

# MULTILATERAL MUTUAL ASSISTANCE AND COOPERATION FRAMEWORK FOR COMPETITION AUTHORITIES

## MEMORANDUM OF UNDERSTANDING

### 1. Recitals

The Australian Competition and Consumer Commission; the Commissioner of Competition, Competition Bureau of the Government of Canada; the New Zealand Commerce Commission; the United Kingdom Competition and Markets Authority; the United States Department of Justice; and the United States Federal Trade Commission (the “Participants”) to this Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (the “Framework”):

- 1.1. *Recognising* the 2014 Recommendation of the Organisation for Economic Co-operation and Development (OECD) Council concerning International Co-operation on Competition Investigations and Proceedings, the 2005 OECD Council Recommendation on Merger Review, and the 2019 revised OECD Council Recommendation concerning Effective Action against Hard Core Cartels, which promote deeper international cooperation among competition authorities;
- 1.2. *Recognising* the existing and ongoing International Competition Network and OECD work on cooperation and that this Framework complements rather than replaces this ongoing work;
- 1.3. *Recognising* that the matters they investigate and review increasingly require engagement with counterpart competition authorities in other jurisdictions on issues that benefit from being considered in a broader, cross-border context;
- 1.4. *Recognising* that the sharing of information among competition authorities requires relationships of trust and mutual understanding that are supported through informal cooperation and appropriate legal protections;
- 1.5. *Recognising* that a consistent cooperation and mutual assistance framework between them can make investigations more effective for the Participants and the subjects of their investigations;
- 1.6. *Recognising* that the transparency of their activities is enhanced by ensuring that this Framework and any subsequent agreements made in relation to it are made publicly available; and

- 1.7. *Recognising* that their respective jurisdictions all have some form of information sharing legislation that allows for sharing of confidential information in certain circumstances and similar competition law enforcement regimes, including criminal cartel provisions;

have come to the following understanding:

## 2. Definitions

In this Framework, terms have the following definitions:

“Agency Confidential Information” means information that is in the possession of a Participant that it is not prohibited from disclosing by law, but normally treats as non-public.

“Competition Laws” means the law of each Participant’s jurisdiction in relation to cartels and other anti-competitive agreements and arrangements, unilateral conduct or monopolistic practices, and merger control, as amended.

"Framework" means this Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities.

“Investigation” means an enforcement matter, inquiry or review conducted by a Participant pursuant to applicable Competition Laws.

"Investigative Information" means information related to an Investigation that is not in the public domain, which has been either compulsorily acquired by, or provided voluntarily to, a Participant and that the Participant is required to protect from disclosure.

"Model Agreement" means the agreement in Annexure A to this Framework.

“Participants” means the competition authorities that are signatories to this Framework as set out on the signature pages.

## 3. Cooperation

- 3.1. Recognising that the Participants can benefit by sharing their experience in developing, applying, and enforcing Competition Laws and competition policies, the Participants intend to cooperate and provide assistance, including by:
- a) exchanging information on the development of competition issues, policies and laws;
  - b) exchanging experience on competition advocacy and outreach, including to consumers, industry, and government;
  - c) developing agency capacity and effectiveness by providing advice or training in areas of mutual interest, including through the exchange of officials and through experience-sharing events;
  - d) sharing best practices by exchanging information and experiences on matters of mutual interest, including enforcement methods and priorities; and
  - e) collaborating on projects of mutual interest, including via establishing working groups to consider specific issues.

- 3.2. The Participants are expected to provide assistance and cooperation on Investigations not covered in the Model Agreement or other existing arrangements with similar effect, including with respect to:
  - a) sharing public information, Agency Confidential Information and Investigative Information permitted to be disclosed by law or by waiver of confidentiality;
  - b) coordinating their investigative activities;
  - c) facilitating voluntary witness interviews;
  - d) providing copies of publicly available records; and
  - e) other cooperation and assistance as requested.
- 3.3. Where Agency Confidential Information is provided, the Participant receiving said information will protect the confidentiality of the information and, unless otherwise jointly decided, consistent with applicable law, will return or destroy any records containing said information promptly at the request of the Participant that provided the Agency Confidential Information.
- 3.4. Participants are expected to provide cooperation and assistance where appropriate and subject to each Participant's reasonably available resources and each Participant's interests.

