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Competition Compliance Programmes – Note by Canada

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This document reproduces a written contribution from Canada submitted for Item 1 of the 133rd OECD Working Party 3 meeting on 8 June 2021.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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Canada

1. Introduction

1. The Canadian Competition Bureau (“CCB”) is pleased to provide this submission to the Roundtable entitled “Competition Compliance Programmes”. The CCB has long been a supporter of proactive competition law compliance measures by businesses. Since 1997, it has published some form of public guidance for the business and legal community on its approach to compliance programmes. This guidance has evolved to reflect updated enforcement policy positions and to keep pace with commercial and legal realities.

2. In 2015, the CCB released the current iteration of its [Bulletin on Corporate Compliance Programmes](#) (“Bulletin”). This principles-based, flexible guidance is designed to set out the minimum requirements to achieve a credible and effective competition law compliance programme. Among the key revisions to the Bulletin are expanded guidance on how businesses can assess their risks and a new section related to evaluating the effectiveness of an existing programme. The revised guidance also provides concrete examples and sample content for a basic compliance programme in order to help businesses understand how they can implement or strengthen their compliance controls.

3. In 2018, the CCB and the Public Prosecution Service of Canada (“PPSC”) published an amended [Leniency Programme](#) that included for the first time an explicit credit for a credible and effective compliance programme. Where the CCB is satisfied that a compliance program in place at the time the offence occurred was credible and effective, consistent with the approach set out in the Bulletin, it will treat the compliance program as a mitigating factor when making its recommendation on sentencing to the PPSC. This created a concrete incentive for businesses to implement strong compliance controls following the principles set out in the Bulletin.

2. The Bureau’s Approach to Compliance

4. The CCB takes a broad view of compliance, especially in light of accelerating digital transformation and the associated competition law risks that have emerged for businesses that operate in rapidly changing markets. Indeed, the 2015 revisions to the Bulletin reframed the introduction to indicate up-front that the Bureau “encourages businesses to craft programs that reflect their specific circumstances.” In the revised section of the Bulletin on risk assessment, the Bureau explicitly advises businesses that they “must be cognisant that risks may change as their business evolves and their compliance programs will need to be sufficiently flexible to allow them to adapt.”

5. In the cartels context, this could mean that businesses that develop or use algorithmic pricing models need to train new categories of employees in competition law matters, such as software engineers. It may also mean that these businesses should revise their processes and procedures to ensure that this aspect of pricing is properly monitored for compliance. These are but a few examples of emerging considerations that could be captured by regular risk assessment and programme evaluation processes contained within a broader compliance programme.

6. While the Bulletin always technically applied to the entirety of the competition law regime administered and enforced by the CCB, the content of the bulletin was updated to

more comprehensively cover non-cartel offences.¹ A credible and effective compliance programme may be taken into account by the CCB when considering whether to pursue a matter on a civil or criminal track where both options are available.

7. Admittedly, many businesses may not be exposed to significant legal risk in relation to unilateral conduct if they do not possess market power. However, as dynamic markets shift quickly and some competitors may rapidly “win” a market that is prone to tipping, competition law should be well understood by all market participants. This is particularly relevant in digital markets where competitors may transition from being a start-up to a dominant player in a short period of time.

8. The common thread across all areas covered by the CCB’s compliance guidance is that businesses should be aware of the laws enforced by the CCB, especially as risks change and emerge more and more rapidly. With flexible guidance and a broad approach, the CCB is well-positioned to promote compliance with competition law and empower businesses with the information they need to understand the rules and mitigate their risks.

3. Promoting Compliance through Agile Advocacy

9. In 2019-2020, the CCB conducted [public opinion research](#) (“POR”) to learn more about the level of awareness and understanding consumers, businesses and policy makers and regulators have about its activities. The POR included focus groups and surveys with 1,500 participants across Canada and allowed the CCB to assess the impact of its work on their behaviours. The POR showed that although stakeholders have limited awareness and understanding of our organization and activities, some of their decisions have been informed by our promotion and advocacy work, particularly our online publications.

10. The POR results identified gaps and opportunities for the CCB’s compliance promotion activities. The results showed that small and medium-sized enterprises (“SMEs”) had a low level of awareness of the Bureau’s work and of the competition laws that applied to them. These are the types of businesses that do not generally have dedicated in-house or external competition counsel. When presented with the CCB’s online resources, SME interviewees generally found them helpful. Given that these resources may in some cases be the primary or only source of information for SMEs about competition laws and their obligations, they are particularly important in promoting compliance.

11. At the same time, the COVID-19 pandemic caused a fundamental shift from in-person outreach to virtual engagement across all sectors of the economy. Virtually all in-person events that normally present an opportunity to engage in outreach were cancelled, postponed or shifted to a virtual platform. As well, training and meetings that would have otherwise been held in person were cancelled or shifted online.

12. The CCB determined that further online resources were necessary in order to effectively engage with Canadians, especially audiences such as SMEs where there was an identified gap in awareness about competition law. In order to amplify the reach of its resources, the CCB sought to collaborate with organizations that support businesses, such as chambers of commerce, accelerators and incubators, and trade associations.

¹ The content of this submission is limited to the CCB’s jurisdiction as it relates to competition matters. However, the CCB enforces and administers legislative provisions related to deceptive marketing and labelling, and the Bulletin also applies to these provisions.

