COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTION OF ANTITRUST LAW
IN RESPONSE TO
THE CANADIAN COMPETITION BUREAU
REQUEST FOR PUBLIC COMMENTS REGARDING
IMMUNITY PROGRAM REVIEW

MAY 2006

The Section of Antitrust Law of the American Bar Association ("the Section") welcomes the opportunity to participate in the Canadian Competition Bureau's (the "Bureau") public consultation process on the Bureau's Immunity Program by responding to the issues raised in the Bureau's *Consultation Paper* of February 7, 2006 (the "Consultation Paper"). The views expressed in these comments are those of the Section of Antitrust Law and have been approved by the Section's Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Section appreciates the Bureau's efforts to consult with stakeholders on substantive aspects of the Immunity Program that have arisen over the past five years, including confidentiality, the oral application process, restitution, revocation of immunity and the possible creation of a formal leniency program. As the Bureau has recognized, the development of immunity programs in many jurisdictions over the past decade has been "critical" in the fight against cartels that stifle competition and harm consumers.[1] The Section applauds the Bureau's effort to seek policy convergence to facilitate applicants seeking immunity in multiple jurisdictions and, in particular, the Bureau's recognition of the particular importance of developing convergence between Canadian and American approaches to immunity programs, given the "geographic proximity and market integration" between our two nations.[2]

In an effort to support greater policy convergence, this submission (where appropriate) offers the Section's interpretation of the relevant law and practice in the United States, and some of the lessons learned from more than a decade of experience with the U.S. Department of Justice Antitrust Division's (the "Division") revised 1993 Leniency Policy.

Executive Summary

The Section commends the Commissioner of Competition and the staff of the Canadian Competition Bureau for their initiative in seeking a public review of the critical elements of the Bureau's Immunity Bulletin, adopted in 2000. The Bureau's Consultation initiative will enhance

---

[1] Competition Bureau, *Immunity Program Review - Consultation Paper* (February 2006) at 1, http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2022&lg=e.

[2] *Id.* at 3.

clarity and predictability, and further convergence, in the criteria of immunity and/or amnesty programs internationally.

On the key elements of the consultation paper, the Section supports a commitment to the highest degree of confidentiality between the Bureau and an immunity applicant. The Section believes that non-disclosure of details pertaining to an immunity applicant should be the norm, to the maximum extent consistent with Canadian law and that the Bureau should clarify any circumstances where disclosure is likely to occur. Similarly, to avoid prejudice to an immunity applicant outside the context of public enforcement proceedings, the Section supports a fully paperless application procedure, to the extent possible under Canadian law.

On specific issues relating to current eligibility criteria, the Section supports the adoption of a single disqualifying criterion for potential applicants: coercion of others to participate in a cartel. Such an approach would contribute to policy coherence with other programs on the international level, including similarity with the Antitrust Division's Corporate Amnesty Program.

The Consultation Paper asks about the role of the individual participants in a cartel who are associated with a corporate immunity applicant. The Section believes as a matter of principle that all current or former employees of a corporate immunity applicant should receive automatic, derivative immunity with the corporation, conditional only on their complete and candid cooperation. A successful corporate applicant should be required to use its best efforts to promote cooperation of its associated individuals. However the failure of those individuals to cooperate should not impact the grant of corporate immunity, unless the corporation itself has failed to fully promote their cooperation. The Section believes that the Bureau has no legitimate concern in whether the employer covers the cost of legal representation of its employees, and that any issues of potential conflict can be properly addressed without reference to the Bureau.

The Section supports the adoption of an appropriate "penalty plus" aspect of the Immunity Bulletin, to promote fullest disclosure and to sanction wilful non-disclosure of competition offences. It should be coupled with the use of a so-called "omnibus question" in the course of the corporate and individual cooperation. The unique Canadian requirement for disclosure of other offences, unrelated to cartel offences, creates serious difficulties for potential applicants and the Section provides its views on this important issue. The Bureau's apparent approach to "penalty plus", namely, the possible revocation of a grant of immunity due to undisclosed conduct is disproportionately harsh, inconsistent with other agencies' policies and unnecessary, in the Section's view.

Restitution to victims is not an appropriate function of a public enforcement agency, in legal systems like Canada's, where legal procedures for redress through civil action are available.

With regard to revocation of immunity, the Section considers that this question raises the most delicate policy issues for the credibility of public enforcement. The Section believes that the criteria for revocation should be clear and limited and, preferably, aligned with the criteria adopted by the Antitrust Division: deliberate, clear non-cooperation, intentional false statements to the authorities or obstruction, or intentional coercion of another party.

The Consultation Paper considers the possible adoption of a formal leniency program. The Section supports the greatest level of clarity and predictability in program administration, and in particular, clear standards for incentivizing early cooperation by parties implicated in cartel activities. The current uncertain criteria for penalty calculation in Canada would benefit from clarification and the adoption of objective standards of assessment. A clear policy as to the treatment of parties, based on the timing of their decision to cooperate, would be similarly positive.

Finally, the Consultation Paper raises the issue of proactive immunity. The Section counsels against any action that might put into question the perceived fairness and impartiality of the Bureau's Immunity Bulletin or the administration of the Immunity Program. It is not evident that such action by the Bureau is warranted on policy grounds.

The Section appreciates the opportunity to offer its views on a program of such importance to cartel enforcement both domestically and internationally.

1. Confidentiality

Confidentiality is of paramount importance to the success of any immunity program, and the Section recognizes and applauds the emphasis that the Bureau has placed on this critical issue throughout the Consultation Paper. Immunity applicants face significant risks in the form of civil class actions and/or commercial retaliation from other cartel members when notifying an enforcement agency of the existence of a cartel. Moreover, the increasingly international scope of most cartels means that an immunity applicant must often undertake a detailed analysis of its liability exposure in multiple jurisdictions. This evaluation necessarily takes time, and requires an enforcement agency to protect the identity of an immunity applicant during this period in order for the party to complete its applications in other jurisdictions. Failure to protect an immunity applicant's identity could discourage parties from coming forward by jeopardizing their immunity applications in other jurisdictions, and thus undermine the success of the agency's immunity program.

These important policy concerns have been endorsed by leading international competition policy organizations, such as the Organisation for Economic Co-operation and Development ("O.E.C.D.") and the International Competition Network ("ICN"). The O.E.C.D.'s recent *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* recognizes that:[3]

- "information exchanges [between competition authorities] should not undermine hard core cartel investigations, including the effectiveness of amnesty programs"; and

[3] Organisation for Economic Co-operation and Development, Competition Committee, *Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations* (October 2005) at 6, http://www.oecd.org/dataoecd/1/33/35590548.pdf.

- "member country authorities should seek to ensure that information exchanges do not have negative consequences for informants, for example by deciding not to disclose their identities in certain cases."

The ICN has recognized that "it is important … for an agency to consider … whether its program contains any disincentives preventing cartel participants from self-reporting their cartel conduct," and has identified one such disincentive to be the risks of "possible disclosure to other enforcement agencies or third parties without the applicant's approval."[4]

Thus, there appears to be international consensus that an effective immunity program must protect the identity of applicants. The Section shares this view, and supports the Bureau's efforts to provide greater clarity to immunity applicants regarding the Bureau's ability to guarantee confidentiality under Canadian law.

CONSULTATION QUESTIONS

1.1 How should the Bureau best balance the interest of immunity applicants that their identities and information remain confidential, with court decisions that information in pre-charge court documents, such as ITOs, be public?

The Bureau should seek the highest level of confidentiality for immunity applicants available under Canadian law. Obviously, opining on the state of Canadian law is beyond the Section's role. However, there may be some question as to whether or not immunity applicants cooperating with a Bureau investigation under the *Competition Act* qualify for the identity protection afforded to confidential informants under Canadian law. The Consultation Paper states that "[i]t is the Bureau's view that the Program's confidentiality provisions recognize an immunity applicant's confidential informant status through the early stages of the investigation."[5]

To the extent that there is a risk that Canadian courts might not grant an immunity applicant the protections afforded to confidential informants, the Bureau's Immunity Program and/or related FAQs should be candid about this risk. The Section also feels that it would be extremely helpful to both potential immunity applicants and their counsel if the Bureau were to provide greater clarity concerning the "certain factual situations … [in which] it will be necessary for the applicant to waive his or her confidential status",[6] and the stage at which such situations typically arise in an investigation. Such information may play an important role in the timing of a party's decision to apply for immunity in Canada, and in any event is a critical part of

---

[4] International Competition Network, Cartel Working Group, *Drafting and Implementing an Effective Leniency Program* (April 2005) at 4, http://www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG2_Enforcement_Techniques/Anti-Cartel_Enforcement_Manual.pdf.

