

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

- Canada -

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Introduction

1. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee's December 2014 roundtable on "Use of Markers in Leniency Programs". The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency responsible for the administration and enforcement of the *Competition Act* (the "Act")¹ and certain other statutes. In carrying out its mandate, the Bureau strives to ensure that Canadian consumers and businesses prosper in a competitive and innovative marketplace.

2. The Act is a federal law governing most business conduct in Canada. It includes both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace, including criminal provisions that prohibit cartels. These cartel provisions prohibit agreements or arrangements among competitors to fix prices, allocate markets or restrict output that constitute "naked restraints" on competition (restraints that are not implemented in furtherance of a legitimate collaboration, strategic alliance or joint venture). They also prohibit foreign directives, bid-rigging and certain conspiracies relating to professional sports and federal financial institutions.²

3. Cartels deprive Canadians of the benefits of competition, such as lower prices and increased product choice, and represent one of the most egregious forms of anti-competitive conduct. Therefore, cracking down on domestic and international cartels has been, and continues to be, one of the Bureau's top enforcement priorities.

4. The Bureau's Immunity and Leniency Programs are its most effective tools for detecting and investigating criminal anti-competitive activities prohibited by the Act. Under the Immunity Program, the first party to disclose to the Bureau an offence not yet detected or to provide evidence leading to the filing of charges may receive immunity from prosecution from the Public Prosecution Service of Canada (the "PPSC")³ as long as the party co-operates with the Bureau.⁴ The Bureau's Leniency Program complements its Immunity Program by supporting the effective and efficient enforcement of the Act. Under the Leniency Program, the Bureau may recommend to the PPSC that cooperating persons who have violated the cartel provisions under the Act, who are not eligible for a grant of immunity, be considered for lenient treatment in sentencing.⁵

5. This submission discusses the Bureau's marker management system, an important feature of both its Immunity and Leniency Programs. It outlines the structure and purpose of the marker management system, as well as issues of confidentiality and waivers.

¹ R.S.C. 1985, c. C-34.

² *Id.* at ss. 45-49.

³ The PPSC is the 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 and the PPSC represents the DPP in proceedings before courts of criminal jurisdiction in Canada.

⁴ For more information on the Bureau's Immunity Program, see www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html.

⁵ For more information on the Bureau's Leniency Program, see www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02816.html.

2. Immunity Program

6. The Bureau's Immunity Program, which was formalized in 2000, has proven to be the Bureau's single most powerful means of detecting criminal cartel activity. The goal of the Immunity Program is to uncover and stop criminal anti-competitive activity prohibited by the Act and to deter others from engaging in similar behaviour. In Canada, immunity is available to both organizations and individuals.⁶

7. The Bureau will recommend to the PPSC that immunity be granted only in the following situations: (a) where the Bureau is unaware of an offence and the party is the first to disclose it; or (b) where the Bureau is aware of an offence and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the PPSC. The party must also meet several conditions to obtain immunity, which are outlined in the Bureau's *Information Bulletin on the Immunity Program under the Competition Act*.⁷

8. Under the Immunity Program, if a company qualifies for immunity, all current directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete, timely and ongoing co-operation, also qualify for the same recommendation for immunity. Former directors, officers and employees who offer to co-operate with the Bureau's investigation may qualify for immunity. However, the Bureau will make any such determination on a case-by-case basis.

9. The Immunity Program's continued appeal to those who would otherwise remain undercover is pivotal to the Bureau's enforcement efforts.

3. Leniency Program

10. The Bureau's Leniency Program complements its Immunity Program by supporting the effective and efficient enforcement of the Act. Under the Leniency Program, the Bureau will recommend to the PPSC that qualifying applicants be granted recognition for timely and meaningful assistance to the Bureau's investigation and any subsequent prosecution. While leniency candidates are not eligible for a grant of immunity under the Bureau's Immunity Program, their early admission and cooperation respecting their role in a cartel offence can earn them a substantial basis for lenient treatment in sentencing.

