



Competition Bureau
Canada

Bureau de la concurrence
Canada

**IMMUNITY PROGRAM REVIEW
CONSULTATION PAPER**

ERRATUM

COMPETITION BUREAU

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Canada 

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I. INTRODUCTION

In Canada, as in other countries, cartels have been a part of the economic landscape for as long as there has been competition. In the 1990's competition authorities around the world began a concerted effort to detect and pursue large numbers of both international and domestic cartels¹. The use of immunity² programs in many jurisdictions has been critical to successful investigation and prosecution. Increased international co-operation, facilitated by treaties and agreements allowing for mutual legal assistance, information sharing and coordination of investigations, has further contributed to enforcement measures.

The Competition Bureau (the “Bureau”) formally launched its current Immunity Program³ (the “Program”) in September 2000. The 2000 Program revised and expanded the “Co-operating Parties” program that had been in place since 1991⁴ and revised in 1994⁵. The Bureau received

¹The term “cartel” includes the offences of conspiracy (e.g. price-fixing and market sharing) and bid-rigging, as defined in sections 45 through 49 of the *Competition Act*, *infra*, note 6.

²Foreign competition authorities use the words immunity, amnesty and leniency to denote the same or related concepts. Throughout this paper immunity is used to describe a full non-prosecution agreement, as the term is used by the Competition Bureau. When describing other agencies’ programs, the paper uses the terminology of the respective agency.

³Competition Bureau, “Information Bulletin: Immunity Program under the Competition Act”, Sept., 2000, online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1389&lg=e>.

⁴Competition 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>. The 1991 program was not available for individuals or for applications received after an offence was detected by the Bureau.

⁵Competition Bureau, Remarks of H. Chandler, “Getting Down to Business, the Strategic Direction of Criminal Competition Law Enforcement in Canada” (Insight and 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>. The 2000 Bulletin eliminated criteria for immunity from the 1994 version including: that the evidence provided by the person be important and valuable; that a prior record of anti-trust violations by the applicant would be a significant factor in deciding whether the Bureau would recommend immunity to the Attorney General; that the applicant should be prepared to consent to the issuance of a prohibition order under section 34(2) of the *Act*; and that the role of the person in the conduct in question will also be considered. It also guaranteed a recommendation of immunity where all criteria were met, something that had remained discretionary in the 1994 version for any applications made after the start of a Bureau investigation.

over thirty-five immunity applications relating to well over forty products in the following five years, a rate almost double that of the previous ten years. The Program is one of the Bureau's most effective tools for detecting and investigating criminal activity prohibited by the *Competition Act*⁶ (the "Act"). Under the Program, immunity is available for all criminal competition offences including conspiracy, price maintenance, and false or misleading representations and deceptive marketing practices. Both business enterprises⁷ and individuals can apply under the Program to report their criminal activities and eliminate their criminal liability under the Act.

The Bureau published Frequently Asked Questions⁸ relating to the Program on the Bureau Web site in November 2003 in an effort to clarify how the Program would be applied in certain circumstances. A revised and expanded "Responses to Frequently Asked Questions" document⁹ (the "Responses") was published in October 2005 as part of the Commissioner's Immunity Review. The Responses provide a step-by-step guide for potential applicants on how the Bureau will handle an immunity application.

II. PURPOSE OF CONSULTATION

The Bureau has gained considerable experience from using the Program in a broad range of cases over the past five years. During that time, questions have arisen with respect to how certain aspects of the Program operate and how the Program can continue to function at levels of optimal effectiveness. The Bureau has also had the opportunity to learn from those experienced in representing immunity applicants and from its international counterparts. It now seeks input

⁶*Competition Act*, R.S. C. 2985, c. C-34, online:
<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=148&lg=e>.

⁷*Supra*, note 3. The Program provides in paragraph 8 that "The terms firm, company and corporation are used interchangeably to denote a business enterprise".

⁸Competition Bureau, "Immunity Program: Frequently Asked Questions", 2003.

⁹Competition Bureau, "Immunity Program: 'Responses to Frequently Asked Questions'", Oct. 17, 2005, online: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&lg=e>.

from all stakeholders with a view to informing its decisions on how to best address how the Program provisions will be applied, the rights and obligations of immunity applicants, and related process matters. The goal is to ensure the Program's optimum contribution to the detection, investigation and prosecution of criminal offences under the Act.

An effective program must provide certainty, clarity and priority for immunity applicants. As stated by the OECD, "...firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximize the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal', but also that the terms of the deal be as clear as possible at the outset."¹⁰ In pursuing these goals the Bureau seeks to ensure the Program is generally in step with the approaches taken by competition authorities in other jurisdictions, while bearing in mind the differences in legal systems. Policy convergence will assist applicants seeking immunity in multiple jurisdictions and facilitate co-operation and coordination among competition authorities. It is particularly relevant in respect of the United States (the "U.S."), given geographic proximity and market integration.

Topics identified for discussion have been chosen based on the Bureau's experience in dealing with immunity cases, the commentary from counsel experienced in representing immunity applicants and the experience of other competition authorities. They are complex matters that can be expected to be of continued and increasing relevance to the Program for the foreseeable future. The impact that resolution of these matters may have on a potential immunity applicant's incentive to approach the Bureau, as well as the implications of their resolution to international enforcement, make public consultation on these items particularly pertinent. The Bureau wishes to consult on the following topics:

1. confidentiality,
2. oral applications - the paperless process,
3. role in the offence,
4. coverage of directors, officers and employees,

¹⁰OECD, Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, "Report on Leniency Programmes to Fight Hard Core Cartels", DAFPE/CLP(2001)13, at 2.

5. “penalty plus”,
6. restitution,
7. revocation of immunity,
8. creation of a formal leniency program, and
9. pro-active immunity.

Stakeholders are encouraged to address any additional matters they consider relevant to the review of the Program. Input is requested by May 10, 2006; details on making submissions are provided at the end of this document. The Bureau will make stakeholder submissions available to the public on the Bureau Web site unless confidentiality is specifically requested.

III. BACKGROUND

A. The Current Program

The Bureau’s enforcement responsibilities include the investigation of activities prohibited under the criminal provisions of the Act. The criminal offences include conspiracy (e.g. price fixing, market sharing), bid-rigging, price maintenance, false or misleading representations and deceptive marketing practices. They are outlined in Program Appendices 1 and 2¹¹. The Bureau investigates suspected criminal activity and, in appropriate cases, recommends prosecution of alleged offenders by the Attorney General of Canada (the “Attorney General”). When an immunity applicant meets all Program eligibility criteria, the Bureau will recommend that the Attorney General grant immunity from prosecution. The Attorney General independently considers if the interests of the public are best served by granting immunity.¹²

Individuals and business enterprises are encouraged to approach the Bureau as soon as they believe they may have been involved in a criminal competition offence under the Act. An

¹¹*Supra*, note 3.

