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IBA Submission on the Revised Canadian Competition Bureau Draft Leniency Bulletin

Introduction

1. The Leniency Working Group of the Antitrust Committee of the International Bar Association (“Working Group” of the “IBA”) welcomes the further opportunity to comment on the leniency policy consultations by the Canadian Competition Bureau that was launched by publication of a revised draft Bulletin on March 23, 2009. The Working Group considers that the Bureau’s dialogue with stakeholders on this important and difficult area of competition law is commendable and a model for the development of law and policy.
2. As outlined in the IBA submission on the Competition Bureau’s initial consultation document, the IBA is the world’s leading organization of international legal practitioners, bar associations and law societies. The IBA takes an interest in the development of international law reform and helps to shape the future of the legal profession throughout the world. Bringing together antitrust practitioners and experts among the IBA’s 30,000 individual lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide analysis in this area. Further information on the IBA is available at:
<http://www.ibanet.org>.
3. The Working Group recognizes the care and consideration that has been devoted by the Competition Bureau to the IBA submission on the initial consultation paper. To recapitulate, the IBA’s consistent view of the fundamental requirements of any leniency policy is that there are three essential criteria for a successful leniency policy that will attract the participation of cartel participants and their advisors:

- (i) predictability of outcomes;
 - (ii) clarity of policy and process;
 - (iii) clear and strong incentives for parties to apply for leniency.
4. The Working Group's comments on the first draft Bulletin focussed on the lack of clarity, and thus predictability, in the formulation of several aspects of the Competition Bureau's proposed policy. The revised draft Bulletin represents considerable, but incomplete, progress towards full transparency on the policy and the rationale for certain components of leniency, and the present submission will address these issues.
5. From a broader perspective, however, the Working Group is concerned that recent important changes in the Competition Act and in the Competition Bureau's approach to criminal enforcement pursuant to the new law may have an effect on the proposed leniency policy. In particular, the substantial increase in fine levels and potential imprisonment under the new law, the potentially diminished evidentiary burden that the Bureau must meet, and the complex interaction between the criminal and non-criminal cartel tracks under the new law all entail significant uncertainties for potential applicants and their advisors. With the Competition Bureau now engaged in consultation on guidelines on competitor collaboration, it might be preferable not to adopt the leniency bulletin in the final form until greater clarity about the underlying law has become available.
6. The interaction between the Competition Bureau policy on leniency and that of the Director of Public Prosecutions (DPP) is a further important area of need for improved transparency and predictability in leniency administration. The Working Group appreciates adjustments in the description of the relationship between the Competition Bureau and the DPP and the policy considerations that are reflected in paragraphs 15-19 of the revised consultation draft. Pending publication of the DPP's position, however, a vital component of the administration of leniency decision is simply unavailable to corporate and individual decision makers. This is a further important factor that may warrant deferral of a final policy pronouncement by the Competition Bureau, because the

views of stakeholders may well evolve, once the formal position of the DPP (and the ability of interested parties to rely upon it) has become available.

7. Paragraph 14 of the revised draft Bulletin is an excellent example of the transitional difficulties which the Working Group envisions. Reference to the current penalty levels under section 45 of the Act, which will become misleadingly low on entry into force of the new legislation, diminishes the prospective or continuing utility of the proposed Bulletin. A cross reference in a footnote to the new legislation, or a subsequent clarification (for example, by way of FAQs to be issued in the future) unnecessarily complicates the task of those seeking the information the Competition Bureau provides in the revised draft bulletin. The Working Group recommends that the proposed Bulletin should be adjusted to ensure it is a stand-alone, up-to-date, and reliable reference source and that should await clarification of the pending sources of law and enforcement policy that have emerged.

Sentencing and Economic Harm

The use of proxies

8. It is evident from the new draft Bulletin that the Competition Bureau continues to believe that a “proxy” of 20% of the affected sales in Canada by a cartel participant represents a proper reflection of presumed economic harm, and an appropriate basis for a deterrent economic penalty for cartel behaviour. As outlined in the Working Group’s prior submission, there are serious analytical and substantive flaws surrounding reliance on a proxy for economic harm. The Working Group is therefore heartened that the Competition Bureau has accepted the proposal that a party confronted by a sentencing proposal based on the use of a proxy should have an opportunity to demonstrate that the actual economic harm associated with the cartel – and the corresponding penalty – is different than the 20% proxy.
9. There are two practical issues that arise from paragraph 34 of the revisions the draft Bulletin. One is a process issue that may arise and one is a matter of law.