11. Leniency applicants are eligible for the following discounts, provided that they meet the requirements of the Leniency Program, including providing full, frank, timely and truthful cooperation:

- The first leniency applicant is eligible for a reduction of 50 percent of the fine that would have otherwise been recommended by the Bureau to the PPSC.
- The second leniency applicant is eligible for a reduction of 30 percent of the fine that would have otherwise been recommended by the Bureau to the PPSC.
- Subsequent leniency applicants may also benefit from reductions to the fine that would have otherwise been recommended by the Bureau to the PPSC. The actual amount of the reduction that

⁶ As defined in the *Criminal Code*, the word "organization" may refer to a public body, a body corporate, a society, a company, a firm, a partnership, a trade union or a municipality. It may also refer to an association of persons that is created for a common purpose, that has an operational structure and that holds itself out to the public as an association of persons.

⁷ Available online at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html.

a subsequent applicant is eligible to receive will depend on when the applicant sought leniency compared to the second leniency applicant and the timeliness of its cooperation. As a rule, later leniency applicants will not be eligible for a greater leniency discount than earlier applicants.

12. In addition to the discounts on fines, in the case of a first-in leniency applicant that is a business organization, the Bureau will recommend that no separate charges be laid against the applicant's current directors, officers or employees, provided that such individuals cooperate with the Bureau's investigation in a full, frank, timely and truthful fashion. Agents and former directors, officers and employees implicated in the offence will also typically qualify for leniency, provided that they offer to cooperate with the Bureau's investigation and any subsequent prosecution. The Bureau will make a determination regarding agents and former directors, officers and employees on a case-by-case basis, for example, depending on the current employment status of such individuals (i.e., if they are currently employed by another party to the offence).

13. Where the first leniency applicant is an individual applying independently (i.e., implicating his or her current or former employer), leniency will be accorded in the same manner as if the individual were covered by an employer's leniency application. That is, if the individual meets the eligibility requirements of the Leniency Program and provides full, frank, timely and truthful cooperation, the Bureau will recommend that the individual not be criminally charged.

14. For the second and any subsequent leniency applicant, current and former directors, officers, employees and agents may be charged depending on their role in the offence. When making its recommendation to the PPSC as to whether a director, officer, employee or agent should be charged, and any applicable fine or custodial sentence, the Bureau will consider all of the available facts and circumstances in respect of such an individual's participation in the offence. Directors, officers, employees and agents who are charged but who cooperate fully under the Leniency Program, independently or under the umbrella of the leniency application of their employer, may be eligible to be evaluated by the Bureau as to whether they meet the conditions necessary to receive a lenient treatment recommendation from the Bureau.

4. Immunity Marker

15. An "immunity marker" is the confirmation given to an immunity applicant that it is the first party to approach the Bureau requesting a recommendation of immunity with respect to criminal anti-competitive activity involving a particular product or business interest. An immunity marker can be requested by an individual or an organization. However, it is an applicant's counsel that typically makes the first contact with the Bureau.

16. An immunity marker guarantees the immunity applicant's place at the front of the line, subject to the immunity applicant meeting all of the other criteria of the Immunity Program. Once an immunity marker is granted, the immunity applicant has a limited period of time, usually 30 calendar days, to provide the Bureau with a detailed statement describing the illegal activity, its effects in Canada and the supporting evidence. This statement is known as a "proffer".

17. An immunity applicant may request an immunity marker for anti-competitive activities subject to sanction under the criminal competition provisions of the Act. Offences described in sections 45 to 49 of the Act, including conspiracy (sections 45 and 46) and bid-rigging (section 47), are handled by the Criminal Matters Branch. Offences described in sections 52 to 55.1 of the Act, including false and misleading representations (section 52) and deceptive telemarketing (section 52.1) are handled by the Fair

Business Practices Branch.⁸ An immunity applicant may also request an immunity marker for such offences when liability arises from aiding or abetting any of these offences contrary to section 21 of the *Criminal Code* or counselling any of these offences contrary to section 22 of the *Criminal Code*.