¹²Refer to the Federal Prosecution Service Deskbook, Department of Justice Canada, particularly Part 7, Chapter 35, “Immunity Agreements”, online: <http://canada.justice.gc.ca/en/dept/pub/fps/fpd/>. Model PGIs and Immunity Agreements, revised in 2005, are available on request, from the Competition Law Division of the Department of Justice at (819) 956-4157.

applicant will be eligible for immunity where it is the first party to disclose an offence and the Bureau is unaware of the offence, or where the Bureau is aware of the offence but has insufficient evidence to refer the matter to the Attorney General for prosecution. An applicant must also meet all other Program criteria¹³. It must disclose an offence under the Act; the Bureau will not recommend that the Attorney General grant immunity if there is insufficient evidence that an offence under the Act occurred.¹⁴ It must take effective steps to terminate its participation in the illegal activity. It must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada. It must provide complete and timely co-operation with the Bureau throughout the Bureau's investigation and any subsequent prosecutions. Where possible, the applicant will make restitution for the illegal activity. Immunity may be refused or revoked if any or all of these conditions are not met.

The four steps in the immunity process are set out in Part E of the Program. On its initial contact with the Bureau, an applicant will typically seek a "marker" for the conduct in question. This is done by identifying the product or service that is the subject of the offence so that the Bureau may determine whether the applicant is the "first-in". The applicant's legal representative typically identifies the type of illegal conduct concerned and provides the required product or service information on a hypothetical basis. If the applicant is "first-in" it will be given a marker that guarantees its place at the front of the line for immunity from prosecution for the identified conduct in respect of the specified product or service.

After receiving a marker, the applicant typically has 30 days to provide the Bureau with a detailed description of the illegal activity and the nature of the evidence available (a "proffer"), usually on a hypothetical basis through its legal representative. Where it appears that there has been an offence under the Act, and all other requirements of the Program are met, the Bureau will present its assessment of the applicant's information to the Attorney General and recommend that the Attorney General grant a written provisional guarantee of immunity ("PGI")

¹³*Supra*, note 3, Part C.

¹⁴*Supra*, note 9, response to question 8.

to the applicant. The Attorney General makes the final decision on whether or not to provide a PGI, independent of the Bureau.

If the PGI is granted, the applicant is required to fully disclose to the Bureau all evidence and information known or available to it in respect of the identified conduct for which immunity is sought, as well as any other criminal competition offences under the Act in which it has participated.¹⁵ The Bureau will interview witnesses and review all of the applicant's relevant documents.

If the Bureau is satisfied with the extent of the disclosure, and that all other Program requirements are met, it will make a recommendation that the Attorney General enter into an immunity agreement with the applicant. The Attorney General makes the final, independent decision on whether to enter into the immunity agreement.

B. The International Context

The wave of cartel cases since the early 1990's involving immunity applicants was initially fuelled by the 1993 revisions to the U.S. Department of Justice Antitrust Division ("U.S. DOJ") Corporate Leniency Policy.¹⁶ The revised U.S. DOJ policy generated an overwhelmingly positive response in terms of the number of applications received leading to the successful completion of investigations and prosecutions. The impact of the 1993 revisions to the U.S. DOJ policy encouraged Canada's adoption of a similar approach in 1994, likewise with positive results. The European Commission ("EC") issued its leniency program in 1996,¹⁷ later revising

¹⁵*Supra* note 9, at question 30. As further stated in the response to question 30, applicants should 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.

¹⁶United States Department of Justice, "Corporate Leniency Policy" (1993), online: <http://www.usdoj.gov/atr/public/guidelines/0091.htm> and United States Department of Justice, "Leniency Policy for Individuals" (1994), online: <http://www.usdoj.gov/atr/public/guidelines/0092.htm>.

¹⁷European Commission, "Commission Notice on the non-imposition or reduction of fines in cartel cases" (96/C207/04) (1996) OJ C 207 of 18.07.1996, online: http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html.

it in 2002,¹⁸ in an effort to increase the transparency and certainty surrounding conditions under which any reduction in its fines would be granted to an immunity applicant. The United Kingdom Office of Fair Trading (“OFT”) recently published an interim note on the handling of applications¹⁹ under its existing published leniency and no-action policies²⁰ and has indicated that it will publish a finalized guidance note in due course, after further consultation. The Australian Corporate and Consumer Commission (“ACCC”) implemented a leniency program²¹ in 2003, conducted a review of that program in 2004²² and issued an updated policy²³ in August, 2005. Many other competition authorities have taken similar measures.

This paper provides background information on the policies of the U.S. DOJ, the EC, the OFT and the ACCC, in an effort to benchmark our own Program and provide possible options for consideration. Readers should understand that this information is based on the Bureau’s understanding of how those policies operate and cannot be relied upon in dealings with the

¹⁸European Commission, “Commission Notice on immunity from fines and reduction of fines in cartel cases” (2002/C45/03)” (2002) OJ C 45 19.2.2002, online: http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf.

¹⁹U.K. Office of Fair Trading, “Leniency and no-action: OFT’s interim note on the handling of applications”, (OFT 803, July 2005), online: <http://www.oft.gov.uk/NR/rdonlyres/FE4F98BF-D8C5-48FB-9F7E-D6133F907538/0/oft803.pdf>.

²⁰See OFT, “Leniency in cartel cases - A guide to the leniency programme for cartels” (2005), online: <http://www.oft.gov.uk/NR/rdonlyres/CC73E8F4-2433-48C4-A3BC-5F3255C58AAF/0/oft436.pdf>; “OFT’s Guidance as to the appropriate amount of a Penalty” (OFT 423, December 2004), online: <http://www.oft.gov.uk/NR/rdonlyres/4546166B-0413-45E4-8C8F-208CC3CDC325/0/OFT423.pdf>; and “Guidance on the issue of No-action letters for individuals” (OFT 513, March 2003), online: <http://www.oft.gov.uk/NR/rdonlyres/C6B72EDF-EA6A-42F4-9F44-E8FED8268458/0/oft513.pdf>.

²¹ACCC, “ACCC leniency policy for cartel conduct”, (June 2003) online: <http://www.accc.gov.au/content/item.phtml?itemId=454181&nodeId=file42377fc4d150e&fn=ACCC%20leniency%20policy%20for%20cartel%20conduct%20June%202003.pdf>.

²²ACCC, “Discussion Paper: Review of the ACCC’s leniency policy for cartel conduct” (November 2005) online: <http://www.accc.gov.au/content/item.phtml?itemId=529200&nodeId=file42e5bc1a9929f&fn=Leniency%20Discussion%20Paper.pdf>.

²³ACCC, “ACCC Immunity Policy for Cartel Conduct”, (26 August 2005), online: <http://www.accc.gov.au/content/item.phtml?itemId=708758&nodeId=file433367d182d4e&fn=Immunity%20policy.pdf>, and ACCC, “ACCC Immunity Policy Interpretation Guidelines” (26 August 2005), online: <http://www.accc.gov.au/content/index.phtml/itemId/619168>

respective competition authorities. Readers should refer to the competition authorities directly for confirmation of how their policies operate and any rights and obligations they may have under those policies.

