

Unclassified**English - Or. English**

4 May 2018

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by
Canada****5 June 2018**

This document reproduces a written contribution from Canada submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03431251

Canada

1. Introduction

1. This submission from Canada's Competition Bureau (the "Bureau") is being provided for the upcoming Competition Committee Working Party No. 3 Roundtable on Challenges and Co-ordination of Leniency Programmes.
2. The Bureau ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Headed by the Commissioner of Competition (the "Commissioner"), the Bureau is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")¹ and other statutes.
3. The Act, a federal law governing business conduct in Canada, includes criminal and civil provisions to maintain and encourage competition in Canada by prohibiting anti-competitive practices, including criminal provisions against cartels. Canada's main cartel provision targets hard-core cartel conduct by prohibiting agreements or arrangements between competitors to fix prices, allocate sales or markets, or restrict supply of a product. Other cartel provisions prohibit foreign directives, bid-rigging and certain conspiracies relating to professional sport and federal financial institutions.²
4. Cartel conduct is a criminal offence in Canada, representing one of the most egregious forms of anti-competitive conduct leading to higher prices, decreased product choice and less innovation. As such, preventing, detecting and halting both domestic and international cartels continue to be one of the Bureau's top priorities.
5. To address this priority, the most important tools the Bureau has at its disposal are its Immunity and Leniency programs (collectively, the "Programs"). Under the Programs, the Bureau may recommend to the Public Prosecution Service of Canada ("PPSC")³ that cooperating applicants be considered for immunity from prosecution, or in the case of applicants who are not eligible for a grant of immunity, lenient treatment in sentencing.⁴ Under the Immunity Program, the first party to disclose to the Bureau an offence not yet detected or to provide evidence leading to the laying of charges may

¹ R.S.C., 1985, c. C-34.

² *Id.* at ss. 45-49. Restraints on competition that are implemented in furtherance of a legitimate collaboration between competitors, such as a joint-venture or strategic alliance, are reviewed under s. 90.1 of the Act which provides for a civil standard on a balance of probabilities where the effect on competition is assessed.

³ The PPSC is a federal government organization responsible for prosecutions on behalf of the Attorney General of Canada. The Director of Public Prosecutions ("DPP") is the head of the PPSC. The PPSC represents the DPP in proceedings before courts of criminal jurisdiction in Canada.

⁴ For more information about the Bureau's current Immunity Program, see http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html. For more information about the Bureau's Leniency Program, see <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html>. Please note that these programs are being revised.

receive immunity from prosecution from the PPSC as long as the party co-operates with the Bureau's investigation and the PPSC's subsequent prosecutions. The Bureau's Leniency Program complements its Immunity Program by supporting enforcement of the Act through uncontested resolutions (guilty pleas).

6. Since 2000, these programs have facilitated the prosecution of over 200 parties with resulting fines of over \$228 million CDN. Their importance lies not only in their ability to enable the Bureau to detect cartel conduct, which is notoriously difficult to do given the secretive nature of cartels, but also in their ability to optimize the use of scarce judicial, prosecutorial and investigatory resources.

7. Given their importance, the Bureau has been reviewing the Programs with the overall objective of improving their efficiency and effectiveness as well as their predictability in light of recent legal and policy developments. Recently, the Bureau released a draft of the proposed revised Programs for public consultation.⁵

8. Many of the proposed revisions are meant to address certain challenges faced by the administration of the Programs. This submission discusses three challenges: the first is to ensure the Programs build cases that are "prosecution-ready". In order to achieve this, the Bureau has recognized structural constraints imposed by Canada's bifurcated law enforcement system and considered certain characteristics of the Programs including eligibility, the recording of witness statements, the preparation of disclosure, and introducing time constraints on cooperation.

9. The second challenge is to obtain full and timely cooperation from applicants, including demonstrating a nexus between the conduct and Canada. In international cartel investigations, Canada, like other small jurisdictions, can find it difficult to obtain the cooperation it requires to demonstrate an offence beyond a reasonable doubt. By providing transparent and detailed instructions, the proposed revised Programs attempt to articulate the Bureau's expectations in order to facilitate the delivery of Canadian specific information to the Bureau sooner.

10. The third challenge to the Programs is to maintain the incentives that make the programs attractive to potential applicants in the face of stricter legal and prosecutorial policy demands.

