Industrial Participation Association of Canada

ANTITRUST POLICY

The Industrial Participation Association of Canada ("IPAC") advances a greater understanding of countertrade, industrial participation and offset, especially as it impacts business in Canada. In doing so, it adheres to the belief that open and vibrant competition is the most efficient mechanism of economic regulation. Accordingly, IPAC operates and conducts business in a manner that complies with the spirit, intent and letter of Canadian and international antitrust and competition laws ("antitrust laws"). The IPAC Antitrust Policy (the "Policy") as adopted by the Executive Committee, reaffirms this commitment and applies to all IPAC Members, IPAC staff, members of the Executive Committee and officers ("Personnel") as well as consultants, representatives, agents, brokers or other intermediaries ("Consultants") in maintaining this standard of compliance.

As a Canadian incorporated Association, IPAC first must and will comply with applicable Canadian antitrust laws. In addition, as many members are subsidiaries of US and European companies and the antitrust laws of these countries may also be applicable to IPAC members. The compliance with Canadian and international antitrust laws requires a basic understanding of the laws which govern and dictate investigative and enforcement efforts. To that end, a brief explanation of these laws is attached as Attachment A.

Five Areas of Concern

IPAC Members, Personnel and Consultants should be aware of the following five areas of concern under antitrust law, each involving activity or conduct that should be avoided as such activity or conduct is likely to be an automatic antitrust violation:

1. Price Fixing. Price-fixing prohibitions are most likely to be strictly enforced and discussion of price or price related matters is to be avoided. If price-fixing is established, IPAC and its Members, Personnel and Consultants may not raise the defense that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy. As such, prices should not be discussed before, at, or after IPAC meetings. "Price fixing" encompasses not only agreements or combinations with competitors on a selling price, but may also include, for example, agreements to buy surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, to control or standardize the price of services and any other agreement or combination which has the net result of affecting the price of goods or services.

Furthermore, discussion of even peripheral matters relating to price, such as credit policies and terms of sale should also be avoided.

2. Agreements to Divide Customers or Split Territories. An agreement or understanding among Members, Personnel and Consultants of IPAC to divide customers is likely to be another enforced violation and is to be avoided. Even an informal agreement whereby one Member agrees to stay out of another's territory may constitute a violation of the antitrust laws.
3. Agreements to Limit Supply. An agreement or understanding between competitors to restrict the volume of goods they will produce or make available for sale is likely to be another violation and is to be avoided.

4. Boycotts. An agreement or understanding between suppliers and/or customers that they will not sell to, purchase from or deal with particular third-parties is likely to be another violation and is to be avoided.

5. Tying Arrangements. An agreement imposed by a seller who enjoys such a substantial market position that enables its sale of one product to compel the buyer also to purchase a different (or tied) product is likely to be another violation and is to be avoided.

Avoiding Antitrust Problems

What we will do:

1. At all Member meetings and conferences, the Executive Committee shall restate the mandates and objectives of this Policy;

2. In the event of any doubt or concern with respect to an activity or discussion, IPAC and its Members, Personnel and Consultants shall immediately raise their doubts and concerns and cease such activity or discussion; and

3. Contact both the Member's company counsel and IPAC's counsel to arrive at a resolution consistent with the mandates and objectives of this Policy.

What we will *not* do:

1. Engage in any conduct or activity discussed in the above Five Areas of Concern;

2. Engage in or participate in any agreement or understanding, expressed or implied, to (a) fix or determine to whom sales are to be made or credit is to be extended or on what terms, (b) establish joint or uniform prices, terms and conditions under which sales are made or credit is to be extended, (c) create uniform or standardized freight rates, (d) limit production or establish quotas, (e) divide markets, or (f) boycott or blacklist customers or suppliers;

3. Participate in or give consideration to any activity, plan, understanding, or arrangement which would restrict or interfere with the exercise of free and independent judgment by the Members in the management or operation of their respective companies;

4. Act in concert or agree with respect to any of the aforementioned prohibited activities, whether at an official meeting or function or a group or committee meeting or in private meetings or talks before and after official functions; or

5. Engage in any discussion contemplating pursuit of the aforementioned prohibited activities.

Conclusion

IPAC's Executive Committee trusts that this Policy provides a meaningful framework to IPAC Members, Personnel and Consultants in advancing the objectives of IPAC while remaining mindful of and complying with the requirements and prohibitions of Canadian and international antitrust laws.

