

**Speech by Philip Lowe, Director General,
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**INTRODUCTION TO CARTELS WORKING GROUP
PLENARY SESSION**

Ladies and gentlemen,

On behalf of the European Commission and the Hungarian Competition Office, as co-chairs of the cartels working group, it is a pleasure and honour to introduce the plenary session of the group at this sixth annual ICN conference.

It is a particular pleasure to participate in this conference in Moscow. Like so many others, I should like to thank the Federal Antimonopoly Service, under the strong leadership of our colleague and friend Igor Artemyev, for the excellent organisation and hospitality which he has offered us over the course of the conference.

I should like to offer our best wishes and support for the future enforcement efforts of the FAS within Russia. These efforts will be further underpinned by the new Russian anti-monopoly law and the revised sanctions regime.

FAS activity has so far concentrated on actions against anti-competitive conduct of monopolies. However FAS plans to develop its anti-cartel activity. In developing this activity, it will be counting on, and I believe it will get, strong support and assistance from ICN member authorities with extensive experience in the cartel field. I can certainly promise that from the European Commission. But I know that a number of authorities from within Europe and North America will also be providing valuable advice and assistance.

One vital ingredient for effective anti-cartel enforcement is the power to execute successful on-the-spot inspections. In this respect, experience from other jurisdictions suggests that a competition authority needs to work hand in hand with police services and other law enforcement agencies. Therefore, it is encouraging that the basis for this inter-agency co-operation is now being actively examined by the Russian Government.

The development of active anti-cartel enforcement in Russia is only one example across the 100 jurisdictions here of the increased priority being given to the fight against cartels around the world.

This should not however lead us into any sense of complacency. We only have to remind ourselves of the size of the challenge and the ongoing need for relentless advocacy against cartels at a political level, as well as for greater awareness of their harmful effects among consumers, whether businesses or individuals.

The size of the challenge is daunting; we know that we probably only discover about 10% of the cartels which exist. We know that behind every national cartel, there is almost certainly an international, if not global, cartel working somewhere. We know that the efforts by cartelists to avoid detection are

becoming more and more sophisticated and require an equally sophisticated response from competition authorities, including IT-forensic capacities. We know too that the incentive of any cartel member to seek immunity or leniency increases when the basic rationale for the cartel is weakened by changes in market conditions. On that basis economists estimate that most of the cartels we detect would in any case break up within one to two years.

So we, as competition authorities, tend to overestimate the benefits which our enforcement actions bring to consumers. So we need to ensure (1) that our leniency and amnesty programmes deliver us the maximum possible in terms of evidence, (2) that detection of cartels by other means is as extensive as possible (3) that the sanctions and deterrence of cartel activity is as effective as possible, through the imposition of civil or criminal fines, or custodial sanctions, through other sanctions against individuals such as disqualification from office, through corporate reputational damage or through facilitating private action against cartel members - or a balanced combination of all these instruments.

These efforts demand substantial resources given the size of the challenge. But they should correspondingly bring major benefits to consumers and taxpayers, increased certainty in terms of a significant multiple of the resources involved – benefits to consumers perhaps 5 to 10 times the cost, irrespective of any revenue gain through fines.

As to the need for continuing advocacy and awareness-building against cartels, we should recognize that we still have a long way to go. Last night I understand that some of our friends and colleagues were tempted to kiss the bear.

Ladies and gentlemen, across our 100 jurisdictions there are many politicians and business leaders whom we have yet to convince that a cartel is a bear you do not kiss. This type of bear is dangerous.

Why is it dangerous? First of all because most cartels simply seek to extract higher rents from their customers – whether other businesses, individuals or public authorities, and doing it covertly. It is straightforward redistribution of income and capital, on the same basis as a credit card fraud or a bank robbery. Secondly, because this type of bear deliberately prevents firms from competing and innovating in order to promote the best products and services at the cheapest cost to consumers. So the cartel bear undermines efficiency and ultimately makes the economy and society poorer.

