

Speaking Notes

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"Cartels: Detection, Detection, Detection"

It is a great pleasure for me to be here today to participate in the 2007 Competition Day hosted by the Físcalia Nacional Económica. Such events are critical in reinforcing for governments, businesses and consumers alike the importance of truly competitive markets in generating economic development, in promoting innovation and in increasing productivity.

More and more countries are recognizing this idea. And academic studies support it. Certainly, William Lewis' decade of research, described in his book "The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability", provides compelling evidence that the key to improving economic development is increasing productivity through intense and fair competition in the marketplace.

I am particularly pleased to be part of this panel. Discussions at an international level are part of the increasing globalization of the marketplace; we all benefit from learning first hand about important developments that are taking place in competition policy around the world. I hope that our discussions will also help to further develop the Canadian Competition Bureau's relationship with the Físcalia Nacional Económica and support greater substantive and procedural convergence among antitrust authorities.

One area where the advantages of such convergence are evident is the focus of this year's Competition Day: hard core cartels. Virtually all anti-trust agencies around the world have made it a priority to detect and prosecute this egregious anti-competitive behaviour. I am very pleased to share with you some of our Canadian experiences in deterring such activities.

Lay of the Land

I should first note that in Canada, we have a bifurcated approach to criminal cartel enforcement. The Bureau investigates anti-competitive conduct. Where the Bureau has developed sufficient evidence of a cartel offence, we refer the matter to the Public Prosecution Service of Canada with recommendations on prosecution.

In this way, the Bureau works with the prosecutors throughout. It is the prosecutors who decide whether and how to proceed with these prosecutions, and who are ultimately responsible for sentencing recommendations to the courts.

Let me turn to the work of the Bureau: detection and investigation of cartels.

As with any crime, the best deterrent to cartels is effective detection and clear consequences for those detected.

Detection is extremely difficult. This is because virtually all who participate in cartels are aware of the illegality of their conduct and take steps to hide their activities. Cartel participants devise sophisticated, covert price-fixing, supply-restriction or market-allocation schemes to stay ahead of detection.

Of course, we as enforcers need to be as innovative and resourceful as the cartelists in order to uncover cartel activity. But *detection* itself is only part of the challenge, because it is not enough to identify a cartel; we need evidence to prosecute successfully. Where, as in Canada, engaging in cartels is a crime, this gives rise to additional challenges. First, there is a high burden on the Bureau in respect of *how* we gather evidence in a criminal investigation; and then there is the high burden of proof applicable to a criminal prosecution.

The Bureau's single most effective tool for detection and investigation of cartels is our Immunity Program. It provides the necessary incentive to cartel participants to come forward and cooperate with the Bureau in identifying, investigating and prosecuting cartels in exchange for full immunity from prosecution. Since the time of the publication of the Bureau's Immunity Program in 2000, we have received over forty immunity applications.

The International Context

The Bureau's Immunity Program and its implementation is guided by the work of the International Competition Network and the OECD in encouraging convergence of the rules and processes governing immunity and leniency. The result has been to maximize the benefits of these powerful tools.

The ICN holds a special place in my heart. It was founded in the fall of 2001, with just 16 member agencies. It now engages the voluntary efforts of 100 competition authorities and many more private sector representatives (or non-governmental advisors) from 88 jurisdictions around the world. This trajectory mirrors closely the rapid introduction of competition laws globally, as those of you seeking to clear multinational mergers will know. Whereas a decade or two ago there was only a handful, we now see close to 100.

As its new Chair, I can say that we get things done. In its very short history, the ICN has produced an impressive number of documents to facilitate the move to greater international convergence of antitrust practices and more effective co-operation and co-ordination of competition agencies' work around the globe.

The role of immunity programs has been the subject of study and concerted policy-making within the ICN Cartels Working Group.

At the 2006 ICN Annual Meeting held in Cape Town, this Working Group addressed effective immunity and leniency programs in its *Anti-Cartel Enforcement Techniques Manual*.

That chapter of the manual highlights the consensus between most agencies that there are 3 conditions for a successful immunity program:

- high risk of detection: those participating in cartels must perceive that there is a real risk of detection, in the absence of an immunity application, and that subsequent enforcement action will necessarily follow;
- transparency and certainty: an applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not; and
- significant sanctions: the cost of getting caught must be greater than the value of the cartel for cartel participants.

