THE BUREAU'S IMMUNITY PROGRAM

FINE TUNING OR OVERHAUL

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I. INTRODUCTION

A good mechanic will tell you that maintenance, repair and overhaul is more likely to ensure you have a well-oiled machine than is an approach based on "if it ain't broke, don't fix it". A general maintenance check of the Competition Bureau's Immunity Program (the Program) is both due and prudent. The responses to the recent public consultation on the Program, and the Competition Bureau's practical experience, have helped identify specific areas of the Program that may warrant improvement and clarification. Our challenge is to balance the various, and sometimes competing, interests of stakeholders with Competition Bureau (the Bureau) enforcement objectives to arrive at an immunity mechanism that operates in an optimal fashion from the perspective of both the applicants and the Bureau together with the Attorney General of Canada (the Attorney General).

Competition law practitioners, enforcers and policy makers from different points on the antitrust spectrum have provided insightful observations and suggestions. The Canadian Bar Association National Competition Law Section (the CBA), the American Bar Association Section of Antitrust Law (the ABA), the Canadian Chamber of Commerce (the CCC) and several provincial and federal government bodies made written submissions all of which are publicly available on the Bureau's Web site.[1] The Bureau's benchmarking of the Program with similar immunity and leniency programs maintained by other jurisdictions, including the United States, European Commission, United Kingdom and Australia,[2] is ongoing and the Bureau continues to benefit from the experience and advice of our international competition law enforcement partners.

This paper provides a brief summary of the submissions the Bureau has received in response to consultations on the Program. A caution is warranted here in that this summary is no substitute for the more complete commentary provided by stakeholders, nor does it do justice to the astute treatment these comments afforded the issues. The paper offers some initial observations as to the commentary; these observations are cautious in the light of the Bureau's ongoing assessment of the comments received and of their implications for any changes to the Program. No final decision on these matters has been taken.

Winston Churchill once commented that "there is nothing wrong with change, if it is in the right direction". The Bureau is advisedly circumspect in addressing change to the Program that has proved itself to be the single most effective weapon available to detect, investigate and advance to prosecution illegal activity that violates the criminal cartel provisions of the

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[1] http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2155&lg=e.

[2] Other jurisdictions whose competition authorities have immunity/leniency programs as a key part of their cartel detection and prosecution toolkit include Brazil, Cyprus, Czech Republic, Finland, France, Germany, Hungary, Ireland, Israel, Japan, Korea, Latvia, The Netherlands, New Zealand, Romania and South Africa.

Competition Act (the Act).

II. THE PROGRAM

The Bureau first introduced the practice of recommending immunity in the early 1990's.[3] It broadened the practice in 1994[4] and formalized it with the publication of the current Program in 2000.[5] The Bureau published a series of Frequently Asked Questions in 2003[6] and expanded them in 2005,[7] providing a "roadmap" to applicants as to what to expect once the decision is made to engage the immunity process.

The Program has been used primarily in support of Bureau enforcement of criminal offences under the Act that address price-fixing and market sharing cartels[8] and bid-rigging activity whether domestic or international in scope. The Program is equally available for criminal offences under the Act that target price maintenance, false or misleading representations and deceptive marketing practices. Applicants may be individuals or business enterprises. In the case of corporate applicants, immunity is available to the corporation and to its directors, officers and employees who cooperate with the Bureau.

Stripped to its essentials, the Program invites applicants that have engaged in criminal activity to undertake, with the Bureau and Attorney General, a four-step process. These four steps, (i) initial contact; (ii) provisional guarantee of immunity (PGI); (iii) full disclosure; and (iv) immunity agreement, are further detailed in the Bureau's publication, *Responses to*

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[3]Competition Bureau , "Notes for an Address by H. I. Wetston, Director of Investigation and Research, Consumer and Corporate Affairs Canada, to the Canadian Corporate Counsel Association", Calgary, Alberta, Aug. 19, 1991, online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1079&lg=e.

[4]Competition Bureau , H. Chandler, "Getting Down to Business, the Strategic Direction of Criminal Competition Law Enforcement in Canada" (The Globe and Mail Conference, Emerging Issues in Competition Law, Toronto, ON, March 10, 1994), online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1045&lg=e.

[5]Competition Bureau, "Information Bulletin: Immunity Program under the Competition Act", Sept. 2000, online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1752&lg=e.

[6]Competition Bureau, "Immunity Program: Frequently Asked Questions", 2003.

[7]Competition Bureau, "Immunity Program: 'Responses to Frequently Asked Questions'", Oct. 17, 2005, online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&lg=e.

