Working Party No. 3 on International Co-operation

COMPLIANCE PROGRAMS: ISSUES FOR A ROUNDTABLE DISCUSSION

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This note is submitted by the Delegation of Canada to the Working Party No. 3 FOR DISCUSSION on 23 October 2000.
THE CANADIAN COMPETITION BUREAU’S APPROACH TO COMPLIANCE

1. This Roundtable will address issues surrounding the compliance activities of members with respect to the administration and enforcement of their respective competition laws. From the perspective of Canada, a great deal of what would normally be said is contained in the Information Bulletin on the Conformity Continuum¹, which the Competition Bureau issued earlier this year and was appended to the Note by the Secretariat. This paper will expand somewhat on the bulletin and place it in the context of the Bureau’s strategy to achieve maximum compliance with the law.

2. To be effective in carrying out its mandate, the Competition Bureau believes strongly that it:
   – must provide clear information and guidance that allows its actions to be predictable to marketplace participants,
   – must develop, publicise and provide to its staff a full range of responses to address and prevent non compliance, and
   – must enlist the support of interested stakeholders to achieve its goals.

3. The first objective is met by publishing a wide variety of documents explaining the law, the enforcement policies of the Bureau, and its approach to specific types of anti-competitive behaviour, particular issues, or industries.

4. The second objective is met through the development and operation of the Conformity Continuum, which describes the wide array of responses available to the Competition Bureau to respond to or prevent anti-competitive behaviour. The Continuum bulletin is a document intended as much for Bureau staff as for an external audience. The instruments in the Continuum provide staff with options for use in their daily work that allows them to match the appropriate tool or combination of tools to a given situation. The bulletin provides the external audience with the understanding that the Bureau can address anti-competitive activity in many ways and has a variety of approaches designed to assist companies to prevent or avoid violating the law.

5. It is important to see that the elements of the Continuum, while available individually to address specific situations, reinforce each other. In practice, the whole is greater than the sum of the parts. Having said that, it is important not to see the Continuum as a stand-alone document; its effectiveness comes not only from the understanding of it in the legal and business communities and from its confident and effective application by Bureau staff. Equally important is its linkage to other related Bureau policies and practices.

6. Thus, the third objective is met through such actions as the Bureau’s active support for the development of corporate compliance programs by individual companies. To provide guidance to business and emphasise its commitment to, and support of, such activities, the Bureau released the Bulletin on Corporate Compliance Programs² in 1997. This document identifies the essential elements of an effective corporate compliance program. It also discusses the value to a company of implementing and maintaining such a program, and the pitfalls of not doing so. One clear benefit is that an effective program puts in

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¹ Available from the Competition Bureau web site - http://competition.ic.gc.ca

² Available from the Competition Bureau web site - http://competition.ic.gc.ca
place a protocol to follow when competition issues or instances of actual anti-competitive behaviour arise. A properly established program will guide company staff on issues such as when to approach the Competition Bureau to seek advice about an issue or, in cases of actual breaches of the law, discuss the possibility of immunity or favourable treatment. As the Continuum bulletin points out, the Bureau has and will continue to educate marketplace participants about the law. It stands ready to provide advice by assessing potential marketplace initiatives by a company or industry. The Information Bulletin on the Immunity Program Under the Competition Act underscores the importance of quickly contacting the Bureau after identifying anti-competitive behaviour. This is essential to obtaining positive consideration of a request for immunity or favourable treatment.

7. Thus, in considering the Canadian approach to compliance with the law, the Conformity Continuum should be seen as incorporating the instruments available to the Bureau to address or prevent anti-competitive behaviour within an integrated array of policies utilised by the Bureau to achieve its mandate.

8. How has the approach set out in the Continuum bulletin been developed by the Bureau? The constituent parts of the Continuum have developed gradually over the past several years in response to a number of factors, including legislative amendments, changing economic and business environments, expanded responsibilities and resource demands. What is new is that, for the first time, there is an articulated policy statement that brings together the old and the new in one coherent and cohesive plan with a clear philosophical underpinning.