Cartel activity, effective enforcement, and the role of immunity programs, has also been the subject of study and concerted policy-making among foreign competition authorities and international organizations, particularly the Organization for Economic Co-operation and Development (“OECD”) and the International Competition Network (“ICN”). Recent work in some countries has also focussed on the criminalization of hard-core cartels²⁴ and the adequacy of current sanctions, whether civil or criminal, for those involved in cartel activity²⁵. Without adequate enforcement regimes, and the corresponding fear by participants in illegal activity that they will be caught, there will be little or no incentive for participants to seek immunity.

²⁴Some countries, including Canada, the US, Japan, France, Germany (for bid-rigging only), the U.K. (for individuals only) Ireland, Israel and Mexico treat cartels as criminal. Japan’s *Antimonopoly Act* amendments of 2005 expanded the Japan Fair Trade Commission’s criminal investigation power in an effort to make the criminal regime more effective. In 2005 the Australian Government proposed amendments to its *Trade Practices Act* to criminalize cartel conduct.

²⁵For example, the 2004 US *Antitrust Criminal Penalty Enhancement and Reform Act* increased the fine for violating sections 1, 2 or 3 of the *Sherman Act* from \$10 million to \$100 million US for a corporation and from \$350,000 to \$1 million US for individuals. The maximum jail time increased from 3 to 10 years. In the UK, the *Enterprise Act 2002* provides for the imprisonment of up to five years and /or unlimited fining of individuals guilty of hard core cartel offences. Japan’s 2005 *Antimonopoly Act* amendments increased the range of anti-competitive activities to which surcharges apply as well as the amounts of those surcharges. The 2005 proposed amendments to the Australian *Trade Practices Act* include criminalizing cartel conduct.

IV. TOPICS FOR CONSULTATION

1. Confidentiality

The Program requires that the Bureau treat as confidential the identity of a party requesting immunity and any information obtained from that party²⁶. The only exceptions to this policy are the following:

- (a) when there has been public disclosure of the information by the party;
- (b) when the party has agreed and the disclosure is for the purpose of the administration and enforcement of the Act;
- (c) when disclosure is required by law; and
- (d) when disclosure is necessary to prevent the commission of a serious criminal offence.

This protection is an added benefit to being first-in under the Program. The Bureau's confidentiality assurances allow immunity applicants to come forward without fear that their identity and the information they provide will be made available to the general public, other Canadian law enforcement agencies or foreign law enforcement agencies²⁷.

Applicants generally seek to obtain immunity from competition authorities in all jurisdictions where they have exposure. The confidentiality guarantee provides them with time to make those applications. Where the applicants choose not to approach the competition authorities in foreign jurisdictions, the guarantee assures them that the Bureau will not disclose their identity and information provided without their consent. The Bureau's confidentiality policy also reduces the risk to applicants of commercial retaliation and ensures that other participants in the alleged offence remain unaware of the investigation, and particularly, of any planned searches.

²⁶*Supra*, note 3, Part H.

²⁷Without these assurances of confidentiality such disclosure could occur under section 29 of the Act for "the administration or enforcement of the Act".

The Bureau routinely requests waivers from immunity applicants allowing it to share information received from the applicant with foreign competition authorities. Applicants are generally willing to provide such waivers for jurisdictions where they have also sought and obtained a “marker” or some form of leniency. Waivers can assist competition authorities in coordinating investigations and support more timely and efficient resolution of the case in question, benefiting both enforcement authorities and the applicant.

It 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. An immunity applicant can be considered a “confidential informant” for a period of time, or until a certain factual situation arises at which time it will be necessary for the applicant to waive his or her confidential status. The Bureau and the Attorney General will take every appropriate measure to protect the identity, except as required by law, while the applicant has the confidential informant status.

The typical immunity applicant will remain a confidential informant until charges against other participants are laid or if disclosure of the applicant’s identity is required by a court in a judicial proceeding. Generally, applicants will have agreed, as part of their immunity agreement, to waive their confidential informant status when charges are laid. The Bureau and the Attorney General have a practice of advising applicants that an immunity agreement will require a waiver of their informant privilege during the judicial process, as described above. The objectives of the Program cannot be achieved unless immunity applicants co-operate fully and agree to testify when requested.

The Program’s confidentiality provisions pose challenges to the Bureau’s flexibility in pursuing investigations. Court documents, including Informations to Obtain (“ITOs”) search warrants or court orders for examinations or returns under section 11 of the Act must be drafted in a way to

protect the identity of the immunity applicant, or be sealed²⁸ unless the immunity applicant waives its informer status. Drafting ITOs in a manner that meets the confidentiality requirements while providing sufficient information to a Judge may be a difficult exercise. Nonetheless, as noted above, the Bureau and the Attorney General will take every appropriate measure to protect the identity of an immunity applicant.

Requests to seal ITOs pursuant to section 487.3 of the *Criminal Code* may be granted on the ground that the ends of justice would be subverted by the disclosure if disclosure of the information would (i) compromise the identity of a confidential informant, (ii) compromise the nature and extent of an ongoing investigation, (iii) endanger a person engaged in particular intelligence-gathering techniques and thereby prejudice future investigations in which similar techniques would be used, or (iv) prejudice the interests of an innocent person in certain circumstances, or for any other sufficient reason. The Attorney General must provide grounds to support its application for a sealing order. There is always a risk that a section 487.3 request will be denied or that a sealing order will be time-limited.

Approaches of Other Competition Authorities

The U.S. DOJ Model Leniency Letter²⁹ indicates that “the Division will not publicly disclose the identity of a leniency applicant, absent prior disclosure by the applicant, unless required to do so by court order in connection with litigation”. The U.S. DOJ will not disclose information obtained from a leniency applicant to foreign antitrust agencies unless the leniency applicant

²⁸A document filed with a court may, on Order of a Judge, be “sealed”. A sealing order under section 487.3 of the *Criminal Code*, R.S.C. 1985, c.C-46, s.187 prohibits access to and disclosure of information relating to a warrant. All applications relating to the interception of private communication (i.e. wiretaps) are sealed pursuant to section 187 of the *Criminal Code*.

²⁹As attached to the presentation by 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” Presented at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust, Washington, D.C. Feb.26, 1999, online: <http://www.usdoj.gov/atr/public/speeches/2247.htm>.

agrees to the disclosure.³⁰ It is the Bureau's understanding that sealing orders are frequently used in the U.S. to protect pre-charge court documents from disclosure.

The EC will keep the identity of a party cooperating with the EC confidential up to the point when the EC issues a "statement of objections"³¹ against other targets of an investigation, typically sometime after inspections (or searches) are carried out. Ultimately, a published decision will also identify the immunity applicant, explaining the reason for the immunity or fine reduction. The EC indicates that "the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 of the EC Treaty."³²

In the U.K., the OFT states in its recent document "Leniency and no-action"³³ that "[I]n cases where a person applies on his/her own account and who arguably participated in a cartel but has valuable information to give to us, they may be granted individual immunity but remain a secret source. In such a case, the OFT will not disclose the identity of the individual. However, an individual immunity applicant would only be treated as a secret source where the safety of the individual would be in serious jeopardy or other very serious adverse consequences would follow if the person's approach to the OFT were to become known." In all other situations the identity of a leniency applicant will be disclosed when the OFT issues a "Statement of

³⁰Gary Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Negotiating the Waters of International Cartel Prosecutions - Antitrust Division Policies Relating to Plea Agreements in International Cases", Presented at the 13th Annual National Institute on White Collar Crime, San Francisco, CA, March 4, 1999, at 11, online: <http://www.usdoj.gov/atr/public/speeches/2275.pdf>.

