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CONFORMITY CONTINUUM INFORMATION BULLETIN

COMPETITION BUREAU

Canada



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PREFACE

This bulletin explains the Competition Bureau's approach to the administration and enforcement of the *Competition Act*, *Consumer Packaging and Labelling Act*, *Textile Labelling Act*, and *Precious Metals Marking Act*.

The approach is referred to as the Conformity Continuum because of the interdependent and complementary nature of the component instruments. The Bureau's commitment to educate the marketplace is complemented by the availability and promotion of several forms of voluntary compliance. For businesses and individuals who disregard the law or fail to take advantage of the opportunities for voluntary compliance, the Bureau will take the necessary action to respond to non-conformity.

The bulletin is designed to provide greater clarity surrounding the circumstances governing the selection and use of each instrument and to set out the considerations influencing the Bureau's decisions.

The publication of the *Conformity Continuum Information Bulletin* is premised upon the belief that businesses will be more likely to comply with legislation if they are provided with the required knowledge and tools. Consistent with this goal, the bulletin provides a comprehensive description of the instruments used to ensure conformity with all the legislation for which the Bureau is now responsible.

By continuing to provide information to the public, the Competition Bureau intends to contribute to a better understanding of the legislation and to foster a business culture of respect for the law that will result in increased and ongoing conformity.

Konrad von Finckenstein, Q.C.
Commissioner of Competition

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INTRODUCTION

The Competition Bureau of Industry Canada is the administrative and law enforcement body charged with the preservation of a competitive marketplace in Canada. The head of the Bureau is the Commissioner of Competition, appointed under the *Competition Act*. In addition to the *Competition Act*, the Commissioner is responsible for the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, and the *Precious Metals Marking Act* (the “standards-based acts”). The purpose of the legislation is to maintain and encourage competition in Canada in order to promote the efficiency of the economy; to expand opportunities for Canadian enterprises in world markets; to ensure that small and medium-sized businesses have equal opportunities; and to provide consumers with competitive prices, competitive product choices and accurate product information.

This bulletin describes the general approach of the Commissioner and the Bureau to the administration and enforcement of the legislation. It is not intended to restate the law or to be a binding statement of how the Commissioner’s discretion will be exercised in a particular situation. Therefore, this bulletin should not substitute for the advice of counsel. Enforcement decisions of the Commissioner or the Attorney General of Canada, and the ultimate resolution of any particular matter, are based on the specific circumstances at hand.

OBJECTIVES AND OVERVIEW

The Bureau’s activities are guided by five governing principles. The first, transparency, means that the Bureau will be as open as the law and confidentiality requirements permit. The second, fairness, refers to striking the right balance between voluntary compliance and enforcement, while responding to many competing interests. The third, timeliness, demands that decisions be made as quickly as possible to avoid costly delays. The fourth, predictability, involves providing appropriate background material on Bureau positions and important issues to assist the business community in conducting its affairs in a manner that complies with the law. Finally, the fifth principle, confidentiality, requires that the Bureau use all available means appropriate to the circumstances to protect confidential or commercially sensitive information provided to it by the business and legal communities or any other source.

The Conformity Continuum is guided by these five principles and operates from the assumption that most businesses and their managers prefer to comply with the law rather than to become involved in enforcement proceedings under the legislation. It represents an effective approach to the enforcement and administration of these laws and to the successful maintenance and encouragement of competition in Canada. The legislation is framework law, designed to establish a set of parameters for the marketplace and to define specific unlawful conduct. There is no intent to have the Commissioner or the Bureau act as an administrative regulator. Within the framework of the legislation, businesses are allowed to operate freely.