10. Paragraph 34 may well be taken by the leniency applicant as an invitation to produce evidence and arguments that will demonstrate that the Competition Bureau's proxy is too high, as a measure of economic harm and therefore, as a monetary penalty. It is probable, in practice, that parties that seek to make that demonstration will require time to prepare the "relevant and compelling evidence" for what the Competition Bureau recognizes, in paragraph 33 of the revised consultation document, as a matter that is "difficult to quantify".
11. The fact that a leniency applicant will require time to prepare adequately on an issue that is critical to the determination of the appropriate sentence should not, in the view of the Working Group, prejudice the application of that party for lenient treatment. But paragraphs 75-78 of the revised consultation document make it apparent that time is of the essence, in terms of cooperation and the value to be placed on it. That might inhibit parties from seeking to overcome the Bureau's proxy in a particular case because of the evident need for time for investigation and analysis. It would be unfair if, for example, the place of such an applicant in the "leniency queue" were adversely affected, or if its cooperation were devalued, because it required time to meet the Competition Bureau's apparent requirement for "relevant and compelling evidence" to show that the proxy is inappropriate. A party that wishes to challenge the application of a proxy should not be discouraged from doing so by virtue of other process elements of the proposed policy.
12. Secondly, the legal burden on such an applicant should be clearly understood. The applicant enjoys the presumption of innocence, and the legal burden of proof on all matters of sentencing lies with the prosecution. There cannot properly be a legal onus of proof to "rebut" a presumption that the overall harm associated with a cartel was 20% of the value of its sales in Canada. Accordingly, the Competition Bureau's articulation of the standard of proof required of the applicant – relevant and compelling evidence – seems misplaced. The Working Group accepts that the Competition Bureau may reasonably determine, as indicated in paragraph 31 of the revised draft Bulletin, that it will ordinarily use a 20% proxy as a "starting point" for the consideration of an appropriate penalty. That indication will assist parties that are contemplating the consequences of cooperation with the investigation to quantify their potential exposure.

However, in the view of the Working Group there is no magic in the proposed proxy, which has no basis in law, there can be no lawful threshold other than one of reasonable doubt, and the only standard for evaluating a challenge to the proxy should be relevance, in any analysis of the proper sentencing disposition in an individual case.

Sentencing that is not Correlated with Canadian Sales

13. The revised draft Bulletin has clearly considered the representations previously made by the Working Group on the appropriate penalty posture where affected direct sales in Canada are low, where some cartel participants do not trade in Canada, or where the cartelized product itself is incorporated as an input in other products that are sold in Canada (indirect sales).
14. The Working Group recognizes the Competition Bureau's concern about the potential economic effect in Canada of such situations and appreciates the Competition Bureau's responsiveness to the prior comments made by the Working Group and other contributors to the consultation process. That is particularly the case with the Competition Bureau's recognition of the point previously made by the Working Group about the risk of double counting, in cases of indirect sales in Canada, where the cartel participants have been penalized in jurisdictions where the direct sales of the input occurred. The approach taken in the revised consultation document does tend to enhance public knowledge of the Competition Bureau's thinking on these issues, and that is always commendable.
15. However, the Working Group continues to believe that the Competition Bureau's approach to these circumstances is questionable and unnecessarily complicated. The document creates the impression – at least in those cases where (i) cartel participants do not conduct business in Canada and (ii) only indirect sales are involved – that the sole or dominant determinant of a Canadian sentence continues to be economic harm, even in cases where the quantification of such harm is inherently unreliable.
16. In cases where a party made no direct sales in Canada, pursuant to a market allocation agreement, for example, or where sales of the cartelized product were indirect, by incorporation into another product, the Bureau's views on the calculation of economic harm may well be conjectural. In two class actions arising out of a cartel that involved

virtually no direct sales in Canada (DRAM), the courts in British Columbia 1 and in Quebec 2 have held that proof of harm to class members in Canada who were indirect purchasers of products containing DRAM could not be established using common proof. Certification or authorization of the class was therefore refused. That finding was based on extensive and detailed economic evidence.