[8] Reference to "cartels" is used throughout to refer to activity directed to offences under Part VI of the Act and specifically offences under s. 45 (conspiracies), 46 (foreign directed conspiracies) and 47 (bid rigging).

Frequently Asked Questions (FAQs).[9] Applicants that step up and fully meet the requirements of the Program are granted immunity from prosecution by the Attorney General.

The Program's effectiveness is measured against its value as an incentive to cartel participants to withdraw from illegal activity and cooperate with the Bureau in investigating and prosecuting cartels. It is designed to overcome the difficulties inherent in cartel detection and to destabilize cartel arrangements. The bad news for enforcers is that cartels are by nature clandestine; participants in the illegal activity know that they serve their own best interests by keeping their activities out of the spotlight even in the event that the illegal activity ceases. The good news for enforcers is that trust among erstwhile business rivals is often precarious.

An effective immunity program capitalises on a wrongdoer's risk assessment that is fundamentally directed to self-preservation. Cartel participants will weigh the financial benefits of wrongdoing against the prospect of detection and the price to be paid on prosecution. The Program ups the ante in respect of detection. Cartel participants have limited assurance that all participants will hold fast to a "cone of silence". Faced with any doubt, the fact that immunity is available only to the first wrongdoer who breaks ranks and comes forward to cooperate with the Bureau and the Attorney General can set off a race to be "first in".

It is sometimes difficult for those unfamiliar with the Program and its process to appreciate its uniqueness. The Bureau's interest might be considered prosaic - active law enforcement dedicated to the detection, investigation, and overall deterrence of illegal cartel activity supported by prosecution by the Attorney General. Cartel participants are engaged in breaking the law, not enforcing it. Immunity applicants, however, become partners in law enforcement - that is the nature of the immunity bargain. The immunity bargain is an extraordinary grant by the Crown to forego prosecution; it is no less a formidable commitment by the applicant to wipe the slate clean to address illegal wrongdoing and to fully support the Bureau and the Attorney General in investigating and prosecuting its former partners in crime. Predictability and transparency in Bureau policy and practice must ensure that an applicant appreciates the nature of the immunity bargain. There should be no surprises.

The Program's operation is centred on two essential elements: the race to report and the full and complete co-operation of the immunity applicant. It also is increasingly responsive to international policy convergence and enforcement cooperation. The immunity race plays out in fostering the earliest possible reporting by an immunity applicant of the criminal activity. As noted earlier, it is designed to maximize the incentive for cartel participants to break ranks and get in first to secure the immunity prize, at the expense of fellow cartel members. The prize for being first-in must clearly outweigh holding on to the risk of detection and prosecution, and attendant monetary fines, jail time and civil damages. It is also a race that does not discount all others who may be ready to confess anti-competitive activity and to cooperate. Those who cross

[9] *Supra*, note 7.

the finish line in second, third and even fourth place will not be granted immunity from prosecution; but they may see reduced sentences commensurate with the timing of their application and the value of their cooperation.

Once past the post as "first in", immunity is not a free ride. Applicants must be ready to deliver on their obligations. For a business enterprise, cooperation will entail making available to the Bureau investigators in a timely fashion all relevant evidence and providing access to and cooperation from the relevant directors, officers and employees whether currently or formerly employed.[10] While there are exceptions, it is anticipated that an applicant will provide a proffer of information outlining the nature of the offence within 30 days.[11] The proffer must be sufficient for the Bureau to assess whether it merits a recommendation that the Attorney General grant a PGI. Post-PGI, applicants are expected to establish a schedule of production and should typically complete full disclosure within a six-month period.[12] Ultimately, immunity applicants may be required to testify in court against their fellow cartel participants.

As to international enforcement considerations, the Bureau's Program and its operational implementation continues to be guided by the work of the Organisation for Economic Cooperation and Development (the OECD) and the International Competition Network (the ICN), both of which have contributed to the development and proliferation of immunity programs worldwide. The OECD and the ICN have also helped encourage convergence in the nature of these programs, an outcome focussed to best practices in respect of law enforcement activity that must address cross-border cartels. Despite differences in legal systems and marketplace contexts, there is evidence of increasing policy convergence in the rules and processes governing immunity and leniency. Combatting illegal activity within a multi-jurisdictional context has helped foster cooperation and coordination among enforcers. It also has resulted in virtually simultaneous applications by cartel participants seeking immunity in multiple jurisdictions.

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[10]Immunity Bulletin, *supra*, note 5, para. 19. If a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation for immunity. Past directors, officers and employees of a corporation who offer to co-operate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis.