³¹The EC is required to provide a statement of objections before adopting a decision that negatively affects a person's rights. Through the statement the person is given the opportunity to make their point of view known on any objection the EC may wish to make in a final decision affecting that person. See also: Van Barlingen, Bertus, Directorate-General Competition, unit E-1, "The European Commission's 2002 Leniency Notice after one year of operation", (2003) 2 Competition Policy Newsletter, 16 at 20, online: http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf and Van Barlingen, Bertus, Directorate-General Competition, unit E "The European Commission's 2002 Leniency Notice in practice", (2005) 3 Competition Policy Newsletter 6 at 8, online: http://europa.eu.int/comm/competition/publications/cpn/cpn2005_3.pdf.

³²*Supra*, note 18 at p.5, para 31.

³³*Supra*, note 19.

Objections”³⁴. The OFT further states that if it wants to pass information deriving from an immunity applicant to another United Kingdom agency it would discuss that with the applicant or his/her legal advisor first; information will never be passed to an overseas agency, save for the EC, without the consent of the provider.

In Australia , the ACCC will not share confidential information provided by an immunity applicant, or the identity of the applicant, with other competition authorities without the applicant’s consent, but will seek that consent as a matter of course, particularly in international matters. Information obtained from sources other than the immunity applicant, including information obtained as a result of inquiries arising from information provided by the applicant, will not be subject to this limitation and will, in appropriate circumstances, be shared where permitted by law.³⁵ The ACCC states that it will “use its best endeavours to protect any confidential information provided by applicants for immunity”.³⁶

Questions for Consultation

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

2. Oral Applications - the Paperless Process

³⁴A “Statement of Objections” issued by the OFT is, in effect, a proposed infringement decision of the OFT and serves to invite views from the business(es) to which it is directed. See *supra*, note 20, “Leniency in Cartel Cases” at 7.

³⁵ACCC, “Immunity Policy Interpretation Guidelines”. *supra* note 23, at para. 44.

³⁶*Ibid*, paragraph 45.

Increasingly, immunity applicants and their counsel request that their immunity application, proffer and disclosure process be conducted orally without the creation of any new, potentially discoverable, documents. Applicants indicate concern over document discovery by private litigants and potential damage awards resulting from civil claims, particularly in the U.S. where treble damages may be awarded.³⁷

U.S. courts have broadly reaching powers to order the discovery of documents relevant to anti-trust proceedings and case law in the area continues to evolve. The U.S. Supreme Court ruled in 2004 that U.S. District Courts have the discretion, depending on a variety of factors to be considered, to compel the production of documents located in the U.S. for use in proceedings before foreign and international tribunals.³⁸ The scope of the judgement, and how it will be applied by the district courts remains to be seen.

In two other cases³⁹, U.S. courts addressed the situation of a class action plaintiff seeking production of documents produced to foreign antitrust authorities in the context of immunity applications or plea negotiations. In the case of *In Re Vitamins*, the defendant was ordered to produce to the plaintiff documents provided to the Bureau and the EC, though the Court made an exception for certain documents provided to the Bureau in the context of settlement. The exception covered the executed plea agreement; drafts of the plea agreement, agreed statement of facts, cover letter to the agreed statement of facts, indictment, prohibition order and of the immunity letter; and counsel comments on those drafts. In the case of *In Re: Methionine*, the Court declined to order production of defendant “corporate statements” to the EC and the ACCC, provided in the context of leniency applications.

³⁷A recent change in U.S. law provides that a company that receives amnesty may be liable for single but not treble damages. See *infra* note 71.

³⁸*Intel Corp. v. Advanced Micro Devices Inc.*, 124 S. Ct. 2466 (June 21, 2004). The discretion operates pursuant to 28 U.S.C. 1782(a).

³⁹*In Re: Vitamins Antitrust Litigation*, No. 99-197 (TFH) MDL No. 1285 (D.D.C. Dec. 18, 2002), and *In Re Methionine Antitrust Litigation*, No. C-99-3491 CRB (N.D. Cal. July 29, 2002).

Exposure to potential disclosure of confidential documents produced within the context of an application or grant of immunity, and the disparate approaches to legal privilege in different jurisdictions, add to the concerns immunity applicants must weigh in deciding whether to report antitrust violations in return for the benefit of an immunity agreement. That being said, in many jurisdictions, including Canada, confidentiality of an applicant's identity, and the information provided to competition authorities, is ultimately subject to disclosure in the event an applicant is required to testify at trial against co-conspirators.

The Bureau accepts oral immunity applications and does not require that new documents be created for the purpose of the application.⁴⁰ In an oral application, information proffered is recorded in Bureau officer notebooks in accordance with standard Bureau note-taking procedures. The Bureau does not insist on corresponding with applicants in writing except where the lack of documentation would leave the immunity process and related information open to uncertainty and misunderstanding. Currently, written correspondence typically will take place if the Bureau wishes to provide formal notice to a party that its marker is being revoked or that it is at risk of breaching its PGI or immunity obligations. In certain circumstances the Bureau may request that applicants provide written confidentiality waivers. PGIs and immunity agreements are set out in writing by the Attorney General and immunity agreements must be signed by the applicant. Existing documents, relevant to the investigation, and available to or in the possession of the applicant, must be provided to the Bureau as part of the applicant's full disclosure obligation following receipt of a PGI.

Approaches of Other Competition Authorities

⁴⁰*Supra* note 9, question 20.

The U.S. DOJ does not have a stated policy on the paperless process but does accept oral applications. Our understanding is that it does not require applicants to create any new documents for the purpose of an amnesty application process, nor does it insist that any communications with applicants be in writing. At least two representatives of the US DOJ, including at least one attorney, are always present for any oral communication with an applicant and the US DOJ representatives take notes of the communication. Letters of conditional and final amnesty, which include the conditions on which the amnesty is based, are provided to applicants in writing.

The EC accepts paperless applications where there is a serious risk that the applicant will face civil legal action in third country jurisdictions.⁴¹ Where oral statements are given to the EC, these typically are taped and transcribed. The EC may request that the applicant review the transcription and certify it for accuracy. These may subsequently be provided to parties with the “statement of objections”⁴² issued by the EC, and become discoverable at that time. Documents already existing in the control of the company and not specially prepared for the EC are required to be produced to the Directorate General - Competition and are potentially discoverable in third country jurisdictions.⁴³

The OFT indicates that the entire leniency application process can be oral if requested. However all pre-existing written evidence of the cartel will need to be provided, and witnesses will need to sign witness statements, setting out their evidence.⁴⁴

Recent changes to the ACCC Immunity Policy have removed the requirement that immunity applications be in writing. The ACCC will now accept oral applications to ensure that no new documents that may involve admissions or provide a roadmap to potential litigants are generated.

⁴¹*Supra*, note 31.

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴*Supra*, note 19 at para. 2.17.

