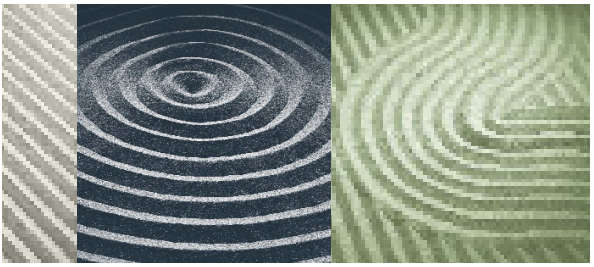

MILLER THOMSON LLP

Barristers & Solicitors, Patent & Trade-Mark Agents

A PRIMER ON THE CANADIAN COMPETITION ACT

Miller Thomson's Competition Law Group has extensive experience in competition law matters, including preventative advice and compliance, negotiation and litigation, merger review and marketing and advertising. For more information about our competition law practice, please contact any of the competition lawyers listed below or visit our website at www.millerthomson.ca.

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OVERVIEW

The *Competition Act* (the "**Act**") is a federal statute intended to promote efficiency through the encouragement of competition in the Canadian marketplace. Other ends sought through the means of competition are the expansion Canadian interests in world markets, the protection of the opportunity for small business to compete, and the protection of competitive prices and product choices for consumers.

The Act deals with the anti-competitive activities of businesses and individuals in two capacities. First, the more serious activities such as price-fixing and bid-rigging are treated as criminal offences, subject to prosecution and severe penalties. Second, otherwise legitimate business practices that cross the line into unreasonable anti-competitive practices may be subject to review and discipline by the Competition Tribunal (known as "reviewable matters").

ADMINISTRATION AND ENFORCEMENT

The Competition Bureau

The Act is administered and enforced by the Competition Bureau (the "**Bureau**"), which is headed up by the Commissioner of Competition (the "**Commissioner**", currently Ms. Sheridan Scott). The Bureau maintains a staff of approximately 400 employees who operate in the following branches: Criminal Matters, Civil Matters, Mergers and Fair Business Practices. The Bureau has published several interpretation guidelines, bulletins, press releases and updates on numerous aspects of Canadian competition law, all of which can be found at the Bureau's web site at **http://cb-bc.gc.ca.**

The Commissioner and her staff have numerous investigative tools at their disposal to assist in their investigations of criminal offences and reviewable practices, including search warrants and onerous "Section 11 orders" (which compel the production of documents and testimony from parties under investigation, as well as other parties who may possess relevant information).

The Competition Tribunal

The Competition Tribunal (the "**Tribunal**") is a quasi-judicial body that conducts hearings as a three-person panel chaired by a Federal Court judge and accompanied by two "lay members", knowledgeable in the fields of economics, industry, commerce or public affairs. The Tribunal has exclusive jurisdiction to hear cases referred to it by the Commissioner (and in certain circumstances, by private parties) under the reviewable practices provisions of the Act. Appeals from the Tribunal can be made to the Federal Court of Appeal. The Tribunal publishes its decisions on its website at **http://www.ct-tc.gc.ca.**

CRIMINAL OFFENCES

Criminal offences under the Act are referred to the Attorney General of Canada by the Commissioner for prosecution before the Federal Court or provincial superior courts. Some offences are punishable by fines of up to $10 million per count and/or imprisonment for periods of up to five years. To assist in criminal investigations, the Bureau has established an Immunity Program which provides for immunity from prosecution in limited circumstances. In order for a party to quality for immunity, it must:

(a) take effective steps to terminate its participation in the illegal activity;

(b) not have been the instigator or the leader of the illegal activity, nor the sole beneficiary of the activity in Canada;

(c) provide complete and timely co-operation throughout the course of the Bureau's investigation and subsequent prosecutions; and

(d) where possible, make restitution for the illegal activity.

Conspiracy

Under the Act, it is a criminal offence to "conspire, combine, agree or arrange" with another person to prevent or lessen competition unduly in the production or sale of a product (which includes both articles and services) or to otherwise restrain or injure competition unduly. In essence, the conspiracy provisions seek to prohibit agreements among competitors to unduly limit competition. There is no requirement for an agreement or arrangement among competitors to be formal or written — the offence covers informal or oral agreements with minimal communication between competitors.