[11]*Supra*, note 7, Responses to FAQs, #15-17. Parties should alert the Bureau to anticipated delays as early in the process as possible to avoid harm to other steps in the Bureau's investigation.

[12]*Supra*, note 7, Responses to FAQs, #22.

III. A MAINTENANCE INSPECTION

The Bureau's Consultation Paper[13] addressed nine specific topics: confidentiality; oral applications and the paperless process; an applicant's role in the offence; the coverage of directors, officers and employees; penalty plus; restitution; revocation of immunity; creation of a formal leniency program and pro-active immunity. Stakeholders were encouraged to address any additional matters they considered relevant to the review of the Program.

1. CONFIDENTIALITY

Stakeholder Comment

There are many points in the course of an investigation and prosecution of cartel activity where the treatment afforded by the Bureau to information may raise issues of confidentiality. Whether in a domestic or multi-jurisdictional context, immunity applicants are justifiably apprehensive about the Bureau's communication of information acquired in administering and enforcing the Act, not least in respect of the impact for civil damage suits, commercial retaliation and the loss of reputation. The majority of stakeholders stressed the paramount importance of confidentiality for the Program, though raised no specific complaints with the current policy or practice.

Stakeholders have advocated maintenance of confidentiality as to the applicant's identity in court filings, unless disclosure is required by law. Several stakeholders suggested that court documents refer to immunity applicants as unindicted co-conspirators. Another indicated that applicants can safely be identified by name provided they are not identified as an immunity applicant, so long as such an approach does not mislead the court. It has also been recommended that the Bureau be completely candid with an applicant about any risk of pre-charge disclosure and that the Bureau obtain basic assurances regarding confidentiality when sharing information with foreign agencies.

Observation:

Under the Program, the Bureau accords an applicant's identity, and any information obtained from that applicant, a heightened degree of confidentiality over and above protections otherwise applicable. The only exceptions to this policy are when there has been public disclosure by the applicant, the applicant has agreed and disclosure is for the purpose of the administration and enforcement of the Act, when disclosure is required by law or when

[13]Competition Bureau, Immunity Program Review - Consultation Paper, February 7, 2006, online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2022&lg=e.

disclosure is necessary to prevent the commission of a serious criminal offence.[14] In the international cartel context, where information exchanges among competition agencies are governed by local laws, cooperation agreements and mutual legal assistance treaties, the Bureau will not disclose an applicant's identity, or information obtained from an applicant without agreement. In practice, waivers are often forthcoming where applicants have sought and secured immunity in other jurisdictions.

Confidentiality protections will only cease when charges are laid against co-conspirators and disclosure of the Crown's case is thereafter required.[15] This said, the Bureau's commitment of confidentiality to the immunity applicant remains the default position and where settlement pleas are secured, the Bureau will not disclose the identity of the applicant absent express agreement or the existence of one of the conditions set out above.[16]

2. ORAL APPLICATIONS

Stakeholder Comment

Stakeholders acknowledged Bureau efforts to provide applicants with an immunity process that is "paperless". The desire to limit documentation in respect of the process is linked to many of the same concerns that inform stakeholder comments about the Bureau's confidentiality commitments and its treatment of information. It is focussed on the potentially harmful implications that disclosure of the applicant's role and details of the illegal activities may have in other litigation or regulatory contexts; exposure to civil suit, and attendant document production issues, often is of paramount concern for an applicant in respect of communications with the Bureau.

The Bureau has been urged by stakeholders to review its correspondence requirements with immunity applicants to eliminate the creation of unnecessary documents potentially discoverable in the hands of the applicant. In particular, stakeholders strongly discouraged the Bureau from issuing any written document to an immunity applicant confirming the termination of a "first in" marker and suggested that the Bureau communicate in writing with applicants only to provide the PGI, final immunity letter, undertakings in respect of witnesses, and notice of formal revocation of immunity.

As to the form of communications, the Bureau was encouraged to develop a series of "form letters" to be used for necessary written communications with an immunity applicant. It

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[14] *Supra*, note 5, Part H.

[15] *R. v. Stinchcombe*, [1995] 1 SCR 754.

[16] *Ibid*.

was proposed that these be designed to be neutral in tone thereby minimizing the potential for overt prejudice in the event of discovery. It has been suggested that any such letters should be sent only through counsel for the Attorney General advising the Bureau. Moreover, stakeholders requested that immunity applicants and cooperating parties be advised of proposed correspondence in advance so that discussions can take place directed to avoiding unnecessary correspondence.