Attachment A

Summary of Canadian and International Antitrust Laws

Canada

The Canadian Competition Act ("the Act") is intended to protect consumers by prohibiting anticompetitive business practices and promoting competition in the Canadian marketplace. Like U.S. antitrust laws, the Act bans harmful restraints on trade. Anti-competitive activities prohibited by the Act include price-fixing, bid-rigging, exclusive dealing, tied selling, market restriction, refusal to deal and abuse of dominance, which is comparable to the American concept of monopolization. Attachment B is an article by Stephen Krebs, of the Association of Corporate Counsel, entitled "*Top Ten Things to Know about the Canadian Competition Act*", published on their website. Additionally, additional information on Canada's laws and regulations is available on the government's website at:
http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00148.html.

United States of America

Compliance with U.S. federal antitrust laws requires a basic understanding of the following four U.S. federal statutes which govern and dictate investigative and enforcement efforts.

The Sherman Antitrust Act. The Sherman Act, enacted in 1890, prohibits contracts, combinations and conspiracies in restraint of trade and is enforced by the Antitrust Division of the Department of Justice. To constitute an offense there must be a contract, combination, or conspiracy between two or more persons or companies which has the effect of restraining or monopolizing trade or commerce. Since trade association activities are by definition collective, with meetings providing an opportunity for competitors to meet and discuss business and business concerns, the Sherman Act is the primary statute available in enforcing antitrust policy applicable to IPAC activity.

The Clayton Antitrust Act. The Clayton Act was enacted in 1914 to supplement the Sherman Act to curtail violations in their incipiency. The Act expands upon the scope of the Sherman Act to address price discrimination, exclusive dealings and tying arrangements, and mergers and acquisitions, all of which may lessen competition; and transitions antitrust enforcement from a reactive approach to a more proactive approach. The Clayton Act is enforced by the Federal Trade Commission.

The Robinson-Patman Act. The Robinson-Patman Act enacted in 1936 as a partial amendment to the Clayton Act, provides in substance that it shall be unlawful for any person engaged in commerce to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be to substantially lessen competition. The Act is enforced by The Federal Trade Commission.

The Federal Trade Commission Act. The Federal Trade Commission Act of 1914 is more sweeping in scope than any of the other federal antitrust laws. It declares unlawful all "unfair methods of competition, and unfair or deceptive acts or practices in commerce". Any practice which might be a violation of the Sherman Act, the Clayton Act or the Robinson-Patman Act or falls short of a violation of those statutes but is related to the type of conduct which they prohibit may constitute an unfair method of competition in violation of the Federal Trade Commission Act.

Penalties for Violation of the U.S. Federal Antitrust Laws. U.S. Federal antitrust laws are enforceable against trade associations, their members, and their staff both by government agencies and by private entities through civil treble damage actions. The penalties for both civil and criminal violations can be severe.

U.S. States. In addition to U.S. federal antitrust laws, each state has its own antitrust law which, more often than not, is patterned on the above discussed U.S. federal statutes. All state laws may be enforced civilly with a majority of the states also providing for criminal enforcement actions.

E.U. Antitrust Laws

Since 1957, the Treaty of the European Community (later growing into the European Union) has prohibited: "...all agreements [regarding] undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market..." In recent years, particularly in the European Union, increased international cooperation has accelerated enforcement. Any IPAC Member conducting international business should familiarize itself with the antitrust laws of any country in which it conducts business as well as the applicable Antitrust Policy of the Member's countries.