Evidence of conspiracy can be found in information showing that competitive market intelligence (*e.g.*, confidential price or product information of a competitor) has been gathered or received, the agendas, minutes and speeches from any trade association meetings suggesting that there has been collusion to limit competition, and business decisions where the decision has a clear, foreseeable impact on competition in a market and competitors have been involved in the process in some way.

Price-fixing agreements are one of the most common forms of conspiracy. Offences can also arise through certain market-sharing agreements designed to divide markets or customers by, for example, agreeing not to solicit a competitor's customers or to boycott certain customers or suppliers.

Persons convicted under the conspiracy provisions are liable to imprisonment for a term of up to five years and/or a fine of up to $10 million. As fines are assessed for each count, an ongoing offence may result in multiple counts. This explains why the largest fine to date (set through an agreed plea) was $51 million – over five times the maximum. An international agreement not to compete or to allocate markets may result in prosecution and penalties in several countries.

Price Maintenance

It is a criminal offence to, by agreement, promise, threat or any like means, attempt to influence upward, or discourage the reduction of, the price at which anyone sells or offers to sell a product. Therefore, in suggesting resale or retail prices, a supplier must clearly indicate that there is no obligation for the purchaser to accept the suggested price and that the purchaser would in no way suffer in its business relations with the supplier if it sells for less. Although this offence is often referred to as "resale price maintenance", it is actually broader and covers, for example, relationships between franchisors and franchisees, or between distributors. The Act also prohibits inducing suppliers, by threat, promise or any like means, and as a condition of doing business with the supplier, to refuse to supply a product to another person because of the low pricing policy of that person.

The price maintenance offence is a "*per se*" offence which means that the prosecution does not need to prove that competition in fact be harmed. Conviction under this offence can result in a fine in the discretion of the court and/or imprisonment for a maximum term of five years.

The Act does, however, provide for certain circumstances under which a firm will be permitted to refuse to supply a purchaser because of its low pricing policy, including where the purchaser has had a practice of: (1) using the product in question as a loss-leader; (2) engaging in misleading advertising in respect of the product; or (3) not providing the level of service that ultimate end-users might reasonably expect to be provided.

Price Discrimination

It is an offence in Canada (although not in some other countries) for a supplier to employ a "practice" of granting any discount, rebate, allowance, price concession or other price-related advantage to a purchaser which is not available to competitors of the purchaser buying articles of like quality and quantity. A "practice" refers to a systematic pattern of behavior as distinct from isolated acts or reactions to competitive market changes (*e.g.*, the adoption of a temporary expedient designed to win a new account, enter a new market or match a competitor's pricing initiatives.) Generally, the longer the seller charges different prices to two competing purchasers of like quality and quantity and the more often this occurs, the more likely it is that a sale is part of a practice of discrimination. Therefore, lower prices offered on a one-time or temporary basis (to, for example, meet a competitor's price or for a special event such as a store opening) would most likely be an acceptable practice that is not subject to prosecution.

This offence carries a penalty of a maximum prison term of two years.

Predatory Pricing

The criminal offence of predatory pricing entails the policy of selling products at unreasonably low prices with the effect or purpose of substantially lessening competition or eliminating a competitor. Potential predatory pricing behaviour will be reviewed to determine whether:

(a) the prices charged are unreasonable in relation to the alleged predator's production costs;

(b) the alleged predator will have sufficient "market power" to recoup the losses incurred from the lower prices (generally, proceedings will not be brought when the alleged predator has less than 35% of the relevant market); and

(c) there is an actual policy of predatory pricing (*i.e.*, the pricing is part of a deliberate corporate program and was in effect for a significant period of time - occasional or temporary pricing at below cost may be legitimate if it is designed to meet competition, keep existing customers or obtain new customers).

It is also an offence to have a policy of selling products anywhere in Canada at prices lower than those charged elsewhere in Canada, with the effect or purpose of substantially lessening competition or eliminating a competitor (known as geographic price discrimination).

A person convicted under these provisions is liable to imprisonment for a term of up to two years. Convictions for predatory pricing are extremely rare because of the difficulty in distinguishing between predatory pricing and vigorous and desirable price competition. Geographic price discrimination cases are also rare because, like predatory pricing, in most cases this would be a very inefficient and costly way of eliminating a competitor.

