

GLOBAL COMPETITION REVIEW

The international journal of competition policy and regulation

The Handbook of Competition Enforcement Agencies

A Global Competition Review special report
published in association with:
Fraser Milner Casgrain LLP

2008



THE QUEEN'S AWARDS
FOR ENTERPRISE
2006

Overview

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Canada's immunity programme, established by the Competition Bureau in September 2000, was amended in October 2007. According to the Bureau, it is its most important means of detecting criminal activity and its contribution to effective enforcement is unmatched. Under the programme, immunity from prosecution is available to the first party to disclose evidence of criminal activity of which the Bureau was either not aware or may not be in a position to effectively prosecute without cooperation from a participant in the illegal conduct. Procedures and considerations employed by the Bureau under the programme closely resemble those of the US amnesty programme.

In October 2007, along with the release of a revised programme information bulletin and background paper reviewing changes to the programme, the Bureau released an amended series of frequently asked questions (FAQ). Together with certain documents published by the director of public prosecutions (DPP), these documents outline the material terms and conditions of the programme.

First, the FAQ sets out the procedure for the first-in applicant to obtain an anonymous 'marker' guaranteeing the applicant's place at the front of the immunity queue. The FAQ confirms that only Bureau officials (and not the Federal Department of Justice or the DPP) may grant a first-in marker and that 'no-names' hypothetical information is adequate to request a marker. Although the Bureau grants the marker, sole discretion to grant immunity lies with the DPP. In practice, the Commissioner of Competition (the administrative head of the Bureau) recommends whether or not immunity ought to be granted with respect to competition law offences, and the DPP then considers whether it is in the public interest to do so.

Second, the FAQ prescribes the time period within which certain proffer requirements must be met. In particular, applicants must deliver an oral or written proffer within 30 days from the date that a marker is requested. The FAQ sets out the process for delivering either an oral or written proffer adequate for the Bureau to

make a recommendation to the DPP regarding the applicant's eligibility for immunity, including the types of information the Bureau expects to receive in a proffer: a description of the parties involved in the conduct; the physical and technical characteristics of the relevant product; a description of the industry involved, including pricing mechanisms and supply channels; a market definition, including the product and geographic markets affected; a description of the conduct, including the time period and monitoring and enforcement mechanisms (if any); the effect of the conduct, including the volume of affected commerce and pricing effects; a general description of the witnesses and records available to assist the Bureau in its investigation; and whether leniency has been or will be requested from other international authorities.

Third, the FAQ outlines that where the DPP agrees with the Bureau's recommendation to grant immunity, the DPP may enter into an immunity agreement with the applicant, the template of which has been prepared by the DPP. A previous Bureau policy under which provisional guarantees of immunity were granted to applicants before a final agreement was executed has been replaced (as of October 2007) by a single final immunity agreement, which remains conditional on complete, timely and ongoing cooperation throughout the course of the Bureau's investigation and any subsequent prosecutions. Applicants complete the full disclosure process, targeted to within a six-month timeline, only after entering into an immunity agreement with the DPP.

Fourth, the FAQ indicates that the Bureau does not expect an applicant to demonstrate decisively that an 'undue' lessening of competition has occurred at the proffer stage. In Canada, unlike the United States, cartel type agreements among competitors are generally not per se illegal. The authorities must demonstrate that the agreement, if implemented, would likely lead to an undue lessening of competition in the relevant market. Although the Bureau does not expect an applicant's proffer to demonstrate an undue lessening of competition, the Bureau does expect an applicant

to disclose adequate information to assess the potential anti-competitive effects, including information about market shares, barriers to entry, countervailing market power and cross-elasticity of demand.

Fifth, the revised FAQ clarifies that the identity of immunity applicants is normally kept confidential, except where disclosure is: required by law; necessary to obtain judicial authorisation for, or law enforcement agency assistance with, the exercise of investigative powers; required to prevent the commission of a serious criminal offence; required for the administration or enforcement of competition legislation; or made or agreed to by the applicant.

Sixth, the recent revisions to the FAQ have also clarified which business organisations or individuals are disqualified from a grant of immunity, and when the Bureau may recommend a revocation of immunity to the DPP. The Bureau will disqualify an applicant where there is clear and objective evidence that the applicant took steps to coerce participants that were otherwise

unwilling to engage in the anti-competitive activity. This criterion replaces the previous standard which focused on whether the applicant was the instigator or leader of the anti-competitive activity. A recommendation by the Bureau to revoke immunity may be made selectively with respect to company officers and directors (for instance, a company's immunity may be revoked while its cooperative employees remain covered), and generally would occur if a party fails to meet its obligations under the immunity agreement, intentionally fails to disclose all offences under the competition legislation, or if a business entity fails to use all lawful measures to secure the cooperation of its current or past officers, directors, employees and agents.

The revisions made to the programme in October 2007, after extensive consultations, have yet to be thoroughly tested in practice. However, the revised guidelines have been well received by the practising bar, and additional reforms are not expected in the near future.

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FMC competition lawyers are recognised internationally as leading practitioners in competition law and litigation by a variety of publications, including *Chambers Global: Guide to the World's Leading Lawyers for Business*, Euromoney's *Expert Guide to Litigation Lawyers*, Practical Law Company *Which Lawyer?*, *The International Who's Who of Business Lawyers*, LexisNexis's *Martindale-Hubbell Law Directory*, *Lexpert/ALM Guide to 500 Leading Lawyers in Canada*, and *Best Lawyers: The Best Lawyers in Canada*.

Global enforcement of competition laws and cooperation among enforcement agencies around the world has increased exponentially over the last decade. The consequences for those who are subject to these enforcement efforts can be severe. Our competition lawyers have significant expertise in international cartel matters and have represented numerous clients in conspiracy investigations and prosecutions involving competition authorities in the United States and Europe, as well as the Canadian Competition Bureau.

We also have extensive experience in merger review and competition tribunal proceedings, civil litigation of competition law claims including class actions, designing and implementing effective compliance programmes and complying with the Investment Canada Act, applicable to acquisitions of Canadian businesses by non-Canadians.