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IBA Submission on the Draft Leniency Bulletin

Introduction

1. The Working Group of the Antitrust Committee of the International Bar Association (the “**Working Group**” of the “**IBA**”) sets out below its submission on the Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (the “**Draft Bulletin**”) published by the Competition Bureau on 28 April 2008.
2. 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 greatly appreciates the opportunity to provide comments on the Draft Bulletin and commends the Bureau for the obvious effort it has devoted to producing the Draft Bulletin and its willingness to engage stakeholders in the development of this policy initiative.

4. The Working Group believes that it is of the utmost importance that the final Bulletin provide clear and predictable guidance both for the benefit of potential leniency applicants who are developing a strategy to address international cartel exposure and for the effectiveness of the Bureau's enforcement efforts. The IBA has had the opportunity to comment on similar draft policies of other cartel enforcement agencies in the recent past. Its consistent view has been that, to be effective, a leniency policy must provide predictability of outcomes, clarity of policy and process, and clear and strong incentives for parties to come forward at the earliest possible time to resolve their liability in a fair and foreseeable manner on a consensual and cooperative, not a contested, basis.

Executive Summary

5. While the Draft Bulletin represents an important first step in developing an effective leniency program in Canada, the Working Group considers that certain areas of the Bulletin would benefit from further clarification or reconsideration. These include:
 - (i) The interaction between the Competition Bureau and the Director of Public Prosecutions (DPP) in settlement discussions. The Working Group considers that the Draft Bulletin would be enhanced by an articulation of the policy of the DPP, or a description of the role actually played by Crown Counsel in the process contemplated by the Draft Bulletin;
 - (ii) The explanation of the underlying basis for calculating penalties and the process of applying for leniency;

- (iii) Safeguards for the confidentiality of information to be provided in the application process and the privileged character of that process. The safeguards associated with this process appear to be inadequate to provide appropriate assurances to all concerned, in the event that the discussions do not result in a settlement;
 - (iv) The disclosure process itself appears premature and would benefit from additional attention to the interests of both sides in the discussions;
 - (v) The position of the Bureau on the treatment of individuals properly reflects the importance of individual accountability, but the Draft Bulletin provides inadequate guidance on the policy of the Bureau on this critical issue;
 - (vi) The 20% proxy for economic harm should be reconsidered both substantively and procedurally, as should the Bureau's stated intention to penalize cartel participants based on indirect sales, or where an alleged offending party had no sales in Canada.
6. The Working Group recommends that further guidance be provided on these issues, and specifically recommends that the Bureau (i) promote publication of the policies of the DPP; (ii) provide a better description of the respective roles and responsibilities of the Bureau and the DPP either in the Bulletin or in a separate publication; (iii) confirm that the earliest party to apply will receive the most favourable treatment, relative to later parties; (iv) articulate the basis for the calculation of penalties and make the proposed proxy rebuttable, if it is retained; (v) re-evaluate the requirements of the proposed

application process and re-balance the safeguards associated with that process; and
(vi) clarify the policy of the Bureau on the prosecution of individuals and the utilisation of alternatives to guilty pleas.

The Relationship Between the DPP and the Competition Bureau

7. The Working Group commends the Bureau’s efforts to clarify the roles of the Competition Bureau, the Commissioner of Competition, the DPP and the courts. Appropriate clarification of these roles will be essential to creating predictability in the leniency process and, therefore, to creating an incentive for parties implicated in international cartels to seek immunity or leniency in Canada.
8. The Draft Bulletin notes that once the Bureau has referred a matter to the DPP, the DPP has independent carriage of the matter and has discretion over the decision to prosecute and over any sentencing submissions. The principle of prosecutorial independence is well-established in Canada. It is emphasised in the Federal Prosecution Service Desk Books and was clearly articulated in the report of the *Royal Commission into the Donald Marshall, Jr. Prosecution*. That report stated that while consultation between the police and the Crown is essential to the proper administration of justice:

“...under our system, the policing function – that of investigation and law enforcement – is distinct from the prosecuting function. We believe the maintenance of a distinct line between these two functions is essential to the proper administration of justice.”¹

¹ *Report of the Royal Commission into the Donald Marshall, Jr. Prosecution* at p. 232.

9. The Working Group believes that in order to preserve prosecutorial independence, it is essential that the right balance be achieved between the consultative role of the Bureau and the decision-making role of the prosecutor. While consultation between prosecutors and investigators is expected, and can assist prosecutors in making decisions, it would seem that the proper role of the Bureau is to investigate and consult, rather than to have carriage of prosecutorial decision-making functions. The description in the Draft Bulletin of the “significant degree of cooperation” between the Bureau and the DPP throughout the enforcement process, including at the plea and sentencing stages, could lead to a perception that the degree of consultation with the Bureau might limit the prosecutorial discretion of the DPP.
10. The description of the role of the Bureau in the application process gives an impression that the DPP is completely absent from the initial interactions with the leniency applicant. It appears from the Draft Bulletin that the relationship between the two agencies is truly sequential, with no role for the DPP until after the Bureau has concluded the discussions and made a recommendation. In the absence of any indication of what policy approach the DPP might adopt in such a situation, the process as outlined gives little or no comfort to an applicant that the expectations developed through discussions with the Bureau will be given effect. If the settlement process is indeed to be bifurcated and separate, it would represent an unwelcome departure from the previous practice of the Bureau and the DPP, which have been joint participants in settlement negotiations. The apparent absence of the DPP from settlement discussions creates uncertainty about the availability of privilege and could be treated as an invitation to successive negotiations with the two agencies if either party to the discussions with the Bureau is dissatisfied with the outcome. The IBA

considers that the separation of the investigatory and prosecutorial functions would be better protected by a description of the policy of the DPP towards cartel settlement negotiations either in the Draft Bulletin or in a separate publication of the DPP, comparable to the existing Prosecution Service Deskbook, which outlines policies relating to other aspects of cartel enforcement.