17. The Competition Bureau's revised consultation document advances a formulaic approach to the definition or quantification of economic harm in cases where a cartel participant made no direct sales in Canada. In cases involving indirect sales, the Bureau's premise is that it will "derive" economic harm in Canada by reference to sales of other parties that incorporated the cartelized product into products that were sold in Canada. The Working Group believes that the factual or analytical basis for either approach is both unprecedented and unreliable, and that the assertion of economic harm as a predicate for penalty calculation in such cases is a hypothesis that cannot be substantiated. If the leniency applicant has the ability to contest both the formula and the "derived harm" in such cases, without prejudice to its sentencing negotiations or to the value given to its early application or readiness to cooperate, it may be that no particular harm is done to the applicant or to the process by the Competition Bureau's effort to attribute or allocate responsibility for economic harm in the manner that is proposed. However, the Bureau's attitude to a challenge to its proxy, as set out in paragraph 34 of the revised consultation document, is not necessarily reflected in its discussion of the proposed formula for penalising cartel participants that agreed to forgo sales in Canada, or where the sales were indirect. To dispel any doubt, the Working Group suggests that the ability to challenge the formula or the "derived" economic harm should be expressly re-confirmed.
18. The Working Group believes, in fact, that the Bureau's analysis may be excessively focussed on concepts of economic harm, and insufficiently attentive to the sentencing concepts of deterrence and denunciation of the illegal conduct. The Working Group believes that over-reliance on assumed economic harm overly complicates the analysis and the likely process of resolution in such cases. Past market allocation cases, such as the Choline Chloride cartel (which involved forbearance from sales in Canada by some cartel members) were resolved on the basis of common sentencing standards, with little

overt reference to any issues of economic harm. That appears to be the Competition Bureau's approach, as outlined in paragraph 37 of the revised consolation document, for cases of low economic harm due to non-implementation or early detection of a conspiracy. There is no reason why the same approach should not be taken in other cases where economic harm is incapable of objective determination, including market allocation and indirect sales. The Working Group accordingly recommends reconsideration of the Competition Bureau's approach to this area.

Aggravating & Mitigating Factors

19. 19. The Working Group appreciates that the Competition Bureau has clarified the aggravating and mitigating factors that the Bureau will consider in formulating sentencing recommendations. However, the Working Group continues to believe that several of the factors set out in the revised draft Bulletin raise concerns, including: (i) corporate size/sophistication; (ii) degree of covertness/complexity of the cartel; (iii) obstruction; (iv) nature of the victims; and (v) cooperation/acceptance of responsibility. The Working Group also questions the Bureau's apparent decision to rely on non-Competition Act offences as an aggravating factor.

Corporate Size/Sophistication

20. 20. While the reference to "large" corporate size as an aggravating factor in and of itself has been removed from the revised draft Bulletin, it is evident that the Competition Bureau continues to believe that a company's sizeable market share is an aggravating factor. As outlined in the Working Group's prior submission, a firm with a large market share will presumably be exposed to greater fines simply because it would have a large volume of sales. There is thus no need to compound the punishment of an undertaking by applying an aggravating circumstance merely for having a sizeable share of the market. The Working Group recommends reconsideration of the Bureau's approach in this regard.

Degree of Covertness/Complexity of the Cartel Activity

21. 21. As outlined in the Working Group's prior submission, as a matter of course, the majority of cartels are covert, and they are frequently complicated arrangements that

require a degree of coordination – factors noted in the revised draft Bulletin. It remains unclear from a policy perspective why these circumstances should be considered as aggravating factors that enhance the penalty to be imposed.

Obstruction

22. 22. The revised draft Bulletin clarifies that the Competition Bureau will address obstruction as either a separate offence under the Competition Act or the Criminal Code, or as an aggravating factor in recommending the sentence for a cartel offence. The Working Group continues to believe, however, that it is inappropriate to consider obstruction as an aggravating factor in determining the appropriate sanction for cartel conduct. As outlined in the Working Group's prior submission, if the Bureau believes that obstruction has occurred, it should bring charges, rather than using a perception or unproven allegations of obstruction as a justification for a higher fine than would otherwise be recommended.

Nature of the Victims

23. As set out in the Working Group's prior submission, while the protection of particularly vulnerable groups is appropriate in the context of misleading advertising/consumer fraud targeted at vulnerable groups, cartels generally involve conduct that results in harm to the economy and consumers in general. Accordingly, it remains unclear whether this factor is particularly applicable to cartel behaviour.

Cooperation/Acceptance of Responsibility

24. While the Working Group agrees that cooperation and acceptance of responsibility should, in most cases, be mitigating factors, it continues to believe that it is important that the Competition Bureau not treat a lack of cooperation, defending allegations, or challenging jurisdiction as any type of aggravating factor.

