International Competition Network

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Cartels Working Group
Subgroup 1 – general framework

OBSTRUCTION OF JUSTICE IN CARTEL INVESTIGATIONS

Report to the ICN Annual Conference
Cape Town
May 2006

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I. Introduction

Competition enforcers around the world have proclaimed the investigation and prosecution of cartels their highest priority. Over the last decade, competition agencies have made great strides in vigorously detecting, investigating and prosecuting hard-core cartels. These tremendous efforts, however, can be compromised by cartel members' attempts to impede investigations. There is broad consensus that obstruction of cartel investigations is a roadblock to successful anti-cartel enforcement. As a whole, anti-cartel enforcers are not adequately addressing this threat. If competition enforcers are to be successful in detecting and deterring cartel activity, protecting the integrity of governmental investigations and proceedings must also be a paramount priority.

In order to protect the integrity of investigations and proceedings, enforcers must first have laws that allow them to punish those who seek to obstruct them. If the laws are to be effective, the penalties for obstructing investigations must at least mirror, or be more severe than, the substantive offenses under investigation. If the penalties for obstruction of justice are less than those for the substantive conduct to be deterred, the perpetrator's incentive is tipped in favor of obstructing investigative efforts because they have little to lose and everything to gain. As the penalties for cartel offenses continue to increase around the world, the sanctions for interferences with cartel investigations must also increase.

However, having obstruction laws available to competition enforcers – even those carrying stiff penalties – is not enough to prevent the obstruction of cartel investigations and enforcement proceedings. It is not only the threat of severe sanctions, but the actual imposition of those sanctions that will lead to deterrence of obstructive conduct. Competition agencies must devote resources to detecting obstruction and prosecuting those who seek to obstruct cartel investigations and proceedings, or cartelists will believe there is little risk of getting caught, and the balance will often weigh in favor of obstruction rather than disclosure.

Recognizing the harm obstruction causes to cartel investigations, the ICN Cartel Working Group addressed the topic of obstruction at its last two Cartel Workshops held in Sydney in 2004 and Seoul in 2005. The General Framework Subgroup also sent out a series of questions to Cartel Working Group members to gauge the availability of obstruction laws, the institutional structures available, and the level of experience in prosecuting the various forms of obstruction found in cartel investigations. The initial set of questions was sent to ICN members in ten jurisdictions,[1] and their responses were discussed at the 2004 Workshop in Sydney. It was clear from these responses that while many jurisdictions had the ability to prosecute acts of obstruction, few were actually

[1] Australian Competition and Consumer Commission, Canada Competition Bureau, EU DG Competition, German Bundeskartellamt, Irish Competition Authority, Japan Fair Trade Commission, Korea Fair Trade Commission, Dutch Competition Authority, UK Office of Fair Trading and the US Department of Justice, Antitrust Division.

doing so. After the 2004 workshop, the competition agencies in the remaining twenty-seven jurisdictions in the Cartel Working Group were asked if they had any experience prosecuting obstruction of justice. The competition agencies in three additional jurisdictions[2] responded. When the topic of obstruction was again discussed at the 2005 Workshop in Seoul, a lively discussion focused on why anti-cartel enforcers are not prosecuting more obstruction of justice cases. After the 2005 Workshop, two additional jurisdictions provided responses,[3] bringing the total of responding jurisdictions to fifteen.

This paper encapsulates and continues the discussions at previous Workshops about what anti-cartel enforcers can and are doing to prevent obstruction of justice. First, obstruction of justice is generally defined and the most prevalent types of obstruction are identified. Second, the paper addresses why the prosecution of obstruction of justice is so important to anti-cartel enforcement. Third, the issue of why so few acts of obstruction of cartel investigations are prosecuted is addressed. Finally, the paper identifies efforts to root out and deter obstruction of justice in cartel investigations.

II. Definition and Types of Obstruction

Obstruction of justice is essentially any offense aimed at negatively affecting government functions. Obstruction of justice broadly encompasses any attempt to interfere with the work of police, investigators, regulatory agencies, prosecutors, courts, judges or other government officials. Obstruction of justice offenses are defined by the laws of each jurisdiction, but the most commonly recognized types are: 1) false statements; 2) destroying, falsifying, concealing or withholding documents or information; and 3) witness tampering.[4]

A. False Statements

1. Oral False Statements

The most simple type of false statement is a lie given in response to a question asked by a government official. If investigators are allowed to compel the oral testimony of a witness and place them under oath to tell the truth, a lie in response to a question made under oath is most commonly prosecuted as perjury. False statements provided outside of the context of sworn testimony, such as false statements made to investigators during voluntary interviews, searches or raids – referred to as unsworn false statements – are another type of oral false statement generally recognized as obstructive to a government investigation.

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[2] Brazilian Ministry of Justice, Secretariat of Economic Law, Hungarian Competition Authority and the Commerce Commission of New Zealand.

[3] Finnish Competition Authority and Turkish Competition Authority.

[4] In some jurisdictions, such as Germany, the scope of obstruction of justice is more limited because the person charged with any wrongdoing is not obliged to do anything that might help investigators to convict him or her. Accordingly, false statements and concealing or withholding documents or information by this person is not prohibited under German law. In Germany, destroying and falsifying documents and witness tampering are criminal offenses but only under certain circumstances.