18. As noted above, the Bureau will recommend that immunity be granted to the first party to disclose to the Bureau an offence not yet detected or to provide evidence leading to a referral of evidence to the PPSC. Accordingly, only one immunity marker will be granted for each offence, regardless of whether liability arises directly from the Act or through the application of section 21 and/or 22 of the *Criminal Code*.

5. Leniency Marker

19. Similar to an immunity marker, a “leniency marker” is the acknowledgement given to a leniency applicant that records the date and time of a leniency applicant’s application to the Leniency Program. It establishes the leniency applicant’s position in line in relation to other individuals or organizations seeking to participate in the Leniency Program. The leniency marker guarantees the leniency applicant’s position in line, subject to the leniency applicant meeting all of the other criteria of the Leniency Program. A leniency marker, like an immunity marker, can be requested by an individual or an organization.

20. An applicant may request a leniency marker only for cartel offences under the Act or for such offences when liability arises from aiding or abetting any of these offences contrary to section 21 of the *Criminal Code* or counselling any of these offences contrary to section 22 of the *Criminal Code*.

21. An applicant that receives a leniency marker will be allowed four business days to confirm its intention to participate in the Leniency Program. Once participation is confirmed, the leniency applicant, like an immunity applicant, has a limited period of time to provide the Bureau with a “proffer”.

6. Purpose of Marker System

22. As previously mentioned, the Bureau will grant an immunity marker, with respect to particular conduct, only to the first party to request immunity. Subsequent applicants may seek a leniency marker under the Bureau’s Leniency Program, but will not be eligible for a recommendation of immunity by the Bureau to the PPSC, unless the first-in party ultimately does not qualify for immunity.

23. It is the Bureau’s view that maintaining the first-in approach encourages parties to apply for immunity as soon as possible and not wait for their co-offenders before reporting illegal activity to the Bureau. Parties should come forward as soon as they believe they are implicated in an offence to ensure their status as first-in to qualify for immunity.

7. Obtaining a Marker

24. Currently, immunity markers are granted by either the Senior Deputy Commissioner of Competition (the “SDC”) of the Criminal Matters Branch⁹ or the Deputy Commissioner of Competition (the “DC”) of the Fair Business Practices Branch,¹⁰ while leniency markers are granted solely by the SDC

⁸ It is worth noting that the Bureau is currently in the process of a re-alignment exercise, which will see the Criminal Matters Branch and the Fair Business Practices Branch combined into a single branch.

⁹ Immunity markers for conspiracy and bid-rigging are granted solely by the SDC of the Criminal Matters Branch.

¹⁰ Immunity markers for false or misleading representations and deceptive marketing practices are granted solely by the DC of the Fair Business Practices Branch.

of the Criminal Matters Branch.¹¹ However, following implementation of the re-alignment exercise referred to above, all markers will be granted by the SDC responsible for the combined branch.

25. It is recommended that both immunity and leniency marker requests be made by telephone. The applicant should ensure that all information is clearly stated and that the applicant and the SDC or DC are in agreement that an immunity or leniency marker has been requested, on the date and time of the request and on the description of the relevant product or business interest. As soon as possible following the request, usually within a few days, the SDC or DC will advise the applicant whether the requested immunity or leniency marker is available to the applicant and, in the case of leniency, the applicant's position in line in relation to other applicants seeking to participate in the Leniency Program.

26. The Bureau encourages individuals and organizations to come forward and request a marker as soon as they believe they may be implicated in an offence. If an applicant later determines that it was not involved in an offence, it should notify the SDC or DC and withdraw its marker.