9. The Continuum can be described as an integrated and balanced approach to the enforcement of the legislation: integrated, in the sense that it applies to all legislation for which the Bureau is responsible and represents a strategy which links all its activities together in support of the common goal of maximising conformity; balanced, with an appreciation of the interdependent and complementary roles of education, compliance and enforcement instruments.

10. The approach and range of instruments developed in the Continuum reflect an expanded philosophical view of the Bureau’s role that has developed in response to a constantly changing and complex environment. However, it must be emphasised strongly that, while there are increased efforts toward education and voluntary compliance, the Bureau has not departed from the belief that, in appropriate circumstances, there needs to be vigorous enforcement action. Such measures effectively deter anticompetitive behaviour and serve as an educational example to others.

11. Within the Continuum, the instruments have been grouped into two main categories. The first is “general application” instruments, which are directed universally to the marketplace on an ongoing basis. Within this category is included a group of instruments that achieve conformity through education in the form of publications, communication and advocacy. As well, compliance is facilitated through monitoring the marketplace.

12. The second category is “specific application” instruments. These are used to respond to individual cases or circumstances where compliance is facilitated through specific application with instruments of voluntary compliance. Other instruments of specific application respond to non-conformity in the form of suasion, consent and adversarial action.

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3 Available from the Competition Bureau web site - http://competition.ic.gc.ca
13. Responding to the desire of the marketplace participants who saw a need for, and benefit from, guidance about the reasoning behind Bureau decisions and the circumstances that dictate the adoption of certain courses of action, the bulletin also explains the considerations that influence the selection and use of each instrument.

14. What is the philosophy underlying the Continuum? The Continuum is premised, in part, upon the belief that the Competition Bureau has a responsibility to inform and to deter misconduct before it occurs. In its view, the majority of businesses prefer to comply with the law rather than become involved in lengthy and costly investigations and, possibly, legal proceedings. The Bureau recognises its role in assisting, as much as is reasonably possible, the business community with conforming with the law.

15. There is a real advantage to increased knowledge and awareness in the business-community. Canadian competition legislation is framework law, designed to establish a set of parameters for the marketplace and to define specific unlawful conduct. Contested proceedings, before the Competition Tribunal or the courts, can help define these parameters but such proceedings are costly and time-consuming. Why not, where possible, try to define these parameters early on? On the assumption that most business people prefer to comply with the law rather than to become involved in lengthy and costly proceedings, it is important that they understand the law and how it is applied. It is, therefore, incumbent on the Bureau to provide a level of predictability on its positions, balanced by a clear indication that the Bureau will use formal proceedings in the appropriate situations.

16. The operation of the Continuum can be described as follows. The Bureau is committed to ensuring 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. This educational activity is 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 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.

17. It is important to stress that the instruments in the general application category are used on an ongoing basis and instruments of specific application are selected for use in individual case circumstances as appropriate. There is no sense or requirement to deal with a matter in the first instance with one of the “soft” tools and, if unsuccessful, move along the Continuum using progressively stricter measures. With the Continuum, to be certain, there is greater emphasis than perhaps in the past on such tools as communication and voluntary means of compliance. However, these instruments are meant to focus the need for enforcement action, not replace them. For example, the business community must be aware that, in challenging certain types of serious anti-competitive behaviour, immediate use of adversarial measures is a real possibility. The use of enforcement instruments is not a last resort, but rather one to be used, as with all other instruments, at the appropriate time and in the appropriate circumstances.

18. How, then, is this a “continuum”? One can clearly see how the interdependent and complementary nature of the instruments creates a continuum-like approach. Education leads to an understanding of the law. With this understanding, businesses are assisted to voluntarily comply with the law. For those who disregard the law, the Bureau is ready and willing to use enforcement action. Deterrence that results from contested proceedings is also a form of education. Once a matter is concluded, whether through a negotiated settlement or prosecution, the results are made public on the Bureau web site. In this way, there is a clear link back to education and the identification of areas that may need to be addressed through information bulletins or enforcement guidelines.
19. In summary, the importance of having available a variety of instruments, as included in the Continuum, arises from the fundamental 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 will effectively achieve the objective of maximum conformity with the law. With the adoption of an integrated approach, the Bureau is able to choose, for any specific situation, the appropriate instrument, or combination of instruments, to address the issues raised.