11. The next section will discuss these challenges in more detail and provide possible means to mitigate these challenges. This submission also addresses and proposes ways in which the coordination of leniency programs between jurisdictions can be improved to help maximize scarce investigative resources and limit the burden of complying with the conditions of programs across different jurisdictions.

2. Challenge 1: Being prosecution-ready

12. Canada has a bifurcated competition law regime. There is no specialized court for criminal competition matters in Canada. Individual accused can elect to be tried by a jury. Criminal prosecutions are dependent upon the coordination of independent arm's length

⁵ For more information about consultations regarding the Bureau's revisions to its Immunity Program, please see https://www.canada.ca/en/competition-bureau/news/2017/10/competition_bureauinvitesfeedbackonrevisionstoitsimmunityprogram.html

agencies. In cartel cases, this requires coordination between the Bureau, which conducts the investigation of cartel offences and PPSC, which conducts the prosecution of cartel offences. The Bureau's role is to make responsible and informed recommendations to the PPSC respecting the scope of offences and charges the Bureau considers warrant prosecution. This includes the identification of offenders, the cooperation provided to the Bureau and the appropriate criminal sanctions, if any, to be recommended to a court⁶. The PPSC consults with the Bureau and gives due consideration of its recommendations but has independent discretion to accept or reject the Bureau's recommendations. While there is overlap, the mandates of the respective organizations are different, and they may apply different criteria to the decision as to whether charges should be laid. In order to narrow the gap between mandates, the Bureau has reconsidered certain requirements and processes found in the Programs in order to refer prosecution-ready cartel cases to the PPSC.

2.1. Proposed Responses

13. Through its proposed revised Programs, the Bureau seeks to address the challenge of being prosecution-ready by: implementing clear eligibility requirements to qualify under the Programs; stipulating how witness evidence will be captured; ensuring that the Bureau is able to provide the PPSC all of the factual information required for the PPSC to complete criminal disclosure to the accused; and, placing time constraints on the disclosure of information by the applicant.

2.1.1. Eligibility

14. Tightening up eligibility to the Programs is one way to ensure that cases are prosecution-ready. When eligibility is too broad, corporate applicants that have little to contribute to the investigation may qualify. In Canada, immunity or leniency will only be granted when the applicant can support the allegations with credible and reliable evidence which demonstrates all elements of the offence.

15. Individuals implicated in a corporate immunity or leniency application may also be eligible for the Bureau's Programs on the condition that they admit their involvement in the conduct and provide complete, timely and ongoing cooperation with the investigation and any subsequent prosecution. The Bureau's proposed revisions indicate that a corporate applicant must identify the relevant individuals that should be immunized or included in a plea agreement.⁷ The Bureau believes that increased eligibility

⁶ While immunity agreements do not require judicial approval, under the Leniency Program, applicants are required to enter a guilty plea in court. PPSC and defence counsel typically will make a joint sentencing submission to the court, which is usually accepted. A judge is not bound by a joint sentencing submission. However, courts understand that the DPP and the defendant must have a high degree of confidence that the joint submission will be accepted and the judge will not depart from it unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest.

⁷ Pursuant to the Immunity Program, former employees and agents can be immunized if they meet the program requirements. Under the Leniency Program, individuals employed by the first-in leniency applicant ordinarily will be immunized. Individuals implicated in second or subsequent applications for leniency may be exposed to criminal charges.

requirements will streamline the investigative process and help ensure the development of prosecution-ready cases by focussing investigations on the most important evidence.

2.1.2. Recording of Witness Statements

16. Taking video recorded statements under oath from witnesses is standard practice in criminal investigations in Canada. Recent experiences have shown that competition related offences should be no exception. Gathering evidence in this way allows the evidence to be preserved in case the witness becomes unavailable or recants previous material statements.

17. The Programs have been revised to clarify the Bureau's expectation that sworn audio or video recorded interviews will be taken at an advanced stage of the investigation, to support the Bureau's recommendations to the PPSC and any subsequent prosecution. Further, applicants should anticipate that witnesses will be asked about any criminal activity that can reasonably be expected to impact their credibility as a witness. The Bureau believes that creating an accurate record of witness statements will assist in ensuring that the Programs deliver prosecution-ready cases to the PPSC by ensuring that persuasive evidence is available and preserved.

2.1.3. Preparing Criminal Disclosure to the Accused

18. Persons charged with criminal offences in Canada are entitled to the "fruits of the investigation" in order to make full answer and defence to the charges.⁸ As such, ensuring that cases are prosecution-ready requires that all factual information gathered during the investigation, including information provided by applicants of the Programs, is organized and disclosed to an accused at the time that charges are laid.