The general approach to the administration and enforcement of the law has evolved over many years. Prior to 1975, when the *Combines Investigation Act* (the predecessor legislation to the *Competition Act*) was strictly a criminal statute, the approach was limited to traditional criminal investigation and enforcement. With the passage of a number of civil provisions in 1975 and the passage of the *Competition Act* in 1986, which greatly expanded the range of civil provisions, the

Bureau began to incorporate more non-adversarial, alternative approaches to the enforcement and administration of the legislation. The 1999 amendments to the *Competition Act* formally provided the Commissioner with the responsibility for administering and enforcing the standards-based acts, which had been in administrative effect since 1995. Non-adversarial approaches have always been an integral component of the application of the standards-based acts.

The Bureau operates in a constantly changing and increasingly complex environment. A combination of factors, including legislative amendments, changing economic and business environments, expanded responsibilities, and financial and resource constraints (with a resulting need to use the available resources in the most effective manner possible) led to a review of the Bureau's approach to the enforcement and administration of the legislation. As a result, the Bureau and Commissioner now place increased emphasis on education and voluntary compliance to limit the need for contested proceedings. There is also a recognition that neither the single-minded pursuit of prosecution before the courts or applications to the Competition Tribunal nor an approach based solely on education and non-adversarial responses is the most effective manner in which to fulfil the Bureau's mandate. To support a balanced approach, the Bureau has developed a variety of education, compliance and enforcement instruments. Collectively, these instruments are known as the Conformity Continuum. The term expresses the concept of a comprehensive, integrated approach to achieving the ultimate goal of conformity with the legislation. A schematic depiction of the Conformity Continuum is presented in Figure 1.

With this integrated approach, the Bureau is able to choose the appropriate instrument or combination of instruments to address the issues raised by any specific situation. The continued development of both compliance and enforcement initiatives and the integration of all instruments as part of the Conformity Continuum ensure that the business community is provided with the knowledge and tools necessary to understand and comply with the legislation. The Bureau also makes clear the intention to use vigorous enforcement measures when necessary to ensure conformity with the law.

Figure 1

CONFORMITY CONTINUUM

CONFORMITY THROUGH EDUCATION			FACILITATING CONFORMITY		RESPONSES TO NON-CONFORMITY		
Publications	Communication	Advocacy	Monitoring	Voluntary Compliance	Suasion	Consent	Adversarial
Information bulletins	Speeches	Interventions	Information Centre	Advisory opinions	Information contacts	Negotiated settlements	Prosecutions
Enforcement guidelines	Seminars	Representations	Prenotification	Pre-market assessment	Information letters	Consent orders	Tribunal applications
Annual report	Trade shows	Policy development	Targeted inspections	Advance ruling certificates	Warning letters	Consent prohibition orders	Product seizures
News releases	Web site	Liaison	Marketplace contacts	Corporate compliance programs	Compliance meetings	Undertakings	Contested prohibition orders
Discussion papers	Media contacts	Partnerships	Practitioner contacts	Voluntary codes		Corrective notices	Injunctions
Reports	Videos	Research	Consultations			Voluntary product recalls	
Pamphlet series							
GENERAL APPLICATION				SPECIFIC APPLICATION			

The continuum can be best understood as a system of compliance and enforcement instruments designed to complement one another and work interdependently toward promoting conformity with the law. No individual part of the continuum is more important than another; no part stands alone; and no part can be effective in isolation. The continuum includes instruments of both general and specific application, which have been grouped accordingly in Figure 1. General application involves proactive efforts in the form of education and monitoring directed universally at the public and the marketplace to encourage conformity. Specific application refers to responses to individual compliance initiatives or the resolution of specific instances of non-conformity.

The continuum operates in such a way as to ensure that the business and legal communities and the general public can readily be made aware of Bureau policies, the outcome of specific cases and the instruments available to avoid coming into conflict with the law. Education efforts are complemented by the availability and promotion of a variety of compliance-oriented instruments. When a business or individual disregards the law or chooses to ignore the compliance options, the Bureau has specific instruments available to respond to non-conformity. With contested proceedings, the results of which are made public, the Bureau builds on jurisprudence, achieves general and specific deterrence, and identifies areas that need to be addressed in order to improve efforts to educate the business community and increase compliance.