The ACCC states that it will make its own records of applications and work with applicants and their lawyers to ensure, as far as possible, that its records do not prejudice applicants' interests.⁴⁵ It further states that it will "vigorously protect" information related to an immunity application both as a matter of fact and "in the public interest" while any legislative protections are a matter for the legislature.⁴⁶

Questions for Consultation

- 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?*
- 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 yes, please identify.*
- 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.*
- 2.4 *Are your disclosure concerns differentiated as between domestic and international case enforcement?*
- 2.5 *What fora do you see as the most effective for developing best practices for the paperless process? ICN? OECD? Other?*

3. Role in the Offence

⁴⁵ACCC, "Immunity Policy Interpretation Guidelines", *supra* note 23 at para. 40.

⁴⁶ACCC, "ACCC Leniency Policy Review 2005 Position Paper", Aug. 25, 2005, para. 144.

To qualify for immunity in Canada, an applicant, whether a company or an individual, must not have been the instigator or the leader of the illegal activity.⁴⁷ The Bureau's Responses explain that a single corporation or individual that, alone, played the leading or instigator role in the illegal activity will not qualify for immunity. Corporations or individuals that were "co-leaders" or "co-instigators" of the illegal activity, as opposed to having been *the* leader or *the* instigator of the illegal activity, will be eligible for immunity, if they meet the other requirements of the Program. As there is no bright line test for determining whether an immunity applicant was the leader or the instigator of the illegal activity, the Bureau and the Attorney General will review and assess all facts obtained at the time the immunity is requested by the party and during the course of its investigation. For example, if during the course of an investigation it is determined that a corporation coerced or threatened another corporation to participate in a cartel or that a corporation was the clear instigator in securing the establishment of the cartel, the corporation will not qualify for immunity.

Initial information provided to investigators by an immunity applicant is often limited and can be biased, 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.

A further criteria, unique to the Canadian Program, is that an applicant must not have been the sole beneficiary of the illegal activity in Canada. In many cases 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. A sole beneficiary that is ineligible for immunity may be eligible for leniency.

⁴⁷*Supra*, note 3, para. 15.

The sole beneficiary criteria has been criticized on the grounds that it may result in an applicant being arbitrarily disqualified on the basis of geographic market; i.e. disqualification may occur solely because an applicant is the only party to have been allocated the Canadian market, as opposed to some other market, rather than on a heightened degree of culpability.⁴⁸

In false or misleading representations and deceptive marketing practices cases there is usually only one company involved in the offence. The sole beneficiary criteria ensures that in this circumstance immunity is not available to the only corporate body or key individual who benefited from the offence and that can be prosecuted.

Approaches of Other Competition Authorities

The US DOJ's Corporate Leniency Policy is the foundation of the Bureau's approach. In cases where a U.S. DOJ investigation has not yet begun, a corporation may qualify for leniency if it "did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity."⁴⁹ A corporate amnesty applicant (the equivalent of an immunity applicant in Canada) is only disqualified if "it is the singular organizer or the singular ringleader of the cartel activity."⁵⁰ Where a U.S. DOJ investigation has begun, or the corporate applicant has failed to meet the otherwise applicable conditions for amnesty⁵¹, leniency (or immunity) may still be granted if the Division determines that it would be fair to others accounting for the nature of the activity, the corporation's role and when the corporation came forward.⁵² The Leniency Policy for Individuals allows for a successful amnesty application,

⁴⁸Gary Spratling, "International Cartel Enforcement and Leniency Programs - A Global Perspective", Presented before the ICN Workshop on Leniency Programs and the ACCC Cracking Cartels Conference, Sydney, Nov. 2004 at 15.

⁴⁹U.S. Corporate Leniency Policy, *supra* note 16 at para. 8.

⁵⁰ *Supra*, note 48 at 4. See also Gary Spratling, *The Corporate Leniency Policy: Answers to Recurring Questions* presented at the ABA Antitrust Section 1998 Spring Meeting, Washington, DC on April 1, 1998.

⁵¹Six Criteria: Information not received from another source; full disclosure and ongoing co-operation; stopped the activity; a corporate act; restitution where possible and did not coerce another party.

⁵²U.S. DOJ Corporate Leniency Policy, *supra* note 16, Part B at para 17.

before a U.S. DOJ investigation has begun, if the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

In 2002, the EC announced that it would no longer exclude from full immunity companies that had acted as an instigator of, or played a determining role in, a cartel. The EC now only disqualifies applicants that took steps to coerce others to participate in the offence. It has indicated its view that it considers the coercion standard to be clearer and more certain than the instigator/leader standard.

Similarly, the OFT states that parties who took steps to coerce others to engage in cartel activities will not be eligible for immunity. The OFT states its view that “looking back in five years time, the coercer bar will not have led to any or any significant number of refusals to grant immunity”. It is possible for potential applicants to contact the OFT for no-names confidential guidance about whether the coercer bar may be an issue in a prospective application.⁵³ The OFT provides a variety of examples by way of additional guidance for prospective applicants.⁵⁴

Under the ACCC’s immunity policy, an applicant will only be eligible for immunity if it has not coerced others to participate in the cartel and was not the clear leader in the cartel.⁵⁵ The ACCC recognises that in many cartels there is no coercion nor a clear leader. It notes that the mere fact that one party has arranged a meeting or maintained records will not necessarily exclude the application of the leniency policy to it, particularly when the other participants took part freely and willingly. The ACCC states that it will not find a clear leader if two or more parties are properly considered the joint leaders in the conduct.⁵⁶

⁵³*Supra*, note 19 at p.11.

⁵⁴*Ibid.*

⁵⁵ACCC, “Immunity Policy”, *supra* note 23, at 2.

⁵⁶ACCC, “Immunity Policy Interpretation Guidelines”, *supra*, note 23. The Guidelines also provide two hypothetical case examples illustrating how the ACCC will examine the coercion/ringleader issue.

Among the competition authorities being canvassed, the sole beneficiary requirement is unique to the Bureau's Program.

Questions for Consultation

- 3.1 *Should leaders / instigators of an offence be denied immunity?*
- 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?*
- 3.3 *How important is the element of "coercion" as a criteria for denying eligibility to the Program? Should it be the only criteria?*
- 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?*
- 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.*
- 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?*

4. Coverage of Directors, Officers and Employees

Current directors, officers and employees of a company will qualify under the umbrella of corporate immunity if they admit their involvement in the illegal anti-competitive activity as part of the corporate admission and if they agree to provide complete and timely co-operation. Companies must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions⁵⁷. Past directors, officers and employees of a company that receives immunity may also qualify for immunity if they offer to co-operate with the Bureau's investigation however this determination will be made on a case-by-case basis.⁵⁸ If a corporation does not qualify for

⁵⁷*Supra*, note 3, at paragraph 16(c).

⁵⁸*Supra*, note 3, at para 19.

immunity, the past or present directors, officers and employees who come forward with the corporation may nonetheless be considered for immunity as if they had approached the Bureau individually.⁵⁹

The Bureau may sometimes want to carve out an individual from an immunity agreement if it is determined that the individual is unwilling to provide complete and timely co-operation with the Bureau investigation. In some cases a carve-out can be a condition of the company obtaining immunity.