11. The Australian system of cartel enforcement is similar to the Canadian system with separate investigatory and prosecutorial agencies: the Australian Competition and Consumer Commission (“ACCC”), and the Australian DPP, respectively. As in Canada, the Australian DPP has discretion over prosecutorial decision-making. In addition to articulating the ACCC’s approach to leniency applicants in the Australian Immunity Policy, the Australian government has published a draft Memorandum of Understanding (“MOU”) between the ACCC and the DPP. The MOU seeks to clearly articulate their relationship in connection to matters arising under the Australian Immunity Policy in relation to the proposed criminalization of cartels.
12. The publication of the MOU has provided Australian Immunity applicants with a clear explanation of the respective roles of the ACCC and the DPP in the leniency process, without undermining the independence of the prosecuting and investigating agencies: the MOU articulates the relationship between the agencies, but does not dictate the outcome of particular cases. This document provides an important degree of transparency and predictability for applicants facing a bifurcated enforcement process. It is understood that the ACCC finds the MOU to be a practical and sensible means of establishing a framework for certainty between the ACCC and the DPP.

13. While the Working Group would not conclude that one method of articulating the DPP’s policy on the leniency application process would be preferable to another – it could be articulated in a joint publication of the Competition Bureau and the DPP, in an agreement, or independently by the DPP in its Deskbook - the Working Group does believe that some greater clarity on the position of the DPP is needed. Greater clarity on the position of the DPP would provide greater certainty and predictability to the leniency process.

The Leniency Recommendation

14. The Draft Bulletin lists three factors that the Bureau will consider in making a leniency recommendation to the DPP: the timeliness of the cooperation, the value of the evidence provided, and whether the applicant provides evidence of other cartel activities so that it qualifies for Immunity Plus.
15. The Draft Bulletin also indicates that subsequent leniency applicants may be eligible for greater reductions in their fines if the evidence that they provide is of greater value than the evidence provided by the first leniency applicant.² The Bureau’s weighing of the “value” of evidence that an applicant can provide will be an important concern for potential leniency applicants.
16. Discretion in the assessment of the value of the evidence introduces undesirable subjectivity into the development of sentencing recommendations and severely limits the ability of a potential applicant to assess its exposure prior to seeking leniency. This

² Competition Bureau, Draft Information Bulletin on Sentencing and Leniency Recommendations in Cartel Cases. (April 2008) at para. 71.

subjective assessment will also limit an applicant’s ability to predict the Bureau’s ultimate sentencing recommendation after it has sought leniency and during the disclosure process.

17. In the EU, the European Commission equally commits to determining the level of the leniency reduction on the basis of the timeliness of the applicant’s submission and of the extent to which it represents “added value”. Whereas timeliness does not usually lead to controversy, the requirement of submitting “significant added value” often does.³
18. In its 1996 Leniency Notice, the Commission required the submission of “decisive evidence” for full leniency (or 100% reduction in penalties). The determination of whether or not evidence provided was “decisive” created a great deal of uncertainty. Most observers consider the uncertainty associated with this threshold to have significantly limited the success of the 1996 Leniency Programme, compared to similar programs in other jurisdictions, notably in Canada and the U.S.
19. This uncertainty has not yet been fully addressed despite the introduction of the standard of “significant added value” in the 2002 and 2006 Leniency Notices. Whether or not a leniency submission provides added value will depend on the quality of the evidence available to the Commission, an issue that is impossible for the leniency applicant to assess in advance. It also depends on a large measure of discretion, which the Commission reserves to itself, as to what is exactly meant by “added value”. The resulting uncertainty and unpredictability for the applicant in assessing whether its co-

³ See, for example, the Insulated Switchgear decision of 24 January 2007, where the European Commission denied leniency to 6 applicants because they did not provide “added value”; all parties appealed to the Court of First Instance.

operation qualifies for a fine reduction – prior to going in – potentially discourages applicants from coming forward. Leniency in the EU is still highly dependent on factors that the applicant does not control rather than on objective and verifiable criteria. The Working Group considers it to be inadvisable for the Bureau to adopt a similar approach.