[5] *Supra* note 1 at 10 (emphasis added).

[6] *Id.*

the "certainty, clarity and priority" which both the Section and the Bureau believe are the hallmarks of an effective immunity program.[7]

Based on the foregoing, the Section respectfully submits that the Bureau's confidentiality policy should reflect the following key principles:

- The Bureau should keep an immunity applicant's identity and information confidential as long as permissible under Canadian law;
- The Bureau should only disclose an immunity applicant's identity and information when required to do so by a court order or otherwise required to do so by law;
- The Bureau should provide an immunity applicant with reasonable notice prior to any such disclosure; and
- The Bureau's Immunity Program and/or its related FAQs should be candid about the risks of disclosure under Canadian law, and provide a detailed explanation of when (i.e. under what circumstances) such disclosure risks would typically arise.

1.2 Are there concerns with immunity applicants being named in court documents if they are not identified as immunity applicants, but rather as participants to the conspiracy?

As noted above, a company exposes itself to significant civil liability and other business risks when it comes forward and discloses its participation in cartel activity in return for immunity from criminal prosecution. In Canada, cartel participants — including immunity applicants — are routinely sued in large class actions under section 36 of the *Competition Act*.[8] Notwithstanding recent de-trebling amendments,[9] a cooperating party still faces significant civil liability for its role in a cartel in the United States. Furthermore, an immunity applicant may face significant reputational loss, irreparable harm to its goodwill and, in the case of public companies, serious decline in its share value on stock exchanges, if named in court documents as a participant to the conspiracy.

The Section's respectfully suggests that the Bureau should follow the common practice of referring to immunity applicants as unindicted co-conspirators in court documents, and should refrain from directly naming an immunity applicant. Failure to do so may cause serious harm to the immunity applicant, and thereby discourage future applicants from seeking immunity, thus undermining the effectiveness of the Bureau's Immunity Program.

---

[7] *Id.* at 3.

[8] R.S.C. 1985, c. C-34, s. 36.

[9] Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213 (2004).

1.3 Are there concerns regarding confidentiality and information sharing among competition authorities? Are there specific concerns with any particular agencies? Please provide detail.

Information sharing, where accompanied by appropriate confidentiality safeguards, is widely recognized as an important element of the recent success in prosecuting and deterring international cartels.[10] However, it is important that the Bureau obtain a confidentiality waiver from an immunity applicant before sharing the applicant's identity or information with another agency. Such waivers are routinely granted by applicants on an agency-specific basis, and provide a reasonable compromise between the legitimate enforcement efforts of competition agencies and the applicant's right to confidentiality, particularly in cases where the applicant is still considering immunity applications in other jurisdictions, or where the applicant is concerned that the requesting agency has not adopted adequate confidentiality safeguards.

The Section is not aware of specific information sharing concerns relating to particular competition enforcement agencies.

2. Oral Applications — The Paperless Process

One cost — sometimes the greatest cost — that a corporation must consider in deciding whether to pursue immunity or leniency and thus expose a cartel is the high probability that its decision to do so will precipitate civil damages actions in the U.S., Canada and other jurisdictions.

As the Consultation Paper correctly notes, there is uncertainty in the U.S. over whether materials prepared specifically for the leniency process are discoverable and thus can be used by plaintiffs as evidence in such civil actions.[11] The possibility of discovery can play a significant role in a corporation's decision to seek immunity, and may therefore impact the efficacy of an immunity program generally. Accordingly, the Section submits that one of the Bureau's primary goals should be the development of measures to prevent discovery of these materials.

---

[10] *See, e.g.*, Organisation for Economic Co-operation and Development, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (March 1998) at I.B, http://webdomino1.oecd.org/horizontal/oecdacts.nsf/linkto/C(98)35.

[11] This comment does not address pre-existing materials — materials that existed before the consideration and development of the leniency submission. In its brief in the *Vitamins* litigation, Canada took the position that pre-existing documents are discoverable. *See* Brief of the Government of Canada as Amicus Curiae in Opposition to Plaintiffs' Joint Motion to Compel Bioproducts to Produce its Governmental Submissions, In re Vitamins Antitrust Litigation, MDL Misc. No. 99-197, MDL No. 1285 (D.D.C. 2002). This position reflects the reality of the situation: documents should not somehow become immunized from discovery merely because they are presented to a government authority. Rather, because these materials are available to a civil litigant to develop the story, there is no need for that civil litigant to get the leniency submissions as well.

CONSULTATION QUESTIONS

2.1 Does the Bureau's paperless process, as it is described above, address the concerns of immunity applicants facing potential civil liability in other jurisdictions?

There are several jurisdictions in which discovery of leniency submissions by civil litigants is a grave concern. The most significant such jurisdiction is the United States, because of the high penalties imposed on private antitrust enforcement, the consequential incentives to sue, and the broad discovery rules that may reach submissions to foreign antitrust authorities. To the extent that the Bureau's measures are calibrated to prevent disclosure in the U.S., they will presumably prevent disclosure elsewhere as well. Therefore, the critical question is whether the Bureau's approach can prevent disclosure of immunity submissions in connection with litigation in the U.S.

On its face, the Bureau's position appears to address these concerns adequately. It is essential that the Bureau not require a written immunity submission, and refrain from corresponding with immunity applicants in writing except where absolutely necessary to make the immunity process work. Civil litigants in the U.S. generally cannot discover the notes taken by Bureau officials or other oral communications,[12] and are forced to develop their evidence from the underlying, pre-existing documents, as would be required had an immunity application not been made. To allow otherwise would be to punish the first co-operating party by putting it in a worse position in the civil damage cases than any of its non-cooperating co-defendants.

However, there remains a risk that everyday Bureau practice, reflecting somewhat the inertia that understandably accompanies well-established and effective habits of communication and confirmation in dealings with third parties, may result in the generation of correspondence and possibly other documentation that is not strictly necessary. The creation of such documents could compromise sensitive negotiations and may, through civil discovery or otherwise, frustrate corporate cooperation not only in Canada but also in other jurisdictions, and ultimately act as a disincentive to the pursuit of immunity.

In recognition of this risk, the Section respectfully recommends that all routine practices in which confirmatory or other correspondence is sent to or exchanged with immunity applicants should be reviewed, with a view to eliminating the creation of potentially discoverable "paper." Careful verbal confirmations that are memorialized in the (typically) undiscoverable file notes of Bureau officials and counsel for cooperating parties should provide a sufficient record of the parties' communications. In addition, the Section would recommend that the Bureau contact immunity applicants and other cooperating parties in advance of sending any written correspondence, so that proposed correspondence can be discussed and unnecessary correspondence avoided.

---

[12] *See* In re Vitamins Antitrust Litigation, MDL Misc. No. 99-197, MDL No. 1285, Revised Report & Recommendation of the Special Master, at 4 (D.D.C. 2002).

2.2 Are certain communications less problematic than others if reduced to writing (e.g. letter from the Bureau confirming a marker; letter from an applicant providing a waiver of confidentiality; letters relating to the failure of an applicant to meet Program requirements; notice in respect of revocation of a marker)? If so, please identify.

The most problematic documents reduced in writing are immunity submissions — *i.e.*, proffers, corporate leniency statements, etc. — that provide a road map of the conduct in question. Clearly these submissions should be oral, with the parties keeping notes of the information conveyed, but requiring neither written submissions nor written affirmation or confirmation of Bureau notes of proffer presentations.

The Section reiterates the view that the generation of paper should be avoided to the maximum extent feasible. Problems can arise not only if documents of these latter sorts go beyond accomplishing their purpose (*e.g.* confirming a marker) and get into the "why" the action documented in the letter is being taken, but also if the matters confirmed might prejudice the party proffering cooperation or frustrate its cooperative efforts in other jurisdictions. Without exhausting the possibilities, this might, for example, occur if a letter terminating a marker were to be disclosed in discovery or otherwise. Similarly, if the Bureau issues an extensive letter withdrawing a marker, stating that the party has not been able to substantiate the commission of an offense and will be subject to prosecution if another company comes forward with evidence substantiating the violation, can destroy cooperation incentives and cause major harm in civil litigation without any offsetting benefits for the Bureau. The concerns surrounding withdrawal of immunity are particularly important so long as the Bureau adheres to its "30 day rule" for perfection of a marker.

2.3 Are there best practices you would endorse for a paperless process that would address applicants' disclosure concerns and the Bureau's interest in avoiding misunderstandings in the communications that take place? If yes, please identify.