13. One such collaboration pre-dated the pandemic and the final POR results. It demonstrated the potential of adopting innovative approaches to awareness-building outreach. In fall 2019, the CCB participated in a [general podcast on competition matters](#) for a virtual professional development platform for Canadian certified accountants, who are well-positioned to spot potential competition infringements within a business. The podcast was accessed or bookmarked by over a thousand individuals in the months following its release. By leveraging annual training requirements for the accounting profession and the ease of access of a virtual platform, the CCB's key messages reached a wider audience than traditional in-person events typically do. This laid the groundwork for using podcasts to deliver awareness-building information, and the CCB is in the process of developing further podcast content for SMEs, especially those in the digital economy.

14. The CCB also developed stronger relationships and provided training to other government departments that provide front-line services to businesses, such as guidance on navigating federal procurement, grants and funding programmes. As the Canadian government announced pandemic-related stimulus spending, the CCB saw the need to enhance its bid-rigging training for procurement officials.² In order to support a proactive approach in the new virtual environment, the CCB produced a training video that combined video narration by actual officers with slide content that would normally be presented during in-person training sessions. The CCB then partnered with a non-profit organization that provides training for procurement officials across all levels of government in Canada to distribute the on-demand training video and follow up with a live question and answer session.

15. This proved to be successful as the online, two-phase training strategy attracted more participants than an average in-person training session. The partnership approach also informed the CCB's business-facing compliance promotion initiatives. For example, the CCB delivered a virtual training roadshow to teams of advisors in other federal agencies that provide support to SMEs, many of which are active in digital economy markets. The objective of this training was to provide simple, high level information about Canada's competition laws so that these advisors could give more informed advice to their clients and spot and report issues that may warrant further investigation or advocacy.

16. Aside from specific collaboration on virtual events or content delivery, the CCB identified an opportunity to use social media to deliver basic messaging and to promote existing resources. At various times of the year, SMEs are the focus of broader marketing and event campaigns. For example, Small Business Week is an annual Canadian campaign supported by a number of public and private business support organizations. By planning a series of [social media posts](#) to coincide with this campaign, the CCB was able to increase engagement with its compliance promotion posts compared to the average level of engagement with its social media activities. In fact, some of these posts were among the CCB's top-performing social media content in 2020.

17. Posts with simple messaging describing the rules enforced by the Bureau were particularly successful, demonstrating that basic awareness-building content is an effective way to attract attention, which can then be directed at more specific existing resources. For example, the awareness-building social media posts also served to promote a [virtual compliance bootcamp series](#) launched by the CCB in late 2020. While the first edition

² In parallel, the CCB released a Competition Advocate publication entitled "[Competitive bidding processes in the public sector: Procuring good value for taxpayer money](#)" in order to raise public awareness of this topic at an early stage, before all of the stimulus funding was rolled out.

related to deceptive marketing practices, forthcoming editions will include plain-language content on business collusion, bid-rigging, and abuse of dominance.

18. The various initiatives undertaken to support the CCB's compliance promotion strategy continue to evolve. POR results have focused efforts on high-level awareness-building activities, supported by plain language content that allows audiences such as SMEs to grasp the basic elements of their compliance obligations. With this foundational knowledge, they are then empowered to understand the more specific, technical guidance that the CCB has long published.

4. Supporting Emerging Compliance-Related Research

19. The CCB has taken steps to integrate Gender-Based Analysis Plus ("GBA+") into its work. GBA+ is an analytical process that assesses systemic inequalities, including how diverse groups of people may experience policies, programs and initiatives. The process aims to help government officials ask questions, challenge assumptions and identify potential impacts of various diversity factors in their work. GBA+ goes beyond gender to include a variety of identity factors, including race, sexual orientation, and disability. Further research and developments in this area will inform the Bureau's approach to enforcement, advocacy and compliance.

20. This work has now reached beyond Canada's borders. Initial results from OECD research show that gender may influence regulatory compliance and that men and women appear to react differently to whistleblower programmes. In addition, this research suggests that women's presence in corporate governance structures such as boards of directors may make a business less likely to engage in anti-competitive conduct, such as collusion.

21. The CCB and the Government of Canada are supporting further OECD research on the topic of gender inclusive competition policy. Given that early results demonstrate that gender and diversity may have an impact on both compliance processes such as whistleblowing programmes and the propensity of a business to engage in anti-competitive behaviour, the additional research projects under way will be of interest to competition authorities as they critically assess their guidance, and to businesses as they assess their risks and evaluate their own compliance protocols.

22. The CCB has taken some preliminary steps to target compliance advocacy and promotion activities with gender, diversity and inclusiveness principles in mind. For example, the CCB is undertaking targeted outreach to chambers of commerce and business support organizations that focus on LGBT+, minority and other under-represented, equity-seeking entrepreneurs and business owners. The CCB has also translated [certain educational resources](#) into languages that will make content more accessible to significant and growing populations of newcomers to Canada, such as Spanish, Chinese, Punjabi, Arabic and Tagalog.

5. Conclusion

23. Compliance promotion and advocacy are an important part of the CCB's [strategic vision](#). In light of POR results that revealed a lack of awareness among SMEs of competition laws, outreach efforts are more important than ever. In addition, resources are increasingly consumed virtually and the CCB is taking steps to adapt its promotion and outreach to this evolving reality.

24. Over the past months, the CCB has found that basic messaging in plain language can resonate well with target audiences. Despite its simplicity, basic content can be powerful as it can help businesses start to identify their own specific compliance risks and take appropriate action. This can include obtaining legal advice, consulting more detailed guidance on certain topics or contacting an authority for further information.

25. Critically assessing new initiatives can be just as important as the initiatives themselves. A periodic evaluation process, whether formal or *ad hoc*, can inform the allocation of limited resources and improve the effectiveness of future iterations of promotional campaigns and educational resources.