This brings the discussion to the value of the Continuum in supporting and directing the work of Bureau staff:

- It provides staff with a “tool-box” of instruments allowing them to consider the use of the appropriate instrument or combination of instruments.

- It underscores the issue of the day-to-day responsibility of Bureau staff for legislation that has general application in all sectors of the economy.

20. Collective responsibility is an important concept. It is vital that all Bureau staff see their work reflected in the Continuum and see all aspects of the Continuum as their responsibility. It is a mistake to see individual instruments or groups of instruments as the sole preserve of a particular working unit. For example, communications is not the sole responsibility of the Communications Unit. Voluntary compliance, education and support for contested proceedings are responsibilities shared by all members of the Bureau.

21. Having described the operation of the Continuum and its importance to the work of the Bureau, it is also important to see the Continuum as an important tool to reach the external audience.

22. The Bureau stresses the importance of remaining in constant and close contact with stakeholders. Put another way, while the Continuum represents an array of activities designed to promote and facilitate compliance with Canada’s competition law and confront non-compliance, the limited resources available to the Bureau can be used more effectively if we can successfully engage marketplace participants in the active promotion of compliance with the law. This may enhance the opportunity for detection of anticompetitive behaviour and, more importantly, promote and encourage the idea that compliance with competition law benefits all parties in a market-oriented economy. To this end, the Bureau believes that devoting resources to the effective encouragement of voluntary compliance is beneficial, both for the business community and for the Bureau. As such, the Bureau offers to work with the legal and business communities to educate them as to the law and the Bureau’s enforcement policies.

23. More specifically, it promotes the value to a company of adopting internal compliance programs. The Information Bulletin on Corporate Compliance Programs mentioned above describes the five essential elements of an effective program and identifies the internal and external benefits of developing such a program. In encouraging the development and implementation of effective compliance programs by corporations, the Bureau is working toward the goal of promoting and facilitating compliance and addressing situations of non-compliance. This approach also works with other parts of the Continuum, including initiatives designed to achieve voluntary compliance and complements the tools designed to address specific examples of non-compliance. For example, an effective and vigorous pursuit of serious anti-competitive behaviour not only acts as a deterrent to others, it also complements a well-focused education and communications plan, by allowing companies to see the value of establishing and, more importantly, effectively implementing a compliance program. A focused communication and education program will provide companies with the necessary understanding of the law and the way it is administered and enforced. A key component of such a plan can be Bureau publications such as the pamphlets on key provisions and the bulletins on the Bureau’s enforcement policies. Greater adoption of
effective compliance programs should, logically, lower the incidence of anti-competitive activities contrary to the law.

24. How does the Bureau promote the value of a corporate compliance program? By pointing out the benefits of having one and the costs of not. The most frequently cited reason for adopting a corporate compliance program is the prevention and detection of illegal conduct and business can easily understand the significant consequences that flow from the investigation and prosecution of unlawful conduct.

25. The strong arguments that can be put forward, based on the evident consequences of a violation of the law, are reinforced by the Bureau in emphasising the equally compelling case that implementing an effective corporate compliance program should be seen as good for business. Uncertainty regarding the rules of the game may well inhibit corporate officials from engaging in perfectly legal conduct that, from a business standpoint, is advantageous to the company. A good corporate compliance program can assist in more clearly identifying the boundaries of permissible conduct, as well as signalling the zones of risk. This ensures that uncertainty or misconceptions regarding the law do not deter legitimate business actions.

26. Having said that, the Bureau encourages companies to consider the good business case for investing the time and resources to develop an effective compliance program. Looking first at estimating the cost of implementing such a program, it is fairly straightforward to aggregate the cost of legal advice on setting up the program, developing and disseminating the policies and procedures, and developing and giving the necessary training. To these can be added the on-going cost of work to keep the various aspects of the program current and relevant, as well as the cost of the staff, some at senior levels, to run the program.