See the suggestions set forth in response to Question 2.1 regarding a review of routine correspondence practices, and the proposal that the Bureau confer with cooperating parties before memorializing any communications in correspondence.

2.4 Are your disclosure concerns differentiated as between domestic and international case enforcement?

From the standpoint of parties dealing with antitrust authorities in multiple jurisdictions, and facing civil litigation in the United States, the concerns are similar at a general level. Parties wishing to disclose their participation in cartel conduct have a strong interest in confidentiality throughout the process, for a number of reasons. Where the applications occur before an investigation is initiated, obviously a major concern is to have the ability to bring applications for amnesty in a number of jurisdictions before disclosures or investigative measures alert other participants in the conduct being disclosed. Both before and after an investigation has commenced, amnesty applicants will wish to avoid having the process generate materials that might be discoverable in civil litigation.

2.5 What fora do you see as the most effective for developing best practices for the paperless process? ICN? O.E.C.D.? Other?

The ICN is likely to be the most effective forum for developing best practices for the paperless process. The ICN is quick, nimble, and flexible by comparison to the other options, and brings together the front-line experience of antitrust agencies in more than 80 countries. In addition, the ICN more effectively considers input from experienced non-governmental entities and individuals. Thus, the Section considers it the preferable vehicle for the development of best practices.

3. Role in the Offence

Every leniency program in the world has some form of a "role in the offense" requirement. The challenge is in identifying how best to determine what constitutes disqualifying behaviour. Although the Section offers an alternative ("coercion" only) test than the one currently applied by the Bureau, as discussed below we generally agree with the Bureau's cautionary approach on the subject, as reflected in the Consultation Paper:

> Initial information provided to investigators by an immunity applicant is often limited and can be biassed, making an accurate evaluation difficult. The Bureau's policy is aimed at providing as many potential applicants as possible with the opportunity to seek immunity, disqualifying only the clear leaders and instigators of illegal acts. Where the leader or instigator does not qualify for immunity, its co-operation in the investigation may nonetheless support a recommendation for leniency.[13]

CONSULTATION QUESTIONS

3.1 Should leaders / instigators of an offence be denied immunity?

A primary objective of all leniency programs is to uncover and terminate cartels. The Section believes that the success of these programs turns on clarity, predictability, and ease of assessment — prospective applicants need to understand how their case will be treated by the competition agency. In the Section's view, the leader/instigator test is vague. For the role in the offense requirement to be effective, the criteria for disqualification must be clearly defined and consistently applied. Accordingly, the Section suggests that the Bureau consider using an alternative approach that relies exclusively on a coercion test.

As noted in the Consultation Paper, the instigator standard (coupled with a "coercion" element) is found in a number of leniency programs.[14] Applicants will only be disqualified from obtaining leniency under these programs if they are the single leader or organizer of a

---

[13] *Supra* note 1 at 18.

[14] *Supra* note 1 at 17-20.

conspiracy, or if they are found to have coerced another party to take part in the illegal activity. If there are several leaders or organizers, any one of them can qualify for leniency under these programs. While the Section agrees with the general principle underlying this hybrid instigator / coercion standard, we are concerned that in practice the criteria for making the determination is unnecessarily ambiguous.

The ambiguity and attendant uncertainty associated with the instigator standard is well known. During a 1998 speech a Division official remarked that "[i]ssues have arisen as to what it means to be 'the leader in, or originator of, the activity.'"[15] He explained that the U.S. amnesty program

> refers to 'the' leader and 'the' originator of the activity, rather than 'a' leader or 'an' originator. Accordingly in situations where the corporate conspirators are viewed as coequals or where there are two or more corporations that are viewed as leaders or originators, any of the corporate participants will qualify [for amnesty].[16]

In 2002, the E.C. criticized the instigator standard when it announced revisions to its 1996 Leniency Notice.[17] Before the revision, the E.C. "excluded from full immunity companies that had acted as an instigator of or played a determining role in a cartel."[18] This language vested the E.C. with a substantial degree of discretion in determining whether to exclude one or more participants from obtaining leniency.[19] In 2002, the E.C. recognized this shortcoming and changed its policy, addressing the question head-on in its publication, "Question & Answer On the Leniency Policy":

> One of the requirements to qualify for full immunity in the 1996 [Notice] was that a company could not have been an 'instigator' or have played a leading role in the cartel. Why do you remove that requirement?

---

[15] Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *The Corporate Leniency Policy: Answers to Recurring Questions*, address before the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), http://www.usdoj.gov/atr/public/speeches/1626.htm.

[16] *Id.*

[17] European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OJ C 45 (Feb. 19, 2002); European Commission, *Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases*, OJ C 207 (July 18, 1996).

[18] European Commission, Press Release, *Commission adopts new leniency policy for companies which give information on cartels*, IP/02/247, Feb. 13, 2002, *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/02/247&format=HTML&aged=1&language=EN&guiLanguage=en; European Commission, *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*, OJ C 45 (Feb. 19, 2002).

[19] Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program*, address before the Conference Board, 2002 Antitrust Conference: Antitrust Issues in Today's Economy, New York, New York (Mar. 7, 2002) ("While under the E.C.'s old program, there was a far greater degree of prosecutorial discretion involved and more than one company (or even potentially all of the companies) could be viewed as ineligible for full immunity in a given cartel.").

> The ultimate objective of this notice is to assist the Commission to unveil cartels and eradicate them. Much of the effectiveness of the tools at our disposal relies on their clarity and certainty. Experience to date has shown that the notion of 'instigator' is somewhat vague (it is rarely clear-cut if and who the instigator of the cartel is: Who is a leader in a cartel of two or three? How many leaders can you have?) and to a certain extent jeopardized the effectiveness of the programme. The main requirement for qualifying for full immunity besides having to be the first to come forward, among other things, is not to have taken steps to coerce other undertakings to participate in the infringement. This sets a clear standard and effectively excludes those cases, which were certainly targeted with the 'no-instigator' rule.[20]

The Section generally agrees with the E.C.'s reasoning. The Section applauds the continuing efforts by competition authorities to clarify their current policies on issues such as this one, but believes that it may sometimes be more beneficial to the process if the underlying policy is changed. [21]

The Section believes that a stand-alone coercion test, similar to the approach used by the E.C., would provide a clearer and more effective standard than the Bureau's hybrid instigator/coercer test.

3.2 Should specific criteria be used to determine if a corporation is "the" leader or "the" instigator of a cartel and if so, what should those criteria be?

As previously stated, the Section recommends that the Bureau consider replacing its instigator standard with a stand-alone coercion test. Further comments regarding the coercion test are provided in the response to Question 3.3 below.

---

[20] European Commission, *Question & Answer on the Leniency Policy*, Memo./02/23 (Feb. 13, 2002), *available at* http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/02/23&format=HTML&aged=0&language=EN&guiLanguage=en.

[21] *See, e.g.*, Canadian Competition Bureau, *Immunity Program: "Responses to Frequently Asked Questions'"* (Oct. 17, 2005), http://www.competition bureau.gc.ca/internet/index.cfm?itemID=1980&lg=e; Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) ("The Antitrust Division has a written Leniency Policy and has published a number of papers in order to clarify the Division's application of its Corporate Leniency Program. We have also created a model conditional amnesty letter that is publicly available for prospective applicants to review. In addition, representatives from the Division regularly speak about the Leniency Program before national and international bar associations, trade groups, and other law enforcement agencies, and the media.").

3.3 How important is the element of "coercion" as a criteria for denying eligibility to the Program? Should it be the only criteria?

In the Section's view, insisting that an applicant must not have coerced others to participate in the illegal activity is an appropriate requirement for immunity and, as discussed above, a clearer standard (standing alone) than the Bureau's current test.

Given the fact-specific nature of the inquiry, the Section believes that there is no utility in crafting a detailed definition of "coercer." However, in order to provide prospective applicants with a reasonable basis upon which to predict how their case would be received, the Section believes that the Bureau should announce with as much specificity as possible the criteria that will govern the analysis. On this point, the Section suggests the Bureau review the type of guidance found in the Australian and U.K. leniency programs. The Australian program provides that, "[f]or an applicant to have coerced others, there will need to be strong evidence of coercive behavior. In particular, there must be clear evidence that the coercer pressured unwilling participants to be involved in the cartel conduct."[22] The U.K. program offers similar direction:

> The OFT believes that there is no mileage in trying to develop a detailed definition of 'coercer', but there must be evidence to prove the two elements of coercion (on an objective basis): [1] an unwilling participant in the cartel, and [2] clear and positive steps from a coercer to pressurize that unwilling participant to take part.[23]

In considering whether a party will be excluded from obtaining leniency, the Section believes that the Bureau should apply a test based exclusively on coercion and consistent with the guidelines found in the Australian and U.K. programs.