27. At the marker application stage, the Bureau requires sufficient information to determine an applicant's position in line under the Immunity or Leniency Program. It does this by comparing the conduct and product description provided by the applicant to information already in the Bureau's possession. This enables the Bureau to determine whether another party has requested an immunity or leniency marker for the same conduct and product.

28. For this reason, it is imperative that the applicant, when identifying the offence, provide a precise product definition, including a description of any sub-products that may be covered within the scope of the immunity or leniency marker request, as well as the time period for the conduct in question. In some circumstances, the Bureau may request more detailed information regarding the offence, the geographic market or the other parties involved to assist it in the determination of whether the requested immunity or leniency marker is available.

29. An applicant may provide information on a hypothetical basis at the marker request stage – it is not required to reveal its identity to obtain a marker. At this stage, information is often provided by an applicant's counsel. However, once a marker is granted, the applicant will need to identify itself to facilitate the Bureau's preparations for the applicant's proffer and the Bureau's investigation.

8. Proffer

30. After receiving an immunity or leniency marker, an applicant must provide the Bureau with a statement known as a proffer. In a proffer, an applicant describes in detail the illegal activity, its role in the offence for which immunity or leniency is sought, and the effect of the illegal activity in Canada. The applicant must also outline all of the supporting evidence and witnesses that it can provide at that point in time as part of its cooperation under the Immunity or Leniency Program. Proffers are generally provided on a "without prejudice" basis by an applicant's counsel. In the case of a leniency applicant, all information provided will be treated as settlement privileged.

31. At the proffer stage, accuracy is critical. The Bureau relies on the information provided to assess the immunity or leniency application, to make its recommendation for immunity or leniency to the PPSC and to pursue its investigation of other parties to the offence.

32. At the proffer stage, the Bureau will not accept a bare outline of the conduct or speculation as to the applicant's role. The Bureau requires the details of the applicant's role and sufficient information to

¹¹ The Leniency Program applies only to conduct subject to the criminal cartel provisions in the Act.

obtain a clear appreciation of the evidence each witness identified by the applicant can provide about the conduct. Applicants should report as completely and accurately as possible with truthfulness and in a spirit of cooperation.

33. Applicants have a positive obligation to update their proffered information as they become aware of either new or corrected information. This must be done promptly and on an ongoing basis, regardless of whether or not the Bureau has specifically asked for the information.

34. An applicant should make and complete its proffer as soon as possible after receiving its immunity or leniency marker, typically within 30 calendar days after the marker has been granted by the SDC or DC. The SDC or DC will discuss timing requirements with an applicant during the immunity or leniency marker call. The timing of a proffer can affect other steps in the Bureau's investigation, such as the execution of a search warrant or cooperation with another jurisdiction, where timing can be critical. In certain circumstances, the Bureau may require the applicant to make its proffer early within the 30 calendar day period.

35. The Bureau considers a proffer to be complete when it has received sufficient information to make an immunity or leniency recommendation to the PPSC. At the request of the Bureau, the applicant must advise the Bureau, in a manner that does not waive any legal privilege, of the progress of its internal investigation so that the Bureau can determine if information may be lacking. The Bureau expects that applicants will continuously provide any new information they become aware of and that applicants will provide timely responses to any questions the Bureau may have.

36. The Bureau accepts both oral and written proffers. The Bureau is sensitive to the concerns of applicants about written proffers and other exchanges and, as a result, it has developed a "paperless process" when dealing with applicants.

9. Immunity or Leniency Recommendation

37. After an assessment of an applicant's completed proffer, the Bureau will present the information to the PPSC in support of its immunity or leniency recommendation to the PPSC. In the case of leniency, this will also include a sentencing recommendation. While the PPSC will give the Bureau's recommendation due consideration, the PPSC has final independent authority to decide if it will enter into an immunity or plea agreement with an applicant and, in the case of leniency, whether it will recommend leniency to the court.