In respect of interview notes, several stakeholders indicated their endorsement of a practice of joint review by all counsel of notes taken by Bureau investigators and its counsel so as to avoid misunderstandings.

In general, the comments on a "paperless process" highlight the cross-jurisdictional nature of an immunity applicant's concerns with how enforcement agencies document the immunity process. In this regard, there appears to be substantial support for multi-jurisdictional policy coherence. Stakeholders referred to the ICN as the most effective multilateral forum for developing "best practices" noting its broad-based membership, flexibility and capacity to rapidly develop proposals. Closer to home, stakeholders urged the Bureau to capitalize on consultation opportunities with both the CBA and the ABA and to seek appropriate coherence of its Program with that of the U.S. Department of Justice, Antitrust Division (the U.S. DOJ Antitrust Division).

Observation

The Bureau is sensitive to the concern of immunity applicants that their cooperation not unduly exacerbate their exposure to civil damage suits. For some time, the Bureau has permitted oral proffers and generally will respond positively to an applicant's request for a fully oral application process - a practice that is becoming more the rule than the exception. The Bureau is prepared to commit to communicating only in person or by telephone to the extent possible but in no case will it jeopardize the integrity of its investigation or the Program. In most circumstances, the only documents that are produced and provided to the applicant are those forwarded by the Attorney General, namely the PGI, final immunity agreement and witness protection letters. Bureau investigators have every interest in avoiding misunderstandings with respect to the form that communications will take with an applicant, not least with respect to e-mail exchanges. In general, the Bureau will not initiate e-mail communications when it has agreed to a paperless process, unless such communication has otherwise been signalled to be appropriate. The Bureau encourages counsel to refrain from using e-mail to correspond with the Bureau if they have concerns with an e-mail response. The Bureau will communicate in writing when oral requests directed to eliciting a response from an applicant have failed or when an applicant is not meeting obligations owed under the Program.

3. ROLE IN THE OFFENCE

Stakeholder Comment

Currently an applicant that was the instigator or the leader of the illegal activity or the sole beneficiary of the activity in Canada will not qualify for immunity status. The CBA, ABA and CCC have indicated their view that the ¨leader/instigator¨ test is excessively vague and should be replaced by a coercion test or a test of a similar nature. They have suggested that, in respect of such a test, the Bureau adopt clear and transparent criteria indicating when the test will be met so as to increase predictability in the Program and the number of applicants coming forward. Only one stakeholder that commented on this issue was of the view that the current test should be maintained so as to deny leaders and instigators of cartel activity the benefit of immunity.

The sole beneficiary criterion as a disqualifying condition for immunity applicants is unique to Canada. It ensures that there will always be at least one target of the investigation with sales into Canada against whom the Attorney General can launch a prosecution. Stakeholders identified the sole-beneficiary criterion as "ill-advised" and characterised it as an inappropriate means of addressing jurisdictional limitations. They argued that this criterion precipitates uncertainty and delay in a party's Canadian application which can cause subsequent delay for its applications in other jurisdictions. It was noted that in most international cases foreign companies attorn to Bureau jurisdiction and therefore there is little practical need for the exclusion. It was suggested that if the criterion is retained, a public statement regarding the test's application be made.

Observation

The Bureau recognizes the factual difficulties in determining when the leader/instigator test applies, particularly as a cartel progresses, and under the current Program will apply the exclusion only in the clearest of circumstances. While the test is not limited to instances where an immunity applicant is demonstrated to have coerced or threatened another party to the offence, those are the circumstances in which the test is most likely to be applied.

Likewise, the Bureau will apply the sole beneficiary test to a cartel situation only in the clearest of circumstances - where an applicant alone has secured under the cartel arrangement the entire Canadian market and is the sole business entity to directly derive revenue from the sale of the relevant product or service in Canada. As part of this review, the Bureau will consider the legal and economic merit of retaining this criterion for immunity in respect of cartel activity.

While cartel enforcement is the primary focus of the Bureau's Immunity Program, unlike other jurisdictions, the Program is available to applicants for all criminal offences under the Competition Act. Applicants and their counsel should be aware that immunity is available to applicants for "single-party" offences such as price maintenance, false or misleading representations and deceptive marketing practices. The inclusion of the sole beneficiary criterion in the Immunity Program Bulletin in 2000 recognised the unique issues that may arise in this context. Corporations are typically excluded from the Program for "single-party"offences based on the sole-beneficiary criterion. Indeed, their cooperation following a receipt of immunity would have no value with no other party left to investigate or prosecute. However, an individual that has engaged in price maintenance or false or misleading representations and deceptive marketing practices on the suggestion of its corporate employer may apply for and qualify for immunity in return for cooperating in the investigation and prosecution of the corporation.