## 4. The Model Agreement

- 4.1. In addition to the cooperation and assistance contemplated under Section 3 of this Framework, the Participants have developed the Model Agreement in Annexure A.
- 4.2. The Model Agreement addresses the following substantive matters involving the provision of investigative assistance to enhance cooperation:
  - a) the nature of the assistance that can be requested;
  - b) the process for making a request for assistance;
  - c) the maintenance of the confidentiality of any Investigative Information; and
  - d) the scope of permitted use of any Investigative Information shared by the Participants.
- 4.3. The Participants have developed the Model Agreement in an effort to assist any Participants that wish to pursue enhanced cooperation agreements or arrangements between or among themselves (bilaterally or multilaterally) to pursue the maximum level of assistance possible, respectful of the law of their respective jurisdictions. It is acknowledged that not all Participants may be able to carry out all of the elements of enhanced cooperation envisaged under the Model Agreement.
- 4.4. The Participants may refer to the Model Agreement as a potential basis for negotiation of bilateral or multilateral agreements, as appropriate to their circumstances, but nothing prevents the Participants from expanding the scope of any such agreement they may negotiate or relying on any existing instruments that deal with matters contained in the Model Agreement.

- 4.5. The Model Agreement is intended to be broadly reciprocal. If there are limitations on a Participant's ability to reciprocate or restrictions on the assistance that a Participant can provide under the law of its jurisdiction, the Participants are expected to address them as part of negotiations that they may carry out. It is acknowledged that a Participant is able to implement the Model Agreement only to the extent permissible under the law of its jurisdiction.

## 5. Framework Committee

- 5.1. To facilitate the cooperation contemplated by Sections 3 and 4 of this Framework, the Participants intend to establish a committee, with representative(s) from each Participant, to oversee the implementation and monitor the operation of this Framework in a manner to be determined via consensus between them.

## 6. Functioning of Framework Memorandum of Understanding

- 6.1. This Framework does not cover, engage, or commit other government entities, or their procedures, beyond the Participants.
- 6.2. This Framework is not intended to be legally binding and does not give rise to legal rights or obligations under domestic or international law.

## 7. Effect and Discontinuation

- 7.1. This Framework becomes effective on the date of its last signature by the Participants.
- 7.2. A Participant may discontinue its participation in this Framework at any time. A Participant is expected to provide 60 days written notice to the other Participants of its intent to do so. Discontinuation may also be effected by the mutual written consent of the Participants.

## 8. Review of Framework

- 8.1. The Participants intend to review the Framework every five years after the Framework takes effect or as otherwise determined by consensus of the Participants.
- 8.2. The Participants intend to consider such matters as whether this Framework requires any modifications.
- 8.3. Any changes to this Framework will be made by consensus between the Participants.

Signed in six originals at the place and date noted below in the English and French languages, each version being equally valid.

On behalf of the Australian Competition and Consumer Commission

Rod Sims

Chair

Place:

Date: \_\_\_\_\_, 2020

\_\_\_\_\_

On behalf of the Commissioner of Competition, Competition Bureau of the Government of Canada

Matthew Boswell

Commissioner of Competition

Place:

Date: \_\_\_\_\_, 2020

\_\_\_\_\_

On behalf of the New Zealand Commerce Commission

Anna Rawlings

Chair

Place:

Date: \_\_\_\_\_, 2020

\_\_\_\_\_

On behalf of the United Kingdom Competition and Markets Authority

Andrea Coscelli

Chief Executive

Place:

Date: \_\_\_\_\_, 2020

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On behalf of the United States Department of Justice

Makan Delrahim

Assistant Attorney General, Antitrust Division

Place:

Date: \_\_\_\_\_, 2020

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On behalf of the United States Federal Trade Commission

Joseph J. Simons

Chairman

Place:

Date: \_\_\_\_\_, 2020

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# ANNEXURE A: MODEL AGREEMENT