3.4 How should the Bureau balance the benefit to enforcement of valuable information and evidence against the interest of pursuing charges against the driving participants of the offence?

The Bureau, like the Antitrust Division, should apply its leniency program — and, in particular, its "role in the offence" requirement — in a manner that favors inclusion.[24] In practice, the Section observes that there have been no reported cases in Canada (or elsewhere) in which leniency has been withheld or revoked based on the applicant's role in the offence. Absent exceptional circumstances, this precedent should continue in the future.

---

[22] Australian Competition and Consumer Commission, *Immunity Policy Interpretation Guidelines* (Aug. 26, 2005), http://www.accc.gov.au/content/index.phtml/itemId/708758.

[23] U.K. Office of Fair Trading, *Leniency and no-action: OFT's interim note on the handling of applications* (July 2005), OFT 803, http://www.oft.gov.uk/Business/Cartels/default.htm.

[24] Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Cornerstones of an Effective Leniency Program*, address before the ICN Workshop on Leniency Programs, Sydney, Australia (Nov. 22-23, 2004) ("The Division's philosophy has always been that, wherever possible, we will tilt our program in favor of finding ways to make companies eligible for our program rather than looking for ways to keep them out.").

As previously stated, the Section believes that the prospective applicant's role in the offense is an important and reasonable criterion for immunity. There may be cases in the future where, on balance, it is appropriate for the Bureau to withhold or revoke leniency based on the prospective applicant's role in the offense.

In making this determination, an important predicate to any successful leniency program is an unambiguous approach to enforcement standards and policies. The criteria used to determine an applicant's role in the offense should be clearly articulated and subject to very limited prosecutorial discretion. On this latter point, the Section agrees with remarks expressed recently by the Division:

> Our Amnesty Program by its nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application. Obviously, this is a very difficult thing to do, and we have had to swallow hard on a number of amnesty applicants that we would have preferred to prosecute. However, remember we had roughly 15 years of experience with an Amnesty Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program.[25]

Potential applicants must be able to predict with a reasonable degree of certainty how their particular situation will be analyzed by a competition authority. Again, the U.S. experience is instructive:

> If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.[26]

As noted, the Bureau should apply its Immunity Program generally, and the role in the offense requirement in particular, in a manner that favors inclusion. A prospective immunity applicant should only be excluded from the program based on its role in the offense when the facts (as discussed above) unequivocally satisfy the governing criteria. Such an approach achieves a reasonable balance between the competing goals of using the leniency program to collect information and evidence while also allowing the Bureau to pursue charges against the culpable participants.

---

[25] *Id.*

[26] *Id.*

3.5 Are there circumstances under which a cartel participant, who is the sole beneficiary of the activity in Canada, should be eligible for immunity? Please comment.

The Bureau's sole beneficiary criterion is, as the Consultation Paper notes, unique to Canada and designed to protect against situations in which "it will only be the sole beneficiary against whom the Attorney-General is able to launch a successful prosecution as other participants may have no link to Canada on which jurisdiction can be based."[27] The Section recognizes the Bureau's legitimate interest in protecting the Canadian economy against these offenses and prosecuting the culpable parties. However, this attempt to solve a jurisdictional issue through the introduction of a unique, difficult to define, and hard to administer requirement in the leniency program is ill-advised. Such a requirement is at odds with every other leniency policy in the world and will cause uncertainty and delay in a party's consideration of whether to seek amnesty in Canada and, perhaps, elsewhere. Furthermore, in the highly unlikely event that a participant in an international cartel that is the "sole beneficiary of the activity in Canada" seeks amnesty in Canada and elsewhere, the government's paramount interests in the detection and eradication of the cartel in question and the coincident protection of Canadian consumers from further harm, will have been served even if for jurisdictional reasons Canada is unable to bring criminal prosecutions against other participants in the cartel.

3.6 Should the Bureau specify the criteria used to determine if an applicant is the sole beneficiary of the activity in Canada? What should those criteria be?

Please see our response to Question 3.5. As we have noted elsewhere in these Comments, clarity, predictability, and ease of assessment are important elements of a successful leniency program. These attributes are all the more important here if the Bureau chooses to retain the sole beneficiary requirement as a potential disqualifying criterion. If this aspect of the Immunity Program is to be preserved, it should be limited to unequivocal market allocation agreements where a single party has been allocated the entire Canadian market and is the only company to derive any revenue from the sale of the affected product(s) or service(s) in Canada.

4. Coverage of Directors, Officers and Employees

Predictability of qualification for immunity is a critical aspect of any immunity program. The Bureau's suggestion that it may sometimes want to carve certain individuals out of an immunity agreement, if applied to cooperating current directors, officers, and employees of an immunity applicant, could negatively affect predictability to such an extent as to jeopardize the viability of the Bureau's Immunity Program.

As a result, the Section strongly recommends that all cooperating current directors, officers and employees be ensured immunity consistent with the immunity granted to the corporate applicant. This approach would be consistent with the policy of the Division, as well as other developed immunity programs.

---

[27] *Supra* note 1 at 18.

The Division's corporate leniency policy does not expressly address leniency for former directors, officers, or employees of a corporate amnesty applicant. However, the Division has stated that, although it is under no obligation to grant leniency to former employees (even if they cooperate fully and provide complete and truthful information); it likewise has the power to agree not to prosecute former employees who come forward.[28] The Division has further stated that it is permissible, and in many cases advisable, for it to negotiate with the applicant to include former employees in the amnesty agreement on the same basis as current employees.[29] The Division's Model Corporate Conditional Leniency Letter states in a footnote that the decision on whether to include former employees "will depend on a number of factors, including whether the applicant company is interested in protecting its former employees and whether it has the ability to help secure the cooperation of key former employees."[30] The Section is unaware of any situation in the United States where culpable former employees of a corporate amnesty recipient, who were willing to cooperate, were not granted leniency consistent with that granted to current employees. The Section supports extending full amnesty protection to cooperating former employees.

CONSULTATION QUESTIONS

4.1 Should standard criteria be developed to determine when past directors, officers and employees will be eligible for immunity under the umbrella of their former employer's immunity? What factors should the Bureau consider in developing criteria?

As previously noted, culpable former directors, officers, or employees of a corporate amnesty recipient, who are willing to cooperate, should be granted leniency consistent with that granted to current employees. Such an approach benefits both the company's application and the enforcement agency's investigation, and the Section believes it is consistent with the current practice in both Canada and the United States.

4.2 Should a company's obligation under the Program to promote the continuing cooperation of past directors, officers and employees who are covered by its immunity parallel those applicable to current directors, officers and employees? If not, how should they differ?

The company should be expected to use its best efforts and any lawful means at its disposal to promote the cooperation of both former and current employees. However, a company's ability to deliver on this expectation as to former employees could be limited. Certainly, a company should not take any action that impedes the ability of individuals to

---

[28] *Supra* note 15.

[29] *Id*.

[30] As attached to presentation by Gary Spratling, *Making Companies an Offer they Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – an Update*, address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust, Washington, D.C., http://www.usdoj.gov/atr/public/speeches/2247.htm.

cooperate, but the Bureau should take care not to impose vague, unrealistic "obligations" on a company with respect to individuals over whom the company has no control. Finally, as discussed below, it is reasonable for non-cooperating individuals to be "carved out."

4.3 Are carve-outs appropriate and if so, when?

Current directors, officers, and employees of an immunity applicant should be "carved out" only on the basis of individual non-cooperation. We believe any other approach would be inconsistent with other developed immunity programs, and would jeopardize the ongoing viability of the Bureau's Immunity Program.

4.4 Does this approach detract from the predictability of the Program?

Any potential for carve-out of cooperating current directors, officers and employees of an immunity applicant on any other basis would seriously detract from the predictability of the Program and would likely lead to a decrease in corporate applicants for immunity.

4.5 What criteria should be considered when deciding whether to "carve-out" an individual?

Current directors, officers and employees of an immunity applicant should be "carved out" only on the basis of individual non-cooperation.

4.6 How should the Bureau address matters of apparent conflict of interest in respect of applicants?

The Section disagrees with the Bureau's statement that "[c]onflict may extend to situations where individuals have separate counsel but the company pays for the counsel."[31] A company's decision to indemnify individuals for legal costs can be governed by many different legal and contractual obligations, and should not lead to a conclusion that a conflict of interest exists.