38. Depending on the circumstances, the Bureau may require further information, including evidence in the form of records or interviews with the applicant's proffered witnesses, to complete its immunity or leniency recommendation or pursue other investigative steps, such as search warrant applications. Any records provided to the Bureau at this stage are treated as confidential or privileged. The Bureau will not return records to the applicant.

10. Confidentiality

39. The Bureau requires that both immunity and leniency applicants keep their applications confidential. Confidentiality helps to ensure that the integrity of the Bureau's investigation is maintained, that evidence is not destroyed, and that targets of the investigation do not become prematurely aware of investigative steps.

40. Immunity and leniency applicants should not disclose their application for a marker and subsequent immunity or lenient treatment, or any related information, to a third party, other than its counsel or agencies in foreign jurisdictions to which the applicant has made similar applications for

immunity or leniency, unless consent is first obtained from the Bureau. Depending on the circumstances, the Bureau may ask that the applicant also obtain the consent of the PPSC.

41. The only exceptions to obtaining consent occur if the application is public,¹² or if the applicant is required by law to disclose the information, whether in Canada or elsewhere. An applicant that believes that disclosure is required by law must give notice to the Bureau as soon as practicable after becoming aware of the disclosure requirement, and consult with the Bureau on how to protect the interests of the Bureau's investigation in light of the disclosure requirement.

42. An applicant must advise the Bureau as soon as practicable of the identity of all third parties, other than its counsel, to whom its application for immunity or leniency has been disclosed, including the agencies in all foreign jurisdictions to which the applicant has made similar applications for immunity or leniency.

43. If an applicant or any of the individuals within the scope of the applicant's immunity or leniency application disclose the applicant's application before obtaining consent or otherwise notifying the Bureau, they risk expulsion from the Immunity or Leniency Program and prosecution for the offence for which immunity or leniency was sought. Whether they will be expelled from the Immunity or Leniency Program will be determined on a case-by-case basis having regard to all of the circumstances in question.

44. Under the Immunity and Leniency Programs, the Bureau treats the identity of an applicant as confidential. The only exceptions to this policy are where:

- disclosure is required by law;
- disclosure is necessary to obtain or maintain the validity of a judicial authorization for the exercise of investigative powers;
- disclosure is for the purpose of securing the assistance of a Canadian law enforcement agency in the exercise of investigative powers;
- the party has agreed to disclosure;
- there has been public disclosure by the party; or
- disclosure is necessary to prevent the commission of a serious criminal offence.

45. The Bureau also treats as confidential information obtained from a party requesting immunity or leniency, subject only to the exceptions listed above, or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act. Typically, the identity of an applicant will remain confidential until charges are laid against participants to the offence and disclosure of the Crown's case to the accused is required. In the case of a leniency applicant, all information provided up until the plea agreement is concluded will be treated as settlement privileged.

46. Immunity and leniency applicants should be aware, however, that their identity may be disclosed before charges are laid if the Bureau relies on their evidence in an application to a Canadian court for a

¹² An example where the identity of an applicant may become public would be if the Bureau relies on their evidence in an application to a Canadian court for a search warrant, production order or judicial authorization of another investigative measure. However, the Bureau will take all reasonable steps to ensure that this type of early disclosure does not occur, except where necessary.

search warrant, production order or judicial authorization of another investigative measure. Recourse to search warrants and production orders, among other things, can be of utmost importance to an investigation. To obtain court authorizations, the Bureau must provide the court with information that there are reasonable grounds to believe that an offence has been, or will be, committed. The Bureau will rely on the information provided by the immunity or leniency applicant to establish these grounds.

47. The Bureau will not allow an immunity or leniency applicant's interest in maintaining confidentiality to jeopardize the Bureau's ability to effectively enforce the Act. However, the Bureau will take all reasonable steps to ensure that this type of early disclosure does not occur, except where necessary. The Bureau will draft applications to the courts for authorization of investigative powers, referred to as "Informations to Obtain" (ITOs), in a manner designed to secure the protection of an applicant's identity, unless the Bureau is of the view that such drafting would not reveal sufficient grounds required to obtain the authorization requested.