But some people continue to defend the bear. Don't we all need cartels when there is a crisis, where jobs are at threat, where the future of whole sectors of the national economy is put at risk? Haven't business and governments been content to resort to cartelization in order to avoid economic instability and social unrest?

It is in principle conceivable that restricting price and output in a particular sector could help to achieve wider social objectives. But the experiences in all our jurisdictions, whether developed, emerging or developing our economy, show that in the first place cartels which are supposedly in the public interest have been run by the firms in the cartel, and invariably in the end for their own narrower interest. But secondly, the bitter lessons of economic policy tell us that if you want to pursue a particular economic or social objective, you need a specific instrument for it. Simply intervening in the functioning of the market through cartels in order to achieve for example protection of employment is a policy condemned to failure. A far more profitable measure is to develop a

programme of support to training, retraining and alternative employment opportunities.

For many of us in this room these arguments will be almost platitudes. I would simply disagree. There is still a widespread complacency about cartel activity which we need to eradicate. A cartel is a bear that governments and businesses must not kiss.

Having said that, we can see the beginnings of a world-wide, and often co-ordinated, effort to strengthen our enforcement activities.

Prominent cartel cases over the last year involving co-operation between agencies (a subject to which I will return) have included the now well-known air cargo investigation, and the marine hoses investigation, which led to 8 arrests as well as the execution of various search warrants in the US while on-the-spot investigations took place in the EU. In the words of the US Department of Justice that investigation "demonstrates our ability to work effectively with foreign competition authorities to shut down international cartels"

In South Africa, consumer products (such as bread and nails and metal wires) were the focus of the enforcement action of the South Africa Competition Commission. In Japan, the recently-adopted leniency programme has led to many applications, including in prominent bid-rigging cases involving tunnel ventilation and human waste disposal. In Mexico, Austria, Italy, Germany and Portugal new leniency programmes were also adopted, and my own agency, as well as France, revised their leniency programmes, based on the new Model Leniency Programme adopted by the competition agencies of the EU.

US cartel enforcement activity continues to demonstrate impressive activity. In 2006, the DoJ filed 40 new cases. Currently it has over 50 individual cartels under investigation. In the first six months of 2007 alone it imposed custodial sanctions of an average of 3 years and totalling 20,000 days. On an annual basis this is 30% more than in 2006.

So far in 2007, a year which is not even half finished, my own agency, DG Competition of the European Commission, has already broken a record by imposing our the biggest-ever fine for a cartel, a fine of just under one **billion** euros for a cartel in the elevators and escalators section. Almost half of that total was taken up by the fine on one single company, which is itself the biggest ever fine on a single company for a cartel imposed by the European Commission. This year has also seen the third highest fine which we have ever imposed, a fine of just under 400 million euros on a major company for its part in the "gas insulated switchgear" cartel, and a fine totalling €19 million was imposed in November 2006 on a synthetic rubber cartel. And, for good measure, last month we also imposed a moderate fine of 273 million euros for a beer cartel in the Netherlands.

Turning to the ICN cartel working group, it has been in existence for three years. Most of you are familiar with it and even very active in it. But just allow me a bit of introduction for the newcomers. As ever, there are two subgroups. Subgroup 1, which is called "General Framework" and is co-chaired by the US Department of Justice and the Brazilian Secretariat for Economic Defence, mainly deals with the legal and conceptual challenges of fighting international cartels.

Subgroup 2, which is called Enforcement Techniques and is chaired by the Australian Competition and Consumer Commission and the Canadian

Competition Bureau, is working on improving the effectiveness of anti-cartel enforcement. Subgroup 2 is responsible for the annual ICN cartels workshop, the anti-cartel enforcement manual, which is growing all the time with the addition of new chapters, and the cartel templates, which are summaries of the laws and rules regarding cartels in different jurisdictions, and are available online on the internet, via the ICN website.

Over the last year, subgroup 1 has revised and extended two work products of which earlier versions were presented at last year's conference in Cape Town, one on co-operation between competition agencies in cartel investigations, and one on the interaction between public and private enforcement as regards cartels. These are both topical subjects, and I would like to make some remarks on both of them.

