

Legal update

Competition law: what directors should know

March 2017

Antitrust and competition

Norton Rose Fulbright partner Thierry Dorval recently moderated a panel hosted by the Institute of Corporate Directors that featured Canada's Commissioner of Competition of Canada, John Pecman.

The following summarizes the related discussions and focuses on guidelines provided by the commissioner during this seminar.

Competition Bureau expectations for Canadian corporate directors

- According to the commissioner, legal compliance is a shared responsibility and the Competition Bureau expects businesses and their directors will each play their role.
- To help businesses play their part, the commissioner encourages implementing a competition law compliance program. The bureau's [website](#) includes a corporate compliance portal that offers a variety of tools to help businesses of all sizes establish effective compliance programs within their organizations.
- An effective compliance program can prevent anticompetitive behaviour in the first place. To this end, the bureau has identified seven elements that should go into every compliance program. However, the extent to which businesses implement each of these will vary depending on each business' activities and its "risk profile":
 1. *Management Buy-in and Support.* Managers need to actively and continuously support the company's compliance program, and should appoint someone in the company with a direct line to top managers and the power to run that program—the "compliance officer."
 2. *Assessing Compliance Risks.* What business activities is your company engaged in that could put it at risk of violating the law or becoming a victim? Figuring out the answer to this question is called "risk assessment," and compliance programs need to focus on those.
 3. *Policies and Procedures.* Your company's policies and procedures should reflect its risk profile, in that they should address how to avoid breaking the law when engaging in business activities with compliance risks—in effect, acting as your company's "compliance roadmap."
 4. *Training.* Anyone in the company who deals with any risk areas needs to understand how to comply with the law.
 5. *Monitoring, Verification and Reporting.* It is not enough to simply tell managers and staff what to do; just like in other aspects of your business, you need to ensure they are doing it. Also, the ability of managers and staff to ask questions and confidentially report concerns to your company's compliance officer without fear of reprisals is a sign of a credible program.

6. *Discipline and Incentives.* A compliance program needs to set out, in advance of any violation of the law or breach of the program, procedures and potential disciplinary actions for those who break the rules (or make others break the rules) or incentives to help ensure employees follow the program.
 7. *Is it Working?* It's good practice to evaluate the program regularly to be sure it works and is credible and effective. Evaluations can also be triggered by an event—for example, if a violation has occurred, or you acquire another company, or move into new lines of business or new markets.
- The commissioner reiterated the importance of management's buy-in and support, which concerns directors directly, and emphasized that the tone from the top is key to building and maintaining an effective culture of compliance.

Consequences for directors of contravening the *Competition Act's* main provisions

Legal framework

- A business that contravenes the criminal provisions of the *Competition Act* may be fined, and an individual may be fined and/or go to jail.
- A business or an individual that contravenes the civil provisions could incur an administrative monetary penalty and also lead to various orders of the court to remedy the anti-competitive effect of the conduct.

Cost of non-compliance

An investigation by the bureau may be costly:

- There are the legal costs of representing the company in interactions with the bureau and (if a criminal matter) the Public Prosecution Service of Canada, and the potential costs of defending the company and the individuals involved throughout a criminal trial;
- There is also the time your management team and board will take to respond to the bureau's investigation—time that won't be spent running a business;
- The business premises—or even management or directors' residences—could be searched by bureau investigators, disrupting the business' operations for what might be several days;
- A business' reputation could be damaged, resulting in a loss of customers and the departure of valued employees;
- Finally, prosecution for offences could result in:
 - Criminal convictions for the company and individuals;
 - Debarment from bidding on government contracts;
 - Jail sentences;
 - Significant fines imposed by the courts;
 - A court-ordered corporate compliance program; and
 - Exposure to follow-on civil claims for damages.

If, however, a business begins with a corporate compliance program, it stands a very good chance of avoiding all these potentially significant costs that far outweigh those associated with implementing a program.

Management Commitment and Support

According to the commissioner, management commitment and support with respect to competition law are paramount:

- Management's clear, continuous and unequivocal commitment and support is the foundation of a credible and effective corporate compliance program.
- Management fosters a culture of compliance within the business by both actively participating in the compliance program and assuming a highly visible and ongoing role in its promotion.
- By demonstrating its clear, continuous and unequivocal commitment to compliance, management conveys the message that contraventions of the law are not acceptable under any circumstances.
- Failure to execute and a lack of management commitment are the main reasons compliance programs fail.
- When a company engages in conduct that breaches the Act, if one or more managers participated in, condoned or were willfully blind to that conduct, it may indicate to the bureau that management's commitment to compliance may not be serious and the company's program was neither credible nor effective.

Conclusion

According to the commissioner, directors should remember three things with respect to competition law:

- All businesses benefit from competition and a fair chance to compete, innovate and grow, which also benefits the economy and innovation generally;
- All businesses must do their share to ensure compliance with the law and promote fair play in the marketplace; and
- Compliance starts at the top: directors must actively emphasize the importance of compliance and of having a compliance program.

Many directors will likely never have to deal with the Competition Bureau. One of the ways of reducing the likelihood of crossing paths with the bureau is to ensure your organization has a culture of compliance, which includes a credible and effective compliance program.

Thierry Dorval
Lady Africa Sheppard

For further information, please contact one of the following lawyers:

> Thierry Dorval	Montréal	+1 514.847.4528	thierry.dorval@nortonrosefulbright.com
> Richard A. Wagner	Ottawa	+1 613.780.8632	richard.wagner@nortonrosefulbright.com
> Kevin Ackhurst	Toronto	+1 416.216.3993	kevin.ackhurst@nortonrosefulbright.com
> John P. Carleton	Calgary	+1 403.267.9406	john.carleton@nortonrosefulbright.com

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to "Norton Rose Fulbright", "the law firm", and "legal practice" are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together "Norton Rose Fulbright entity/entities"). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a "partner") accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.