4.7 Are there circumstances where corporate counsel should be permitted to attend interviews of individuals who they do not represent and who are not covered under the umbrella of corporate immunity?

If the individual to be interviewed consents, there should be no impediment to corporate counsel participating in the interview. Indeed, corporate counsel may be in the best position to assist the individual and the Bureau concerning particular issues by reference to information (e.g., corporate business documents) that are not available to the individuals or to their counsel and experience in the United States particularly provides strong evidence of its value.

[31] *Supra* note 1 at 22.

5. Penalty Plus

A clearly articulated, transparent, and fairly applied penalty plus policy is appropriate and consistent with international norms. Penalty plus policies provide that if a party that is cooperating with an enforcement agency in connection with the investigation of one competition law violation, knowingly and intentionally fails to disclose the existence of a second competition law violation about which the party has knowledge, and that second violation is later discovered and successfully prosecuted, the competition law authority will treat the failure to disclose the second violation as an aggregating factor increasing the penalty otherwise appropriate for that violation. Such a policy fairly encourages the disclosure and self-reporting of cartel conduct and appropriately punishes intentional misleading of - if not out-and-out lying to - enforcement authorities.

The standards trigging application of such a policy should be stated clearly and applied in a transparent, even-handed fashion and should require a finding of intentional misleading on the part of the party against whom or which the policy is imposed. Of course, the standards should be applied and evaluated separately with respect to each cooperating individual and entity. For example, if a single corporate employee affirmatively fails to disclose a second violation about which he is knowledgeable, but which is unknown to the company's board, senior management, or counsel, a "penalty plus" sanction may be appropriate against the individual but not the company. The company should be subject to a penalty plus sanction with respect to the prosecution of the undisclosed violation only when the failure to disclose is shown to be truly a knowing corporate act.

Additionally, the Bureau should adopt the uniform practice of asking all applicants the omnibus involvement-in-other-cartel-offenses question. This practice, if adopted, should be well publicized so that the issue of disclosure will be properly understood by business personnel and the bar. It also could help establish that the failure to disclose the second violation was a knowing attempt to mislead enforcement authorities.

CONSULTATION QUESTIONS

5.1 Should the Bureau adopt a "Penalty Plus" program, similar to that used by the U.S. DOJ?

There should be some penalty for a party that has committed two separate conspiracies and intentionally fails to disclose the second conspiracy in the context of seeking immunity or leniency for the first. Adopting such a policy, modeled on the U.S. DOJ policy, is appropriate and consistent with international norms.

However, there is one significant difference between the operation of the Bureau's Immunity Program and the U.S. DOJ Corporate Leniency Policy that could make the application of such a policy in connection with the Canadian Immunity Program problematic. The Bureau describes its existing "plus penalties" as being the loss of immunity for the first offense, an aggravating factor in plea discussions, and an aggravating factor in sentencing submissions related to the unreported offense. In fact, Paragraph 16 a) of the Bureau's Immunity Program makes disclosure of "any and all offences in which it may have been involved" a requirement of

obtaining and maintaining corporate immunity in Canada. This position appears to contemplate "revocation" of immunity as the principal "plus" in penalties for failure to reveal any and all offences. This far outreaches the approach in the United States, where the "plus" goes only to the second, undisclosed offense and does not reach back to remove amnesty for the first offense.[32] As we believe the concept should be utilized, a cooperating party would not lose its immunity with respect to any offenses as to which it has made complete disclosures and has cooperated fully. Rather, the party would be subject to increased sanctions in connection with its prosecution for the second offense because of its intentional failure to disclose additional culpable conduct known to it. The Bureau's apparently contemplated interpretation and application of the penalty plus policy to act as a trigger to revoke immunity with respect to the investigation with which the immunity applicant has cooperated, would inject substantial uncertainty in the immunity policy itself and would create a substantial disincentive to self-report and cooperate in the first place.[33]

5.2 How much of an increase in penalty (either pecuniary, or custodial in cases of individuals) would be appropriate, and on what basis?

The answer to this question will be fact-specific and will be particularly difficult to quantify in a sentencing system that does not provide for a quantifiable penalty scale for the offense itself. As a first step, the Bureau may want to consider developing a set of sentencing recommendation guidelines which would provide some guidance and certainty as to the level of penalty a defendant would face upon conviction for a competition law offense. Such a system would achieve a greater degree of transparency and predictability than currently exists in Canada and would enhance the effectiveness of the current immunity and contemplated leniency programs.

6. Restitution

Public policy would not be served by allowing a leniency applicant to retain its ill-gotten gains. In the United States, victims almost certainly seek a civil remedy to make them whole. This concept is newer in Canada, but has become more prevalent. Restitution, however, should not be a requirement for eligibility under the Bureau's Immunity Program.

CONSULTATION QUESTIONS

6.1 Is restitution an appropriate requirement for eligibility under the Program?

Restitution is not an appropriate criterion for eligibility under the Bureau's (or any other) Immunity Program. As the Consultation Paper notes, the Antitrust Division, like the Bureau, requires that the applicant make restitution "where possible" to the victims of the cartel. The

---

[32] Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division's Criminal Enforcement Program*, address before the ABA Antitrust Section Fall Forum (Nov. 26, 2005), http://www.usdoj.gov/atr/public/speeches/213247.htm.

[33] *See*, discussion at § 7.1 *infra*.

other programs profiled in the Consultation Paper (the E.C., the OFT, and the ACCC) do not "require immunity applicants to make restitution though civil proceedings may be brought against an applicant in each of those jurisdictions."[34] Against this backdrop we think it is important to further discuss the U.S. policy — and actual practice — on this subject.

In general terms, the Consultation Paper accurately summarizes the U.S. approach towards restitution.[35] However, one critical element is important to highlight: in the United States, the applicant's exposure to civil litigation effectively means that the restitution is never directly sought by the Division in the criminal proceeding. The Division's model leniency letter is instructive because it requires the applicant to make "all reasonable efforts, to the satisfaction of the Antitrust Division, to pay restitution to any person or entity injured as a result of any [e.g., price-fixing] agreements or other conduct violative of 15 U.S.C. § 1. . . ."[36] In practice, applicants typically meet this standard by disclosing to the Division any relevant private civil cases. Because injured parties can seek redress for their harms in the civil courts, the Division usually finds no need to get involved, nor does it interfere in situations where the leniency applicant may contest the private litigation or the level of damages demanded by the plaintiffs.

As previously noted, the ICN has recognized that "[w]hen drafting and implementing a leniency policy, it is important for an agency to not only consider whether its program has the right incentives, but also whether its program contains any disincentives preventing cartel participants from self-reporting their cartel conduct."[37] Including restitution as a central tenet for obtaining immunity could potentially be a disincentive that deters potential applicants from approaching the Bureau. To be clear, culpable parties should not be permitted to retain their ill-gotten gains, immunity applicants included. However, competition agencies should resist the temptation in cartel cases (absent exceptional circumstances) to get involved directly in restitution issues, particularly where meaningful redress can be provided through private civil litigation. Public law enforcement agencies generally lack the resources and institutional structure to participate effectively in the resolution of private interests. This reasoning is even more appropriate where injured parties have the ability to seek redress through civil litigation. In Canada, as the Consultation Paper notes,

---

[34] *Supra* note 1 at 27. Indeed, the ACCC chose to eliminate the restitution requirement from its program. Australian Competition and Consumer Commission, Leniency Policy Review Position Paper (August 2005) at 14, http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=file43fcda2cc99fb&fn=Leniency%20position%20paper.pdf ("Retaining the requirement of restitution, in any form, will not cure the problem that restitution may be a disincentive which may inhibit prospective applicants from self-reporting their involvement in a cartel. In the US, the DOJ accepts private litigation as a substitute for restitution and does not actively manage any restitution process, simply accepting the assurance from the applicant. The ACCC considers that the obligation to provide restitution should be removed from the policy.").

[35] *See, e.g.*, Gary Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Making Companies an Offer they Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – an Update*, address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust, Washington, D.C., *available at* http://www.usdoj.gov/atr/public/speeches/2247.htm.

[36] *Supra* note 29.

[37] *Supra* note 4.

> Civil suits are specifically provided for in the Act. Section 36 provides that any person who has suffered loss or damage as a result of a criminal offence under the Act may sue for and recover the amount of those damages together with costs incurred. Action must be brought within two years from the last day the conduct was engaged in or the day on which any criminal proceedings were disposed of.[38]

Accordingly, because Canada has a well developed civil litigation remedy for antitrust offenses, the Section believes that the highest and best use of the Bureau's limited resources is to detect and prosecute criminal violations of the Competition and, as a general matter, leave the resolution of complex damage issues to the civil courts.