20. Generally, the Working Group submits that timeliness should be the primary factor in assessing the appropriate penalty to be imposed. The earlier a party comes forward, the more favourable the treatment it should receive, relative to parties that hold back. Later parties should not be able to leapfrog the process, or obtain a relatively better outcome than an earlier party, by virtue of some attribute that cannot be objectively determined in advance, such as the “value” the Bureau investigators might place on the evidence the settling party can provide. Not only does the adoption of such subjective criteria impede predictability, it may well encourage parties with significant evidence to hold back on a strategic basis, reducing the pressure that should be on the parties to race to a settlement. The Bureau should rely only on criteria that are capable of being ascertained on objective grounds in advance. The Working Group considers that there is no prospect of a valueless settlement: as cartel participants settle and commit to cooperating in the prosecution of non-settling defendants, they will clearly provide at least corroboration of the evidence of the immunity applicant and tip the balance against parties that do not choose to settle. We would recommend that the perceived “value” of evidence not be a consideration in either the decision to recommend leniency, or the Bureau’s sentencing recommendations.

SENTENCING PRINCIPLES

Economic Harm

21. As a general proposition, the Working Group acknowledges the view that sanctions for cartels should reflect the economic harm occasioned by the conduct at issue. However, the Working Group believes that the Bureau's position, as stated in the Draft Bulletin, is problematic in three key areas: (i) the use of proxies and minimum fine recommendations; (ii) the inclusion of indirect sales in the fine calculation process; and (iii) the proposed sanctions for parties who have agreed not to participate in the Canadian market. Moreover, reliance only on an assessment of economic harm in developing sentencing recommendations would ignore the sentencing factors of deterrence and proportionality that are prescribed in the Criminal Code.

The Use of the 20% Proxy and 10% Minimum Fine Recommendations

22. The Bureau's position regarding sentencing principles in cartel cases is somewhat contradictory. The Draft Bulletin states that the Bureau's starting point for sentencing recommendations is the magnitude of the economic harm caused by the conduct at issue – but then goes on to state the Bureau's intention to use an unexplained proxy of 20% of the relevant volume of commerce. The Draft Bulletin does not indicate whether this proxy is proposed because it is thought to be an accurate estimate of economic harm, or simply because the Bureau does not believe it can develop an accurate estimate of the

actual economic harm.⁴ The Draft Bulletin refers to “numerous [but unspecified] studies” that have estimated that cartels result in a 10% overcharge. The Working Group is unaware of the existence of any generally accepted studies that would support the Draft Bulletin’s statement. The American enforcement authorities rely on a proxy of a 10% overcharge, doubled to 20%, purportedly to reflect the totality of the harm caused by a cartel. As explained by the ABA in submissions to the United States Sentencing Commission,⁵ there is no empirical support for the 20% proxy. There is no data or consensus in support of a legal presumption for sentencing, that is, the notion that cartels generally result in a 10% overcharge and that doubling this overcharge amount would accurately capture the economic impact of other harm caused by a cartel. Indeed, the Antitrust Modernization Commission recommended a re-evaluation of the 20% proxy used by the Sentencing Commission, or amendments to the Sentencing Guidelines to clarify that the proxy is rebuttable by proof on a preponderance of evidence that the actual overcharge was either higher or lower.⁶

23. The Working Group acknowledges the difficulty in precisely quantifying the adverse economic effects of cartel behaviour. However, that difficulty does not justify arbitrary penalty calculation. In this regard, the issues associated with proving the overcharge in a

⁴ The U.S. Sentencing Commission has indicated that the “...purpose of specifying a percent of volume of commerce is to avoid the time and expense that would be required for a court to determine the actual gain or loss”: USSG, § 2R1.1(d)(1), comment, n.3. Difficulty, cost or inconvenience seem inadequate justifications for the determination of a penalty that in law would require proof on a criminal standard.

⁵ Comments of the ABA Section of Antitrust Section on the Proposed Amendments to the Antitrust Recommendations of the United States Sentencing Guidelines: <http://www.abanet.org/antitrust/at-comments/2005/03-05/ussg-com-05.pdf> at pp. 20-23 (hereafter “ABA Sentencing Comments”)

⁶ Antitrust Modernization Commission, Report and Recommendations. (April 2007), Recommendation 53 at p. 295.

conspiracy case are not dissimilar to those associated with proving the degree of harm in criminal cases involving corporate/accounting/securities fraud.

24. Past experience in Canada and in other jurisdictions suggests that, while economic harm may be difficult to quantify, it is not impossible and need not be a barrier to resolving criminal prosecutions. Under the Alternative Fine Statute (18 U.S.C. §3571(d)), the U.S. D.O.J. is able to seek a higher fine than the previous \$10 million maximum that was in place until 2004, or the current \$100 million maximum. The Statute authorizes a fine of up to double the gain or double the loss attributable to the cartel. But it precludes proof of the gain or loss when that would “unduly complicate or prolong the sentencing proceeding.” In fact, the D.O.J. has never successfully invoked the Alternative Fine Statute in a contested case, though it has been used on a number of occasions to justify larger than maximum fines in plea agreements. In those consensual situations, of course, it would appear that the D.O.J. must have had the ability to prove the loss or gain, and, by virtue of the statutory test, there is at least a strong inference that the D.O.J. and the pleading party concluded that actual harm could be proven without excessive complexity or delay.⁷ Notably, civil plaintiffs routinely undertake the exercise of proving harm in all competition/antitrust private damages cases brought in both Canada and the US.

