness interviews in a number of jurisdictions. The (inaudible) workplace for competition enforcers has prompted competition agencies to seek out reliable constructive and innovative means of cooperation with other competition agencies. The ICN's anti-cartel enforcement manual contains a chapter highlighting tools for cooperation and information sharing among competition agencies.

SCOTT HAMMOND: Competition agencies should strive to maximize transparency and

predictability across their anti-cartel enforcement policies to the greatest extent possible. For example, authorities should provide clear guidance as to what conduct is subject to sanctions, informing businesses of the rules and the consequences for breaking the rules provides a critical foundation for both compliance training and effective deterrence. Transparency is also the touchstone of an effective leniency program. Unless companies are able to predict with relative certainty whether they will qualify for immunity, they will not self-report. Transparency is also critically important when incentivizing companies to accept responsibility and cooperate even when immunity is no longer available. Ideally, companies should be able to predict how much sanctions will be reduced if they cooperate. They should also have a clear sense as to what the consequences will be if they do not cooperate, but are still held liable. Giving companies the ability to make an informed decision on the benefits and the risks of choosing whether or not to cooperate is in both the companies' and the authorities' best interest. That is because cooperating parties come forward in direct proportion to the predictability and the certainty of their treatment following cooperation. If prospective cooperating parties cannot predict with a high degree of certainty their treatment following cooperation, then they're less likely to come forward in the first place. You will find that the ICN cartel working group offers a wealth of information on the policies and the practices of jurisdiction around the world. We hope the enforcement community will find these useful in drafting and publishing clear and transparent guidance for businesses operating in your jurisdictions.

LISA PHELAN: Effective sanctions are a vital component to effective anti-cartel enforcement. There is widespread agreement that an effective penalty needs to be deterrent. Competition laws must provide the threat of stiff sanctions for those who participate in hard-core cartel activity. The penalty for cartel conduct should fit the crime. Penalties should reflect the

fact that cartels inflict consumer harm with no likelihood of corresponding efficiency gains. Penalties should also take into account the fact that cartelists' motivation is financial. The potential rewards to corporations and individuals from engaging in cartel conduct can be enormous. Cartelists are quite capable of making a cost/benefit decision that factors in an occasional discovery and fine as a cost of their illegal conduct. Cartel activity will not be deterred if potential penalties are perceived by firms and their executives as outweighed by the potential rewards. If the potential sanctions are not sufficiently punitive, then they will merely be seen as a cost of doing business. Jurisdictions impose stiff corporate fines against companies that participate in cartels. Many jurisdictions provide for fines against individuals as well. In fact, in recent years, the equivalent of billions of dollars in punitive fines have been imposed on corporations and individuals by enforcement agencies. A growing number of jurisdictions also prosecute hard-core cartel conduct criminally, reflecting the view that there is no greater deterrent to cartel activity than affecting cartelists directly via the risk of imprisonment for corporate officials. In the past few years alone, dozens of executives from North and South America, Europe, Asia and beyond, who have engaged in international cartel violations, have served increasingly significant jail terms in their home countries and also in other countries in which their cartel conduct impacted that country's consumers. 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, authorities must cultivate a law enforcement environment in which business executives perceive a real and significant risk of detection if they enter into or continue to engage in cartel activity.

CARLOS MENA: Most consumers have never heard of competition laws, even though anti-cartel enforcement saves them money by protecting the benefits of free and open

competition. It is important for competition enforcers to publicize their anti-cartel efforts and raise awareness of the harmful effects of cartels. Deterrence is preferable to prosecution, whether as a matter of marketplace effects or of enforcement resources. Deterrence requires that violators learn the penalties they face and the rewards available if they confess. Over time, publicizing enforcement policies and efforts can change the norm of what is acceptable or tolerated in the marketplace. Awareness and outreach efforts also aid with detection. Outreach to audiences that may interact with cartels, such as government procurement officials, can help educate them about anti-cartel laws and enforcement efforts and the typical signs of cartel conduct. Outreach efforts can generate more and better investigative leads as cartel victims and leniency applicants learn to give enforcers the specific information necessary to make a case. Competition agencies employ a various range of methods to generate awareness of competition laws, educate the public through outreach activities and foster general compliance amongst the public. For a better sense of these methods, please see the ICN's anti-cartel enforcement manual chapter on cartel awareness, outreach and compliance efforts undertaken by competition agencies from around the world. Here is a compilation of several creative cartel awareness campaigns and efforts from around. (Several examples in different languages).

MALE: I am a businessman trying to make more money. I participate in cartels and I do not believe it is illegal. I may not know much about law and economics, but I know that there are benefits to cartel conspiracies and I refuse to believe that the Competition Act can stop cartels and help businesses grow. Trust me, it makes sense to raise prices and overcharge my customers by 30 percent. I do not see why it benefits my business to give customers choices in prices, products and services. I believe that the benefits of cartels exceed the loss in my business productivity and innovation. I do not see how this is cheating. If you think harder about it, cartel

conspiracies do not hurt the competitiveness of my business and the economy. It is foolish to think that I do not wish to engage in cartel activities. All these sound attractive, but what if I have this the wrong way around. I do not wish to engage in cartel activities. It is foolish to think that cartel conspiracies do not hurt the competitiveness of my business and the economy. If you think harder about it, this is cheating. I do not see how the benefits of cartels exceed the loss in my business productivity and innovation. I believe that it benefits my business to give customers choices in prices, products and services. I do not see why it makes sense to raise prices and overcharge my customers by 30 percent. Trust me, the Competition Act can stop cartels and help businesses grow, and I refuse to believe that there are benefits to cartel conspiracies. I may not know much about law and economics, but I know that cartel conspiracies are illegal and I will play no part in it.

CARLOS MENA: The ultimate goal of cartel enforcement is deterrence and deterrence only works when consequences are real. To effectively deter cartels, competition enforcers must aggressively and predictably prosecute cartelists and use the full range of the investigative weapons in the enforcement arsenal culminating in effective sanctions. Stiff sanctions and robust enforcement that creates a significant risk of detection affect cost benefit analysis of cartels and (inaudible) deterrence. The goal is to destabilize cartels through the fear of harsh penalties, the incentive to cooperate and expose co-conspirators, and the recognition that enforcers are predictable and relentless in their approach. Anti-cartel enforcement is a legally and practically demanding task, but one at the heart of competition enforcement and protection of the interest of consumers.

This overview model highlights the basic building blocks for an effective anti-cartel enforcement program as identified and shared by ICN members around the world. For more

ICN Training On Demand Module II-1: Introduction to Cartels

details, we encourage you to seek out the work product of the ICN's cartel working group available on the ICN's website. Thank you.