[Party A], [Party B], [Party C], [etc.], (the “Parties”),

*Noting* this Agreement is based on the Model Agreement contained in the Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities, signed by the Parties at [location] on [date] (the “Framework”);

*Noting* the [list/reference any existing agreements [between] [among] the Parties];

*Recognising* that the matters they investigate and review increasingly require engagement with counterpart competition authorities in other jurisdictions on issues that benefit from being considered in a broader context;

*Recognising* that the sharing of confidential or sensitive information [between] [among] competition authorities requires relationships of trust and mutual understanding that are supported through informal cooperation, information sharing, expertise sharing and appropriate legal protections outlined in the Framework;

*Recognising* the importance of having appropriate safeguards to protect the privacy of information and data shared under this Agreement;

*Recognising* that their respective jurisdictions all have some form of information sharing legislation that allows for sharing of confidential information in certain circumstances and similar Competition Law enforcement regimes, including criminal cartel provisions;

*Recognising* that they intend to give full effect to the provisions of this Agreement with a view towards the ultimate objectives of improved international cooperation and information sharing;

*Recognising* that they will make good faith efforts to respond to requests for cooperation in a timely manner; and

*Recognising* that procedural fairness in competition investigations is acknowledged internationally as being a foundation of effective and efficient enforcement;

agree as follows:

## 1. Definitions

For the purpose of this Agreement:

“*Agreement*” means this [insert title of bilateral or multilateral agreement here].

“*Competition Laws*” means the law of each Party in relation to cartels and other anti-competitive agreements, unilateral conduct or monopolistic practices, and merger control, including:

- a) For [Party A], the statutes and regulations as set out in Appendix A to this Agreement; and

- b) For [Party B], the statutes and regulations as set out in Appendix A to this Agreement;

as well as any subsequent amendments and such other laws as the Parties may agree in writing.

*“Investigative Assistance”* means the scope of assistance described in Section 3.

*“Investigation”* means an enforcement matter, inquiry or review conducted by a Party pursuant to applicable Competition Laws.

*“Investigative Information”* means information related to an investigation that is not in the public domain, which has been either compulsorily acquired by, or provided voluntarily to, a Party and that the Party is required to protect from disclosure.

*“Person”* means any natural person or legal entity, including corporations, unincorporated associations, trusts, partnerships, or bodies corporate.

*“Requesting Party”* refers to a Party seeking or receiving Investigative Information or Investigative Assistance pursuant to this Agreement.

*“Responding Party”* refers to a Party from which Investigative Assistance is sought pursuant to this Agreement.

## 2. Application of Laws

- 2.1. This Agreement does not require a Party to act inconsistently with its law.
- 2.2. This Agreement does not give rise to a right on the part of any private Person.

## 3. Scope of Investigative Assistance

- 3.1. The Parties intend to provide Investigative Assistance to each other on a broadly reciprocal basis in facilitating the administration and enforcement of their Competition Laws. If there are limitations on a Party’s ability to reciprocate or restrictions on the assistance that a Party can provide under its law, that Party shall explain such limitations or restrictions.
- 3.2. The Parties shall provide timely Investigative Assistance to the fullest extent permissible under their respective law.
- 3.3. Investigative Assistance contemplated by this Agreement includes:
  - a) disclosing, providing or discussing Investigative Information in the possession of a Party;
  - b) obtaining Investigative Information at the request of a Party, including:
    - i. taking the testimony or statements of Persons or otherwise obtaining Investigative Information from Persons;
    - ii. obtaining documents, records, or other forms of Investigative Information;
    - iii. locating or identifying Persons or things; and
    - iv. executing searches and seizures;



together with disclosing, providing or discussing any such Investigative Information obtained.

- 3.4. This Agreement does not prevent a Party from seeking Investigative Assistance from or providing Investigative Assistance to the other Party pursuant to other agreements, arrangements, or practices, either in place of or in conjunction with Investigative Assistance that may be provided pursuant to this Agreement.
- 3.5. Investigative Assistance may be provided whether or not the conduct underlying a request would constitute a violation of the Competition Laws of the Responding Party, unless a Party is prevented from doing so under its law.
- 3.6. This Agreement does not authorise a Party to compel a Person to provide Investigative Information in violation of a legally applicable right or privilege.
- 3.7. This Agreement does not affect the ability of a Party to seek information on a voluntary basis from a Person located in the territory of the other Party and does not preclude any such Person from voluntarily providing information to a Party.