25. Strict reliance on a problematic mathematical formula for determining a sentencing recommendation would be inconsistent with Canadian sentencing principles and with the practice of Canadian courts in contested sentencing decisions in cartel, and non-cartel, cases. The Draft Bulletin acknowledges that the fundamental sentencing principles under

⁷ See: ABA Sentencing Comments, p.21-22; and see comment: “Time for a New Look at Antitrust Penalties”, Competition Law 360 (3 July 2008).

Canadian law are that a sentence must be proportionate to the gravity of the offence and that it must reflect the degree of responsibility of the offender. The objectives of a financial penalty are also directed to general and specific deterrence. There is no assurance of either proportionality or deterrence if the penalties imposed are either too high or too low, by reference to the actual harm or the actual gain to be achieved from cartel behaviour. If the proposed 20% proxy is too high, on that standard, it will inhibit applications for leniency. If it is too low, it will fail the test of deterrence, by being a mere “licence fee”. The Working Group recommends that the Bulletin be amended to clarify that the 20% of the volume of commerce proxy can be rebutted by the charged offender, with the burden of proving the amount of the overcharge remaining on the Bureau.

26. If, for the purpose of settlement negotiations, the Bureau’s default position will be that the 20% proxy should apply in all cases, it may encourage parties to resist settlement, on the basis that that the 20% proxy is too high on the facts of their case. There should be no onus on the settling party as to the fact or extent of harm: that burden lies on the prosecution. In the Working Group’s view, the premise of a standardised penalty at the settlement stage is problematic, in particular given that, if the matter were to proceed to trial, the onus would be on the Crown to prove the overcharge factor to the criminal standard. Nonetheless, the use of a proxy in an indicative manner or as part of a range of past settlements, not as a floor for a sentencing negotiation, would be of use in helping parties to evaluate the possible outcomes. The same considerations apply, but with greater force, to the indication in the Draft Bulletin that the lowest possible penalty will be 10% of the volume of commerce. Ultimately, in the absence of any empirical evidence

of “typical” economic harm, and without reference to any studies or analyses that would substantiate either the assumption of a 10% overcharge, or total economic harm of 20% of the volume of commerce, the Draft Bulletin is likely to carry little persuasive force for a judge in a sentencing case, and as such it does not provide an appropriate sentencing policy. The Working Group considers that reconsideration of this issue by the Bureau, and publication of the view of the DPP, is of pre-eminent importance.

Volume of Commerce/Inclusion of Indirect Sales

27. While the Working Group agrees with the Bureau’s focus on direct sales in Canada,⁸ it has serious concerns about the Bureau’s apparent intent to include indirect sales as the basis for a fine in cases where the party’s direct Canadian sales would not reflect the actual economic harm associated with its conduct.⁹ Penalizing parties on the basis of transactions that took place outside of Canada raises comity issues regarding the extra-jurisdictional application of the *Competition Act* to “foreign effects” of the cartel. In addition, reliance on direct sales that took place outside of Canada – the counterpart of an indirect sale in Canada – raises a concern about “double-jeopardy” (or double counting). Enforcement agencies in other jurisdictions could impose fines on the same party for the direct sales in their jurisdiction that underlie the indirect sales that the Bureau would include in its fine calculation. If the indirect sales in question do duplicate the sales of

⁸ The Working Group interprets the Draft Bulletin’s phrase “volume of commerce” to mean sales in Canada during the period of time the cartel was in effect. The phrase is not, however, free from ambiguity.

⁹ “[A]ctual economic harm associated with its conduct” is particularly opaque. For a party that was a Canadian market participant, does it refer to the anti-competitive overcharge on a cartelized product? Or would it include perceived economic harm to be attributed to a cartel member that acquiesced in a low market share and did not seek a greater share? Is it restricted to the overcharge on the cartelized product, or, where it is an input in a product that is used in successive manufacturing stages, would the Bureau argue that the “economic harm” includes any markup on the overcharge?

another party, logic – but not good sentencing policy – would suggest that the penalty for the latter should be reduced by a corresponding amount. The Working Group recommends that the Bureau should not rely on indirect sales in its sentencing recommendations but, if it does, the Bulletin should provide much greater explanation and analytical guidance for an approach that has not been adopted by any other cartel enforcement regime.¹⁰

Fines For Parties That Have No Canadian Sales

28. The Draft Bulletin also raises the amount of fines to be paid by parties that do not sell the cartelised product directly in the Canadian market. It may be appropriate to proceed against a party to an international market allocation conspiracy that agreed not to sell in Canada or to cease its participation in the Canadian market. But it seems inappropriate to sanction a party to a global cartel which had no plans or ability to service the Canadian market.¹¹ There have been dispositions in such cases in past Canadian practice, though they have been comparatively rare.¹²

29. With regard to the appropriate sanction for a party that agreed to refrain from participating in the Canadian market, the Draft Bulletin states that the Bureau will consider various factors, including the “volume of commerce of the other cartel participants”, the “size of each participant”, as well as “historic market share figures”.

¹⁰ The Working Group is unaware of any disposition in a Canadian cartel case that explicitly relied on indirect sales as a basis for a penalty calculation. Nor is the Working Group aware of indirect sales providing the basis for imposing a penalty in any other jurisdiction.