4. COVERAGE OF DIRECTORS / OFFICERS / EMPLOYEES

Stakeholder Comment

The majority of stakeholders indicated that both current and past directors, officers and employees (DOE's) should be eligible under the umbrella of corporate immunity provided they cooperate with the Bureau investigation. They agreed that a company must use its best efforts and any lawful means at its disposal to promote the cooperation of current DOE's. They stressed the limitations on a company's ability to promote the cooperation of past DOE's even where they are being covered by the umbrella of corporate immunity. All stakeholders agreed that it was reasonable to carve-out employees who refuse to cooperate with the Bureau investigation from a corporate immunity agreement.

The CBA asserted that conflicts of interest with respect to legal representation is a concern for counsel, not the Bureau. Stakeholders did not believe that corporate indemnification of an individual's legal costs creates a conflict of interest, nor did they believe it to be problematic if corporate counsel attends an individual witness' interview, provided the individual consents.

Observation

The current Program provides for automatic coverage of current DOE's who admit their involvement in the illegal activity as part of a corporate admission provided that they comply with the requirements of the Program and, in particular, provide full, frank and truthful disclosure of the evidence they have respecting the cartel activity and their role therein. The Bureau will carve out individuals from a corporate immunity agreement if they do not provide complete and timely co-operation with the Bureau's investigation and the Bureau may subsequently recommend their prosecution to the Attorney General. The Bureau will not carve individuals out of a corporate immunity agreement for any reason other than a failure to co-

operate.

Currently, past DOE's can apply for individual immunity, or, if they are not first-in, for lenient treatment. The Bureau's overarching interest is in the value that can be brought to the investigation and, in assessing an application, the Bureau will consider, for example, whether there are issues associated with the departure of the DOE that will inhibit his or her full cooperation. Immunization of past DOEs emphasizes the need to avoid conflict of interest between the DOE and the corporate entity.

5. PENALTY PLUS

Stakeholder Comment

Most stakeholders either supported or were neutral with respect to the adoption of a penalty plus program similar to that used by the U.S. DOJ Antitrust Division. They voiced strong concerns with the Bureau's current approach of requiring applicants to disclose all competition offences of which the applicant is aware or ought reasonably to be aware when applying for immunity and the revocation of immunity penalizing non-disclosure. As an alternative, they showed a clear preference for the U.S. DOJ Antitrust Division practice of imposing heavier penalties for the second undisclosed offence rather than withdrawing immunity for the earlier immunized offence. Stakeholders suggested that if the Bureau adopts a penalty plus program, it clarify the level of increased penalty a defendant may face.

One stakeholder indicated that the Bureau need not adopt a penalty plus approach, stating that revocation of immunity for the first offence was a suitable approach to non-disclosure.

Observation

The Bureau currently requires immunity applicants to disclose their involvement in any criminal competition offences under the Act, of which they are aware, relating to any product. Both the Bureau and the Attorney General expect applicants to exercise reasonable due diligence in determining whether they have been involved in other criminal competition offences.[17] As a separate requirement applicants can also anticipate that the Attorney General will ask them about any criminal activity, under any legislation, that can reasonably be expected to impact their credibility as a witness.[18]

The current Program discourages applicants from coming forward with "unclean hands",

[17] Response to FAQs #30, *supra* note 7.

[18] *Ibid*.

confessing one instance of illegal activity under the Act while knowingly proceeding with others. The Bureau is aware that some jurisdictions address such situations through "penalty plus" rather than through revocation of immunity and will consider the relative merits of the two approaches. In this and in other areas, adjustments to the Program will be made in a manner supportive of legal and policy considerations relevant to the Attorney General's discretion as prosecutor.

6. RESTITUTION

Stakeholder Comment

Stakeholders diverged on the topic of restitution. Not surprisingly, those reflecting consumer interests supported retention of the restitution criterion while those representing potential applicants are proponents of leaving the matter to private litigants and the civil courts. Consumer groups argued that an applicant's commitment to restitution is linked to whether they deserve the benefits of the Program. They suggested distributing ill-gotten gains to charitable groups or non-profit organizations as one alternative when victims are not readily identifiable. Proponents of private legal action argued that Bureau resources are better allocated to detecting and prosecuting criminal violations, leaving resolution of complex damage issues to civil courts.