## 4. Requests for Investigative Assistance

- 4.1. A Party may make a request for Investigative Assistance to a Responding Party. The Parties shall consult and share views on the nature and scope of the Investigative Assistance and the process for carrying out the request prior to and following the request.
- 4.2. Requests shall be in writing and include, without limitation:
  - a) a general description of the subject matter and nature of the investigation or proceeding to which the request relates, including identification of the Persons subject to the investigation or proceeding and citations to the specific Competition Laws giving rise to the investigation or proceeding in sufficient detail to explain how the subject matter of the request concerns a possible violation of the Competition Laws in question;
  - b) a description of the Investigative Assistance sought pursuant to Section 3 and to this Section, including, if applicable and to the extent possible:
    - i. the identity and location of any Person from whom information is sought, and a description of that Person's relationship to the investigation or proceeding which is the subject of the request;
    - ii. the subject matter to be addressed in the examination of a witness;
    - iii. a description of the materials requested;
    - iv. with respect to searches and seizures, a precise description of the place or Person to be searched and of the information or records to be seized;
    - v. the relevance of the requested assistance to the investigation or proceeding; and
    - vi. any further information required under the law of the Responding Party;
  - c) if applicable, a description of procedural or evidentiary requirements bearing on the execution of the request, which may include requirements relating to:
    - i. the manner in which any testimony or statement is to be taken or recorded, including the participation of counsel;

- ii. the administration of oaths;
- iii. any legal privileges that may be invoked under the law of the Requesting Party that the Requesting Party wishes the Responding Party to respect in executing the request, together with an explanation of the desired method of taking the testimony or provision of evidence to which the privilege(s) may apply;
- iv. the authentication of records;
- v. the desired time period for a response to the request;
- vi. requirements for confidential treatment of the request or its contents;
- vii. any obligation upon the Requesting Party to retain Investigative Information after the conclusion of an Investigation; and
- viii. any other information that may facilitate review or execution of a request.

## 5. Responses to Requests for Investigative Assistance

- 5.1. After receiving a request, the Responding Party shall use its best efforts to provide the Requesting Party an initial response within 14 calendar days that:
  - a) acknowledges receipt of the request;
  - b) provides an indicative timeline for responding to the request in more detail; and
  - c) provides, if possible, an early indication of the likelihood of the Responding Party being able to respond to all or part of the request.
- 5.2. The Responding Party shall execute the request in a timely manner, taking into account the complexity and nature of the Investigative Assistance sought by the Requesting Party, and any particular timing considerations noted by the Requesting Party in its request.
- 5.3. The Requesting and Responding Parties shall discuss the procedures required for executing the request and any legal requirements and processes for obtaining and handling any Investigative Information.
- 5.4. The Responding Party shall, to the extent permitted by its law, facilitate the participation in the execution of a request of such officials of the Requesting Party as are specified in the request, including allowing these officials to question the Person giving the testimony or providing the Investigative Information.
- 5.5. The Responding Party shall provide to the Requesting Party timely updates as to the progress of efforts to secure the Investigative Assistance requested and when it expects to be in a position to provide the Investigative Assistance requested.
- 5.6. The Responding Party may impose conditions on the Investigative Assistance it provides.
- 5.7. The Responding Party shall execute the request in the manner established with the Requesting Party to the extent permitted by the Responding Party's law.
- 5.8. The Requesting Party may modify or supplement a request if the Responding Party consents.
- 5.9. If the request is for testimony:

- a) a Person requested to testify and produce documents, records, or other articles pursuant to this Agreement may be compelled to appear and testify and produce such documents, records, and other articles, in accordance with the requirements of the law of the Responding Party;
- b) every Person whose attendance is required for the purpose of giving testimony pursuant to this Agreement is entitled to such fees and allowances as may be provided for by the law of the Responding Party;
- c) upon request by the Requesting Party, the Responding Party shall furnish information in advance about the date and place of the taking of testimony or the production of evidence pursuant to this Agreement;
- d) the Responding Party shall, to the extent permitted by its law, comply with any instructions of the Requesting Party made pursuant to Section 4 with respect to any claims of legal privilege or immunity under the law of the Requesting Party; and
- e) the Responding Party shall permit a Person whose testimony is to be taken pursuant to this Section, to have counsel present during the testimony, to the fullest extent appropriate under its law.