Attachment B

Top Ten Things to Know about the Canadian Competition Act

By: Stephen Krebs, Association of Corporate Counsel

The Canadian Competition Act ("the Act") is intended to protect consumers by prohibiting anticompetitive business practices and promoting competition in the Canadian marketplace. Like U.S. antitrust laws, the Act bans harmful restraints on trade. Anti-competitive activities prohibited by the Act include price-fixing, bid-rigging, exclusive dealing, tied selling, market restriction, refusal to deal and abuse of dominance, which is comparable to the American concept of monopolization. The Act also permits the government to review mergers to assess their anti-competitive effects, and protects consumers by prohibiting deceptive marketing and advertising. Here are ten important things to know about the Canadian Competition Act.

1. The Canadian Competition Act, administered by the Competition Bureau, is the sole source of competition law in Canada.

Competition law in Canada is exclusively federal; there are no provincial or territorial competition laws. The Act comprises the entirety of competition law in Canada and there is only one agency, the Competition Bureau, responsible for administering and enforcing it.

The Commissioner of Competition, appointed by the Federal Government, is the head of the Competition Bureau. The Bureau investigates anti-competitive activity and may challenge a merger or other civil violation by filing an application with the Competition Tribunal. The Competition Tribunal is a separate, specialized court with jurisdiction to examine "reviewable practices," discussed below, and determine whether a civil violation of the Act has occurred. It consists of a rotating panel of up to six members of the federal judiciary, along with up to eight other experts in business, economics and law. If, however, the Competition Bureau's investigation produces sufficient evidence to support prosecution under the criminal provisions of the Act, the Bureau makes recommendations to the Public Prosecution Service of Canada ("PPS"), which then makes its own determination about how to proceed. The PPS is an independent agency responsible for federal criminal prosecutions. The director of PPS is the Deputy Attorney General of Canada.

2. The Act has both civil and criminal provisions.

Until 1976 the Act was exclusively criminal in nature. The Act now has both criminal and civil provisions. Conspiracies to restrain trade, the implementation in Canada of offshore conspiracies to restrain trade, bid rigging, multi-level marketing plans, and deceptive advertising and marketing practices done knowingly or recklessly are considered violations of the criminal law. Recent amendments to the law, enacted in 2009, allow for more effective criminal enforcement against the most serious anti-competitive activities, as well

as increased criminal penalties. Criminal violations now carry a fine of up to $25 million and 14 years in prison.

Other anti-competitive activities are deemed "reviewable practices" and considered civil matters. Reviewable practices include mergers, abuse of dominance, agreements that substantially lessen competition, price maintenance, vertical non-price restrictions and deceptive advertising and marketing practices done without a reckless or knowing state of mind. The Bureau investigates reviewable practices and may challenge them directly before the Competition Tribunal. The reviewable practices provisions cover activities that are generally legal and only take on an illegal nature when the Competition Tribunal reviews all the circumstances to determine whether the activity has a harmful, anti-competitive effect. Because reviewable practices only take on an illegal character once the Competition Tribunal has reviewed all the facts and made its determination, there is usually no punishment for past conduct. Rather, if the Competition Tribunal finds a violation of the Act, in general, the violating parties are prohibited from continuing that conduct in the future.

3. Anti-competitive agreements between competitors violate the Act.

A cartel is a group of competitors that agree to take actions to reduce competition with other members of the group. These agreements limit incentives for innovation and often result in higher prices for consumers. The Act proscribes cartel activity by prohibiting conspiracies to reduce competition.

The most serious forms of anti-competitive agreements are "per se illegal" and violate criminal provisions of the Act, regardless of whether they have an anti-competitive impact. Section 45 of the Act identifies three of these types of conspiracies: agreements between competitors to fix prices, allocate markets or customers, or control the supply of a product. Bid rigging – agreeing to withhold or withdraw a bid, or agreeing to the contents of a bid – is also per se illegal, but covered by a separate provision.

