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*Competition Bureau
Information Bulletin*

IMMUNITY PROGRAM UNDER THE COMPETITION ACT

Canada



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Cat. No. RG52-35/2000
ISBN 0-662-65225-8
53212B



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PREFACE

This Bulletin explains the policy and procedures involved in obtaining a grant of immunity from prosecution for criminal offences under the *Competition Act*.

In the past few years, the Bureau has experienced an increase in the number of requests for immunity. As a result of this increase, the Bureau thought it necessary to draft and publish this document in order to provide more clarity and certainty regarding the conditions and requirements to obtain immunity.

The Bulletin clearly outlines the process through which parties must agree to cooperate, in order to obtain immunity. It also explains the distinct roles of the Commissioner and the Attorney General, and the conditions under which the Commissioner would consider recommending immunity to the Attorney General. The Bulletin reflects current practices jointly employed by both the Bureau and the Attorney General.



Konrad von Finckenstein
Commissioner of Competition

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A. INTRODUCTION

1. The *Competition Act* (the Act) is a law of general application that establishes basic principles for the conduct of business in Canada. The Act maintains and encourages competition:
 - to promote the efficiency and adaptability of the Canadian economy;
 - to expand opportunities for Canadian participation in world markets while recognizing the role of foreign competition in Canada;
 - to ensure small and medium-sized enterprises have equal opportunity to participate in the Canadian economy; and
 - to provide consumers with competitive prices and product choices.
2. The Act gives the Commissioner of Competition (the Commissioner) independent authority to administer and enforce the *Competition Act*. The Commissioner is the head of the Competition Bureau (the Bureau), the organization that carries out investigations under the Act.
3. The *Competition Act* contains criminal provisions² that prohibit anti-competitive business activities such as conspiracies that prevent or lessen competition unduly (e.g., price fixing or market allocation), bid rigging, price maintenance and deceptive marketing practices. There are also civil provisions relating to mergers, abuse of dominant position and misleading advertising. The criminal provisions carry serious penalties. For example, the conspiracy provision carries a maximum fine of \$10 million and five years in prison per count.
4. When there has been a violation of the Act, the Bureau's objective is to halt the anti-competitive acts and punish the firms and individuals responsible. By attaching penalties to such behaviour, the Bureau hopes to deter similar crimes. The Bureau also encourages firms to set up corporate compliance programs to ensure they adopt policies and practices that conform with the law. The *Corporate Compliance Programs Bulletin* provides advice to company management to promote appropriate corporate conduct.
5. The Bureau, as with other law enforcement agencies, recognizes the importance of programs that contribute to the detection, investigation and prosecution of serious crimes. This information bulletin details the Bureau's approach to recommending immunity for violations of the *Competition Act*, and expands upon and supercedes earlier public statements by senior Bureau officials.
6. This bulletin describes the roles and responsibilities of the Commissioner and the Attorney General of Canada (the Attorney General), outlines the requirements for granting immunity requests, discusses the issues of timing and corporate versus individual immunity, and sets out the steps in the immunity process. Particular mention is made of transnational criminal activity, as well as issues such as confidentiality and failure to comply with the requirements of an immunity agreement.

¹ *Competition Act*, R.S.C. 1985, c. C-34.

² See Appendix I for relevant provisions.

7. This bulletin does not give legal advice. Readers should refer to the Act when questions of law arise and obtain private legal advice if a particular situation causes concern.
8. For the purposes of this bulletin, the term *party* means a business enterprise or individual, as the case may be. The terms *firm*, *company* and *corporation* are used interchangeably to denote a business enterprise.
9. Anyone implicated in activity that might have violated the *Competition Act* may offer to co-operate with the Bureau and request immunity. A firm may, but does not have to, initiate an application on behalf of its employees. Employees may approach the Bureau on their own behalf. Each offer of co-operation will be evaluated for the benefit of the requesting party.
10. In this bulletin, the term *immunity* refers to a grant of full immunity from prosecution under the *Competition Act*. When a party does not qualify for immunity, the Commissioner may recommend that the Attorney General grant another form of leniency. When a party believes it does not meet the requirements for immunity, it may still offer to co-operate with the Bureau and request another form of leniency.