Bid-rigging

It is a criminal offence to enter into an agreement where, in response to a call or request for bids or tenders, one or more bidders agree not to submit a bid, or two or more bidders agree to submit bids or tenders that have been prearranged among themselves. Bid-rigging is a *per se* offence and does not require proof that competition has been lessened unduly.

A person convicted of bid-rigging is liable to a fine in the discretion of the court or imprisonment for a term not exceeding five years, or both.

Promotional Allowances

It is an offence to grant a purchaser any allowance (other than in the form of a price reduction shown on the face of the invoice) for advertising or display purposes that is not offered to that purchaser's competitors on proportionate terms (*i.e.*, proportionate to its sales). Persons convicted under this offence are liable to a maximum prison term of two years.

Multi-level Marketing Plans and Pyramid Selling Schemes

Generally, the Act permits the operation of and participation in multi-level marketing plans. The only restriction is that plan operators and participants must not make any representations to prospective participants about potential compensation in a plan that does not constitute fair, reasonable and timely disclosure of compensation *actually* received, or likely to be received, by typical participants in that plan.

Pyramid selling schemes, a type of multi-level marketing plan, are strictly prohibited. These include multi-level marketing plans:

(a) that provide for recruitment bonuses;

(b) that require participants to purchase a certain amount of products as a condition of participating in the plan;

(c) where products are supplied to participants in commercially unreasonable amounts; or

(d) that do not have a buy-back guarantee or a right to return the product in saleable condition.

Penalties under these offences are, for conviction on indictment, a fine in the discretion of the court and/or imprisonment for a maximum term of five years, and, for summary conviction, a maximum fine of $200,000 and/or imprisonment for a maximum term of one year.

REVIEWABLE PRACTICES

Conduct that falls under the reviewable practices provisions of the Act are not *per se* unlawful and, in many circumstances, are seen as beneficial to the economy. However, where such conduct has the effect of preventing or lessening competition substantially, it may be reviewed by the Tribunal and ultimately prohibited by an order thereof.

Abuse of Dominance

Abuse of dominant position is the exercise of market power through the practice of anti-competitive acts. The Commissioner may apply to the Tribunal for prohibition orders or other remedies when a dominant firm engages in predatory, exclusionary or other anti-competitive acts that result in a substantial lessening or prevention of competition. While a dominant position is not in itself illegal, abuse of a dominant position through anti-competitive acts can give rise to an order by the Tribunal where the following three conditions have been met:

(a) there is dominance of an entity or joint dominance by more than one entity (generally, a market share of 35% or more for a single firm or a combined market share of 60% or more for more than one firm, will prompt further examination);

(b) there was an abuse of such dominance; and

(c) such abuse has the effect of preventing or lessening competition substantially in a market.

Common examples of anti-competitive acts that may lead to a finding of abuse of dominance include:

- price-squeezing by a vertically-integrated supplier of an un-integrated competitor for the purpose of preventing the competitor's entry or expansion in a market;
- use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- pre-emption of scarce facilities or resources required by a competitor with the object of withholding those facilities or resources from a market;
- buying up products to prevent the erosion of existing price levels;
- adoption of product specifications that are incompatible with products produced by another person, designed to prevent his entry into or eliminate him from a market;
- requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor with the object of preventing that competitor's entry or expansion in a market; and
- selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

Exclusive Dealing, Tied-Selling and Market Restriction

The following types of business practices can be, upon application by the Commissioner or a private party (with leave of the Tribunal), subject to review by the Tribunal.

(a) ***Exclusive dealing -*** means a requirement that, as a condition of supplying a product, a purchaser must deal only or primarily in products supplied or designated by the supplier. Exclusive dealing is a common practice (*e.g.*, motor vehicle dealerships) and, like other reviewable practices, can be seen as beneficial to the economy.

(b) ***Tied selling -*** occurs where a supplier, as a condition of supplying a product to a customer, requires the customer to purchase other of its products. Again, this is a common practice where products are sold with bundled prices and is usually seen as beneficial because purchasing in larger quantities results in savings to all parties.

(c) ***Market restriction -*** occurs where a supplier, as a condition of supplying a product to a customer, requires the customer to supply the product only in defined markets (*i.e.*, geographic or customer class markets) or extracts a penalty if the customer supplies the product outside the defined market. Again, this is a common practice with many kinds of franchises and dealerships and can be considered beneficial in many cases.