Other agreements between competitors that do not fall into one of the categories defined in Section 45, such as strategic alliances or joint ventures, are reviewable practices. While these agreements are not per se illegal, the Competition Tribunal may determine that a civil violation exists if it finds that the agreement has or is likely to prevent or lessen competition substantially in a market.

4. Certain distribution practices violate the Act.

The Act also prohibits certain harmful distribution practices that occur when a supplier places conditions or restrictions on the supply of a product, or refuses to supply a product altogether. These types of activities are known as tied selling, market restriction, refusal to deal and exclusive dealing. Because they may not always be anti-competitive, they are considered reviewable practices. Whether the conduct violates the Act depends on the Competition Tribunal's evaluation of the specific facts and circumstances surrounding the practice.

Tied selling is a coercive practice that occurs when a seller provides a product or service on the condition that the purchaser also buy a second product or service along with it. Exclusive dealing is an arrangement where a seller agrees to sell all or substantially all of its products to a specific purchaser, or where a purchaser agrees to purchase all or a substantial portion of its requirement of a product or service from a specific seller. Market restriction occurs when supplier conditions its sale to a business on the requirement that the business only operate in a specific market. Finally, although a business is not obligated to supply another business with products, in some situations, a refusal to deal may be an anti-competitive violation of the Act, including a situation in which the would-be customer will be substantially affected by the refusal to supply, the product is in ample supply and the would-be customer is willing to meet the supplier’s terms.

5. A business may avoid criminal prosecution by participating in the Competition Bureau’s Immunity Program.

If a company provides the Competition Bureau with information about a criminal agreement, the company may qualify for immunity from prosecution under the Bureau’s Immunity Program. To qualify for immunity, the company must be the first to provide information about the activity to the Bureau. Additionally, it must cease its illegal conduct and cooperate with the Bureau, and the information provided must lead to a criminal prosecution.

A company may use counsel to secure its position as the first to report the information by contacting the Bureau’s Senior Deputy Commissioner for Criminal Matters, and initially, may remain unidentified. The company then “perfects” its spot as the first to report by providing additional information, including its identity, to the Bureau within 30 days. (Time extensions are sometimes permitted.) In addition to the identity of the parties involved, the Bureau requires detailed information about the illegal activities, including details of the products and markets affected, the duration of conduct, the effect on competition, and a description of witnesses and records that will aid the Bureau in its investigation.

6. Mergers, regardless of their size, are subject to review by the Competition Bureau.

The Competition Act permits the Bureau to review mergers to assess whether they are a threat to competition and, when that threat exists, to challenge them before the Competition Tribunal. The Tribunal may block mergers or order divestitures or other remedies if it determines the transaction will substantially lessen competition. Examples of mergers that may harm competition include a company’s acquisition of an increasingly dynamic competitor or potential market entrant, an acquisition that prevents or limits the introduction of new products, or the acquisition of an existing business by a company which, absent the merger, likely would have entered the same market.

Participants in mergers that exceed a certain size threshold must notify the Bureau ahead of time. However, the Bureau may review and challenge a merger of any size that gives rise to significant competitive harm, regardless of whether pre-merger notification is required. Generally, pre-merger notification is required when the assets or revenues of the firm to be

acquired exceed $70 million and when the aggregate assets or revenues of both parties exceed $400 million. Failure to provide pre-merger notification when it is required is a criminal offense. The 2009 amendments to the Act restructured the pre-merger notification process so that it is similar to the review process used in the U.S. After the initial notification, there is a 30 day review period. The Bureau then has the discretion to order a second review to further evaluate the proposed transaction, which is similar to the "second request" used in the U.S. by the Federal Trade Commission and the Department of Justice.