27. The more challenging issue is to estimate the cost of not having the program. While perhaps not as straightforward, the Bureau is convinced that those costs can be predicted and estimated. Taking the hypothetical example of a conviction, there is ample information on the level of fines for both corporations and individuals. For individuals there is also the threat of imprisonment. A company can also readily assess both the legal and internal costs that would be incurred. A major cost that should not be underestimated is the time and attention of senior personnel required to deal with the Bureau and the Attorney General. There are other intangibles to consider such as dealing with company boards of directors and shareholders and having to disclosed potential legal liability in securities filings. Furthermore, if convicted of an offence, such a company may well have to face the possibility of exposure to private civil actions. In addition, a company convicted of an offence will also likely have to deal with the adverse publicity from the press exposure of its unlawful conduct. Most companies have a reasonable idea of the value of their good name and the goodwill associated with the company and could make some assumptions as to the adverse impact from a financial perspective of such a conviction. These are just some of the costs that the Bureau can identify of not having an effective compliance program. Clearly, it is a fairly extensive list.

28. Having identified the arguments for adopting a compliance program, the next step for the Bureau in developing awareness and support is to identify the benefits to be gained, if one has such a program, in any dealings with the Competition Bureau. While simply having a compliance program will not preclude enforcement action by the Commissioner of Competition or the Attorney General in the face of anti-competitive conduct, the one incontrovertible fact is that having no program means that there is no possibility of any benefit.

29. First, if a company is faced with the prospect of becoming involved in an inquiry and, potentially, legal proceedings, the existence of an effective program could have a positive impact on the Bureau’s deliberations concerning alternative case resolution, immunity consideration, and the Attorney General’s receptiveness to favourable sentencing recommendations. Second, where the Commissioner is considering
alternatives to prosecution, the existence of an effective corporate compliance program may provide credible evidence that it has met the necessary prerequisites for alternative case resolution. For example, the bulletin suggests that an effective corporate compliance program can enable a firm to demonstrate to the Commissioner that:

- the company terminated illegal conduct as soon as it came to light;
- the company attempted to remedy the adverse effects of the conduct; and
- the conduct was not in keeping with corporate policy.

30. All this then begs the question as to what is, in the Bureau’s view an “effective compliance program”. As noted above, in the Compliance Programs bulletin, the Bureau identified five essential components of an effective program:

- the creation and dissemination of relevant policies and procedures under the direction of a member of senior management;
- an effective and focussed training program targeted at those employees at all levels of the organisation who are in a position to engage in, or be exposed to anticompetitive behaviour, or who may be hampered in their activities by the lack of a full understanding of the law and jurisprudence in their area of work;
- a program of monitoring, auditing and reporting designed to detect violations and competition issues and measure the effectiveness of the compliance training;
- disciplinary procedures, including a clear articulation of what the consequences are for those who, notwithstanding all the education and the dissemination of polices, violate the law; and
- the clear commitment of senior management to the objective of compliance with the law must be visible, vocal and on-going.

31. Without these five basic elements, a company cannot reasonably expect to have an effective program or to obtain the buy-in of its employees. Given its view of the importance of partnership with business to increase compliance and specifically in this view the value of effective corporate compliance programs, the Bureau is committed to assisting companies to develop and maintain compliance programs by, for example, disseminating the maximum amount of information about its activities and policies. In addition, the Bureau will work with companies to encourage the development of effective programs and will lend its support to best practices in the field. At the same time, the Bureau will be looking at ways to link its efforts to the broader interest in compliance programs in many legal areas, to explore potential partnerships to get its message out and to encourage the integration of competition law modules into overall compliance programs, to make competition law an accepted part of any good corporate compliance program.

**Conclusion**

32. The Continuum provides a full range of tools to promote and facilitate compliance and address anti-competitive activity. It gives Bureau staff the ability to effectively use the instrument appropriate to the circumstances. In addition, it provides the business community with the ability to understand the available options. With the support and advocacy of effective compliance programs, premised on the fact
that they make good business sense, the Competition Bureau believes that working in partnership with marketplace participants, it will achieve its goal of maximising compliance with Canada’s competition law.