Generally, the Tribunal will make an order prohibiting one or more suppliers from engaging in such practices where it finds that (1) the practice is engaged in by a *major supplier* of a product or the practice has become widespread and (2) the practice will, or is likely to, lessen competition substantially.

Refusal to Deal

This Canadian provision is not commonly found in the antitrust laws of other countries. If a major supplier of a product refuses to supply a prospective customer, the Tribunal may order the supplier to accept the person as a customer where:

(a) the person is substantially affected or precluded from carrying on a business due to the inability to obtain adequate supplies of a product on usual trade terms;

(b) the lack of supply is because of insufficient competition among suppliers;

(c) the person is willing and able to meet the usual trade terms of the supplier;

(d) the product is in ample supply; and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market.

A refusal to deal will not be prohibited if it is based on valid business reasons, including, for example, where the purchaser does not meet the supplier's requisite credit policies or the supplier has legitimately concluded that it has enough distributors in a given market.

MERGERS

Mergers fall under the reviewable practice provisions of the Act. The Act establishes a two-tiered approach to merger review in Canada. First, it establishes pre-merger notification obligations and mandatory waiting periods with respect to certain larger transactions. Second, it empowers the Tribunal, on application of the Commissioner, to block, in whole or in part, or make other remedial orders (including a dissolution order) in respect of mergers that are likely to give rise to a substantial prevention or lessening of competition in any market in Canada, regardless of whether such transactions are subject to the requirements for pre-merger notification. This is normally arises from complaints brought to the attention of the Bureau by the customers, suppliers or competitors of the merging parties.

Pre-merger Notification

The pre-merger notification requirements apply to the following types of transactions involving the acquisition of all or part of an "operating business":

(a) ***Assets*** **-** an acquisition of any of the assets of an operating business;

(b) ***Shares of a public corporation*** **-** the acquisition of more than 20% of the voting shares of a public corporation that directly or indirectly carries on an operating business (or more than 50% if the purchaser already owns more than 20%);

(c) ***Shares of a private corporation*** **-** the acquisition of more than 35% of the voting shares of a private corporation (or more than 50% if the purchaser already owns more than 35%);

(d) ***Corporate amalgamations***; and

(e) ***Non-corporate combinations***.

A transaction will trigger the pre-merger notification requirements of the Act when **BOTH** of the following two financial thresholds are exceeded:

(1) *Size of parties threshold* - The parties to the transaction (including their affiliates) have combined assets in Canada **OR** gross annual revenue from sales in Canada (domestic), from Canada (export) or into Canada (import) that exceed **$400 million**.

(2) *Size of transaction threshold* -

(a) **Asset transaction -** the aggregate value of the Canadian assets being acquired **OR** the gross annual revenue from sales in or from Canada generated by such assets exceed **$50 million**.

(b) **Share transaction -** the aggregate value of the Canadian assets owned by the target corporation (and its subsidiaries) **OR** the gross annual revenue from sales in or from Canada of the target corporation (and its subsidiaries) exceed **$50 million**.

If both the above thresholds are exceeded, each party to the proposed transaction must file a pre-merger notification with the Bureau prior to completing the transaction. Pre-merger notification is normally provided using what is known as a short-form filing. The information required in the short-form filing includes a description of the transaction and detailed information relating to the nature of the businesses carried on by the parties and their affiliates (*e.g.*, product and geographic markets, principal customers and suppliers, and general financial information).

In the very rare circumstances where a transaction raises significant competition concerns, the parties may file, or be requested by the Bureau to file, a long-form filing. As its name suggests, the long-form filing is considerably more difficult to prepare and, in addition to the information provided in a short-form filing, requires the parties to provide certain internal reports, studies, surveys and analyses prepared for the purpose of the competitive analysis of the transaction. Fortunately, the long-form filing is rarely required and the merging parties will often negotiate with the Bureau to supplement their short-form filings with additional information rather than provide a long-form.

There is a $50,000 filing fee required for a short-form or long-form filing.

