

Kluwer Competition Law Blog

CONDUCTING A COMPETITION LAW COMPLIANCE AUDIT: A CHECKLIST FOR CORPORATE COUNSEL

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Canada's Competition Bureau, like other competition enforcement agencies, identifies "compliance audits" as one of the essential elements of a credible and effective competition compliance program.

The following is an overview for corporate counsel of the basic steps for conducting a competition law compliance audit:

Stage I: General Preparation and Planning

a. Set out a plan for the competition audit that includes goals, scope, steps, timing and the desired outcome. Specific issues for consideration may include:

- Who will perform the audit? Is outside counsel required? Could or should accounting auditors be involved?
- Which locations need to be involved in the audit? Should international counsel be involved?
- Who are the key personnel that will play a role in conducting the audit? Consider any executives whose support may be required;
- Which records will be examined? Where are the required records located, either in hardcopy or electronically (including off-site storage)?
- Are there any past competition compliance issues, including any Competition Bureau or court order the company is subject to?
- Which areas of the audit require more detailed planning? For example, the use of statistical screening to identify anomalies and areas of focus for the audit, or planning for employee interviews.
- Consider whether it is advisable to merely record that an audit has taken place, or to create a detailed record of the audit. The record of the audit itself, where the audit was conducted by in-house counsel, may not be protected by privilege.

b. Communicate with senior management of the company about the audit:

- Before starting the audit, the company's senior management must endorse the audit. Senior management should be briefed on the audit before it commences, preferably by the company's General Counsel or senior in-house counsel, on the scope of the audit, timing and the desired outcomes. It is also important that senior management understand the significance of the audit to the company.
- Throughout the audit process, keep senior management informed about any changes to the original timeline or scope of the audit, without disclosing any findings until the conclusion of the audit.

c. Assess the company's likely market share(s) in the product and geographic markets where it operates. Where market share is significant, the scope of the audit set out below and the ultimate risk assessment need to be considerably more robust.

Stage II: Collection and Review of Documents and Processes

a. Review major agreements, as applicable to the company. This will often include:

- licensing agreements;
- distribution agreements; and
- merger, acquisition and joint venture agreements.

b. Close consideration should be given to any agreements with competitors. This might include:

- competitors who are also suppliers or customers;
- competitors who are partners in a joint venture;
- swap/exchange agreements; and
- joint sourcing, marketing or packing agreements.

c. In all of the agreements, close consideration should be given to any clauses that reference competitors, such as "most favoured nation" clauses (which require the contractual terms provided be at least as favourable as those provided to competitors), exclusivity clauses that bar competitors' products from being carried or other restrictions on contracting with rivals. Consider whether the documents raise any competition concerns, or whether they could be improperly perceived by competition authorities as raising concerns. Review a sample of all other agreements, in particular those related to retailers and to customers.

d. Review other relevant documents for competition compliance, including:

- sales reports;
- sales plans;
- documents used in decisions on pricing; and
- if applicable given the scope of the audit, advertising.

Watch for competition buzz words that could be troublesome from the perspective of competition authorities, like "driving competition out of the market", "crushing", "destroying" or "killing" a competitor, "eliminating" a competitor or a brand (e.g., "negotiations continue with Customer X where we hope to see the elimination of their value priced private-label brand").

e. Review major competition policies and ethics policies.

Where employees sign acknowledgment of receipt of competition policies and training, consider reviewing the records of such acknowledgements for completeness. If such policies do not exist, consider as part of the audit whether policies are needed.

f. Review the documentation analyzing any potential transactions that could raise competition concerns. Consider whether there is problematic language being used in the pre-merger assessment documents. Consider this from the perspective of merger approval by competition authorities, but also from the perspective that documents produced in merger reviews may lead to findings of other competition violations, such as conspiracies.

g. If applicable to the company, review recent major bids, the processes for submitting bids for business, and for accepting bids from other companies.

Stage III: Employee Interviews

1. General

a. Conduct employee interviews to the extent necessary to fully assess the company's contractual practices and agreements, pricing processes, competitive information gathering, involvement in trade associations and transactional activities. Consider:

- Which employees should be interviewed? Which employees are in a position to engage in or be exposed to conduct in potential breach of the Competition Act?;
- In what order should any employee interviews be conducted?; and
- Who should conduct the employee interviews? A related consideration is whether detailed records should be kept of employee interviews and whether such records would be subject to privilege.