Immunity Program

The Bureau's Immunity Program is in step with the approach proposed by the ICN. The Program was implemented in September 2000. It offers immunity from criminal prosecution to cartelists who are the first to disclose an offence we have not yet detected or, in cases where we have an ongoing investigation, who can provide additional evidence to support referral to the prosecutors.

Any applicant – both businesses and individuals – may request immunity by providing sufficient details to the Bureau to secure a “marker” as first in line to request immunity. This must be followed by a significantly more detailed description of the illegal activity, demonstrating the ability and the readiness of the applicant to co-operate fully with the investigation and the prosecution. If the Bureau is satisfied that the applicant meets the conditions of the programme, it recommends that the prosecutors grant immunity.

In February 2006, the Bureau issued a public consultation paper on its Immunity Program. The purpose of the consultation was to elicit responses from a broad range of stakeholders on substantive issues that arose since the Program's inception and to determine whether we should modify any of its conditions.

Very recently, we published the results of our review. On October 10th, the Bureau issued a new Information Bulletin setting out the new Immunity Program, along with a Policy Backgrounder describing the program adjustments and revised Responses to Frequently Asked Questions. These documents together provide a “road map” for applicants on what to expect when they engage the immunity process.

A detailed road map is essential if we wish to provide the certainty and transparency that is one of the three ICN conditions for a successful immunity program. A full and complete description of our program allows an applicant to predict how it will be treated if it reports criminal conduct and cooperates, and what the consequences will be if it does not.

Here is a quick summary of some of the key features of our program.

In addition to being the “first in”, the immunity applicant must terminate participation in illegal activity. This has been an important condition since the inception of our program.

The applicant must also provide complete, timely and ongoing co-operation. A corporate applicant must secure the participation of current directors, officers and employees. Securing timely participation can sometimes present challenges for smaller or medium size agencies, such as the Canadian Competition Bureau, particularly in the context of international cartels. Corporations frequently seek immunity in more than one jurisdiction and different agencies make competing demands for witnesses' time. We are constantly seeking ways to address this and to ensure that our investigations are not prejudiced by delay.

A further condition is that the party must not have coerced others to participate in the illegal activity. This is one area where we updated our programme, in light of our consultations, to bring ourselves more in line with other jurisdictions.

The applicant must meet all of these conditions, or it runs the risk of seeing its immunity revoked. This would be a serious and exceptional step.

As I noted earlier, our Information Bulletin and related documents provide a detailed road map to a potential immunity applicant who wishes to assess how it will be treated if it reports the conduct, and what the consequences will be if it does not. Communicating details of our program addresses the ICN's call for certainty and transparency.

The situation is less clear, however, with respect to leniency applicants. Under the Bureau's 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 prosecutors. Lenient treatment includes a recommended reduction in the severity of any penalty or obligation that would be otherwise sought in the absence of disclosure and co-operation by a cartel. There is, however, no formal program, as there is in the case of immunity applicants. At least not yet.

In the October 10th release of the new Immunity Program, the Bureau also announced its commitment to develop a formal and transparent leniency program for parties that do not qualify for immunity. The next step to the Bureau's commitment to adopt a formal leniency program will be to develop a bulletin on its approach to recommending leniency.

The immunity program provides the single most effective mechanism to detect and enforce both international and domestic cartels. But we are also taking steps to improve our ability to unearth this harmful anti-competitive behaviour in other ways. For example, over the last two years we have strengthened the enforcement capacity of our regional offices and have given them responsibility for local cartels, especially bid rigging. Our regional strategy is based on investigators being close to the action - we call it our "feet on the street" response. By locating regional offices across the country, we believe they will develop a better understanding of what is going on in local markets and where intervention by the Bureau is warranted.

Being close is not enough, however. We have to have effective detection tools. An immunity programme is not enough to secure the evidence required to detect, investigate and prosecute cartels. Trained officers, skilled in analysis and in gathering evidence, need tools to carry out their work. In Canada, there are basically three mechanisms for obtaining evidence, with differing levels of

judicial oversight. These are the powers to secure subpoenas, search and seizure orders and wiretaps.