The vast majority of jurisdictions polled have some ability to prosecute false oral statements.[5] (See Chart A). Of the fifteen responding jurisdictions, ten are able to prosecute those who perjure themselves. In Germany, a distinction is drawn between false statements made by a subject of a cartel investigation and a third party witness due to the rights of defense afforded to subjects of the investigation which prohibit their prosecution for providing false statements. In all ten of the responding jurisdictions that can prosecute perjury, a term of imprisonment can be imposed and maximum penalties range from one year to fourteen years imprisonment. Relatively modest maximum corporate fines were available in most jurisdictions, but in all likelihood the individual who provided the false statement would be prosecuted in their individual capacity, rather than holding the company responsible for the oral false statement of an employee, so corporate fines are rarely relevant. Thirteen of the responding jurisdictions can prosecute an unsworn false statement, although a term of imprisonment can be imposed against individuals providing an unsworn false statement in only seven jurisdictions, with maximum penalties ranging from one to ten years imprisonment. Again, maximum corporate fines are modest in all jurisdictions.

While most of the polled jurisdictions have the ability to prosecute sworn and unsworn oral false statements, few are doing so in cartel cases. Of the fifteen responding jurisdictions, only two – the US and Canada – prosecuted an oral false statements case within the last five years. (See Case Example 1). The Commerce Commission of New Zealand currently has its first false statements case pending in its courts.

[5] Since some competition agencies are able to directly prosecute acts of obstruction while others must refer the matter to a public prosecutor's office, the questions asked did not draw a distinction between who prosecuted the act of obstructions, but rather focused on whether prosecution was possible in the jurisdiction by either the competition agency or a public prosecutor's office.

Case Example 1: International Obstruction (US and Canada)

When anti-cartel enforcement agencies in multiple jurisdictions set out to investigate an international conspiracy to fix the prices of carbon brushes and current collectors used in certain automotive applications and municipal transit vehicles, their investigations were hampered by a complex conspiracy among British conglomerate Morgan Crucible Company plc and its affiliates and employees to fabricate information, lie to investigators and destroy conspiratorial records.

The US uncovered and prosecuted this elaborate plot to obstruct the Antitrust Division's investigation of price fixing of carbon brushes. On November 4, 2002, the Antitrust Division filed a three-count Information charging US subsidiary Morganite Inc. with fixing the prices of various electrical carbon products and charging Morgan Crucible Company plc with two counts of obstruction of justice. The first obstruction count involved witness tampering by preparing and distributing a fabricated "script" that contained false information about conspiratorial meetings, and the second obstruction count charged Morgan Crucible with obstruction through the destruction of records and documents relevant to the grand jury's price-fixing investigation. As charged in the Information, Morgan Crucible warned a co-conspirator that if the US investigation proceeded, the price-fixing investigation would spread to the EU, which Morgan Crucible noted had become more aggressive in its investigations, and where the co-conspirator would face more serious economic consequences. Morgan Crucible pled guilty to the obstruction charges and was sentenced to pay a $1 million criminal fine and its US subsidiary Morganite, Inc. pled guilty to price fixing and was sentenced to pay a $10 million fine.

On September 24, 2003, UK citizens Ian Norris, the former CEO of The Morgan Crucible Company plc, and Robin D. Emerson, the former Marketing Coordinator were indicted for allegedly conspiring to obstruct the Antitrust Division's carbon brushes price-fixing investigation and corruptly persuading others to destroy or conceal documents to prevent their use by the grand jury. On December 5, 2003 Emerson entered a guilty plea and was sentenced to serve five months incarceration and to pay a $20,000 fine. Dutch national Jacobus Johan Anton Kroef, former Chairman of Morgan's Industrial and Traction Division, pled guilty to obstructing the Antitrust Division's investigation by witness tampering and was sentenced to a four-month jail sentence. F. Scott Brown, former Global President and Board Member of Morgan Advanced Materials & Technology, pled guilty to aiding and abetting obstruction of justice related to document destruction and was sentenced to serve a six-month jail sentence.

On October 15, 2003 former CEO of The Morgan Crucible Company plc, Ian Norris was charged by superseding indictment with one count of price fixing, in addition to the obstruction counts returned on September 24, 2003. Norris is a UK citizen and the US is seeking his extradition from the UK on all counts of his indictment. On June 1, 2005, the Bow Street Magistrates' Court in London ruled that Norris is extraditable on both the price-fixing and obstruction charges and referred the case to the UK's Secretary of State. On September 29, 2005, the Secretary of State approved the extradition request on all counts. Further appeals by the defendant are now pending in the UK High Court of Justice.

On July 16, 2004, the Morgan Crucible Company plc pled guilty in Canada and was sentenced to pay a criminal fine of C$550,000 for obstructing justice by providing false and incomplete information to Canadian Competition Bureau investigators during the course of their investigation of price-fixing in the carbon brushes industry. Morgan Crucible admitted that through certain high-level executives it denied its participation and the participation of its affiliates in an agreement to fix the prices of carbon brushes and current collectors and also made false oral statements during interviews with Canadian Competition Bureau investigators. Also on July 16, 2004, Morgan Crucible's affiliate Morgan Canada Corporation pled guilty to implementing the underlying price-fixing at the direction of its British affiliate Morganite Electrical Carbon Limited without knowledge of the conspiracy and was sentenced to pay a criminal fine of C$450,000.

2. Written False Statements

a. General Definition

False statements can also come in written form. If the government has the ability to compel written responses to questions, a false response is the simplest form of a written false statement. For instance, if a competition authority asks interrogatory-style written questions to subjects of a cartel investigation calling for written responses and the subject company submits a false written response, that written false statement might provide an independent basis for prosecution of the submitting company or individual. If the competition authority asks "Have you ever discussed future pricing with a competitor?" and in response the subject falsely answers "No," the responding company or individual might be prosecuted for the written false statement. Thirteen of the responding fifteen jurisdictions have the ability to prosecute some types of written false statements. (See Chart B). In six responding jurisdictions the maximum penalties include the possibility of a period of incarceration ranging from one to fourteen years and in five jurisdictions administrative fines are available.

b. False Certificates of Non-Collusion

Contracts for goods or services let by governments are often large and lucrative, making them targets for bid rigging. The government, like any consumer, is entitled to the benefit of true competitive bids and fair pricing for the goods and services it purchases. One way that governments can try to ensure that they will receive competitive pricing is to require those who bid for government contracts to submit a certificate of non-collusion signed under penalty of perjury with their bid offer. A certificate of non-collusion, also known as a certificate of independent price determination (CIPD), often requires that the bid offeror certify under oath that prices were reached independently, that the bid offeror has not and will not disclose the prices contained in its bid to other bidders, and that the bid offeror has not colluded and will not collude to rig the bidding process.