The resolution of each case is determined on its own merits, in light of the objectives of the applicable legislation. When the Bureau becomes aware of alleged non-conformity, the appropriate instrument is selected from the range of available responses. When appropriate, the Bureau will use a blended approach, which involves the selection and use of more than one instrument. The choice will depend on the particular circumstances of the case at hand. A variety of factors will be assessed, including the gravity of the alleged infraction, previous anti-competitive conduct and the willingness of the parties to resolve the matter.

Although increased emphasis has been placed on providing the business community with the knowledge and the tools to comply, the Bureau does not consider the use of enforcement instruments as a last resort. Rather, as with all other instruments, enforcement is used at the appropriate time and under the appropriate circumstances. This does not mean that all other efforts must be exhausted before the Bureau will consider using adversarial instruments. In selecting the appropriate instrument, it may be necessary for the Bureau to use immediate enforcement action. In civil matters, where reasonable solutions cannot be worked out by consent orders or by other means, the Bureau will not hesitate to apply to the Competition Tribunal. In criminal matters involving serious violations, the Commissioner will refer cases to the Attorney General of Canada and recommend that prosecution be undertaken with the full force of the law.

GENERAL APPLICATION

The instruments that make up the continuum fall into three broad categories: conformity through education, facilitating conformity, and responses to non-conformity. As noted previously, the instruments are also classified by general and specific application. General application instruments (e.g. the Web site or information bulletins) are primarily directed toward a broad general audience. Specific application instruments (e.g. prosecutions or advisory opinions) are directed toward parties in specific circumstances. General application instruments are typically

used on an ongoing basis, whereas specific application is characterized by the selection of appropriate instruments.

CONFORMITY THROUGH EDUCATION

Education efforts represent a fundamental element of the continuum. The Bureau believes that, if the business community is informed about its obligations, the majority of businesses will comply with the applicable legislation. The Bureau has developed several instruments to communicate with the business community and promote competition policy. These instruments include the publication of informative documents, direct communication with the public and advocacy for a pro-competitive marketplace.

Publications

Because easy access to the Bureau is important, attempts are made to publicize as much of the Bureau's policies as the law permits. The Bureau's publications include the following.

- Information bulletins and enforcement guidelines, which provide an outline of specific provisions of the legislation and its administration.
- The Annual Report to the Minister of Industry, which is tabled in Parliament and contains information about proceedings from the previous year and priorities for upcoming years.
- News releases, which outline the assessment and resolution of certain cases or report on other news from the Bureau.
- Discussion papers and reports, which examine a particular aspect of the law or general developments in competition policy and industrial organization, both in Canada and internationally.
- A pamphlet series, which provides general information about the Bureau and various provisions of the legislation it administers and enforces.

Communication

Education efforts are supported by several other communication initiatives. All publications are made available on the Bureau's Web site (<http://competition.ic.gc.ca>). In addition, it is possible to subscribe to receive news updates from the Bureau via electronic mail.

Other communication activities include frequent speaking engagements with businesspeople, consumers, the legal community and academics. Speeches delivered by the Bureau's senior officials are made available on the Web site. Seminars on a variety of topics are provided for businesspeople and consumers, and the Bureau participates in several trade shows. The Bureau has also produced videos to raise awareness of specific issues and offences. In addition to the Bureau's regular contact with the media, these communication initiatives help the Bureau to maintain close contact with the public and the business community.

Advocacy

The Bureau takes an active role in promoting a pro-competitive marketplace and developing competition policy and legislation. Bureau research contributes to the knowledge and understanding of industrial organization and competition law. The *Competition Act* provides the Bureau with a statutory right to intervene before federal regulatory boards and tribunals such as the Canadian Radio-television and Telecommunications Commission and the Canadian International Trade Tribunal. The Bureau also makes representations to provincial boards, upon invitation or with the consent of the board in question. Through interventions, appearances and submissions, the Bureau makes full use of its advocacy mandate to promote competition.

