

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S
SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW
ON
THE IRISH COMPETITION AUTHORITY'S
CARTEL IMMUNITY PROGRAMME REVIEW**

September 2010

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together the "Sections") of the American Bar Association respectfully submit these comments on proposed revisions to the Cartel Immunity Programme (the "Programme") by the Irish Competition Authority (the "Authority") as described in its Consultation Paper released on July 15, 2010.

EXECUTIVE SUMMARY

The Sections are grateful for the opportunity to comment on the Authority's proposed changes to the Programme and to offer suggestions on the Programme for consideration by the Authority and the Director of Public Prosecutions ("DPP")¹. The Sections, through the collective experience of their members (including government and private attorneys), have the benefit of substantial experience in connection with international cartel enforcement and have observed a variety of leniency/immunity programs in diverse parts of the world. Based on the experience in such matters, the Sections offer the following observations and comments.

¹ The Sections have previously provided comment on numerous immunity and leniency programs in many jurisdictions around the world, including comments to the Japan Fair Trade Commission, the Canadian Competition Bureau, the European Commission (the "Commission") and the U.S. Department of Justice Antitrust Division (the "Antitrust Division"), and these may provide additional insights as the Authority reviews its programme. *E.g.*, ABA Sections of Antitrust and International Law's Joint Comments on the Japan Fair Trade Commission Draft Leniency Rules (August 2005) (<http://www.abanet.org/antitrust/at-comments/2005/08-05/japan-fair-trade.html>); Comments of the ABA Section of Antitrust Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding Immunity Programme Review (May 2006) (<http://www.abanet.org/antitrust/at-comments/2006/05-06/canadian-leniency.shtml>); Comments of the ABA Sections of Antitrust Law and International Law to the Commission of the European Communities regarding the Commission's Draft Notice on Immunity From Fines and Reduction in Fines in Cartel Cases (November 2006) (<http://www.abanet.org/antitrust/at-comments/2006/11-06/european-communities.shtml>). Comments of the ABA Section of Antitrust Law on Draft Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (September 2001) (<http://www.abanet.org/antitrust/at-comments/2001/2001.shtml>).

The Sections commend the Authority for its efforts to promote greater transparency and increase certainty for undertakings and individuals considering self reporting and cooperating with the Authority. In that regard, the Sections fully support the Authority's decision to remove "ringleaders" from the category of cartel participants who are excluded from the Programme. As the Authority has recognized, the proposed approach provides greater convergence between the Programme and other immunity programmes around the world, including the ECN Model Leniency Programme. However, the Sections recommend changes to paragraph 15 of the Programme to ensure that the scope of the exclusion is as narrow as the Sections believe is intended.

The Authority's current review process presents an excellent opportunity for the Authority and the DPP to make further substantive changes to certain aspects of the Programme. In this regard, the Sections respectively submit that to increase the transparency and predictability of the Programme, provide greater certainty to potential applicants, promote further convergence between the Programme and immunity programmes in the United States, the European Union, and elsewhere and to enhance the credibility of the Programme as a whole, the Authority should consider providing greater clarity respecting the roles of the Authority and DPP, certain requirements for immunity, the marker system, the failure to comply with the requirements for immunity and the circumstances where information provided pursuant to the Programme may be disclosed.

The Sections understand that the Authority may have reasons for not introducing a formal leniency policy to complement the Programme. Accordingly, the Sections have refrained from providing their views on the benefit of a formal leniency policy. If the Authority is interested in hearing the Sections' views in this regard, the Sections would be happy to provide further comment. The Sections nevertheless encourage the Authority to review Part VI of the Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, Section of Business Law, and Section of Criminal Justice on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases Issued by the Competition Bureau of Canada (July 25, 2008), which discusses the desirable attributes of a leniency policy.²

COMMENTS

The Sections comment on the form and substance of the proposed revisions to the Programme and then offer comment on five substantive aspects of the Programme that the Sections believe would benefit from further clarification. The Sections' comments start from the premise that transparency, predictability, legal certainty and confidentiality are necessary criteria for making the Programme attractive to potential applicants. In the Sections' experience, applicants will come forward in direct proportion to the predictability and certainty of whether they will be

² These comments may be found at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/comments-sentencing-CBC.pdf> and a copy is appended for convenience.

accepted into the Programme. If an undertaking cannot accurately predict how it will be treated as a result of its confession, our experience suggests that it is far less likely to report its wrongdoing.