19. Given the implications of recent Supreme Court of Canada jurisprudence regarding post-charge delay⁹, the Bureau and PPSC are striving to flag and resolve potential issues surrounding disclosure to the accused early in the process to ensure that a prosecution is not unduly delayed by these issues. To address this concern, the Bureau has proposed a privilege-claim process¹⁰ that essentially follows the same process to address claims of solicitor-client privilege during the execution of search warrants under the Act.¹¹

2.1.4. Time constraints

20. Time constraints on certain steps of the program are essential to ensure that a file is prosecution ready. The Programs stipulate that proffers should be completed within 30 days of the marker request. The Bureau is proposing to add a schedule of disclosure that

⁸ See *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

⁹ See *R. v. Jordan*, [2016] 1 S.C.R. 631.

¹⁰ When an applicant chooses to withhold a record on the basis of legal privilege, the applicant must provide the Bureau with notice of: the claim of privilege, the specific legal privilege being relied upon, and, the nature of the record to which the privilege is purported to attach. The Bureau will provide this information to the DPP who may seek a determination of any privilege claim with the assistance of an independent counsel (IC) or a court of law.

¹¹ See *Competition Act*, R.S.C., 1985, c. C-34, section 19.

would be established early in the immunity or leniency process, whereby the disclosure of records will be completed, normally within 6 months.

2.1.5. Summary

21. It is the Bureau's view that tightening up eligibility requirements, recording witness statements, settling privilege claims earlier in the investigation and imposing time constraints on cooperation will assist in ensuring that the Programs will deliver prosecution-ready cases to the PPSC, notwithstanding the constraints imposed by the bifurcated system of law enforcement in Canada. Having two unique agencies involved can create enforcement challenges, especially in the context of proving criminal offences beyond a reasonable doubt in court.

3. Challenge 2: Obtaining full cooperation from applicants, including information demonstrating the nexus to Canada

22. International cartel enforcement raises an additional challenge to obtaining full and timely cooperation from Program applicants. In many international cartel cases, even if the cartel agreement is unlikely to directly involve any Canadian entities, legal jurisdiction over extraterritorial conduct and foreign parties can be established. Canadian prosecutors must demonstrate a real and substantial connection between the alleged conduct and Canada, to the extent that the agreement affected Canadians, whether sales were made directly or indirectly into Canada.¹²

23. Program applicants often are focussed on the obligations owed to competition authorities in larger jurisdictions where they have a greater business presence and, thus, greater legal exposure and liability for cartel offences. Consequently, the Bureau may wait longer for Canadian specific information that establishes the nexus and impact of the conduct in Canada. For applicants, the benefits of prioritizing the requirements of leniency programs in larger jurisdictions often outweigh the benefits of meeting Canadian requirements, where their exposure and liability is often significantly lower. The timing or neglect of such disclosures affects the ability of investigators to perfect their recommendation to prosecutors in a timely manner, threatening the quality and availability of evidence to be put before the court.

3.1. Proposed Responses

24. Fostering full and timely cooperation and communicating these expectations to applicants is one of the objectives of revising the Programs. There are many ways in which the Bureau is encouraging full and timely cooperation.

25. The proposed revised Programs clearly communicate the Bureau's expectations to applicants regarding the type of information that is required for an immunity or leniency recommendation. Proffers must describe in detail the illegal conduct by demonstrating each element of the offence, the applicant's role in the offence, and the connection of the

¹² See *Libman v. The Queen*, [1985] 2 S.C.R. 178.

illegal activity to Canada. The applicant must also outline all of the supporting evidence and witnesses that it can provide at that point in time.¹³

26. Of particular relevance to international cartel investigations, the Bureau will expect to be informed of the following to demonstrate the nexus to Canada: how the conduct was implemented in Canada; a description of key customers in Canada and elsewhere; and the volume of commerce affected in Canada, whether directly or indirectly, along with a description of the methodology, data and sources used to make or support that determination.