The Bureau enters into partnerships and cooperative agreements with other government departments and agencies to facilitate the sharing of information, divide responsibilities, identify potential efficiencies and ease the way for collaboration on enforcement matters. The Bureau also liaises with major Canadian retailers, importers and manufacturers.

Internationally, efforts to promote competition policy in the global economy and increased enforcement cooperation have become essential. As trade barriers are reduced or eliminated and as markets extend beyond our borders, effective competition policy plays an increasingly important role. Moreover, as public, government-created trade barriers fall, there is a risk that they will be replaced by private, anti-competitive barriers. For years, Canada and the United States have cooperated to eliminate and discourage transborder agreements and other activities that restrict competition. The Bureau also cooperates with the European Union and other jurisdictions toward this end. Finally, the Bureau is active in supporting Canada's activities regarding competition policy at the Organisation for Economic Co-operation and Development, the World Trade Organization and other international fora.

FACILITATING CONFORMITY

The Bureau's efforts to facilitate conformity include both general application (proactively monitoring the marketplace to detect and prevent anti-competitive conduct) and specific application (working directly with individual stakeholders to provide instruments of voluntary compliance). These instruments are used to ensure conformity before the need to remedy anti-competitive activity through enforcement action.

Monitoring

The Bureau closely monitors the practices of parties following the resolution of a matter through formal instruments or alternative case resolutions. It also proactively monitors conduct in the marketplace to detect possible contraventions and to identify the needs of consumers and members of the business community.

Information Centre

Complaints and information requests, received from businesspersons, consumers, government departments, and other sources, are processed through the Bureau's Information Centre. When a complaint is received, the information is examined to determine if further investigation is

required or if a formal inquiry should be commenced. The Bureau may contact customers or competitors to obtain more information; however, all investigations are confidential. The Centre also responds to requests for publications and videos.

Prenotification

The notifiable transactions provisions of the *Competition Act* require that the parties to certain proposed merger transactions notify the Commissioner and provide specified information before the transaction is completed, in instances where two monetary thresholds are exceeded. The thresholds relate to the size of the proposed transaction and to the combined size of the parties to the transaction and their affiliates. The prenotification process is intended to allow the Bureau the opportunity to assess the competitive impact of merger transactions and take appropriate action if the transactions are likely to substantially prevent or lessen competition.

Targeted Inspections

The use of product inspections in known or suspected problem areas most often results in the application of the standards-based laws being clarified. Under these statutes, an inspector may, at any reasonable time, enter any premises of a dealer, except for a private residence, and examine a product or records if the inspector has reasonable grounds to believe that it is necessary to do so for any purpose relating to the enforcement of the legislation. Targeted inspections can provide an understanding of compliance issues within a particular firm or industry and afford an opportunity to review the means of achieving compliance.

Marketplace Contacts

The Bureau maintains regular contact with industry representatives, consumers and the legal community to collect and analyse market information. This market intelligence contributes to a better understanding of stakeholders and helps the Bureau maintain or set priorities. Liaison with marketplace contacts such as major Canadian retailers, importers and manufacturers helps to ensure compliance with the standards-based acts. Designated Bureau officers provide a single point of contact for major retailers to resolve compliance issues. These officers are also called upon to deliver in-house seminars to managers, buyers and quality control personnel.

Consultations

The Bureau uses a consultation process for legislative amendments and enforcement practices that are under review. Typically, guidelines and information bulletins are released only after extensive consultations. The Bureau consults regularly to ensure that its policies reflect the input of stakeholders.