The Sections appreciate the efforts of the Authority and the DPP to evaluate the way the Programme operates in practice, identify strengths and weaknesses in the Programme and measure its effectiveness. The Sections further applaud the Authority's efforts to make changes to the Programme in an attempt to make it more self-contained, transparent and attractive for potential applicants and thus a more effective tool in the fight against cartels. The Sections agree with the Authority that, to the extent possible, a self-contained document promotes transparency and legal certainty in the Programme. Accordingly, the Sections support the format of the Programme.

The Sections fully support the removal of "ringleaders" from the category of cartel participants who are excluded from the Programme and a limited exclusion for undertakings who have taken steps to coerce one or more undertakings to join or remain in the cartel. However, in the opinion of the Sections, the last sentence of paragraph 15 undoes much of the certainty and transparency benefits of this revision as it seems to suggest a more broad-based assessment of the degree of participation by the immunity applicant in the cartel. The Sections assume that the Authority intends only to take into account the degree of participation of the applicant in assessing whether coercion has occurred, not as a separate factor. However, as drafted the Programme is not clear in this regard. The Sections recommend that the last sentence be removed or that the Authority's intention be clarified. The inclusion of a practical example of "coercion" would in the views of the Sections also improve the transparency and predictability of the Programme.

Before offering comment on other aspects of the Programme that the Sections believe would benefit from clarification, the Sections offer some minor technical comments. The Sections note that paragraph 25 of the Programme states that joint applications for immunity by two or more conspirators will not be accepted and will be invalid. We believe that overall it is clear that an application can be made jointly by a company and one or more of its officers, directors or employees and also assume that this restriction does not preclude an undertaking making the application on behalf of all of its affiliated corporate entities, e.g., parents, subsidiaries. The Sections recommend that this be clarified. The Sections also suggest, as recommended in the ECN Model Leniency Programme, that the Authority provide an acknowledgement of receipt of all applications for immunity confirming the date and time of the application. Finally, the Sections note that references are made throughout the Programme to collective treatment of an undertaking and its directors, officers, and employees (see, e.g., paragraphs 5, 15, 18). The Sections recommend that the Authority consider conforming the language of paragraph 31, which refers to the failure of an undertaking to promote the complete and timely co-operation of its employees, to that used elsewhere throughout the Programme.

1. Roles of the Authority and the DPP when a request for Immunity is made

The Sections appreciate the organizational structure which gives rise to the division of responsibilities between the Authority and the DPP. However, successful immunity programmes eliminate, to the extent reasonably feasible, prosecutorial discretion as a factor in the

determination of whether an applicant is entitled to immunity.³ Accordingly, the Sections continue to have concerns about the certainty of immunity in bifurcated regimes.⁴

The Sections further appreciate that the fact that the Authority and the DPP are working closely together on a review of the Programme illustrates a continued commitment to the Programme by both the Authority and the DPP. However, the Sections believe that greater transparency and legal certainty in the Programme will only come from further clarification of how the DPP will exercise its discretion when a recommendation is made by the Authority for a grant of qualified immunity and, at least, a statement from the DPP in this regard. The Sections respectively submit that the objectives of the Authority and the DPP to make the Programme more attractive to potential applicants and thus a more effective tool in the fight against cartels would be enhanced if there was a transparent policy as to the principles that the DPP will adopt in deciding whether to accept a recommendation of the Authority. For example, what weight will the DPP grant to the Authority's recommendation? What would be the basis for any possible rejection of the Authority's recommendation?