When a past director, officer or employee is not covered by corporate immunity, or where there are carve-outs, a conflict of interest may arise if the same counsel represents the individual(s) and the company. Conflict may extend to situations where individuals have separate counsel but the company pays for the counsel. The Bureau's interest is to ensure that no issues of conflict jeopardize the Bureau's investigation or the subsequent prosecution of the offence by the Attorney General.

Approaches of other Competition Authorities

The US DOJ states in its Corporate Leniency Policy that if a corporation qualifies for amnesty then "all directors, officers, and employees" who come forward and provide complete and truthful information will be granted leniency. This applies to current, but not past, directors, officers, and employees. Amnesty coverage for current officers, directors, and employees will continue however even if they leave their employment. Thus, if, for example, an executive leaves a company shortly after the company receives conditional amnesty, the individual can still qualify for amnesty if he/she provides full and truthful cooperation.⁶⁰ While the US DOJ provides some additional guidance on when a director, officer or employee will be considered

⁵⁹*Supra*, note 3, at para 20.

⁶⁰*Spratling, supra*, note 29 at 4.

“current”⁶¹, it does not provide additional guidance on how it will deal with past directors, officers, and employees.

The ACCC will extend any offer of immunity or conditional immunity made to a corporation to its current or former directors, officers and employees who satisfy the policy requirements. In some circumstances however the ACCC provides that it may specifically exclude certain directors, officers or employees, having regard to the wishes of the corporation and the individuals concerned. It indicates, for example, that it is unlikely to extend immunity to an executive who has left the applicant’s employment and continued to participate in the cartel in the employment of another participant.⁶²

The OFT provides that a business that has applied for leniency may also request that leniency be granted to named current or former employees or directors of the business. It indicates that where a business has been granted total immunity, the OFT will normally be prepared to issue no-action letters to the named individuals.⁶³

EC competition law is applicable only to business undertakings⁶⁴. Accordingly, its Leniency Policy does not address this matter.

Questions for Consultation

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?*

⁶¹*Ibid.*

⁶²*Supra*, note 23, “Interpretation Guidelines” at 6.

⁶³*Supra*, note 20, “Leniency in Cartel Cases” at 12. Further detail also available in “Leniency and no-action: OFT’s interim note on the handling of applications”, *supra*, note 19.

⁶⁴An undertaking is defined as any entity engaged in an economic activity...regardless of its legal status and the way in which it is financed. European Commission, “Glossary of terms used in EU competition policy - Antitrust and control of concentrations”, 2002.

- 4.2 *Should a company's obligation under the Program to promote the continuing co-operation 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?*
- 4.3 *Are carve-outs appropriate and, if so, when?*
- 4.4 *Does this approach detract from the predictability of the Program?*
- 4.5 *What criteria should be considered when deciding whether to "carve out" an individual?*
- 4.6 *How should the Bureau address matters of apparent conflict of interest in respect of applicants?*
- 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?*

5. Penalty Plus

The Bureau has an "immunity plus" program as set out in the Responses.⁶⁵ It provides that when an applicant approaches the Bureau with respect to an offence, but is not first-in, that applicant may qualify for lenient treatment on that offence and immunity on any other offences that it divulges. The additional offences brought in for immunity will be considered in determining the degree of leniency the Bureau recommends, and the Attorney General considers, for the first offence.

"Immunity plus" is based on the U.S. DOJ "amnesty plus" program which operates in the same manner. The U.S. DOJ also has a "penalty plus" program. Under this program an applicant who applies for amnesty for one offence and fails to disclose a second offence will be given an increased sentence on the second offence as a result. The US DOJ has indicated that it will pursue a fine or jail sentence at or above the upper end of the Sentencing Guidelines range in such situations. Failure to self report under the amnesty plus program and qualify for a zero fine

⁶⁵*Supra*, note 9, question 31.

could thus result in a fine of 80% or more of the volume of affected commerce under penalty plus. For an individual it could mean a lengthy jail term.⁶⁶

The Bureau does not have a stated “Penalty Plus” program however if a party applies for immunity for one offence but fails to disclose other offences under the *Competition Act*, it can result in revocation of immunity for the first offence. The non-disclosure will also be considered as an aggravating factor by the Bureau and the Attorney General in plea discussions or sentencing submissions relating to the unreported offences.

Approaches of other Competition Authorities

The US DOJ has both an amnesty plus and a penalty plus program, as described above. The ACCC recently adopted an amnesty plus program as part of its new Immunity Policy⁶⁷ but does not have an equivalent to the U.S. DOJ “penalty plus”. The OFT has a “leniency plus” program, distinguishing the OFT approach from that of the EC which has no equivalent program. The OFT does not have a “penalty plus” program.

Questions for Consultation

- 5.1 *Should the Bureau adopt a “Penalty Plus” program, similar to that used by the U.S. DOJ?*
- 5.2 *How much of an increase in penalty (either pecuniary, or custodial in the case of individuals) would be appropriate, and on what basis?*

6. Restitution

⁶⁶Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, “Cornerstones of an Effective Leniency Program”, Presented before the ICN Workshop on Leniency Programs, Sydney, Australia, Nov. 22-23, 2004, at 13.

⁶⁷*Supra*, note 23, “Interpretation Guidelines” at paras. 72-75.

The Program provides that one requirement for obtaining immunity is that “where possible, the party will make restitution for the illegal activity”.⁶⁸ Through restitution, an applicant acknowledges that its illegal conduct caused harm and attempts to compensate parties harmed by the conduct. Restitution requirements are an additional deterrent for those weighing the risks and returns of engaging in illegal anti-competitive activity. Although restitution does not preclude civil suits being brought by injured parties against the applicant, a court will typically consider prior restitution in deciding upon an award for damages.

Restitution is a relatively frequent requirement of judgments in cases involving false and misleading representations and deceptive marketing practices. Restitution is less common in cartel offences where it can be difficult to identify victims of the activity for which immunity is sought and to quantify the appropriate amount of restitution. It has been argued that the requirement serves to deter potential immunity applicants from approaching the Bureau, and suggested that the reimbursement of victims in cartel cases may be more appropriately handled by the parties themselves, either privately or through civil suits.

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.

Approaches of other Competition Authorities

The U.S. DOJ requires restitution “where possible” to government entities, businesses and individuals located in the U.S. The U.S. DOJ has indicated that only where restitution is not

⁶⁸*Supra*, note 3, at para. 17.

possible will it be excused⁶⁹ and has published examples of situations in which an applicant may be excused.⁷⁰ These situations include:(i) where an applicant is bankrupt and prohibited by court order from undertaking additional obligations; (ii) where there is only one victim and that victim is defunct; or (iii) where the applicant’s continued viability would be threatened if it makes the payment. In the U.S., a company that is first in and granted leniency remains subject to civil litigation but can avoid the risk of treble damages.⁷¹ The U.S. DOJ has indicated that should it close its investigation without charging any other entity in the conspiracy, the obligation to pay restitution remains in effect, unless the leniency applicant withdraws its application.⁷²

Neither the EC, the OFT or the ACCC require immunity applicants to make restitution though civil proceedings may be brought against an applicant in each of those jurisdictions. The ACCC withdrew its restitution requirement when it published its revised Immunity Policy in August, 2005.⁷³

Questions for Consultation

- 6.1 *Is restitution an appropriate requirement for eligibility under the Program?*
- 6.2 *How can it best be ensured that victims of the offence are accurately identified and that restitution is appropriately assessed?*
- 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.*

⁶⁹Gary 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” Feb. 6, 1999 at 2; and Gary Spratling, “The Corporate Leniency Policy: Answers to Recurring Questions”, *supra* note 50 at 4.