Observation

It is a requirement of the current Program that, where possible, the applicant make restitution for the illegal activity. Generally, the Bureau exercises some discretion in how it enforces this requirement. The Criminal Matters Branch, which is responsible for conspiracy, bid-rigging and price maintenance offences, has not typically involved itself in matters of restitution for cartel offences, particularly where civil courts are placed to provide an appropriate mechanism for victims to seek recourse. In terms of addressing restitution with cartel participants other than the immunity applicant, Bureau settlement recommendations to the Attorney General recognize restitution as a mitigating factor in keeping with the purpose and objectives of sentencing enunciated in Canada's *Criminal Code*.[19]

7. REVOCATION

Stakeholder Comment

Almost by way of tenet, stakeholders recommended that the Bureau take all reasonable steps to resolve disputes and give formal notice and reasonable opportunity to amend any shortfalls in an application prior to revoking immunity. Criteria to revoke immunity should be "few in number, clearly articulated, consistent across jurisdictions, and fairly applied". Revocation should be limited to situations in which an applicant deliberately and clearly fails to

[19] *Criminal Code* R.S. 1985, c. C-46, s. 718.21.

cooperate or gives false information in an intentional and serious manner.

The CBA stressed that a corporation should not lose its immunity because of a lack of co-operation on the part of its employees except where there are indicia of deliberate non-cooperation on the part of the corporation. It noted that if too many of a corporate applicant's employees fail to co-operate, the corporate applicant will be unable to make out the offence in question and will not qualify for a PGI. The CBA also indicated its desire to see the Bureau approach to revocation remains clearly aligned with that of the Attorney General.

Stakeholders are of the view that an individual's immunity should not be revoked unless the individual is personally at fault for non-compliance. In addition, an end to corporate immunity should not necessarily result in a revocation to individuals captured under the coverage of the corporate immunity umbrella.

Observation

The current Program is very clear that failure to comply with the requirements of the immunity agreement may result in the Attorney General revoking immunity. Revocation became a "hot" issue in competition law enforcement circles in March 2004 when the U.S. DOJ Antitrust Division revoked the immunity of Stolt-Nielsen S.A.[20] Given the history of anti-trust enforcement in the U.S. and Canada, it remains the case that revocation of a grant of immunity is an exceedingly rare event. In the best of possible worlds, revocation would never occur. The Bureau's interests are best served in securing an applicant's complete and timely cooperation with the Bureau's investigation; Bureau officers provide applicants full opportunity to meet their commitments and comply with clearly stated Program requirements. To date, the Attorney General has never withdrawn corporate immunity. The Attorney General has twice withdrawn individual immunity but only following repeated and unsuccessful attempts by the Bureau to gain the co-operation of the parties in question.[21]

As rare an event as revocation may be, there can be no confusion as to the nature of the immunity bargain; it is not a free ride and it demands an applicant's active and concerted cooperation. Revocation should never take place as a result of miscommunication in terms of the

[20]Following the revocation, Stolt-Nielsen et al filed lawsuits against the U.S. DOJ which were ultimately dismissed by the U.S. Court of Appeal in June 2006. Stolt Nielsen S.A,, two executives and two subsidiaries were recently indicted; see U.S.Department of Justice, *Stolt-Nielsen S.A. Indicted on Customer Allocation, Price Fixing and Bid-Rigging Charges for its Role in International Parcel Tanker Shipping Cartel*, Washington, Sept. 6, 2006. According to the Division, this is the only time that the Division has revoked a grant of conditional leniency: see *Stolt-Nielsen S.A.* v. *U.S.A.*, Brief for Appellant, U.S.C.A. (3rd Circ) online: http://www.usdoj.gov/atr/cases/f209100/209127.htm#N_12.

[21]Neither of these individuals has been prosecuted.

nature of the immunity agreement. The Bureau will seek to address the specific questions and concerns raised by stakeholders in the course of its deliberations as to possible adjustments to the Program. Corporate and individual applicants must be fully aware of when they are at risk of courting revocation.

Bureau investigations aim to uncover information that is secret, hidden or otherwise unavailable. For the goal to be realized the integrity and effectiveness of the investigative process and related legal proceedings must be maintained. It is impossible for the Bureau to fulfill its mandate without the assurance that certain limits cannot be crossed without consequence. The rights of witnesses, targets and accused do not negate their responsibilities - to tell the truth when they provide information, either orally or in writing, and not knowingly mislead investigators; to comply with court orders, to refrain from destroying, altering or withholding evidence; and to refrain from interfering with other witnesses to the offence.