As will be discussed in greater detail below, the Sections are also concerned about the uncertainty created by the roles of the Authority and the DPP in revoking immunity and the lack of transparency that exists in this regard.

2. Requirements for Immunity

The Sections appreciate that the Authority has a significant and justifiable interest in ensuring that neither the fact nor the content of an application for immunity be disclosed during a period when doing so can jeopardize the Authority's investigation. However, the Sections respectfully submit that the non-disclosure requirements in paragraphs 14 and 16(e) create slight inconsistencies and hamper the certainty of the Programme.

In this regard, the Sections submit that greater flexibility is required under paragraph 14 to permit an applicant to comply with the disclosure rules of securities laws, such as Section 409 of the *U.S. Sarbanes-Oxley Act* of 2002 and Form 8-K of the *U.S. Securities Exchange Act* of

³ Competition officials in the United States and elsewhere comment frequently about the importance of removing prosecutorial discretion from the leniency process. See, e.g., Scott Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Department of Justice, Cornerstones of an Effective Leniency Programme, address before the ICN Workshop on Leniency Programmes, Sydney, Australia (Nov. 22-23, 2004) ("Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the programme. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty programme.").

⁴ See also Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, Section of Business Law, and Section of Criminal Justice on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases Issued By the Competition Bureau of Canada (July 2008) (<http://www.abanet.org/antitrust/at-comments/2008/07-08/sentencing-CBC.shtml>).

1934,⁵ and other corporate disclosure obligations that may arise upon change of control (e.g. merger, sale of stock or assets). As drafted, paragraph 14 may place applicants in the untenable position of having to choose between violating the requirements of the Programme – and, thereby losing the benefit of immunity – or violating the securities or corporate laws of their home jurisdiction.

Furthermore, the Sections encourage the Authority to consider broadening the exception to the no disclosure requirement in paragraph 16 as the "except where required to do so by laws" exception does not capture all situations where disclosure may be desirable. For example, pursuant to the U.S. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, an amnesty applicant under the Antitrust Division's Corporate Leniency Policy can obtain relief from treble damages and joint and several liability if it cooperates with the plaintiffs in related civil damage cases.

With respect to the requirement of the Programme for the applicant to provide complete and timely co-operation, the Sections note that there is potential for confusion on the requirements for obtaining and maintaining immunity in that paragraph 16(a) requires the applicant to reveal any and all cartel offences under the Act in which it may have been involved and paragraph 31 of the Programme states that "failure to disclose any and all offences" is grounds for revoking immunity. The Sections respectfully suggest that the Authority should clarify that the applicant is required to disclose "any and all known cartel offences and all "known" cartel offences in which it may have been involved. Absent such clarifying language, some potential applicants could perceive that a top-to-bottom audit to identify "any and all offences" (perhaps even extending beyond antitrust offences) would be required. This would create a powerful disincentive to self-reporting without furthering the mission of the Authority.

The Sections note that a policy that requires the disclosure of unrelated illegal activity (i.e., activity other than antitrust-related offences) will create a powerful disincentive for companies to seek immunity for antitrust offences. Other criminal violations are, in Ireland and other jurisdictions, not eligible for immunity protection. Indeed, U.S. authorities, including the Department of Justice and the Securities Exchange Authority, retain discretion to prosecute/sue a company even for offences it self-reports (although such self-reporting is a factor in favor of non-prosecution). If reporting other crimes becomes part of the "admission price" for immunity, corporate officers attempting to discharge their fiduciary obligations would face a Hobson's choice: (a) report antitrust offences and risk prosecution for other offences, which they could

⁵ Financial disclosures (and certifications signed by management) are also required on a quarterly and annual basis under Form 10-Q and Form 10-K of the Securities Exchange Act of 1934. Similarly, if an Australian Company listed on the Australian Stock Exchange Limited (ASX) were put in that position, it could be in breach of the continuous disclosure obligations that require public companies to disclose any information "concerning it that a reasonable person would expect to have a material effect on the price value of the entities securities." ASX Listing Rule 3.1. While there has not been any judicial consideration of the issue in Australia, companies in Australia have made disclosures in such circumstances. See, e.g., Amcor Limited, announcement to the ASX, November 23, 2004.