B. ROLES OF THE COMMISSIONER AND THE ATTORNEY GENERAL

11. Criminal prosecutions under the *Competition Act* are the responsibility of the Attorney General, and the Commissioner may refer a matter to the Attorney General for consideration when there is evidence of an offence, for whatever action the Attorney General may wish to take. The Attorney General has the sole authority to grant immunity to a party implicated in an offence under the *Competition Act*. The Bureau investigates the matter and makes a recommendation to the Attorney General. The Attorney General then independently considers if the interests of the public are best served by granting immunity. The Attorney General's policy on immunity is articulated in a document published by the Department of Justice.³

³ Refer to the *Federal Prosecution Service Deskbook*, Department of Justice, particularly Part 7, Chapter 1, Immunity Agreements.

C. OBTAINING IMMUNITY

12. The Bureau encourages parties to come forward as soon as they believe they are implicated in an offence. It is not necessary for the party to have assembled a complete record of the information required at the first contact with the Bureau. Requests for immunity are subject to close scrutiny by the Attorney General and the Commissioner.
13. Subject to the following requirements, and consistent with fair and impartial administration of the law, the Commissioner will recommend to the Attorney General that immunity be granted to a party in the following situations:
 - a) the Bureau is unaware of an offence, and the party is the first to disclose it; or
 - b) the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the Attorney General.

Requirements

14. The party must take effective steps to terminate its participation in the illegal activity.
15. The party must not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada.
16. Throughout the course of the Bureau's investigation and subsequent prosecutions, the party must provide complete and timely co-operation:
 - a) the party must reveal any and all offences in which it may have been involved;
 - b) the party must provide full, frank and truthful disclosure of all the evidence and information⁴ known or available to it or under its control, wherever located, relating to the offences under investigation. There must be no misrepresentation of any material facts; and
 - c) the party must co-operate fully, on a continuing basis, expeditiously and, when the party is a business enterprise, at its own expense throughout the investigation and with any ensuing prosecutions. Companies must take all lawful measures to promote the continuing co-operation of their directors, officers and employees for the duration of the investigation and any ensuing prosecutions.
17. Where possible, the party will make restitution for the illegal activity.
18. If the first party fails to meet the requirements, a subsequent party that does meet the requirements may be recommended for immunity.

⁴ Subsequent references to evidence and information relate to this requirement to provide complete and continuing co-operation to the Bureau.

D. IMPACT OF CORPORATE IMMUNITY ON DIRECTORS, OFFICERS AND EMPLOYEES

19. If a company qualifies for immunity, all present directors, officers and employees who admit their involvement in the illegal anti-competitive activity as part of the corporate admission, and who provide complete and timely co-operation, will qualify for the same recommendation for immunity. Past directors, officers and employees who offer to co-operate with the Bureau's investigation may also qualify for immunity. However, this determination will be made on a case-by-case basis.
20. If a corporation does not qualify for a recommendation for immunity, the past or present directors, officers and employees who come forward with the corporation to co-operate may nonetheless be considered for immunity as if they had approached the Bureau individually.

E. THE IMMUNITY PROCESS

Step 1: Initial Contact

21. Anyone may initiate a request for immunity by communicating with the Deputy Commissioner of Competition, Criminal Matters, or the Deputy Commissioner of Competition, Fair Business Practices, to discuss the possibility of receiving immunity from prosecution in connection with an offence under the Act. Certain inculpatory information will need to be disclosed at this stage in order for the Bureau to determine whether the party might qualify under Part C, above. Usually the request is made in terms of a hypothetical disclosure.

Step 2: Provisional Guarantee of Immunity

22. If the party decides to proceed with the immunity application, there will need to be a description of the illegal activity, usually still in hypothetical terms. The Bureau will then present all the relevant information to the Attorney General, who has independent discretion in these matters, in order to obtain a written provisional guarantee of immunity.⁵

Step 3: Full Disclosure

23. After the party receives a written provisional guarantee of immunity from the Attorney General, the Bureau will need to know with sufficient detail and certainty what evidence or testimony a potential witness will be able to provide and how probative it is likely to be. Full disclosure is, therefore, essential. The full disclosure process will be conducted with the understanding that the Bureau will not use the information against the party, unless there is a failure to comply, as described in Part F, below.

