

Network effects

Antitrust authorities strengthen cooperation efforts

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Six of the leading global antitrust authorities have announced a new framework to strengthen their cooperation on investigations as well as their work more broadly. While the new arrangements are limited to the authorities in Australia, Canada, New Zealand, the UK and US for now, the increasingly global nature of antitrust enforcement – with authorities often considering the same cross-border cases and issues – may mean authorities elsewhere also look to join or replicate this new model.

On September 2, 2020, the Australian Competition and Consumer Commission (ACCC), Competition Bureau of Canada, New Zealand Commerce Commission, UK Competition and Markets Authority (CMA), US Department of Justice (DOJ) and US Federal Trade Commission entered into a “Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities” (MMAC). This comprises both: (i) a memorandum of understanding to reinforce and improve existing cooperation and coordination; and (ii) a model agreement for enhanced individual arrangements. Key aspects are:

- The memorandum of understanding provides for cooperation on specific investigations, with the authorities expected to: (i) share information, including case-related information not in the public domain; (ii) coordinate investigative activities; (iii) facilitate voluntary witness interviews; (iv) provide copies of publicly available records; and (v) provide other cooperation and assistance as requested.
- In addition, the model agreement can be used where two or more of the participating authorities wish to pursue enhanced cooperation and maximize the level of assistance possible. While the parties can adapt the model as appropriate, it broadly sets out: (i) the nature of assistance that can be requested (see further below); (ii) the process for requesting assistance; (iii) confidentiality protections; and (iv) permitted use of information that is shared.
- More general cooperation is also envisaged under the memorandum of understanding – regarding the development of competition issues, policies and laws, competition advocacy (including to consumers, industry, and government), best practices, and advice, training and collaboration on areas of mutual interest (including working groups on specific issues).

- Significantly, existing laws and protections are unchanged – the MMAC is not legally binding and the participating authorities will respect the confidentiality of any information provided and any cooperation will not exceed what is allowed under the laws of the jurisdictions concerned.

Cooperation between antitrust authorities is not new, but its increasing importance is driving the new arrangements. The MMAC notes that the parties recognize their cases increasingly require engagement with competition authorities in other jurisdictions on issues that benefit from being considered in a broader, cross-border context. All the main areas of antitrust are covered, with “competition laws” defined to include laws relating to cartels and other anti-competitive agreements, unilateral conduct or monopolistic practices, and merger control.

Cross-border cartels regularly trigger investigations in multiple jurisdictions with authorities often coordinating the timing of “dawn raids” (unannounced inspections), while merger control filings across the world are now a fact-of-life for international companies involved in M&A deals. From a policy perspective, authorities globally are also often grappling with similar issues – such as whether existing antitrust regimes are fit for purpose when dealing with fast-moving digital markets and tech giants. ACCC Chair, Rod Sims, for example, has highlighted that work regarding digital platforms is an area where he expects the new arrangements to be particularly beneficial.

It is common for parties to M&A deals to agree to provide waivers to allow authorities reviewing their deals to coordinate and share information, with M&A parties keen to secure approvals as soon as possible. The new arrangements therefore seem likely to have greater relevance to cartel and abuse of dominance/ monopolization cases, where parties under investigation face potentially significant fines and other sanctions. Certainly, cartel cases will be where envisaged cooperation on search and seizure operations, locating persons or things and taking statements/ testimony (which are all included in the types of cooperation mentioned in the model agreement) are likely to be most relevant.

While the arrangements recognize protections for sensitive information, a potential area of concern for parties under investigation will be information that is legally privileged. Privilege rules are complex and differ between jurisdictions, meaning an authority in one jurisdiction may collect information that is legally privileged elsewhere. Despite the model agreement including protections against disclosure and use of privileged information between the participating authorities, this could be a contentious area given a party under investigation may not necessarily agree with an authority's view as to whether particular documents are privileged.

The new arrangements are intended to complement rather than replace existing arrangements for cooperation. Both the OECD and the International Competition Network have and continue to undertake work encouraging cooperation between authorities, and the participating authorities are already party to a number of agreements providing for cooperation. However, it is to be expected that the participating authorities will now focus their cooperation efforts under the new arrangements, with a committee to oversee and monitor implementation and operation of the MMAC.

The MMAC notes that the participating authorities recognize that the transparency of their activities is enhanced by ensuring the new arrangements and any subsequent agreements made in relation to the MMAC are publicly available. Given the sensitive nature of cartel investigations, in particular, it will be interesting to see whether and at what stage any enhanced arrangements applying the model agreement might in specific cases be made public – such as whether this might be done at an early stage during an investigation but without revealing the names of the parties under investigation.

In the US, Assistant Attorney General Makan Delrahim of the DOJ's Antitrust Division has expressed a hope that the MMAC will provide a model for antitrust agencies around the world interested in enhancing international cooperation, while emphasizing this sets a new standard for enforcement cooperation, strengthening tools for international assistance and evidence gathering in the increasingly digital and global economy. The extent to which additional antitrust authorities seek to join or replicate the MMAC will also be a development to keep an eye on.

Finally, for the CMA there is also the added significance of Brexit that should not be overlooked. While the UK ceased to be an EU Member State on January 31, 2020, it remains within the EU competition regime until the end of 2020 when the Brexit "transition period" is due to end. After the transition period has ended the UK aspects of the largest cross-border antitrust and merger cases will fall to the CMA to investigate, rather than the European Commission as tends to be the case currently. Inclusion in an initiative such as this in its own right therefore reflects the CMA's expanding role in this regard.

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Contacts

Global and US

Robin Adelstein

Global and US Head of antitrust and competition

Tel +1 212 318 3108

robin.adelstein@nortonrosefulbright.com

Amanda Wait

Partner

Tel +1 202 662 4550

amanda.wait@nortonrosefulbright.com

Australia

Nick McHugh

Head of antitrust and competition – Australia

Tel +61 2 9330 8028

nick.mchugh@nortonrosefulbright.com

Canada

Kevin Ackhurst

Head of antitrust and competition – Canada

Tel +1 416 216 3993

kevin.ackhurst@nortonrosefulbright.com

Europe

Ian Giles

Head of antitrust and competition – EMEA

Tel +44 20 7444 3930

ian.giles@nortonrosefulbright.com

Mark Simpson

Head of antitrust and competition – London

Tel +44 20 7444 5742

mark.simpson@nortonrosefulbright.com

Mark Daniels

Head of antitrust and competition – Knowledge

Tel +44 20 7444 5872

mark.daniels@nortonrosefulbright.com

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