6.2 How can it best be ensured that victims of the offence are accurately identified and that restitution is appropriately assessed?

See the discussion set forth in response to Question 6.1 above.

6.3 Should alternative arrangements be made with applicants in cases where victims are not identifiable or the amounts cannot properly be assessed? Please identify suggested alternative arrangements.

See the discussion set forth in response to Question 6.1 above.

6.4 Are there situations in which restitution should be excused? If yes, please identify.

As previously noted, required restitution is not an appropriate criterion for obtaining immunity. But if the Bureau decides to retain the requirement, restitution issues generally should be left to resolution by the parties through civil damage litigation without the involvement of the Bureau, consistent with the approach followed by the Antitrust Division.

6.5 Is restitution a matter better handled between the parties themselves, either privately or through civil action?

Yes. See the discussion set forth in response to Question 6.1 above.

7. Revocation of Immunity

As the Bureau has clearly stated in the Consultation Paper, "[r]evocation is a serious decision."[39] This statement, undeniably true, seems premised on an understanding of the extreme impact of revocation, which leaves a cooperating party far worse off than had it not sought immunity at all. Such a company will have disclosed damaging information; subjected itself to prosecution for the reported conduct, including the possibility of increased sanctions; created a serious risk of having waived applicable privileges based on its reports to the

[38] *Supra* note 1 at 26.

[39] *Supra* note 1 at 29.

government; facilitated the filing of civil class actions against it in Canada, the United States, Australia, and, in the future, the European Union40 and possibly other jurisdictions; and left itself virtually defenseless against these various enforcement and civil actions

Unquestionably, revocation of amnesty can lead to the most dire consequences for a company and its employees, shareholders, customers, suppliers, and creditors, the overwhelming majority of which will have played no role in the anticompetitive conduct. For these reasons, all antitrust enforcement agencies, including the Bureau, are careful and deliberate in considering the subject.

CONSULTATION QUESTIONS

7.1 What factors should the Bureau take into account in assessing whether a breach of an immunity agreement is sufficient to warrant revocation?

To promote the transparency of the Immunity Program, keep international antitrust enforcement programs aligned, and create the greatest incentives to self-report, the stated criteria for revocation should be few in number, clearly articulated, consistent across jurisdictions, and fairly applied. Broadening these factors, or applying them inconsistently, will undoubtedly lead to suspicion about the prudence of seeking immunity. The Antitrust Division's decision to revoke immunity in the Stolt-Nielsen case has already raised concerns in corporate boardrooms as to whether good faith efforts to cooperate may ultimately leave a company at risk. Any efforts by the Bureau (or other international antitrust authorities) to broaden the factors for revocation may increase corporate suspicion about immunity programs and deter self-reporting.

Thus, the Bureau should impose a significant burden of proof on its staff — both qualitative and quantitative in nature — before considering revocation of immunity.

(a) Qualitative Analysis: What factors should be weighed?

The Bureau's staff should be required to show clear proof of one or more of the following conditions before recommending the revocation of immunity. The Bureau may wish to consider the three-factor test used by the Division, which has generally worked as an effective policing mechanism:

1) Deliberate, clear failure to co-operate;

2) Intentionally and deliberately making false statements or representations; or

3) Intentionally coercing another to participate in cartel activity.

---

[40] *See* European Commission, Green Paper: Damages Actions for Breach of the E.C. Antitrust Rules, (December 2005), http://europa.eu.int/eur-lex/lex/LexUriServ/site/en/com/2005/com2005_0672en01.pdf.

These three factors are sufficient to protect against abuse of the Immunity Program and unfairness to non-immunity candidates. Only evidence of one or a combination of these factors should lead the Bureau to recommend to the Attorney-General that amnesty be revoked.

The Bureau should be especially cautious about exercising its discretion to recommend revocation if a candidate's cooperation either (a) occurred before the Bureau commences its own investigation or (b) helped lead the Bureau to the discovery of other important evidence.[41] In such circumstances, even difficult amnesty candidates will have meaningfully advanced the Bureau's investigatory objectives. Moreover, revocation after self-reporting gives the appearance that enforcement authorities are trying to have their proverbial cake and eat it too. It is abundantly clear that the Bureau — as well as all enforcement authorities — understands and appreciates these issues and will be extremely prudent in its application.

Adopting additional grounds for revocation will likely undermine confidence in the Immunity Program, especially among the business executives who must make the corporate decisions. For example, and as described in greater detail below, a company cannot force its officers, directors, and employees to cooperate with the Bureau. Rather, the applicant should be required only to use good-faith efforts to facilitate and encourage cooperation by its personnel. Revocation should be the Bureau's remedy only where the company is not making a good-faith effort, leading to a conclusion that, along with other aspects of the company's cooperation, it is not providing meaningful assistance.

Importantly, a company should not be required to disclose illegal conduct unrelated to the immunity application, even if that conduct may violate other provisions of the *Competition Act*. A company's failure to disclose other anticompetitive conduct can and should be resolved through a "penalty plus" program, as addressed in Part 5 above.

Other antitrust authorities do not require the disclosure of other criminal activity as part of the amnesty process, but rather use different techniques to uncover other *antitrust* offenses. For example, the Antitrust Division commonly poses an "omnibus question" at the conclusion of interviews, asking whether the individual is aware of other anticompetitive conduct. If the individual discloses new conduct in response to the "omnibus question," the Division retains discretion to either allow the company to investigate such conduct and seek amnesty or apply the provisions of the "penalty plus" policy, depending on the surrounding circumstances.[42] In this way, other anticompetitive conduct can be effectively discovered and punished without requiring the company to report other offenses as a condition of retaining immunity.

---

[41] This restriction is consistent with the administration of the Division's Corporate Leniency Program, which imposes higher standards on a company if its cooperation is delayed and the Division's case becomes independently stronger. *See* United States Department of Justice Antitrust Division, Corporate Leniency Policy (August 1993) at 3, http://www.usdoj.gov/atr/public/guidelines/0091.htm.

[42] Retaining such discretion is important, as the company may have used good faith efforts to learn about other conduct, only to have faced recalcitrant employees who disclose only when asked a direct question by the Bureau. In such situations, the company should not be punished for the individual's decision to withhold, which the company had no way to detect or prevent.

A policy that requires the disclosure of unrelated illegal activity (i.e., activity other than antitrust-related offenses) will create a powerful incentive for companies to refrain from seeking amnesty for antitrust offenses. Other criminal violations are, in Canada and other jurisdictions, not eligible for immunity protection. Indeed, U.S. authorities, including the Department of Justice and the Securities Exchange Commission, retain discretion to prosecute/sue a company even for offenses it self-reports (although such self-reporting is a factor in favor of nonprosecution).[43] If reporting other crimes becomes part of the "admission price" for immunity, corporate officers attempting to discharge their fiduciary obligations would face a Hobson's choice: (a) report antitrust offenses and risk prosecution for other offenses, which they could otherwise correct and remediate, or (b) forgo the benefits of the Immunity Program, and hope authorities do not learn of the conduct, while protecting the company against certain prosecution for the other unrelated offenses. Such a decision could not be undertaken lightly, and even a considered decision would leave the company vulnerable to unforeseeable consequences. For this reason, other antitrust authorities, including the Division, do not require a company to face such a choice. The Section respectfully submits that the Bureau not require such reporting as a condition of retaining immunity.

(b) Quantitative Analysis: How much evidence?

Stringent standards, based on evidentiary findings are required for transparent revocation decisions. The same standards used to evaluate the underlying antitrust conduct should be used to assess a breach of the terms of immunity agreements: both should be proven by clear evidence about the transgression alleged. Authorities should be especially careful in the context of revocation based on the coercion of other cartel members. The "ringleader" provisions of many leniency programs create powerful incentives for companies toward the back of the immunity line to cry "coercion", especially where their participation was reluctant or half-hearted, although not truly coerced.

7.2 Are there limits to a company's ability to secure the cooperation of its officers, directors, and employees that should be recognized by the Bureau?

Although the immunity decision is a corporate act, a corporation cannot force employees to cooperate. The Bureau should expect strong and meaningful incentives and encouragement by the company as a condition of its immunity. That encouragement could, in limited cases (if available under the applicable labor and employment laws), include termination of an employee for failing to cooperate in the face of clear evidence that the employee has broken the law. Many companies cannot, however, threaten to suspend payment of legal fees for the non-cooperating individual, even if that person is charged with a crime. (Many state statutes in the United States require advancement of legal fees and indemnification of officers and directors is a common element of corporate by-laws for many public and private companies.)