48. If the identity of the immunity or leniency applicant cannot be kept confidential when the Bureau applies for such authorization, it will request that the ITO, or relevant portion thereof, be sealed until charges are laid. If a party challenges the sealing order before a court to access the ITO, the Bureau will recommend to the PPSC that it resist the disclosure of the applicant's identity and provide a redacted version of the ITO, with the identity of the applicant kept confidential, unless the court orders otherwise. Where it appears likely that disclosure is unavoidable, the Bureau will advise the applicant as soon as possible.

11. Waivers

49. The Bureau will not disclose the identity of an 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 of competent jurisdiction). This confidentiality protection is an added benefit afforded to applicants under the Bureau's Immunity and Leniency Program.

50. It is important to note, however, that as part of an applicant's ongoing cooperation, without compelling reasons, the Bureau will expect a waiver allowing communication of information with jurisdictions to which the applicant has made similar applications for immunity or leniency. Such waivers are to be provided immediately and are expected to cover both substantive and procedural information.

12. Marker Cancellation

12.1 Investigations the Bureau does not intend to pursue

51. The Bureau will not make a formal recommendation for immunity or leniency to the PPSC in cases where it does not intend to further investigate the alleged anti-competitive conduct. In these situations, the Bureau will advise the applicant of its immunity or leniency position, confirm that the applicant's immunity or leniency position will be respected should the Bureau decide to pursue the investigation at a later time, and describe the scope of the products and conduct that would have been included in an immunity or leniency recommendation to the PPSC had the investigation continued. This will be done verbally, unless the applicant requests that it be done in writing.

52. If the Bureau subsequently decides that it will investigate the alleged anti-competitive conduct, it will advise the applicant and take steps to recommend that immunity or leniency be granted for the products and conduct previously described to the applicant, provided that the organizations and/or individuals that would be covered by the recommendation for immunity or leniency continue to meet the conditions of the Immunity or Leniency Program.

12.2 *Instances where a marker will be cancelled*

53. Where an applicant's proffer provides insufficient information that it committed an offence, the Bureau will make no recommendation to the PPSC as to a grant of immunity or leniency and will request that the applicant withdraw its marker. In the event that the applicant does not withdraw its marker, the marker will be cancelled by the SDC or DC following a minimum of 14 calendar days notice to the applicant.

54. If an applicant fails to provide its proffer within 30 calendar days after a marker has been granted, or within any extended period of time agreed to by the SDC or DC, the applicant's marker will automatically lapse. The applicant's marker will also automatically lapse at the end of this period if the applicant provides a proffer and is subsequently informed by the Bureau that the proffer is incomplete or otherwise insufficient and it has not obtained an extension from the SDC or DC.

55. There is no obligation on the SDC or DC to notify the applicant that its leniency marker has lapsed in such circumstances. Rather, it is the applicant's responsibility to seek an extension from the SDC or DC in such cases. The SDC or DC may also cancel a marker if the applicant fails to meet any of the other requirements of the Immunity or Leniency Program. The SDC's or DC's decision to cancel a marker will be made only after serious consideration of all factors and a minimum of 14 calendar days notice to the applicant.

13. Conclusion

56. The Bureau's marker management system is an important aspect of both its Immunity and Leniency Programs. This system compels companies to report conduct as soon as it is discovered. This discourages a "wait and see" approach to reporting wrongdoing, and reduces gaming of the system. The low evidentiary threshold for obtaining a marker encourages early reporting, which provides the Bureau with an opportunity for early involvement in an investigation. It is the Bureau's belief that predictability and transparency in its policies and practices related to its Immunity and Leniency Programs ensure that applicants can make informed decisions about their participation in the programs.