SPECIFIC APPLICATION

Those instruments classified as general application are typically used in the same manner with all legislation for which the Bureau is responsible. In the case of specific application, however, there can be a significant difference in approach, depending on the statute in question. For some matters falling under the standards-based acts, the use of various enforcement instruments is

often, but not always, made in a progressive fashion. For example, an inspection visit, if unsuccessful in achieving conformity, may be followed up with a warning letter which, if ignored, may lead to prosecution. However, in the case of matters under the *Competition Act*, while a progressive approach may be used, usually one or more enforcement instruments appropriate to the circumstances will be chosen and used. This is especially true in matters involving serious criminal offences, where the only appropriate mechanism for resolution is a court proceeding on either a contested or a consent basis.

Voluntary Compliance

Advisory Opinions

Advisory opinions are provided to those who express a desire to avoid coming into conflict with the legislation. Company officials, lawyers and others may request an opinion on whether or not a proposed business plan or practice would comply with the legislation. Opinions take into account jurisprudence, previous opinions and the stated policies of the Bureau. An opinion does not regulate business conduct or pronounce on the legality of the proposal; it merely indicates whether or not the proposal would raise concerns under the legislation.

Advisory opinions are prepared based on the information provided by the requester, without the benefit of market contacts. The Bureau has adopted a Fees and Service Standards Policy, which provides for specific fees and commits to service standards for the preparation of advisory opinions.

Pre-market Assessment

At the request of manufacturers or importers, the Bureau will review the content of labels prior to the launch of a new product. In certain instances, the Bureau will also make pre-emptive contacts. For example, foreign retailers have been approached prior to their expansion to Canada and advised of regulatory requirements with respect to labelling and advertising.

Advance Ruling Certificates

Parties to a proposed merger have the option of applying for an advance ruling certificate instead of filing a notice to the Commissioner. Advance ruling certificates allow the parties to a merger to seek assurance that the contemplated transaction will not be challenged. A certificate is binding on the Commissioner if the transaction is substantially completed within one year and if there is no substantial change in the information on the basis of which the certificate was issued. If the Commissioner decides not to issue a certificate, it is standard practice to issue a non-binding letter stating the Bureau's views on the proposed merger. The issuance of an advance ruling certificate, appropriate in cases where the transaction is unlikely to raise anti-competitive concerns, exempts the parties from filing prenotification materials. The Commissioner may waive the requirement to notify and supply information if the information had been previously supplied for an advance ruling certificate request that was subsequently denied.

Corporate Compliance Programs

The bulletin entitled *Corporate Compliance Programs* provides guidance on measures that businesses can take to prevent or minimize the risk of violating the legislation. The bulletin describes elements that the Bureau considers essential for any compliance program to effectively prevent or detect anti-competitive conduct. An effective corporate compliance program can assist in identifying the boundaries of permissible conduct and help company officials identify situations in which it may be advisable to seek legal advice. Knowing the limits frees a company to pursue innovative and profitable business practices.

Voluntary Codes

The Bureau supports the use of voluntary codes to encourage conformity with laws and regulations. Voluntary codes are arrangements to influence, shape, control or set benchmarks for behaviour in the marketplace. Through a voluntary code, one or more individuals or firms agree to a set of non-legislatively required commitments that are to be applied in a consistent manner or expected to reach a consistent outcome. The Bureau has been a leader in developing voluntary compliance programs for industry, in areas such as textile care labelling and environmental labelling and advertising. These programs were developed with the full participation of consumers, government, non-governmental organizations and industry. They provide businesses with a framework in which to operate without the need for detailed regulation.

RESPONSES TO NON-CONFORMITY

Responses to non-conformity are grouped into three categories: suasion, consent, and adversarial instruments. Adversarial instruments are the logical choice in cases of serious or deliberate criminal conduct, or when resolution of civil or criminal matters on a consent basis is inappropriate. However, the Bureau's effort to increase compliance without the need for contested proceedings is supported by the availability of alternative case resolution in the form of both suasion and consent.