Restitution

25. The Working Group believes that in practice, restitution prior to plea negotiations is normally an unrealistic scenario. Furthermore, the history of competition class actions in Canada and elsewhere confirms that in competition cases, the quantification of civil

damages or “restitution” is an exceedingly complex issue which is generally beyond the normal scope of expertise of most criminal courts. In the United States, which explicitly refers to restitution as a relevant criterion in sentencing, restitution has always been left for resolution in civil courts by way of class actions. After careful consideration, restitution was dropped as a factor in Australia’s recently developed policy. The Working Group believes that the U.S. and Australian approach is the correct policy position. The Bureau’s apparent unwillingness, in paragraph 58 of the revised draft bulletin, to take account of the inevitable fact of civil liability for parties that plead guilty to an offence under the Act, by virtue of section 36 of the Act, would inappropriately penalise potential leniency applicants, without advancing the interests of possible claimants in any real sense. The Bureau should, in the view of the Working Group, re-think its approach to restitution.

Prohibition Orders

26. As stated in the Working Group’s prior submission, prohibition orders have historically been an important enforcement tool in cartel cases. Significantly, several cases have been resolved on the basis of a prohibition order – in the absence of any guilty plea. The Working Group believes that the revision to the revised draft Bulletin, confirming that cases may be resolved on the basis of a prohibition order only, is a positive change.
27. In this regard, Draft Bulletin states that the Bureau will recommend prohibition order in the absence of a guilty plea only in “exceptional circumstances”. It goes on to provide some examples of where this might be an appropriate resolution “for example, the actual and potential economic harm is negligible, there are no aggravating factors and there are significant mitigating factors”. While the Working Group acknowledges that prohibition order-only resolutions of cartel investigations will be the exception to the norm, it believes that the Bureau should adopt a principled, as opposed to formulaic approach in this area to ensure that prohibition orders continue to serve as a flexible public enforcement tool.

Sentencing Recommendations

28. The Working Group believes that the revisions relating to sentencing recommendations for individuals provide useful clarification as to the circumstances where the Commissioner may recommend individual prosecution. The revised draft bulletin appears to clarify that individual prosecution is not a blanket policy of the Commissioner but is a matter to be evaluated on a case by case basis, in light of specific circumstances. The Working Group commends that approach. However, with respect to individuals, the Draft Bulletin suggests that the only three possible sanctions are (i) jail, (ii) fines and (iii) prohibition orders. This does not reflect the fact that, in the relatively recent carbonless paper conspiracy, the consent prohibition order entered into by the companies required them to transfer certain employees to new positions and/or demote them.
29. To the extent that the Bureau believes that, in addition to any other sanctions, it is appropriate to require employees to be transferred to other areas within a company , demoted, or possibly even terminated, the Draft Bulletin should address the related issues directly. Specifically, the Bureau should indicate where measures of this nature will be pursued, as well as the process by which they will form part of a negotiated settlement.

Leniency Applicants

30. The Working Group believes that the discussion in the Draft Bulletin regarding how the timing of a leniency application may affect the reduction of possible sanctions is a positive addition. That being said, the difference in the possible reduction of penalties available to the various leniency applicants based on the order in which they approach the Bureau seems somewhat arbitrary, in particular given that there may be cases where the applications are made within a short period. This is especially so given that some firms may be in a better position to make a timely leniency application (for example larger firms with more resources to quickly conduct an internal investigation, etc.) than others. From a policy perspective, there is no basis for distinguishing between firms who make their respective applications for leniency around the same time, although the Working Group appreciates the Bureau's interest in fostering a "race to the door" approach to enforcement of the leniency policy.