8. CREATION OF A FORMAL LENIENCY POLICY PROGRAM

Stakeholder Comment

Stakeholders recommended that the Bureau adopt a formal leniency program. The view advanced is that a more formalized leniency policy will support case resolution if it provides substantial incentives for cartel participants who, though not first in, are able to secure consideration from the Bureau and the Attorney General in respect of reduced sentencing exposure in return for a guilty plea and a high level of cooperation with the investigation and prosecution of the cartel. The greater the sentencing incentives, which can include access to reduced fines and the foregoing of individual charges or reduced jail time, the more likely a party will be to cooperate with the Bureau. Parties will be more likely to come forward and cooperate if there are high levels of transparency and predictability in immunity/leniency conditions on sentencing. Implementing an escalating series of penalties, premiums associated with timeliness, and differentiated exposure to individual charges is viewed as enhancing prospects for early engagement with the Bureau by leniency applicants.

Observation

Until recently, the Bureau has had a case driven, largely ad-hoc approach to leniency. In general, leniency applicants can expect their fine level to be assessed from a starting point of 20 per cent of the volume of commerce affected, a proxy used by the Bureau for the likely value of ill-gotten gains and the loss inflicted on consumers. From there, aggravating factors increase the fine and mitigating factors (such as the level and value of the co-operation provided to the Bureau's investigation) will lower it. In the normal course, the Bureau will not recommend that a leniency candidate receive a fine level of less than 10 per cent of the volume of affected commerce; there is no interest in having a cartel participant relieved of a minimum clawback of the gains secured from the illegal activity.

Timing is a critical factor in leniency. The Bureau will use information and evidence provided by a leniency applicant against any and all participants involved in the cartel's illegal activity. Early approaches are recognized positively in terms of a fine credit and also may affect the overall value of cooperation. Applicants may find that at a later stage in the Bureau's investigation, their information will be assessed as offering little value added to the investigation, warranting little by way of reduction credit in terms of fine or other sentencing option.

The Bureau is committed to developing the basis for a formal, transparent leniency program by March 2007. As in the case of the Bureau's Immunity Program, benchmarking will be conducted in relation to leniency programs maintained by our international enforcement partners, particularly the U.S. and other jurisdictions that enforce competition laws subject to criminal sanctions.[22]

The rationale for leniency is straightforward; a more transparent and predictable approach will support effective, cost-efficient enforcement of the Act, consistent with the public interest. It is rare that an immunity applicant can provide sufficient information to enable an enforcement agency to break the back of a cartel so as to prompt other participants to forego costly and protracted litigation in lieu of settlement. Cooperation provided to the Bureau by a second or even third-in applicant for leniency can provide investigations with sufficient evidence to bring all participants to the settlement table. Transparent and predictable leniency rules should assist in securing this vital cooperation.

While not prejudging the outcome of deliberations to engage a new program in this matter, factors to be considered in assessing the scope for leniency are likely to track factors familiar in respect of current sentencing recommendations; the nature and the value of the cooperation provided, including the speed with which that cooperation was offered; the size of the companies involved in the cartel and their respective market shares; their position or influence in the cartel and their role in promoting the agreement, the duration of the offence and each company's involvement in it, the number and level of participation of senior officers and directors in the agreement; any restitution that the organization is ordered to make or any amount that the organization has paid to a victim of the offence; compliance measures taken to ensure against recidivism; previous convictions; and any other relevant aggravating or mitigating circumstances.

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[22]OECD countries that criminally sanction hard-core cartels include Canada, the US, Ireland, Japan, Korea, Norway, France, Greece, Switzerland and Sweden. The U.K. has criminal sanctions for individuals and Australia has proposed amendments to its legislation that will criminalize cartel conduct. Amongst developing nations, Vietnam has made the criminal option part of its law.

These factors will be weighted to enable an applicant *ex ante* appreciation of the sentence recommendation it can expect under the Bureau's leniency program. It is important to remember that while a formal leniency program will identify the parameters within which the Bureau will make leniency recommendations to the Attorney General, acceptance of this recommendation remains subject to the Attorney General's discretion. [23]

The Bureau will be working in close collaboration with the Attorney General to finalize a leniency framework. To be workable, any leniency program the Bureau develops must not only encourage applicants to come forward early and cooperate, it must meet the requirements of appropriate sentencing.