---

[43] *See* United States Department of Justice, Memorandum of Larry D. Thompson, Principles of Federal Prosecutions of Business Organizations (January 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm; Tim Reason, *The Limits of Mercy: The cost of cooperating with the SE.C. is high; the cost of not cooperating is even higher* CFO MAGAZINE, Apr. 1, 2005, http://www.cfo.com/article.cfm/3804652.

For this very reason, the Antitrust Division has not, and does not, require companies to suspend advancement of legal fees for non-cooperating employees as a condition of amnesty, nor does it require termination in all cases. Indeed, the Division's decision in Stolt-Nielsen, as the Bureau is aware, had nothing whatever to do with Stolt's failure to encourage cooperation by employees. The Section is not aware of the Division ever revoking a marker or dispelling an amnesty holder for failing to take action against the applicant's employees.

7.3 How should the Bureau treat individuals covered by an immunity agreement between the Attorney General and their company where the company's immunity agreement is revoked?

The answer to this question depends on (a) whether the individual has cooperated with the Bureau in the investigation, (b) whether the individual continues to cooperate with the Bureau's investigation despite the company's breach of its obligations, (c) the strength of the Bureau's case against the individual, and (d) the gravity of the conduct at issue. If the individual was involved in hardcore cartel activity and failed to meaningfully cooperate or obstructed the Bureau's investigation, contributing to the decision to revoke corporate amnesty, it may be appropriate to refer that individual to the Attorney-General for prosecution.

However, individuals can continue to assist the Bureau in a meaningful way even where their employer has suffered a revocation of immunity. The individual's cooperation will often be a source of direct evidence against other cartel members, and also of derivative benefit against its employer when another corporate immunity applicant comes forward. Furthermore, immunity is personal to the individual employee, and therefore even where the individual enjoys derivative immunity via the company's application, that individual immunity should not be revoked unless the individual is personally at fault for failing to cooperate with the Bureau's investigation.

7.4 What procedural steps should the Bureau follow before making a recommendation for the revocation of immunity?

Before making a recommendation for the revocation of immunity, Bureau staff should be required to show that they made good-faith efforts with the immunity holder to resolve the conduct at issue. If the charge is lack of meaningful cooperation, the staff should provide clear notice of the deficiency and provide meaningful opportunity for redress. If the charge is coercion of other cartel members, the immunity holder/applicant should be permitted — once meaningful notice of the nature and source of coercion evidence is given — to demonstrate contrary evidence.

If the company lawyer in charge of co-operating with the investigation fails to respond appropriately or in a timely fashion to this notice, the Bureau should notify the company's Lead Independent director that revocation of amnesty may follow from a failure to immediately rectify the conduct. In the Section's experience, such action can be extremely effective. In two recent cases in the United States, in-house corporate counsel placed restraints on an internal investigation that hampered the collection of evidence and prevented prompt disclosure to enforcement authorities. In both cases, notice was elevated to the Board, which took prompt action to replace counsel and restore cooperation. Both companies, and their innocent

employees and shareholders, were the beneficiaries of that notice, which saved the companies from certain prosecution and all collateral consequences.

If the Bureau elects to proceed with a revocation decision, the Company should be provided with a meaningful opportunity to argue its case to the Attorney-General. This is precisely the mechanism used by the Antitrust Division, which uniformly provides a hearing before the final arbiters on such significant decisions. Only with a full and fair hearing of the issues, and an opportunity to respond to the allegations, will amnesty candidates have confidence that there is a real avenue of redress for decisions it believes are incorrect, leading to greater transparency and confidence in the process, and thus a more successful Immunity Program.

7.5 Are there any other concerns the Bureau should be aware of in respect of its investigation or prosecution of applicants whose immunity has been revoked?

In light of the issues outlined in these consultation questions, it appears clear that the Bureau understands the enormous impact that revocation can have on a company and its affiliates. Accordingly, anything but a very delicate handling of revocation decisions can have a severe and long-lasting impact on the Immunity Program, which has been a centerpiece of the Bureau's recent and widely-recognized successes.

Central to the effective handling of revocation is the avoidance of any perception that the Bureau can or will use evidence of the immunity holder/applicant, including evidence from its employees, against it after revocation -- except in extraordinary circumstances. "Revocation" can occur in two settings: (1) failure of the applicant to perfect a marker; and (2) removal of the applicant from the program for cause after the issuance of a provisional guarantee of immunity. In light of the increase in immunity applications, decisions to revoke immunity "markers" have become more common, and the incidence of revocation may also increase. If such a trend develops, potential amnesty candidates will have dampened enthusiasm for any program through which its own evidence could be used against it. This may happen if an amnesty candidate discloses anticompetitive conduct before any other notice to the Bureau. If a marker then expires, but the Bureau uses the evidence even indirectly to try to solicit cooperation from others, confidence in the Bureau's Program will be lost. The Bureau should continue its policy of refraining from using any evidence provided by a "marker-holder" against that entity where the marker is not perfected.

Even where revocation occurs for cause after the issuance of a provisional guarantee of immunity, the Bureau should disavow the use of evidence provided by the immunity applicant directly against the applicant except in extraordinary circumstances, i.e., where there is compelling evidence that the applicant knowingly made affirmative misrepresentations regarding its qualification for immunity or the facts of the matter under investigation. Agreeing not to use the applicant's evidence against it in all but these limited circumstances will cause no "unfairness" to the Bureau. Indeed, in large cartel investigations, multiple candidates for amnesty have traditionally come forward, a circumstances often touted by the Bureau as a reason for prompt action. The evidence provided by others - whether cooperating pursuant to a plea agreement or through taking the place of the revoked immunity applicant - likely would be more than sufficient to convict the revoked immunity applicant. Although the Bureau would endure little hardship in adopting such a position, the benefits could be substantial. Potential amnesty

candidates will undoubtedly have greater confidence in the good faith application of the Bureau's program knowing that, except in cases of its own demonstrable malfeasance, the evidence it provides the Bureau will not be used directly against it should the provisional guarantee of immunity be revoked despite its best efforts to cooperate. Indeed, such confidence could make significant difference in the company's decision to cooperate.

Therefore, for the greater good of the program, the Bureau should reaffirm its commitment to eschew the use of evidence provided by a failed immunity applicant, except in the extraordinary circumstances noted above, thus bolstering confidence in the fairness and transparency of the program.

8. Creation of a Formal Leniency Program

An essential element of any successful immunity program is to provide a clear incentive for early cooperation. Other things being equal, the earlier a party comes forward to resolve its exposure, the more advantageous its treatment should be. Sentencing policy recognizes the legitimacy of imposing a lower sentence for a party that cooperates at an early juncture and thus limits or lowers the societal and administrative costs of law enforcement. While the practice of the Competition Bureau recognizes this principle, the articulation and application of its policy is ambiguous. Significant room exists for clarifying the guiding principles the Bureau employs in leniency cases, and the range of penalties that the Bureau will seek.

It would markedly assist the decision to cooperate if the Competition Bureau made its policy absolutely clear that a cartel participant that agrees to resolve its exposure to prosecution should receive materially better treatment than *any* similarly situated later party. This principle maintains the important incentive of inducing a party to withdraw from economically destructive behavior, to cooperate in the investigation and prosecution of other culpable parties, and to facilitate cost-effective and efficient investigative and prosecutorial outcomes for the settling party. Most, though not all, of the outcomes of the Bureau's past investigations were demonstrably predicated on this principle. These dispositions involved more lenient treatment of individuals associated with the earliest party to plead, as well as notably lower fines, expressed as a proportion of sales for that party. But not all cases exemplify the principle of better treatment for early settlement. Ambiguous cases include the resolution of the Vitamins cartel and the recent Carbonless Paper and Rubber Chemicals investigations. In Carbonless Paper,[44] the accused companies pled guilty and paid the maximum $10 million fine for their conduct in Ontario (as well as an additional $2.5 million each on separate counts charged respecting Quebec); in Rubber Chemicals,[45] Crompton Corporation — a cooperating party — paid $9 million, nearly the statutory maximum. While there were doubtless other considerations in those

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

[45] *See* Competition Bureau, News Release, "Crompton Corporation Fined $9 million for Role in Rubber Chemicals Cartel" (May 28, 2004), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=265&lg=e.

cases, they tend, without clear explanations, to weaken the pressure to be early, if a party cannot be first.