## 6. Privileged Information

- 6.1. Each Party shall respect its own law with respect to legal rights and privileges when requesting or providing Investigative Information and shall endeavour not to request or provide Investigative Information that it knows is protected by any legal right or privilege in the other Party's jurisdiction.
- 6.2. If the Responding Party transmits any Investigative Information that is later identified as privileged or protected against self-incrimination under its law, the Requesting Party shall ensure that it does not use such information for the purposes of the enforcement of its Competition Laws and shall use all appropriate procedures to limit the disclosure of such information in other contexts, except when after discussion with the Responding Party it has been determined that any such privilege or protection against self-incrimination has been waived or otherwise lost.
- 6.3. If the Requesting Party discovers that it has received Investigative Information from the Responding Party that is privileged or protected against self-incrimination under the law of the Requesting Party, the Requesting Party shall treat this information in accordance with its law protecting such information.

## 7. Authentication and Certification

- 7.1. Investigative Information transmitted by the Responding Party pursuant to this Agreement shall be authenticated in accordance with the requirements of the law of the Requesting Party, insofar as these requirements are consistent with the law of the Responding Party.

- 7.2. When a request is to be executed by means of the search or seizure of information, the request shall include such information as is necessary to justify such action under the law of the Responding Party. Upon request, the Responding Party shall ensure that its officials who have custody of information seized pursuant to this Agreement certify the continuity of custody, the identity of the evidence, and the integrity of its condition; the Responding Party shall furnish such certifications in the form specified by the Requesting Party.

## 8. Costs

- 8.1. The Parties shall mutually decide on a case-by-case basis who will pay the costs associated with executing a request, including costs associated with staff time and any disbursements.
- 8.2. If during the execution of a request it becomes apparent that expenses of an amount substantially more than anticipated in Sub-section 8.1 above are required to fulfil the request, the Parties shall consult to determine the terms and conditions under which the request may be executed.
- 8.3. The Parties shall decide on practical measures on a case-by-case basis for the management and payment of costs in conformity with this Section.

## 9. Handling of Investigative Information at Conclusion of Matter

- 9.1. Unless the Parties otherwise determine, at the conclusion of the investigation or proceeding specified in a request, the Requesting Party shall, upon the request of the Responding Party or as required by its law, return or destroy all Investigative Information obtained pursuant to the execution of a request under this Agreement, along with all copies thereof, in the possession or control of the Requesting Party, subject to any legal obligations to retain the documents.
- 9.2. Investigative Information that has lawfully become public is no longer subject to the requirement in Sub-section 9.1.
- 9.3. A Responding Party may request that Investigative Information be returned or destroyed before the conclusion of an investigation or proceeding upon termination of this Agreement for an unauthorized disclosure or use as outlined in Section 13.

## 10. Limitations on Assistance

- 10.1. The Responding Party may deny or postpone Investigative Assistance in whole or in part if it determines that:
- a) a request is not made in accordance with this Agreement;
  - b) execution of the request would exceed its reasonably available resources;
  - c) execution of the request would be contrary to its law or other important interests; or
  - d) the Requesting Party is unable to give assurances with regard to confidentiality or the purposes for which the information will be used.

- 10.2. Before denying or postponing a request, the Responding Party shall consult with the Requesting Party to determine whether Investigative Assistance may be given in whole or in part subject to terms and conditions. When a request is denied in whole or in part, the Responding Party shall provide an explanation for the denial.
- 10.3. If the Requesting Party accepts Investigative Assistance subject to terms and conditions, it shall comply with those terms and conditions.