¹¹ The Working Group understands that this was a consideration in the Lysine investigation, in which no proceedings were taken against Cheil Jedang, which independently chose not to participate in the Canadian market.

¹² Examples include the market allocation agreement in the choline chloride investigation in Canada, with fines against at least two parties that were unrelated to any calculation based on sales.

The pertinence of these factors is not apparent. Care should be taken in these types of circumstances to ensure that any sanction is truly reflective of economic harm actually (rather than theoretically) resulting from a party's agreement not to participate in the Canadian market. Furthermore, any sanction must take account of the additional sentencing consideration of proportionality, as well as deterrence. It is not appropriate to create an artificial construct that does not reliably reflect all these considerations.

30. In cases where it is appropriate to sanction a party that has no Canadian sales, a more precise, objective and transparent methodology is needed. In this respect, the European Commission's 2006 Fining Guidelines¹³ provide an example. Normally fines in the EU are calculated on the basis of the value of sales of the relevant party in the European Economic Area ("EEA"). The Guidelines, however, contain a provision to cover situations where the parties' relevant sales in the EEA are not a proper basis for calculating fines. This may be so for market sharing cartels with a geographic scope extending beyond the EEA where certain parties abstained from selling into the EEA. Such global market sharing agreements presumably distort the parties' market shares in the EEA and reliance on EEA sales alone might not reflect the economic harm the parties inflicted. In such cases, the Guidelines provide that the Commission can determine the market share of the parties that agree to stay out of the EEA on the basis of global market share and to apply this market share to the aggregate sales of the product in the EEA. The result would be taken as the value of sales for the purpose of calculating the fines.

¹³ Official Journal of the EU, 1 September 2006, C210/2 (pt. 18).

31. The first time that this provision was applied was in the European Commission’s Aluminium Fluoride Decision of 25 June 2008. That decision is not yet publicly available. It therefore remains unclear whether this alternative calculation method will yield fair and satisfactory results and, thus, serve as a model to be adopted by Canada. The Working Group suggests that reliance on a criterion of “sales in Canada” in these situations is artificial and requires the Competition Bureau to strain facts or rely on considerations that may not reflect actual harm to the Canadian economy. Moreover, the discussion of these exceptional situations makes little contribution to clarity or to the incentives to come forward that underlie the proper purpose of the Draft Bulletin. The proposed approaches to indirect sales and non-sales should be reconsidered as these are comparatively rare situations. The desired goals of deterrence, certainty and predictability can effectively be advanced in the more productive ways outlined in the Draft Bulletin if it is modified as suggested herein.

Aggravating & Mitigating Factors

32. While many of the aggravating and mitigating factors listed in the Draft Bulletin seem uncontroversial, several raise concerns, specifically: (i) size/market share; (ii) degree of covertness/complexity of the cartel; (iii) obstruction; (iv) nature of the victims – in particular government/public agencies; and (v) cooperation/acceptance of responsibility, as defined in the draft Bulletin.

Size/Market Share

33. In the view of the Working Group, the size/market share of a cartel participant is not necessarily an aggravating factor. While larger firms may be in a better position to obtain

compliance advice, it is not accurate as a general proposition to conclude that the size/market share of a firm, taken by itself, is an aggravating factor. While the US Sentencing Guidelines rely on such a consideration, the policy rationale for increasing a fine based on a party's size has not been articulated and is questionable. This is particularly the case where other aggravating factors (for example, the involvement of senior officers) would address the Bureau's concerns. Further, the hypothesis that larger firms can cause greater economic harm would be addressed by the fact that 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 a large undertaking by applying an aggravating circumstance merely for being large. Moreover, it is not invariable that a large global enterprise will have a proportionately large presence in Canada. The Draft Bulletin's reference to enterprise size is accordingly ambiguous, as well as unfair. The sentencing focus should be on the concept of specific deterrence for the particular party. The Working Group recommends reconsideration of the Bureau's size of firm approach. At a minimum, it must be clarified as to size in Canada.

Degree of Covertness/Complexity of the Cartel Activity

34. 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 Draft Bulletin. It is unclear from a policy perspective why these circumstances should be considered as aggravating factors that enhance the penalty to be imposed.

Obstruction

35. In the Working Group's view, it is inappropriate to consider obstruction, which constitutes a separate criminal offence, with its own penalties, as an aggravating factor in determining the appropriate sanction for cartel conduct.
36. If the Bureau believes that obstruction has occurred, it should bring the appropriate charges, rather than using a perception or unproven allegations of obstruction as justification for a higher fine than would otherwise be recommended. Further, bringing separate obstruction charges, where warranted, is more transparent than treating obstruction as an aggravating factor, and would likely be a more effective general deterrent to obstruction.

Nature of the Victims

37. 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 is unclear whether this factor is particularly applicable to cartel behaviour.
38. It is similarly unclear why government/public agencies should be considered particularly vulnerable. In many cases, these agencies are more sophisticated and have greater access to legal resources than do many private firms or individuals. It is notable that in cases of bid rigging, Government bids enjoy a higher level of protection, by virtue of subsection 121(1)(f) of the *Criminal Code*, than private tendering procedures have under section 47

of the *Competition Act*.¹⁴ Accordingly, there is a question as to whether this is an appropriate aggravating factor in the context of cartel sentencing recommendations.