31. With respect to the treatment of current directors, officers or employees where a business or organization is the applicant, the Working Group sees no reason to distinguish between first and subsequent leniency applications other than to create the incentive for corporate applicants to apply early. From a policy perspective, there is no other valid reason to differentiate among culpable individuals because of the timing of their employer's leniency application. The Working Group recognizes that nothing in the revised Bulletin impedes an individual from applying on his or her own behalf.
32. From the Draft Bulletin, it appears that there is effectively a penalty (or at least a loss of potential advantage) for those who are late to apply for leniency. As a matter of enforcement policy, it is unclear whether this is appropriate. Further, an unintended consequence is that it may reduce the willingness of firms to seek immunity if they cannot get a significant benefit from doing so.
33. One issue that members of the Working Group have raised is whether there should be a commitment by the Bureau to pursue other alleged wrongdoers before requiring a leniency applicant to formally plead guilty. In this regard, Members of the Working Group are aware of situations where the Bureau accepted a leniency application, required the leniency applicant to plead guilty, but then decided not to pursue the inquiry against any other firms alleged to have been involved in the conduct at issue. This has resulted in a perverse situation where the successful leniency applicant was the only firm to plead guilty, with significant negative consequences in terms of its exposure to civil liability.
34. In this regard, the Working Group's view is that, before an leniency applicant is required to plead guilty or otherwise publicly admit its wrongdoing, the Bureau should have either (i) secured a similar plea/admission from a third party; (ii) initiated criminal proceedings against one or more other parties alleged to have been involved in the conduct at issue; and/or (iii) made the determination to refer the investigative file to the DPP, under section 23 of the Act, for consideration of prosecution of other parties to the cartel.
35. In short, with respect to leniency applications, the Working Group believes that two overriding policy considerations should govern the Bureau's approach: (i) similarly situated leniency applicants should receive similar advantages; and (ii) no one should be

made worse off as a result of their leniency application than they would have been had they not made their application.

Confidentiality

36. The Working Group commends the Bureau on the inclusion of an enhanced section on confidentiality in the new draft Bulletin and on its effort to balance an applicant's interest in the confidentiality of its information with the Bureau's legitimate interest in ensuring effective enforcement of the Act. However, the Working Group is concerned that the apparently wide scope for disclosure by the Bureau of information provided by a leniency applicant could be a disincentive to participation in the program.

37. The Bulletin clearly articulates the exceptional situations in which the identity of a leniency applicant might be disclosed, and confirms that the identity of a leniency applicant will not be disclosed to foreign law enforcement agencies unless required by law. The circumstances in which the Bureau may disclose information provided by a leniency applicant, however, are less clear; the Bulletin refers to an exception "where disclosure of such information is otherwise required for the administration or enforcement of the Act." While the draft Bulletin does not elaborate on the situations – other than those enumerated in paragraph 119 of the revised draft bulletin - in which information may be required for the "administration or enforcement of the Act", that phrase is potentially of considerable extent. The Bureau's Bulletin on the Communication of Confidential Information under the Competition Act ("Confidentiality Bulletin") states that the administration or enforcement of the Act can include matters "such as developing and participating in national and international enforcement initiatives, and engaging in activities to advocate for competition". Specific situations in which the Confidentiality Bulletin suggests that confidential information may be disclosed include "when eliciting information from market participants", "when obtaining an opinion or analysis by an ... expert" and "when coordinating enforcement actions with foreign law enforcement authorities." The Working Group would encourage the Bureau to clarify the limited circumstances in which information provided by a leniency applicant might be disclosed, and preferably, to limit such circumstances to those set out in paragraph 119, without reference to the more amorphous standard of administration and enforcement of the Act.

Further, the Working Group would suggest that, given the exposure to adverse civil and other consequences that leniency applicants may face, these circumstances should in any event be significantly narrower than those set out in the Confidentiality Bulletin.

38. The Working Group also continues to be concerned that discussions between a leniency applicant and the Bureau should be privileged. Paragraph 117 of the draft Bulletin suggests that not all discussions will be privileged, with the clear implication that applicants face a serious risk of discovery in civil actions and in enforcement actions in other jurisdictions. The Working Group reiterates its recommendation that the revised Bulletin should make clear that all discussions with a leniency applicant are privileged. Discussions with the applicant should invariably involve participation by the DPP, to foster acceptance that settlement privilege applies and the Bureau should confirm in the Bulletin that it will claim all available heads of privilege to preserve the confidentiality of its dealings with a leniency applicant..

Conclusion

39. The Working Group considers that the revised draft Bulletin represents important progress in the effort to develop a sound and balanced leniency policy for Canada. Some uncertainty in the original draft Bulletin has been clarified and resolved and the Working Group appreciates the openness of the Competition Bureau to persuasion. Other aspects of the revised draft bulletin continue to be of concern to the Working Group, as factors that do not provide a sufficient degree of transparency and predictability that would enhanced the incentives for potential leniency applicants to come forward in Canada, especially those that are seeking to resolve multi-jurisdictional penal liability. The greater the clarity of policy, the easier the task of integrating a Canadian resolution into a worldwide strategy. From that perspective, the Working Group considers the revised draft Bulletin to be an important step forward, and hopes that the present submission will assist the Bureau to perfect this important policy.