The specific terms of CIPDs may vary depending on the circumstances of the contract that is being let, but the general idea is that any bidder submitting an offer to the government must certify that the bid offeror has not and will not engage in collusion. Like the certification of compliance discussed below, a CIPD can provide an independent basis for prosecution. If a bid offeror falsely certifies that it did not collude, the offeror can be prosecuted independently for the false statement made on the CIPD as well as for any underlying bid rigging or price fixing that can be proven.

Of the fifteen responding jurisdictions, only three – the US, Canada and Australia – responded that they are able to prosecute a bid offeror for submitting a false certification of non-collusion.

Example Certificate of Independent Price Determination

Bid offeror must certify:

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
(2) The prices in this offer have not been and will *not be knowingly disclosed* by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
(3) No *attempt* has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

Federal Acquisition Regulation, 48 C.F.R. § 52.203-2 (emphasis added).

The italicized terms in the example of a CIPD above illustrate that the evidentiary standard and standard of proof necessary to prosecute a false CIPD is generally lower than that required to prove the underlying cartel conduct such as bid rigging or price fixing. The sample CIPD above is intentionally drafted to require the offeror to certify that prices have not been "knowingly disclosed" by the offeror to any competitor before the bid opening. The language does not require any certification that no "agreement" on price or bid terms was reached. Thus, a bid offeror that exchanges bid prices prior to the opening of a bid may potentially be prosecuted for falsely certifying that it did not share bid information without prosecutors having to prove that an agreement on price or bid terms was reached. In addition, the sample CIPD requires that the bid offeror certify that it has not and will not attempt to induce a competitor to submit an anticompetitive bid. Thus, a bid offeror who falsely certifies it made no attempt to solicit a competitor to bid rig may be prosecuted for a false CIPD even if the competitor did not agree to rig the bid and the offeror cannot be prosecuted for bid rigging. These requirements are intended to provide additional safeguards for the competitive bidding process for government contracts beyond the deterrence provided by traditional cartel enforcement.

The US is the only responding jurisdiction that regularly requires a bid offeror to include a CIPD. (See Federal Acquisition Regulation, 48 C.F.R. 3.103-1 and 48 C.F.R. § 52.203-2). The US DOJ will criminally prosecute companies and individuals who submit false certifications of non-collusion; additionally, the US Government entity letting the bid may also take independent steps to "debar" the company submitting the false certification prohibiting them from submitting future bids for government contracts. The Canadian Competition Bureau encourages both government procurement agencies and purchasers in private corporations to require that bidders complete a CIPD that contains all material facts about any communications and arrangements that the bidder has entered into with competitors regarding the bid. In Canada, bidders who make or file false

CIPDs may be prosecuted under the forgery provisions of the Criminal Code or, in some circumstances, a variant of the perjury offense may be applied. In Australia, the ACCC can take action against a company for false or misleading representations made in a bid offer and the Australian Government may also have a contractual or debarring remedy. Of the responding jurisdictions, only the US has prosecuted a case for a false CIPD in the last five years. (See Case Example 2).

Case Example 2: False Certification of Independent Price Determination (US)

In 2002, the Antitrust Division of the US Department of Justice charged Taylor & Murphy Construction Co., Inc. and Maymead, Inc. with making separate false statements to the government in connection with each company's bid on separate federal multi-million dollar highway construction projects.

The US Federal Highway Administration's (FHWA) solicitations for bids on road construction projects for portions of a federal highway in North Carolina required the submission of line item prices and also required the submission of a Certificate of Independent Price Determination (CIPD). The CIPD is a certification that the bidder has not and will not disclose its bid prices to any other bidder or competitor before the sealed bid opening. The FHWA will not consider a bid if the bidder does not include the CIPD.

Taylor & Murphy Construction Co., Inc. and Maymead, Inc. were separately charged with falsely certifying to the FHWA that they had not disclosed their sealed bid prices for their respective highway projects. Corporate officers of Taylor & Murphy Construction Co., Inc. and Maymead, Inc. each signed CIPDs with the full knowledge that an employee of their respective company had met with an unnamed competitor and had shared prices with that competitor before the bid deadline.

Taylor & Murphy Construction Co., Inc. and Maymead, Inc. pled guilty to the charges. On September 2002, Maymead, Inc. was sentenced and paid a criminal fine of $100,000 and Taylor & Murphy was sentenced and paid a criminal fine of $200,000.

c. False Certifications of Compliance

If the competition authority's practice is not to ask interrogatory-style questions, or it is not authorized to do so, the competition authority might instead ask the company to produce: "All documents relating to communications with competitors regarding pricing." The withholding of documents responsive to this request may constitute a prosecutable case, which will be discussed below. Depending on the jurisdiction, there may be another way competition enforcers can prosecute a recipient of a request for information who fails to provide responsive documents. In the US, Antitrust Division subpoenas compelling the production of responsive documents usually contain a requirement that the responding company or individual provide a written certification of compliance with the Division's demands.

Example Certification of Compliance

Your company, at its sole election, may also comply with the subpoena, in lieu of producing documents before the grand jury, by producing all responsive documents via certified or registered mail, or via equivalent delivery, to the address listed below, provided that each of the following prerequisites is met:

. . .

