

Granting immunity

The Canadian Competition Bureau has revised its immunity bulletin

by *Mark Katz and Elisa Kearney**

On 10 October 2007, the Canadian Competition Bureau (the Bureau) released a revised version of its information bulletin on the granting of immunity from prosecution for criminal offences under the Competition Act (the Revised Immunity Bulletin). The Bureau also released a backgrounder explaining the changes made to the Revised Immunity Bulletin and an amended set of frequently asked questions (the Revised FAQs) which provide helpful details on the application of the Bureau's immunity programme.

The Bureau introduced a formal immunity programme in 2000. As in other jurisdictions, the Bureau's programme is based on a "first-in" policy which offers immunity to the first party (corporate or individual) that discloses an offence. The immunity programme in Canada, like similar amnesty or leniency programmes elsewhere, has proved to be a very effective tool in uncovering and prosecuting criminal conduct, principally cartels.

Achieving consistency

The Revised Immunity Bulletin and Revised FAQs reflect the results of a public consultation process which the Bureau initiated in February 2006, as well as acting as a benchmark against which to compare the practices of other competition enforcement agencies. The purpose of these revisions is to clarify certain aspects of the Bureau's immunity programme and to achieve – where possible – consistency with the programmes of other agencies. Convergence with the practices of other authorities is particularly important given that many immunity applications in Canada involve participants in international cartels, who are applying for immunity in a variety of other jurisdictions as well.

Key changes

Some of the notable changes made to the Bureau's immunity programme are summarised briefly below.

■ **Disqualification.** Where a cartel offence is at issue, the Bureau will now only disqualify an otherwise acceptable applicant for immunity if there is clear and objective evidence that the applicant took steps to coerce unwilling participants to engage in the cartel.

Previously, the Bureau said that it would also disqualify any "instigator" or "leader" of a cartel or any party that was the "sole beneficiary" of the cartel. These latter criteria proved difficult to define and apply in practice. The Bureau's view now is that a "coercion" test provides a clearer standard and increased predictability for potential immunity applicants. It also has the added benefit of being consistent with the standards applied in the US, EU and numerous other jurisdictions.

■ **Disclosure.** The Bureau's immunity programme obliges applicants to disclose all offences under the Competition Act of which they have knowledge, regardless of whether these offences are the ones for which immunity is sought. Failure to provide complete disclosure is considered by the Bureau to be grounds for revocation of immunity.

The Revised Immunity Bulletin now makes clear, however, that immunity will only be revoked if the non-disclosure is intentional. This is a welcome development, as it takes into account the difficulties faced by parties, even when motivated by good faith, to uncover all possible wrongdoing prior to initiating an immunity application.

This does not mean that failure to disclose is necessarily without consequence. If the immunity applicant fails to uncover additional offences that are subsequently uncovered by the Bureau, the Bureau may recommend increased penalties with respect to these new offences. However, the Bureau will not recommend the revocation of immunity.

■ **Restitution.** The Revised Immunity Bulletin clarifies that the Bureau will no longer require that parties agree to pay restitution as a condition for obtaining immunity. This recognises that alleged victims of the conduct can – and will – initiate their own civil actions (often class actions) to recover damages and that civil litigation is a more appropriate vehicle for providing compensation.

■ **Single-step approach.** Procedurally, the Bureau has now adopted a single-step approach to granting immunity. Under this new procedure, an immunity applicant will receive a final (though conditional) immunity agreement when the Bureau and the federal director of public prosecutions (DPP) are satisfied that the entry requirements of the immunity programme are met and that the applicant is capable of subsequently meeting its obligations. This replaces the previous two-step approach in which successful applicants first received a provisional guarantee of immunity (PGI), which was eventually followed by a final grant of immunity. In practice, the Bureau usually only issued a PGI, which became the de facto final immunity grant.

■ **Interview and documents.** The Revised FAQs indicate further that, under the new single-step approach, the Bureau may request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending a grant of immunity. This is a significant change from the previous two-step process, in which witnesses and documents were only made available to the Bureau after the PGI was granted.

■ **Disclosure.** The Revised Immunity Bulletin confirms that the Bureau will not share information provided by an immunity applicant with other enforcement agencies without

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an express waiver from the applicant. The offer of confidentiality is a key incentive for potential immunity applicants, so it is appropriate for the Bureau to provide this type of assurance.

However, the protection against disclosure is not absolute. For example, the Bulletin now clarifies that the Bureau may disclose, where necessary, the identity of an immunity applicant in order to obtain judicial authorisation for investigative steps such as search warrants or to maintain the validity of such authorisations. The Bureau considers an immunity applicant's acquiescence to disclosure in these circumstances to be part of the applicant's obligation of continuing co-operation.

Implications

On the whole, the changes reflected in the Revised Immunity Bulletin are a positive step forward in the application of the Bureau's immunity programme.

A note of reservation, however, should be expressed about the Bureau's elimination of the PGI as an interim step in the immunity process.

While the single-step approach brings Canada's immunity programme into line with the programmes of other jurisdictions, and offers the advantage of a more streamlined process, it is not clear how workable it will be in practice, given that Canadian cartel law also requires proof of an "undue" lessening or prevention of competition.

Under the Bureau's old two-step approach, an applicant could obtain a provisional guarantee of immunity within 30 days of coming forward without providing evidence of an "undue" impact on competition, which can involve a very fact-intensive and potentially difficult inquiry. Once the PGI was granted, the applicant then had up to six months (and in practice more) to gather the evidence needed to "perfect" its PGI and obtain final immunity. With the Bureau's new approach, this interim step is now gone, meaning that applicants will have only 30 days (unless extended) to demonstrate market impact in order to obtain immunity. Moreover, as noted above, parties may be obliged to make witnesses and documents available to the Bureau as part of this process, which will only increase the burden placed upon them.

It remains to be seen whether the Bureau and the DPP will actually be prepared to grant immunity in circumstances where insufficient evidence has been provided in time and the Bureau is unable to complete a proper undueness assessment. At the very least, it seems that immunity applicants in complex cases, where market impact may be difficult to assess, can expect long delays between the initial proffer and any final grant of immunity in Canada.

References

All of the Bureau materials referred to are available at www.competitionbureau.gc.ca.