⁷⁰*Ibid.*

⁷¹*Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Public Law No. 108-237.*

⁷²*Supra*, note 50.

⁷³*Supra*, note 23.

- 6.4 *Are there situations in which restitution should be excused? If yes, please identify.*
- 6.5 *Is restitution a matter better handled between the parties themselves, either privately or through civil action?*

7. Revocation of Immunity

The Bureau can revoke a marker where an applicant fails to provide a proffer within 30 days unless the Bureau and the applicant have agreed on an extended time line. A marker may also be revoked if an applicant fails to meet any of the other requirements for immunity set out in Part C of the Bulletin⁷⁴. The Bureau's decision to revoke a marker will be made only after serious consideration of all factors and prior notification of the applicant.

A PGI will cease to be operative if one or more of its conditions are not met. In a case where the Bureau becomes aware that conditions are not being met, it will advise the Attorney General and, where appropriate, recommend that the PGI be treated as inoperative. If the Attorney General agrees with the Bureau's recommendation, it will notify the applicant that the PGI is no longer in effect.

The Bureau will recommend that the Attorney General revoke a grant of immunity to a party that has failed to fulfill one or more of its obligations under an immunity agreement.⁷⁵ Once revoked, the party concerned could face prosecution.⁷⁶ The Program specifically provides that the Bureau will consider revocation when a company does not fully promote the complete and timely co-operation of its employees, where the party fails to disclose any and all offences that it has been involved in or where a party does not provide full, frank and truthful disclosure.⁷⁷

⁷⁴*Supra*, note 3.

⁷⁵*Ibid.* at para. 26.

⁷⁶*Ibid.*

⁷⁷*Ibid* at para. 27.

Under the Program, for a company's participation to be considered "full, frank and truthful", the corporation must take all legal and reasonable steps to co-operate with the Bureau's investigation. The Bureau will not be prevented from recommending immunity if the corporation is unable to secure the co-operation of one or more individuals or that co-operation is not within the firm's control. However, the number and significance of the individuals who fail to co-operate and the steps taken by the company to secure their co-operation are relevant in the Bureau's determination as to whether the corporation's co-operation is "full, frank and truthful".

The Bureau's recently published Responses are designed to assist applicants to understand their obligations under the Program. They specify both the time lines for providing information to the Bureau and the type of information expected from applicants in proffers and as part of the full disclosure process.

The Program encourages early reporting while recognizing that the scope of the illegal activity may not always be immediately apparent. It requires, among other things, that the illegal activity be terminated and that applicants co-operate fully with the Bureau investigation and subsequent prosecutions. The onus falls to the applicant to demonstrate that it has complied with these requirements. In assessing compliance the Bureau takes into account the efforts made by an immunity applicant to meet the pre-requisites for receiving a PGI and immunity agreement.

Revocation is a serious decision and the Bureau will consider all factors before making a recommendation to the Attorney General. The final decision to revoke immunity is made by the Attorney General.

Where the Bureau recommends the revocation of an immunity agreement it will retain possession of information provided by the immunity applicant. The Program states that "the full disclosure process will be conducted with the understanding that the Bureau will not use the information against the party, unless there is a failure to comply (with the agreement)"⁷⁸. Pre-

⁷⁸*Supra*, note 3, at para. 23.

PGI information is typically provided in hypothetical proffers through an applicant's legal representative.

Approaches of other Competition Authorities

An assessment by the U.S. DOJ that there had been a failure to comply with the terms of an immunity agreement recently prompted the U.S. DOJ to revoke Stolt-Nielsen SA's amnesty agreement. The issue concerned the agency determination that Stolt-Nielsen had made material misrepresentations as to when it ceased its participation in the illegal activity. Stolt-Nielsen subsequently secured an order from the U.S. District Court enjoining the U.S. government from prosecuting the plaintiffs for criminal antitrust violations that were the subject of the amnesty agreement⁷⁹. The matter currently is under appeal.

The EC states in its 2002 Notice that “[F]ailure to meet any of the requirements...at any stage of the administrative procedure, may result in the loss of any favourable treatment...”.⁸⁰

The OFT provides that an individual “no-action” letter may be revoked if the recipient ceases to satisfy, in whole or in part, any of the relevant conditions, or has knowingly or recklessly provided information to the OFT that is false or misleading⁸¹. On revocation any immunity granted by the no-action letter will cease to exist as if it had never been granted and the OFT may rely on any information given by the applicant in a prosecution against them for the cartel offence. If a no-action letter is to be revoked the recipient of the letter will be notified in writing and given a reasonable opportunity to make representations.

Similarly, if a person granted immunity or conditional immunity by the ACCC fails to comply with any of the immunity requirements, the ACCC will advise that person of its belief in writing,

⁷⁹*Stolt-Nielsen S.A., Stolt-Nielsen Transportation Group Ltd. and Richard Wingfield v. United States of America*, 4 CV 537 (District Court for the Eastern District of Pennsylvania, 2005).

⁸⁰*Supra*, note 18, at para 30.

⁸¹*Supra*, note 20.

and may, after giving that person a reasonable opportunity to address its concerns, advise that person in writing that they no longer qualify for immunity.⁸²

Questions for Consultation

- 7.1 *What factors should the Bureau take into account in assessing whether a breach of an immunity agreement is sufficient to warrant revocation?*
- 7.2 *Are there limits to a company's ability to secure the co-operation of its directors, officers and employees that should be recognized by the Bureau?*
- 7.3 *How should the Bureau treat individuals covered by an immunity agreement between the Attorney General and their company where their company's agreement is revoked?*
- 7.4 *What procedural steps should the Bureau follow before making a recommendation for the revocation of immunity?*
- 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?*

8. Creation of a Formal Leniency Program

Parties who are not the first to disclose illegal conduct to the Bureau or who otherwise do not qualify for immunity may still qualify for lenient treatment if they co-operate with the Bureau and the Attorney General. As is the case for immunity, the Bureau can make a recommendation to the Attorney General that an applicant be accorded lenient treatment, however the final decision rests with the Attorney General. Lenient treatment includes a reduction in the severity of any penalty or obligation that would be otherwise sought in the absence of disclosure and co-operation by a party to an offence. In practical terms, this typically results in the Attorney General and counsel for the accused making a joint submission to the relevant court recommending that the matter be resolved with a guilty plea by the accused, and a lesser fine or period of imprisonment than would otherwise have been merited. A prohibition order under section 34(1) of the Act may also form part of the plea agreement.

⁸²*Supra*, note 23, "Interpretation Guidelines" at para. 63.