2. Pricing/Distribution

a. Pose questions on how the company sets prices for its products. Consider:

- Who is responsible for price setting within the company?
- What documents and sources of information are considered in setting prices?
- Are there industry-wide practices that involve discounting, allowances or other price-related policies?
- How does the company decide on such policies and changes to such policies?
- Is there evidence that pricing decisions are being made independently of competitors?

b. Pose questions on how the company communicates price changes. Consider:

- What is the process for announcing pricing (e.g. online, in print)?
- How far in advance of a price change does this occur?
- Are price changes ever announced and subsequently retracted? What role does competitor pricing have in such behaviour?

c. If the company likely has significant market share, also consider whether the following may be of concern and include applicable questions:

- price maintenance;
- exclusive dealing;
- tied selling or
- refusals to deal – What is the process for termination of distributors? Is legal counsel involved in the process prior to termination?

3. Competitive Information Gathering

a. Ask questions to identify the sources of formal and informal gathering of competitor information

that is carried out by the company.

b. Assess compliance with competition law in each of the information gathering activities identified. Consider:

- Are those who interact with competitors aware of the restrictions in doing so?
- Are they aware of the need to report any improper contact by competitors seeking to agree upon, discuss or share information on competitively sensitive topics?
- What are the processes for documenting the sources of information? Are they robust and consistently used? Remember, some competition cases hinge on only one or two “smoking gun” documents.

c. Consider the role of employees who gather information about competitors. Is it possible they could be the middleman in a “hub and spoke” conspiracy, passing on information between competitors at a different stage of the value chain?

d. Include questions on whether employees are upholding the ethical limits on obtaining competitor information.

4. Other Contact with Competitors

a. For any other competitor contact that is occurring, consider:

- What are the other sources of competitor contact, if any?
- When, where and how frequently does such conduct occur?
- Are there records kept of such contact?
- Are the records properly kept, with identification of the date, source and circumstances under which the information about the competitor was obtained.

b. In particular, identify whether employees have contact with competitors through trade association meetings, either in attendance or in the organizational functions of the association.

- Assess whether such trade association participation is desirable from the company’s perspective; what is the benefit to the corporation and is it worth the potential competition risk?
- Confirm that such employees have attended competition compliance training. Consider if more in-depth training is appropriate for any employees involved in sensitive areas of trade association functions, such as membership criteria setting and industry standard setting.
- Verify that such employees are familiar with the limits on competitor discussions and the need to end and report any inappropriate contact from competitors.

Stage IV: Audit Outcomes

a. No violations identified

If no violations were identified, then no remedial action is required. Continue with the compliance training on a regular basis. Provide updates to employees and management on any changes in competition law. Consider performing another audit, depending on changes in the law or in the company’s business practice.

b. Possible areas of concern identified

Develop a remedial plan to address the areas of risk in the competition compliance program. This may include, for example:

- Review and update of training materials used in competition law compliance seminars;
- Additional competition compliance training;
- Follow-up audits on a lesser scale;
- Changes to business processes and procedures; and
- Other changes specific to the business.

c. Potential or actual competition law violations identified

Consider the appropriate action, including:

- assessing the scope of the violation;
- preventing further violations;
- correcting any continuing effect of a violation that has already ceased;
- whether to report the conduct to authorities and the best approach to doing so;
- potential conflicts of interest and the need for individual employees to consider retaining their own counsel; and
- modifying competition compliance training programs and carrying out remedial training as required.

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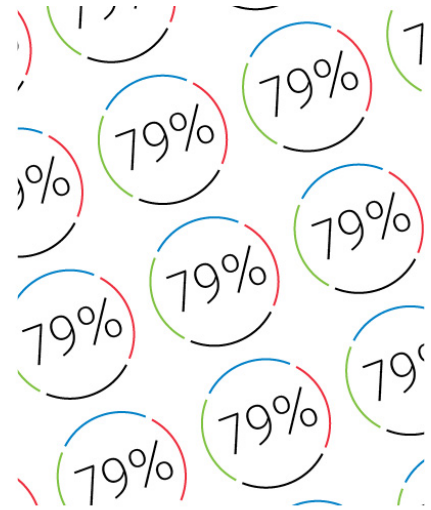
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