



## THE CRACK-DOWN ON CARTELS

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The current "flavour of the month" in competition law circles is "convergence", the notion that the interests of both government authorities and private parties are best served by having common enforcement principles, processes and procedures applied consistently across jurisdictions.

There is still a long way to go before this goal is achieved, assuming that it can be accomplished at all. However, one area in which convergence is indeed becoming more of a reality is with respect to anti-cartel enforcement. There is a wide and ever-growing consensus among competition law authorities about the harm caused by cartels, and about the best ways to detect and prosecute them.

The views expressed in a recent speech by Graeme Samuel, Chairman of the Australian Competition and Consumer Commission, reflect the received wisdom on the pernicious effects of cartel behaviour:

"Cartels are a silent extortion that ...steal billions of dollars both here and abroad from business, from taxpayers and ultimately from you and me as consumers in higher prices... By controlling markets and restricting goods and services cartels can put honest and well run companies out of business while protecting their own inefficient members and stifling innovation."

### *Key Trends*

Three aspects of the global effort against cartels are particularly noteworthy as ongoing trends:

- **Tougher Penalties:**

The exposure to penalties for cartel participants continues to escalate, as authorities attempt to ensure that the risks of anti-competitive conduct outweigh any potential rewards. Record fines are being imposed, laws requiring stricter sanctions are being enacted or proposed, and punitive measures are increasingly being used to target individuals, whether through financial penalties, imprisonment (especially in the United States) or enforcement steps such as "border watches" and extradition.

- **Leniency/Amnesty/Immunity Programs:**

The name used to describe these programs may differ from jurisdiction to jurisdiction, but the objective is the same: to induce cartel participants to "blow the whistle" on each other by holding out the prospect of complete immunity from prosecution for the first party to come forward to the authorities.

These programs are now viewed as an essential aspect of effective anti-cartel enforcement and the number of jurisdictions utilizing them continues to increase. In the last year alone, competition authorities have adopted leniency programs – or announced the intention to adopt one – in Japan, Spain, Denmark, Austria, Mexico and Greece. In addition, existing programs have been updated in jurisdictions such as Australia, the European Union, Germany and the United Kingdom.

- **International Cooperation**

At one time, international cooperation in competition law enforcement was regarded with suspicion, as simply another way for the United States to extend the "long arm" of its antitrust statutes extraterritorially. Now, however, cross-border coordination is being embraced as an irreplaceable aspect of the war against cartels, which often operate on a multi-jurisdictional basis. This cooperation takes place through both formal agreements and informal coordination amongst authorities. It also involves the exchange of practical know-how between officials in organizations such as the International Competition Network, which provides a forum for competition authorities to address issues of common concern (the ICN's motto: "all competition, all the time").

#### *Canada Plays its Part*

Canada has been a leading and enthusiastic participant in the anti-cartel wave. (In fact, as we Canadians like to remind everyone, our criminal prohibition against cartels actually predates that of the United States by one year.)

The Canadian Competition Bureau has made it clear that combating domestic and international cartels (usually called "conspiracies" in Canada) is a top enforcement priority. As a reflection of this commitment, there have been over 70 convictions for cartel-related offences in the last decade, involving aggregate fines of over \$230 million. Just recently, record fines for a domestic cartel were imposed on the participants in a conspiracy relating to the distribution of carbonless sheets.

There also are an increasing number of cases in which individuals have been penalized in addition to corporate offenders. Individual penalties still largely involve the imposition of fines rather than jail sentences. However, the Bureau is obviously aware of the experiences in other jurisdictions and it will not come as a surprise if, at some point, the Bureau seeks to imprison an individual defendant as well.

As with other competition authorities, the Bureau points to its own "Immunity Program" as an important element of its success in obtaining cartel convictions. The Bureau's program is loosely modelled on the U.S. program – and is also broadly similar to the programs in place in other jurisdictions – the key aspect being an offer of immunity to the first (but only the first) party to provide evidence of an offence. The Bureau has just launched a consultation process in an effort to further revise and improve this program.

Canada is also a party to several state-to-state treaties and inter-agency agreements designed to promote and facilitate cooperation in cartel investigations (among other things). It also has developed very effective informal ties with authorities in other jurisdictions. A recent and well-publicized example of the type of cooperation this generates took place in February 2006, when the Bureau, Korea's Fair Trade Commission, the European Commission and the Antitrust Division of the U.S. Department of Justice conducted coordinated investigations into the cargo operations of certain airlines.

In short, it is a risky proposition to engage in cartel conduct in Canada (or affecting Canada). And the stakes will only get higher if the Bureau has its way. Recently, the Bureau sought to increase the fines for engaging in unlawful conspiracies from \$10 million to \$25 million (per count) and it has proposed to transform the conspiracy offence into a "*per se*" offence, eliminating the need to prove a negative ("undue") impact on competition. Although these specific measures are controversial in Canada and have yet to be adopted, it is clear that enhancing its ability to tackle cartels remains high on the Bureau's enforcement agenda.