Certifies that the documents produced fully comply with the demands of the subpoena, and that your company has withheld no documents, except on grounds of privilege in accordance with Paragraph X, above.

Only three of the responding jurisdictions said they are able to prosecute a false certification of compliance. (See Chart B). The US is the only responding jurisdiction that regularly requires a certification of compliance for information produced in response to a document request it issues and the only responding jurisdiction to report prosecuting a false certification of compliance. (See Case Example 3). In Canada, a company responding to a demand for documents can be required by court order to provide a sworn certification of compliance and a false certification of compliance can be prosecuted criminally. The ACCC indicated that while they cannot currently require a sworn certification of compliance, if one were required, a false certification could be prosecuted in Australia by the public prosecutor's office as a false statement.

Twelve of the responding jurisdictions said they are unable to prosecute a false certification of compliance. (See Chart B). During discussions among anti-cartel enforcers regarding obstruction, some jurisdictions indicated that they are unable to require a certification of compliance because such a request would implicate the right against self-incrimination. For instance, under German law, the right against self-incrimination is applied such that a person charged with wrongdoing is not obliged to assist in his or her own conviction, so a certification of compliance cannot be required.

Case Example 3: False Certification of Compliance (US)

In May 2005, Bobby Keith Moser, a tax attorney in Little Rock, Arkansas, was sentenced to 188 months in prison (15 years and 8 months) for orchestrating a complicated anticompetitive tax and money laundering scheme and obstructing the investigation of his conduct.

Moser originally agreed to plead guilty in 2004 to charges of tax fraud, conspiracy, money laundering and obstruction of justice. However, instead of appearing in court for the plea, Moser fled the country on the eve of arraignment and became an international fugitive. After Moser fled, he was charged in a seven-count Indictment with conspiracy to commit money laundering, conspiracy to commit mail fraud, mail and wire fraud, obstruction of justice, and making a false declaration before a grand jury.

The obstructive conduct Moser was charged with centered around a corporate subpoena for documents related to Moser and his co-conspirator's scheme permitting an executive of an audio-visual company to solicit and obtain more than $3.5 million in kickbacks from vendors seeking multi-million dollar contracts from his company in exchange for the executive's support in contract negotiations and the award of contracts to the vendors. Moser, who designated himself as the custodian of records for the subpoenaed company, altered and falsified documents, submitted those documents to the grand jury, and then signed under oath and submitted to the grand jury an "Affidavit of Compliance" which falsely declared that the documents produced to the grand jury were made at or near the time identified on each particular document and that the documents were kept in the ordinary course of business even though Moser knew this to be false. Moser was charged with two separate types of obstructive conduct: 1) providing altered and manufactured documents to the grand jury, and 2) making a false declaration before a grand jury for the "Affidavit of Compliance."

Moser was eventually identified and detained by government officials in Madagascar and was returned to the US. Moser ultimately pled guilty to the charges in the Indictment and was sentenced to the 188 month jail sentence and to pay $144,335 in restitution on the Division's charges.

Requiring a sworn certification of compliance from those producing documents may provide an independent means to prosecute an individual certifying compliance and/or the company on behalf of whom the certification is made for the false certification alone. In the US, this offense can be punishable in addition to the actual withholding of the documents (See Case Example 3) and may be easier to prove since the government must only show that the certification was knowingly false rather than prove that existing, responsive documents were intentionally not produced.

B. Document Destruction, Falsification, and Withholding

Documents play an important role in cartel investigations. Companies produce a large amount of paper and electronic documents in the course of conducting business. The vast majority of documents in the custody and control of a company participating in a cartel are not evidence of cartel conduct. If documents evidencing collusion (such as score sheets) exist, however, a cartel case can sometimes be proven on the basis of these conspiratorial documents. Any cartel investigator wants those few "hot" documents that evidence an agreement among competitors to fix prices, rig bids or allocate markets. Cartel investigators in jurisdictions with experienced anti-cartel programs find it increasingly rare to discover "smoking gun" documents directly evidencing a collusive agreement. Still, notes of meetings with competitors, emails between competitors, internal emails or documents about competitors do sometimes exist and provide critical evidence of collusion and valuable corroboration in cartel investigations.

Given the relative importance of documentary evidence, there exists a large temptation for companies and executives engaged in cartel activity to destroy, falsify or withhold collusive documents when requested by a competition authority. Numerous competition authorities have experienced blatant document destruction at the site of a dawn raid or search. Stories of hearing document shredders running in a back room, or hearing toilets flushing, smelling smoke from burning documents or finding documents in trash cans are not uncommon. When competition enforcers request documents from subject companies, the subject companies may provide non-collusive responsive documents, but withhold or destroy documents evidencing collusion or alter documents to make them appear non-collusive. Companies and executives need to fear detection and prosecution for these obstructive acts because if the risk of being caught for the substantive offense outweighs the risk they take by hiding evidence of the conduct, they may choose to take the risk and destroy, withhold or falsify documents.

Each of the fifteen responding jurisdictions has some ability to prosecute companies and/or individuals for destroying, withholding, altering or falsifying documents. (See Chart C). The maximum penalties for such offenses range from solely administrative fines in four jurisdictions to possible terms of incarceration in eleven jurisdictions ranging from one to twenty years.

The US has criminally prosecuted nine individuals and eight corporations for document destruction, falsifying or withholding in the last five years. Korea also imposed administrative fines against seven individuals for obstructing three different cartel investigations in 2005 alone. (See Case Example 4). Turkey has imposed administrative fines for document withholding in eight cases during the last five years. The competition authority in Hungary (GVH) has not turned to criminal authorities to seek the imposition of criminal sanctions for false testimony, but the GVH itself has imposed procedural administrative fines in approximately twenty cases. New Zealand recently prosecuted its first individual and company for document destruction.