Cooperation/Acceptance of Responsibility – As Defined in the Draft Bulletin

39. While cooperation and acceptance of responsibility should, in most cases, be a mitigating factor, as defined in the Draft Bulletin, cooperation/acceptance of responsibility includes pleading guilty and accepting the jurisdiction of a Canadian court. Past dealings with the Bureau suggest it considers active measures to defend conspiracy allegations or to challenge Canadian jurisdiction as *de facto* aggravating factors. The Working Group believes this perception is problematic. It is inconsistent with the presumption of innocence, and it effectively penalizes parties who believe they have valid defences to the allegations against them.
40. A voluntary decision to plead guilty, rather than insist on trial, is a recognised mitigating factor in many systems of criminal law. The reverse is not necessarily true. To treat a decision to contest criminal charges as an aggravating facture abrogates the presumption of innocence. Essentially, while the Working Group agrees that cooperation/acceptance of responsibility should be mitigating factors, it is important that the Bureau not treat a lack of cooperation, defending allegations or challenging jurisdiction as any type of aggravating factor.

¹⁴ Cf. *R. v. Rowe*, (2003), 29 CPR (4th) 525.

Sentencing Recommendations

41. It appears from the Draft Bulletin that the Bureau intends to recommend more stringent sentences for corporations and individuals in the future. The Draft Bulletin suggests that, in the future, the Bureau will as a matter of policy insist on a fine as well as a prohibition order in its sentencing recommendations. If this is the position of the Bureau, it represents a marked departure from past practice. The Bulletin also emphasizes the importance of individual accountability, reflecting past statements of the Commissioner.

Prohibition Orders

42. Prohibition orders have traditionally played an important role in Canadian cartel enforcement. Numerous cases such as the Sotheby's disposition in the auction houses case in 2006, the Fort McMurray Autobody Shops case in 2007 and the investigation into bio-insecticide and insect control companies in 2008 have been resolved through stand-alone prohibition orders under subsection 34(2) of the *Competition Act*. The Draft Bulletin's explanation of the scope and application of prohibition orders is useful, particularly for foreign practitioners who may be unfamiliar with this form of remedy.
43. The Draft Bulletin, however, seems to suggest that the Bureau will no longer recommend that cases be resolved on the basis of a prohibition order without a guilty plea and a fine. If this is the position of the Bureau, the change of practice should be made quite explicit in the Bulletin. It would also be important to clarify the DPP's position on this issue, including, in particular, whether a policy that precludes reliance on subsection 34(2) of the Act as a basis for a non-prosecution agreement in appropriate cases is sustainable.

The Working Group considers that such a posture could be construed as fettering the discretion of the DPP in an inappropriate fashion. A fuller discussion of the role of prohibition orders as a uniquely Canadian tool for the resolution of cartel cases seems warranted.

44. If a guilty plea is the sole disposition available to a leniency applicant, an additional concern is the risk that, subsequent to the applicant's plea, the Bureau might terminate its investigation, without pursuing charges against other participants in the cartel. This has occurred on at least one occasion¹⁵ and it is an outcome that could jeopardise the success of the proposed Leniency Policy, if it recurred. In such a situation, the leniency applicant would be left as the only party facing deemed civil liability under section 36 of the *Competition Act*. In order to mitigate this risk, the DPP should develop a policy of negotiating agreements with leniency applicants, but not implementing them until the DPP is prepared to lay charges against other parties to the cartel.

45. As noted above, stand-alone prohibition orders have been used to resolve numerous cartel cases in Canada. The Working Group would suggest that such orders prove a useful degree of flexibility in public enforcement in cases where the full rigour of criminal prosecution, conviction and sentencing, with consequential civil liability, may not be appropriate. In some cases, the party with the greatest degree of culpability or responsibility for a cartel will be in a better position to seek immunity because of its deeper knowledge of the cartel and, therefore, may pre-empt a less culpable party in the

¹⁵ After the plea by Arteva Specialties, s.a.r.l., the Competition Bureau terminated its inquiry into the Polyester Staple cartel without further proceedings against any other parties: <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00312e.html>.

race for immunity. In such cases, or where the second-in party has relatively few sales in Canada, or where the evidence is inconclusive, it may be more appropriate to resolve the investigation through a prohibition order than to seek to impose criminal fines, and likely civil damages.

Individual Sanctions

46. In comparison to the United States, Canada has a relatively limited recent history of prosecuting individuals for cartel offences, notwithstanding the clearly stated belief of the U.S. Department of Justice Antitrust Division that individual jail time is the most effective deterrent to cartel activity, activity which requires criminal acts by individuals. In cartel investigations initiated in the last five years, only a handful of individual criminal charges have been laid in Canada. Where individual criminal proceedings have been conducted in that period, fines have been imposed as a result of plea agreements, and no individuals have received prison sentences. No contested cartel cases have been successfully prosecuted against individuals in this time frame. The Draft Bulletin states that, except where an individual has coerced others to participate in the cartel, committed previous cartel offences, or obstructed the investigation, the Bureau will typically not recommend that charges be laid against the individuals associated with the first leniency applicant. That is a very significant incentive for cartel participants to begin the race to settle, where immunity is no longer available. The Draft Bulletin does not, however, provide any guidance on the Bureau's proposed approach to the individuals associated with subsequent leniency applicants, and that creates serious uncertainty in light of recent practice.