27. At the disclosure stage of the application, which follows the recommendation for immunity or leniency, the applicant must provide full, complete, frank and truthful disclosure of all non-privileged relevant information, evidence or records in the applicant's possession, under its control or available to it, wherever located, that relate to the illegal activity. An applicant should consult with the lead officer assigned to the matter in order to discuss the relevance and scope of records to be produced and the form in which they will be provided, in order to ensure that the records are relevant and required.¹⁴

28. The Bureau believes that directly and explicitly addressing its expectations in international matters and demonstrating the nexus of the conduct to Canada will result in more fulsome and timely investigations as the Bureau will be satisfied earlier that it has jurisdiction over the conduct and parties.

4. Challenge 3 – Maintaining the Attractiveness of the Programs to Applicants

29. The Canadian Defence Bar has raised concerns that the proposed revised Immunity Program will be less attractive to clients, in part, due to the increase in the complexity of internal investigations that must be done in order to comply with its requirements. Another apprehension concerns confidentiality with the possibility of private actions for the recovery of damages when the alleged conduct becomes public. Applicants should not be worse off by participating in the Programs.

4.1. Proposed Responses

4.1.1. Penalties

30. The Bureau recognizes that the Programs are only effective if they are used. Appropriate incentives must be sufficiently attractive, relative to the imposed burdens, in order to draw applicants into the Programs. To this end, the Bureau is proposing revisions to the manner in which the recommended fine is calculated in order to encourage earlier cooperation and disclosure.

31. Under the current Leniency Program, the first-in leniency applicant is eligible for a 50 percent reduction of the base fine that would have been recommended by the Bureau to the PPSC. The second-in applicant is eligible for a reduction of 30% of its

¹³ Further details of the type of information that the Bureau expects to receive during a proffer is included in an appendix in the proposed revised program.

¹⁴ "Record dumps" are not acceptable.

recommended fine, and subsequent leniency applicants would generally be eligible for reductions no greater than that of earlier applicants.

32. The proposed revised Leniency Program contemplates that all leniency applicants will be eligible for a recommended credit of up to 50 percent of the calculation of the fine. The amount of credit available to an applicant will be based on the value of its cooperation and determined by the extent that the cooperation added to the Bureau's ability to advance its investigation to pursue other culpable parties. It will take into account: the timing of the leniency application (relative to other parties in the cartel, as well as relative to the stage of the Bureau's investigation), the timeliness of disclosure; the availability, credibility and reliability of witnesses; the relevance and materiality of documents; and any other factor relevant to the development of the Bureau's investigation into the matter or any additional matter for which the party is eligible for "immunity plus"¹⁵. Furthermore, the credit received will normally be higher for earlier disclosure. The Bureau hopes to replace the "race to the door" with a "race to provide information and evidence".

33. Moreover, the Bureau can analyse and credit corporate compliance programs when assessing penalties. The Bureau can recommend that credit be afforded where a compliance program is found to be credible and effective. A compliance program is "credible and effective" when it meets all seven of the requirements found in the Bureau's *Corporate Compliance Programs Bulletin*¹⁶. The proposed revised Leniency Program considers recommendations of an additional credit of up to 20% to the calculation of the recommended fine.

34. In addition to these proposed measures to increase the attractiveness of these programs, the Bureau already has certain valuable incentives in place. For example, despite the procedural modifications, the Immunity Program provides applicants with a substantial benefit as the applicant and its current directors, officers and employees will not face criminal charges or prosecution as long as they cooperate with the Bureau's investigation and subsequent prosecution. Individuals of the first-in leniency applicant may also receive a recommendation of immunity.

4.1.2. Confidentiality

35. Confidentiality is a key concern, which the Bureau's Programs address in a transparent and predictable manner. The Bureau will not disclose the identity of an immunity or leniency applicant, or the information provided by that applicant, to any foreign law enforcement agency without the consent of the applicant or unless required by law (e.g., in response to an order of a Canadian court). Typically, the identity of an applicant will remain confidential until the applicant enters a guilty plea into court or until charges are laid against other participants to the offence and disclosure of the DPP's case to the accused is required.

¹⁵ If a leniency applicant discloses evidence of conduct constituting a further criminal offence under the Act unknown to the Bureau, the leniency applicant may be eligible for immunity plus status, which provides greater recommended discounts. In addition to receiving immunity for the new offence, the Bureau will typically recommend that an additional five to 10 percent be added to the applicant's leniency credit.

¹⁶ http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html#s4_0

36. If the Bureau uses the applicant's information in an application to a Canadian court for a search warrant, production order or judicial authorization of another investigative measure, then the Bureau will take all reasonable steps to ensure that the applicant's identity will remain confidential. For example, the Bureau will draft applications to the courts for authorization of investigative powers in a manner designed to secure the protection of an applicant's identity.¹⁷ The Bureau may also request a sealing order to protect confidential information.