7. A dominant position in the marketplace is not illegal by itself, but activities that abuse that dominance may be.

The Act does not penalize a company simply for acquiring a dominant position in a market as a result of superior performance. But a dominant company may be subject to sections 78 and 79 of the Act if it exploits its dominance by engaging in anti-competitive conduct that eliminates or punishes competitors, or prevents new competitors from entering the market. Unlike the Sherman Act, which makes monopolization a criminal matter in the U.S., abuse of dominance is considered a reviewable practice under the Canadian Competition Act. Additionally, unlike the U.S. approach, attempted monopolization is not a violation of the Act.

In some situations, the Commissioner of Competition may engage in discussions with the dominant party with the goal of reaching a voluntary agreement to remedy the situation. If a voluntary agreement can't be reached, other remedies are available, including an order to stop the harmful conduct or an administrative monetary penalty of up to $10,000,000 for the first violation and $15,000,000,000 for subsequent violations. These remedies are available if the Competition Tribunal finds three factors to be true:

- 1) The party has complete or substantial control of a market, which is generally defined as the power to set prices higher than they would be if competition existed.
- 2) The party has engaged in anti-competitive conduct, such as buying a competitor's customers or supplies, using significantly discounted products to stifle competitors or cutting off supplies to competitors.
- 3) The conduct has lessened competition in that marketplace, or is likely to lessen or prevent competition.

8. The Act establishes ground rules for truthful advertising.

The Competition Act contains both criminal and civil provisions prohibiting misleading and deceptive advertising and marketing. A materially false or misleading statement or representation that is made knowingly or recklessly is a criminal violation. Other criminal violations include deceptive telemarketing, deceptive notices of winning a prize, double ticketing and pyramid selling schemes. Materially false or misleading statements that are not made with a knowing or reckless state of mind are civil violations. Other practices that fall within the civil regime include performance representations not based on proper testing, misleading warranties or guarantees, bait and switch selling, misleading or unauthorized use of testimonials and the sale of a product above its advertised price.

9. Private litigants may sue to enforce the Act.

Until 1976, the Act was exclusively criminal and was enforced solely by the Commissioner of Competition and Attorney General of Canada. However, over the years, changes to the Act permitted private antitrust actions, and private enforcement has become increasingly common. The Act permits plaintiffs to pursue two types of claims: a "private action" before the courts for damages and other relief for conduct that violates the Act's criminal provisions, and an application for "private access" before the Competition Tribunal for conduct that qualifies as a reviewable practice.

Private actions against parties alleged to have violated criminal provisions of the Act may be brought in either the federal or provincial courts. These claims are often brought as class action lawsuits. Notably, the Act only allows an award for actual damage or loss and the cost of the investigation and legal proceedings, which contrasts with the treble damage awards available to plaintiffs in the U.S.

Private access to the Competition Tribunal is a recent development in Canadian law instituted by 2002 amendments to the Act. It is still somewhat rare. Private parties may apply to the Tribunal for leave to make an application for the evaluation of certain reviewable practices, including exclusive dealing, tied selling and refusal to deal. At this time, however, private litigants may not bring an action against a party for abuse of dominance.

10. An effective compliance program reduces the risk of liability under the Act.

A properly developed compliance program that includes competition law training can provide a business with a variety of benefits. Most importantly, it reduces the risks of violations of the Act and increases a corporation's preparedness in the event of an enforcement action by the Competition Bureau. By identifying the limits of permissible conduct, and training its employees on how to keep the business within those bounds, a company can help avoid liability under either the civil or criminal provisions of the Act.

Furthermore, an effective compliance program will allow a company to identify possible competition issues early on, put its management in the position of recognizing when it's necessary to seek the advice of counsel and, by avoiding problems or identifying them early, reduce the costs associated with a Bureau investigation and any related litigation. In the event that a violation is established, it may also help mitigate penalties as it evidences the intent to avoid unlawful acts. Finally, an effective compliance program that includes competition law training also makes good business sense, as it will help a company avoid the negative publicity that accompanies charges of wrongdoing.