otherwise correct and remediate, or (b) forgo the benefits of the Programme, and hope authorities do not learn of the conduct, while protecting the company against certain prosecution for the other unrelated offences. Such a decision could not be undertaken lightly, and even a considered decision would leave the company vulnerable to unforeseeable consequences. For this reason, among others, other antitrust authorities, including the Antitrust Division, do not require immunity applicants to report non antitrust offences.

3. Obtaining Immunity

With respect to the immunity process, the Sections are concerned with the discretionary nature of the marker system. The experience of the Sections' members is that there must be certainty that a marker will be available in a particular jurisdiction in order to encourage potential applicants to come forward in that jurisdiction, to secure their place in the queue, and to conduct an internal investigation to collect the information and evidence regarding the suspected cartel conduct. The Sections are concerned that the introduction of prosecutorial discretion about whether to grant markers when immunity is available is a disincentive to undertakings considering whether to self-report.

The Sections support the Authority's decision to adopt a flexible approach by not detailing a specific time period within which a marker must be perfected as it will clearly depend on the circumstances of each individual case. However, the Sections suggest that the Authority consider providing a non-binding indication of the allowable time period to impart predictability into the Programme for perfecting the marker. The period of time afforded to perfect a marker should be adequate to allow a party to complete its internal investigations while at the same time reasonably accommodating the Authority's own timetable.⁶

In an effort to provide further transparency to potential immunity applicants, the Sections also recommend that more detailed guidance be provided on the "description of the illegal activity" that must be furnished by the applicant to satisfy the Authority that it is "sufficient for its purposes to identify the conduct, as well as the particular cartel". In this regard, we suggest that the Authority look to the first three clauses of paragraph 20 of the ECN Model Leniency Programme for guidance.

Finally, with respect to the Immunity process, the Sections recommend that the Authority include in its Programme an express statement that, absent bad faith on the part of a marker applicant, the Authority will refrain from using any evidence provided by the applicant against it where the marker is not perfected. The Sections believe that this type of express reassurance is

⁶ The Sections note that the Canadian Competition Bureau and the Australian Competition and Consumer Commission have generally opted for fixed time periods to perfect a marker. For example, unless the Bureau concludes that a delay is reasonable, a marker may be revoked if the immunity applicant cannot produce its "proffer" of information within 30 days. The Sections also note that concerns have been expressed that Canada's 30-day time period is too short.

desirable to avoid compromising the willingness of immunity applicants to come forward with potentially incriminating information.

4. Failure to Comply with the Requirements of the Agreement

Revocation of immunity presents perhaps the direst risk to a potential applicant – after disclosure of inculpatory information, an applicant may face revocation of qualified immunity or full immunity and be in a far worse position than had it not sought immunity in the first place. Revocation of immunity can occur after the issuance of qualified immunity by the DPP or after the issuance of an immunity agreement. As drafted, the Programme only addresses revocation of the immunity agreement.

Under the bifurcated regime that exists in Ireland, the Authority recommends to the DPP that immunity be granted to the applicant but according to the Programme, the Authority appears to play no role in the revocation of that immunity. While this may be the case in situations where revocation occurs after an immunity agreement has been issued, the role of the Authority in revoking qualified immunity is uncertain given the fact that an immunity applicant's interaction and cooperation will primarily be with the Authority at this stage. The Sections are of the opinion that the Programme would benefit from transparency if the role of the Authority, if any, in recommending revocation to the DPP were described in the Programme.

The Sections further recommend that additional detail be provided about the circumstances that may lead to the revocation of qualified immunity or full immunity. To create the greatest incentives to self-report, the circumstances that may lead to revocation should be few in number, clearly articulated, consistent and fairly applied.