47. The Working Group considers that it is critically important to know whether the Commissioner would, as a matter of policy, recommend individual charges against the individuals associated with subsequent leniency applicants. The issue of individual charges is an essential consideration in a corporate evaluation of whether to seek leniency. It affects the availability of evidence that individuals might have. It creates a risk of conflicts between corporate counsel and the individual employees. And, the potential threat of individual charges generates inappropriate leverage for the Bureau in discussing the terms of a possible settlement.
48. In contrast, the U.S. Department of Justice has provided clear guidance on its approach to individual liability in cartel cases. It is clear that individuals will be prosecuted in the United States, and that increasing numbers of individuals will be routinely carved out of corporate plea agreements¹⁶ for individual prosecution. That policy is based on a track record of increasingly aggressive prosecutions of individuals, a dynamic that has not prevailed in recent Canadian practice. In the EU, criminal enforcement is a matter for Member States, not for the European Commission, and the national authorities' track record on the prosecution of individuals is still very limited. However, Ireland has conducted a number of individual prosecutions since the criminalization of cartels in 2002.¹⁷ In the UK, the first charges were brought against individuals in the Marine Hoses cartel in 2008. The Enterprise Act provides for a maximum prison term of five years

¹⁶ Scott D. Hammond, "Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations" (March 2006). Presented at the American Bar Association Section of Antitrust Law Spring Meeting in Washington, D.C.

¹⁷ For example, the Chairperson of Connacht Oil Promotion was fined €15,000 in 2006 and a director of Corrib Oil Company Ltd. was fined €10,000 in early-2007.

and/or unlimited fines (and disqualification for up to 15 years). It is the Office of Fair Trading's role to investigate and to bring charges against individuals if it sees fit to do so.

49. As in the U.S., Ireland, Australia and Canada, the actual sentence in the UK is at the discretion of the Court. Indeed, the Office of Fair Trading does not give any formal sentencing recommendation. It also has not issued any guidance in this respect. Consequently, except when individual immunity is available, there is no guidance in the UK as to the sentence that individuals are likely to receive prior to the judge's final decision. That position is understandable, perhaps, for an agency that is only commencing its experience with criminal prosecutions, but the lack of guidance is highly undesirable and guidance should not be left in abeyance by an agency with the experience of the Competition Bureau.
50. Individual exposure to criminal liability is a central – and proper – concern for individuals and corporations implicated in cartel offences. Clear guidance on this issue is particularly important for implicated corporations and their counsel as they conduct internal investigations. Individuals facing a substantial likelihood of criminal exposure are likely to require independent counsel at an early stage of the investigation and that should be clear from the outset. Participation in the proposed leniency process of the Bureau, without an advance indication of the Bureau's attitude to individual charges, creates serious risks for all participants in the process. The Draft Bulletin skirts this issue. Thus, the Working Group suggests that a clear policy on the treatment of individuals will be essential to the success of the Draft Bulletin and the Leniency Policy of the Bureau.

Leniency Process

51. The Draft Bulletin outlines a leniency application process that is very similar to the immunity application process. It involves an initial proffer, a conditional lenient treatment recommendation, full and frank disclosure and a final sentencing recommendation. Several aspects of this proposed process will raise concerns for potential applicants: (i) the requirement for full disclosure while they face an uncertain level of exposure (ii) the confidentiality of the information provide by an applicant and (iii) the suggestion that applicants must approach the investigator, rather than the prosecutor, to commence leniency negotiations.

52. A leniency application is, in essence, the commencement of negotiations for a plea bargain. A leniency applicant is in a different situation from an immunity applicant because a leniency applicant faces both criminal and civil liability, and individuals working for the leniency applicant may also face liability. In contrast, the immunity applicant faces none of these consequences. Moreover, leniency discussions are unlike the immunity context, where the facts are generally quite uncertain. The Draft Bulletin seems to require that leniency applicants must participate in a similar procedure to immunity applicants, with the same disclosure requirements. It is simply not appropriate to draw an analogy between the situation of a party that is expected to accept criminal liability and one that is not.

53. The Draft Bulletin contemplates that a leniency applicant will provide the Bureau with full and frank disclosure, including interviews with key witnesses, before the Bureau makes a final sentencing recommendation to the DPP. The Working Group doubts that it

should be necessary for the leniency applicant to provide a detailed description or evidence of the illegal activity prior to negotiating a settlement. The Bureau will have the evidence provided by an immunity applicant, or, as indicated in the Draft Bulletin, it will have sufficient evidence to warrant a referral to the DPP for consideration of charges. It should not need admissions by the leniency applicant to assess the nature of the cartel or its effects. An applicant that provides full cooperation prior to reaching a final settlement lacks any assurance that it will be able to reach an acceptable settlement with the Bureau, or with the DPP, and compromises its capacity to defend itself in a contested criminal case. The risk to the applicant is compounded by the risk to individuals associated with it who also face uncertain criminal exposure.

