

Canadian Competition Law Considerations for Small and Medium-Sized Businesses - Know the Risks

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For small and medium-sized businesses, compliance with Canadian competition law may not be at the forefront in business planning and operational considerations. However, there are a variety of potential risks and associated liabilities (including criminal liability) for a business that has not considered the application of Canadian competition law to its day-to-day business activities. As discussed below, understanding the Canadian competition laws which apply to your business and implementing internal compliance policies and controls will help mitigate these risks to your business.



Canadian Competition Law

Canadian competition law is designed to maintain a competitive marketplace and prohibits and regulates certain business activities (including those conducted by non-Canadian companies operating in Canada) that might prevent or reduce competition or harm consumers. Enforcement of these laws, primarily the *Competition Act* (Canada) (the “Act”), is conducted by the Competition Bureau of Canada. While the Act also contains provisions which apply to mergers and acquisitions, the focus of this article is the provisions of the Act relating to day-to-day business activities.

Potential Risk

All it may take is for an aggrieved consumer, competitor or whistleblower to file a complaint with the Competition Bureau and trigger an investigation that could ultimately result in an order against a business, its management personnel and/or employees. Such an order may include a requirement to compensate consumers for losses and/or to stop or modify conduct. There is also the possibility of civil damages and criminal prosecution. In addition, even before a final determination is made, a business suspected of breaching the Act may also be subject to a time and resource-consuming investigation process as well as potential reputational damage.

Examples of Regulated or Prohibited Business Activities

The following are examples of business activities that are regulated or prohibited by the Act:

- **Price-fixing** – Competitors (or potential competitors) agreeing to fix, maintain, increase or control the price for the supply of a product.
- **Market division/allocation** – Competitors (or potential competitors) agreeing to allocate sales, territories, customers or markets for the production or supply of a product.
- **Bid-rigging** – Two or more bidders or tenderers: (i) submitting a bid or tender that is arrived at by agreement; (ii) agreeing not to submit a bid or tender; or (iii) agreeing to withdraw a bid or tender already made.
- **Refusals to deal** – A refusal to sell a product to a customer in certain circumstances, such as when: (i) the customer is willing to meet the supplier's usual terms; (ii) the refusal prevents the customer from being able to obtain adequate supplies of a product, significantly harming its ability to do business; (iii) the refusal is a result of insufficient competition among suppliers; (iv) the refusal occurs even though there is ample supply of the product; and (v) the refusal has an adverse effect on competition or is likely to do so.
- **Price maintenance** – A supplier preventing a customer from selling a product below a minimum price or refusing to supply a customer or otherwise discriminating against a customer, because of the customer's low pricing practices.
- **Promotional Contests** – A promotional contest conducted by a business may be illegal if: (i) it does not disclose the number and approximate value of prizes and information relating to the chances of winning; (ii) there is a delay in the distribution of prizes; or (iii) it does not choose the participants and awards the prizes either randomly or on the basis of skill.
- **Wage Fixing and 'No Poaching' Agreements** – Starting June 23, 2023, businesses are prohibited from having an agreement (including one entered into before that date) with each other to fix, maintain, decrease or control wages or other terms of employment or refraining from hiring one another's employees.

Proactively Protecting Your Business

Navigating the requirements of the Act can be challenging, but compliance is important for all businesses and legal advice is recommended to ensure a proper understanding of the Act's prohibitions and restrictions. A first step towards reducing the risk to your business is to understand which of a business' activities are regulated under the Act. Next is to ensure that there is a general understanding among management and relevant employees of the applicable legal requirements and to put internal policies and controls in place to ensure compliance and avoid drawing regulatory scrutiny.

Developing and implementing an internal compliance program is a prudent and proactive way to mitigate legal liability and ensure a business is operated legally and in accordance with best practices. Having a properly designed, implemented and effective compliance program will: (i) clearly communicate to management and employees the need to comply with applicable provisions of the Act and related laws to ensure internal business operations do not contravene the Act; (ii) identify the nature of the compliance risks associated with discussions or arrangements with third parties, such as partners, competitors, or trade associations; (iii) reduce the risk of costly investigations and lawsuits that adversely impact on core business activities; (iv) reduce the risk of penalties or third party damage claims for

the business and criminal liability for its management and employees; (v) protect the business' reputation; and (vi) support eligibility for participation in public sector procurement opportunities.

For more information about how your business may be impacted by competition law requirements, please contact Jeffrey Kowall at (204) 934-2565 or jkowall@tdslaw.com.

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