Suasion

If appropriate resolution can be achieved by providing guidance on a certain aspect of the law, the Bureau may elect to achieve conformity through suasion. The various forms of suasion address the immediate issue and have long-term benefits. If industry participants are made aware of their responsibilities under the legislation, there may be less future need to respond to situations of non-conformity.

An information contact may be made during a stage of an investigation at which the Bureau is of the opinion that a person may be unaware that particular conduct raises issues under the legislation. In such cases, compliance may be facilitated by contacting the person to explain the legislation. Persons contacted are not under any obligation to discuss the matter or justify their conduct, but may choose to take advantage of this opportunity to do so. Following an information contact, depending on whether or not a party takes voluntary corrective action, the Bureau will decide to continue the examination, monitor the conduct in question, or close the file.

Information letters, which note specific requirements of the legislation but contain no warning statements, are another form of suasion. Letters may confirm information relating to a violation under one of the standards-based acts that was found during an inspection visit, or may contain a request asking for a reply confirming that a business intends to take specified corrective measures within a reasonable time. A letter may also be used to draw attention to a new policy direction or interpretation by the Bureau.

Warning letters are formal written notices to a business that identify a specific alleged violation. The business is explicitly advised that more stringent action may be considered if the violation is not corrected or if it is repeated. Letters provide a clear record of, and reference to, the responsibilities of the recipient and communicate future intentions if the party does not comply. Letters could be used to rebut a defence of due diligence.

Compliance meetings are arranged when there are continued infractions under one of the standards-based acts, but there is still the possibility of encouraging the party to comply without resorting to prosecution. The senior officials of a company are requested by letter to attend a meeting to discuss the history of inspections, record of compliance and measures that the party intends to take to correct the situation. At the meeting, the company officials are informed that, without changes, prosecution is the next step in the enforcement process.

Adversarial and Consent Instruments

Adversarial and consent instruments can be described as opposite sides of the coin in terms of formal enforcement actions. Adversarial instruments include those that involve the Bureau or the Attorney General in contested court or Tribunal proceedings, as well as product seizures under the standards-based acts. These measures are used when the resolution of cases on a consent basis cannot be reached or is considered inappropriate.

In criminal cases, both adversarial and consent proceedings are conducted by the Attorney General after referral of the matter by the Commissioner. The Bureau works closely with the Attorney General to prosecute individuals and companies for violations of the core criminal provisions of the legislation, and to punish individuals for serious and deliberate misconduct. One of the objectives is to obtain penalties adequate to promote the policy goal of general and specific deterrence.

Negotiations can often lead to reasonable settlements that are less costly and time-consuming than contested proceedings. For criminal matters, upon the Bureau's recommendation, the Attorney General will consider offering leniency to a cooperating party at any stage of the investigative process. Leniency may involve full immunity, partial immunity or a negotiated plea and settlement. Requests for immunity are subject to close scrutiny. They will be considered if the Bureau is unaware of the offence or if the party is the first to provide sufficient evidence to warrant a referral of the matter to the Attorney General. A grant of immunity must be consistent with the fair and impartial administration of the law, and is subject to a set of requirements that must be met by the party. If the party does not meet all the requirements for immunity, some form of favourable treatment may be available to those parties wishing to cooperate with the Bureau throughout the investigation and any ensuing prosecutions of other involved parties.

For criminal offences under the *Competition Act*, the Bureau can make a recommendation to the Attorney General to apply directly to the courts for a prohibition order. A prohibition order can be part of a penalty imposed by the court in contested or consent proceedings where parties have been found guilty, or it can be made by the court without a finding of guilt in circumstances where the parties have committed acts or done things directed toward the commission of an offence. A prohibition order normally includes terms prohibiting the continuation or repetition of an offence. In the case of a conviction, it includes prescriptive terms requiring positive steps or acts that are considered necessary to prevent the commission, continuation or repetition of the offence. Examples of additional terms that may be imposed by a court include the establishment of a corporate compliance program or the implementation of seminars on competition law and policy for officers and employees of the company. In addition to remedying the anti-competitive activity, these enforceable orders encourage future conformity with the legislation, provide an educational tool to others with respect to competition offences, and help restore competition in the marketplace.