Let me say just a few words about the ICN third condition for a successful immunity programme: imposing strong sanctions for cartel conduct. Criminal convictions and significant financial sanctions are becoming more common in many countries. In Canada, our courts have, in the past, demonstrated some reluctance to impose sizeable fines for domestic cartels; however, this is changing. In one recent domestic cartel case, the court levied fines of \$12.5M on each of three companies, declaring that monetary sanctions must be sufficiently high so that they are not viewed simply as a cost of doing business.

The importance of the “3 C’s” for international enforcement

Before I conclude, I would like to say a few words about what I sometimes call the “3 C’s” for effective international enforcement: co-ordination, cooperation and communication. ¹

First, with respect to co-operation, it is critical that we be able to exchange information with our counterparts around the world, both in terms of our economic theory of the case as well as the specific evidence we have been able to gather. It is for this reason that the Bureau routinely obtains confidentiality waivers to facilitate information sharing that otherwise would be prohibited under the confidentiality commitments in the Immunity Program.

Applicants generally are willing to provide a waiver in respect of those jurisdictions where they have sought and obtained a “marker” or some form of leniency. This provides benefits for competition agencies and the immunity applicant by enabling enforcers to better coordinate their investigations for a more timely and efficient resolution of the case.

Second, co-ordination. Timing is critical to locating evidence as quickly as possible and coordinating planned steps in an investigation. This is particularly important at the pre-search stage to ensure that targets are not “tipped-off” about upcoming raids and thereby given the opportunity to destroy documents or other evidence. In a recent example, one jurisdiction delayed its search to allow another jurisdiction to complete part of its work, thus avoiding alerting the party prematurely, which could have led to the destruction of documents. The issue of timing is also important for applicants with multi-jurisdiction immunity applications. They must decide which jurisdiction to approach first, but they need to move quickly to make sure that they are first in every jurisdiction. They have to keep in mind that jurisdictions may be alerted to offences following the filing of civil suits in another jurisdiction.

The third “C” stands for communication. This is perhaps the most important key to the successful attack on international cartels. Only through frequent communication between agency staff at various levels, can we build the sorts of relationships that are essential for effective co-operation and co-ordination of cartel enforcement. That is one of the reasons that I am particularly delighted to be here in Santiago, to share our experiences and deepen our ties with the competition enforcement community here.

Conclusion

I began by explaining how important it is for competition agencies to actively follow the development of competition policies and laws around the world – and this holds true in respect to immunity programs, especially at a time when cartel enforcement is a priority to many agencies globally. In reflecting on this, I would like to close with one of my favourite quotes from Bill Kovacic, currently a Commissioner of the US Federal Trade Commission. In remarks before the Seoul Competition Forum 2004, he observed the following:

Efforts to promote convergence among the world's competition policy systems often urge the adoption of what we call "best practices" ... Today I want to propose another way to describe the identification and pursuit of superior competition policy norms. Rather than promoting "best" practices, it might be more accurate and informative to say we are seeking "better" practices... To speak of "best" practices may suggest the existence of fixed objectives that, once attained, make the end of the task. Envisioning problems of substance or process as having well-defined, immutable solutions may neglect the imperfect state of our knowledge and obscure how competition authorities must work continuously to adapt to a fluid environment that feature industrial dynamism, new transaction phenomena and continuing change in collateral institution vital to the implementation of competition policy."²

I hope you have found Canada's way of addressing the three ICN conditions for a successful immunity programme to be one of those better practices; at the same time, I look forward to discussing with you how we can learn from each other to continue to improve our ability to pursue competition policies as a means to bring prosperity to all of our nations.

¹ Speaking notes for Sheridan Scott, Commissioner of Competition, Competition Bureau, Canadian Perspectives on the Role of Comity in Competition Law Enforcement in a Globalized World. To Defer or Not to Defer? Is that the question? American Bar Association's Section of Antitrust Law 2006 Spring Meeting, Washington, D.C., March 29, 2006, available online at: <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2049&lg=e>.

² Kovacic, William E. "Achieving Better Practices in the Design of Competition Policy Institutions", Remarks before the Seoul Competition Forum 2004.