54. Leniency applicants will not always have detailed knowledge of the overall cartel, but may still have valuable information. After a grant of immunity, the ability to prove a conspiracy typically requires corroboration. The willingness of successive parties to admit guilt and cooperate will make a essential contribution to the prospects of a successful prosecution against non-settling defendants. It should be sufficient for the applicant to admit the anti-competitive conduct, agree to plead guilty and to provide the information and evidence available to it, once settlement negotiations have resulted in a satisfactory plea agreement.
55. The Working Group believes that the proposed process demands too much, too soon, given that negotiations may not succeed. In the EU there is no obligation for a leniency applicant to provide a full corporate statement; it is sufficient to provide “added value”. While it is perhaps unclear what this means, it is clear that it is not necessary for a leniency applicant to provide a full overview of the cartel as is required of the immunity

applicant under the Draft Bulletin. In the U.S., a party can request a “marker”, preserving its “first-in” leniency status, until it has had a fuller opportunity to investigate the conduct in question. This approach obviously requires no admission of anti-competitive conduct but has encouraged parties to come in at an early stage. Even when the leniency applicant comes in to perfect the marker and actually apply for leniency in the U.S., it is not required to provide a detailed account of the anti-competitive conduct or inculpatory evidence. That level of disclosure is not required until after a plea agreement has been concluded.

56. While it is appropriate for the Bureau to require cooperation from leniency applicants, the Working Group considers that it would be more realistic to expect applicants to negotiate the terms of a settlement with the DPP prior to providing full disclosure to the Bureau, as is the case in the U.S. The agreed sentence could be conditional on cooperation. Establishing an agreed sentence prior to disclosure would provide applicants with a clear understanding of their own criminal exposure and would also clarify any criminal exposure for individuals associated with the applicant.

57. An essential concern for all applicants will be the confidentiality of any discussions connected to their leniency application. Negotiations with the DPP would be protected by settlement privilege. It is less clear that leniency discussions with the Bureau, which lacks the authority to enter into a plea agreement, would be protected by such privilege. The uncertainty regarding privilege could affect an applicant’s position in both criminal and civil proceedings. If the leniency process were to break down, it is quite unclear whether information provided by the applicant could be used against it in eventual criminal proceedings. While the Draft Bulletin suggests that the disclosures by the

applicant would be “without prejudice”, that is not a satisfactory safeguard for any applicant, in the view of the Working Group. Clearly that phrase provides no assurance that derivative evidence would not be used against the leniency applicant if it does not reach a satisfactory settlement. Further, the Draft Bulletin asserts that any information and evidence disclosed by a leniency applicant may be used against the applicant if it fails to comply with its leniency “obligations”. That position is quite inconsistent with the concept of privileged settlement negotiations. There may be various reasons why the applicant could fail to comply with commitments given in leniency discussions, including circumstances that are not under its control (e.g. if relevant employees refuse to cooperate with the Bureau). Furthermore, if the discussions with the Bureau are not privileged, there would be a serious risk of discovery in civil actions, in Canada or abroad, or in enforcement action in another jurisdiction. The possibility of failed negotiations and the evident risk of direct or indirect use could well undermine both the willingness of parties to co-operate with the Bureau and ultimately, the effectiveness of the program. Furthermore, these risks apply not only to the leniency applicant, but also to any individuals associated with it. The Working Group recommends that the Bulletin make clear that all discussions with a leniency applicant are privileged.

58. While the Draft Bulletin suggests that leniency applicants should approach the Bureau, it is not clear whether it would also be open to leniency applicants to approach the DPP directly. From the perspective of a leniency applicant, greater safeguards might be available in direct plea negotiations with the DPP than proposed process laid out in the Draft Bulletin. Once again it would be highly desirable to clarify the DPP’s position about direct settlement negotiations without prior engagement with the Bureau.

Conclusion

51. The Working Group respectfully submits that the draft Bulletin represents a significant advance in clarity and predictability for cartel participants in deciding whether, when and how to seek leniency for their misconduct. However, the bifurcated nature of the Canadian enforcement system creates considerable uncertainty which can and should be resolved in any final Bulletin. Furthermore, the Working Group believes that the practical effects of several key aspects of the proposed process and of the approach of the Competition Bureau to sentencing in cartel cases require further consideration. Undue reliance on the fine calculation approach taken by the US Sentencing Commission would conflict with principles of Canadian sentencing law. Certain other questions deserve further clarification or reconsideration, including the principle that the earliest party in should receive the most favourable treatment, the calculation of fines with reference to indirect or even no sales in Canada, the policy of the Bureau in relation to individuals, and the provision of assurances to potential applicants that the proposed process will not require premature prejudice to the legal position of a potential pleading party.
52. The Working Group believes that the Draft Bulletin is a strong and commendable first step in an analytical process, and it appreciates the openness of the Competition Bureau in launching consultations on such a complex and delicate area of practice. The Working Group will be interested in further developments in Canadian leniency policy and looks forward to the opportunity to contribute to another draft of the Bureau's policy.