For civil matters under the *Competition Act*, the process parallel to court proceedings is application to the Competition Tribunal for remedial orders. Applications can be made on either a contested or a consent basis. As with criminal proceedings, the Commissioner will pursue contested proceedings in cases where the resolution of the issues on a consent basis is considered inappropriate.

Urgent situations under the *Competition Act* that involve serious harm may be remedied by an application to the courts or the Tribunal for an interim injunction. Injunctions may be used to immediately halt activities that constitute or are directed toward the commission of an offence, pending the commencement or completion of the legal proceedings. Injunctions can be issued against third parties, including telephone companies that provide services to businesses or persons who have been previously convicted of deceptive telemarketing. The Bureau may also apply to the Tribunal for injunctions to remedy anti-competitive practices. This instrument provides an expedient and cost-effective means of preventing the commission or continuation of activities that would injure competition or harm consumers.

If a Bureau officer has reasonable grounds to believe that there has been a failure to comply with any provision of one of the three standards-based acts or their regulations, the product, labelling, packaging or advertising material in question may be seized and detained until correction. Product seizures may be undertaken to ensure control of a product or advertising material when alternative actions are unlikely to maintain control and when it is in the public interest to prevent the sale of the product.

In circumstances in which the actions at issue represent less serious contraventions of the law than cases in which court or Tribunal proceedings are considered appropriate, matters may be resolved on a consensual basis. When negotiated corrective measures will resolve the matter, the Bureau may accept an undertaking from the party as an alternative to pursuing the investigation. Undertakings are designed to remedy or overcome the potential effects of anti-competitive behaviour and restore competition in the market. Undertakings would typically be accepted in matters involving infrequent and inadvertent offences by cooperative parties willing to offset the damage to the marketplace. A speedy remedy may be required to correct a market-sensitive situation. The breach of an undertaking may result in the reopening of the investigation and, ultimately, more stringent enforcement responses. Parties may provide written undertakings, for

example, to cease or amend an activity; implement an in-house corporate compliance program; voluntarily recall a product or amend the labelling, packaging or advertising material in question; pay restitution to damaged parties; or publish corrective notices.

The publication of corrective notices as well as the payment of a monetary penalty may also form part of a court or Tribunal order in cases of misleading advertising.

CONSIDERATIONS

The Bureau determines the most appropriate response to instances of non-conformity based on factors that are relevant to the circumstances at hand. The objective is to select the most effective and efficient instrument to address the specific situation and achieve lasting conformity. The importance of each of these considerations varies according to the provision of the legislation under which the matter falls. Only the factors relevant to a particular situation are considered, and no one factor determines the resolution.

A general discussion of some of the factors considered by the Bureau follows. It is important to note that, notwithstanding some similar language, the following is not a discussion of case selection criteria used by the Bureau or its branches. The considerations are relevant to the use of both specific and general application instruments.

Economic impact involves a consideration of various factors, which may include the volume of commerce affected, geographic scope and the duration of the conduct. Typically, stronger enforcement action will be used in cases with significant losses to the economy.

Consideration will also be given to whether or not the practice is widespread. For example, if there is a practice by a whole industry group or a significant portion of an industry that contravenes the legislation and there is a need to signal members of the industry against the use of this practice, depending on the circumstances, it may be appropriate to use contested proceedings, perhaps in conjunction with industry-wide education programs or voluntary codes.

In some circumstances, there will be a consideration of whether or not a firm has the incentive or ability to maintain or enhance its market power. Market power is defined by the ability to cause prices or other important facets of competition to deviate from competitive levels. Market power will be evaluated in terms of market shares, the likelihood of entry or expansion by other enterprises, the existence of product substitutes, and the presence of interdependent behaviour.