On co-operation, the theme of the working group report (which is available here in many glossy copies by the way), is that while there is a lot of co-operation taking place in cartel investigations, a great deal of it is within a relatively small group of agencies (those with advanced co-operation arrangements between themselves, such as agencies in the EU or between the USA and Canada), and that outside those groups, many barriers exist to the exchange of information, particularly regarding so-called confidential or protected information. As far as most competition agencies are concerned, they can for example co-ordinate the timing of inspections with other agencies, but not exchange the evidence found.

Within the EU, competition agencies have deep co-operation arrangements, including the right to ask an agency in another Member State to gather information and exchange it, including confidential information, but this is a fairly exceptional arrangement. Outside such regional arrangements, "second generation co-operation agreements" (that is, agreements allowing the exchange

of confidential information") are a good idea, but require very careful negotiation and drafting, in order to skate around the complicated legal issues relating to rights of defence in this area.

However, one simple way to facilitate greater co-operation is for jurisdictions to establish leniency programmes and strongly encourage companies which have applied for immunity in different jurisdictions to grant waivers of confidentiality to allow the different competition agencies to exchange and compare the contents of their applications. In this context I would draw attention to the EU's recent "model leniency programme" and to the European Commission's own leniency programme, which was revamped last year in the light of the model programme.

On private enforcement, particularly actions for damages against cartels, as many of you know our stated objective in the European Commission is to encourage it and work towards removing some of the barriers which currently limit it. One key question in this regard is whether developing private enforcement could interact negatively with leniency programmes, by discouraging cartel members from applying for immunity for fear of being hit by damages later, even if they avoid a fine. Differing opinions on this question have been expressed by the NGAs and companies consulted for the report. My own personal view is that there is a need to optimise the relationship between leniency programmes and damages claims: in jurisdictions where leniency and private enforcement are working well in fighting cartels, care is taken to ensure that leniency programmes and damage actions complement each other and that there are provisions and incentives for disclosure of evidence between the parties.

Bear in mind also that diversion of private actions related to effects in one jurisdiction to the courts of another jurisdiction can only ultimately lead to a frustration of efforts to encourage private enforcement in the former jurisdiction. This is not conducive for effective co-ordinated enforcement across jurisdictions.

Turning to the subgroup 2 work products, the 2006 cartel workshop took place in the Netherlands, hosted by the Dutch competition agency, the NMA, and was a success in terms of substance, organisation and of attendance, with 145 people attending from 49 jurisdictions (not counting the Dutch hosts). By the way, if you wish to find out where the 2007 ICN cartel workshop will take place and all the details about it (for those of you who don't know already), then I encourage you to attend the future work session tomorrow morning.

In addition, Subgroup 2 has produced a further chapter for the anti-cartel enforcement manual, on "case selection and prioritisation". This is of relevance to all of us, as we all have to detect possible cartels (and not just by waiting for immunity applications to come in), and then decide which investigations our scarce human resources should work on. This is always a tricky question, especially with regard to relatively small cartels in niche sectors, which might have supposed that the marginal nature of their activity might protect them from the attention of competition authorities.

We have two panels for you today in the plenary session, both of them linked to work products of the working group this year; one panel is on co-operation, and one is on case selection and prioritisation (if you recall, private enforcement was tackled in a panel in Cape Town last year). Then, in the break-out sessions which follow after the coffee break, there will be an opportunity to discuss those two subjects in smaller groups, together with a third subject, direct settlements,

which is one of the items on the work programme for the coming year. I would point out that all six break-out rooms will cover all three subjects, so there is no need to make a choice.

In conclusion, I hope that you find the products presented to you by the cartel Working Group this year, and the forthcoming panels, both stimulating and relevant for your work. Whether that is true or not, please speak up in the break-out sessions, to ensure a vigorous discussion.

I hope that our overall message of advocacy on the fight against cartels has the similar degree of fire to that of the acrobats of yesterday evening.

Thank you.