Step 4: Immunity Agreement

24. Upon recommendation by the Bureau, and if, after an independent review, the Attorney General accepts the recommendation, the Attorney General will execute an immunity agreement that will include all continuing obligations as described in paragraph 16, above.

⁵ Having regard to the immunity agreement policy set out in the *Federal Prosecution Service Deskbook*, Department of Justice, Part 7, Chapter 1.

F. FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE AGREEMENT

25. Failure to comply with any of the requirements of the immunity agreement may result in the Attorney General revoking immunity.
26. The Bureau will resume investigating the party who has agreed to co-operate but who does not fulfill its obligations under the agreement and consider referring the matter to the Attorney General. The Bureau will recommend that the Attorney General revoke any grant of immunity and take appropriate action against the party concerned.
27. Paragraph 26 extends to a company that does not fully promote the complete and timely co-operation of its employees, and to a party that fails to disclose any and all offences or that does not provide full, frank and truthful disclosure of all evidence and information known or available to it or under its control.

G. TRANSNATIONAL CRIMINAL ANTI-COMPETITIVE ACTIVITY

28. As a matter of law and practicality, international anti-competitive activity, including price-fixing cartels and deceptive marketing practices, may fall under the jurisdiction of more than one competition authority. Parties should expect, then, that all jurisdictions affected will look into the matter. This may be the case when, for example, agreements to fix prices or allocate markets apply across national borders or when deceptive telemarketers take advantage of differing legal treatments to locate in one country and do business in another. In these circumstances, the authorities may decide to pursue independent, joint or parallel investigations.
29. Because the timing of an approach to the Bureau usually dictates the resolution options available, a party and its counsel should appreciate that when the matter involves other countries, a foreign investigation can potentially lead to the Bureau's becoming aware of the matter prior to an approach by an involved party.
30. In situations involving multiple jurisdictions, a party may wish to approach each competition law authority individually. In particular, a party whose business activities have a substantial connection to Canada should consider contacting the Bureau either prior to, or immediately after, approaching foreign competition law authorities.
31. The Bureau will not afford any special consideration to a party solely because it has been granted immunity or another form of favourable treatment in another jurisdiction.
32. When approached by a party seeking immunity, the Bureau will inform the party of the existence of similar immunity programs in other jurisdictions.

H. CONFIDENTIALITY

33. The Bureau treats as confidential the identity of a party requesting immunity and any information obtained from that party. The only exceptions to this policy would be the following:
- a) when there has been public disclosure by the party;
 - b) when the party has agreed and when disclosure is for the purpose of the administration and enforcement of the Act;
 - c) when disclosure is required by law; and
 - d) when disclosure is necessary to prevent the commission of a serious criminal offence.
34. It is the Bureau's policy with respect to private actions under section 36 of the Act to provide confidential documents and evidence only in response to a court order. In connection with information obtained under the Immunity Program, the Bureau will take all reasonable steps to protect the information.

I. CONCLUSION

35. The Bureau encourages the public to take advantage of its policies and programs, which facilitate conformity with the provisions of the *Competition Act*.
36. Anyone wishing to apply under the Commissioner's Immunity Program may contact:
- Deputy Commissioner, Criminal Matters
(819) 997-1208,
- Johanne D'Auray
Deputy Commissioner, Fair Business Practices
(819) 997-1231.
37. For further information, visit the Bureau Web site (<http://competition.ic.gc.ca>) or contact the Bureau toll free at 1 800 348-5358.

APPENDIX 1: A BRIEF OUTLINE OF THE CRIMINAL PROVISIONS OF THE *COMPETITION ACT*
 (Responsibility of the Deputy Commissioner of Competition, Criminal Matters)

Part VI of the *Competition Act* prohibits under criminal sanction specified trade practices, bid rigging, agreements or arrangements that lessen competition unduly, misleading advertising and deceptive marketing practices. For operational and statistical purposes, those offences found in sections 45 to 51 and section 61 (described below), which may be loosely characterized as offences in relation to competition, are treated separately from the criminal misleading advertising and deceptive marketing practices provisions found in sections 52.1, 54, 55, 55.1 (and described on the next page).