Waiting Periods

Once a complete pre-merger notification has been filed, the parties are not permitted to complete the transaction until the mandatory waiting period has expired, which is 14 days for a short-form filing and 42 days for a long-form filing. In addition, the Bureau has issued non-enforceable service standards that provide the parties with an indication of the time the Bureau will take to complete its review. These standards are based on the complexity (as related to competition concerns) of the proposed transaction. A transaction that raises no substantive competition law concerns will normally be classified as "non-complex" and assigned a review period of 14 days. A transaction classified as "complex" will be assigned a review period of 10 weeks. A transaction raising serious substantive concerns may be classified as "very complex" and assigned a review period of up to five months.

Disposition by the Commissioner

Upon the completion of the Bureau's review, if the Commissioner is satisfied that the transaction will not lessen or prevent competition substantially in any relevant product or geographic market in Canada, she will issue a "no-action" letter stating that she does not intend to challenge the transaction at that time. However, in such cases, the Commissioner reserves the right to revisit the transaction if there are any changes in circumstances that occur within three years of its substantial completion.

In the event that the Commissioner concludes that the merger will, or is likely to, prevent or lessen competition substantially in any market in Canada and the parties do not rectify her competitive concerns, she may apply to the Competition Tribunal for an order prohibiting the proposed transaction from proceeding, in whole or in part, or requiring the dissolution of certain assets that may be the subject of her competitive concerns.

ARCs

Pre-merger notification is not required if the parties apply for and the Commissioner issues an advance ruling certificate (an "**ARC**"). ARC applications, which are usually easier to prepare than a short-form filing, are normally made when it is clear that the transaction will raise no competitive concerns. Many (if not most) transactions proceed under an ARC application. Once an ARC has been issued, the Commissioner loses her jurisdiction to revisit and challenge the transaction at a later point in time. There is a $50,000 filing fee (plus GST for Canadian residents) required in connection with the filing of an ARC application.

FAIR BUSINESS PRACTICES (DECEPTIVE MARKETING)

Under the Act, false or misleading representations or advertising may be treated either as offences under the criminal regime (which provides for prison sentences and fines) or as reviewable practices under the civil regime (which provides for, among other things, cease and desist orders and monetary penalties). While the Act allows the Commissioner to pursue enforcement actions using either of the two adjudicative regimes or tracks, the criminal track will be adopted for the most egregious matters and will be considered only if (1) there is clear and compelling evidence suggesting that the accused knowingly or recklessly made a false or misleading representation to the public and (2) the Bureau is satisfied that criminal prosecution would be in the public interest.

Criminal Track

The criminal provisions contain a general prohibition against a person knowingly or recklessly making of a representation to the public that is false or misleading in a material respect for the purpose of promoting the supply or use of a product or any business interest. The penalties for contravening this section of the Act are, on indictment, a fine in the discretion of the court and/or a maximum prison term of five years; or, on summary conviction, a fine of up to $200,000 and/or a maximum prison term of one year.

Civil Track

The civil provisions set out several marketing and advertising practices that may constitute "reviewable practices", including:

- representations relating to a supplier or its business (*e.g.*, nature, size and market position of the business, reasons for sale);
- untrue, misleading or unauthorized use of tests and third party testimonials;
- comparative advertising that is misleading or inaccurate;
- representations of the performance, efficacy or length of life of a product that are not based on adequate and proper testing;
- price representations that fail to disclose any additional or hidden payments;
- misleading warranty claims;
- misleading "sale price" representations where the product was not previously sold at its "ordinary selling price" in sufficient quantities or for a sufficient period of time;
- non-availability of advertised specials ("bait and switch" selling); and
- selling items above their advertised price.

"Representation to the public" include advertisements to the media (such as newspaper, television, radio or billboards), as well as oral or written representations made to individual customers.

In 2004, the Bureau and the Tribunal were particularly vigilant in pursuing civil remedies against companies and individuals engaged in misleading representation activities. Almost all of the parties under investigation agreed to enter into settlements or consent agreements with the authorities, requiring them to, for example:

- pay very large administrative monetary penalties;
- publish corrective notices in newspapers;
- implement competition law compliance programs;
- cease selling and marketing the relevant product in Canada;
- provide a refund to certain consumers; and
- post a notice about the settlement on their website.