The Sections respectfully submit that the policy of the Authority should be to require one or more of the following conditions before recommending to the DPP that qualified immunity be revoked or before the DPP revokes immunity on its own accord:

- 1) Deliberate, clear failure to co-operate;
- 2) Intentionally and deliberately making false statements or representations; or
- 3) Intentionally coercing another to participate in cartel activity.

If co-operation has not been forthcoming, the Sections suggest that the policy of the Authority should be similar to that of the Antitrust Division – the immunity applicant should be provided notice and the opportunity for redress before the Authority recommends to the DPP that qualified immunity be revoked. If the Authority recommends that immunity be revoked, the Sections suggest that the DPP adopt the practice of the Antitrust Division and provide the applicant with a meaningful opportunity to be heard.

The Sections believe that the Programme would benefit from the clarification that failure by an undertaking to secure the co-operation of its officers, directors and employees where good faith efforts have been used will not result in revocation of the undertaking's immunity and vice versa, that the revocation of an undertaking's immunity will not affect the immunity granted to

individual directors, officer and employees who continue to comply with the requirements of the Programme. Even where an individual enjoys derivative immunity via an undertaking's immunity application, the Sections submit that individual immunity should not be revoked unless the individual has personally failed to meet its obligations under the grant of immunity.

5. Disclosure

The decision to apply for immunity is a complicated one that entails considerable risk to the applicant. A significant factor in that decision is potential collateral business and legal consequences associated with disclosure of the immunity applicant's identity or information. For example, an immunity applicant exposes itself to significant civil liability and other business risks when it comes forward and discloses its participation in cartel activity in return for immunity from criminal prosecution. An immunity applicant may also face significant reputational loss, irreparable harm to its goodwill and, in the case of public companies, serious decline in its share value of stock exchanges, if named in court documents as a participant to a conspiracy.

Given the importance of confidentiality, the Sections suggest that the Authority provide further elaboration on the level and scope of confidentiality afforded to immunity applicants' identities and information and, in particular, clarify the circumstances where disclosure may be required "for the purpose of the administration and enforcement of the Act" or "when disclosure is made in the course of an investigation or subsequent proceedings".

In that regard, the Sections recognize that the sharing of information between foreign competition agencies can be an important component in detecting, prosecuting, and deterring domestic or international cartels. However, the Sections recommend that the Authority obtain a confidentiality waiver from an immunity applicant before sharing that applicant's identity or information with another agency. Confidentiality waivers provide a reasonable compromise between the legitimate enforcement efforts of competition agencies and the applicant's right to confidentiality, particularly in cases where the applicant is still considering immunity applications in other jurisdictions, or where the applicant is concerned that the requesting agency has not adopted adequate confidentiality safeguards.

The Sections recommend that the Authority consider integrating the following confidentiality principles into Part G of the Programme:

- (a) Express a commitment to keeping an immunity applicant's identity and information confidential as long as permissible under law and refrain from directly naming an immunity applicant during the course of an investigation or in subsequent proceedings;
- (b) Clarify, with accompanying detailed examples, the scope and circumstances of any potential disclosure "for the purpose of the administration and enforcement of the Act" and commit to obtaining a waiver of confidentiality before sharing the identity of an immunity applicant or any information provided by an immunity applicant with foreign competition authorities;

- (c) Clarify, with accompanying detailed examples, the scope and circumstances of any potential disclosure "made in the course of an investigation of subsequent proceedings"; and
- (d) Provide an immunity applicant with reasonable notice prior to disclosure of its identity or information. This is especially important given the likelihood that any applicant must coordinate, and therefore consider, applying for immunity in other jurisdictions and the consequences of disclosure in those jurisdictions.

CONCLUSION

The Sections commend the Authority and the DPP for undertaking a review of the Programme and are grateful for the opportunity to provide these comments to help the Authority and DPP achieve its goals of detecting and prosecuting cartels. We hope that our comments are useful.