Case Example 4: Document Destruction (Korea)

In 2005, the Korea Fair Trade Commission (KFTC) imposed fines upon seven individuals for destroying documents relevant to three different cartel investigations.

In June 2005, four employees of a petrochemical company under investigation by the KFTC for cartel conduct stole evidence during a KFTC inspection and smuggled the evidence outside of the company's offices. The KFTC imposed fines totaling 185 million won against the four individuals involved including a fifty million won fine against an executive officer of the company and forty-five million won against the three other employees.

Also in June 2005, employees of a flour manufacturing company under investigation by the KFTC for cartel activity hid and destroyed evidence. The KFTC imposed ten million won in fines against an executive officer and another company employee who destroyed the documents.

Finally, in October 2005, the head of a branch office of a steel sheet producer under investigation by the KFTC for cartel activity ordered an employee to take evidentiary materials from his desk and destroy them while delaying the commencement of a KFTC inspection. A fine of fifty million won was imposed on the head of the office.

The KFTC attributes this recent increase in obstructive conduct to the fact that since the maximum penalty for cartel activity was doubled from 5% to 10% of related turnover in April 2005, the level of sanctions for cartel activity is now usually much higher than the maximum penalty for obstruction of fifty million won, so cartel members will risk being caught obstructing an investigation because even if caught, it is less costly than prosecution for the cartel offense under investigation.

The KFTC is implementing measures against obstruction such as 1) excluding obstructing companies from available reductions or exemptions from sanctions and adding aggravating surcharges for companies and individuals obstructing investigations; 2) considering criminal punishment for companies and individuals obstructing KFTC investigations; and 3) intensively monitoring companies engaged in obstructive conduct for three years after the obstructive conduct is committed.

See *"Countermeasures to Obstruction of Cartel Investigation*," presented by Dong- Won Suh, Commissioner KFTC, November 9, 2005, ICN Cartel Workshop, Seoul, Korea.

Competition enforcers cannot always catch would-be obstructers in the act of document destruction. Document falsification and alteration can be difficult to detect. If someone creates a fake document, he or she will likely make it look very much like other actual business documents created in the past. Falsification or alteration of documents is easier to detect if originals are produced rather than copies. Differences in ink color, type-face, font, or handmade changes are easier to detect on original copies than photo copies. Electronic data can also hold the key to detecting document falsification or alteration since metadata can tell investigators when a document was created and altered and even by whom. Metadata is much harder to falsify than hard copy documents. (See ICN Anti-Cartel Enforcement Manual Chapter on Electronic Evidence Gathering).

Document withholding is often very difficult to detect and prove because the competition authority is forced to try to prove a negative; that is, prosecutors must prove that the company or individual possessed a document responsive to a government request and that the document was intentionally not produced. Document falsifying or withholding is most often detected when competition enforcers compare a document from multiple sources and disparities are identified. Also, if the same general categories of documents are seized or requested from all market participants, the absence of certain documents in one competitor's files can indicate possible obstruction. For instance, if one competitor produces notes or memos from a specific meeting with competitors and a competitor known to be at that meeting does not produce meeting notes, or they cannot be found during a raid or inspection, then further investigation might uncover the withholding or destruction of such documents. Of course the documents may not exist, or there may be non-incriminating reasons for the missing documents, but the absence of potentially incriminating documents should at least give competition investigators pause and some thought should be given to further investigation of potential obstruction.

Practical Tips for Deterring and Detecting Document Falsification and Destruction:

- Seize or request original documents;
- Seize or request documents and email in electronic form with metadata that can be reviewed for suspicious anomalies;
- Seize or request documents in original order and folders (not shuffled);
- Request same categories of documents from all market participants;
- Find and compare key "hot" documents in the files of all companies and individuals who should have these documents (e.g. all those copied on a memo, attending the meeting, etc.);
- Include a clear and visible warning regarding obstruction in all document requests. (See Example Notice Concerning Obstruction);
- Hold individuals accountable for their obstructive conduct.

Most obstruction statutes contain an intent element, requiring the government to prove that the obstructing company or individual knowingly destroyed, withheld or altered the document. A clear notice of the potential penalties attendant to obstruction not only helps to potentially deter obstruction, but if obstruction occurs, these types of warnings may help to prove that the recipient of the request was on notice of the possible charges and that their obstructive act was intentional. In the US, such warnings are regularly included in Antitrust Division document subpoenas.

Example Notice Concerning Obstruction: Obstruction Notice Contained in Subpoenas Issued by the Antitrust Division of the US Department of Justice

NOTICE CONCERNING OBSTRUCTION OF JUSTICE

Any person who withholds, alters, deletes, or destroys documents – including electronic documents – demanded by this subpoena, or who removes or transfers such documents from the US jurisdiction, may be subject to criminal prosecution for obstruction of justice, contempt of court, or other federal criminal violations. Conviction of any of these offenses may be punishable by substantial fine and imprisonment.

Extraterritorial Acts of Obstruction

Six of the fifteen responding jurisdictions – Canada, Finland, Hungary, Korea, Turkey and the US – indicated that they can prosecute obstructive acts occurring outside their jurisdiction. (See Chart C). The ability to prosecute extraterritorial acts of obstruction protects the integrity of investigative processes. If obstruction is outlawed and obstructive acts vigorously prosecuted in a jurisdiction, but subjects can destroy evidence of the conspiracy located abroad, the likely result is that documents will be kept or shipped outside the jurisdiction to avoid detection.