SECTION 45	Conspiracies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product.
SECTION 46	Conspiracies, combinations, agreements or arrangements that are implemented in Canada as a result of directives, instructions, intimations of policy or other communication from a person outside of Canada, in a position to direct or influence the policies of the corporation, for the purpose of giving effect to a conspiracy, and that, if entered into in Canada, would have been in contravention of section 45.
SECTION 47	Bid rigging, when two or more persons agree that one party will refrain from bidding in a call for tenders, or when there is collusion in the submission of bids, unless such actions are made known to the tendering authority.
SECTION 48	Conspiracies, combinations, agreements or arrangements that limit unreasonably the opportunities, terms or participation of a player or competitor in professional sports, or to limit unreasonably the opportunity to negotiate with or play for a professional team or club.
SECTION 49	Subject to a number of exceptions explained in section 49 (2), any agreement between two or more federal financial institutions with respect to interest rates or charges on deposits or loans, service charges to customers, kinds of services provided, or the person or classes of persons to whom a loan or other service will be provided or withheld.
PARAGRAPH 50 (1)(a)	Knowingly engaging in a practice of discriminating against competitors of a purchaser of an article by granting a discount or other advantage to a purchaser that is not available to competitors purchasing articles of like quality and quantity.
PARAGRAPH 50 (1)(b)	Engaging in a policy of selling products in any area of Canada at prices lower than those exacted elsewhere in Canada, when the effect or design is to lessen competition substantially or eliminate a competitor.
PARAGRAPH 50 (1)(c)	Engaging in a policy of selling products at unreasonably low prices when the effect or design is to lessen competition substantially or eliminate a competitor.
SECTION 51	Granting to a purchaser an allowance for advertising or display purposes that is not offered on proportionate terms to competing purchasers.
SECTION 61	Attempting to influence upward or to discourage the reduction of the price at which another person supplies or advertises a product, or refusing to supply or otherwise discriminating against anyone because of that person's low pricing policy.
SECTION 61 (6)	Attempting to induce a supplier to refuse to supply a product to a particular person because of that person's low pricing policy.

APPENDIX 2: CRIMINAL MISLEADING ADVERTISING AND DECEPTIVE MARKETING PRACTICES PROVISION
 (Responsibility of the Deputy Commissioner of Competition, Fair Business Practices)

<p>PARAGRAPH 52 (1)(a)</p>	<p>Knowingly or recklessly making representations that are false or misleading in a material respect for the purpose of promoting a product or any business interest.</p>
<p>SECTION 52.1</p>	<p>While engaging in telemarketing (the practice of using interactive telephone communications for the purpose of promoting the supply of a product or any business interest):</p> <ul style="list-style-type: none"> • failing to disclose the identity of the person on whose behalf the communication is being made, the purpose of the communication and the nature of the product or business being promoted; • making a representation that is false or misleading in a material respect; • requiring any advance payment as a condition for receiving a prize that has been, or supposedly has been, won in a contest or game; • failing to provide adequate and fair disclosure of the value of the prizes and of any fact that materially affects the chances of winning; • offering a gift (or any product at less than fair market value) as an inducement to buy another product, without fairly disclosing the value of the gift; or • requiring payment in advance for any product offered at a price grossly in excess of its fair market value.
<p>SECTION 54</p>	<p>Supplying a product at a price that exceeds the lowest of two or more prices that are clearly shown on the product, its container, wrapper or display mount or on any in-store advertisement. This provision does not actually prohibit the existence of two or more prices, but requires that the product be offered for sale at the lowest price depicted.</p>
<p>SECTION 55</p>	<p>Making representations relating to compensation under a multilevel marketing plan without fair, reasonable and timely disclosure of compensation actually received (or likely to be received) by typical participants in the plan.</p>
<p>SECTION 55.1</p>	<p>Establishing, operating, advertising or promoting a pyramid-selling scheme, which is defined as a multilevel marketing plan under which:</p> <ul style="list-style-type: none"> • a participant pays for the right to receive compensation for recruiting another participant; • a participant is required to purchase a specified amount of product (other than an amount bought at the seller's cost price for the purpose of facilitating sales); • a participant is supplied with an unreasonable amount of product; or • there is no right to return the product in saleable condition on reasonable terms, or the participant is not informed of the right to return product.