

New Immunity and Leniency Programs: Still the Best Deal in Town?

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It used to be the best deal in town: participants in criminal price-fixing conspiracies could approach the Competition Bureau and receive either complete immunity or leniency in exchange for ratting out their co-conspirators.

The Bureau and the Public Prosecution Service of Canada (PPSC) still offer immunity and leniency in exchange for cooperation, but recent changes to the immunity and leniency programs increase the uncertainty faced by participants. As a result, the decision to seek immunity or leniency becomes harder to make; indeed, it is not always the right choice.

Immunity and Leniency for Competition Offences

The concept behind the immunity and leniency programs is simple: the Bureau and the PPSC offer a reward to firms that are prepared to assist with the investigation of criminal offences under the *Competition Act*. The programs operate on a first-come, first-served basis: the first firm to seek a “marker” is eligible to receive full immunity from prosecution. The firm and its executives thus escape fines that can be as high as \$25 million (more for bid-rigging) and jail terms of up to 14 years. Later applicants receive leniency in the form of a discount from the fine that would otherwise be imposed.

The Changes

The Bureau and the PPSC have made three major changes to the immunity and leniency programs:

- The grant of immunity is delayed until later in the process
- Directors, officers, and employees are no longer automatically covered by immunity
- Leniency discounts are based on the value of cooperation

Immunity Delayed is Immunity Denied?

The most important change is that the grant of immunity is delayed until after the case is finished. A firm that obtains a marker has thirty days to provide a “proffer” of information about the offence. Formerly, after receiving this information, the Bureau would decide whether to recommend immunity, and, if it did, the firm would enter into an immunity agreement with the PPSC. That agreement would require the firm to cooperate fully with the Bureau’s investigation.

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Now, after making a proffer, a firm only obtains “interim immunity.” It will cooperate with the Bureau by making full disclosure of documents and providing witnesses to be interviewed by the Bureau.

Once the Bureau is satisfied that the immunity applicant has satisfied its obligations, it makes a recommendation to the PPSC, which grants immunity “if it accepts the recommendation.”

This delay in the grant of final immunity obviously creates a certain degree of insecurity for immunity applicants. It is the Bureau and the PPSC that determine whether or not an immunity applicant has met its obligations of providing full cooperation. If it determines that an immunity applicant has not met its obligations, the PPSC can revoke the grant of interim immunity.

After revoking the grant of interim immunity, the Bureau and the PPSC can use information disclosed by the immunity applicant against it.

That being said, the PPSC has always had the ability to revoke immunity from participants who failed to meet their obligations. Revocations of immunity are not done lightly, and have been rare.

Under That Umbrella

Directors, officers, and employees of immunity applicants used to be automatically included under the immunity umbrella. Now the immunity applicant must identify individuals it wishes to include in the grant of interim immunity. Those individuals must admit their knowledge of or participation in the unlawful conduct and cooperate in the investigation; if they do not, they will lose their immunity.

Let’s Make a Deal!

After a leniency applicant makes its proffer of information to the Bureau, the Bureau makes a leniency recommendation to the PPSC. It recommends a fine that incorporates a “leniency discount.” The applicant then enters into a plea agreement with the PPSC and begins cooperating with the Bureau by providing documents and making witnesses available. At some point in the process, the applicant will be charged and will plead guilty to an offence.

Formerly, the leniency discount was based on the applicant’s place in line. The first leniency applicant would receive a 50% reduction in the fine; the second, 30%, and subsequent applicants, a lesser reduction.

Under the revised program, the leniency discount is based on the value of the applicant’s cooperation. All applicants can potentially obtain a 50% discount.

The change to a value-based discount means that it is impossible to predict the discount when applying for a marker. However, the amount of the discount will be determined after the proffer, as part of the negotiation

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of the plea agreement, and before the applicant starts cooperating. This means that the discount is based on the anticipated value of the applicant's cooperation.

The \$25 Million Question

The big question is whether it is still worthwhile applying for immunity or leniency, given the changes made by the Bureau and the PPSC.

A decision to seek immunity or leniency involves many considerations, including:

- The consequences of not seeking immunity or leniency, namely potential criminal prosecutions, fines up to \$25 million, and jail
- The likelihood that the Bureau will discover and investigate the conspiracy – or that another firm will seek immunity or leniency
- The likelihood that the PPSC's prosecution would be successful (the track record to date favours defendants)
- The cost of participating in the immunity and leniency programs
- The certainty of follow-on class actions seeking damages

While the recent changes to the immunity and leniency programs increase uncertainty and likely weaken the programs, they do not alter the fundamental deal that is on offer: immunity or reduced fines in exchange for cooperation. Because immunity and first-in leniency offer protection to executives who may be involved, they remain especially attractive. The leniency program is less attractive to latecomers, however.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.