While the Bureau has a well-developed practice of dealing with claims for lenient treatment, this practice has not been articulated in a public policy document. A formal leniency program could take into account factors such as:

- the nature and extent of the party's involvement in the offence;
- the seriousness of the offence;
- 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 Act;
- the impact of leniency on the protection of the public.

The Bureau considers that any formal leniency program must preserve a significant incentive for the first-in immunity applicant - that is, complete non-prosecution of the applicant and all its directors, officers and employees as well as the possibility for immunity of its past directors, officers and employees. However, the disparity in treatment of subsequent applicants wishing to co-operate remains a significant consideration. While the disparity must be significant, it should not be so great as to overly discourage potential leniency applicants from approaching and assisting the authorities. While leniency applicants will be required to plead guilty and pay a fine and/or serve a jail sentence, that fine and/or sentence will clearly be materially less than it would be if they contested the charges.

Approaches of other Competition Authorities

The US DOJ does not have a leniency policy for applicants other than the first-in however the United States does have statutorily authorized sentencing guidelines.⁸³ The guidelines standardize sentencing largely on the basis of a defendant's volume of affected commerce, role in the offence, any obstruction of justice, the defendants cooperation with investigation and

⁸³United States Sentencing Commission, "2005 Federal Sentencing Guidelines Manual", online: <http://www.ussc.gov>. Promulgation of the Guidelines is authorized by 28 U.S.C. para 994(a). U.S. Supreme Court decisions in 2004 and 2005 called into question the validity of the earlier Guidelines Manual. The January 2005 case of *United States v. Booker*, 125 S. Ct. 738 (2005) allowed for the continued use of the Guidelines, though in an advisory rather than a mandatory fashion.

prosecution and the defendant's acceptance of responsibility for its acts. For corporate defendants the size of the organization, the involvement of high-level employees, officers or directors and prior offences also play a role.

A number of foreign competition authorities have adopted leniency policies that specify the reductions in monetary penalties according to whether a party is the first or subsequent leniency applicant. In the EC, the first applicant that does not qualify for immunity but that does provide evidence to the EC that has "significant added value with respect to the evidence already in the Commission's possession" will receive a reduction in fine of 30 to fifty per cent. The second such applicant will be eligible for a reduction of 20 to 30 per cent and any subsequent applicant for a reduction of up to 20 per cent.⁸⁴ In setting the base fine, the EC follows general guidelines requiring it to consider the gravity and duration of the offence as well as certain aggravating and attenuating circumstances.⁸⁵

The OFT takes a similar approach⁸⁶. It offers a discretionary reduction in financial penalty up to one hundred per cent for the first cartel member to come forward after an investigation has started but before a statement of objections has been issued by the OFT. Subsequent applicants may be eligible for a reduction of up to fifty per cent provided they provide evidence to and cooperate with the OFT, and terminate their involvement in the cartel. In determining the reduction, the OFT will take into account the stage at which the business came forward, the evidence already in the possession of the OFT and the evidence provided by the business. The base fine from which reductions are made is determined on the basis of the seriousness of the offence and the relevant turnover of the undertaking, adjusted for duration and aggravating and mitigating factors.⁸⁷

⁸⁴*Supra*, note 18 at paras. 20-23.

⁸⁵European Commission "Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17 and Article 65(5) of the ECSC Treaty" (98/C9/03).

⁸⁶"Leniency in Cartel Cases", *supra* note 20, at 7-8.

⁸⁷For further detail see "OFT's guidance as to the appropriate amount of a penalty", *supra*, note 20.

The ACCC has a Cooperation Policy⁸⁸ that continues to operate in cases where its Immunity Policy does not apply. The policy emphasizes flexibility and operates on the principle that more lenient treatment, up to full immunity, will be afforded to those who cooperate with ACCC investigations and court proceedings. Under the policy, leniency is more likely to be granted where applicants provide valuable and important evidence and cooperate fully with the ACCC, where the applicant was not the ringleader of the activity and did not coerce others to take part in the activity, where the applicant terminates involvement in the activity and is prepared to make restitution, and where the applicant does not have a prior record of offences under the *Trade Practices Act* or related legislation.

Reduction or elimination of exposure to civil damages or other relief is not typically part of a leniency program and competition authorities typically lack the power to directly grant that type of relief.

The OECD stresses the need for clarity, certainty and priority in leniency programs as in immunity programs. It cautions that a general offer to reduce penalties may not be enough to encourage firms to come forward as the benefits of remaining with the cartel may appear larger and more certain than the unknown reward that would result from confessing. It also suggests that competition authorities may wish to specifically narrow the scope of penalties available - for example, to eliminate the possibility of jail time for individuals.⁸⁹

Questions for Consultation

8.1 *When should leniency be available and under what terms?*

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

⁸⁸ACCC, "Cooperation Policy for Enforcement Matters" (July, 2002) online: <http://www.accc.gov.au/content/item.phtml?itemId=459482&nodeId=file42377ff017a57&fn=ACCC%20cooperatio n%20policy%20July%202002.pdf>.

⁸⁹*Supra*, note 10, and OECD, OECD Observer, "Policy Brief: Using Leniency to Fight Hard Core Cartels", Sept., 2001.

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?*

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

9. Pro-active Immunity

During the course of an investigation and prior to having sufficient evidence to refer a matter to the Attorney General, the Bureau may advise targets of the existence of the Program and how it functions. This practice is beneficial to targets who may not always be aware of all their options and serves the Bureau's interest in encouraging potential applicants to come forward. While the Program is public, many people and businesses continue to be unaware of its content or potential relevance to their situation. While the Bureau does not typically seek out potential immunity applicants in cartel cases (except if meeting or communicating with those parties in the normal course of an investigation), it has approached potential immunity applicants in false and misleading representations and deceptive marketing practices cases on its own initiative outside the normal course of an investigation. These initiatives have been successful.

Approaches of Other Competition Authorities

The ACCC addressed the issue of “affirmative leniency” in its Discussion Paper *Review of the ACCC's Leniency Policy for Cartel Conduct*⁹⁰ where it raised the possibility of approaching parties that it believed might be able to take advantage of its leniency policy. The ACCC queried in particular whether (a) it should have a policy about how it approaches alleged cartel participants so as not to give one party an advantage in a “race to the door” and whether (b) it should be able to decide who it approaches first, thereby prompting a particular party to make an application for leniency.

⁹⁰*Supra*, note 22.

In its new Immunity Policy, the ACCC states that where it has information which leads it to suspect that certain persons have engaged in, or may have been engaged in, cartel conduct, it may, at its discretion, approach any one or more of those persons and inform them of its immunity policy and encourage them to apply⁹¹.

Questions for Consultation

- 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?*
- 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?*
- 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?*

⁹¹*Supra*, note 23.

V. Conclusion

The Bureau would appreciate your input on the above topics, for consideration in its review of the Program, by May 10, 2006. Stakeholders are also encouraged to address additional topics not raised in this consultation paper. Submissions may be made by e-mail, fax or regular mail. Unless confidentiality is specifically requested, submissions will be made public on the Bureau Web site.

For assistance, please call the Bureau Information Centre at (819) 997-4282 or our toll-free number at 1-800-348-5358.

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