The conduct of the party and the case history are relevant in determining the appropriate instrument. In cases involving serious conduct that is deserving of sanction from either the courts or the Tribunal, adversarial instruments may be more appropriate. Such conduct may include deliberate attempts to harm competition, clear disregard of the legislation and covert acts for the purpose of concealing evidence. If the party assists with the investigation or inquiry, or terminates and attempts to remedy the effects of the conduct, consideration will be given to recommending a mitigation of sentence, using consent orders, or proposing an alternative case resolution, whichever is appropriate. With less serious offences, a non-deliberate first offence where the activity has ceased, or where it is believed that certain behaviour is at risk of contravening the legislation, suasion instruments may be the most appropriate choice.

Adversarial instruments may be appropriate for a repeat offender or one who has acted in contravention of an order, previous undertaking or other consent instrument. If the conduct is not of a serious nature and does not involve significant economic harm, and if there is no prior history of contravention, an alternative case resolution may be the most appropriate choice. However, suasion instruments will not be appropriate if the Bureau has previously provided an advisory opinion, a warning or an information contact concerning the conduct in question. A long history of ongoing non-compliance or heightened public sensitivity to a particular matter may also influence the choice of instrument.

The selection of instrument will be determined, in part, by whether or not the requisite level of general and specific deterrence will be achieved. Deterrence is achieved both by the prosecution of offenders and by the publication of the results of these proceedings.

The above considerations should serve as a guide as to how the Bureau determines the most appropriate instrument to respond to an instance of non-conformity. However, the Commissioner and the Attorney General retain the right to exercise their discretion with respect to all enforcement decisions and the resolution of all matters. The final decision is based on the particular facts, timing and context of each case.

CONCLUSION

The organization of the wide range of instruments available to the Competition Bureau into an integrated, coherent, comprehensive and effective approach known as the Conformity Continuum, supported by the targeted application of the Bureau's resources, will maximize conformity with the law and guarantee a competitive marketplace with obvious and continuing benefits to consumers, the business community and the economy as a whole.

Appendix A: Selected Competition Bureau Publications

Corporate Compliance Programs (1997)

Guide to the Advertising of Consumer Textile Articles (1996)

Guide to the Consumer Packaging and Labelling Act and Regulations (1996)

Guide to the Precious Metals Marking Act and Regulations (1996)

Immunity Program Under the Competition Act (2000)

Merger Enforcement Guidelines (1997)

The Merger Enforcement Guidelines as Applied to a Bank Merger (1998)

Misleading Advertising Guidelines (1991)

Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil

Track under the Competition Act (1999)

Predatory Pricing Enforcement Guidelines (1992)

Price Discrimination Enforcement Guidelines (1992)

Pamphlet Series

Abuse of Market Power

Bid-rigging

The Competition Bureau

Misleading Representations and Deceptive Marketing Practices

Multi-level Marketing and Pyramid Selling

Precious Metals

Reaching an Agreement with Competitors

Refusal to Supply

Restricting the Supply and Use of Products

Setting Your Own Price

What You Should Know About Telemarketing

Appendix B: How to Contact the Competition Bureau

Many of the Competition Bureau's publications are available on the Internet at the Bureau's Web site address listed below. To obtain general information, make a complaint under the provisions of the legislation, or request an advisory opinion, contact the Commissioner or a member of the Bureau at the address and telephone numbers below.

Information Centre
Competition Bureau
Industry Canada
50 Victoria Street
Hull QC K1A 0C9

Tel.: (819) 997-4282
Toll-free: 1-800-348-5358
TDD (for hearing impaired): 1-800-642-3844

Fax: (819) 997-0324
Fax-on-demand: (819) 997-2869

Web site: **<http://competition.ic.gc.ca>**
E-mail: **compbureau@ic.gc.ca**