9. PRO-ACTIVE IMMUNITY

Stakeholder Comment

Pro-active immunity, in the context of the consultation, means that the Bureau would initiate contact with a potential immunity applicant prior to that applicant having approached the Bureau to apply for immunity, and outside the normal course of investigation. One respondent urged the Bureau to be liberal in its application of the Program and to inform a potential immunity applicant of the existence of the Program while balancing its investigative goals with fairness if it uses this process. Remaining commentators raised concerns in respect to potential issues of fairness in respect of how the Bureau might go about making its overtures and the timing of any such approaches. The Bureau's selection of one potential applicant over another raised concerns as to real or perceived bias or unfairness, particularly at an early stage in an inquiry when the Bureau may lack sufficient information to ensure an informed selection. Commentators also raised the spectre of Charter challenges and risks that evidence might be tainted were the Bureau to initiate targeted approaches to potential immunity applicants in the course of an investigation.

In any event, the majority of stakeholders agreed that the Bureau should contact second-in applicants if the first-in failed to perfect its immunity application.

Observation

The Bureau will continue its practice of informing targets and potential targets about the Program in the normal course of investigation but will not otherwise embark on a search for

[23] After the Competition Bureau refers a criminal matter under the *Competition Act* to the Attorney General pursuant to section 23 of the Act, the Attorney General has carriage of the matter. The Attorney General has the discretion whether to litigate or to settle a case, a decision it makes in consultation with the Bureau. The leniency agreement advanced through the Bureau and Attorney General will ultimately be subject to the sentencing discretion of the court hearing the plea.

possible immunity applicants. It believes that the concept of hand-selecting applicants is more likely to lead to perceptions of unfairness and ensuing detriment to the Program than to any real investigatory benefits. The Bureau will endeavour to contact second-in parties in cases where the first-in has failed to perfect its immunity application.

IV. OTHER ISSUES RAISED BY STAKEHOLDERS

Since the publication of our Responses to FAQs in the fall of 2005 we have received ongoing comments from counsel regarding the 30-day time line for perfecting a first-in immunity marker. Despite concerns raised with this time line, the Bureau's experience has been positive. While not all applicants have met the 30-day deadline, delays, for the most part, have been justified, short, and provided with sufficient advance notice to the Bureau to accommodate investigative planning. While it is too early to provide any reliable statistical analysis, applicants generally seem to be meeting their obligations to provide information to the Bureau more quickly and comprehensively than in the past.

IV. CONCLUSION

The Program has proven to be the Bureau's single most powerful means of detecting cartel activity. Its contribution to effective enforcement is unmatched. Its continued appeal to those who would otherwise remain undercover is pivotal to our enforcement efforts. Since the publication of the Program in 2000 we have received close to 50 first-in immunity applications on a broad spectrum of products. Fines levied in conspiracy cases in the same period total over $68 million[24]. Eradicating international cartels remains central to the Bureau's enforcement initiatives, though in keeping with the Commissioner's priorities, the Bureau is placing enforcement priority on domestic cartels. In January 2006, the Bureau secured record fines of $37.5 million for a cartel in the domestic fine paper industry.[25] The point to note is that the Bureau's Immunity Program will be an equally vital enforcement asset in cracking domestic cartels as the Bureau's regional offices build enforcement capacity and advance anti-cartel campaigns across Canada.

As a final word - overall the Program is in good shape, but good isn't the objective. Over the next few months we will be consulting internally, analyzing consultation feedback and determining how to address the comments and questions raised. The Criminal Matters Branch is leading this initiative, working in conjunction with the Fair Business Practice Branch and the Attorney General, and will recommend to the Bureau's Enforcement Policy Committee and

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[24]The Bureau has had some form of immunity program since 1991, *supra* notes 3 and 4, From 1991 to the present, fines levied in cartel cases have totalled over $250,000,000.

[25]Competition Bureau, *News Release: Competition Bureau Investigation Leads to Record Fine in Domestic Conspiracy*, Jan. 9, 2006, online: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2018&lg=e.

Senior Management Committee how to best address the consultation issues Our goal is to complete these initiatives by the end of the fiscal year - March 2007.

And this is not the end of the road. Regular maintenance checks are essential to ensure that the Bureau's Program keeps pace with changes that affect its ability to continue to deliver significant value to the Bureau in terms of cartel detection and prosecution. One of IBM's top executives in the 1960s - a man by the name of L.W. Lynett - said that "the most effective way to cope with change is to help create it". The Bureau has many allies in this cause. Let me acknowledge and express my personal gratitude for the considerable time and effort that our stakeholders and international partners have given in considering and addressing the issues raised in our consultation paper. The clear and even-handed comments received have all been founded in a genuine interest and respect for competition law objectives and the integrity of the Bureau's Immunity Program.