PRIVATE ENFORCEMENT

Private Actions and Applications

In addition to enforcement by the Commissioner and the Attorney General, the Act allows anyone who has suffered loss or damage as a result of a breach of any of the criminal provisions of the Act or a breach of an order of a court or the Tribunal to bring a civil action against the breaching party. Private parties may also apply to the Tribunal for leave to make an application in respect of certain reviewable matters provisions of the Act (*i.e.*, refusal to deal, market restriction, tied selling and exclusive dealing).

Class Actions

Criminal prosecutions, or more commonly, guilty pleas to offences, are normally followed quickly by class actions. As stated above, the Act provides a civil cause of action for the recovery of losses caused by breaches of the Act's criminal provisions. Successful class plaintiffs may also recover their costs of any investigation they conducted, as well as any the court proceedings. To succeed, the plaintiffs must show only (1) that a violation occurred and (2) that this violation was the cause of their economic losses. Provincial legislation in Quebec, Ontario, Manitoba, Saskatchewan, Newfoundland and British Columbia provide a comprehensive, readily-accessible procedure for class actions. In the few provinces in which such special class proceedings legislation does not exist, a recent Supreme Court of Canada decision has given the courts the power to apply their rules as if such legislation did exist. A prospective class representative must demonstrate an ability to meet the procedural requirements for a class action (which is a relatively easy test to meet). The central issue is often whether a class action is the preferable procedure for conducting the litigation, or whether each class member must sue individually. In any event, many convictions for a breach of the Act result in successful national class actions.

COMPETITION LAW COMPLIANCE PROGRAMS

Every business that markets its products and services in Canada in any manner faces potential exposure under the Act. The Act applies to almost all aspects of a business, including sales, marketing, distribution and purchasing. Violations of the Act can have serious consequences for companies, their employees and ultimately their shareholders, including extended, disruptive and costly Bureau investigations, large fines for the company and its employees, imprisonment for employees, officers and directors, and negative and unwanted publicity**.**

Benefits of a Compliance Program

The Bureau has stated that an effective competition compliance program is an essential and prudent feature of modern business. The main purpose of a competition law compliance program is to reduce the risk that a company's employees will contravene the Act by raising their awareness of competition law issues. The benefits of an effective competition law compliance program are as follows:

- provides an understanding of the Act and an early warning of suspect conduct;
- prepares a company for a Bureau investigation;
- reduces criminal and civil exposure for the company and its officers and employees;
- reduces or avoids the costs of litigation and bad publicity;
- may provide an opportunity for early participation in the Bureau's Immunity Program;
- may provide for an opportunity for favourable alternative case resolution by the Bureau;
- may invite more favourable treatment in sentencing;
- may assist in a due diligence defence; and
- provides awareness to use the Act as a "sword" against the anti-competitive behaviour of a company's competitors, suppliers or customers.

Elements of an Effective Compliance Program

The Bureau has established the following five elements that it believes are fundamental to a successful competition compliance program:

(1) the unequivocal involvement and support of senior management;

(2) the development of relevant policies and procedures (*i.e.*, a compliance manual);

(3) the ongoing education of management and employees;

(4) monitoring, auditing and reporting mechanisms; and

(5) disciplinary procedures for noncompliance.

Competition Compliance Audits

Normally, one of the first steps in preparing a competition compliance program is to have competition lawyers conduct a competition audit of the company's records. A proper audit will allow the lawyers to understand the company's business and its commercial transactions and, more importantly, identify any potential or actual competition law issues.

Education and training

Even the best of competition compliance policies will be of limited value if employees are not adequately trained to recognize and avoid the pitfalls of unlawful and other anti-competitive behaviour. Any proper training must, of course, be adapted to address the needs and functions of the various classes or types of employees, with particular attention required for those employees working in "high risk" areas such as sales, marketing and purchasing. (These employees will need specialized training to recognize and understand infringements relating to, for example, pricing decisions or the exchange of confidential or competitive information.)

Competition Law Compliance Manual

A competition law compliance manual is to be read, understood and agreed to by each relevant employee. It describes the various offences and reviewable practices in the Act, sets out the relevant penalties that may be imposed under the Act, and provides examples of what is acceptable and unacceptable behaviour. It also encourages employees to be ever-vigilant in their day-to-day activities and to report to or ask their legal department (or their company compliance officer) if they are uncertain of a proposed activity, if they believe that the company has or is about to commit an offence, or if they believe that the company may be a victim of an offence or anti-competitive conduct engaged in by another party.