All parties would benefit from the Bureau clarifying its policy on this issue. Although the decision as to a sentencing submission is the Attorney-General's, and there are numerous sentencing factors that may affect the exercise of the discretion of the Attorney-General and members of the Federal Prosecution Service, the Bureau's policy should clarify its approach in recommending penalties to the Attorney-General. It would be constructive for the Bureau and the Attorney-General to articulate clearly that the earlier a party comes forward to resolve its exposure, the better the treatment that it and individuals associated with it can expect to receive, relative to those who remain.

CONSULTATION QUESTIONS

8.1 When should leniency be available and under what terms?

Immunity should be available to the earliest party to come forward to settle its liability and cooperate, where cooperation provides valuable assistance to the investigation or prosecution of other cartel members. Immunity is available to only one corporate entity. Leniency — meaning generally a guilty plea and cooperation in exchange for a reduced sentence — should be available, with the range of penalties generally increasing with the passage of time and with little or no leniency shown to the last participants to settle.

The absence of any formal standards for sentencing in Canada analogous to the U.S. Sentencing Guidelines creates some difficulty in understanding what a "standard" penalty might be. As noted above, the range of penalties imposed on parties who plead guilty has varied considerably in recent years. There have also been occasional instances where settling parties do not pay "fines", but have instead made ostensibly voluntary charitable donations totalling very large sums.[46] The Bureau should develop advisory criteria for determining appropriate penalty levels, to give greater clarity and predictability to the process and provide incentives for potential co-operating parties to come forward. Any such criteria could incorporate, for example, reference to the volume of commerce affected by an illegal agreement as one means of providing greater clarity.

8.2 What criteria should be considered in determining the degree of leniency recommended by the Bureau to the Attorney General?

The timeliness of a party's cooperation should be the principal criterion considered by the Bureau, as it complements the "first-in" nature of the Immunity Program. The Consultation Paper identifies other useful, objective criteria including:

---

[46] *See, e.g.*, the $2.3 million in "voluntary donations … to several charitable organizations across Canada" made by Toyota in resolving criminal allegations of price maintenance made by the Bureau in 2003: Competition Bureau, News Release, "Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program" (March 28, 2003), http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=300&lg=e.

- the nature and extent of the party's involvement in the offense;
- the seriousness of the offense;
- the importance and reliability of the party's testimony or co-operation;
- the strength of the case against the party;
- the party's history of co-operation and compliance with the *Competition Act*; and
- the impact of leniency on the protection of the public.

As noted in the response to Question 8.1 above, the Bureau would add a reference to the volume of affected commerce, which is common practice in the U.S. and the E.U.

8.3 Under what circumstances, and based on what incentives, would a party be most likely to co-operate with the Bureau in return for leniency?

Obviously, the greater the incentives — in this instance, access to reduced fines and/or jail time — the more likely a party will be to co-operate with the Bureau. Furthermore, as noted above, where the outcome of a program is relatively clear and predictable, one can expect a greater volume of applications for pleas.

8.4 How should different levels of incentives for co-operating parties be approached?

Any program will provide different sentencing reductions, based on the objective criteria — such as those suggested in the response to Question 8.2 above — applied. However, the guiding principle in determining incentives should be to encourage and reward parties for coming forward early.

9. Pro-Active Immunity

The Consultation Paper indicates that the Competition Bureau does not ordinarily reach out pro-actively to potential immunity applicants in cartel cases, but that it may advise potential targets of the existence of its Immunity Program from time to time. Based on certain public comments of the Australian Competition and Consumer Commission ("ACCC"), the Bureau has raised the issue of pro-active (or, as the ACCC describes it, "affirmative") immunity. The United States has employed a similar policy when it has occasionally informed a party about a suspected cartel and provided the party with the possibility of leniency before the investigation begins. The Antitrust Division has limited this policy to companies that have previously cooperated with it in other matters.[47] The Antitrust Division has also, on occasion, attached a copy of its leniency

[47] Scott D. Hammond, Deputy Assistant Attorney General, Antitrust Division, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, March 29, 2006.

policy to grand jury subpoenas to make certain the parties in the investigation know what it provides.

The ACCC's policy is more specific. It has indicated that "where [it] has information that leads it to suspect that certain persons have engaged in, or may be engaged in, cartel conduct, the ACCC may at its discretion, approach any one or more of those persons and inform them of its immunity policy and encourage them to apply."[48] The ACCC's position appears to be influenced by its understanding that "the [U.S.] DOJ and Canadian Competition Bureau approach alleged cartel participants inviting them to enter their leniency program and report some success in this."[49] This latter statement may, to some degree, be at odds with the Bureau's statement in the Consultation Paper that "the Bureau does not typically seek out potential immunity applicants in cartel cases", although it does do so in deceptive marketing cases.[50] As further addressed below, there may be serious fairness concerns where the Bureau proactively approaches a suspected cartel participant, thereby allowing that firm to win the race for immunity. Whether such concerns are substantively accurate or not, even the appearance of bias or partiality may do harm to the Bureau's image and the reputation for fairness of the Immunity Program.

One solution may be for the Bureau to simply expand its already visible efforts to publicize and promote the existence of the Immunity Program, and leave it to the cartel participants themselves to come forward. Given the unprecedented number of active cartel investigations and sitting grand juries in the United States — and presumably similarly high levels of enforcement activity in Canada —is far from certain that there is a proven need to embark upon a pro-active Immunity Program.

CONSULTATION QUESTIONS

9.1 Should the Bureau consider initiating approaches to potential immunity applicants during the course of an investigation if it has some reason to believe that a party might be eligible to apply under the Program? If your answer is 'yes", under what circumstances should such an approach be made?

This question presents what is effectively a case management decision for the Bureau, which may decide in a particular case that the circumstances justify such an initiative. Presumably, the Bureau would take affirmative steps to alert a potential applicant of the availability of the Immunity Program in circumstances where the Bureau has insufficient evidence to proceed in Canada. If the Bureau investigation is not public, such disclosure might

---

[48] Australian Competition and Consumer Commission, Immunity Policy Interpretation Guidelines (August 2005) at para. 39, http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=file43fcda2cb888c&fn=Immunity%20policy%20interpretation%20guidelines.pdf.

[49] Australian Competition and Consumer Commission, Leniency Policy Review Position Paper (August 2005) at para. 125, http://www.accc.gov.au/content/item.phtml?itemId=706268&nodeId=file43fcda2cc99fb&fn=Leniency%20position%20paper.pdf.

[50] *Supra* note 1 at 35.

have a prejudicial effect on the investigation, if the party chose not to apply. Such an approach might be more successfully be made where a party has, to the knowledge of the Bureau, sought amnesty or leniency in another jurisdiction, but has not yet come forward in Canada, or already is cooperating with the Bureau, pursuant to an amnesty application or plea agreement, in the investigation of another product.

9.2 Do matters of fairness arise with respect to which parties the Bureau may choose to approach or when it chooses to make the approach? How should they be addressed?

Issues of fairness may arise where the Bureau pro-actively approaches a certain potential immunity applicant, as opposed to inviting all parties that are not the ring leader or coercer. Even where substantive fairness concerns do not exist, the mere appearance of selectively choosing one potential applicant over others may create the appearance of bias or unfairness. In any event, the Section is concerned about the Bureau's choosing a candidate to qualify for immunity. Any such approach should be limited to notifying the party of the existence of the Immunity Program.

If the Bureau adopts a pro-active immunity policy, the fairness concerns could perhaps be mitigated to some extent by publishing clear guidelines as to how it would typically select the target(s) of its pro-active approach (e.g., would the Bureau prefer the smallest or fringe players in the cartel, would the Bureau consider the parties' history of compliance with the *Competition Act*, etc.), thus limiting the degree of subjectivity in the Bureau's choice.

9.3 If a party requests a marker, is denied because it is not first-in and then decides not to co-operate further, should the Bureau subsequently contact that party if the first-in application fails?

Yes. On the facts of this question, the sole reason that the party is denied a marker is the prior application of an earlier party. If the earlier party's application fails, the second party should be given an opportunity to apply.

However, the question does not address other, more troubling circumstances, for example the case where a party seeking a marker identifies the specific product market, as is required. The applicant then fails to perfect the marker, either because it cannot substantiate all the elements of the Canadian offense, or because it fails to meet the Bureau's 30 day requirement for perfection. The requirement for product specificity exposes the marker-seeker to the risk that the Bureau might ascertain the identity of and invite another potential cartel participant to come forward, to the prejudice of the original applicant. Such a situation would clearly raise significant fairness concerns, which would be further exacerbated by the Bureau's strict 30-day deadline.