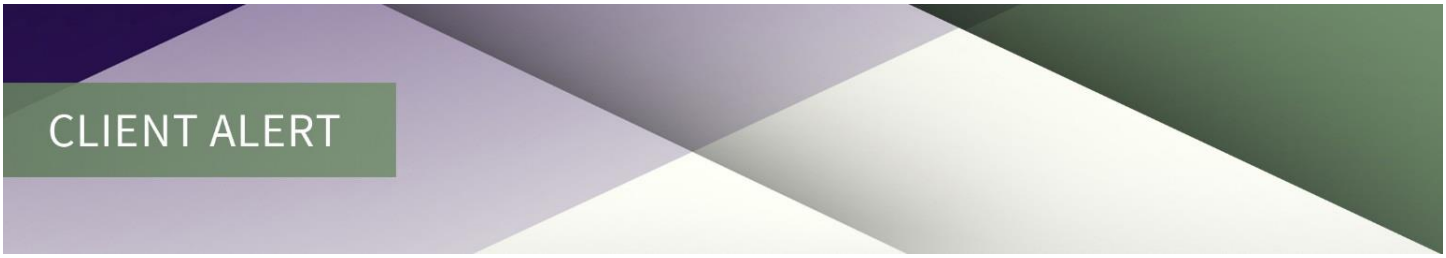

“Five Eyes” Nations Bolster Cross-Border Antitrust Investigations with Cooperation Agreement

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On September 2, 2020, officials of the “Five Eyes” nations – the United States, the United Kingdom, Canada, Australia, and New Zealand – signed the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (***Framework***), which establishes common procedures for exchanging confidential information and gathering evidence in mergers and antitrust investigations. The Framework’s main component, the Model Agreement, expands the scope of the authorities’ existing cooperation agreements, and introduces new challenges for businesses facing cross-border investigations.

Thirty years of cooperation in competition enforcement

Bilateral agreements to facilitate cooperation among the Five Eyes in relation to antitrust and merger matters have existed since the 1980s, although most current versions date from the 1990s. These agreements reflect the structure and content of the key EU-US agreement reached in 1991 (the ***EU-US Agreement***), with its three-fold emphasis on (i) notifying cooperating authorities of enforcement action which may relate to their territory; (ii) setting out principles for coordinated enforcement; and (iii) developing a framework for addressing the adverse impacts of anticompetitive conduct, or enforcement action taken against such conduct, in each territory.

Among the five, only New Zealand had not previously entered into a bilateral cooperation agreement with the US (and has no such agreement with the EU) concerning competition law enforcement. Canada reached agreements with the US in 1995 and the EU in 1999. Both largely mirrored the EU-US Agreement. (Canada has preserved its agreement with the EU through the Comprehensive Economic and Trade Agreement 2017.) In 1999 Australia and the US also concluded a cooperation agreement, and it is this agreement which has become the model for the new Framework.

Framework for obtaining investigative assistance

The key provisions of the Framework are the mechanisms in the Model Agreement (annexed to the Framework) which facilitate the request for “investigative assistance” from cooperating authorities. This includes (i) disclosure of information already held by another competition authority and (ii) obtaining such additional information as may be requested (through searches, seizures, and interviews). Inviting a wide adoption, the Framework states that this Model Agreement should serve as a basis for the negotiation of bilateral or multilateral agreements with other authorities in the future.

The Model Agreement also establishes a common procedure for making, and responding to, requests for investigative assistance. Requests must describe the subject-matter of the investigation or proceedings, the legal basis on which the requesting authority is acting, the nature and relevance of the assistance sought, and any associated procedural or evidential requirements in the requesting authority’s jurisdiction. The responding authority has 14 calendar days in which to acknowledge receipt and to confer with the requesting authority. It may also impose conditions on its assistance.

Procedural safeguards for confidentiality and privilege

Certain procedural safeguards have been included in order to limit the scope and use of evidence which is exchanged between cooperating authorities.

Each authority must maintain the confidentiality of the evidence that is exchanged, including the existence of the request itself. Concerns as to the maintenance of confidentiality are grounds for refusal to cooperate, and an authority may be required to return or destroy evidence provided to it by another authority which has not been made public at the conclusion of its investigation. An authority may disclose evidence provided to it by another authority only in specified circumstances, after giving 14 calendar days’ notice to the authority which provided it with the evidence.

Other procedural rules are designed specifically to protect rights of defence and legal privilege over communications between businesses facing an investigation and their legal counsel. Each authority is prohibited from requesting (or providing) information that it knows is privileged. If information which is exchanged is later determined to be privileged under the laws of the responding authority’s jurisdiction, the requesting authority must treat it as privileged under its *own* laws.

New paradigm for cooperation in cross-border investigations

The Framework differs from the EU-US Agreement in a number of respects. The EU-US Agreement is structured around the efficient allocation of responsibility and resources in investigating conduct that has cross-border effects. Enforcement action is taken by an authority to enforce its *own* competition laws, regardless of whether the action is initiated by that authority or follows a cooperating authority’s request that it take action. Notifications by investigating authorities presume that the notified authority will pursue a *parallel* investigation for breaches in its own territory of its own competition laws.

By contrast, the Framework expressly states that cooperating authorities may provide investigative assistance *regardless* of whether the conduct underlying the request would constitute a violation of the competition laws of the country of the responding authority (unless that authority is prohibited from providing such assistance under its law). Rather than allocating responsibility and resources for enforcement, the Framework operates as a mechanism for engaging the procedural powers of a responding authority to investigate breaches, alleged by a requesting authority, of the substantive competition rules of the *latter’s* jurisdiction.

Challenges for companies in cross-border investigations

The Framework introduces two challenges for businesses that face cross-border investigations. First, the Framework expressly states that it does not give rise to rights on the part of any private person. This provision may potentially operate to exclude judicial challenges, brought against the provision of investigative assistance, in order to enforce the Framework’s procedural protections in the country of the requesting or the responding authority. If effective (which remains to be tested), it could prevent a business facing an investigation from relying on the Framework as the basis, for example, for excluding privileged communications.

Second, the Framework states that it is not intended to be legally binding, and does not give rise to legal rights or obligations under domestic or international law. However, competition authorities have not always been successful in precluding their cooperation agreements from producing legal effects. Indeed, the EU-US Agreement, signed in 1991 by then Attorney General William Barr and Sir Leon Brittan, was annulled by the Court of Justice of the EU (before it was restored by the Council of the EU) on the grounds that it produced legal effects binding on the parties under international law (C-327/91 *France v Commission*).

Regardless of its legal status, the Framework is a clear signal that the Five Eyes competition authorities wish to enhance and intensify their cooperation in antitrust and merger cases. For businesses, the agreements envisaged by the Framework could create risks of extraterritorial enforcement, as authorities could rely on third-country cooperation to undertake searches, seizures, and interviews to assist with domestic prosecutions. For individuals, this closer cooperation could increase risks of criminal cartel prosecution, as penalties for antitrust violations in each of the Five Eyes include both criminal fines and custodial sentences for individuals.

The lawfulness of such cross-border measures will likely be tested in specific cases in the future, should the exercise of such measures pose risks to the protection of legal privilege or the rights of defence of a business, or its executives, under investigation.

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