37. With respect to private actions for recovery of damages, the Bureau's policy is to only disclose the identity of, or any information provided by, an immunity or leniency applicant in response to a court order. In the event of such an order, the Bureau will take all reasonable steps to protect the confidentiality of the information and the identity of the applicant, including seeking protective court orders, to address the concerns of potential Program applicants.

4.1.3. Coordination of Immunity and Leniency Programs

38. The Bureau recognizes the benefits of the coordination of immunity and leniency programs among foreign jurisdictions, such as maximizing scarce investigative resources, and decreasing the burden on applicants. The Bureau believes that coordination of leniency programs can be improved by: requiring applicants to provide waivers covering both procedural and factual information; early disclosure of evidence to ensure that the Bureau is in a position to conduct coordinated enforcement actions with its foreign counterparts; and coordinating witness evidence, such as possibly obtaining shared witness declarations from applicants' witnesses.

39. As part of an applicant's ongoing cooperation and absent compelling reasons, the Bureau expects a waiver allowing communication of confidential information with jurisdictions to which the applicant has made similar applications for immunity or leniency. Such waivers shall be provided immediately and are expected to cover both substantive and procedural information ("full waiver"). The Bureau also encourages applicants to disclose its application for immunity or leniency and subsequent grant(s) of immunity, or any related information to agencies in foreign jurisdictions to which the applicant has made similar applications for immunity or leniency. This will allow us to cooperate more effectively with foreign jurisdictions.

40. When undertaking coordinated multi-jurisdictional enforcement actions, such as the execution of search warrants, it is essential that the Bureau is in a position to move quickly in order to ensure that evidence is not lost or destroyed. The proposed revisions to the Immunity Program stipulate that in certain circumstances and at its sole discretion, the Bureau may require the immunity applicant to make its proffer early within the 30 calendar day period, and provide documentary evidence and access to witnesses before the proffer is completed. This early disclosure at the proffer stage will form the basis of an application to court for search warrant(s) or other enforcement actions earlier in the immunity process than would normally be the case.

41. While not specifically addressed in the proposed revisions to the Programs, the Bureau has been considering other sources of efficiencies in international cartel

¹⁷ Unless the Bureau is of the view that such drafting would not provide sufficient grounds to obtain the authorization sought.

investigations. One possibility is joint investigative steps, such as coordinating the collection of witness evidence. For example, initially witness evidence could be provided via shared witness declarations that could be used in multiple jurisdictions. Not only would this help mitigate the burden of scheduling multiple interviews with different jurisdictions on the applicant and its witnesses, it would also ensure consistent witness statements, which is important in contested proceedings. However, it is not clear how this would work in practice, given the Bureau's requirement to obtain taped interviews under oath at a later stage in the investigation, and whether this would complicate the preparation of criminal disclosure to the accused in contested proceedings.

5. Conclusion

42. The Bureau sees three main challenges facing the Programs: ensuring cartel-related files are prosecution-ready, obtaining full and timely cooperation and maintaining incentives to continue to attract applicants to the Programs in light of changing policy and legal considerations. First, the Bureau seeks to address being prosecution ready by implementing clear eligibility requirements to qualify under the Programs; stipulating how witness evidence will be captured; ensuring that the Bureau is able to provide all of the factual information required for the PPSC to complete disclosure; and, placing time constraints on the disclosure of information by the applicant. Second, the Bureau seeks to address cooperation and incentives by communicating the Bureau's expectations to applicants; setting the expectations for the applicant to inform the Bureau of factors which demonstrate a nexus of the conduct to Canada; and facilitating effective disclosure of relevant materials from the applicant. Lastly, the Bureau seeks to maintain the attractiveness of the Program to applicants by proposing revisions to the manner in which the recommended fine is calculated in order encourage earlier cooperation and disclosure.

43. In addition to addressing these challenges, improving the coordination of leniency programs among different jurisdictions can be achieved through: the requirement of full waivers; ensuring that the Bureau is in a position to conduct coordinated enforcement actions with its foreign counterparts; and coordinating witness evidence.

44. The Bureau has and will continue to propose changes to address these challenges and improve coordination of its Programs with foreign counterparts, to improve their predictability and encourage their continued use.