## 11. Confidentiality

- 11.1. Each Party represents that the confidentiality of Investigative Information communicated and received under this Agreement is protected by its law and procedures, that its law and procedures are sufficient to securely maintain the confidentiality of Investigative Information provided under this Agreement, and that the Parties are themselves subject to the confidentiality restrictions imposed by their respective law and procedures.
- 11.2. Except as otherwise provided by this Section and Section 12, each Party shall, to the fullest extent possible and consistent with its law, maintain confidentiality of any Investigative Information communicated and received under this Agreement, including the fact that a request for Investigative Information has been communicated or received.
- 11.3. Each Party shall protect Investigative Information received under this Agreement from disclosure to the fullest extent possible under its law, as determined by the Party, except as outlined in Sub-section 11.4 and Sub-section 11.5.
- 11.4. This Agreement does not prevent disclosure of Investigative Information received under this Agreement:
  - a) to Persons that are subject to an enforcement proceeding brought by a Requesting Party if such disclosure is required by its law as determined by the Requesting Party;
  - b) to courts and tribunals in the course of a judicial or administrative proceeding; or
  - c) when the Requesting Party advises the Responding Party it is required to do so under its law.
- 11.5. Investigative Information received pursuant to this Agreement that has been disclosed by virtue of Sub-section 11.4 and that has been made public consistent with the terms of this Section may thereafter be used by the Requesting Party for any purpose consistent with its law.
- 11.6. The Requesting Party shall notify the Responding Party at least 14 calendar days in advance of any proposed disclosure under Sub-section 11.4, or, if such notice cannot be given because of a court or tribunal order, then as promptly as possible.

## 12. Limitations on Use

- 12.1. Except as provided by this Section and Sections 9 and 11:
  - a) Investigative Information provided to the Requesting Party pursuant to this Agreement may be disclosed or used by the Requesting Party solely to

administer or enforce its Competition Laws with respect to the investigation specified in the request and for the purpose stated in the request;

- b) Investigative Information obtained pursuant to this Agreement may only be disclosed or used by the Requesting Party to administer and enforce its Competition Laws with respect to a different investigation or for a different purpose than stated in the request with the consent of the Responding Party; and
- c) Investigative Information obtained pursuant to this Agreement may only be disclosed or used by the Requesting Party with respect to the administration and enforcement of laws other than its Competition Laws with the consent of the Responding Party.

## 13. Unauthorized Disclosures

- 13.1. Unauthorized disclosure or use of Investigative Information provided to a Party pursuant to this Agreement shall, upon discovery, be reported immediately to the Responding Party by the Requesting Party.
- 13.2. The Parties shall promptly consult on steps to minimize any harm resulting from such disclosure or use and to ensure that unauthorized disclosure or use of Investigative Information does not recur.
- 13.3. Unauthorized disclosure or use of Investigative Information provided under this Agreement is a ground for immediate termination of this Agreement by the Responding Party, in accordance with the procedures set out in Sub-section 15.4.

## 14. Changes in Applicable Law

- 14.1. The Parties shall provide to each other prompt written notice of any significant modifications to their relevant Competition Laws or relevant confidentiality laws and procedures.
- 14.2. In the event of a significant modification to any relevant Competition Laws or relevant confidentiality laws and procedures, the Parties shall promptly consult to determine whether this Agreement should be amended or terminated.

## 15. Entry into Force, Amendments, Termination of Agreement

- 15.1. This Agreement enters into force on the date of the last signature of the Parties.
- 15.2. Investigative Assistance under this Agreement shall be available for requests concerning conduct occurring before, as well as after, this Agreement enters into force.
- 15.3. This Agreement may be amended, in writing, by the mutual agreement of the Parties.

- 15.4. A Party may terminate this Agreement by giving 60 calendar days written notice to the other Party or by giving immediate written notice pursuant to Sub-section 13.3. This Agreement may also be terminated by mutual written consent of the Parties.
- 15.5. The obligations set out in Sections 9, 11, 12 and 13 remain in effect despite termination of this Agreement.
- 15.6. Upon termination of this Agreement, all materials or information provided pursuant to this Agreement still in the possession or control of a Requesting Party shall be managed consistent with Section 9.

[Signature block to be settled between the Parties]

## Appendix A

[Insert list of competition laws here, as per definition of Competition Laws in the Model Agreement]