C. Witness Tampering

Witnesses provide the most valuable evidence of a cartel. The insiders involved in conspiratorial activity and those who assist them in implementing a cartel agreement can provide an eyewitness account of the cartel and how the anticompetitive agreements reached were implemented. For those jurisdictions employing a witness-based system, the testimony provided by these witnesses is usually the most critical aspect of the case. In jurisdictions where there is an administrative system based less on oral testimony, eyewitness accounts are still invaluable to the competition enforcers charged with determining whether a cartel existed. The truthful, candid and uninfluenced account of those involved in and witnessing cartel conduct is essential to the detection of cartel activity. The notion that conspirators would pressure potential witnesses and attempt to influence their testimony undercuts the ideals of fairness espoused by any justice system.

Witness tampering is any act that attempts to influence a potential witness. Twelve of the fifteen responding competition authorities are able to prosecute a company or individual for witness tampering either directly or through reference to a public prosecutor. (See Chart D). Each jurisdiction that has the ability to prosecute individuals for witness tampering has a maximum penalty including a possible term of incarceration. The maximum sentences range from one year to twenty years. The US was the only responding jurisdiction to report prosecuting any witness tampering cases – five individuals and one corporation – in the last five years. (See Case Example 1).

III. Why is the Prosecution of Obstruction of Justice Important?

The most important reason to prosecute obstruction of justice is to protect the integrity and effectiveness of cartel investigations. There are, however, some other advantages to investigating and prosecuting obstruction offenses for competition enforcers.

Both obstruction of justice and cartels are hard to detect. If detected, however, obstruction can be easier to prove than the underlying cartel offenses the conspirators seek to conceal. Obstruction of justice generally requires intentional interference with a government investigation. Once evidence of the intent to impede the investigation is discovered, proving that the offending individuals lied, destroyed documents or otherwise impeded the investigation is relatively straightforward. The obstruction of an investigation is usually a discreet and generally isolated act, not a complex agreement implemented secretly over long periods of time like anticompetitive cartel activity.

In addition, evidence of obstructive conduct is also generally evidence of consciousness of guilt. Strong evidence of concealment can be very persuasive in proving the underlying cartel offense that the conspirators are attempting to conceal from government detection. Finally, when a cartel offender is caught in the act of obstructing the government's investigation, he or she is likely to offer to cooperate with the government and provide assistance in the cartel investigation in the hopes of more favorable treatment for the obstruction offense. This is especially likely where the penalties for obstruction match or exceed the possible penalties for the cartel offense. So, in a twist of irony, the detection and prosecution of an obstructive act can lead to cooperation essential to prosecuting the cartel that the conspirators sought to conceal.

Obstructive conduct may also be taken into account when determining penalties for cartel conduct. In some jurisdictions, evidence of obstruction may be considered as an aggravating circumstance that increases the level of punishment when determining the appropriate penalty to be imposed for a cartel offense.

IV. Why are So Few Acts of Obstruction of Cartel Investigations Prosecuted?

The results of the survey make it clear that few of the fifteen responding jurisdictions have prosecuted instances of obstruction. There have been less than sixty total prosecutions for obstruction of cartel offenses worldwide over the last five years and a number of the prosecutions that have taken place were prosecutions of the same individuals and corporations for multiple acts of obstruction. At the 2005 Workshop in Seoul, an interactive panel was dedicated to discussing why competition enforcers have prosecuted so few instances of obstruction. The panelists identified four possible reasons for the lack of obstruction prosecutions.

Possible Reasons for Lack of Prosecutions for Obstruction in Cartel Cases

1. Subject/targets of investigations do not obstruct investigations;
2. Obstruction suspected but there is a lack of sufficient evidence to meet the burden for successful prosecution;
3. Obstruction is detected but the competition authority is not willing to expend resources to prosecute or otherwise makes the decision not to pursue it;
4. Obstruction is detected but the prosecuting authority is not willing to expend resources to prosecute or otherwise makes the decision not to pursue it.

A show of hands and discussion by the audience quickly ruled out the first possible reason, when none of the over one hundred participants representing more than thirty jurisdictions indicated that they believed subjects and targets never obstruct cartel investigations. The largest number of participants responded that they believed the reason for the lack of obstruction prosecutions in cartel investigations was the second reason – obstruction is suspected but there is a lack of sufficient evidence to meet the burden for successful prosecution. A few participants offered reason number three – obstruction is detected but the competition authority is not willing to expend resources to prosecute or otherwise makes the decision not to pursue it. Fewer still believed that the fourth option – obstruction is detected but the prosecuting authority is not willing to expend resources to prosecute or otherwise makes the decision not to pursue it – was the reason for the lack of prosecutions for obstruction of cartel investigations.

This discussion did not lead to a strong consensus as to why anti-cartel enforcers are not prosecuting the obstruction of their investigations. Awareness of obstruction in cartel investigations has certainly been raised through the Cartel Working Group's efforts, but more work must be done to explore why competition enforcers are not prosecuting acts of obstruction and jurisdiction-specific training must be done to identify and prevent obstructive acts.[6]

[6] The Jamaican Fair Trading Commission (JFTC) is an example of an agency taking steps to stress and improve the prosecution of obstruction in its jurisdiction. The obstruction of an investigation is a criminal

V. Conclusion

The results of the survey and the discussion at the Sydney and Seoul Workshops lead to the conclusion that obstruction is occurring in cartel investigations and that competition authorities in many jurisdictions have the ability to prosecute some types of obstruction either directly or through the public prosecutor's office – some with potentially stiff sanctions – yet obstruction is rarely prosecuted. A majority of enforcers polled identified a lack of sufficient evidence as the primary reason for the lack of obstruction prosecutions. In jurisdictions such as Germany, however, where certain types of obstruction cannot be prohibited due to defendants' self-incrimination rights, these conclusions and recommendations may not apply.

In order to move beyond identification of obstructive conduct and toward prosecution and eventually deterrence, enforcers must ask ourselves why we do not have sufficient evidence to prosecute those that attempt to thwart our investigative efforts? While obstructive conduct can be difficult to identify and prove, it is not necessarily more difficult, and sometimes easier, to detect and prove than the secretive cartel agreements we are successfully investigating and prosecuting. Are we asking the right questions? Are we asking for documents in a format that helps identify alterations (such as seeking originals or electronic evidence including metadata)? Are we failing to follow up when documents are missing or appear altered? Are we ready to divert our cartel investigation or devote additional resources to investigate and prosecute obstruction whenever it occurs? Are we using evidence of obstruction to induce cooperation in our cartel investigations?

As with the obstructive conduct by Morgan Crucible and its employees in the carbon brushes investigations (See Case Example 1), efforts to obstruct cartel investigations can be as far-reaching and international in scope as the cartels the conspirators seek to hide. Cartel members may seek to obstruct investigations of cartel enforcers in several jurisdictions to not only hinder ongoing investigation, but also to limit further investigations in other jurisdictions. Failure to detect or prosecute obstruction by cartel enforcers in one jurisdiction can lead to the contravention of investigations in other jurisdictions and ultimately lead to additional harm to consumers in multiple jurisdictions.

There is broad consensus that obstruction of cartel investigations should be a priority for enforcers. The survey responses show that anti-cartel enforcers are currently not adequately addressing obstruction. The following list encapsulates the experience of those jurisdictions which have prosecuted obstruction in cartel investigations with the hope that competition enforcers can improve their collective efforts to protect the integrity of cartel investigations and ultimately further anti-cartel enforcement efforts.

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offence under Jamaica's Fair Competition Act, to be prosecuted by the police. The JFTC has met with police officials in an effort to stress the police's role in aiding effective competition enforcement in Jamaica by targeting obstructive conduct. For example, the JFTC encouraged the police training program to include workshops on competition law.

To better detect, prosecute and deter obstruction in cartel investigations:

- Train investigators to ask questions in every investigation about obstructive conduct such as:
    - Was this or any other government investigation discussed by anyone (*other than legal counsel*) within your company?
    - Were you contacted by any competitors or customers regarding this or any other government investigation?
    - Were you given instructions by anyone (*other than legal counsel*) about collecting or handling documents in relation to this or any government investigation?
    - Did you destroy, alter or falsify any documents?
    - Did you see or hear of anyone destroying documents?
    - Did you, or anyone, create false documents (such as fake meeting minutes)? If so, was it done to intentionally mislead investigators?
    - Did anyone (*other than legal counsel*) discuss with you, coach or direct you how to answer questions from government investigators?

- Be on the lookout for altered or missing documents (e.g. missing pages, scratched out text, missing folders, files or notes from key suspects).

- Encourage government procurement officials to require bidders on government contracts to sign certificates of non-collusion under penalty of perjury. (See Example Certificate of Independent Price Determination).

- Require companies and individuals submitting documents to certify compliance. (See Example Certification of Compliance).

- Require leniency applicants and cooperators to report any information about obstruction by their employees or their co-conspirator's employees.

- Clearly and frequently notify and remind subject companies and employees about any duty they have to tell the truth or cooperate with the investigation and the possible penalties for obstruction. (See Example Notice Concerning Obstruction).

- Work with police or public prosecutors in the jurisdiction to develop a strategy for the efficient detection and prosecution of obstructive conduct in cartel investigations.

- Educate members of the legal community who will represent the subjects of investigations through speeches, papers and other outreach efforts about obstructive conduct and the potential penalties associated with that conduct.

- Allocate resources to the investigation and prosecution of obstruction.

- Seek penalties for obstruction that are equal to or greater than penalties for cartel offense.

- Vigorously prosecute and publicize egregious cases of obstruction.

CHART A: Oral False Statements

Country	Compel Under Oath?	Perjury?	Max Penalty	Liability for unsworn false statement	Max Penalty	Cases Last 5 yrs?
Australia	Yes	Yes	12 mos, A$2,200 (ACCC) 5 yrs (Pub. Pros.)	Yes	12 mos, A$2,200 (ACCC) 5 yrs (Pub. Pros.)	None
Brazil	Yes	Yes	3 years, fine (Crim); US$30000 fine (Admin)	No	n/a	None
Canada	Yes	Yes	14 yrs, Unltd Fine (Crim)	Yes	2 yrs C$5000 (Hybrid) 10 yrs Unltd Fine (Crim)	One Corp
E.U.	No	No	N/A	Yes, Corp Only	< 1% turnover (Admin)	None
Finland	Yes	Yes	3 years	Yes	6 months	None
Germany	Yes (only witness)	Yes (only witness)	1yr	Yes (only witness)	€ 100,000 (Admin) 5 yrs, Fine (Crim)	
Hungary	No	Yes	1 yr, fine (Crim); 1% turnover (Admin Corp) 50,000 HUF (Admin Indiv)	Yes	Fine	None
Ireland	Yes	Yes	1 yr (Pub. Pros.)	No	N/A	None
Japan	Yes	Yes	10 yrs, Crim Fine ¥ 3,000,000	Yes	1yr, Crim Fine ¥ 3,000,000	None
Korea	No	No	N/A	Yes	Admin Fine 10M Won	None
Netherland	No	No	N/A	Yes	Admin Fine € 450,000	None
New Zealand	Yes	Yes	$30,000 (Corps) 7 years $10,000 (Indiv)	Yes	$30,000 (corporate) $10,000 (individual)	One Pending
Turkey	No	N/A	N/A	Yes	Admin Fine € 1997* (corp) Admin Fine Up to 10% of € 1997* (Ind) For 2006, redetermined each year	None
U.K.	No	No	N/A	Yes	2 yrs, Unlimited Fine	None
U.S.	Yes	Yes	5 yrs, $250,000	Yes	5 yrs, $250,000 $500,000 (Corp)	2 Indiv

CHART B: Written False Statements

Country	Prosecute false written statements?	Prosecute false certification of non-collusion?	Prosecute false certification of compliance?	Max Penalty	Cases Last 5 yrs?
Australia	Yes	Yes	Yes	12 mos, A$2,200 (Ind) A$10,000 (Corp)	None
Brazil	Yes	No	No	Administrative fine US$ 30000	Yes, CADE fined several companies (not criminal prosecutions)
Canada	(1) Yes (different offenses depending on circumstances)	(2) Yes	(3) Yes (if under oath by affidavit or solemn declaration)	(1) 2 yrs, C$5000 (Hybrid Crim) (1) 10 yrs, unltd fine (Crim) (2) 10 yrs, unltd fine (Hybrid Crim) (1) & (3) 14 yrs, unltd fine (Crim)	None
E.U.	Yes	No	No	< 1% turnover (Admin) Increase Fine	None
Finland	Yes	No	No	N/A	None
Germany	Yes (only witness)	No	No	€ 100,000 (Admin) 5 yrs, Fine (Crim)	
Hungary	No	No	No	N/A	None
Ireland	No	No	No	N/A	None
Japan	Yes	No	No	1yr, ¥3,000,000 (Ind) ¥3,000,000 (Corp)	None
Korea	Yes	No	No	Admin Fine 10M Won	None
Netherlands	Yes	No	No	Admin Fine € 450,000	None
New Zealand	Yes	No	No	$30,000 (Corp) $10,000 (Ind)	1
Turkey	Yes	No	No	Admin Fine € 1997* (corp) Admin Fine Up to 10% of € 1997* (Ind) For 2006, redetermined each year	2
U.K.	Yes	No	No	2 yrs, Unlimited Fine	None
U.S.	Yes	Yes	Yes	5 yrs, $250,000 (Ind) $500,000 (Corp)	1 Indiv 2 Corps

CHART C: Document Destruction, Withholding, Altering, Falsifying

Country	Prosecute destroy, withhold, alter, falsify documents?	Prosecute acts occurring outside country?	Max Penalty	Cases Last 5 yrs?
Australia	Yes	No	12 mos, A$2,200 (ACCC) 5 yrs (Pub. Pros. Office)	None
Brazil	Yes	No	2 to 6 yrs if public document 1 to 5 years if private document *(based on criminal statute);* and If false or omitted information, based on a destruction of documents, such conduct may be administratively fined from US$ 1500 to US$ 30000	None
Canada	Yes (different penalties depending on nature of conduct)	Yes	2 yr, C$5000 (Hybrid, Crim) 5 yrs, C$50,000 (Hybrid, Crim) 10 yrs, Unlimited Fine (Crim) 14 yrs, Unlimited Fine (Crim)	None
E.U.	Yes	No	< 1% turnover (Admin) Increase Fine	No case, but increased fines
Finland	Yes	Yes (if by a Finnish national)	2 yrs imprisonment	None
Germany	Yes	No	Admin fine € 25,000 If Criminal 5 yrs, Fine	
Hungary	Yes	Yes	Up to 5 yrs imprisonment or criminal fine 1% Turnover (Admin Corp)	20 Admin Fines, Largest 112 M HUF
Ireland	Yes	No	5 yrs (Pub. Pros.)	None
Japan	Yes	No	1yr, ¥3,000,000 (Ind) ¥3,000,000 (Corp)	None
Korea	Yes	Yes	Admin Fine 50M Won	7 Individuals (2005)
Netherlands	Yes, altering, falsifying No, destroying	No	Admin Fine € 450,000	None
New Zealand	Yes	No	$30,000 (Corp) $10,000 (Indiv) Up to 7 years	1
Turkey	Yes	Yes	Admin Fine € 1997 and/or € 399 per day* (corp) Admin Fine Up to 10% of € 1997* (Ind) For 2006, redetermined each year	8 (Document Withholding)
U.K.	Yes	No	5 yrs, unltd fine (If Crim) 2 yrs, unltd fine (If Civil)	None
U.S.	Yes	Yes	20 yrs, $250,000 (Indiv) $500,000 (Corp)	9 Individuals 8 Corporations

CHART D: Witness Tampering

Country	Prosecute for witness tampering?	Max Penalty	Cases Last 5 yrs?
Australia	Yes	12 mos, A$2,200 (ACCC) 5 yrs (Pub. Pros. Office)	None
Brazil	Yes	3 to 4 years and fine (based on criminal statute)	None
Canada	Yes	10 yrs, unlimited fine (Crim)	None
E.U.	No	N/A	None
Finland	Yes	3 yrs	None
Germany	Yes (only for the instigation of false statements or perjury of witness)	Admin fine € 25,000 Criminal 5 yrs, fine	
Hungary	Yes	Up to 2 yrs if civil proceeding Up to 3 yrs if criminal proceeding Up to 5 yrs under general obstruction statute if in connection with criminal court proceeding	None
Ireland	Yes	10 yrs	None
Japan	Yes	(If False Statement against JFTC Order) 1yr, ¥3,000,000 (Ind) ¥3,000,000 (Corp)	None
Korea	Yes	Admin Fine 50M Won	None
Netherlands	No	Can increase admin sanction for Competition Act violation	None
New Zealand	Yes	$30,000 (corporations) $10,000 (individuals) Up to 7 yrs	None
Turkey	No	N/A	N/A
U.K.	Yes, as a criminal offense	5 yrs, Unltd Fine (If Crim Invst) 2 yrs, Unltd Fine (If Civil Invest)	None
U.S.	Yes	10 yrs (20 If phys force), $250,000 $500,000 (Corp)	5 Individuals 1 Corporation